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SPOT Delivery®

A Monthly Legal Update for Auto Dealers and Finance Companies *from* *publisher of*

DEALER/BANK RELATIONS

Dealers Are from Mars, Finance Companies Are from Venus

By Thomas B. Hudson*

Over the years, I have represented both dealers who enter into retail installment contracts and the banks and finance companies that buy the RICs from the dealers. In working with folks from both sides of this divide, I quickly concluded that, in viewing dealership financing, the dealers were looking through one end of the binoculars, while the banks and finance companies were looking through the other end.

I've found that there are few dealers who understand that, in a typical RIC transaction, the dealer is the creditor. Many (most?) dealers feel that they are in the business of selling cars and that the financing of those sales transactions is the job of the bank or finance company, entities that dealers regularly erroneously refer to as "lenders." These dealers might consider themselves as agents in gathering credit and other information from car buyers and in getting the RICs and other related documents signed by the buyers. But, if you asked these dealers if they financed their buyers' purchases, they would deny it.

(see **DEALER/BANK RELATIONS,** page 2)

WARRANTY LAW

Words (and Texts) Matter: When "As Is" Does Not Mean "As Is"

By Catharine S. Andricos and Christopher J. Capurso*

When you sell something "as is," what do you generally understand that to mean? Our guess is something along the lines of "what you see is what you get."

When a used car is sold "as is," the Federal Trade Commission requires the dealer to post a Buyer's Guide on the car, with a checkbox indicating that the car is sold "AS-IS – NO DEALER WARRANTY" (along with a statement—"THE DEALER DOES NOT PROVIDE A WARRANTY FOR ANY REPAIRS AFTER SALE"). In a recent case, a federal district

(see **WARRANTY LAW,** page 3)

IN THIS ISSUE:

5 Federal Law
What Access Problems?
By Thomas B. Hudson

6 Insurance Issues
Vendor's Single Interest Insurance—Important Pesky Details
By Elizabeth C. Yen

8 Privacy
The Brand-New Right to Privacy in California
By Patricia E.M. Covington

10 Commentary
Post-Election Musing
By Michael A. Benoit

11 Arbitration
Arbitration Clause in Vehicle Retail Installment Contract Applies to Buyers' Defamation Claim Against Salesperson
By Latif Zaman

12 Jurisdiction
Sued Out of State?
By Nicole F. Munro

13 Marketing
Like to Live Dangerously? Have I Got a Deal for You!
By Eric L. Johnson

14 Consumer Financial Protection Bureau
CFPB Watch
By Michael A. Benoit

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SPOT Delivery

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DEALER/BANK RELATIONS from page 1

Some finance company folks share the dealers' view of the dealers' role in the RIC process. But those in charge of establishing and enforcing the legal framework for dealer financing have a completely different view of the process and the roles of the participants. In their view, the finance companies and the banks are simply "buying a coupon," analogous to buying a bond. The bank or finance company is on the hook for the credit risk of the car buyer, but every other risk belongs to the dealer.

If a car buyer defaults on her payments and the finance company or bank discovers that she lied on her credit application, presented false credentials, or held herself out as the car buyer in a straw purchase, the bank or finance company likely will turn to the dealership and, citing representations and warranties contained in its contract for the purchase of RICs from the dealership, demand that the dealership compensate it for the loss. The same result would ensue if the dealership's F&I folks "dummy up" the buyer's credit application with phantom income, invent non-existent trade-in vehicles, engage in "power booking," or pull any other shenanigans.

The only risk that the bank or finance company wants to be on the hook for is the risk that the actual buyer who bought the actual vehicle that was accurately described in the RIC fails to pay as agreed. The bank or finance company has loaded up the contract it uses to buy RICs from dealers with every representation and warranty that it can dream up to ensure that its risk is so limited.

Banks and finance companies typically are reluctant to negotiate the terms and conditions under which they buy RICs, and those terms and conditions are usually pretty comprehensive. If you'd like to get an idea of how tough those terms and conditions can be, I'd suggest that you whip out two or three of those dealer agreements and peruse them, with special attention to the section dealing with the dealership's representations and warranties.

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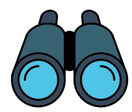
If you thought that the Consumer Financial Protection Bureau was slowing down its claims of unfair and deceptive acts and practices, think again. See the **CFPB Watch** on page 15 for details of a recent consent order issued in connection with a UDAP enforcement action.



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court in Arkansas determined that checking this box is not always enough to disclaim an express warranty. The case tells us something else: be careful what you say—or text—in a vehicle transaction because those words could come back to haunt you in 5.8 million ways.

Last month's *Spot Delivery* featured an article that discussed the Arkansas case, in which Hamid Adeli sued Silverstar Automotive, Inc., for breach of express warranty and fraud in connection with his purchase of a used Ferrari. To summarize, a pre-purchase inspection of the vehicle had turned up an exhaust header problem that Silverstar chose not to repair. Silverstar told Adeli in phone calls and text messages that the inspection had been completed and that all necessary repairs had been made—aside from an issue separate from the recommended exhaust header repair. Adeli signed a Buyer's Guide with the "AS-IS" box checked, as well as an invoice that disclaimed all warranties. Shortly after Adeli bought the car, the exhaust header required a repair. Our prior article focused on the court's denial of summary judgment, which raised the question of whether Silverstar's phone calls and text messages created an express warranty inconsistent with the disclaimer.

Well, the jury found that they did.

As you likely know, jury trials can be unpredictable and can result in damages and punishments that may not have been foreseen. This case is a prime example of why parties seek to avoid jury trials at nearly any cost.

The jury found for Adeli on both the breach of warranty and fraud claims and ordered Silverstar to pay compensatory damages of $6,835 and incidental damages of $13,366. However, the court had instructed the jury members that if they found for Adeli on the fraud claim, they could also award him punitive damages. The jury did just that and awarded punitive damages, to the tune of a staggering $5.8 million.

Some in the industry have speculated that the case might have gone the way it did because the retail

(see **WARRANTY LAW,** page 4)

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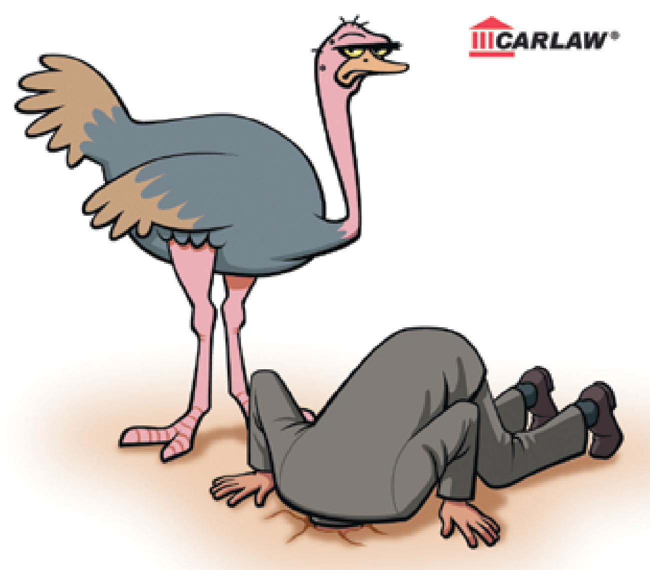

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WARRANTY LAW from page 3

If the RIC had included a typical integration clause, it might have been possible for the dealer to argue that the statements made in the phone calls and text messages would not have been binding because they would not have been part of the final agreement.

installment contract may not have contained an integration clause. An integration clause is a provision that generally states that the RIC and any other documents signed at the same time (for example, the Buyer's Guide or the odometer statement) constitute the entire agreement between the parties and that no prior written or oral communications have any effect. If the RIC had included a typical integration clause, it might have been possible for the dealer to argue that the statements made in the phone calls and text messages would not have been binding because they would not have been part of the final agreement. So, one takeaway may be for you to consider talking to your counsel about the benefits of adding an integration clause if your RICs do not already have one.

The larger takeaway, though, is a reminder of the importance of training (and re-training) your sales employees on how to communicate and use text messages in the sales process and the limitations on warranty disclaimers when an employee says (or texts) something that may arguably contradict the disclaimers.

Adeli v Silverstar Automotive, Inc., 2018 U.S. Dist. LEXIS 156139 (W.D. Ark. September 13, 2018); *Adeli v Silverstar Automotive, Inc.*, 2018 WL 5256608 (W.D. Ark. September 27, 2018) (Verdict, Agreement and Settlement).

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FEDERAL LAW

What Access Problems?

By Thomas B. Hudson

I'll confess that I hadn't given a whole lot of thought to the Americans with Disabilities Act since its enactment nearly 30 years ago. Recently, my son's Golden Retriever clipped my wife's legs out from under her, resulting in a broken ankle and several weeks in a wheelchair for her and behind a wheelchair for me. I quickly learned to appreciate the ramps and curb cuts that nearly all businesses have installed for wheelchair accessibility. Our favorite restaurant, housed in a building that predates Noah and the flood, hasn't gotten the word, but compliance with the physical accessibility requirements of the law seems to be widespread.

When the ADA was enacted in 1990, I expected a flurry of litigation against businesses that were slow to meet the law's requirements. We tried to gin up interest in the new law by scheduling presentations at conferences, writing articles, and generally getting the word out to our dealership and finance company clients.

But nothing happened. Or nearly nothing.

For the first 20 years that the law was in effect, I fielded exactly two calls from clients saying that they had ADA complaints. One was from a finance company client that had declined the credit application of a buyer who wanted to buy a car. The decline was based on the company's policy requiring all credit applicants to have a driver's license in order to be approved for credit. The buyer, however, was blind and, therefore, did not have a driver's license.

Miffed that her credit request had been declined, the buyer complained to the Missouri attorney general. The AG called the finance company, suggesting that the company's policy violated the ADA. The credit manager called me and asked what the company should do.

I suggested that the company approve this particular applicant's credit request and change its requirement for a driver's license to a requirement for a photo ID. That seemed to satisfy all concerned, and I heard no more of the blind buyer.

Then a year or so later, I got a call from a client in the car leasing business. The company had leased a 5-Series BMW to a lawyer (why is it always a lawyer?), and the lawyer had lodged an ADA claim, saying that the high lease payments were causing him mental distress and that the leasing company was required to make a "reasonable accommodation," as required by the ADA, to address his situation. Specifically, he wanted the leasing company to lower his monthly lease payment. I suggested that the leasing company offer a different "reasonable accommodation," substituting a Ford Fiesta for that 5-Series (sometimes I really amuse myself). The lawyer lessee wasn't thrilled with that solution, but the case went away.

… we've picked up reports of new ADA activity. This new batch of complaints appears to center around two areas—website accessibility and modifications to vehicles to permit hand controls.

So, my fears that plaintiffs' lawyers would quickly weaponize the ADA turned out to be unfounded—until recently, that is.

Over the last couple of years, we've picked up reports of new ADA activity. This new batch of complaints appears to center around two areas—website accessibility and modifications to vehicles to permit hand controls.

In the first area, plaintiffs' lawyers argue that people with vision problems are unable to access a dealership's website—not surprising, given that few dealers have attempted to accommodate these users. In the second area, the lawyers claim that dealerships do not have the sorts of hand controls necessary to permit their disabled clients to take vehicles for test drives—also not surprising, since few dealerships have such equipment on hand.

In both instances, the plaintiffs assert that they represent a class of "similarly situated" persons, and their lawyers drop a demand letter on the dealership, threatening a class action lawsuit unless—guess what?—the dealership forks over some long green.

If your dealership has gotten wind of these developments and has moved to address them, good for you. If not, you probably want to sit down with your lawyer, and maybe with your insurance company, too, and discuss what you need to do to avoid these attacks.

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Vendor's Single Interest Insurance—Important Pesky Details

By Elizabeth C. Yen*

Car dealers and finance companies generally assume that their preprinted retail installment contracts effectively exclude vendor's single interest premiums from the finance charge for Truth in Lending purposes. However, a RIC template cannot, by itself, ensure that VSI premiums are properly excluded from the finance charge; that depends in large part on the VSI policy itself. The federal $10 finance charge disclosure tolerance that applies to most vehicle retail installment transactions is insufficient to shelter VSI premiums that should have been treated as prepaid finance charges. Such VSI premiums may also cause the Annual Percentage Rate to be underdisclosed by more than the federal 0.125% APR tolerance that typically applies to vehicle retail installment transactions. A consumer could receive $2,000 in statutory civil penalties under the federal Truth in Lending Act, and attorneys' fees and court costs, for improper exclusion of VSI premiums from the finance charge. Furthermore, if VSI premiums should have been treated as prepaid finance charges, then the "true" APR may exceed applicable state limits. Contract prepayment or acceleration also may need to include a rebate or credit for unearned prepaid finance charges, calculated in accordance with applicable state statutes.

... a RIC template cannot, by itself, ensure that VSI premiums are properly excluded from the finance charge ...

What does TILA require to exclude VSI premiums from the finance charge? First, the consumer must be given clear and conspicuous written disclosure that VSI is required and may be obtained from a person of the consumer's choice (subject to the creditor's right to refuse the consumer's VSI choice for reasonable cause). If this disclosure is not given clearly and conspicuously (even if a consumer might not have access to VSI in the open market), the VSI premium is includable in the finance charge. Several courts have held that if the checkbox in front of the VSI disclosure section of a RIC was not checked (due to printer misalignment or user error), this may cause the preprinted VSI disclosure to have been either (i) not provided at all (because the checkbox was not checked) or (ii) provided in an unclear and confusing manner.

Second, if the consumer chooses to obtain VSI from or through the creditor, the cost must be clearly and conspicuously disclosed. If the VSI premium amount is printed on top of boilerplate contract text due to printer misalignment, instead of in the appropriate blank space on the contract, then the amount will not have been clearly and conspicuously disclosed.

Third, if the initial term of the VSI policy available from or through the creditor is shorter than the scheduled term of the RIC, then the initial term of the VSI policy must be disclosed. Typically, a retail installment buyer who finances a lump sum VSI premium will have paid for VSI coverage for the scheduled term of the RIC, but the initial term of the VSI policy is a question of fact that depends on the actual provisions of the policy or certificate of insurance. Dealers should consider whether lower VSI premiums quoted by some insurers might be associated with policy terms shorter than the scheduled terms of the related RICs.

Fourth, Regulation Z and its Official Staff Commentary define "single interest insurance" in a way that requires reviewing a VSI policy to ensure that it meets all Reg. Z "single interest" coverage requirements. For example, the policy must waive the insurer's right of subrogation (right to seek reimbursement of a covered claim paid to the creditor) against the retail buyer.

Official Staff Comment 10 to Section 1026.4(d) of Reg. Z also limits the scope of "single interest insurance" to "protection of tangible property against normal property damage, concealment, confiscation, conversion, embezzlement, and skip." Coverage for things such as "repossession insurance and holder-in-due-course insurance" falls outside the scope of "single

(see **INSURANCE ISSUES,** page 7)

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INSURANCE ISSUES from page 6

interest insurance" for Reg. Z purposes. Comment 10 generally requires allocating a portion of the total VSI premium to the non-single interest coverages provided by the policy and treating that allocated portion of the premium as a prepaid finance charge. "However, such allocation is not required if the total premium in fact attributable to all of the non-VSI coverages included in the policy is $1.00 or less (or $5.00 or less in the case of a multiyear policy)." If a dealer's multiyear VSI policy includes non-single interest coverages, the dealer should determine whether the insurer is charging more than $5.00 for such coverages. (If the VSI policy has only a 1-year term, the dealer should confirm that the total additional amount charged for non-single interest coverages is not more than $1.00.) TILA finance charge issues arise if it is not obvious from a multiyear VSI policy that non-single interest coverages are provided by the insurer at no additional charge or for a total additional premium of not more than $5.00.

Because assignees of RICs are responsible under TILA for facially obvious disclosure errors on assigned documents, including assigned RICs and related assigned VSI policies, assignees should look for VSI TILA issues, such as checkboxes left unchecked or blank spaces improperly completed due to printer alignment error and whether an assigned VSI policy includes non-single interest coverages.

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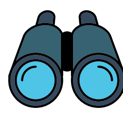
Are you confused about why the Consumer Financial Protection Bureau became the Bureau of Consumer Financial Protection and is now back to being called the Consumer Financial Protection Bureau? The **CFPB Watch** on page 14 may provide an answer.



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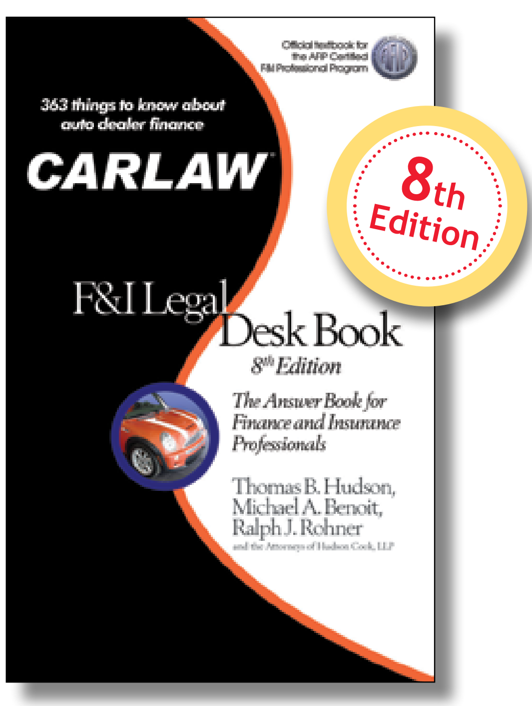

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PRIVACY

The Brand-New Right to Privacy in California

By Patricia E.M. Covington*

If you haven't heard yet, California has a new privacy law, and it's a doozy! Even if you're not in California, pay attention because this privacy law, or a similar one like the one recently proposed in New York, may be coming to your state. Remember, the security breach notice laws began in California, and now every state has one.

On June 28, 2018, California's governor signed into law the California Consumer Privacy Act, which expanded exponentially the rights consumers have regarding information collected and retained about them. Broadly described, the CCPA gives consumers the right to:

- know what personal information is collected about them;
- know what personal information is sold or disclosed for a business purpose;
- opt out of the "sale" of their personal information;
- have their personal information deleted;
- not be discriminated against if they choose not to share their personal information; and
- sue a company if their personal information is breached.

The CCPA was drafted and passed in a matter of days, without meaningful input or feedback from relevant stakeholders, resulting in many provisions being ambiguous and duplicative, internal inconsistencies, and unintended and impractical consequences. There are lots of questions about how this new privacy animal will behave in the real world. The CCPA has already been amended once and will likely be amended again before it goes into effect. Regulations implementing the CCPA must be completed by July 1, 2020. While the CCPA is effective January 1, 2020, it cannot be enforced until the California AG issues the required regulations or July 1, 2020, whichever is sooner.

To assist its rulemaking efforts, the California AG's office is holding six public forums across California through March 2019. The forums are intended to give the public an opportunity to comment on the proposed regulations, voice concerns, propose solutions, and generally give feedback on how this law can and should operate. The AG's office is also accepting comments via email and mail.

The CCPA and its implementing regulations will significantly alter how California residents' data can be collected, used, and stored. The CCPA shifts from regulating data based on subject matter (e.g., GLBA applies to financial data, HIPAA applies to medical data) to treating privacy like a basic human right. This follows the model adopted by Europe with the GDPR (General Data Protection Regulation). Dealers need to pay attention. This paradigm shift is not likely to go away and will conceivably spread to other states.

Let's go over some basics. The CCPA applies to a "business," defined as:

- a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity organized or operated for the profit or financial benefit of its shareholders or other owners;
- that collects consumers' personal information or has another person collect this information;
- that acts alone, or jointly with others, to determine the purposes and means of the processing of consumers' personal information;
- that does business in California; and
- that has annual gross revenues that exceed $25M (to be adjusted for inflation from time to time).

Note that this is the most logical way to interpret the statutory definition, which has other subparts. However, it's not beyond the realm of possibility for the California AG to interpret the definition more broadly to include businesses that are physically located outside of California but do business with California residents. Unfortunately, the phrase "does business in California" is not defined in the CCPA, and the reference to "consumers" complicates the definition.

"Consumer" is defined as a natural person who is a California resident, however identified, including by

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PRIVACY from page 8

... the CCPA provides an exception for entities subject to the Gramm-Leach-Bliley Act, but that exception won't cover all consumers with whom a dealer interacts.

any unique identifier. "Resident" is:

- every individual who is in California for other than a temporary or transitory purpose, and
- every individual who is domiciled in California who is outside California for a temporary or transitory purpose.

This definition includes students who go to school in California but otherwise "live" (are domiciled) in another state and persons who have a home (are domiciled) in California but may live part of the year in another state or are traveling. And, to be clear, this term includes employees of the business.

The CCPA applies to "personal information," which is "information that identifies, **relates to**, describes, **is capable of being associated with**, or **could reasonably be linked**, directly **or indirectly**, with a particular consumer **or household**."

Pay special attention to the items in bold. The most common examples of personal information are a person's name, address, unique personal identifier, email address, account name, social security number, driver's license number, passport number, and biometric information. Other examples are online identifiers, Internet Protocol addresses, geolocation data, and audio, electronic, visual, thermal olfactory, or similar information. Yes, you read that correctly: "thermal olfactory information." And, the statute provides for the term to include "inferences drawn from any of the information [previously] identified … to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities and aptitudes."

Those who have heard of this law are probably thinking that there must be exceptions. Yes, the CCPA provides an exception for entities subject to the Gramm-Leach-Bliley Act, but that exception won't cover all consumers with whom a dealer interacts. Recall that the GLBA only applies to an individual who obtains or has obtained a financial product or service from the dealer primarily for personal, family, or household purposes. That will not include employees, service aisle customers, cash buyers, and many consumers who visit a dealer's website.

So, get ready. Dealers who do business in California will need to put in place new compliance measures, including providing new disclosures, maintaining an opt-out program, deleting customer data, and monitoring the use and distribution of consumer data. Start your data mapping and compliance engines now!

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SPOT'S Mailbag

Questions? Comments? Thoughts to Share?

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COMMENTARY

Post-Election Musing

By Michael A. Benoit*

They say elections have consequences, and, by all accounts, the 2018 midterms were definitely consequential. The Democrats flipped enough seats to take control of the House of Representatives, effectively quashing President Trump's hopes of pushing through his legislative agenda. Republicans increased their Senate majority but are still short of the 60 votes necessary to move legislation forward. A divided Congress does not bode well for new financial services legislation.

Maxine Waters (D-CA) is the new chair of the House Financial Services Committee and is already considering legislation to undo some of the structural changes Mick Mulvaney made during his tenure as acting director of the Consumer Financial Protection Bureau, including the reorganization of the Office of Fair Lending. One imagines that Kathleen Kraninger, confirmed as the new CFPB director on December 6, will be asked to testify before the committee numerous times on matters great and small. It will be interesting to see if a Director Kraninger is as recalcitrant with Democratic committee members as former Director Cordray was with Republican committee members.

But what is likely to change? Probably not much. Legislation produced by the Financial Services Committee will almost certainly be approved by the full House, albeit likely on party lines. But such legislation's fate in the Senate is likely to be far less rosy. Democrats will have to vote in a block and wrangle a number of Republican votes to move the legislation forward. Assuming they can do that, the White House will remain a roadblock, as President Trump is at best a wildcard. In a rational world, I'd put him in the "no" column, but, like many, I've discovered that predicting his actions is a futile exercise. Still, all things being equal, Democrats are going to have a very tough row to hoe to advance any new financial services legislation.

Might we see bipartisan legislation to convert the CFPB to a commission? All indicators point to bipartisan support for this change, but Republicans were in no hurry to move forward over the last two years; instead, they used their majority to defang the CFPB and support the rollback of some of former Director Cordray's initiatives. Both sides of the aisle recognize the value of a stable and relatively predictable CFPB, but, apparently, neither side can resist playing politics with the agency. Rep. Waters should consider bringing up this legislation in the near term to establish an environment of bipartisanship on the committee. There is no question that there will be many other activities of the committee that are controversial—not the least of which would be to launch investigations of the president—but quickly doing something both sides can agree on would help set a productive tone for the next two years.

Might we see bipartisan legislation to convert the CFPB to a commission?

In my view, the congressional outlook for the next two years is rocky at best. The acrimony between Democrats and the president will continue but will be turbocharged. There will be plenty of investigations, accusations, and insinuations, some designed to uncover the facts and others designed to simply tweak the emotions of the parties involved.

Often, a divided Congress gives rise to ludicrous legislation because all parties understand it won't go anywhere. But it's an effective way to make a political point. Many of us in the real world see that as a waste of time, energy, and resources, and too often our elected representatives can't help themselves. But that's the silver lining. A divided Congress rarely does harm.

While it's probably too much to hope for, a spirit of bipartisanship and a concerted effort to pass bipartisan legislation would serve the House Financial Services Committee and the American people well. Perhaps the committee could identify those initiatives that both sides can support—as each side has identified those things they want to investigate—and prioritize them. My suggestion? Start with converting the CFPB to the Consumer Financial Protection Commission.

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ARBITRATION

Arbitration Clause in Vehicle Retail Installment Contract Applies to Buyers' Defamation Claim Against Salesperson

By Latif Zaman*

The enforceability and scope of consumer arbitration clauses are hot-button legal issues. In a recent case, a Florida appellate court addressed the scope of claims covered by an arbitration clause in a retail installment contract between a dealership and Florida buyers and held that the clause applied to a defamation claim the buyers filed against one of the dealership's salespeople.

Sounds unusual, huh? Read on.

Olga and Stanislav Kulinsky bought a vehicle from Countyline Auto Center, Inc., pursuant to a retail installment contract. Countyline later mistakenly repossessed the car.

The Kulinskys sued Countyline for the inappropriate repossession and included a defamation claim based on the conduct of a Countyline salesperson. The Kulinskys alleged that the salesperson, who lived in the same condominium complex as the Kulinskys and many of their business customers, told other members of the condominium community that the vehicle was repossessed because the Kulinskys were in financial difficulty. The Kulinskys asserted that Countyline was vicariously liable for damages caused by the salesperson's defamatory statements.

The RIC contained an arbitration clause that covered, among other things, any claim or dispute in tort that "arises out of or relates to" the credit application, purchase, or condition of the vehicle. Countyline moved to compel arbitration. The trial court ruled that the defamation claim was an independent tort and did not fall within the scope of the arbitration agreement. Countyline appealed. The Court of Appeal of Florida reversed the trial court's ruling and remanded for entry of an order compelling arbitration of the Kulinskys' defamation claim.

The appellate court noted that the arbitration language expressly contemplated tort actions. The appellate court also determined that the addition of the words "relates to" broadened the scope of the arbitration provision to include all claims, including tort claims such as defamation, having a "significant relationship" to the contract. The appellate court found that there was a significant relationship between the Kulinskys' tort claim and the contract. The Kulinskys alleged that the defamation was based on statements allegedly made by Countyline's salesperson within the scope of his employment. The appellate court found that those statements related to the Kulinskys' purchase of the vehicle and their ability to afford it, which in turn related to the credit application and the RIC that controlled the purchase. The appellate court also ruled that any ambiguity that existed concerning the scope of the arbitration clause should be resolved in favor of arbitration.

... the addition of the words "relates to" broadened the scope of the arbitration provision to include all claims, including tort claims such as defamation, having a "significant relationship" to the contract.

The court's decision indicates that Florida courts are willing to broadly interpret the scope of a consumer arbitration clause and that ambiguities concerning the scope of the clause will be resolved in favor of arbitration. Contract drafters should consider drafting consumer arbitration clauses with open-ended language that could allow a court to interpret the clause to apply to a wide range of scenarios, even scenarios as unusual as defamation claims by customers against employees.

Countyline Auto Center, Inc. v. Kulinsky, 2018 Fla. App. LEXIS 16684 (Fla. App. November 21, 2018).

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JURISDICTION

Sued Out of State?

By Nicole F. Munro*

With dealer Internet sales activity now common, and with many of the sales involving a dealership in one state and a buyer in another, we are seeing an uptick in lawsuits dealing with the question of jurisdiction over the parties to a lawsuit. Whether a dealership can be sued in a buyer's home state probably isn't a "top-of-mind" question, at least until a lawsuit is filed against the dealership hundreds of miles from its location. A recent case, this one decided favorably for the dealership, illustrates how these issues play out.

Talam Qatato, a Texas resident, bought a used car from Warren Chevrolet, Inc., d/b/a Green Family Chevrolet, after seeing the car advertised on Autotrader.com. Green Family Chevrolet, incorporated in Iowa, has its principal place of business in Illinois.

Qatato sued Green Family Chevrolet in a Texas court for fraud, among other claims, after he discovered that the car allegedly had undisclosed damage. The trial court concluded that it had personal jurisdiction over Green Family Chevrolet, but the dealership appealed that ruling.

The Court of Appeals of Texas reversed, concluding that Green Family Chevrolet was a "nonresident defendant" without sufficient contacts with Texas to establish personal jurisdiction. With respect to general jurisdiction, the appellate court found that Green Family Chevrolet was not incorporated in Texas and did not have its principal place of business in Texas. In addition, Green Family Chevrolet's contract with a third-party vendor headquartered in Texas was insufficient to establish that the dealership's affiliations with Texas were so continuous and systematic as to render it "essentially at home" for purposes of general jurisdiction.

With respect to specific jurisdiction, the appellate court concluded that Green Family Chevrolet's contacts with Texas did not amount to "purposeful availment" and thus did not satisfy jurisdictional requirements. The appellate court reasoned that the sale at issue was initiated by Qatato; Qatato sent full payment to Green Family Chevrolet and paid for and arranged for the car to be transported to Texas; and the sales contract included a forum selection clause that provided that any litigation in connection with the sale would occur in Illinois.

Whether a foreign court does or does not have jurisdiction over a dealership in a particular instance is almost always, as the lawyers say, "a very fact-specific inquiry."

The appellate court also found that the phone calls, text messages, and emails between Green Family Chevrolet and Qatato did not establish "purposeful availment" because almost all these communications concerned an isolated sale and were initiated by Qatato. According to the court, "[r]esponding to a customer's inquiries in a single sale does not amount to a purposeful act 'to create continuing relationships and obligations with citizens from another state,'" which the Texas Supreme Court has deemed necessary to create personal jurisdiction. Green Family Chevrolet only initiated contact with Qatato a few times by sending announcements, discount offers, and service reminders.

The appellate court rejected Qatato's argument that the warranty terms and the alleged misrepresentations by Green Family Chevrolet gave rise to specific jurisdiction. The appellate court clarified that it is the defendant's contacts themselves, not whether the contacts are tortious, that determine whether personal jurisdiction exists.

Finally, the appellate court rejected Qatato's argument that Green Family Chevrolet's online marketing, including its advertising on Autotrader.com, and the use of its website to interact with customers gave rise to specific jurisdiction. The appellate court found that Green Family Chevrolet's advertising did not specifically target Texas residents. It also found that the interaction of the parties on Green Family Chevrolet's website was minimal, noting that most of the alleged misrepresentations concerning the car were made via phone calls, text messages, emails, and documents mailed to Qatato and not through Green Family Chevrolet's website.

Whether a foreign court does or does not have jurisdiction over a dealership in a particular instance is almost always, as the lawyers say, "a very fact-specific

(see **JURISDICTION,** page 14)

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MARKETING

Like to Live Dangerously? Have I Got a Deal for You!

By Eric L. Johnson*

Do you have too much positive goodwill in the community and marketplace? Need to shed some so you can pump up your bad boy or girl image? How would you like to engage in some illegal conduct that will result in claims of invasion of privacy, harassment, aggravation, and disruption in the daily life of thousands of consumers?

And, best of all, do you just happen to have a few million bucks burning a hole in your pocket? If so, have I got a deal for you! Just start a telemarketing campaign or, better yet, hire a third party to start a telemarketing campaign for you, and start calling and texting consumers' cell phones without doing your legal homework. That's just what happened to one Florida Ford dealership that recently settled, for millions of dollars, a federal class action suit for allegedly violating the federal Telephone Consumer Protection Act.

Here's what happened.

In May 2018, Vincent Papa filed a class action lawsuit in the U.S. District Court for the Southern District of Florida, accusing Grieco Ford Fort Lauderdale, LLC, of engaging in "unsolicited marketing directly to consumers' cellular telephones, harming thousands of consumers in the process."

Papa argued that the dealership called and texted him concerning an offer to purchase his vehicle, all without getting his prior express consent to do so. He alleged that the illegal conduct "resulted in the invasion of privacy, harassment, aggravation and disruption of the daily life of thousands of individuals." On behalf of two different class action classes, he sought up to $1,500 in statutory damages for each call made in violation of the TCPA.

Grieco Ford's telemarketing campaign was reportedly designed by a third-party marketing firm with offices in another state. Guess who wasn't named in Papa's suit? You guessed it—the marketing firm. The dealership was left to defend itself and the actions of the marketing firm against the claims in the lawsuit.

... it is ultimately the dealership's responsibility to ensure that it has the prior express written consent to call or text a consumer for marketing purposes.

The TCPA regulations distinguish between sales calls and non-sales calls to cell phones that are placed using an autodialer or a prerecorded message. The rule requires "prior express consent" for non-sales calls and requires "prior express written consent" for sales calls. The "prior express written consent" standard applies when a person initiates, or causes to be initiated, any telephone call to a cell phone that includes or introduces an advertisement or constitutes telemarketing (i.e., sales calls) using an autodialer or an artificial or prerecorded voice (i.e., prerecorded message). The Federal Communications Commission regulates text messages as telephone calls. As a result, the consent standards described above apply equally to text messages that are sent using equipment that satisfies the TCPA's "autodialer" standard.

One of the most significant features of the TCPA is the creation of a private right of action that comes with statutory damages, even if the consumer did not sustain any economic harm as a result of an improper or "illegal" call or text. Courts ***must*** award $500 per violation under certain provisions and ***may*** award up to $500 per violation under other provisions. Courts also may triple the statutory damages award to $1,500 per violation for willful or knowing conduct. As you might expect, plaintiffs' attorneys love to bring TCPA cases due to the possibility of class action status and nine-figure statutory damages awards.

Grieco Ford agreed to settle the federal class action suit five months after the suit was filed. The plaintiffs' tally for only five months' worth of work? The dealership agreed to pay $4,781,160, with the recipients of the unwanted calls and text messages getting up to $180 each. If you're a plaintiffs' attorney, not a bad day at the office.

So, what lessons can you learn from this poor dealership that will be paying recipients of the unwanted calls and texts almost $4.8 million? The most important

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MARKETING from page 13

lesson is that it is ultimately the dealership's responsibility to ensure that it has the prior express written consent to call or text a consumer for marketing purposes. Don't rely on a third party to ensure that you have that consent. The best course of action a dealership can take is to engage a lawyer who is knowledgeable about TCPA requirements to review the marketing program on the dealership's behalf.

If you don't heed my warning and hire an attorney knowledgeable about TCPA compliance to review your program, at the very least, make sure you press for an indemnity from the third party and confirm that the company has the proper insurance coverage in case things go wrong. An indemnity won't buy you a cup of coffee if the vendor isn't on a firm financial footing, so check its financial wherewithal to pay.

Finally, if you buy marketing lists, make sure the vendor has assured you that it obtained the proper consents for the calls and/or texts, and get proof of that fact for your files. You've worked hard on your reputation and business; don't make yourself an easy target for plaintiffs' attorneys.

Papa v. Grieco Ford Fort Lauderdale, LLC, 2018 U.S. Dist. LEXIS 209834 (S.D. Fla. December 11, 2018).

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JURISDICTION from page 12

inquiry." Change a couple of facts, and you'll get a different verdict. That can be good news, though, because it means that careful attention to a dealership's operations, procedures, documentation, and advertising can drive a verdict favorable to the dealership.

Now, where's that lawyer's phone number?

Warren Chevrolet, Inc. v. Qatato, 2018 Tex. App. LEXIS 10735 (Tex. App. December 21, 2018).

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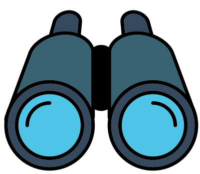
CONSUMER FINANCIAL PROTECTION BUREAU

CFPB Watch



By Michael A. Benoit

This monthly report is designed to catch you up on the most recent Washington developments relating to the auto sales, financing, and leasing world. This month, the action involves the Consumer Financial Protection Bureau and the Federal Trade Commission.

There's a New Sheriff in Town. On December 6, the U.S. Senate, in a 50-49 party-line vote, confirmed Kathy Kraninger to a 5-year term as the director of the CFPB, replacing acting director Mick Mulvaney. Kraninger previously worked as an associate director in the Office of Management and Budget.

What's in a Name? Mick Mulvaney, who served as acting CFPB director before Kraninger's nomination and confirmation, had decreed a name change for the Consumer Financial Protection Bureau—he preferred the Bureau of Consumer Financial Protection, the name used in the Dodd-Frank Act. One of Kraninger's first acts at the Bureau was to drop the name change initiative, so we're back to calling the Bureau the CFPB again and, as you'll note above, back to calling this column the CFPB Watch rather than the BCFP Watch.

Were You Thinking the CFPB Had Quit Enforcing the Credit Laws? Think again. On December 6, the CFPB announced a settlement with State Farm Bank, FSB, for violating the Fair Credit Reporting Act, Regulation V, and the Consumer Financial Protection Act of 2010 in connection with its credit card lending and auto refinance loans. Specifically, the CFPB alleged that State Farm obtained consumer reports without a permissible purpose, including obtaining consumer reports for the wrong consumer, not the consumer who had applied for a credit product; furnished to credit reporting agencies information about consumers' credit that the bank knew or had reasonable cause to believe was inaccurate, including furnishing account information for the wrong consumer, reporting current accounts as delinquent, and reporting inaccurate payment histories and past-due amounts; failed to

(see **CFPB WATCH**, page 15)

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promptly update and correct information furnished to CRAs; furnished information to CRAs without providing notice that the information was disputed by the consumer; and failed to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of information provided to CRAs. The consent order requires State Farm to implement and maintain policies and procedures to address the alleged violations and to develop a compliance plan designed to ensure that its consumer credit reporting activities comply with federal law.

Wave that Red Flag! On December 4, the FTC, as part of its periodic review of current rules and guides, issued a request for comment on its Red Flags Rule, which requires financial institutions and some creditors to implement a written identity theft prevention program designed to detect the "red flags" of identity theft in their day-to-day operations, take steps to prevent identity theft, and mitigate its damage. Comments are due by February 11, 2019.

Report Card Time. On December 4, the CFPB issued its annual Fair Lending Report to Congress highlighting the CFPB's fair lending activities in 2017. The report addresses, among other things, (1) the CFPB's oversight and enforcement of federal laws intended to ensure fair, equitable, and nondiscriminatory access to credit, including the Equal Credit Opportunity Act and the Home Mortgage Disclosure Act, (2) the CFPB's coordination with other federal and state agencies to promote enforcement of federal fair lending laws, and (3) the CFPB's fair lending education initiatives.

Bureau's UDAP Authority Is Alive and Well. On January 3, the Bureau announced that it reached a consent order with USAA Federal Savings Bank for allegedly (1) violating the Electronic Fund Transfer Act and Regulation E by failing to honor consumers' requests to stop payment on preauthorized electronic fund transfers and by failing to initiate and complete adequate error resolution investigations when consumers contested incorrect or unauthorized electronic fund transfers, and (2) engaging in unfair acts and practices by reopening deposit accounts consumers had previously closed without seeking prior authorization or providing adequate notice. The consent order requires USAA to, among other things, provide approximately $12 million in restitution to affected consumers and pay a $3.5 million civil penalty.

... the CFPB announced a settlement with State Farm Bank, FSB, for violating the Fair Credit Reporting Act, Regulation V, and the Consumer Financial Protection Act of 2010 in connection with its credit card lending and auto refinance loans.

Looking for Authority. On January 17, CFPB Director Kraninger announced that she has asked Congress to grant the Bureau clear authority to supervise for compliance with the Military Lending Act. The Bureau sent its legislative proposal to Speaker Pelosi and Vice President Pence (in his capacity as president of the U.S. Senate), with copies to the chairs and ranking members of the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services.

And Another Report. On January 24, the CFPB's Office of Servicemember Affairs released its annual report. The OSA monitors and analyzes complaints from servicemembers, veterans, and military families about consumer financial products or services, credit reporting, and debt collection, among other issues facing servicemembers in the financial marketplace. The report provides an analysis of those complaints and discusses perceived emerging issues and trends in the financial marketplace that affect servicemembers, educational initiatives, and the OSA's coordination with other federal and state agencies.

So, there's this month's report. See you next month!

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