Consumer Financial Services LAW REPORT

Focusing on Significant Caselaw and Emerging Trends

Route to:

Volume 9, Issue 2 June 15 , 2005

Truth in Lending

Finance charge does not include withheld rebate

Sellers of consumer goods can offer consumers either a cash rebate or a below-market rate of interest on their financing. If a consumer receives the below-market interest rate, the seller does not violate the **Truth in Lending Act** by failing to disclose the availability of the rebate as an alternative. Withholding a rebate need only be disclosed as a finance charge under the TILA when it is offered as an incentive to get purchasers to pay cash rather than use credit, the **9th U.S. Circuit Court of Appeals** has held. (*Virachack, et al. v. University Ford*, No. 03-55852 (9th Cir. 05/20/05).)

Malinee B. and **Ritnarone T. Virachack** bought a Ford Explorer from **Bob Baker Ford**. The Virackacks financed part of the purchase price at an interest rate of 0.9 percent.

On the day the Virachacks bought the Explorer, **Ford Motor Co.** offered a $2,000 rebate to certain customers buying that model and year vehicle.

(See **REBATE** on page 14)

Arbitration

Conn. high court upholds arbitrator's $5M punitive damages award

With the pervasive use of arbitration clauses in consumer lending agreements, the enforceability of arbitrators' damage awards has become an important issue for defense attorneys. They generally want the benefits of arbitration for their clients, while preserving some avenue of appeal in the case of a "rogue" arbitrator who awards an excessive amount of punitive damages.

In *MedValUSA Health Programs, Inc. v. Memberworks, Inc.*, No. SC 17116 & 17117 (Conn. 05/17/05), however, the **Connecticut Supreme Court** held that neither the due process clause of the 14th Amendment nor Connecticut public policy provided defendants with a basis for challenging an arbitrator's $5 million punitive damages award. Due process did not protect the defendant because an arbitrator's damages award is not state action, even when it has been confirmed by a state court. The court also found that Connecticut has no explicit, well-defined, dominant public policy against excessive punitive damage awards. So defendants who are wish to challenge excessive punitive damage awards must do so on the basis of the arbitrator's "evident partiality" or "manifest disregard of the law" — two very difficult things to prove.

(See **DAMAGES** on page 6)

INSIDE

1098-9315/05/$2 + $1.50

Guest Commentary

Practitioners review 'abstention' procedure under Sections 1332(d)(3) and (4)

By Anthony Rollo, Hunter Twiford** and Gabriel Crowson****

The recently enacted **Class Action Fairness Act** expands original federal jurisdiction over interstate class actions by creating "minimal diversity" in cases where: 1) at least $5 million is in dispute; and 2) any class member is diverse from any defendant.

After these two jurisdictional elements are established at the threshold, the CAFA procedurally allows a court to "decline to exercise" its minimal diversity jurisdiction on a discretionary or mandatory basis, under certain conditions.

Sections 1332(d)(3) and (4) of the CAFA do not, however, spell out the nature of this procedure, or how or when the court should "decline to exercise" its minimal diversity jurisdiction. The proper characterization of this procedure has far-ranging legal and practical ramifications.

Application of abstention principles

The CAFA's plain language and other authority suggests that this procedure may involve *abstention* principles, which presuppose the existence of minimal diversity jurisdiction, as opposed to threshold jurisdictional principles and issues. In that event, a court should consider a motion under Section 1332(d)(3) or (4) to "decline to exercise" jurisdiction only *after* minimal diversity jurisdiction under Section 1332(d)(2) is established and any remand motion is denied.

The CAFA's "abstention" provisions are complex and ambiguous, and turn on a "body count" of putative class members.

Under the CAFA's *discretionary* "abstention" provision — Section 1332(d)(3) — "in the interests of justice and looking at the totality of the circumstances, a court may decline to exercise jurisdiction" under Section 1332(d)(2) in cases where between one-third and two-thirds of the class members, and the "primary defendants," are citizens of the forum state, after considering a number of listed, complex factors.

***Anthony Rollo** is a member of **McGlinchey Stafford PLLC**, in its New Orleans office. He chairs his firm's national Consumer Financial Services Litigation Group, and focuses his practice on consumer financial services and class action litigation. He may be contacted at (504) 596-2743 or *arollo@mcglinchey.com*.

****H. Hunter Twiford** is a member of McGlinchey Stafford PLLC, in its Jackson, Miss. office. He focuses his practice on consumer financial services and class action litigation. He may be contacted at (601) 960-3523 or *htwiford@mcglinchey.com*.

*****Gabriel A. Crowson** is an associate in **McGlinchey Stafford PLLC**'s New Orleans Office. He practices in the firm's Consumer Financial Services Litigation Group.

Under the CAFA's two *mandatory* "abstention" provisions — Sections 1332(d)(4)(A) and (B) — a court "shall decline to exercise" its minimal diversity jurisdiction in cases where a movant can show that either: 1) more than two-thirds of the class members and the "primary defendants" are citizens of the forum state; or 2) more than two-thirds of the class members are forum state citizens, at least one defendant from whom "significant relief is sought" and whose conduct forms a "significant basis" of the claims is a forum state citizen, the "principal injuries" occurred in the forum state, and no other similar class actions asserting the same claims were filed within the previous three-year time period.

The MMTJA lends addition support

In addition to the plain language of CAFA, support for the view that this is an abstention procedure is found in the analogous **Multiparty, Multiforum, Trial Jurisdiction Act**, 28 USC § 1369, enacted in November 2002, and a recent decision interpreting the MMTJA.

Like the CAFA, the MMTJA creates "minimal diversity" jurisdiction, offers a procedure allowing a court to decline to exercise its minimal diversity jurisdiction, and identifies as factors to be considered a plaintiff "body count" and the citizenship of the "primary defendants." Section 1369(b) of the MMTJA generally provides that federal courts have original jurisdiction over cases where minimal diversity exists between adverse parties, which involve an accident when at least 75 people have been killed and certain other factors are satisfied.

Under the MMJTA, the court shall abstain from exercising its minimal diversity jurisdiction if, among other things, a movant can establish that a "substantial majority of all plaintiffs" and the "primary defendants" are citizens of the same state. 28 USC § 1369(b).

The *Passa* decision

One federal decision — *Passa v. Derderian*, 308 F. Supp. 2d 43 (D.R.I. 2004) — specifically addresses this analogous procedure under the MMTJA and found that its provisions involved abstention, instead of a jurisdictional limitation.

The *Passa* court considered whether the purpose of the procedure was to determine if minimal diversity jurisdiction existed in the first instance, as opposed to whether the court should abstain from exercising its already-established jurisdiction. The court held that the MMTJA procedure involves "mandatory abstention" issues that presume the existence of minimal diversity jurisdiction.

Broad strategic implications

As noted in *Passa*, whether or not the correct CAFA characterization calls this an abstention procedure vs. a

1098-9315/05/$2 + $1.50

Class Actions

Federal court certifies class action under California's FDCPA

A consumer may bring a class action against a debt collector under California's version of the **Fair Debt Collection Practices Act**.

Section 1692k of the federal FDCPA clearly contemplates the use of class actions, and numerous courts have certified classes under the federal FDCPA based on allegedly improper form debt collection letters.

Since all remedies in Section 1692k of the federal FDCPA are incorporated into the California FDCPA, the latter must also allow class actions, the **U.S. District Court, Northern District of California** has held. (*Abels, et al v. JBC Legal Group, P.C., et al.*, No. C-04-02345-JW (RS) (N.D. Cal. 05/16/05).)

Raymond Abels brought a class action against a law firm, **JBC Legal Group PC**, and one of its lawyers, **Jack Boyajian**, for violating the federal and California FDCPAs by sending out form debt collection letters containing false and misleading statements.

Abels moved for class certification on his claims under both the federal and state statutes.

The defendants did not contest class certification under the federal FDCPA. They did, however, contest certification under the California FDCPA, arguing that the California statute "specifically states that its remedies are only recoverable in the procedural context of an individual."

Federal FDCPA allows class actions

U.S. District Judge James Ware first analyzed whether class certification was appropriate under the federal FDCPA.

The federal FDCPA clearly contemplates the use of class actions to enforce its provisions because Section 1692k(a)(2)(B) of the act provides for limits upon statutory damages recoverable "in the case of a class action," the judge reasoned.

Indeed, in the case of form collection letters, courts routinely certify class actions under the federal FDCPA, explained Judge Ware, citing *Sledge v. Sands*, 182 F.R.D. 255 (N.D. Ill. 1998).

In *Sands*, the Illinois federal court certified an FDCPA class action, recognizing "the importance of the class action remedy when the predominate legal issue is whether collection form letters violate the [federal] FDCPA."

Cal. Civil Code § 1788.17

Judge Ware then turned to the California act.

In 1999, the California **Legislature** amended the CA FDCPA by adding Civil Code Section 1788.17, noted Judge Ware.

Section 1788.17 provides that "every debt collector ... shall be subject to the remedies in Section 1692k of [the federal FDCPA]."

"A strict reading of 1788.17 clearly paves way for CA FDCPA violators to be subjected to the same remedies articulated in 15 U.S.C. 1692k," explained Judge Ware. "The mandatory language in the amendment — '... shall be subject to the remedies in Section 1692k' — leaves little doubt as to the intent of the legislature to broaden the remedies for CA FDCPA providing for a class action."

Based on Section 1788.17 and his finding that a class action was appropriate under the federal FDCPA, the court certified a class under the California FDCPA. ❑

Ronald Wilcox in San Jose, Calif., and **O. Randolph Bragg** of **Horwitz, Horwitz & Associates** in Chicago represented Abels.

June D. Coleman, **Mark Ewell Ellis** of **Murphy Pearson Bradley & Feeney** in Sacramento, Calif., represented JBC and Boyajian.

jurisdictional procedure has broad strategic implications. For example, if Sections 1332(d)(3) and (4) involve abstention principles and not jurisdictional conditions, then a CAFA removal notice may arguably need show only that there is more than $5 million in dispute with one plaintiff and one defendant from different states.

Similarly, if this is an abstention analysis, then that procedure — and any discovery relating to the Section 1332(d)(3) and (4) factors — arguably should not occur until *after* any remand motion is denied. In other words, class counsel may not argue that they are entitled to a "class list" during remand proceedings to ascertain the "body count."

In light of the "body count" issues under the Section 1332(d)(3) and (4) analysis, and assuming this is an abstention analysis, then the courts may schedule the procedure and any related discovery to take place in conjunction with subsequent class certification proceedings for efficiency reasons. Also, once a court addresses abstention and declines to abstain, it generally may not revisit that issue at a later point as it can for a subject matter jurisdiction question, which can be addressed at any time. This dynamic may be important in cases where the class "body count" changes over time.

Significantly, while the CAFA allows remand decisions involving subject matter jurisdiction to be appealed at the court's discretion, a decision on a CAFA "abstention" motion — which assumes jurisdiction has already been established — may instead be subject to different appeal standards governing abstention rulings.

Under either characterization, the CAFA makes it clear that the person seeking to take a class action away from the federal court's jurisdiction will bear the burden of establishing that all of the required factors under Sections 1332(d)(3) and (4) have been satisfied. ❑

1098-9315/05/$2 + $1.50