Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

May 28, 2010

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Federal Issues

FTC Delays Red Flags Rule Enforcement Through December 31, 2010. On May 28, the Federal Trade Commission (FTC) announced that it will delay enforcement of its Red Flags Rule (the Rule) through December 31, 2010. The Rule was most recently scheduled to become effective on June 1, 2010 (reported in *InfoBytes*, Oct. 30, 2009). According to Chairman Leibowitz, the delay is required because of pending Congressional legislation to "fix the unintended consequences of the legislation"—specifically, the application of the Rule to certain professions (*e.g.*, healthcare, accounting, and legal practices). This is the fourth time that the FTC has delayed enforcement of the Rule, which, among other things, requires creditors and financial institutions to develop and implement written Identity Theft Prevention Programs. For a copy of the press release, please see http://ftc.gov/opa/2010/05/redflags.shtm. For more information on the Rule, please see http://www.ftc.gov/bcp/edu/microsites/redflagsrule and the FTC's Frequently Asked Questions for the Rule at http://www.ftc.gov/bcp/edu/microsites/redflagsrule/faqs.shtm.

U.S. Attorney's Office Launches New Financial Fraud Task Force. On May 20, federal and Virginia state officials announced the creation of the Virginia Financial and Securities Fraud Task Force, a partnership between criminal investigators and civil regulators to investigate and prosecute financial fraud cases nationwide. The task force stems from an existing working relationship (between the Federal Bureau of Investigation, the U.S. Postal Inspection Service and the Internal Revenue Services' Criminal Investigation Division) that will be expanded to include civil regulators from the U.S. Securities and Exchange Commission, the Commodities Futures Trading Commission and the Virginia State Corporation Commission, as well as state prosecutors from the Virginia U.S. Attorney General's Office. The Virginia Financial and Securities Fraud Task Force is also intended to be an investigative arm of the President's Financial Fraud Enforcement Task Force, an interagency national task force responsible for investigating and prosecuting financial crimes (the creation of the President's Financial Fraud Enforcement Task Force was reported in *InfoBytes*, Nov. 20, 2009). For a copy of the press release, please see here.

FHFA Announces Uniform Mortgage Data Program for Freddie Mac, Fannie Mae. On May 24, the Federal Housing Finance Agency (FHFA) announced the Uniform Mortgage Data Program (Program), which is intended to enhance the depth of collateral, borrower and loan data submitted to Freddie Mac and Fannie Mae (the GSEs). The intention of the Program is to standardize data submissions to the GSEs. According to Freddie Mac, the Program will not make "significant changes" to data that is currently collected. For a copy of the announcement, please see http://bit.ly/cwi2jm. For a copy of the Frequently Asked Questions for the Program, please see http://bit.ly/hL8T4N.

Federal Reserve Board Posts Credit Card Agreements. On May 24, the Federal Reserve Board (Board) announced that consumer credit card agreements from a vast majority (over 300) of credit card issuers have been made available online at http://www.federalreserve.gov/creditcard agreements. The Board's database is the result of the Credit Card Accountability, Responsibility, and Disclosure Act of 2009, which also requires card issuers to post account agreements on their websites, as well as to provide consumers with credit card agreement(s) upon a consumer's request. The next submission deadline for the Board's database is August 2, 2010. For a copy of the announcement, please see here.

State Issues

Maryland Enacts Reverse Mortgage Loan Legislation. On May 20, Maryland Governor Martin O'Malley signed into law S.B. 878, a bill setting forth requirements applicable to reverse mortgage loan lenders and arrangers of financing. Among other things, the bill:

- Requires reverse mortgage loan lenders and arrangers of financing to comply with certain federal laws and regulations governing federally-insured home equity conversion mortgage loans;
- Prohibits reverse mortgage loan lenders and arrangers of financing from conditioning the origination of a reverse mortgage loan upon a borrower's purchase of an annuity, long-term care policy, or other related financial or insurance product. However, a reverse mortgage loan borrower may be required to purchase title, hazard, and/or flood insurance, as well as any other financial or insurance product that is required for reverse mortgage loans insured under federal law; and
- Requires reverse mortgage loan lenders and arrangers of financing, upon receipt of a reverse mortgage loan application from a prospective borrower, to provide a borrower with a written checklist of reverse mortgage loan-related issues that a borrower should discuss with a counseling agency.

The bill applies to reverse mortgage loans applied for on or after October 1, 2010. For a copy of the bill, please see http://mlis.state.md.us/2010rs/bills/sb/sb0878t.pdf.

Colorado Governor Signs Bill on Refund Anticipation Loans. On May 19, Colorado Governor Bill Ritter signed HB 10-1400, a bill that creates protections for Colorado consumers seeking refund anticipation loans (RALs). RALs are loans made based on a borrower's anticipated income tax refund. The bill establishes the Refund Anticipation Loan Act (RAL Act), under which:

- Individuals offering tax refund loan services must be employed directly by an electronic return originator;
- Loan facilitators must provide specific oral, written and posted disclosures that communicate, among other things, (i) a schedule of fees and example interest rates for different loan amounts up to $5,000, (ii) the duration, amount, applicable fees and interest rates associated with the anticipated tax refund loan, and (iii) procedures for making a complaint about the tax refund loan; and
- A willful violation of the RAL Act is a misdemeanor punishable by a $500 fine and/or imprisonment for up to one year.

The RAL Act becomes effective August 11, 2010. For the full text of the bill, please see http://bit.ly/qufP5i.

Vermont Enacts Law Restricting Certain Practices of Credit Card Companies. On May 21, the Vermont legislature enacted S. 138, a bill limiting certain practices of "electronic payment systems" (a defined term that includes most credit card companies). Under the new law, electronic payment systems would be prohibited from (i) imposing penalties on merchants that offer discounts for use of certain cards (or alternate forms of payment), (ii) restricting the freedom of merchants to set minimum card transaction amounts up to $10, and (iii) limiting the right of merchants to accept electronic payments at some, but not all, of their locations. Electronic payment systems that violate S.138 would also violate Vermont's Consumer Fraud Act and could face civil penalties of up to $10,000, as well as private civil actions. Notably, the final bill does not contain a restriction on interchange fees that was present in the original version of the bill. The bill becomes effective January 1, 2011. For a copy of S.138, please see http://www.leg.state.vt.us/docs/2010/Acts/ACT116.pdf.

Maryland Attorney General Settles with Payment Processing Company for Allegations It Failed to Properly Dispose of Consumer Information. On May 10, Maryland Attorney General Douglas Gansler announced a settlement with a payment processing company (MAP, LLC) and two of its officers for allegedly violating the Maryland Personal Information Protection Act by failing to take "reasonable" steps to protect consumer information when it discarded sensitive consumer information (*e.g.*, Social Security Numbers, cancelled checks, etc.) in a public dumpster. According to the statement, no consumer information was actually compromised. Under the settlement, the company and officers (i) deny any liability, (ii) will take reasonable steps to dispose of the information (and will continue to take reasonable steps to dispose of consumer information in the future), and (iii) will pay a $20,000 penalty. For a copy of the press release, please see http://www.oag.state.md.us/Press/2010/051010.htm.

Courts

California Federal Courts Separately Hold California's Notice of Default Filing and Notice Requirements are Preempted by NBA, HOLA. On May 21, the U.S. District Court for the Northern District of California held that the National Bank Act (NBA) preempts a California state law that (i) requires a lender or servicer to assess a delinquent borrower's financial situation prior to filing a notice of default, and (ii) prohibits a lender or servicer from filing a notice of default until 30 days after

initial contact with a delinquent borrower (Cal. Civil Code Section 2923.5). *Acosta v. Wells Fargo, N.A.,* No C.10-991 (N.D. Cal. May 21, 2010). In*Acosta*, the plaintiff borrower sought a preliminary injunction to prevent the defendants (including the lender, a national bank) from foreclosing on her home based on, among other claims, an alleged violation of Section 2923.5. The court, relying on other Ninth Circuit district court cases holding that the Home Owners' Loan Act (HOLA) preempts Section 2923.5, held that the NBA, which contains "nearly identical language," also preempts Section 2923.5. The *Acosta* court, in part, relied on an April 23 decision by the U.S. District Court for the Eastern District of California holding that HOLA preempted a Section 2923.5 claim against a mortgage servicer that was a direct subsidiary of a federal savings bank. *Parcray v. Shea Mortgage Inc.,* No. VV-F-09-1942, 2010 WL 1659369 (E.D. Cal. Apr. 23, 2010). In *Parcray*, the court reasoned that HOLA preempted Section 2923.5 because it concerns the processing and servicing of a mortgage, which is an area specifically preempted by HOLA and Office of Thrift Supervision regulations. For a copy of the opinions, please see here and here.

Third Circuit Holds Unconscionability Challenge to Class Action Waiver Properly Decided in Federal Court. On May 10, a divided U.S. Court of Appeals for the Third Circuit ruled that the question of whether a class action waiver provision in an arbitration agreement is unconscionable is one that a court, and not an arbitrator, should decide. *Puleo v. Chase Bank USA, N.A.,* No. 08-3837, 2010 WL 1838762 (3rd Cir. May 10, 2010). In *Puleo*, the consumer plaintiffs brought a putative class action on behalf of themselves and other credit card holders in Pennsylvania state court, arguing that the class action waiver in the arbitration agreements signed by the card holders was unconscionable. The defendant bank removed the matter to federal court and filed a motion to compel arbitration and dismiss the action. The consumers urged the federal district court to order the parties to arbitrate their claims as a class; however, the court rejected this claim, holding that the validity of the class action waiver was a "gateway dispute" and a "question of arbitrability" for a court to decide. The consumers appealed, arguing that the district court should not have addressed the unconscionability of the class action waiver and should have let the arbitrator decide that issue. The consumers argued that (i) no question of arbitrability was presented, (ii) under U.S. Supreme Court precedent, the arbitrator should determine whether an otherwise binding arbitration agreement bars class actions, (iii) because the arbitration agreement contained a severability clause, the lower court erred in considering the unconscionability of its terms, and (iv) even if the consumers' challenge to the class action waiver raised a question of arbitrability, the agreement at issue demonstrated that the parties clearly intended to arbitrate questions of arbitrability. The majority rejected all four arguments, holding that a challenge of unconscionability "is a challenge to the validity of the parties' agreement to arbitrate, and thus a question for the court to decide." In a strongly worded dissent, Circuit Judge Rendell, joined by two others, concluded that the question of whether an arbitration should proceed on an individual basis or as a class action was *not* "a question of *arbitrability*," (emphasis in original) and concluded that the determination of unconscionability should have been submitted to arbitration. For a copy of the opinion, please see http://www.ca3.uscourts.gov/opinarch/083837p.pdf.

Ninth Circuit Denies Rehearing in Case Determining the Scope of a "Permissible Purpose" to Access Consumer Credit Reports Under FCRA. On May 21, the U.S. Court of Appeals for the Ninth Circuit denied rehearing (*en banc*) a case in which the Ninth Circuit previously held that a transaction in which a consumer does not seek credit and that does not involve a judgment debt does

not constitute a permissible purpose to access a consumer credit report under the Fair Credit Reporting Act (FCRA). *Pintos v. Pacific Creditors Ass'n*, Nos. 04-17485, 04-17558, 2010 WL 2011550 (9th Cir. May 21, 2010). In *Pintos*, a defendant debt collector purchased a consumer's credit report from a credit reporting agency (CRA), claiming that the right to view the report was permissible under FCRA because the debt was "in connection with a credit transaction," even though the debt was incurred in connection with an unpaid towing fee. The Ninth Circuit, in its revised opinion, held that, "[b]ecause the current case involves neither a transaction for which [the plaintiff] sought credit nor the collection of a judgment debt," the collection agency did not have a permissible purpose under FCRA to obtain the credit report (the court's revised opinion was reported in *InfoBytes*, May 8, 2009). Although the Ninth Circuit denied rehearing the case, several judges joined in a dissent (written by Judge Kozinski) reasoning that the plain meaning of Section 1681b(a)(3)'s limitations on accessing credit reports were inapplicable to the plaintiff in this case because she did initiate the transaction by owing the debt. For a copy of the opinion, please see http://www.ca9.uscourts .gov/datastore /opinions/2010/05/21/04-17485.pdf.

Arizona Federal Court Holds No Private Right of Action for Inaccurate Reporting Under FDCPA. On May 13, in an unpublished decision, the U.S. District Court for the District of Arizona held that, as pleaded in this case, the Fair Debt Collection Practices Act (FDCPA) does not provide a private right of action against a credit reporting agency (CRA) for inaccurate reporting. *Horvath v. Premium Collection Services, Inc.,* No. CV 09-2516, 2010 WL 1945717 (D. Ariz. May 13, 2010). In *Horvath*, an employer demanded the return of disability payments upon determining that the plaintiff was unqualified for them and should not have received them. When the plaintiff refused, the employer retained a debt collector that reported the plaintiff's debt to the major CRAs. Alleging that the debt was invalid, the plaintiff filed a lawsuit claiming negligence, defamation and a violation of the FDCPA. Regarding the FDCPA claim, the court construed the claim, in part, as violating a provision of the FDCPA that prohibits communications with a CRA, except when permitted by law. Finding that the FDCPA is silent as to what communications with a CRA are permitted by law, the court looked to the Fair Credit Reporting Act (FCRA). The court found that, although inaccurate reporting is unlawful under Section 1681s-2(a) of FCRA, Section 1681s-2(a) does not provide a private right of action. In turn, the court interpreted the plaintiff's FDCPA claims as an attempted end-run around the FCRA's limitation on private rights of action and, therefore, dismissed the case. Notably, the court did not construe the complaint to allege a violation of Section 807(8) of the FDCPA, which prohibits "communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed." For a copy of the opinion, please see here.

Heartland Announces Settlement with MasterCard Regarding Data Breach. On May 19, Heartland Payment Systems Inc. (Heartland) and MasterCard International, Inc. (MasterCard) announced a settlement agreement (subject to certain conditions) to resolve potential claims by MasterCard against Heartland for damages due to a 2009 payment card data breach involving the theft of approximately 130 million credit and debit card numbers. Under the settlement terms, Heartland will pay $41.4 million to settle MasterCard's claims. The settlement, once finalized, would resolve approximately 15 consolidated bank and credit union class actions against Heartland. In order to finalize the settlement, at least 80 percent of MasterCard financial firms affected by the breach

must accept the terms of the settlement by June 25, 2010. Heartland previously announced settlements of approximately $3.5 million to the American Express Travel Related Services Company Inc. and $60 million to Visa Inc. (and Visa card-issuing banks) for similar claims arising out of the data breach. Other consumer class actions remain pending against Heartland. For a copy of the MasterCard settlement, please see Heartland's 8-K filing here.

Texas Federal Court Holds Errors in Processing of Buyback Requests May Not Be "Clerical Errors" Entitled to FDCPA Bona Fide Error Defense. On May 17, the U.S. District Court for the Southern District of Texas held that an employee of a collection agency who processed buyback requests may have performed "substantive" duties and, as such, the court denied a motion to dismiss asserting that errors made by that employee were "clerical errors" subject to the bona fide error defense under the Fair Debt Collection Practices Act (FDCPA). *Liu v. Arrow Financial Services, LLC*, No. H-08-3116, 2010 WL 1994190 (S.D. Tex. May 17, 2010). In this case, the defendants (a collection agency and its law firm) filed an erroneous collections lawsuit against the consumer plaintiff and the consumer subsequently sued the defendants, alleging claims under, among other laws, the FDCPA. Regarding the FDCPA claim, the court rejected the defendants' argument that the FDCPA violations were subject to the FDCPA's bona fide error defense because they were an inadvertent "clerical mistake" and that there were procedures in place to prevent such clerical errors. The court reasoned that the error, caused by an employee of the collection agency who processed accounts subject to a buyback request (which will cease accounts collection activity), may have involved more than a "ministerial[]" process (*i.e.*, a process that would result in a "clerical error") and that the error, instead, might have involved "substantive decisions" to determine whether accounts met the criteria for a buyback request. The court further held that the defendants failed to show sufficient evidence that their procedures to prevent such mistakes were reasonable. The court accordingly denied summary judgment to the defendants to dismiss the FDCPA claim. For a copy of the opinion, please see here.

Firm News

Margo Tank will be speaking on a panel titled "Preventing and Managing Litigation Associated with the Complex Array of State Breach Notification Laws" at the ACI Data Privacy & Information Security Conference, June 3-4 in Dallas, TX.

Andrew Sandler will be speaking on June 6-7 at CBA Live, the Consumer Banker Association Conference being held in Hollywood, Florida. Andrew will present a Fair Lending Industry Overview on Fair Lending on June 6 and will be speak on Auto Fair Lending on June 7.

Christopher Witeck will be speaking on the "Securitization and Secondary Market" panel at ACI's Reverse Mortgage Conference in New York on July 23.

Andrew Sandler was quoted in the Wall Street Journal regarding the SEC's recent securities fraud charges against Goldman Sachs.

Andrew Sandler and Jerry Buckley spoke at the recent National CRA, HMDA & Fair Lending Forum held in Dallas, Texas. Andrew also hosted a welcome reception and presented a Fair Lending Risk Update on April 27. Jerry spoke on the topic "The Changing Regulatory Environment" on April 28.

Margo Tank was the featured speaker in a webinar on May 4 entitled “New Disclosure Regulations: How Consumer Lenders can Reduce Risk and Cost with E-Disclosures.”

Andrew Sandler, Jeff Naimon, Christopher Witeck and Margo Tank participated in the Mortgage Bankers Association Legal and Regulatory Compliance Conference on May 3-5 in Coronado, CA. Chris spoke on “Hot Secondary Market Issues” on May 3. Andrew spoke on a panel and roundtable session on the topic “Fair Lending” on May 4; Jeff discussed servicing issues on May 4; Margo spoke on the topic "Update on Legal Issues in Mortgage Technology and eMortgages" on May 5.

Christopher Witeck spoke on the “Reverse Mortgage Secondary Market Panel” at the MBA’s Secondary Market/Government Housing Conference in New York on May 24.

Kirk Jensen spoke on "Overcoming Problem Areas in Issuance and Utilization of Gift Cards" at the American Conference Institute’s 4th National Advanced Forum on Financial Services Marketing Compliance in New York on May 26.

Mortgages

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Arizona Federal Court Holds No Private Right of Action for Inaccurate Reporting Under FDCPA. On May 13, in an unpublished decision, the U.S. District Court for the District of Arizona held that, as pleaded in this case, the Fair Debt Collection Practices Act (FDCPA) does not provide a private right of action against a credit reporting agency (CRA) for inaccurate reporting. *Horvath v. Premium Collection Services, Inc.,* No. CV 09-2516, 2010 WL 1945717 (D. Ariz. May 13, 2010). In *Horvath*, an employer demanded the return of disability payments upon determining that the plaintiff was unqualified for them and should not have received them. When the plaintiff refused, the employer retained a debt collector that reported the plaintiff's debt to the major CRAs. Alleging that the debt was invalid, the plaintiff filed a lawsuit claiming negligence, defamation and a violation of the FDCPA. Regarding the FDCPA claim, the court construed the claim, in part, as violating a provision of the FDCPA that prohibits communications with a CRA, except when permitted by law. Finding that the FDCPA is silent as to what communications with a CRA are permitted by law, the court looked to the Fair Credit Reporting Act (FCRA). The court found that, although inaccurate reporting is unlawful under Section 1681s-2(a) of FCRA, Section 1681s-2(a) does not provide a private right of action. In turn, the court interpreted the plaintiff's FDCPA claims as an attempted end-run around the FCRA's limitation on private rights of action and, therefore, dismissed the case. Notably, the court did not construe the complaint to allege a violation of Section 807(8) of the FDCPA, which prohibits "communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed." For a copy of the opinion, please see here.

Texas Federal Court Holds Errors in Processing of Buyback Requests May Not Be "Clerical Errors" Entitled to FDCPA Bona Fide Error Defense. On May 17, the U.S. District Court for the Southern District of Texas held that an employee of a collection agency who processed buyback requests may have performed "substantive" duties and, as such, the court denied a motion to dismiss asserting that errors made by that employee were "clerical errors" subject to the bona fide error defense under the Fair Debt Collection Practices Act (FDCPA). *Liu v. Arrow Financial Services, LLC*, No. H-08-3116, 2010 WL 1994190 (S.D. Tex. May 17, 2010). In this case, the defendants (a collection agency and its law firm) filed an erroneous collections lawsuit against the consumer plaintiff and the consumer subsequently sued the defendants, alleging claims under, among other laws, the FDCPA. Regarding the FDCPA claim, the court rejected the defendants' argument that the FDCPA violations were subject to the FDCPA's bona fide error defense because they were an inadvertent "clerical mistake" and that there were procedures in place to prevent such clerical errors. The court reasoned that the error, caused by an employee of the collection agency who processed accounts subject to a buyback request (which will cease accounts collection activity), may have involved more than a "ministerial[]" process (*i.e.*, a process that would result in a "clerical error") and that the error, instead, might have involved "substantive decisions" to determine whether accounts met the criteria for a buyback request. The court further held that the defendants failed to show sufficient evidence that their procedures to prevent such mistakes were reasonable. The court accordingly denied summary judgment to the defendants to dismiss the FDCPA claim. For a copy of the opinion, please see here.

Securities

U.S. Attorney's Office Launches New Financial Fraud Task Force. On May 20, federal and Virginia state officials announced the creation of the Virginia Financial and Securities Fraud Task Force, a partnership between criminal investigators and civil regulators to investigate and prosecute financial fraud cases nationwide. The task force stems from an existing working relationship (between the Federal Bureau of Investigation, the U.S. Postal Inspection Service and the Internal Revenue Services' Criminal Investigation Division) that will be expanded to include civil regulators from the U.S. Securities and Exchange Commission, the Commodities Futures Trading Commission and the Virginia State Corporation Commission, as well as state prosecutors from the Virginia U.S. Attorney General's Office. The Virginia Financial and Securities Fraud Task Force is also intended to be an investigative arm of the President's Financial Fraud Enforcement Task Force, an interagency national task force responsible for investigating and prosecuting financial crimes (the creation of the President's Financial Fraud Enforcement Task Force was reported in *InfoBytes*, Nov. 20, 2009). For a copy of the press release, please see here.

Litigation

California Federal Courts Separately Hold California's Notice of Default Filing and Notice Requirements are Preempted by NBA, HOLA. On May 21, the U.S. District Court for the Northern District of California held that the National Bank Act (NBA) preempts a California state law that (i) requires a lender or servicer to assess a delinquent borrower's financial situation prior to filing a notice of default, and (ii) prohibits a lender or servicer from filing a notice of default until 30 days after

initial contact with a delinquent borrower (Cal. Civil Code Section 2923.5). *Acosta v. Wells Fargo, N.A.,* No C.10-991 (N.D. Cal. May 21, 2010). In*Acosta*, the plaintiff borrower sought a preliminary injunction to prevent the defendants (including the lender, a national bank) from foreclosing on her home based on, among other claims, an alleged violation of Section 2923.5. The court, relying on other Ninth Circuit district court cases holding that the Home Owners' Loan Act (HOLA) preempts Section 2923.5, held that the NBA, which contains "nearly identical language," also preempts Section 2923.5. The *Acosta* court, in part, relied on an April 23 decision by the U.S. District Court for the Eastern District of California holding that HOLA preempted a Section 2923.5 claim against a mortgage servicer that was a direct subsidiary of a federal savings bank. *Parcray v. Shea Mortgage Inc.,* No. VV-F-09-1942, 2010 WL 1659369 (E.D. Cal. Apr. 23, 2010). In *Parcray*, the court reasoned that HOLA preempted Section 2923.5 because it concerns the processing and servicing of a mortgage, which is an area specifically preempted by HOLA and Office of Thrift Supervision regulations. For a copy of the opinions, please see here and here.

Third Circuit Holds Unconscionability Challenge to Class Action Waiver Properly Decided in Federal Court. On May 10, a divided U.S. Court of Appeals for the Third Circuit ruled that the question of whether a class action waiver provision in an arbitration agreement is unconscionable is one that a court, and not an arbitrator, should decide. *Puleo v. Chase Bank USA, N.A.,* No. 08-3837, 2010 WL 1838762 (3rd Cir. May 10, 2010). In *Puleo*, the consumer plaintiffs brought a putative class action on behalf of themselves and other credit card holders in Pennsylvania state court, arguing that the class action waiver in the arbitration agreements signed by the card holders was unconscionable. The defendant bank removed the matter to federal court and filed a motion to compel arbitration and dismiss the action. The consumers urged the federal district court to order the parties to arbitrate their claims as a class; however, the court rejected this claim, holding that the validity of the class action waiver was a "gateway dispute" and a "question of arbitrability" for a court to decide. The consumers appealed, arguing that the district court should not have addressed the unconscionability of the class action waiver and should have let the arbitrator decide that issue. The consumers argued that (i) no question of arbitrability was presented, (ii) under U.S. Supreme Court precedent, the arbitrator should determine whether an otherwise binding arbitration agreement bars class actions, (iii) because the arbitration agreement contained a severability clause, the lower court erred in considering the unconscionability of its terms, and (iv) even if the consumers' challenge to the class action waiver raised a question of arbitrability, the agreement at issue demonstrated that the parties clearly intended to arbitrate questions of arbitrability. The majority rejected all four arguments, holding that a challenge of unconscionability "is a challenge to the validity of the parties' agreement to arbitrate, and thus a question for the court to decide." In a strongly worded dissent, Circuit Judge Rendell, joined by two others, concluded that the question of whether an arbitration should proceed on an individual basis or as a class action was *not* "a question of *arbitrability*," (emphasis in original) and concluded that the determination of unconscionability should have been submitted to arbitration. For a copy of the opinion, please see http://www.ca3.uscourts.gov/opinarch/083837p.pdf.

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not constitute a permissible purpose to access a consumer credit report under the Fair Credit Reporting Act (FCRA). *Pintos v. Pacific Creditors Ass'n*, Nos. 04-17485, 04-17558, 2010 WL 2011550 (9th Cir. May 21, 2010). In *Pintos*, a defendant debt collector purchased a consumer's credit report from a credit reporting agency (CRA), claiming that the right to view the report was permissible under FCRA because the debt was "in connection with a credit transaction," even though the debt was incurred in connection with an unpaid towing fee. The Ninth Circuit, in its revised opinion, held that, "[b]ecause the current case involves neither a transaction for which [the plaintiff] sought credit nor the collection of a judgment debt," the collection agency did not have a permissible purpose under FCRA to obtain the credit report (the court's revised opinion was reported in *InfoBytes*, May 8, 2009). Although the Ninth Circuit denied rehearing the case, several judges joined in a dissent (written by Judge Kozinski) reasoning that the plain meaning of Section 1681b(a)(3)'s limitations on accessing credit reports were inapplicable to the plaintiff in this case because she did initiate the transaction by owing the debt. For a copy of the opinion, please see http://www.ca9.uscourts.gov/datastore/opinions/2010/05/21/04-17485.pdf.

Arizona Federal Court Holds No Private Right of Action for Inaccurate Reporting Under FDCPA. On May 13, in an unpublished decision, the U.S. District Court for the District of Arizona held that, as pleaded in this case, the Fair Debt Collection Practices Act (FDCPA) does not provide a private right of action against a credit reporting agency (CRA) for inaccurate reporting. *Horvath v. Premium Collection Services, Inc.,* No. CV 09-2516, 2010 WL 1945717 (D. Ariz. May 13, 2010). In *Horvath*, an employer demanded the return of disability payments upon determining that the plaintiff was unqualified for them and should not have received them. When the plaintiff refused, the employer retained a debt collector that reported the plaintiff's debt to the major CRAs. Alleging that the debt was invalid, the plaintiff filed a lawsuit claiming negligence, defamation and a violation of the FDCPA. Regarding the FDCPA claim, the court construed the claim, in part, as violating a provision of the FDCPA that prohibits communications with a CRA, except when permitted by law. Finding that the FDCPA is silent as to what communications with a CRA are permitted by law, the court looked to the Fair Credit Reporting Act (FCRA). The court found that, although inaccurate reporting is unlawful under Section 1681s-2(a) of FCRA, Section 1681s-2(a) does not provide a private right of action. In turn, the court interpreted the plaintiff's FDCPA claims as an attempted end-run around the FCRA's limitation on private rights of action and, therefore, dismissed the case. Notably, the court did not construe the complaint to allege a violation of Section 807(8) of the FDCPA, which prohibits "communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed." For a copy of the opinion, please see here.

Heartland Announces Settlement with MasterCard Regarding Data Breach. On May 19, Heartland Payment Systems Inc. (Heartland) and MasterCard International, Inc. (MasterCard) announced a settlement agreement (subject to certain conditions) to resolve potential claims by MasterCard against Heartland for damages due to a 2009 payment card data breach involving the theft of approximately 130 million credit and debit card numbers. Under the settlement terms, Heartland will pay $41.4 million to settle MasterCard's claims. The settlement, once finalized, would resolve approximately 15 consolidated bank and credit union class actions against Heartland. In order to finalize the settlement, at least 80 percent of MasterCard financial firms affected by the breach

must accept the terms of the settlement by June 25, 2010. Heartland previously announced settlements of approximately $3.5 million to the American Express Travel Related Services Company Inc. and $60 million to Visa Inc. (and Visa card-issuing banks) for similar claims arising out of the data breach. Other consumer class actions remain pending against Heartland. For a copy of the MasterCard settlement, please see Heartland's 8-K filing here.

Texas Federal Court Holds Errors in Processing of Buyback Requests May Not Be "Clerical Errors" Entitled to FDCPA Bona Fide Error Defense. On May 17, the U.S. District Court for the Southern District of Texas held that an employee of a collection agency who processed buyback requests may have performed "substantive" duties and, as such, the court denied a motion to dismiss asserting that errors made by that employee were "clerical errors" subject to the bona fide error defense under the Fair Debt Collection Practices Act (FDCPA). *Liu v. Arrow Financial Services, LLC*, No. H-08-3116, 2010 WL 1994190 (S.D. Tex. May 17, 2010). In this case, the defendants (a collection agency and its law firm) filed an erroneous collections lawsuit against the consumer plaintiff and the consumer subsequently sued the defendants, alleging claims under, among other laws, the FDCPA. Regarding the FDCPA claim, the court rejected the defendants' argument that the FDCPA violations were subject to the FDCPA's bona fide error defense because they were an inadvertent "clerical mistake" and that there were procedures in place to prevent such clerical errors. The court reasoned that the error, caused by an employee of the collection agency who processed accounts subject to a buyback request (which will cease accounts collection activity), may have involved more than a "ministerial[]" process (*i.e.*, a process that would result in a "clerical error") and that the error, instead, might have involved "substantive decisions" to determine whether accounts met the criteria for a buyback request. The court further held that the defendants failed to show sufficient evidence that their procedures to prevent such mistakes were reasonable. The court accordingly denied summary judgment to the defendants to dismiss the FDCPA claim. For a copy of the opinion, please see here.

Privacy/Data Security

Maryland Attorney General Settles with Payment Processing Company for Allegations It Failed to Properly Dispose of Consumer Information. On May 10, Maryland Attorney General Douglas Gansler announced a settlement with a payment processing company (MAP, LLC) and two of its officers for allegedly violating the Maryland Personal Information Protection Act by failing to take "reasonable" steps to protect consumer information when it discarded sensitive consumer information (*e.g.*, Social Security Numbers, cancelled checks, etc.) in a public dumpster. According to the statement, no consumer information was actually compromised. Under the settlement, the company and officers (i) deny any liability, (ii) will take reasonable steps to dispose of the information (and will continue to take reasonable steps to dispose of consumer information in the future), and (iii) will pay a $20,000 penalty. For a copy of the press release, please see http://www.oag.state.md.us/Press/2010/051010.htm.

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collection agency and its law firm) filed an erroneous collections lawsuit against the consumer plaintiff and the consumer subsequently sued the defendants, alleging claims under, among other laws, the FDCPA. Regarding the FDCPA claim, the court rejected the defendants' argument that the FDCPA violations were subject to the FDCPA's bona fide error defense because they were an inadvertent "clerical mistake" and that there were procedures in place to prevent such clerical errors. The court reasoned that the error, caused by an employee of the collection agency who processed accounts subject to a buyback request (which will cease accounts collection activity), may have involved more than a "ministerial[]" process (*i.e.*, a process that would result in a "clerical error") and that the error, instead, might have involved "substantive decisions" to determine whether accounts met the criteria for a buyback request. The court further held that the defendants failed to show sufficient evidence that their procedures to prevent such mistakes were reasonable. The court accordingly denied summary judgment to the defendants to dismiss the FDCPA claim. For a copy of the opinion, please see here.

Credit Cards

Federal Reserve Board Posts Credit Card Agreements. On May 24, the Federal Reserve Board (Board) announced that consumer credit card agreements from a vast majority (over 300) of credit card issuers have been made available online at http://www.federalreserve.gov/creditcard agreements. The Board's database is the result of the Credit Card Accountability, Responsibility, and Disclosure Act of 2009, which also requires card issuers to post account agreements on their websites, as well as to provide consumers with credit card agreement(s) upon a consumer's request. The next submission deadline for the Board's database is August 2, 2010. For a copy of the announcement, please see http://www.federalreserve.gov/newsevents/press/other/20100524a.htm.

Vermont Enacts Law Restricting Certain Practices of Credit Card Companies. On May 21, the Vermont legislature enacted S. 138, a bill limiting certain practices of "electronic payment systems" (a defined term that includes most credit card companies). Under the new law, electronic payment systems would be prohibited from (i) imposing penalties on merchants that offer discounts for use of certain cards (or alternate forms of payment), (ii) restricting the freedom of merchants to set minimum card transaction amounts up to $10, and (iii) limiting the right of merchants to accept electronic payments at some, but not all, of their locations. Electronic payment systems that violate S.138 would also violate Vermont's Consumer Fraud Act and could face civil penalties of up to $10,000, as well as private civil actions. Notably, the final bill does not contain a restriction on interchange fees that was present in the original version of the bill. The bill becomes effective January 1, 2011. For a copy of S.138, please see http://www.leg.state.vt.us/docs/2010/Acts/ACT116.pdf.

Third Circuit Holds Unconscionability Challenge to Class Action Waiver Properly Decided in Federal Court. On May 10, a divided U.S. Court of Appeals for the Third Circuit ruled that the question of whether a class action waiver provision in an arbitration agreement is unconscionable is one that a court, and not an arbitrator, should decide. *Puleo v. Chase Bank USA, N.A.,* No. 08-3837, 2010 WL 1838762 (3rd Cir. May 10, 2010). In *Puleo*, the consumer plaintiffs brought a putative class action on behalf of themselves and other credit card holders in Pennsylvania state court, arguing that the class action waiver in the arbitration agreements signed by the card holders was unconscionable.

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