The CARLAWYER©

By Eric L. Johnson

Here's our monthly article on selected legal developments we think might interest the auto sales, finance, and leasing world. This month, the developments involve the Consumer Financial Protection Bureau, Federal Trade Commission, U.S. Supreme Court, Department of the Treasury, Internal Revenue Service, Department of Justice, Federal Communications Commission, State of Wisconsin, Office of the Comptroller of the Currency, Federal Reserve Board, and Federal Deposit Insurance Corporation. As usual, our article features the "Case(s) of the Month" and our "Compliance Tip." Note that this column does not offer legal advice. Always check with your lawyer to learn how what we report might apply to you or if you have questions.

Federal Developments

On September 28, the **Consumer Financial Protection Bureau and the Federal Trade Commission filed an amicus brief in the case of *Suluki v. Credit One Bank, NA***. The agencies urged the U.S. Court of Appeals for the Second Circuit to reverse a federal district court decision that granted summary judgment for the defendant bank under the Fair Credit Reporting Act, arguing that the district court overlooked the FCRA's requirement that a furnisher of credit information delete information when its accuracy cannot be verified. Specifically, the brief argues that "[t]he district court's ruling that Suluki could not prove actual damages was mistaken and should be reversed. The court failed to consider the possibility that Credit One had not verified Suluki's debt and thus should have removed it from her credit report. If Suluki had made that showing at trial, she well could have been entitled to damages. But the district court's summary judgment ruling wrongly denied her that opportunity. Under Section 1681s-2(b) of the FCRA, when a furnisher receives a consumer dispute forwarded by a consumer reporting agency, the furnisher must conduct an investigation to determine whether the disputed information can be verified. If the evidence available to the furnisher is inconclusive—i.e., if the investigation is unable to determine whether the disputed information is accurate or not—then the FCRA does not allow a furnisher to report back to the consumer reporting agency that its investigation verified the accuracy of that information. Even if no reasonable investigation could have conclusively determined that the information was false, the fact remains that the information has not been verified and must be handled accordingly. In particular, Section 1681s-2(b)(1)(E) provides that when disputed information 'is found to be inaccurate or incomplete or cannot be verified,' the furnisher must, 'as appropriate,' delete, modify, or permanently cease reporting the disputed information. The appropriate response is the one that will ensure that the furnisher does not continue to report any of the information that the consumer has disputed unless that information is verifiably accurate. Thus, any information that cannot be verified should be deleted from the data that the furnisher submits to consumer reporting agencies. That approach is consistent with the statutory scheme and longstanding agency guidance. The district court failed to recognize that a furnisher is required to delete any unverifiable information, which led to a flawed holding that Suluki cannot show that she sustained any damages attributable to Credit One's handling of her dispute. If Credit One did not have sufficient evidence to show that the disputed information was true yet reported that its investigation verified the accuracy of the disputed information and continued to report that information, then Suluki could have sustained damages as a result of its improper continued reporting of the disputed information. [The Second Circuit] should therefore reverse the district court's conclusion that, as a matter of law, Suluki could not prevail on her Section 1681s-2(b) claim because no reasonable investigation could have uncovered evidence showing that the disputed information was inaccurate."

On October 3, the **U.S. Supreme Court heard oral argument in *Consumer Financial Protection Bureau v. Community Financial Services Association of America***. At issue was the constitutionality of the CFPB's funding structure, the separation of powers among the three branches of government, and the power of administrative agencies to issue regulations affecting broad swaths of the nation's economy.

On October 6, the **Department of the Treasury and the Internal Revenue Service** released guidance and a joint notice of proposed rulemaking on an Inflation Reduction Act provision that will allow consumers to transfer their new clean vehicle tax credits of up to $7,500 and their previously owned clean vehicle tax credits of up to $4,000 to car dealers starting January 1, 2024. These efforts will effectively lower a vehicle's purchase price by providing consumers with an upfront down payment on their clean vehicles at the point of sale, rather than waiting to claim their credits on their tax returns. Dealers will be able to register as entities eligible to receive advance payment of tax credits on a new IRS website at the end of October. When completing a vehicle sale, the dealer will electronically submit information regarding the transfer, including a time of sale report, to receive an advance payment for the value of the tax credit. The IRS expects to issue advance payments within 72 hours. Dealers are expected to reduce the purchase price of the vehicle or provide cash to the car buyer. The proposed rules address, among other things, who is eligible to elect to transfer their tax credits to dealers, under what circumstances these car buyers may have to pay back some of the transferred credit, disclosures dealers must provide in connection with the tax credit transfer, and safeguards to prevent fraud and abuse. Comments on the notice of proposed rulemaking must be received by December 11, 2023.

On October 11, the **Federal Trade Commission announced a proposed rule, titled "Trade Regulation Rule on Unfair or Deceptive Fees," that would prohibit unfair or deceptive practices relating to fees for goods or services, including fees charged in connection with consumer financial products and services**. Specifically, the proposed rule would prohibit businesses from misrepresenting the total costs of goods and services by omitting or hiding mandatory fees in advertising prices and misrepresenting the nature and purpose of fees. On October 20, 2022, the FTC issued an advance notice of proposed rulemaking seeking comment on deceptive or unfair acts or practices relating to "junk fees." For purposes of the ANPR, the FTC stated that "the term 'junk fees' refers to unfair or deceptive fees that are charged for goods or services that have little or no added value to the consumer, including goods or services that consumers would reasonably assume to be included within the overall advertised price; the term also encompasses 'hidden fees,' which are fees for goods or services that are deceptive or unfair, including because they are disclosed only at a later stage in the consumer's purchasing process or not at all, whether or not the fees are described as corresponding to goods or services that have independent value to the consumer. These terms may overlap - a junk fee can be a hidden fee, but not all junk fees are hidden fees." The FTC received over 12,000 comments in response to the ANPR. The FTC is seeking a new round of comments on the proposed rule, due within 60 days after the proposed rule is published in the *Federal Register*, which is expected shortly.

On October 11, the **Consumer Financial Protection Bureau issued an advisory opinion regarding Section 1034(c) of the Consumer Financial Protection Act, which requires large banks and credit unions - those with more than $10 billion in assets - to comply in a timely manner with consumer requests for information concerning their accounts for consumer financial products and services, subject to certain exceptions**. This is the first time the Bureau has provided guidance on compliance with Section 1034(c). The advisory opinion provides clarification on whether certain fees or charges imposed on a consumer who requests account information will unreasonably impede the consumer's ability to exercise the right granted by Section 1034(c) and, therefore, violate the provision. The advisory opinion also states that a large bank or credit union may violate the provision by imposing other conditions or obstacles that unreasonably impede a consumer's ability to make an information request. In addition, the advisory opinion provides guidance on whether a response to a Section 1034(c) request is timely, accurate, and complete.

On October 11, the **Consumer Financial Protection Bureau released a special edition of its *Supervisory Highlights* concerning "junk fees" in the areas of consumer deposit accounts (focusing on non-sufficient fund fees, overdraft fees, and fees for sending paper bank statements), auto finance servicing (focusing on servicers' handling of refunds of add-on products), and remittance transfers**. The report also describes risks related to payment platforms used by parents and guardians to pay for school lunches. The findings in the report cover Bureau examinations that generally were completed between February 2023 and August 2023.

On October 12, the **Consumer Financial Protection Bureau and the Department of Justice issued a joint statement to assist creditors and credit applicants in understanding the potential implications of a creditor's consideration of an individual's immigration status under the Equal Credit Opportunity Act and its implementing Regulation B**. According to the joint statement, "[t]he ECOA does not expressly prohibit consideration of immigration status, and ... a creditor may consider an applicant's immigration status when necessary to ascertain the creditor's rights regarding repayment. However, creditors should be aware that unnecessary or overbroad reliance on immigration status in the credit decisioning process, including when that reliance is based on bias, may run afoul of ECOA's antidiscrimination provisions and could also violate other laws." The joint statement also clarifies that neither the ECOA nor Reg. B provides creditors with a safe harbor with respect to other laws barring discrimination on the basis of immigration status.

On October 19, the **Consumer Financial Protection Bureau proposed the Personal Financial Data Rights Rule to implement Section 1033 of the Dodd-Frank Act**. The proposed rule follows a Small Business Regulatory Enforcement Fairness Act review process earlier this year. Section 1033 of the Dodd-Frank Act, often referred to as the law's "open banking" provision, requires that, subject to prescribed rules, a consumer financial services provider must make available to a consumer information in its control or possession concerning the financial product or service that the consumer obtained from the provider. The proposed rule would cover financial institutions subject to Regulation E and card issuers subject to Regulation Z ("data providers") and their account data, including transaction information, account balances, basic account verification information, and other data. Under the proposed rule, data providers would be required to provide information to consumers and authorized third parties upon the consumer's authorization. The proposed rule would also: (1) limit third-party recipients' use and further disclosure of the information to permitted purposes; (2) permit third-party recipients to use data aggregators to access the information; (3) provide consumers with the right to revoke access to and retention of the information; (4) require third-party recipients to develop written information security programs in line with the Safeguards Rule; and (5) limit access to provider data through means other than direct secure connections. The Bureau is requesting comments on the proposed rule until December 29, 2023.

On October 23, **Federal Communications Commission Chairwoman Rosenworcel announced that the agency will be issuing a Notice of Inquiry into the strengths and vulnerabilities of using artificial intelligence to protect consumers from unwanted robocalls and robotexts under the Telephone Consumer Protection Act**. The Notice of Inquiry will seek comment on how AI technologies fit into the Commission's statutory responsibilities under the TCPA, if and when future AI technologies fall under the TCPA, how AI impacts existing regulatory frameworks and future policy formation, and if the Commission should consider ways to verify the authenticity of legitimately generated AI voice or text content from trusted sources.

On October 24, the **Federal Trade Commission and the State of Wisconsin entered into proposed court orders with the current and former corporate owners of a Wisconsin-based auto dealership group, as well as the general manager and part-owner of the dealerships, resolving allegations that, from at least 2016 to the present, they charged customers for add-on products or services without their authorization or led them to believe that add-ons were mandatory and engaged in unlawful discrimination under the Equal Credit Opportunity Act by charging American Indian customers more to finance their vehicles than non-Latino White customers**. Specifically, the complaint alleged that the defendants more frequently imposed unwanted add-on charges when American Indian customers purchased vehicles compared to non-Latino White customers and that the defendants had a discriminatory policy or practice of marking up the interest rates of American Indian customers significantly more than those of similarly situated non-Latino White customers. The proposed settlement with the current owners and GM will require the companies to, among other things, establish a comprehensive fair lending program and pay $1 million to be used to refund affected customers. The former owners have agreed to a separate proposed settlement that would require the companies to pay $100,000 to be used to refund affected customers.

On October 24, the **Office of the Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance Corporation issued a final rule to update regulations implementing the Community Reinvestment Act**. According to the agencies' summary, the rule updates the CRA regulations to achieve the following key goals: encourage federally insured banks to expand access to credit, investment, and banking services in low- and moderate-income communities; adapt to changes in the banking industry, including the expanded role of mobile and online banking; provide greater clarity and consistency in the application of the regulations; tailor performance standards to account for differences in bank size, business models, and local conditions; tailor data collection and reporting requirements and use existing data whenever possible; promote transparency and public engagement; promote fair lending responsibilities; and promote a consistent regulatory approach that applies to banks regulated by all three agencies. Most of the final rule's requirements will be applicable beginning January 1, 2026. The remaining requirements, including the data reporting requirements, will be applicable on January 1, 2027.

On October 27, the **Federal Trade Commission issued its second amendment to the Safeguards Rule, requiring financial institutions to report certain data breaches and other security events to the FTC**. The Safeguards Rule implements certain provisions of the Gramm-Leach-Bliley Act and requires financial institutions to develop, implement, and maintain a comprehensive written information security program appropriate to the size and complexity of the financial institution, the nature and scope of its activities, and the sensitivity of the customer information involved. Financial institutions covered by the Rule include a broad range of entities engaged in financial activities defined by statute. The amendment requires financial institutions to notify the FTC when unencrypted customer information, or encrypted information along with the encryption key, has been acquired without the authorization of the consumer. Specifically, a financial institution, upon discovery of a notification event involving the information of at least 500 consumers, must notify the FTC as soon as possible, and no later than 30 days after discovery of the event. The notification must be made electronically on a form located on the FTC's website and must include the following items of information: (1) the name and contact information of the reporting institution; (2) a description of the types of information that were involved in the notification event; (3) if the information is possible to determine, the date or date range of the notification event; (4) the number of consumers affected or potentially affected by the notification event; (5) a general description of the notification event; and (6) whether any law enforcement official has provided the financial institution with a written determination that notifying the public of the breach would impede a criminal investigation or cause damage to national security, and a means for the FTC to contact the law enforcement official. The breach notification requirement will be effective 180 days after publication of the final rule in the *Federal Register*.

Case(s) of the Month

Class Action Waiver in Lease Agreement Is Unenforceable as Against Public Policy in Rhode Island: An individual leased a vehicle from a dealership. The lease agreement contained a class action waiver. At the end of the lease term, the individual bought the vehicle. She signed a purchase agreement and installment contract in connection with that purchase, but those documents did not contain class action waivers. The individual contended that she had to pay a purchase price for the vehicle that was more than the amount stated in the lease agreement and, therefore, sued the dealership for breach of contract, tortious interference with contract, unjust enrichment, violation of the federal Consumer Leasing Act, and violation of the Rhode Island Deceptive Trade Practices Act. The individual sought to have her case proceed as a class action. The dealership moved for an order to strike the class action allegations or, alternatively, to dismiss the class action claims.

The **U.S. District Court for the District of Rhode Island** denied the motion. The court noted that, in Rhode Island, a contract term is unenforceable only if it violates public policy, and Rhode Island statutes are the state's declaration of public policy. Therefore, according to the court, acting in contravention of those statutes violates public policy. Because the DTPA explicitly allows consumers to bring class actions, the court concluded that the class action waiver in the lease agreement between the individual and the dealership was unenforceable as against public policy in Rhode Island. The court also found that the purchase agreement and installment contract that the parties entered into at the end of the lease term did not contain class action waivers and that these agreements superseded the lease agreement. Therefore, for a second independent reason, the class action waiver in the lease agreement did not apply. *See* ***Metcalfe v. Grieco Hyundai LLC***, 2023 U.S. Dist. LEXIS 177881 (D.R.I. October 3, 2023).

This Month's *CARLAWYER*© Compliance Tip

Let's talk about the sale of voluntary protection products and GAP. Has your dealership trained its salespeople about what they could and should not say about the voluntary protection products and GAP they may offer to their car buyers? Have the dealership's employees involved in the sale of these products read the terms and conditions of these products thoroughly and do they understand their terms and conditions? Does your dealership have scripts for the salespeople to follow, and were those scripts blessed by the dealership's lawyer(s)? How does your dealership handle GAP refunds and cancellations? How are these issues addressed in your shop?

So, there's this month's roundup! Stay legal, and we'll see you next month.

Eric (ejohnson@hudco.com) is a Partner in the law firm of Hudson Cook, LLP, Editor in Chief of CounselorLibrary.com's ***Spot Delivery®***, a monthly legal newsletter for auto dealers, and a contributing author to the ***F&I Legal Desk Book***. For information, visit www.counselorlibrary.com.