The CARLAWYER©

By Eric 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, the Federal Reserve Board, the National Credit Union Association and the Federal Trade Commission. 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

CFPB Issues Opinion on FCRA Obligations. On July 7, the CFPB issued an advisory opinion outlining certain obligations of consumer reporting agencies and users of consumer reports under Section 604 of the Fair Credit Reporting Act. Noting that some CRAs use insufficient matching procedures, such as name-only matching, which can result in consumer reports being provided to persons without a permissible purpose to receive them, the advisory opinion explains that the permissible purposes listed in Section 604 are consumer specific and affirms that a CRA may not provide a consumer report to a user unless it has reason to believe that all of the consumer report information it includes pertains to the consumer who is the subject of the user's request. In addition, the advisory opinion clarifies that it is unlawful to provide consumer reports of multiple individuals as "possible matches" where the requester only has a permissible purpose to obtain a consumer report on one individual. The CFPB notes that disclaimers will not cure a failure to have a reason to believe that a user has a permissible purpose for a consumer report. The advisory opinion also reminds users of consumer reports that Section 604 strictly prohibits them from obtaining a consumer report without a permissible purpose for doing so. Finally, the advisory opinion outlines some of the criminal liability provisions in the FCRA.

CFPB Releases Blog on Auto Debt, Delinquency Rates, and Repossession Rates of Young Servicemembers. On July 18, the CFPB released a blog post highlighting its prior research on the amount of auto debt young servicemembers carry, as well as delinquency and repossession rates among young servicemembers. The blog post also highlights the Department of Justice's recent enforcement actions addressing illegal repossession practices under the Servicemembers Civil Relief Act and states the CFPB's expectations that creditors, servicers, and repossession agents adhere to the SCRA's requirements, especially when using repossession technologies like starter-interrupt devices, GPS locators, and license plate recognition.

FRB Proposes Rule Implementing LIBOR Act. On July 19, the FRB invited comments on a proposed rule that would implement the Adjustable Interest Rate (LIBOR) Act. The proposed rule would establish benchmark replacements for certain contracts that use the LIBOR reference rate and do not have terms that provide for the use of a clearly defined and practicable replacement benchmark rate when the LIBOR reference rate in its current form is discontinued on June 30, 2023. The proposed rule also would provide additional definitions and clarifications consistent with the AIR (LIBOR) Act. Comments are due by August 29, 2022.

NCUA Proposes Rule on Cyber Incident Notification. On July 21, the NCUA Board approved a proposed rule on cyber incident notification requirements. The proposed rule would require a federally insured credit union that experiences a reportable cyber incident to report the incident to the NCUA as soon as possible and no later than 72 hours after the credit union reasonably believes that it has experienced a reportable cyber incident. This notification requirement provides an early alert to the NCUA and does not require credit unions to provide a detailed incident assessment within the 72-hour time frame. Comments are due on or before September 26, 2022.

National Associations Request Delay of Safeguards Rule. On July 21, ACA International, the American Financial Services Association, the Consumer Data Industry Association, and the National Automobile Dealers Association, requested that the Federal Trade Commission delay the applicability date of the Standards for Safeguarding Customer Information rule (the Safeguards Final Rule) until December 2023. Without a delay or extension, the applicability date for the Safeguards Final Rule will be December 9, 2022.

Case(s) of the Month

Court Refused to Compel Arbitration Where Parties Signed Conflicting Arbitration Agreements in Connection with Online Car Purchase: In connection with her online car purchase, the buyer signed a number of documents electronically, including a purchase agreement, a retail installment contract, and a GAP waiver addendum, all of which contained arbitration provisions. The buyer sued the dealership from which she bought the car and the assignee of the RIC. The defendants moved to compel arbitration. The buyer opposed the motion, arguing that there was no meeting of the minds with regard to the issue of arbitration. The RIC identified the dealership as the dealer and contained an arbitration agreement providing that the buyer may choose any arbitrator subject to the approval of the defendants and that the defendants are required to pay up to $5,000 in arbitration costs. The purchase agreement incorporated the RIC, including the arbitration agreement. However, the GAP waiver addendum, which stated that it amended and became part of the RIC, identified another company as the dealer and contained an arbitration agreement that did not specify which party was responsible for paying arbitration fees and costs and provided that the administrator would select one of at least three arbitrators that the buyer identified. Because there was a conflict between at least two of the arbitration agreements over responsibility for fees and how the arbitrator would be chosen and because there was no indication as to the relationship between the dealership named as the dealer in the RIC and the other company named as the dealer in the GAP waiver addendum, the **U.S. District Court for the Western District of Washington** agreed with the buyer that the parties did not agree on the terms of arbitration and denied the motion to compel. *See* ***Bendickson v. Vroom, Inc.***, 2022 U.S. Dist. LEXIS 114134 (W.D. Wash. June 28, 2022).

This Month's *CARLAWYER©* Compliance Tip

Our Case of the Month highlights issues that we've harped on in prior CARLAWYER© reports regarding arbitration provisions. This Case of the Month highlights how conflicting arbitration provisions can be fatal to compelling arbitration. The purchase agreement, the retail installment contract and a GAP waiver addendum all contained arbitration provisions. However, the arbitration provision in the GAP waiver addendum identified another company as the dealer, contained an arbitration agreement that did not specify which party was responsible for paying arbitration fees and costs (thus differing from the arbitration provision in the RIC) and provided that the administrator would select one of at least three arbitrators that the buyer identified. The court agreed with the consumer that "there was no meeting of the minds" between the parties because: (i) there was a conflict between at least two of the arbitration agreements over responsibility for fees and how the arbitrator would be chosen, and (ii) there was no indication as to the relationship between the dealership named as the dealer in the RIC and the other company named as the dealer in the GAP waiver addendum. As the parties didn't agree on the terms of arbitration, the motion to compel arbitration was denied. This is yet another reminder to read your arbitration agreement(s) (you are using an arbitration agreement, right?) in your consumer-facing documents and see if you have conflicting terms or requirements.

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

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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.