Consumer Litigation Section
E-Newsletter
MSBA Sections
from the Minnesota State Bar Association

Fall 2013

Vol. 1, No. 1
E-Newsletter Editorial Staff
Editor in Chief: Ellen B. Silverman, Esq.
Contributors: Thomas J. Lyons, Sr., Esq., David Goodwin, Esq., Kevin Lampone, Esq.

From your Co-Chairs:

Welcome to the first issue of the Consumer Litigation E-Newsletter! We'd like to thank our first three contributors to the newsletter – Tom Lyons, Dave Goodwin and Kevin Lampone– for taking the time to write some insightful pieces for our first issue. We hope you enjoy.

The Consumer Litigation Section aims to elevate the practice of law – in both state and federal courts – regarding typical consumer transactions, credit cards, mortgages, loans, and the like, involving typical players, such as consumers, banks, title companies, lenders, brokers, and other businesses. Our section touches on individual consumer claims, as well as government enforcement actions and class action claims. We also aim to educate our members about current trends in consumer financial litigation.

We need your assistance to make this newsletter a success. Please help us by contributing an article. Article ideas and/or articles can be sent to: Ellen Silverman at esilverman@hinshawlaw.com.

Thank you all for your support of our section. Please feel free to contact us with any suggestions.

Kai Richter
Ellen Silverman

Recent Developments in Consumer Arbitration Agreements

Arbitration is less formal than litigation and generally provides for fast and low-cost resolution of claims. This expedited process often effectively serves the interests of both parties; however, in more complex cases, the costs of vindicating a claim through arbitration may prohibit a plaintiff from pursuing an individual claim.

The Federal Arbitration Act ("FAA") was established in 1925 in order to quell judicial hostility to arbitration agreements. A string of recent United States Supreme Court

In This Issue

Events & CLEs

December 4 CLE:
Perspectives on the CFPB from a Minnesota Insider

Online Services

About

The Consumer Litigation Section E-Newsletter is a service for members of the Minnesota State Bar Association's Consumer Litigation Section. Feedback

Contact

Sue Bores, Section Services Manager
Phone: (612) 278-6325

cases have reinforced the role of arbitration clauses in consumer contracts. Below is a review of important recent Supreme Court decisions that may affect you and your clients.

In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010), the Supreme Court held that a party may not be compelled under the FAA to submit to class arbitration unless a clear basis exists for concluding that the party specifically agreed to class arbitration. The parties in this matter consented to have the arbitration panel determine whether the arbitration clause at issue permitted class-wide arbitration. That panel unanimously decided that the arbitration clause did allow for this arbitration to proceed as a class arbitration. The Second Circuit affirmed, deciding that "the arbitration panel did not exceed its authority in deciding that issue—irrespective of whether it decided the issue correctly." *Id.* at 689.

The dissent in this five to three decision (Justice Sotomayor did not take part in this decision as she had earlier decided an issue in this matter while sitting as a Second Circuit judge) asserted that this issue was not ripe for Supreme Court review because it was not a final decision. The dissent also raised concerns about the ability of parties to vindicate their rights after this decision, noting that the "*realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Id.* at 699.

The Opinion is available here.

A year later, in the landmark decision *AT&T Mobility, L.L.C. v. Concepcion*, 131 S. Ct. 1740 (2011), the Supreme Court heard arguments in a class action lawsuit alleging that the "free" phones AT&T sold the class were not free because the class was charged sales tax and other fees on the phones. The Court reversed the Ninth Circuit's affirmation of the district court's decision that AT&T's consumer contract was unconscionable because it prohibited class-wide arbitration. In a five to four decision, the Supreme Court found the arbitration agreement enforceable. The Court also indicated that it did not favor class-wide arbitration because class treatment undermined the primary benefits of arbitration – efficiency and cost savings.

The dissent countered that the California law in question prohibited class action waivers in this situation because it would exempt AT&T from responsibility for its violation of the law.

The Opinion is available here.

In *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2067 (2013), John Sutter, a pediatrician, entered into a contract with the Oxford Health Plans. Pursuant to that agreement, Sutter agreed to provide medical care to members of Oxford's network, and Oxford agreed to pay for those services at prescribed rates. Eventually, Sutter filed suit against Oxford in New Jersey Superior Court on behalf of himself and a proposed class of other New Jersey physicians under contract with Oxford alleging that Oxford had failed to make full and prompt payment to the doctors, in violation of their agreements and various state laws. The Supreme Court issued a unanimous, yet narrow holding, concluding that when an arbitrator determines that the parties to an arbitration agreement intended to authorize class-wide arbitration, that determination survives judicial review under the FAA as long as the arbitrator was arguably construing the contract. The Court distinguished this circumstance from

Stolt-Nielsen because in *Stolt-Nielsen* the parties entered into an unusual stipulation that they had never reached agreement on the issue of class arbitration.

The Opinion is available here.

Most recently, in *American Express Co. v. Italian Colors Restaurant, et al.*, 133 S. Ct. 2310 (2013), the Supreme Court further limited the ability of plaintiffs to use class arbitration procedures in a five to three decision (Justice Sotomayor again recused herself because she was a member of the Second Circuit appeals panel that reviewed this case). In this case, the Court held that the FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

Justice Kagan's spirited dissent argues that this decision prevents effective vindication of federal statutory antitrust rights. In sum, the "monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse." *Id.* at 2313.

The Opinion is available here.

These recent decisions demonstrate the Supreme Court's inclination to support arbitration clauses in consumer contracts. Expect to see more of these clauses, along with limits on class wide relief, in more of your consumer contracts.

Submitted by David A. Goodwin
DGoodwin@gustafsongluek.com
Gustafson Gluek PLLC
120 South Sixth Street, Suite 2600
Minneapolis, MN 55402
(612-333-8844)

TCPA Alert: New Telephone and Text Marketing Rules

Effective October 16, 2013, the rules governing telephone and text marketing will change significantly. Under the Telephone Consumer Protection Act (TCPA) (47 U.S.C. 227) companies will need to obtain "express written consent" before placing telemarketing calls to either (1) consumers' wireless phones using autodialing

equipment, or an artificial or prerecorded voice or (2) consumers' residential phones using an artificial or prerecorded voice. (47 C.F.R. 64.1200). The new rules eliminate the "established business relationship" exception for calls to residential lines using an artificial or prerecorded voice without prior express consent, where the call was made to a person with an established business relationship. Now, businesses will need to obtain prior express written consent, irrespective of an established business relationship.

The Rules are available here.

The Danger of Decrees, Debts, and Divorce: A Proactive Solution

Divorced parties seeking new beginnings must contend with their obligations to creditors that survive the divorce, or else risk damaging their consumer credit and inviting further litigation.

In the wake of an economic recession, families continue to struggle to pay down their debts. But what happens to credit card and other joint debt in a divorce? Divorce proceedings result in the parties division and court's decree of the financial duties and responsibilities of the divorcing parties. However, decrees do not bind credit card companies and other creditors who earlier have entered into joint financing contracts with the divorcing parties. Left with only a state court decree that relies upon the cooperation of the divorced parties to be fulfilled, divorced parties are left in a precarious position.

Consider the following scenario. Party A and Party B file for divorce, having previously signed a financing contract for a joint credit card. By court decree or settlement agreement, Party A is ordered to pay the full debt on the credit card, but suffers an unfortunate accident and is unable to pay the debt. Since Party B's name is still an obligor on the credit card, Party B is still obligated to pay the debt, no matter what the state court decree may order. The Minnesota state court system provides for indemnification in the event that Party B pays a debt for which Party A should have paid, however, this invites further non dispositive litigation. *Boulevard Del, Inc. v. Stillman*, 386 N.W.2d 405, 407 (Minn. Ct. App. 1986) (recognizing that indemnity, "protects a person who has discharged a duty owed by himself but which, as between himself and another, should have been discharged by the other").

The Opinion is available here.

While divorced parties may pursue indemnification or a motion for contempt for a failure to abide by the court decree, the outcome will not avoid the claims of pre-divorce creditors in joint obligation settings. For members of the Family Law Bar, the solution is to be proactive. Family lawyers need to bring the divorcing parties to an agreement on who pays the creditors the joint debt. First, joint credit obligations have to be isolated. Second, the creditor has to be notified that the joint obligation is to be amended in some manner and agreement sought. Third, the family lawyer secures the new obligation or arranges payment of the debt. In either event, the family lawyer must insure that the physical credit cards tied to the account are destroyed, and terminates the original joint account with the lending financial institution. Such pro-active participation by the family lawyer insures that the party she represents avoids relying on the empty assurances in the state court decree. In this way, the family lawyer does not leave his divorce client exposed to needless future financial liability.

Or if no settlement is reached, then the joint debt issue must be brought to the attention of the trial judge and seek court sanctioned resolution of the joint debt commitment beyond the state court decree.

Several cases provide cautionary tales. In a case involving the alleged inaccurate reporting of a car loan, a Texas court acknowledged that even though the vehicle and its car loan were awarded by state court decree to the ex-wife, the ex-husband was still contractually liable for the car loan. *Hillis v. Trans Union, LLC et al.*, 2013 WL

5272922 at *1 (E.D. Penn. 2013). A New Jersey court dismissed all of Plaintiff's claims stemming from alleged violations of the FCRA, because they were based on the argument that "Plaintiff [was] not liable for the outstanding debt on the Account." *Dunkinson v. Citigroup, Inc.*, 2012 WL 323573 at *1 (D. N.J. 2012). In *Dunkinson*, the state divorce court ordered the ex-husband to remove the ex-wife's name "from the Account as a secondary cardholder, pay the outstanding balance ($2,239), destroy the credit card associated with the Account, and refrain from incurring any additional charges on the Account for which" the ex-wife could be liable. *Id* at *1. The ex-husband failed to abide by the final judgment, continuing to use the Account for over a decade. *Id* at *1. The ex-wife remained unaware until she completed a student loan application for her daughter. *Id* at *1. To the federal court it was "clear from the pleadings" that the ex-wife was responsible for the debt and that the credit card companies were not bound by the court's judgment regarding the ex-husband's responsibilities for the Account. *Id* at *3. Other cases across the country have held similar decisions. *Moline v. Experian Info. Solutions*, 289 F. Supp. 2d 956 (N.D. Ill. 2003); *Morse v. USAA Fed. Sav. Bank*, 2012 WL 6020090 (D. Nev. Dec. 3, 2012).

The Opinions are available here:
Dunkinson v. Citigroup, Inc., 2012 WL 323573 at *1 (D. N.J. 2012)
Hillis v. Trans Union, LLC et al., 2013 WL 5272922 at *1 (E.D. Penn. 2013)
Moline v. Experian Info. Solutions, 289 F. Supp. 2d 956 (N.D. Ill. 2003)
Morse v. USAA Fed. Sav. Bank, 2012 WL 6020090 (D. Nev. Dec. 3, 2012)

Barring a proactive solution pursued by Family lawyers in the midst of their client's divorce, divorced parties who stand to have their consumer credit threatened by defaulting ex-spouses should seek the representation of an attorney utilizing Consumer Protection law features. Thus, if necessary Family Lawyers should inquire of a consumer lawyer as to the need for resolving joint debt issues before the dissolution agreement is finalized.

Submitted by Thomas J. Lyons, Sr.
tlyons@lyonslawfirm.com
Lyons Law Firm, P.A.
367 Commerce Street
Vadnais Heights, MN 55127
(651-770-9707)

Ruiz: What Did the Court Decide and What Comes Next

This summer, the Minnesota Supreme Court punted on its opportunity to bring certainty to an issue commonly raised in foreclosure litigation: Must foreclosing parties strictly comply with mandatory requirements in Minnesota's foreclosure-by-advertisement statute, or is "substantial" compliance enough to validly foreclose? By affirming an unpublished Court of Appeals decision, but limiting its analysis to a single section of the statute, the Supreme Court did little to provide clear guidance on the compliance standard for the remainder of the foreclosure-by-advertisement statute, Minnesota Statutes Chapter 580. As a result, the Eighth Circuit recently rejected the strict compliance standard for a separate section of the statute.

In *Ruiz v. 1st Fidelity Loan Servicing, LLC*, 829 N.W.2d 53 (Minn. 2013), the Minnesota Supreme Court held that strict compliance is required for Minnesota Statutes Section 580.02, which "provides that 'to entitle any party to . . . foreclosure, it is requisite' that certain conditions be met." *Ruiz*, 829 N.W.2d at 57. One of those conditions, that any assignment of the mortgage be recorded prior to publication of the notice of sale, was unmet in *Ruiz*: the assignment at issue had been recorded *on* the date of the publication of the notice of sale, not *before* that date. *Id.* at 58 (citing § 580.02(3)). Relying on the statute's mandatory language ("requisite"), the court required strict compliance with the statute's language and held the foreclosure was void based on the unprejudicial and relatively minor failure to record the assignment one day earlier. *Id.* at 59. In short, close doesn't count.

The Opinion is available here.

However, the court declined to go further and address the Court of Appeals's analysis of the strict versus substantial compliance issue as to other sections of the statute. Just as Section 580.02(3) requires assignments of mortgage to be recorded prior to publishing the notice of sale, Section 580.032, subdivision 3, mandates that a foreclosing party "shall record a notice of the pendency of the foreclosure . . . before the first date of publication of the foreclosure notice." And just as the foreclosing party in *Ruiz* recorded the assignment *on* the date of publication, rather than *before* that date, they had also recorded the notice of pendency on the same date as publication of the foreclosure notice. *Ruiz*, No. A11-1081, 2012 WL 762313, at *4 (Minn. Ct. App. Mar. 12, 2012). Based on the foreclosing party's failure to strictly comply with both Section 580.02 and 580.032, the Court of Appeals held the foreclosure was void.

The Opinion is available here.

Because the Supreme Court declined to address the strict versus substantial compliance issue for Section 580.032, this issue remains unsettled. The Supreme Court's analysis of Section 580.02, which relied on the use of plain, mandatory language in the statute to determine that the statute leaves no room for only "substantial" compliance, indicates the same result should obtain for other instances of unambiguous, mandatory provisions.

Nevertheless, the Eighth Circuit Court of Appeals recently held otherwise in *Badrawi v. Wells Fargo Home Mortgage, Inc.*, 718 F.3d 756 (8th Cir. 2013). In *Badrawi*, the Eighth Circuit also considered Section 580.032, subdivision 3, under the same basic facts as the Minnesota Court of Appeals had in *Ruiz*, but reached the opposite conclusion. Because the Minnesota Supreme Court did not address this issue for Section 580.032 in *Ruiz*, and because the Minnesota Court of Appeals's opinion was unpublished and therefore unprecedential, the Eighth Circuit declined to apply the strict compliance standard. *Badrawi*, 718 F.3d at 760. Instead, the court relied upon *Holmes v. Crummett*, 13 N.W. 924 (Minn. 1882), which held that a "homeowner may not set aside a foreclosure based on 'an omission of some prescribed act which cannot have affected him, and cannot have been prescribed for his benefit.'" *Badrawi*, 718 F.3d at 758 (citing *Holmes*, 13 N.W. at 924). After concluding that Section 580.032's recording requirement protects the interests of third parties with an interest in the property by ensuring they receive notice of the foreclosure, not the interest of homeowners (who must also receive personal service of the notice under

the statute), the Eighth Circuit rejected a strict compliance standard. *Id.* at 759. Instead, it only required strict compliance with Section 580.02 and held that the homeowner could not seek relief for failure to strictly comply with Section 580.032, subdivision 3.

The Opinions are available here:
Badrawi v. Wells Fargo Home Mortgage, Inc., 718 F.3d 756 (8th Cir. 2013)
Holmes v. Crummett, 13 N.W. 924 (Minn. 1882)

These cases provide little practical guidance for the future. It's clear that Section 580.02 requires strict compliance. And that failure to comply with Section 580.032, subdivision 3, at least for cases in federal court, cannot be used by homeowners to invalidate foreclosures. But for the remainder of Chapter 580's requirements, it remains uncertain how courts may treat failures to strictly comply with the statute, whether or not homeowners must show the requirement was intended to protect them, and if so, whether or not they must further show they were prejudiced by the failure to strictly comply with that requirement.

Submitted by Kevin Lampone
kevin@clawoffice.com
Christensen Law Office PLLC
800 Washington Avenue North, Suite 704
Minneapolis, MN 55401

(612-823-4016)