Business Law Today April Month-in-Brief Posts

May 3rd, 2021

Posts were previously published in the ABA Business Law Section's *Business Law Today* April Month-In-Brief.

Maryland Commissioner of Financial Regulation Asserts Action against Non-Maryland State Bank for Lending Without State License

By: Latif Zaman

On January 21, 2021, the Maryland Commissioner of Financial Regulation filed an administrative charge letter against an FDIC-insured, out-of-state, state chartered bank and its non-bank service providers in connection with the bank's consumer lending platform. Among other allegations, the Commissioner asserted that the bank was required to hold state lending licenses to originate loans to Maryland residents, despite the fact that Maryland law apparently prohibits the Commissioner from licensing banks. The defendants recently removed the case from the Maryland Office of Administrative Hearings to the U.S. District Court for the District of Maryland.

Mid-America Bank & Trust Company, an FDIC-insured, Missouri state-chartered bank, made loans with an APR of 36% or less to Maryland consumers. The Bank engaged Fortiva Financial, LLC to assist it in originating loans. According to the charge letter, the bank retained ownership of accounts after origination. The Commissioner claimed that the bank violated Maryland law by failing to hold licenses to make loans under the following three consumer credit statutes: (1) the Maryland Consumer Loan Law, the state's small loan act; (2) the Credit Grantor Closed End Credit Provisions; and (3) the Credit Grantor Revolving Credit Provisions. The Commissioner also claimed that Fortiva was required to hold a credit service business license to assist Maryland consumers to obtain extensions of credit and another service provider was required to hold a collection agency license to collect accounts on behalf of the bank.

The Commissioner claimed that the loans were unenforceable because the bank made the loans without the licenses noted above, barring the bank or any assignees from collecting any amounts related to the loans. The Commissioner brought these claims despite the fact that the Maryland Consumer Loan Law expressly provides that the "Commissioner may not license any bank, trust company, savings bank, credit union, or savings and loan association." In its notice of removal, the defendants argued that the Maryland licensing statutes interfered with the bank's rate exportation authority under Section 27 of the Federal Deposit Insurance Act and that the Commissioner's claims were, therefore, completely preempted.

U.S. Supreme Court Holds Section 13(b) of FTC Act Does Not Authorize Recovery of Equitable Monetary Relief, Such as Restitution or Disgorgement, by FTC

By: Eric D. Mulligan

On April 22, 2021, the U.S. Supreme Court ruled unanimously that Section 13(b) of the Federal Trade Commission Act did not allow the FTC to bypass its own administrative process and seek equitable monetary relief in court directly against a defendant it accused of unfair or deceptive trade practices.

The FTC sued Scott Tucker and his payday loan companies in federal district court for making deceptive disclosures to consumers in violation of Section 5(a) of the FTC Act. The FTC alleged that Tucker did not adequately disclose the loans' automatic renewal features. The FTC, under its authority in Section 13(b), sought a permanent injunction against future violations of the FTC Act. The FTC also asked the court to order restitution and disgorgement, again relying on Section 13(b). The FTC moved for summary judgment, and the district court granted the motion. The district court issued a permanent injunction against Tucker and ordered him to pay $1.27 billion in restitution and disgorgement. Tucker appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the district court's decision, including the monetary relief order. Tucker petitioned the Supreme Court for certiorari. The Court granted the petition.

The Supreme Court reversed the lower courts' rulings. The Court found that Section 13(b) does not authorize the FTC to seek monetary relief in court directly. The court gave two main reasons for this conclusion. First, Section 13(b) provides prospective, not retrospective, relief. Second, other provisions of the FTC Act allow a court to award monetary relief or impose monetary penalties, but only after the FTC has issued a cease and desist order. The FTC argued that several U.S. Courts of Appeals had agreed with the FTC's interpretation of Section 13(b) and that Congress had ratified that interpretation in later amendments to the FTC Act. However, the Court explained, the later amendments to the FTC Act were too minor to create a presumption of Congressional acquiescence. The FTC also argued that policy considerations disfavored an interpretation of Section 13(b) that allowed a defendant to keep profits that it had earned illegally at consumers' expense. The Court answered that the FTC could use its administrative process under other provisions of the FTC Act to obtain monetary relief.

U.S. Supreme Court Adopts Narrow, Business-Friendly TCPA "Autodialer" Standard

By: Michael A. Goodman

On April 1, 2021, the U.S. Supreme Court announced its decision in Facebook, Inc. v. Duguid, adopting the narrow "autodialer" standard under the Telephone Consumer Protection Act that Facebook favored. The unanimous opinion establishes that equipment can be regulated as a TCPA "autodialer" only if it has the capacity either to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator. This decision rejects the broader, consumer-friendly interpretation that applied the TCPA "autodialer" definition to equipment that was capable of automatically dialing numbers from a stored list.

The Court boiled this issue down to a basic application of grammatical standards. The TCPA's

"autodialer" definition contains the phrase "using a random or sequential number generator" after referring to "capacity to store or produce telephone numbers to be called." Facebook argued that the use of a random or sequential number generator must apply to either capacity to store or capacity to produce telephone numbers. Duguid argued that the use of a random or sequential number generator must apply only to the capacity to produce numbers.

The Court concluded that the TCPA's text, its legislative purpose, and canons of statutory construction favored Facebook's reading. While the Court conceded that Congress might have been trying to address a broad concern with consumer privacy, it found that Congress chose to do so with a narrow statutory "autodialer" definition. Therefore, the Court directed Duguid to Congress to seek a revision to the statutory text. While Justice Sotomayor posited in the opinion that "Duguid greatly overstates the effects of accepting Facebook's interpretation," the Court's decision sharply cuts back the options for plaintiffs to bring TCPA cases.

North Dakota Enacts Significant Limits on Money Broker Loans Including 36% Rate Cap

By: Wingrove S. Lynton

On April 16, 2021, North Dakota Governor Doug Burgum signed Senate Bill 2103, which limits the finance charge a licensed money broker may charge to not more than an annual rate of 36%. This rate includes all charges and fees necessary for the extension of credit incurred at the time of origination.

Unless an exemption applies, the North Dakota Money Brokers Act requires consumer and commercial lenders to obtain a money broker license. Prior to SB 2103, money brokers looked to North Dakota's Usury Law for guidance on interest rate limitations on loans above $1,000. However, the Usury Law contains an exemption for loans made by a lender that is regulated by a North Dakota regulator or loans greater than $35,000. As a result, for loans made by a licensed money broker or loans greater than $35,000, the maximum rate is the rate agreed to by the parties. SB 2103 changes that because the Money Brokers Act will contain its independent rate cap.

SB 2103, which becomes effective August 1, 2021, also impose news limits for late fees on loans greater than $1,000 for the first time. The legislation also imposes additional restrictions on small loans of $2,000 or less, including:

- Installment loans must be paid in equal installments;
- The maximum term for installment loans may not be greater than 36 months;
- Balloon payments are prohibited;
- Existing loans may be refinanced into a new small loan of less than $2,000, but the combination of any refinance fees and any fees collected as part of the original loan may not be greater than $100 per calendar year; and
- Charges imposed as part of a loan extension or deferment may not be more than $100 per calendar year.

The legislation also amends the money broker and collection agency exemptions. Finally, for the first time, North Dakota permits a licensed deferred presentment provider (under very limited

circumstances) to renew a deferred presentment service transaction more than once.

Tennessee Amends TILT Act Fee Provisions

By: David Hicks

Tennessee has amended the Industrial Loan and Thrift Companies Act to increase certain fee amounts permitted for "A-loans" and to authorize a new fee for "B-loans."

For loans charging fees authorized by T.C.A. § 45-5-403(a) ("A-loans"), House Bill 421 increases the maximum service charge from four percent (4%) of the total amount of the loan to five percent (5%). It also increases the maximum installment maintenance fee to five dollars ($5.00) per month.

For loans charging fees authorized by T.C.A. § 45-5-403(b) ("B-loans"), the new bill adds a "closing fee" up to 4% of the amount financed (not to exceed $50), which may be paid from the loan proceeds or added to the amount financed. The closing fee is in addition to charges already authorized by the statute but must be refunded pro rata if the loan is prepaid within ninety (90) days of the date of the loan.

These changes become effective on July 1, 2021, and apply to contracts entered into on or after that date.