Federal Advocates Inc.

1701 Pennsylvania Avenue
Suite 300
Washington, DC 20006
Phone: (202) 351-6855
Fax: (202) 351-6855
www.federaladvocates.com, 2013

June 28, 2013

To: NIADA
From: Federal Advocates
Subject: June Monthly Report

Rental Cars Recall

No additional action to date on S.921, the "Raechel and Jacqueline Houck Safe Rental Car Act of 2013," beyond the Senate Subcommittee's hearing last month. FYI, on behalf of NIADA, made the rounds again with staff of key Members on the Senate Commerce's Subcommittee on Consumer Protection, Product Safety and Insurance. Reaffirmed NIADA's position in opposition to the bill in its current form and advocated for inclusion of the NIADA/NADA amendment and/or no further action on the bill given the voluntary compliance of the major rental car companies to not rent, lease or sell a vehicle subject to recall. Monitoring developments for NAAA. No House bill introduced to date. Last Congress, Congresswoman Capps (D-CA) introduced a companion bill.

Auction Sales

To review, we will continue to report on this issue even if there are no additional monthly developments. We do so in recognition of its importance and the possibility of congressional action at some point. However, to date there have been no further developments from the Hill. Also, no further developments between the industry and law enforcement.

H.R. 749, Eliminate Privacy Notice Confusion Act

This was H.R. 5817 that was introduced by Congresswoman Luetkemeyer last Congress and passed the House. He reintroduced it in the new Congress on February 15 and the bill passed the House (with 73 cosponsors) on March 12 without amendment. On March 13, it was referred to the Senate Committee on Banking, Housing, and Urban Affairs. The bill amends the Gramm-Leach-Bliley Act to exempt from its annual privacy policy notice requirement any financial institution which: (1) provides nonpublic personal information only in accordance with specified requirements, and (2) has not changed its policies and practices with regard to disclosing nonpublic personal information from those disclosed in the most recent disclosure sent to consumers. On March 21, Senator Brown (D-OH) introduced companion bill S.635, the Privacy Notice Modernization Act of 2013. With 20 cosponsors, the bill was also referred to the Committee on Banking, Housing, and Urban Affairs.

Status Update: No change since the last report.

S.1029, the Regulatory Accountability Act of 2013

Introduced on May 23 by Senator Portman with 8 cosponsors (bipartisan) and referred to the Committee on Homeland Security and Governmental Affairs. The bill amends the Federal regulatory process by specifying issues agency must consider in a rulemaking; various notice requirements for major and high-impact rules; public comment and hearing procedures; judicial review; and, final rulemaking. Last Congress, the Senator introduced a similar bill – S.3468, the “Independent Agency Regulatory Analysis Act of 2012.”

Status Update: S.1029 introduced since the last report.

MACMURRAY PETERSEN & SHUSTER LLP

To: **National Independent Automobile Dealers Association**

From: **Shaun K. Petersen**

Re: **June 2013 Regulatory Update**

Date: **July 5, 2013**

I. Consumer Financial Protection Bureau

A. Arbitration Study

The CFPB is charged with studying the viability of arbitration clauses in consumer financial product contracts. As part of that study, the CFPB is conducting consumer surveys to determine consumers' awareness of mandatory arbitration clauses in financial contracts. The survey will gather information about consumers' perceptions, preferences, and assumptions related to arbitration proceedings. The CFPB will limit surveys to consumer credit card financial agreements, however, the information gathered in this survey will have bearing on the CFPB's perceptions with respect to other products. The CFPB has proposed survey questions open for public comment. A copy of the survey can be found at this link. http://www.regulations.gov/#!documentDetail;D=CFPB-2013-0016-0002

B. Debt Collection Data Workshop

Early in June, the CFPB and FTC joined together to host a workshop on debt collection and reselling of debt. (See, FTC section for more information).

C. Bulleting on Responsible Business Conduct

The CFPB released the "Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation, and Cooperation" bulletin. The CFPB recognized four areas where it would give businesses under investigation "credit" when determining how to resolve a case: self-policing, self-reporting, remediation and cooperation. The bulletin focused on businesses taking proactive steps to prevent violations, reporting violations once they have been discovered, and implementing procedures to insure such violations do not occur again. The bulletin outlined specific questions the CFPB would be asking themselves about the party's actions or inaction prior to, during and after the investigation.

6530 West Campus Oval • Suite 210 • New Albany, Ohio 43054 • Office: 614.939.9955 • Fax: 614.939.9954 • **www.mpslawyers.com**

We will continue to evaluate this bulletin and provide guidance on it in the future, particularly as it is implemented. A copy of the bulletin can be found at this link.
http://files.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf

D. Auto Lending Consent Decrees

The CFPB ordered US Bank and Dealer Financial Services to end what was deemed to be unfair and deceptive practices. US Bank work with Dealer Financial Services to market "Military Installment Loans and Education Service" loan programs ("MILES") to junior members of the US military who had not yet established credit. The MILES program provided competitive rates to the junior military in exchange for the payment being withdrawn using the military allotment system. This system deducts payments to the creditor prior to the paycheck being credited to the service member's bank account.

In utilizing the allotment system, US Bank charged the service member a monthly $3 processing fee. This fee was not disclosed as a finance charge on the retail installment contract. Additionally, there was a delay between when the payment was deducted from the service member's pay check and when it was credited to the loan. Interest accrued during this period.

DFS is alleged to have misrepresented to the cost of extended service contract and GAP coverage. The sales pitch to the service member stated that the coverage would only cost a few dollars, or in some cases, a few pennies a month. However, often the cover costs in excess of $40 per month. Additionally, DFS's marketing misrepresented the quality of the extended service contract. They explained that it would cover all major repairs, when in fact many expensive repairs were not included.

As part of the settlement, US Bank and DFS have agreed to stop requiring the use of the allotment system in order to qualify for the MILES program. Additionally, US Bank will refund all processing fees and all interest that accrued during the lag time. DFS agreed to improve its disclosures, especially related to the cost of the additional products. The ultimate restitution will cost US Bank and DFS approximately $6.5 million.

A copy of the consent order with US Bank can be found at this link.
http://files.consumerfinance.gov/f/201306_cfpb_enforcement-order_2012-0340-02.pdf

A copy of the consent order with DFS can be found at this link.
http://files.consumerfinance.gov/f/201306_cfpb_enforcement-order_2013-0589-02.pdf

E. Procedural Rules To Establish Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination

In May 2012, the CFPB issues a proposed rule outlining the procedure the CFPB would follow in determining a nonbank poses a risk to the market. In July 2012, we submitted proposed comments to the CFPB on the rule (see, August 2012 report for more information). The CFPB has sifted through the comments submitted and has issued the final rule on June 27, 2013. The rule will become effective 30 days after publication in the Federal Register. This rule will have the potential to impact our members that are not otherwise defined as a larger market participant if they pose a risk to the market.

The final rule largely mirrors what the CFPB proposed in the initial rule. The procedural rules outline the process under which the CFPB would find an entity to be a risk and the process by which that entity is entitled to challenge the proposed determination before being subject to the CFPB's supervision. If the CFPB staff has "reasonable cause" to believe the entity is a risk, the Deputy Director will send a written notice to the entity, along with a summary of the supporting evidence relied upon by the CFPB in issuing the notice, explaining the why the Bureau believes that risk exists. They will then provide an opportunity for the entity to respond in writing and to participate in an informal telephone hearing or in person meeting between the CFPB staff and the Associate Director. The response from the entity would include any written information the CFPB could and should consider. After this information hearing, the Associate Director would submit a written, proposed order to the Director of the CFPB to bring the entity under the supervisory oversight of the CFPB. If the determination is made to supervise the entity, the CFPB will do so for a minimum of two years and can make a petition to be relieved of that obligation after that time, but only once annually.

It is unclear how the CFPB will begin to assert jurisdiction based off of a risk determination. However, it is anticipated that with the passage of this new rule, risk-determination based supervision will commence immediately.

F. Congressional Democrats Inquiry into Disparate Impact Theory

In last month's report, we referenced a letter send to the CFPB by Congressional Democrats asking the Bureau for information about its methodology when issuing its March 2013 bulletin on its theory that discrimination may result in indirect auto lending as evidenced by disparate impact. Mr. Cordray responded to the Democrats inquiry. Cordray mentioned that the CFPB has found instances where lenders had robust fair lending programs for mortgage related lending, but failed to have any (or weak) compliance programs for other consumer lending products.

A copy of Cordray's response can be found at this link.
http://www.cfpbmonitor.com/files/2013/06/06-21-13_CFPB-Letter-on-Auto-Lending1.pdf

G. Congressional Republicans Inquiry into Disparate Impact Theory

Thirty-five House Republicans sent the CFPB a letter raising concerns with the CFPB's March 2013 guidance on disparate impact in indirect auto lending. The Republicans raised concerns with the lack of public comment on the methodology and analysis the CFPB used in issuing its guidance. The Republicans also encouraged the CFPB to be cautious in asserting this theory given the reliance on statistics and lack of any intentional misconduct. The Republicans asked the CFPB to provide detailed information concerning its methodology in finding its statistical disparate impact.

A copy of the letter can be found at this link.
http://images.magnetmail.net/images/clients/NADA/attach/CFPB_Auto_Lenders_Letter.pdf

II. Department of Justice

No significant updates.

III. Department of Labor

No significant updates

IV. Environmental Protection Agency

No significant updates

V. Federal Trade Commission

A. Debt Collection Data Workshop

The FTC held a debt collection and debt selling roundtable in conjunction with the CFPB. The roundtable invited industry and consumer advocates to the table to discuss issues with debt collection and debt sales. A large part of the discussion was focused on the lack of communication between original creditor and the second or third debt buyer. Specifically, once a creditor sells a debt to a collector, the consumer may be unaware or confused on whether the collector is collecting a legitimate debt.

Consumer advocates cited the fact that the amount in collections often is a lump sum that includes principal, interest, fees and other costs associated with the debt and it is unrecognizable to the consumer. Another reason cited was the fact that the company the consumer does business with is different from the name listed on the collection notice. For example, the BHPH dealer is XYZ Auto and the consumer comes into XYZ Auto and makes payments to what it believe to be XYZ Auto. However, the RFC may be entirely different (i.e. EFG Financing). The consumer sees EFG Financing on the collection account, does not know the company, and assumes the collector is a scammer and the debt is not legitimate.

Recommendations were made by both the industry and consumer advocates. Both sides agreed that the required information in debt collection notices should be tweaked to better inform the consumer of the debt owed. The FTC and CFPB will use the information in crafting future changes to debt collection laws and regulations.

B. Red Flags Rule Business Guide

The FTC revised its guidance document to help businesses comply with the Red Flags Rule. The guidance explains which businesses are required to comply and what is expected of those businesses to comply with the rule and protect consumers from identity theft. The guidance can be found at this link:
http://business.ftc.gov/documents/bus23-fighting-identity-theft-red-flags-rule-how-guide-business

VI. Internal Revenue Service

No significant updates

VII. National Highway Traffic Safety Administration

No significant updates

VIII. National Motor Vehicle Title Information System

The National Advisory Board held a teleconference this month and was provided with statistical updates on the implementation of California AB 1215 and the impact the new law has had on the NMVTIS system. Likewise, the Board was updated on enforcement efforts, and the concerns with reporting as a result of Hurricane Sandy.

IX. Significant State Law/Regulatory Updates

a. Pending Legislation

California

S.B. 686 has been refereed to committees on Business, Professions & Consumer Protection and Judiciary. The law would prohibit dealers from reselling or offer for sale a new or used vehicle that is subject to a manufacturer's recall, unless recall work performed.

A.B. 964 has been placed in the inactive file. The bill would prohibit a vehicle dealer from selling a vehicle as part of a used vehicle certification program if the dealer knows or should have known that the vehicle is the subject of an open or unaddressed recall. It also would prohibit vehicle dealer's from selling any used car, including a car that is not part of a used vehicle certification program, without providing the buyer a completed inspection report.

Illinois

H.B. 2773 has been sent to the Governor for signature. The bill changes the fee schedule for new and used vehicle dealers that is charged for inclusion in the Dealer Recovery Trust Fund to a graduated payment schedule based on the number of cars sold in the previous year; provides that dealers selling less than a specified number of vehicles a year are considered dealers for the purpose of the Fund; sets forth fees for renewal of licenses.

New York

A.B. 7789 is in front of the committee on Transportation. The bill requires that manufacturers make the same diagnostic and repair information and tools available to owners and repair shops as such information is available to franchised motor vehicle dealers.

A.B. 6522 has been sent to the Committee on Rules. This bill would require motor vehicle dealers to search for recalls prior to selling a used motor vehicle and either make the required repair or disclose, in writing, the recall to the consumer.

Oklahoma

S.B. 1017 was sent to the Senate Committee on Business and Commerce. The bill prohibits certain extended service contracts, gap products and extended maintenance plans.

b. Passed Legislation

Maine

H.B. 658 passed in Maine this month. It will require dealers to disclose, in writing, the date an extended warranty beings and the date it terminates.

Florida

Florida passed H.B. 55 which made changes to its unfair trade practices act. The new legislation would require consumers to provide demand letter to motor vehicle dealer as condition precedent to initiating civil litigation, including arbitration. The law also provides for tolling of applicable time limitations for initiating actions; provides opportunity for claimants to comply; provides for waiver of notice; requires a stay of civil litigation, including arbitration, brought without compliance.

X. Significant Case Law Updates

a. US Supreme Court:

American Express Co. v. Italian Colors Restaurants

The Supreme Court overturned the 2nd Circuit Court of Appeals ruling that a class action waiver in an arbitration agreement entered into by merchants could not be enforced because it would preclude the merchants from asserting federal antitrust claims against the credit card company. The court rejected an attempt to create an exception to the *AT&T Mobility v. Concepcion* case that held that class action waivers in consumer arbitration agreements are enforceable. The exception would have been premised on an argument that it is too expensive for a plaintiff to prove a statutory claim in an individual arbitration action.

b. California:

Vargas v. Sai Monrovia B, Inc., 2013 Cal. App. LEXIS 440 (2nd App. Dist. Div. 1)

The court held an arbitration clause unconscionable. The arbitration provision was on the back side of a RISC, outlined in a black box. There was no reference on the front of the RISC to the arbitration provision and no signature or initial was needed on the back side of the contract agreeing to/acknowledging the arbitration provision. Further, there was no discussion about arbitration during the sales presentation and the F&I person did not flip the RISC over to show the clause during closing.

c. Florida:

Bengal Motor Co. V. Cuello, 38 Fla. L. Weekly D 1088

The court addressed only the buyer's claim under the FMVRSFA. It held that the disclosures required by the Truth in Lending Act (TILA), 15 U.S.C.S. § 1601 et seq., in the Retail Sales Installment Contract (RISC) were made before credit was extended by the third-party lender, but the RISC did not contain any language notifying the buyer that the deal was contingent on securing financing. Thus, the sale was consummated when the buyer signed the RISC, not when a third party lender approved financing (or not) at the stated rates. The language of contingency set forth in the Retail Buyers Order and Bailment Agreement, not mirrored in the RISC, negated the TILA requirement of finality. This resulted in a TILA violation, and, thus, a per se violation of FMVRSFA. The trial court erred in awarding the buyer damages under § 520.12(2), Fla. Stat. (2011), however. The buyer paid no finance charges, and no fees were charged to her; thus, she suffered no compensable damages under the FMVRSFA.

d. Missouri:

Johnson v. JF Enters., 2013 Mo. LEXIS 31

The trial court did not enforce an arbitration agreement the consumer signed because it did not apply to an installment agreement she signed, which contained a merger clause. The supreme court held it was error to deny the dealer's motion to compel arbitration, on this theory, because the numerous documents the consumer signed at one sitting were construed together, and harmonized, if possible, to determine the parties' intent, so the arbitration agreement applied to the entire transaction, as the merger clause did not make the installment contract the parties' total contract. The order in which the consumer signed the documents did not affect the enforceability of the merger clause or the arbitration agreement because the documents were signed contemporaneously. The arbitration agreement and the merger clause could be harmonized because these contemporaneously signed documents relating to one transaction were construed together, as nothing showed the parties intended otherwise.

e. Ohio:

Jones v. N & S Auto Sales, Inc., et al 2013-Ohio-2468 (8th App. Dist.)

Recently, the 8th Appellate Court upheld a trial court's decision not to award recession in damages for failure to deliver title. The consumer brought suit for a variety of CSPA violations, specifically failure to deliver title within 40 days. The dealer delivered title 43 days after purchase. After receiving the title, the consumer drove the vehicle for six months, although the vehicle was plagued with repairs. At the end of the 6th month period, the consumer demanded his money back from the dealer, but the dealer refused. The consumer brought suit and recovered $200 in statutory damages for each of the 5 CSPA violations, decided on summary judgment.

The consumer appealed the damages calculation, claiming he was entitled to recession under R.C. 4505.181(B)(1) for failure to deliver title within 40 days. The trial court relied on Anousheh v. Planet Ford, Inc., 2007-Ohio-4543, which held that the consumer was not entitled to recession because the dealer remedied the problem immediately, thus the consumer did not incur any actual damages. The appeals court upheld the lower court's decision to deny recession, but for a different reason. The Appellate Court did not find providing title 43 days after purchase was an immediate remedy. However, because the consumer did not demand recession until 7 months after purchase the Appellate Court determined "there [was] no direct, incidental, or consequential relation between defendants failure to provide [Jones] title to the vehicle within 40 days of the sale and [Jones's] demand for recession and refund of the vehicle six months after title was transferred." Therefore, the consumer was not allowed to rescind the transaction.