AFSA Law Committee

Vehicle Finance Subcommittee
Litigation Report

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Arbitration

Balasiori v. Darcars of Auth Way, Inc.
2018 Md. App. LEXIS 782 (Md. App. August 9, 2018)

- **Arbitration** - Arbitration provision in vehicle buyer's order was enforceable even though car buyer's signature on assigned retail installment contract was allegedly forged

Fotein Balasiori bought a vehicle from Darcars of Auth Way, Inc. She financed the purchase through a retail installment contract, which Darcars assigned to Santander Consumer USA. Balasiori signed a buyer's order and the RIC at the time of sale. However, she alleged that Darcars forged her signature on a "second" RIC that it sent to Santander, which she claimed contained terms materially less favorable than those to which she had agreed. She sued Darcars and Santander for fraud and violation of the Maryland Consumer Protection Act based on the allegedly forged RIC. The buyer's order and both RICs contained arbitration clauses. The defendants moved to compel arbitration, and the trial court granted the motion. Balasiori appealed to the Court of Special Appeals of Maryland, which affirmed.

Balasiori argued that inconsistencies in the arbitration provisions in the buyer's order and the RIC precluded treating them as part of a single transaction. She further argued that the RIC superseded the buyer's order and that the forgery of the second RIC invalidated all the documents related to the transaction. The buyer's order mandated arbitration while the RIC required arbitration at the election of one of the parties. Although the buyer's order mediation provisions did not bind assignees, there was no language excepting assignees from the arbitration provisions. The appellate court held that the arbitration provisions in the buyer's order and in both RICs were not materially inconsistent.

The appellate court noted that Maryland common law permits multiple documents to be read together as part of a single transaction. The appellate court determined that the buyer's order and the original RIC were signed by the parties to reflect a single transaction. The buyer's order provided the terms of sale, and the RIC provided the financing terms. The appellate court noted that the buyer's order was conditioned on approved financing. Accordingly, the appellate court held that the instruments should be read together. While the appellate court acknowledged that the alleged forgery would have negated the arbitration provision in the second RIC, it determined that arbitration was still appropriate based on the arbitration provision in the buyer's order and the first RIC, which Balasiori signed. The appellate court held that the arbitration provision in the buyer's order could be enforced between Santander and Balasiori even if the RIC that Santander received was invalid as a forgery.

Cullinane v. Uber Technologies, Inc.
2018 U.S. App. LEXIS 17222 (1st Cir. (D. Mass.) June 25, 2018)

- **Arbitration** - Uber users not reasonably notified of arbitration agreement in online registration process where they were not required to click box agreeing to terms, link to agreement was not in common form for hyperlink, and hyperlink and introductory text were of similar or lesser size and emphasis as other terms on screen

A group of Massachusetts residents sued Uber Technologies, Inc., claiming that the company violated a Massachusetts consumer protection statute by knowingly imposing a Massport surcharge of $8.75 and/or an East Boston toll of $5.25 in connection with its ride-sharing service. Uber moved to compel arbitration

pursuant to an arbitration agreement that Uber claimed the users agreed to when they registered through the Uber mobile application. The trial court granted the motion, but the U.S. Court of Appeals for the First Circuit reversed.

After creating an account and a profile during the registration process, the user would arrive at a screen that prompted the user to enter payment information for Uber's services. On that screen was text stating, "By creating an Uber account, you agree to the." Below this text was a clickable button titled "Terms of Service & Privacy Policy." If a user clicked on the button, he or she would be taken to another screen with separate clickable buttons for "Terms of Service" and "Privacy Policy." If the user clicked on the "Terms of Service" button, he or she would be taken to a 10-page document that contained a "Dispute Resolution" section in which Uber and the user agreed to settle any disputes by binding arbitration.

The federal appellate court cited a state appellate court decision finding that online agreements are enforceable if the contract terms were reasonably communicated and accepted. In deciding whether the users had reasonable notice of the arbitration provision, the appellate court considered whether Uber conspicuously informed users of the existence and location of the provision and other terms. The court noted that Uber did not require users to click a box stating that they agree to certain terms before moving on to the next screen. Instead, Uber merely provided a link to the terms. Uber argued that the gray rectangular box with the language "Terms of Service & Privacy Policy" in white bold text was conspicuous "because it was displayed in a larger font, in bold, contrasting in color, and highlighted by the box around it" and because the screen only contained 26 words, making the box difficult to miss. The appellate court found that the "Terms of Service & Privacy Policy" hyperlink did not appear to be a hyperlink and was not conspicuous because other terms on the screen were displayed similarly and some were even displayed more prominently in size and color. The appellate court added that the text above the hyperlink notifying users that the creation of an account would bind them to the linked terms was even less conspicuous than the "Terms of Service & Privacy Policy" hyperlink because it was displayed in a dark gray small non-bold font against a black background. The appellate court concluded that because the screen was "filled with other very noticeable terms that diminished the conspicuousness of the 'Terms of Service & Privacy Policy' hyperlink and the notice, … the terms of the [arbitration a]greement were not reasonably communicated to the [users]."

Graham v. Santander Consumer USA, Inc.
2018 U.S. Dist. LEXIS 91802 (D. Md. June 1, 2018)

- **Arbitration** - Assignee of retail installment contract was permitted to enforce arbitration provision in contract

Troy Graham bought a car from Darcars of Auth Way, Inc., and financed the purchase. Darcars assigned the retail installment contract to Santander Consumer USA, Inc. Graham defaulted on the contract, and Santander repossessed his car. Three years later, Santander assigned its right to any monetary claim on Graham's debt to NCB Management Services. Graham then sued Santander for violating the Maryland Credit Grantor Closed End Credit Provisions. Santander moved to compel arbitration pursuant to the buyer's order and the RIC that Graham signed when he bought the car.

The U.S. District Court for the District of Maryland granted the motion to compel arbitration. First, the court addressed Graham's argument that Santander could not enforce the arbitration agreement because it was not a party to the original contract. The court rejected this argument, finding that Darcars's

assignment of the RIC to Santander granted Santander every right Darcars previously enjoyed under the contract. The court noted that an assignment allows a third party to "stand in the shoes" of an original party to the contract.

Second, the court addressed Graham's argument that even if the assignment was valid, by its terms, the RIC prohibited the assignment of its arbitration provision. The court noted that, for purposes of the arbitration agreement, the RIC defined "dispute" as "any question as to whether something must be mediated and the terms and procedures of the mediation, as well as any allegation concerning a violation of a … state or federal statute that may be the subject of mediation, any monetary claim, whether contract, tort, or other, arising from (1) the negotiation of and terms of the Buyer's Order, (2) any service contract or insurance product, or (3) any retail installment sale contract or lease (*but this mediation agreement does not apply to and shall not be binding on any assignee thereof*) (emphasis added)*."* Following a Fourth Circuit decision interpreting a nearly identical contractual provision, the court found that the limiting parenthetical only modifies the list of three types of monetary claims that are subject to arbitration. Therefore, because Santander is an assignee of the entire contract and not just a monetary claim, the RIC does not limit its ability to compel arbitration.

Finally, the court addressed Graham's argument that Santander may not enforce the arbitration agreement because Santander assigned its rights to NCB Management. The court found that Santander assigned to NCB only its rights to a monetary claim on Graham's outstanding debt. The assignment did not suggest that Santander no longer possessed rights over all other parts of the contract with Graham. Therefore, Santander was entitled to compel arbitration of Graham's claims.

Gamble v. New England Auto Finance, Inc.
2018 U.S. App. LEXIS 14608 (11th Cir. (N.D. Ga.) May 31, 2018)

- **Arbitration** - Arbitration provision in vehicle financing contract did not encompass debtor's Telephone Consumer Protection Act claims against creditor that sent unwanted text messages to debtor after contract was paid in full
- **Unsolicited Marketing/Telephone Consumer Protection Act** - Arbitration provision in vehicle financing contract did not encompass debtor's Telephone Consumer Protection Act claims against creditor that sent unwanted text messages to debtor after contract was paid in full

Hope Gamble signed an auto "loan agreement" with New England Auto Finance, Inc. (The court refers to the parties' transaction as a "loan agreement," but it appears to be an auto financing contract.) The loan agreement contained an arbitration provision. The loan agreement also contained a provision granting New England Auto the right to send its customers emails, text messages, and other electronic communications ("text consent provision"). The loan agreement and the text consent provision required separate signatures, and the text consent provision was placed after the signature line for the loan agreement. Gamble signed the loan agreement, but she did not sign the text consent provision.

After Gamble paid off her obligation under the loan agreement, New England Auto began sending her text messages offering her a new "loan." Gamble allegedly called New England Auto and requested that it stop sending the text messages, but the messages continued. Gamble sued New England Auto for violating the Telephone Consumer Protection Act by sending her text messages without her prior express consent. New England Auto moved to compel arbitration pursuant to the arbitration provision in the loan

agreement. The trial court denied the motion. *See* Gamble v. New England Auto Finance, Inc., 2017 U.S. Dist. LEXIS 196390 (N.D. Ga. November 20, 2017).

The U.S. Court of Appeals for the Eleventh Circuit affirmed. The appellate court explained that the TCPA, not the unsigned text consent provision, was the source of Gamble's right not to receive text messages from New England Auto without her prior express consent. The appellate court agreed with the trial court that the text consent provision, when unsigned, did not create any rights or obligations between the parties and that Gamble based her claims on rights created under the TCPA, not the loan agreement. The appellate court rejected New England Auto's argument that the loan agreement's arbitration provision was broad enough to encompass Gamble's TCPA claims. The arbitration provision applied only to disputes arising out of, or related to, the loan agreement or the vehicle securing that agreement. The appellate court found that Gamble's TCPA claims concerning unwanted text messages did not arise out of the loan agreement or any breach of it. Gamble's claims arose from post-agreement conduct that allegedly violated a separate, distinct federal law. In addition, the appellate court noted that the text consent provision was a separate stand-alone provision that Gamble never signed and, therefore, no agreement regarding text messages existed between the parties. Accordingly, the trial court properly denied New England Auto's motion to compel arbitration of the TCPA claims.

Signor v. GWC Warranty Corp.
2018 N.J. Super. Unpub. LEXIS 1160 (N.J. Super. App. Div. May 17, 2018)

- **Arbitration** - Arbitration provisions on last page of 11-page vehicle service contract were conspicuous and thus enforceable

Joseph Signor bought a used Ford truck and a service contract issued by GWC Warranty Corporation from 123 Auto Sales, LLC. The service contract was 11 pages long. The service contract instructed the consumer to refer to "important definitions" found in the agreement and included a disclosure warning that all disputes and claims must be settled in arbitration. The contract had several numbered sections. Section 16 of the contract, on the last page of the contract, was titled "**ARBITRATION PROVISIONS.**" Section 16 included a detailed explanation of the types of claims subject to arbitration, the rules that would govern an arbitration, a jury trial waiver, and a class action waiver. Section 16 included the following language: "Claims by, or on behalf of, other individuals will not be arbitrated in any proceeding that is considering Your Claims. You and We understand and agree that because of this Provision neither You nor Us will have the right to go to court except as provided above and to have a jury trial or to participate as any member of a class of claimants to any Claim." The service contract also explained, separately from the arbitration provisions, that the buyer waived the right to go to court.

Signor sued GWC, alleging that it violated numerous New Jersey laws, including the Uniform Commercial Code, the Service Contracts Act, the Truth in Consumer Contract, Warranty and Notice Act, and the Consumer Fraud Act. He asked the court to certify a class action and for a declaratory judgment. GWC moved to compel arbitration. The trial court determined that the arbitration provisions were invalid because they were buried among other contract terms at the back of the service contract and were ambiguous. The trial court denied GWC's motion to compel arbitration. GWC appealed to the New Jersey Superior Court, Appellate Division.

The appellate court reversed the trial court's denial of GWC's motion to compel arbitration. According to the appellate court, the law favors arbitration. Whether the parties have agreed to arbitrate disputes is

fundamentally a matter of contract law. Under contract law, an agreement to waive the right to judicial process is enforceable if the waiver is clear and the parties understand the terms of the agreement and mutually assent to its terms. The appellate court determined that the arbitration provisions were clear, even though GWC placed them among other contract terms. The appellate court noted that the service contract was short enough (only 11 pages) for Signor to locate the provisions. GWC made the provisions noticeable by using the term "**ARBITRATION PROVISIONS**" in the section heading and making that heading all caps, bold, and underlined. GWC also added a disclosure elsewhere in the service contract with the heading "Special State Disclosures/Requirements." This disclosure stated that the service contract included arbitration provisions, that the provisions waived any right he would have to seek relief in a judicial forum, and where the arbitration provisions were located. Finally, the appellate court concluded that the arbitration provisions were not ambiguous. They required Signor to submit all claims to arbitration and barred him from participating in class action arbitrations.

Bankruptcy

In re Dunn (Toyota Motor Credit Corporation v. Dunn)
2018 U.S. Dist. LEXIS 123260 (E.D. Pa. July 24, 2018)

- **Bankruptcy** - Automatic stay terminates 30 days after first meeting of creditors if debtor fails to state intent to surrender secured personal property, redeem property, or reaffirm debt or fails to perform stated intent

Markel Dunn filed a Chapter 7 bankruptcy petition and stated his intent to retain his Toyota Land Rover on which Toyota Motor Credit Corporation held a lien. Toyota repossessed the Land Rover 16 days after the first meeting of creditors. Dunn moved for sanctions for Toyota's violation of the automatic stay. The bankruptcy court ruled for Dunn, finding that because he timely stated his intent regarding the Land Rover and could have timely reaffirmed the debt, Toyota violated the automatic stay by prematurely repossessing the vehicle. The U.S. District Court for the Eastern District of Pennsylvania affirmed.

Section 362(h) of the Bankruptcy Code provides that the automatic stay is terminated if a debtor fails to file a statement indicating his or her intent to surrender secured personal property or retain that property by reaffirming the debt, redeeming the property, or assuming an unexpired lease of the property and fails to take the intended action timely. Section 521(a)(2)(A) gives a debtor 30 days after the bankruptcy filing or on or before the date of the first meeting of creditors, whichever is earlier, to file a statement of intention. Section 521(a)(2)(B) gives a debtor 30 days after the first meeting of creditors to perform his or her stated intent. Toyota argued that Dunn's statement of intention did not comply with Section 362(h) because he failed to indicate whether he intended to redeem the car or reaffirm the Toyota debt. The court found that even if Dunn's statement of intention was insufficient, the soonest the stay terminated was 30 days after the first meeting of creditors. The court relied on several bankruptcy court cases holding that the later deadline in Section 521(a)(2) (30 days after the meeting of creditors) is controlling. Because Toyota repossessed Dunn's car within that 30-day period, the court agreed with the bankruptcy court that Toyota violated the automatic stay.

In re Doud
2018 Bankr. LEXIS 1883 (Bankr. E.D. Ky. June 21, 2018)

- **Bankruptcy** - GAP insurance proceeds were property of retail installment contract assignee under terms of RIC and GAP Addendum, even though assignee's security interest was avoided in bankruptcy
- **Credit Insurance/GAP/CPI** - GAP insurance proceeds were property of retail installment contract assignee under terms of RIC and GAP Addendum, even though assignee's security interest was avoided in bankruptcy

When Jerrod Doud bought a 2014 Nissan Versa from McCluskey Chevrolet, Inc., he bought and financed optional guaranteed auto protection insurance. The GAP Addendum Doud signed did not specify which person or entity would receive payment from the GAP provider in the event any payment became due. After Doud filed a Chapter 13 bankruptcy petition, the Chapter 13 trustee and Credit Acceptance Corporation, to which Doud's retail installment contract had been assigned, entered into an agreed order providing that CAC's lien was avoided, that Doud's car was preserved for the benefit of his bankruptcy estate, and that CAC's claim would be treated as an unsecured claim. Thereafter, Doud totaled the Versa, and CAC received $5,830 in GAP insurance proceeds. Doud moved to compel release of the funds, claiming that CAC was not entitled to the insurance proceeds as an unsecured creditor and that CAC should turn over the proceeds to the Chapter 13 trustee. CAC objected, and the U.S. Bankruptcy Court for the Eastern District of Kentucky denied Doud's motion.

Although the GAP contract was not included in the record, the court found that both a supplemental document, which defines terms in the GAP Addendum and explains the way benefits are calculated and how benefits may be requested, and the RIC lead to the conclusion that the GAP insurance proceeds are CAC's property. The supplemental document stated that if the car owner provides proof that the financing agreement has been satisfied, then the GAP benefit will be paid to the car owner, but if that proof is not provided, then the GAP benefit will be paid to the financial institution. The RIC provided that Doud assigned his rights to any insurance that McCluskey financed and the proceeds of that insurance to McCluskey. The court found that the avoidance of CAC's lien on the Versa did not affect CAC's rights under the RIC or the GAP Addendum. Because the pre-petition assignment of rights under the RIC prevented the GAP benefits from becoming property of Doud's bankruptcy estate and the avoidance of CAC's security interest in the Versa did not transfer CAC's rights under the RIC to the Chapter 13 trustee, the court found that CAC was entitled to retain the GAP proceeds.

Bobka v. Toyota Motor Credit Corporation
2018 U.S. Dist. LEXIS 87989 (S.D. Cal. May 24, 2018)

- **Bankruptcy** - Vehicle lease assumption need not be accompanied by reaffirmation to be effective
- **Bankruptcy** - Vehicle lessor had right to waive Bankruptcy Code's notification and timing requirements for lease assumption

Melissa Bobka filed a Chapter 7 bankruptcy petition and, in her bankruptcy schedules, stated her intent to reaffirm her debt to Toyota Motor Credit Corporation, believing that TMCC had a lien on her vehicle when, in fact, it was the lessor of her vehicle. The Chapter 7 trustee failed to assume the lease during the first 60 days of the bankruptcy case. Therefore, the automatic stay terminated with respect to the vehicle. Bobka contacted TMCC and explained that she wished to continue making payments to retain the vehicle. TMCC informed her that she needed to assume the lease, which she did by executing an assumption agreement. When Bobka defaulted on her lease payments, TMCC engaged in collection activity. Eventually Bobka surrendered the vehicle to TMCC and sued TMCC for violating the automatic stay and

the discharge injunction. She claimed that collection activity was prohibited because her assumption was ineffective, as it was not accompanied by reaffirmation of the debt. The bankruptcy court ruled for TMCC, and the U.S. District Court for the Southern District of California affirmed.

Noting that courts are split on the issue of whether a lease assumption must be accompanied by a reaffirmation of the debt approved by the bankruptcy court to be effective, the district court sided with those courts that have determined that reaffirmation is not required. The court predominantly relied on the fact that the assumption process set forth in the Bankruptcy Code is superfluous if reaffirmation is still required. The district court went on to find that Bobka's lease was assumed even though Bobka did not technically comply with the notice and timing requirements of the Bankruptcy Code's lease assumption provision. The district court noted that TMCC had the right to waive these requirements.

Credit Insurance/GAP/CPI

Foster v. Parker Community Credit Union
2018 Wisc. App. LEXIS 436 (Wis. App. April 26, 2018)

- **Credit Insurance/GAP/CPI** - Lender's purchase of retroactive insurance for period during which borrowers did not maintain continuous coverage for boat that was collateral for loan did not violate Wisconsin Consumer Act

On June 15, 2015, Demetrius and Alvina Foster obtained a loan from Parker Community Credit Union secured by a lien on their boat. The loan agreement required the Fosters to keep the boat insured, and if they failed to do so, the credit union could purchase coverage and add the cost to the unpaid loan balance. The Fosters allowed the insurance coverage they had obtained on the boat to expire on April 10, 2016. The Fosters bought a new insurance policy that took effect on June 4, 2016. The boat was not covered for the 55-day period in between those dates ("lapsed-coverage period"). The credit union asked the Fosters to obtain or provide proof of coverage for the lapsed-coverage period, but they failed to do so. The credit union then bought retroactive lender-placed insurance for the lapsed-coverage period and added the cost to the balance of the loan. The Fosters sued the credit union for violating the Wisconsin Consumer Act. The trial court ruled for the credit union, and the Fosters appealed.

The Court of Appeals of Wisconsin affirmed. The appellate court noted that all of the Fosters' claims were based on the premise that it was unnecessary and unreasonable for the credit union to purchase retroactive insurance for the lapsed-coverage period because the boat was not damaged during that time. First, the appellate court found that the consumer credit transaction between the parties requiring the consumer to maintain insurance on collateral and allowing the lender to purchase gap-coverage insurance if the borrower failed to maintain continuous coverage was not unconscionable under the WCA.

Next, the appellate court rejected the Fosters' contention that the credit union was not acting in good faith when it bought retroactive insurance for the lapsed-coverage period. The appellate court noted that the credit union was not "required to accept at face value the Fosters' assertion that there had been no damage to the boat. Moreover, the fact that the Fosters were unaware of any damage to the boat caused during the period of lapsed coverage does not preclude the possibility however remote that damage might subsequently be discovered and attributed to some event that had occurred during that time period." Therefore, the appellate court concluded that the trial court properly dismissed the bad faith claim under the WCA.

Finally, the appellate court rejected the Fosters' contention that the credit union attempted to "enforce a right with knowledge or reason to know that the right does not exist," in violation of the WCA. The loan agreement explicitly required the Fosters to maintain continuous insurance coverage, and the Fosters' purchase of prospective insurance did not cure the period of lapsed coverage. Therefore, the credit union's decision to enforce its contractual right to purchase its own insurance for the lapsed-coverage period was not an attempt to enforce a non-existent right.

Dealer-Manufacturer Relations/Dealer-Bank Relations / Floor Plan

Eddy's Motors, LLC v. Santander Consumer USA, Inc.
2018 Tex. App. LEXIS 5924 (Tex. App. July 31, 2018)

- **Dealer-Manufacturer Relations/Dealer-Bank Relations/Floor Plan** - Dealer breached agreement with finance company by failing to perfect finance company's security interest in car

Eddy's Motors, a Chrysler dealer, signed a dealer agreement in which it agreed to originate retail installment contracts and sell them to Santander Consumer USA d/b/a Chrysler Capital. The agreement required Eddy's Motors to "file and/or record all documents necessary to reflect a valid and enforceable first priority security interest in favor of Chrysler Capital." Eddy's Motors sold a car to Tou Hang, prepared a title application for the car, and gave the application to Hang to file. However, Hang did not file the application. After Hang defaulted on the contract, Chrysler Capital demanded that Eddy's Motors repurchase the contract because it failed to perfect the security interest as required by the dealer agreement. After Eddy's Motors refused, Chrysler Capital sued Eddy's Motors for breach of contract. The trial court found for Chrysler Capital. Eddy's Motors appealed.

The Court of Appeals of Texas affirmed. Eddy's Motors argued that it did not breach the dealer agreement. Eddy's Motors contended that the agreement did not require it to perfect the security interest, but to do "something less than perfection" because the agreement provided that the security interest should be "reflected" rather than "perfected." However, the appellate court ruled that the plain language of the dealer agreement requiring Eddy's Motors to "file and/or record" to create a first priority security interest clearly and unambiguously demanded that the security interest be perfected. As a result, the appellate court ruled that Eddy's Motors breached the dealer agreement.

Eddy's Motors also argued that the trial court improperly awarded damages by either not subtracting the car's value or requiring that Chrysler Capital return the car. The appellate court ruled that the contract clearly provided for a chargeback amount of the net payoff balance without subtracting the car's value and that the contract separately required Chrysler Capital to assign the car back after receipt of the chargeback amount.

Enforcing Security Interests

Ally Financial, Inc. v. Hillside Auto Body & Service, Inc.
2018 Ill. App. Unpub. LEXIS 1202 (Ill. App. July 13, 2018)

- **Enforcing Security Interests** - Lienholder's replevin and conversion claim against purchaser of vehicle at public sale allowed to proceed where police department failed to follow procedures for sale of unclaimed vehicle

Lori Figueroa leased a 2014 Cadillac SRX. Ally Financial, Inc., financed the lease. Figueroa was in an accident in Mount Prospect, Illinois, on September 8, 2016. Hillside Auto Body & Service, Inc., towed the car to its storage facility. On October 19, 2016, the local police department sent letters to Figueroa and Ally informing them that they had to claim the SRX by October 31, 2016, or it would be "junked" in accordance with the Illinois Vehicle Code. The letter to Ally explained that it could claim the SRX if it showed proof of ownership to the police department, obtained a release from the police department, gave a copy of the release to Hillside, and paid Hillside its towing and storage fees. The police department later extended the deadline to November 11, 2016. Nelson Mitten, a lawyer for Ally, contacted Hillside on November 2, 2016, to ask about the SRX's condition. Hillside faxed Mitten an invoice for towing and storage fees and a repair estimate. Mitten did not contact Hillside again. Hillside bought the SRX at a public sale on November 14, 2016.

Ally sued Hillside for replevin and conversion. Hillside moved to dismiss under Illinois Code of Civil Procedure § 2-619(a)(9). Hillside argued that it took the SRX free and clear of all other liens because it acquired the SRX at a sale conducted pursuant to the Illinois Abandoned, Lost, Stolen or Unclaimed Vehicles Act. Ally argued that the protections afforded to a purchaser under the Unclaimed Vehicles Act did not apply to this sale because the sale did not comply with the Act's requirements. The trial court granted Hillside's motion and dismissed Ally's complaint. Ally appealed to the Appellate Court of Illinois, which reversed the trial court's dismissal of Ally's complaint.

The appellate court found that the police failed to comply with several procedural steps imposed by the Unclaimed Vehicles Act. The Act requires a police department to send an impound notice to the registered owner and the lienholder either within 10 business days after the department impounds the vehicle or within two days after it identifies the owner, whichever is later. The police did not send the notice within that period. The Unclaimed Vehicles Act requires a police department to wait at least 30 days after sending the notice to the registered owner before conducting the sale. The police department waited only 26 days. Finally, the Unclaimed Vehicles Act requires a police department to give the registered owner and the lienholder notice of the time and place of the sale at least 10 days before the sale, but the police department did not send that notice.

Duncan v. Ford Motor Credit
2018 Iowa App. LEXIS 571 (Iowa App. June 20, 2018)

- **Enforcing Security Interests** - Conversion claim against creditor and repossession company accrued when plaintiff's vehicle was repossessed, not when plaintiff was aware taking was wrongful, and, therefore, trial court did not err in finding that claim was barred by applicable 5-year statute of limitations
- **Enforcing Security Interests** - Debtor's civil extortion claim against creditor and repossession company, based on allegations that defendants threatened to continue to hold debtor's vehicle until she released them from liability for wrongfully taking vehicle, alleged injury to property, and, therefore, 5-year statute of limitations in Iowa Code Section 614.1(4) applied and did not bar claim

Shannon Duncan bought a vehicle with financing through Ford Motor Credit Company. After she allegedly defaulted, Bruce Shores of Repossessors, Inc., repossessed the vehicle on November 19, 2010. Duncan informed FMCC that the vehicle had been wrongfully repossessed and demanded return of the vehicle. Duncan paid the balance owed on March 11, 2011, but the vehicle was not returned to her. FMCC and Repossessors allegedly stated that they would not return the vehicle to Duncan unless she signed a release of liability for wrongful taking. Duncan was able to retrieve the vehicle on June 17, 2011, without signing a release. She claimed that the car had been damaged. On December 16, 2015, Duncan sued FMCC, Repossessors, and Shores for conversion and civil extortion. The trial court concluded that both claims were barred by the applicable statute of limitations. Duncan appealed.

Iowa Code Section 614.1(4) provides a 5-year statute of limitations for actions "founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud." This statute of limitations applies to conversion claims. The Court of Appeals of Iowa found that the conversion cause of action accrued when the vehicle was repossessed on November 19, 2010, not when Duncan claimed that she was aware the taking was wrongful. The appellate court rejected Duncan's argument that because the defendants wrongfully kept her vehicle until June 17, 2011, there was continuous conversion during this time and the continuous tort doctrine applied. The appellate court found that the doctrine did not apply because conversion is a distinct act. Because the conversion occurred on November 19, 2010, the complaint filed on December 16, 2015, was beyond the 5-year statute of limitations in Section 614.1(4). Accordingly, the trial court did not err in granting summary judgment for the defendants on the conversion claim.

With respect to the civil extortion claim, Duncan argued that the trial court erred by applying the 2-year statute of limitations in Section 614.1(2) for actions involving personal injuries and that the 5-year statute of limitations in Section 614.1(4) should have applied. The criminal offense of extortion, codified in Section 711.4(1), gives rise to a civil cause of action for extortion. Duncan's civil extortion claim was based on her allegations that the defendants threatened to continue to hold her vehicle until she released them from liability for wrongfully taking the vehicle. Therefore, the appellate court found that Duncan's cause of action was a claim of civil extortion based on a violation of Section 711.4(1)(g), a threat to wrongfully injure the property of another. The appellate court concluded that Duncan's civil extortion claim alleged an injury to property and, therefore, the 5-year statute of limitations in Section 614.1(4) applied. Because the civil extortion claim arose in June 2011 when Duncan was able to retrieve her vehicle, her complaint, filed on December 16, 2015, was timely under the 5-year statute of limitations. Accordingly, the trial court erred in applying the 2-year statute of limitations in Section 614.1(2) and finding that the civil extortion claim was time-barred.

Fair Credit Reporting Act

Cook v. Mountain America Federal Credit Union
2018 U.S. Dist. LEXIS 130478 (D. Ariz. August 3, 2018)

- **Fair Credit Reporting Act** - Consumer alleged sufficient facts to support FCRA claim that credit report was inaccurate or misleading where original creditor and collection agency both reported balance for account charged off by original creditor

Tyler Cook obtained a loan from Mountain America Federal Credit Union to buy a vehicle. After Cook failed to make payments, Mountain America repossessed the vehicle, sold it at auction, and reported the

outstanding balance of $13,000 as a charge-off to Experian, Equifax, and TransUnion. Mountain America then transferred the deficiency balance to Financial Assistance, a collection agency. Financial Assistance also reported the outstanding balance to the three credit bureaus. Cook disputed the double reporting, but his credit report was not updated. Cook sued the three credit bureaus and Mountain America for failure to report accurate information and conduct a reasonable investigation under Fair Credit Reporting Act. Cook claimed that, because of the same balance being reported by both Mountain America and Financial Assistance, he was denied credit for the purchase of a new home and apartment rentals and suffered emotional distress.

Mountain America moved to dismiss on the ground that the information it reported was accurate. The U.S. District Court for the District of Arizona found that because there was only one $13,000 debt owed by Cook, it was possible that the double reporting could be inaccurate or misleading and lead to an adverse credit decision. In addition, the court found that Cook failed to allege that the credit bureaus notified Mountain America of his disputes, which was an essential element of a claim for failure to conduct a reasonable investigation under the FCRA. The court granted Mountain America's motion to dismiss, but also granted Cook's motion to amend the complaint to cure the defect.

Privacy

LabMD, Inc. v. FTC
2018 U.S. App. LEXIS 15229 (11th Cir. June 6, 2018)

- **Privacy** - FTC's cease and desist order mandating overhaul of company's data security program was unenforceable because, even assuming company's failure to implement and maintain reasonable data security program constituted unfair act or practice under Section 5(a) of FTC Act, order did not enjoin specific act or practice

The U.S. Court of Appeals for the Eleventh Circuit vacated a cease and desist order issued by the Federal Trade Commission related to LabMD, Inc.'s data security practices. The appellate court held that the order was unenforceable because it did not direct LabMD to stop committing any specific act or practice. The appellate court stopped short of deciding whether the FTC has authority under Section 5(a) of the Federal Trade Commission Act to bring enforcement actions based on an alleged failure to implement and maintain reasonable data security.

The appellate court's decision responds to a petition by LabMD to vacate the order that resulted from an administrative complaint filed by the FTC in August 2013. The complaint alleged that, contrary to company policy, a LabMD employee installed a peer-to-peer sharing application on a computer that allowed consumer data to be exposed and further alleged that LabMD engaged in practices that, taken together, failed to provide reasonable and appropriate security for consumers' personal information on LabMD's computer networks. In its answer to the complaint and a motion to dismiss, LabMD called into question whether its alleged failure to implement and maintain a reasonably designed data security program constituted an unfair act or practice under Section 5(a), thereby questioning the FTC's authority to bring the action. When the FTC appealed the administrative law judge's decision regarding the administrative complaint to the full Commission, the Commission vacated the ALJ's decision and declared that the allegations constituted an unfair act or practice under Section 5(a) because such failure caused substantial injury to consumers' privacy rights.

In addressing LabMD's appeal of the FTC's decision, the Eleventh Circuit noted that the decision did not explicitly cite a source for the standard of unfairness it used to reach that finding, but determined that the source was common law negligence. The appellate court stated that, under a negligence theory, a consumer's right of privacy is protected against unintentional invasion. While the appellate court did not address the merits of this theory, the court assumed for the purpose of its decision that the FTC was correct and that LabMD's negligent failure to design and maintain a reasonable data security program invaded consumers' right of privacy and, therefore, constituted an unfair act or practice.

The appellate court then addressed whether the FTC's order was enforceable. In doing so, the court reviewed the FTC's authority to establish an unfair act or practice through litigation in one of two forums - before an ALJ or before a federal district judge. Regardless of the forum, the appellate court observed that specificity in the prohibitions contained in a cease and desist order or an injunction is crucial to enforceability.

Here, the FTC's cease and desist order commanded LabMD to overhaul and replace its data security program to meet what the court called "an indeterminable standard of reasonableness." The appellate court went on to question how a district court could hold that LabMD violated the order's injunctive provisions based on the FTC's vague requirement that LabMD establish, implement, and maintain a comprehensive security program reasonably designed to protect the security, confidentiality, and integrity of consumers' personal information. The appellate court posited a scenario where the FTC sought to enforce the order in a district court and a battle of expert witnesses ensued over whether LabMD's data security practices were reasonable. The appellate court concluded that such a battle would be impossible to resolve because nothing in the order indicates which expert would be correct. Therefore, the appellate court concluded that the FTC could never win on its own motion to enforce the order. In fact, the appellate court stated that for the court to determine that LabMD violated the order by failing to implement a necessary data security practice, the district court would be required to micromanage an injunction that would require repeated modification.

In holding that the order was unenforceable, the appellate court referred to the order's "sweeping prophylactic measures to collectively reduce the possibility of employees installing unauthorized programs on their computers and thus exposing consumer information." Because the FTC failed to enjoin a specific act or practice and instead mandated a complete overhaul of LabMD's data security program, while saying little about how such overhaul was to be accomplished, the order could not be enforced.

Notably, the appellate court observed that had the complaint alleged only that the peer-to-peer sharing application was installed in defiance of LabMD's policies and that act caused alleged consumer injury, a narrowly drawn and easily enforceable order may have followed, requiring LabMD to eliminate the possibility that employees could install unauthorized programs on their computers. The complaint went beyond that single allegation, however, and used the installation of the peer-to-peer sharing application as an entry point to broadly allege that LabMD's data security operations were deficient.

RICO

Kwon v. Santander Consumer USA
2018 U.S. App. LEXIS 20473 (2d Cir. (E.D.N.Y.) July 24, 2018)

- **RICO** - RICO claim against vehicle-secured creditor failed where rate charged for car financing was less than twice enforceable rate

Dae Kwon entered into a vehicle financing contract with a subsidiary of Santander Consumer USA. Kwon sued Santander for violating the Racketeer Influenced and Corrupt Organizations Act, the Servicemembers Civil Relief Act, the Equal Credit Opportunity Act, the Truth in Lending Act, and New York's General Obligations Law. The trial court dismissed Kwon's amended complaint, and the U.S. Court of Appeals for the Second Circuit affirmed.

The appellate court noted that to state a RICO claim based on the collection of an unlawful debt, the plaintiff must allege that the defendant charged a usurious interest rate that is at least twice the enforceable rate. In this case, the appellate court noted that Santander charged an interest rate of 24.99%, which was less than twice New York's maximum permissible rate of 16%. Therefore, the appellate court found that the trial court properly dismissed the RICO claim.

The appellate court noted that the SCRA bars creditors from creating an adverse credit report because of a servicemember's exercise of his or her rights to apply for a stay of a civil action. Kwon's SCRA claim alleged that he exercised his SCRA rights to suspend a civil obligation in 2001 and that Santander submitted an adverse credit report about him. The appellate court found that the SCRA claim failed because Kwon did not allege that Santander knew that he exercised his SCRA rights in the past or that Santander submitted an adverse credit report *because* Kwon exercised those rights.

The appellate court also found that Kwon's ECOA claim failed because he did not allege that he was a member of a protected class or how Santander discriminated against him. Finally, the appellate court agreed that Kwon's TILA and General Obligations Law claims were time-barred.

State Consumer Protection Laws/UCCC

Murphy v. Exeter Finance Corporation
2018 Tex. App. LEXIS 6263 (Tex. App. August 9, 2018)

- **State Consumer Protection Laws/UCCC** - Car buyer unsuccessful on usury, deceptive trade practices, and breach of contract claims against retail installment contract assignee where assignee applied payments, many of which were late or insufficient to pay accrued finance charges, in accordance with contract

Robyn Murphy entered into a retail installment contract with Excel Pre-Owned Super Center in connection with his purchase of a 2011 Dodge Ram truck. Murphy made a $1,000 down payment and financed the remaining $16,330 at 20.6%. The RIC was assigned to Exeter Finance Corporation. Later, Murphy sued Exeter for usury, deceptive trade practices, and breach of contract, claiming that it charged interest exceeding the rate agreed to in the contract by applying his payments primarily or entirely to interest rather than principal. The parties filed cross-motions for summary judgment, and the trial court granted Exeter's motion and denied Murphy's motion. The Court of Appeals of Texas affirmed in part and reversed in part.

The appellate court found that Exeter properly applied Murphy's payments, many of which were late or insufficient to pay accrued finance charges, according to the RIC, which provided that payments will be allocated first to accrued but unpaid finance charges and then to principal. However, the appellate court found that the trial court erred in granting Exeter $5,500 in attorneys' fees and expenses. The parties' contract provided that Exeter could recover attorneys' fees if it hired an attorney to enforce the contract. The appellate court found that Exeter's actions in this case did not amount to enforcement of the contract.

Duke v. All American Ford, Inc.
2018 N.J. Super. Unpub. LEXIS 1809 (N.J. Super App. Div. July 27, 2018)

- **State Consumer Protection Laws/UCCC** - Appellate court affirmed dismissal of New Jersey Truth-in-Consumer Contract, Warranty, and Notice Act claims in four consolidated cases concerning purchase, lease, or rental of motor vehicles where plaintiffs failed to allege they suffered harm or adverse consequence as result of contract provisions that allegedly violated Act

The Superior Court of New Jersey, Appellate Division, consolidated four class actions concerning the purchase, lease, or rental of motor vehicles and certain provisions in those contracts that allegedly violated the New Jersey Truth-in-Consumer Contract, Warranty, and Notice Act. The TCCWNA prohibits sellers, lessors, creditors, lenders, and bailees from offering or entering into written consumer contracts, or displaying any written consumer warranties, notices, or signs, that include "any provision that violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law." The first three cases involved contracts for the lease or purchase of vehicles, and the fourth case involved a vehicle rental agreement. The plaintiffs alleged that certain provisions violated Section 16 of the TCCWNA, which prohibits the inclusion in a consumer contract, warranty, notice, or sign any language stating that "any of its provisions is or may be void, unenforceable, or inapplicable in some jurisdictions without specifying which provisions are or are not void, unenforceable, or inapplicable within the State of New Jersey." The plaintiffs contended that certain language in their purchase, lease, and rental agreements - such as "unless prohibited by law," "where state law requires us," and "the maximum amount permitted by law" - is prohibited by Section 16. The trial court concluded that the contested provisions in the purchase, lease, and rental contracts did not violate the TCCWNA, concluding that the prohibition in Section 16 applies only to multi-jurisdictional contracts, and the contracts in question were subject to New Jersey law only. The plaintiffs appealed.

The New Jersey appellate court affirmed the dismissal, albeit on another ground. The appellate court noted that the New Jersey Supreme Court's decision in *Spade v. Select Comfort Corp.*, 2018 N.J. LEXIS 483 (N.J. April 16, 2018), determined that an additional element of harm is required to be an "aggrieved consumer" entitled to relief under TCCWNA Section 15. The appellate court discerned no significant difference between Sections 15, 16, and 17 of the TCCWNA. The appellate court concluded that the plaintiffs' class action claims failed to state a claim under the TCCWNA because they did not allege that any plaintiff or class member had suffered harm or an adverse consequence as a result of any consumer contract containing any provision or language prohibited by Section 16. Accordingly, the appellate court affirmed dismissal of the TCCWNA claims in all four cases with prejudice.

Armata v. Target Corporation
2018 Mass. LEXIS 364 (Mass. June 25, 2018)

- **State Consumer Protection Laws/UCCC** - Massachusetts debt collection regulations prohibiting creditor from calling debtor more than twice in 7-day period apply to calls made with predictive dialer, whether or not caller actually reaches recipient

In 2013, Debra Armata obtained a debit card from Target Corporation and incurred a debt to Target. In 2015, Armata defaulted on the debt, and Target contacted her frequently, including more than twice in a 7-day period. Target contacted Armata using a predictive dialer or an automatic dialing device. When Armata answered the telephone calls, she heard a prerecorded message requesting that she contact Target. When Armata did not answer, Target did not leave voicemail messages.

The Massachusetts attorney general has issued debt collection regulations that prohibit a creditor from initiating a communication with a debtor by telephone, either in person or by way of text messaging or recorded audio message, more than two times in a 7-day period. The regulations provide an exemption for a creditor that is truly unable to reach the debtor or leave a message for the debtor. Armata sued Target, and the trial court entered summary judgment for Target. Armata appealed.

The Supreme Judicial Court of Massachusetts reversed and granted summary judgment for Armata. First, Target argued that it had not "initiated" the calls with Armata because the calls were initiated using a predictive dialer and not using a recorded audio message, as would be the case with a robocall. The state high court concluded that the specific technology employed by the caller was irrelevant and that the regulation covered any type of call to a debtor's telephone. Next, Target argued that most of its telephone calls to Armata, which went unanswered, were not "communications" under the regulations because Target did not leave a message and, therefore, had not conveyed any information to Armata. The high court determined that it did not matter whether Target had conveyed any information to Armata; rather, the analysis turned on whether Target had initiated the calls to Armata's telephone, which it had.

Finally, Target argued that it qualified for the exemption for a creditor that is truly unable to reach the debtor because it did not leave voicemail messages for Armata and could not have done so without otherwise violating other Massachusetts attorney general debt collection regulations and the Federal Debt Collection Practices Act. With regard to the other Massachusetts debt collection regulations, which prohibit disclosure to third parties that the creditor is collecting a debt, the high court found that Target could have left messages that simply identified that the call was on behalf of Target and that the recipient should return the call, without stating that the purpose of the call was to collect a debt. With regard to the FDCPA, the high court found that the Act does not apply to a creditor collecting its own debts and was, therefore, inapplicable.

Brown v. Capital One, N.A.
2018 U.S. Dist. LEXIS 105414 (D. Md. June 25, 2018)

- **State Consumer Protection Laws/UCCC** - Borrower not entitled to damages from creditor that charged unauthorized convenience fees under Maryland Credit Grantor Closed End Credit Provisions where creditor did not collect more than principal amount of debt

Ella Brown executed a retail installment contract with Easterns Mega Center of Laurel in connection with her car purchase. After Capital One, N.A., the assignee of the RIC, repossessed and sold the car, Brown sued Capital One, claiming that it violated the Maryland Credit Grantor Closed End Credit Provisions ("CLEC") by charging convenience fees when collecting payments by phone or over the Internet. Capital

One moved to dismiss the complaint, and the U.S. District Court for the District of Maryland granted the motion.

The court found that even if Capital One violated CLEC by collecting convenience fees, Brown's claim failed because she is not entitled to damages. Section 12-1018(a)(2) of CLEC provides that a credit grantor that violates the statute may collect only the principal amount of the debt and may not collect any interest, costs, fees, or other charges. Section 12-1018(b) further provides that a credit grantor that knowingly violates the statute must forfeit three times the amount of interest, fees, and charges collected in excess of the amount authorized. The court cited two Fourth Circuit cases holding that a borrower is not entitled to relief under CLEC unless he or she has paid more than the original principal amount of his or her debt. In this case, the court noted that Brown had paid less than the principal amount owed, including approximately $10,000 in interest, costs, fees, and other charges, when she defaulted. The court added that Capital One credited her for all the convenience fees she paid, waived the outstanding balance on the debt, stated that it would not attempt to collect any amounts from her, and deleted the trade line from her credit reports. Brown claimed that even if she was not entitled to damages under Section 12-1018(a)(2), she was still entitled to treble damages under Section 12-1018(b). The court disagreed, noting that recovery under Section 12-1018(b) is allowed only if the credit grantor has recovered excess fees. Because Section 12-1018(a) allows a credit grantor that violates the statute to collect the principal amount of the debt and Capital One had not collected the principal amount owed, the court concluded that it had not collected any excess fees for purposes of liability under Section 12-1018(b).

State Retail Installment Sales Acts / Motor Vehicle Sales Finance Acts

Campbell v. Toyota Motor Credit Corp.
2018 U.S. Dist. LEXIS 118715 (D. Md. July 16, 2018)

- **State Retail Installment Sales Acts/Motor Vehicle Sales Finance Acts** - Creditor that violated Maryland's Credit Grantor Closed End Credit Provisions could keep proceeds of sale of collateral, even though proceeds plus debtor's payments exceeded amount financed
- **State Retail Installment Sales Acts/Motor Vehicle Sales Finance Acts** - Maryland's Credit Grantor Closed End Credit Provisions bar collection of amounts other than amount financed only after date of violation

Delphine Campbell bought a Toyota Rav 4 and financed the purchase with a retail installment contract. Toyota Motor Credit Corporation bought the contract. Two years later, Campbell defaulted, and TMCC repossessed the Rav 4. TMCC sold the Rav 4 to A1 Imports, Inc. TMCC sent Campbell a post-sale notice and a separate deficiency notice. Campbell sued TMCC in state court. She alleged that the post-sale notice she received from TMCC did not include information required under Maryland's Credit Grantor Closed End Credit Provisions ("CLEC") and, as a result, TMCC was not allowed to collect anything other than the original principal balance of the contract. She claimed that TMCC owed her a refund equal to the sale proceeds plus the sum of payments she made on the debt minus the original principal balance. TMCC removed the case to U.S. District Court for the District of Maryland and moved to dismiss.

The court granted TMCC's motion. According to the court, the CLEC bars a creditor from seeking a deficiency if the creditor fails to deliver the required statutory notices. However, the anti-deficiency rule

does not apply unless the creditor brings an action for a deficiency after the sale. TMCC made no attempt to collect anything from Campbell after the sale, so the CLEC anti-deficiency rule did not come into play. The court went on to disagree with Campbell's argument that the CLEC requires a creditor to disgorge all accrued finance charges if the creditor violates the CLEC. According to the court, the CLEC bars a creditor from collecting finance charges and fees earned after a violation. However, the CLEC allows a creditor to keep the finance charges earned before the violation took place. In this case, the error occurred after the sale, and the account did not accrue any new finance charges after the error. As a result, TMCC did not have to refund any finance charges.

Nolden v. Summit Financial Corporation
2018 Fla. App. LEXIS 5742 (Fla. App. April 25, 2018)

- **State Retail Installment Sales Acts/Motor Vehicle Sales Finance Acts** - Legal rate of interest that applied to consumer's car financing transaction was set forth in Motor Vehicle Retail Sales Finance Act, not in usury statute, and thus interest rate imposed under retail installment contract was permissible
- **Usury** - Because consumer's retail installment contract secured price of property sold, transaction was not "loan" subject to Florida's usury statute

Adrianne Nolden signed a retail installment contract to finance the purchase of a used car from Holcombe, USA, Inc., d/b/a AutoShow Sales and Service. The RIC was assigned to Summit Financial Corporation. After Nolden defaulted and the car was repossessed, she sued Summit and AutoShow, alleging that the 27.81% interest rate charged under the RIC exceeded the 18% interest rate limit imposed by Florida's usury statute, Florida Statutes § 772.101. The trial court granted the defendants' motions for summary judgment. Nolden appealed.

The Court of Appeal of Florida affirmed the trial court's decision. Usury requires proof of four elements: (1) an express or implied loan; (2) a repayment requirement; (3) an agreement to pay interest in excess of the legal rate; and (4) a corrupt intent to take more than the legal rate for the money loaned. The parties disputed the first and third elements.

With respect to the third element, the appellate court concluded that the legal rate of interest that applied to Nolden's transaction was set forth in the Motor Vehicle Retail Sales Finance Act (Chapter 520), not in the usury statute. The appellate court based this conclusion on evidence showing that the contract at issue was a RIC (the title, language, and terms of the document and the characteristics and conduct of the parties supported this determination), and, under the rules of statutory construction, the more specific statute (the MVRSFA) controlled over the general usury statute. The appellate court went on to find that the interest rate imposed on Nolden - 27.81% - was permissible under the MVRSFA.

With respect to the first element, the appellate court concluded that the transaction at issue was not a "loan" under the usury statute. The usury statute applies only to "contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of a debt." Courts look to the substance of the transaction in order to determine whether a transaction is a "loan" under the usury statute. The appellate court noted that Florida courts have held that contracts to secure the price of property sold are not governed by general usury laws. The appellate court also cited a 1958 attorney general opinion that recognized that sellers and finance companies qualified under the MVRSFA receive "rights and privileges," including the ability to enter contracts that are not "amenable to the

general usury statutes." Accordingly, because Nolden's contract secured the price of property sold, the transaction was not a "loan" subject to Florida's usury statute.

Finally, the appellate court rejected Nolden's argument that AutoShow was required to write "Chapter 520" on the face of the RIC to exempt the contract from the usury statute. The court noted that Nolden misapplied the "parity exception" under Section 687.12, under which licensed lenders are permitted to take advantage of interest rates permitted by a different class of licensed lender if they indicate on the instrument the specific chapter of the Florida Statutes authorizing the interest rate charged. The appellate court found that AutoShow did not rely on the parity exception to charge the interest rate allowed by Chapter 520; it was licensed under Chapter 520 and was thus allowed to charge interest in an amount allowed under Chapter 520.

Titling

In re Thompson
2018 Bankr. LEXIS 1521 (Bankr. W.D. Va. May 23, 2018)

- **Titling** - Car owner unsuccessful on claim that creditor's lien was unsecured because it was not noted on paper title as of bankruptcy petition filing date, where lien was electronically recorded pre-petition
- **Bankruptcy** - Car owner unsuccessful on claim that creditor's lien was unsecured because it was not noted on paper title as of bankruptcy petition filing date, where lien was electronically recorded pre-petition

Eric Thompson filed a Chapter 13 bankruptcy petition on January 8, 2018. He scheduled OneMain Financial as the holder of an unsecured claim. OneMain filed a proof of claim asserting a claim secured by a lien on Thompson's Nissan Altima. Thompson objected to OneMain's proof of claim, arguing that OneMain was an unsecured creditor because its interest was not noted on the Altima's certificate of title as of the petition filing date. Instead, Thompson argued that OneMain's security interest was not perfected until February 2, 2018, when the Department of Motor Vehicles issued a paper title showing OneMain's lien. OneMain countered that its lien was noted on the vehicle's electronic title more than one year prior to Thompson's bankruptcy filing. The U.S. Bankruptcy Court for the Western District of Virginia overruled Thompson's objection.

The court noted that, under Virginia law, a security interest in a vehicle is perfected on the day a successful title application is filed with the DMV. OneMain submitted as evidence a title application signed by Thompson on August 30, 2016 and was stamped as received by the DMV on September 2, 2016. Therefore, the court concluded that OneMain's lien was perfected on September 2, 2016, more than one year prior to Thompson's bankruptcy filing, and that OneMain was the holder of a secured claim.

Truth in Lending Act/Reg Z

Mendoza v. Sidney Auto Sales, Inc.
2018 U.S. Dist. LEXIS 76908 (C.D. Cal. May 7, 2018)

- **Truth in Lending Act/Reg Z** - Payment schedule in retail installment contract that failed to specify amount due for final payment violated TILA

Susana Mendoza bought a vehicle from Sidney Auto Sales, Inc., and financed the purchase by signing a retail installment contract. The RIC contained disclosures required by the Truth in Lending Act. The disclosures included a payment schedule providing for 29 monthly payments of $351.58 beginning on January 20, 2017, and "one final payment" due on June 20, 2019. The payment schedule did not identify the amount due for the final payment. Mendoza sued Sidney Auto, alleging that the failure to include the amount of the final payment violated TILA and Regulation Z.

The U.S. District Court for the Central District of California granted Mendoza's motion for summary judgment. The court concluded that by not including the amount due for the final payment, Sidney Auto violated Section 1638(a) of TILA, which requires a payment schedule to include "the number, amount, and due dates or period of payments scheduled to repay the total payments." The court awarded Mendoza $2,000 in statutory damages.

Unfair and Deceptive Trade Practices Act / Fraud

Yates Bros. Motor Company, Inc. v. Watson
2018 Tex. App. LEXIS 2893 (Tex. App. April 25, 2018)

- **Unfair and Deceptive Trade Practices Act/Fraud** - Use of GPS tracker without buyer's knowledge, repossession of vehicle without any basis to do so, and failure to release truck without payment of repossession fee deemed unconscionable conduct under state deceptive trade practices law

Donna Watson bought a used Toyota Tundra from Yates Brothers Motor Company, Inc. Watson financed the purchase and signed a retail installment contract. Yates installed a GPS tracker on the truck without Watson's knowledge. A Yates employee repossessed Watson's truck. When Watson called to find out the reason for the repossession, Yates told her it took her truck because she did not submit proof of insurance as required under her contract. In response, Watson provided proof of insurance and asked Yates to return the truck. Yates refused to return the truck unless Watson paid a $500 repossession fee. Watson did not pay the repossession fee, and Yates sold the truck. Watson sued Yates for breach of contract, conversion, and violations of the Texas Deceptive Trade Practices Act, including unconscionable conduct under the DTPA. Yates counterclaimed for breach of contract. At trial, Yates testified that it repossessed the truck because Watson did not provide proof of insurance, was behind on her payments, and did not give Yates her current address. The jury found that Watson did not default under the RIC and that Yates acted unconscionably. Yates appealed the judgment to the Texas Court of Appeals.

The appellate court affirmed the trial court's judgment. Yates argued that Watson failed to prove that Yates acted unconscionably. The appellate court disagreed. The appellate court found that the record contained more than enough evidence to support the jury's conclusion that Watson did not breach the contract and that Yates acted unconscionably. Watson offered credible evidence that she was current on her payments, she notified Yates when she changed her address, and her insurance company had provided Yates with proof of insurance. As a result, the jury could reasonably find that Watson did not breach the RIC and, therefore, Yates had no basis to repossess her truck. Assuming no default, Yates had no contractual or other basis to require Watson to pay a repossession fee or to sell the truck. According to the appellate court, a person acts unconscionably under the DTPA if he or she takes advantage of a

consumer's lack of knowledge and the resulting unfairness is "glaringly noticeable, flagrant, complete and unmitigated."

Uniform Commercial Code

Williams v. American Honda Finance Corporation
2018 Mass. LEXIS 351 (Mass. June 5, 2018)

- **Uniform Commercial Code** - Under Massachusetts law, pre- and post-sale notices are insufficient when deficiency balance is not calculated using fair market value of repossessed vehicle and when they fail to accurately describe this calculation
- **State Retail Installment Sales Acts/Motor Vehicle Sales Finance Acts** - Under Massachusetts law, fair market value used to calculate debtor's deficiency balance after vehicle repossession is not fair market retail value

Rachel Williams defaulted on the financing contract for the purchase of her car. American Honda Finance Corporation repossessed and sold the car. Based on the car's condition and data from the *Black Book* - a trade manual that provides estimated values for vehicles - Honda Finance set a floor price of $8,700 for the car at auction. The car sold for $8,900.

Williams brought a putative class action against Honda Finance, alleging that the pre-sale and post-sale notices it sent to her in connection with the repossession and sale violated the Uniform Commercial Code, the Massachusetts Motor Vehicle Retail Installment Sales Act, and Chapter 93A of the Massachusetts General Laws. Williams argued that, in calculating her deficiency obligation, the pre-sale notice did not reference the "fair market value of the car," but used the following language: "The money received from the sale (after paying our costs) will reduce the amount you owe. If the auction proceeds are less than what you owe, you still owe us the difference." Williams argued that, in calculating her deficiency obligation, the post-sale notice again referenced the auction proceeds, which she contended did not represent the fair market value of the car.

The U.S. Court of Appeals for the First Circuit certified three questions to the Massachusetts Supreme Judicial Court. *See* Williams v. American Honda Finance Corporation, 2017 U.S. App. LEXIS 10238 (1st Cir. (D. Mass.) June 8, 2017). In this decision, the Massachusetts high court issued a majority decision answering them.

The MMVRISA imposes certain consumer protections when a vehicle is repossessed and sold. These protections displace standard Uniform Commercial Code Article 9 provisions in three key regards: (1) no deficiency balance may be sought if the consumer's unpaid balance was $2,000 or less at the time of default; (2) if a deficiency balance is permissible, it must be calculated by subtracting the "fair market value" of the collateral from the unpaid balance due; and (3) the only permissible costs that may be added to this calculation are reasonable vehicle repossession and storage costs. What constitutes the "fair market value" of the vehicle is undefined in the statute. The MMVRISA notes: "In a proceeding for a deficiency the fair market value of the collateral shall be a question for the court to determine. Periodically published trade estimates of the retail value of goods shall, to the extent they are recognized in the particular trade or business, be presumed to be the fair market value of the collateral."

The first certified question asked: Is the fair market value used to calculate the deficiency balance the fair market retail value of the collateral? The high court responded to this question in the negative. The high court noted that the language of the statute simply refers to the "fair market value" as the basis for calculating the consumer's deficiency balance, with such value being generally understood to mean the "highest price … a hypothetical buyer would pay to a hypothetical willing seller in an assumed free and open market." While the high court did not endorse any particular method to determine the fair market value when calculating a deficiency balance, the holding suggests that creditors should act reasonably under the circumstances and use a method aimed at obtaining the highest possible price when the vehicle is sold.

In a strict parsing of the statute, the high court noted that the estimated retail value of the collateral becomes relevant only in a suit for the deficiency balance. The estimated retail value becomes the presumptive fair market value of the collateral and shifts the burden to the creditor to otherwise prove the fair market value. Ultimately, the court in such a deficiency proceeding will determine that value "based on all of the facts and circumstances, including the particular goods to be sold, the relevant markets, the particular creditors and debtors, and the [estimated retail value of the collateral] rebuttable presumption."

The final two certified questions are similar and were handled together in the high court's response. The second certified question asked: Is (and in what circumstances) a pre-sale notice of a vehicle that conforms to UCC Article 9 requirements - but does not reference the potential deficiency as based on the fair market value of the vehicle - reasonable and sufficient under the UCC? The third certified question asked: Is (and in what circumstances) a post-sale accounting and deficiency explanation sufficient under the UCC if it does not calculate the deficiency amount based on the fair market value of the collateral?

In both cases, the high court held that such notices are insufficient when the deficiency is not calculated using the fair market value of the collateral and when they fail to accurately describe this calculation. The holding provides model language that may be used in lieu of the standard pre-sale notice required under UCC Section 9-614 and indicates that post-sale accounting notices required by UCC Section 9-616 must clearly identify the fair market value of the collateral in the calculation of the deficiency balance.

Unsolicited Marketing / Telephone Consumer Protection Act

Ammons v. Ally Financial, Inc.
2018 U.S. Dist. LEXIS 108588 (M.D. Tenn. June 27, 2018)

- **Unsolicited Marketing/Telephone Consumer Protection Act** - Court granted plaintiff's partial summary judgment motion in Telephone Consumer Protection Act case, finding as matter of law that predictive dialer is regulated as autodialer
- **Unsolicited Marketing/Telephone Consumer Protection Act** - In Telephone Consumer Protection Act case, court denied both parties' summary judgment motions on issue of whether contract can eliminate consumer's ability to revoke Telephone Consumer Protection Act consent

Martha Ammons and her daughter financed a vehicle purchase, and the credit contract was assigned to Ally Financial, Inc. Ally called Ammons's cell phone hundreds of times in an attempt to collect the amount

owed on the contract and used a predictive dialer to do so. Ally's calls continued even after Ammons allegedly asked Ally to stop calling. Ammons sued Ally, alleging that its calls violated the Telephone Consumer Protection Act because Ally used an autodialer to call her cell phone without the consent required by the Telephone Consumer Protection Act. Ally moved for summary judgment, and Ammons moved for partial summary judgment. The U.S. District Court for the Middle District of Tennessee denied Ally's motion and granted in part and denied in part Ammons's motion. The court's opinion addresses high-priority issues in current TCPA litigation: the "autodialer" standard and the right to revoke consent.

On the first issue, the parties agreed that Ally used a predictive dialer to call Ammons but disagreed as to whether a predictive dialer satisfies the TCPA's "autodialer" standard. This standard has evolved over time and is the subject of considerable uncertainty following the decision in *ACA Int'l v. Federal Communications Commission,* 2018 U.S. App. LEXIS 6535 (D.C. Cir. March 16, 2018). In that decision, the U.S. Court of Appeals for the District of Columbia Circuit rejected the Federal Communications Commission's 2015 guidance interpreting the autodialer standard. In the wake of that opinion, courts have wrestled with whether that opinion also rejected the FCC's related guidance from 2003, 2008, and 2012. That earlier guidance was not expressly at issue in the *ACA Int'l* matter. This court held that the FCC's earlier interpretations were still valid. For that reason, the court concluded as a matter of law that Ally's predictive dialer was a TCPA "autodialer" because it had the capacity to dial without human intervention.

On the second issue, the court considered whether the parties' contract permitted Ammons to revoke TCPA consent she had previously provided when she volunteered her cell phone number to Ally on her credit application. In 2015, the FCC established that consumers may revoke TCPA consent at any time and through any reasonable means. The FCC further stated that callers could not limit the manner in which revocation may occur. The parties' contract in this case stated that any changes to the contract must be in writing and signed by Ally. Ally relied on this provision in arguing that any oral attempt by Ammons to revoke TCPA consent was ineffective. This approach to using the contract to restrict or eliminate a consumer's right to revoke TCPA consent was effectively established in *Reyes v. Lincoln Automotive Financial Services*, 2017 U.S. App. LEXIS 11057 (2d Cir. (E.D.N.Y.) June 22, 2017). In *Reyes*, the U.S. Court of Appeals for the Second Circuit held that oral revocation of TCPA consent was an improper attempt to unilaterally modify a bargained-for agreement, given that the contract precluded oral modifications. This court took a dim view of the *Reyes* court's position. The court reasoned that it effectively gutted a right established in a consumer protection statute using unpersuasive logic. The court acknowledged that this is a fact-specific analysis, depending on the contractual language regarding modification. However, the court seemed skeptical that any sweeping elimination of the right to revoke TCPA consent would survive scrutiny. In this case, the court concluded that the question of whether Ammons revoked her TCPA consent could not be resolved at the summary judgment stage.

Warranty/Lemon Laws

Friedberg v. Maserati North America, Inc.
2018 U.S. Dist. LEXIS 128758 (E.D. Pa. August 1, 2018)

- **Warranty/Lemon Laws** - Vehicle lessee qualified as "consumer" entitled to sue manufacturer under Magnuson-Moss Warranty Act

Michael Friedberg leased a new Maserati from F.C. Kerbeck & Sons and received a warranty booklet that outlined several warranties he obtained. Soon after leasing the car, Friedberg noticed significant defects, including an oil leak and a defective rear differential. He had the car repaired several times, but the defects remained. Friedberg sued Maserati North America, Inc., for violating the Magnuson-Moss Warranty Act, among other claims. Maserati moved to dismiss the MMWA claim, and the U.S. District Court for the Eastern District of Pennsylvania denied the motion.

Maserati claimed that the MMWA only protects consumers who buy vehicles, not consumers who, like Friedberg, lease vehicles. The court disagreed. The MMWA protects consumers who are damaged by the failure of a warrantor to comply with a warranty. The statute defines "consumer" as: (1) a buyer; (2) any person to whom the product is transferred during the duration of a warranty applicable to the product; and (3) any other person who is entitled, under the terms of the warranty or service contract or applicable state law, to enforce the obligations of the warranty or service contract against the warrantor or service contractor. Because Friedberg did not qualify as a buyer, the court looked to the other two definitions of "consumer" and the definition of "warranty" as a written affirmation "in connection with the sale of a consumer product." Maserati argued that, in light of the "warranty" definition, "only an individual who actually bought a good with a warranty can qualify as a consumer" under the MMWA. The court, instead, found that "the statute does not require the plaintiff to show that he has purchased the product at issue; it only requires that a sale 'occur sometime within the sequence of events that ultimately places the consumer product with the consumer.'" At this stage of the litigation, the court found that Friedberg adequately alleged that there was a warranty made in connection with a sale of a consumer product because Maserati sold the car to F.C. Kerbeck with a warranty, and F.C. Kerbeck leased the car to Friedberg with a warranty. Therefore, according to the court, Friedberg qualified as a "consumer" entitled to sue under the MMWA.

ASSEMBLY, No. 1843

STATE OF NEW JERSEY

218th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2018 SESSION

Sponsored by:
Assemblywoman PAMELA R. LAMPITT
District 6 (Burlington and Camden)
Assemblyman RAJ MUKHERJI
District 33 (Hudson)
Assemblyman JAMEL C. HOLLEY
District 20 (Union)
Assemblyman JOE DANIELSEN
District 17 (Middlesex and Somerset)
Assemblyman BENJIE E. WIMBERLY
District 35 (Bergen and Passaic)
Assemblywoman ANGELA V. MCKNIGHT
District 31 (Hudson)

Co-Sponsored by:
Assemblyman Conaway, Assemblywoman Quijano, Assemblyman Coughlin and Assemblywoman Mosquera

SYNOPSIS

Allows termination of motor vehicle lease in event of death; prohibits imposition of fee for early termination.

CURRENT VERSION OF TEXT

Introduced Pending Technical Review by Legislative Counsel.

AN ACT concerning motor vehicle leases and supplementing Title 56 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. a. A dealer or lessor shall allow a motor vehicle lease to be terminated early in the event of a lessee's death, if the motor vehicle was leased in this State and, at the time of the lessee's death, registered in this State.

b. A dealer or lessor shall not impose or assess a fee for the early termination of a motor vehicle lease in the event of a lessee's death pursuant to the provisions of subsection a. of this section. This subsection shall not preclude a dealer or lessor from assessing a reasonable fee for a motor vehicle returned with excess wear, if specified in the lease agreement.

c. A motor vehicle lease shall not require, in the event of a lessee's death, that the decedent's surviving spouse, family member, guardian, or estate administrator or executor: purchase the leased motor vehicle; buy out the remainder of the lease; or continue to lease the motor vehicle under the original terms of the lease.

d. A surviving spouse, family member, guardian, or estate administrator or executor shall provide a death certificate or other satisfactory proof of the lessee's death to the dealer or lessor within 60 days after the death of the decedent in order to have a lease terminated pursuant to the provisions of this section.

e. The lease shall be terminated upon return of the motor vehicle to the dealer or lessor.

f. This section shall not apply to commercial vehicles.

2. a. A dealer or lessor shall provide written disclosure, in a contract or financing agreement to lease a motor vehicle, that the lease may be terminated early in the event of the lessee's death, pursuant to section 1 of P.L. , c. (C.) (pending before the Legislature as this bill).

b. A violation of subsection a. of this section shall be subject to a penalty of $500, to be collected in a civil action by a summary proceeding under the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

3. Section 1 of this act shall take effect immediately and shall apply to any motor vehicle lease signed on or after the date of enactment of this act, and section 2 of this act shall take effect on the first day of the second month next following enactment.

STATEMENT

This bill allows a motor vehicle lease to be terminated upon the death of the lessee and the return of the vehicle to the dealer or lessor.

The bill prohibits a dealer or lessor from imposing or assessing any fee for the early termination of a vehicle lease in the event of a lessee's death. However, the dealer or lessor would be permitted to assess a reasonable fee for a vehicle returned with excess wear, if specified in the lease agreement.

The bill also prohibits a lease from requiring, in the event of a lessee's death, that the decedent's surviving spouse, family member, guardian, or estate administrator or executor: purchase the leased motor vehicle; buy out the remainder of the lease; or continue to lease the motor vehicle under the original terms of the lease.

A surviving spouse, family member, guardian, or estate administrator or executor would need to provide a death certificate, or other satisfactory proof of the lessee's death, to the dealer or lessor within 60 days after the death of the decedent.

Further, the bill requires that dealers and lessors provide information about early termination in the event of death in the lease contract or financing agreement. A dealer or lessor in violation of this requirement would be subject to a $500 penalty.