Additional State Action

California Student Loan Servicing License

Applies to anyone who:

1. Receives any scheduled periodic payments from a borrower or any notification that a borrower made a scheduled periodic payment and applied those payments to the borrower's account pursuant to terms of the loan/contract;
2. During a term when no payment is required, one who maintains account records and communicates with the borrower regarding the loan; OR
3. Interacting with the borrower regarding the prior two categories in the effort to avoid default.

The legislature has since reconsidered this scope, and excluded debt collectors collecting who are collecting defaulted student loans.

A licensee must

Develop policies and procedures
Comply with the SLSA
Report a licensee's bankruptcy filing
File reports with the commissioner
Submit to periodic examination
Provide info re repayment and loan forgiveness options on its website

Additional State Action

Other States With Student Loan Servicing License Requirements

Washington DC Student Loan Servicing License

Cost originally was set at $800 plus **$6.60 per loan**!

The city reduced it to $0.50 per loan… *phew*

Licensing regulations exist in Connecticut and Illinois as well. Additional licensing considerations are in place for Main, New York and Washington state.

New York Cybersecurity Law

Overly detailed regulation requiring policies and procedures, audit, risk assessments, designation of a CISO, and submission to examination.

Arbitration Clauses

CFPB's attempt to establish a rule that regulated arbitration clauses

- Final rule issued July 10, 2017
- Required notice for new terms in all existing arbitration agreements
- Mandatory language for all future arbitration agreements
- Production of arbitration records to the Bureau, which would then be published

→ Congress utilized the Congressional Review Act to invalidate the rule, which was signed by President Trump (Nov. 1, 2017)

Arbitration Clauses

Federal Arbitration Act establishes a strong policy supporting arbitration of disputes (9 *USC* Section 1)

- Arbitration agreements may be enforced in federal court by making a motion to compel arbitration
- The arbitration clause will not be enforced if there is a finding "at law or equity for the revocation of any contract" e.g.:

  Fraud

  Duress

  Unconscionability

- Statutory provisions also cover appointment of arbitrator(s), witnesses, fees and compelling attendance
- Once an arbitrator makes a decision, the arbitrator's award may be enforced in federal court

Arbitration Clauses

Advantages to Arbitration

- Choice of arbitrator
- Privacy
- Expedited decision-making

Disadvantages to Arbitration

- Cost
- Limited appeal rights
- Uncertainty in the standards to determine the merits

A well-drafted arbitration clause gives you control over your dispute process!

But maybe even more importantly…

Arbitration Clauses

Class actions may be waived under Federal Law:

AT&T Mobility LLC v. Concepcion 131 S.Ct. 1740 (2011)

- The case involved whether the defendant could compel arbitration and enforce a class action waiver in a case filed in federal court within the State of California.
- The district court denied the motion and the 9th Circuit affirmed holding that California's "Discover Bank" rule invalidated the arbitration clause under California state law.
- The Supreme Court reversed finding that the Federal Arbitration Act (FAA) preempts the California state rule, and that the arbitration clause and class action waiver were enforceable under the FAA

Arbitration Clauses

Class actions may be waived under Federal Law (cont'd)

American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013)

- Arbitration clause states that all disputes are to be resolved by way of binding arbitration and that there "shall be no right or authority for any Claims to be arbitrated on a class action basis".
- 5-3 Supreme Court decision holding that class action arbitration waivers contained in mandatory arbitration clauses are enforceable

DIRECTV, Inc. v. Imburgia, 136 S.Ct. 463 (2015)

- Arbitration clause in the DirecTV agreement also included a class action waiver regarding disputes over termination fees
- The case was originally venued in California Superior Court, which denied DirecTV's motion to compel arbitration.
- The California Court of Appeals held that California state law would apply, and applied the Discover Rule.
- The U.S. Supreme Court reversed consistent with the decision in *AT&T Mobility v. Concepcion*.

Express Consent to Receive Autodialed Calls

47 *USC* Section 227(b)(1) states:

"It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes ***or made with the prior express consent of the called party***) using any automatic telephone dialing system or an artificial or prerecorded voice…" (Emphasis added)

The FCC ruled in 2008: "[P]rior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed… Calls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call."

Express Consent to Receive Autodialed Calls

Reyes v. Lincoln Automotive Financial Services, 861 F.3d 51 (2017 2nd Cir.)

- Lease agreement included a provision consenting to receive phone calls placed using an automatic telephone dialing system, prerecorded and artificial voice, text messages and emails.
- After not making payments, Lincoln called multiple times.
- Reyes disputed the balance and made verbal and written requests to cease contacting him.
- Reyes sued Lincoln under the TCPA.

The 2nd Circuit ruled in Lincoln's favor holding: "The TCPA does not permit a party who agrees to be contacted as part of a bargained-for exchange to unilaterally revoke that consent."

Other cases have followed this ruling. See e.g.:

Harris v. Navient Solutions, LLC 2018 WL 3748155 (D. Conn. Aug. 7, 2018)

Tillman v. The Hertz Corp., 2018 WL 4144674 (ND Ill. Aug. 29, 2018)

Few v. Receivables Performance Management, 2018 WL 3772863 (ND Ala. Aug. 9, 2018)

Express Consent to Receive Autodialed Calls

But see:

Rodriguez v. Pemier Bankcard, LLC, 2018 WL 4184742 (ND Ohio Aug. 31, 2018) finding a distinction between "prior express consent" under the TCPA and a consent provision embedded within a contract.

Ginwright v. Exeter Finance Corp., 280 F.Supp. 3d 674 (D. Md. 2017) finding that a contractually enforceable consent is inconsistent with the FCC's 2015 ruling that a consumer has "a right to revoke consent."

Collection Costs

Bradley v. Franklin Collection Services, 739 F.3d 606 (11th Cir. 2014)

- Hospital admission forms that stated the consumer agrees "to pay all costs of collection" means the "actual costs" of collection.
- The court differentiated actual costs from a percentage of the balance.

→ Because a percentage of the balance was not authorized by the agreement, the debt collector was in violation of the Fair Debt Collections Practices Act.

- But the court wrote:

"This is not to say that Bradley and [the creditor] could not have formed an agreement allowing for the collection of the percentage-based fee. It is the nature of the agreement between Bradley and [the creditor], not simply the amount of the fee that is important here."

Collection Costs

Kaymark v. Bank of America, NA, 783 F.3d 168 (3rd Cir. 2015)

Contract stated: "Lender may charge Borrower fees for services *performed in connection with* Borrower's default and for the purpose of protecting Lender's interest in the Property and rights under this Security Agreement, including, but not limited to, attorneys' fees, property inspection and valuation fees.

....

If the default is not cured as specified.... Lender shall be entitled to collect all expenses *incurred* in pursuing the remedies provided in this Section [ ], including, but not limited to, attorneys' fees and costs of title evidence to the extent permitted by Applicable Law."

Ruled: Consistent with Bradley, a debt collector may not assess a percentage of the balance as a collection cost because it is not authorized by the agreement.

Collection Costs

Robertson v. Enhanced Recovery Co., 2017 WL 5951584 (D. NJ Nov. 30, 2017)

- Contract between creditor and debtor stated:

"If you fail to pay on time and Verizon Wireless refers your account(s) to a third party for collection, Verizon Wireless will charge a collection fee at the maximum percentage permitted by applicable law, but not to exceed 18 percent, to cover collection-related costs."

- This court stated: "unlike the agreement in Bradley, it explicitly permits Verizon to charge a percentage-based fee."
- Not only was the percentage expressed in the provision, but the phrase "to cover collection-related costs" made the provision prospective.

Questions? Please type them using the chat feature located on the right side of your screen

Thank You for Your Time!

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