The Inside Line

March 1, 2014
Volume 2 Issue 1

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Exec's Corner

Terry Metcalf, Executive Vice-President

On February 26, 2014, Sandy Lynskey, the Chief of the Ohio Attorney General Mike DeWine's Consumer Protection Section, notified me that the Section has initiated an Advertising Review and Enforcement Project to ensure that businesses are complying with Ohio's consumer laws that govern advertising. In response, we have reached out to the Attorney General's office to conduct a seminar for the members to review the applicable laws in order to contrast what are good practices with those that the Attorney General views as deceptive. Our legal counsel, Larry Bach, would participate in the seminar and be available to discuss specific examples. Please let me know if this is of some interest and depending on the response we will schedule the seminar.

Inside This Issue

Ohio's Right to Cure Law: Despite the Bad Press, it is Working to Quickly Resolve Consumer Litigation

By Larry Bach

"Two years into the amendment, the Right to Cure law is working to speed up resolution of consumer claims."

On April 2, 2012, Ohio adopted the "Right to Cure" amendment to the Ohio Consumer Sale Practices Act (the "CSPA") which allows suppliers to offer a settlement in the early stages of a lawsuit brought by a consumer under the Act. The amendment generated significant controversy. In a press conference on June 21, 2011, Ohio Attorney General Mike DeWine announced his support of the changes as an effort to "speed up the process" in resolving consumer disputes. Nevertheless, the "Consumer" voice of many Ohio newspapers bitterly opposed the amendment and singled out it sponsors as being anti-consumer.

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By distorting the nature of the amendment its opponents tried to claim that the CSPA—which was first adopted in Ohio in 1972—was "now one of the weakest consumer laws in the country." For example, Sheryl Harris, a columnist for the Plain Dealer, wrote on April 3, 2012 that:

> *With the scratch of a pen, [Governor John] Kasich granted companies that cheat Ohioans a "right to cure," which lets wayward businesses dodge consequences for using deception as a sales tool.*

Apparently, the mere fact that someone was named in a lawsuit automatically branded them as cheater. She went on to claim that "Businesses that conduct themselves honorably are put at a disadvantage" because competitors that engage in unfair tactics "no longer face an economic penalty for cheating." Naturally, no proof was offered for any of these assertions and a fair analysis would show that the statement lacks merit.

A February 13, 2012 article in the Akron Beacon Journal lamented that the CSPA before the amendment was "one of the nation's best preventions against fraud and unfair business practices." The article listed a number of unsupported "facts" to support the claim that the right to cure amendment would make Ohio's law "substantially weaker" than the laws in other states. One of the most glaring misstatements was the claim that "no other state has a 'right to cure' law or provision that allows businesses to stop a suit after filing. As a point of fact, the amendment does *not allow anyone to stop the lawsuit!* As for the laws in other states, one need look no further than West Virginia for a statute that requires a consumer to allow a business the opportunity to cure a complaint ***before*** any lawsuit was filed. See, §46A-6-106 West Virginia Code.

The Columbus Dispatch quoted a representative of the Ohio's trial lawyers association who stated that the current law was already one of the "weakest" in the country and that the amendment would make the CSPA one of the "very worst" in the nation. Of course no one could point to any study examining the various consumer protection laws enacted within the United States and, the Uniform Law Commission, the body that drafted the Uniform Consumer Sales Practices Act from which Ohio's CSPA is patterned, shows that only Ohio, Kansas, and Utah adopted the act.

Ohio's CSPA was designed to provide consumers with remedies against suppliers who engage in deceptive or unconscionable acts or practices. The CSPA allows

consumers to recover economic and non-economic damages as well as treble damages, attorney's fees and court costs if the consumer prevails. Several years ago the Ohio Legislature noticed that the law was having unintended results and limited non-economic damages to $5,000.00.

The CSPA is generally used as one of many methods for a consumer to press a legal claim against a supplier. Common law claims for fraud, breach of contract, and negligence, just to name a few, are usually included in the lawsuit. In practice, the award of massive attorney fees to prevailing consumers prompted the legislature to take another look at the CSPA. In Summit County alone, courts repeatedly affirmed attorney fee awards in excess of $100,000.00.

What the "Right to Cure" amendment does.

The amendment allows a supplier to take quick action to resolve a consumer complaint. The statute allows for a supplier to make a cure offer to the consumer within 30 days after being served with the lawsuit. The cure offer must:

- Include a monetary settlement amount;
- Include an offer to pay the consumer's attorney fees (up to $2,500) and court costs;
- Include a prominent notice using specific statutory language;
- Be served by certified mail on the consumer; and the
- Notice of the cure offer must be filed in the court proceeding.

Once the cure offer is properly served, the consumer has thirty days to accept the offer. If the consumer rejects the offer, or does nothing within the 30 day period—which is considered a rejection—the burden shifts to the consumer to demonstrate in the lawsuit that the cure offer was insufficient to remedy the violation. If the consumer is unable to establish actual economic damages in excess of the amount in the cure offer, then the consumer cannot receive treble damages, court costs, and attorney fees incurred after receipt of the cure offer.

How the Right to Cure has impacted litigation.

Despite the virulent attacks on the legislature when the Right to Cure amendment was enacted, the Attorney General's office has seen no noticeable decline in consumer complaints, and Mr. DeWine's staff continues to actively investigate consumer complaints. To date, no Ohio Appellate Court has issued a ruling regarding the amendment. Two years into the amendment, the Right to Cure law is working to

speed up resolution of consumer claims. My office has used the amendment with mixed, but generally positive results. In eight CSPA cases since July, 2012, we have been able to dispense with five matters within less than six months after the lawsuit was filed, which if you have ever been involved in a civil lawsuit, is near record time. In those cases, the consumer accepted the cure offer. In the remaining three cases, no cure offer was made in one and in the other cases the consumers rejected the cure offers and the claims continue.

There is no guarantee that a cure offer will quickly resolve a consumer's claim. In one case, the consumer's attorney accepted the cure offer on the CSPA allegation, but wanted additional relief on the common law claims, which is a practice that the amendment arguably allows. The key to making a cure offer is to thoroughly analyze the claims and make a worst case assessment of the claims and base your cure offer on that assessment. The assessment does not need to include the prospect of treble damages for purposes of the cure offer.

You should note also that at least one consumer attorney has crafted a way around the statute by invoking the dealer's arbitration agreement. If a consumer does not file a lawsuit but instead, demands arbitration, there is no ability to resort to the right to cure protection, as the statute only applies when a civil lawsuit is filed, and arbitration can begin without any involvement of the courts. Nevertheless, the Right to Cure is a positive development for dealers that find themselves on the receiving end of a CSPA claim.

Arbitration Update: Will the Government Ban Consumer Arbitration Agreements?

By Larry Bach

The last issue of *The Inside Line* examined the use of arbitraton agreements in consumer contracts. While the Supreme Court continues to uphold their use, the new Federal Consumer Protection Agency seems to be moving to limit the use of such agreeements or prohibit them completely.

In the wake of the recession of 2007, Congress passed and President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Act created the Consumer Financial Protection Bureau (CFPB). The stated desire of the CFPB was to consolidate most Federal consumer financial protection authority in one place.

The CFPB's stated goal is to watch out for American consumers in the market for consumer financial products and services.

The agency actively collects complaints and conducts investigation and, if necessary, will sue to enforce the law. While the law establishing the agency was passed in 2010 and the first director of the agency was appointed in January, 2012, the appointment was not confirmed until July, 2013. President Obama used a recess appointment to fill the post with Richard Cordray, the former Ohio Attorney General. His confirmation was strongly opposed in the Senate and lingered until a deal was struck between the Senate and the President. The exact process was quite interesting but outside the scope to this comment.

Whether his opponents' criticisms were regarding Mr. Cordray were fair remains to be seen. As the Ohio Attorney General, he did show a willingness to meet with auto dealers and discuss enforcement of Ohio's consumer laws.

An overlooked provision of the law is its ability to develop rules that have the potential of altering long standing and settled practices. It now seems that mandatory arbitration agreements in consumer contracts are squarely in the agency's cross hairs.

On December 12, 2013, Director Cordray held a meeting in Dallas, Texas as part of the agency's efforts to go outside of the Beltway to gather information "about how consumer financial products and services are affecting people around the country." The specific purpose of the meeting was to examine the impact of arbitration agreements. In his prepared remarks at the meeting, Director Cordray examined the history of arbitration in the United States including the longstanding judicial hostility to mandatory arbitration agreements. He noted that in the late 1960's the law "took a dramatic turn" in which the Supreme Court revised its previous views of the Federal Arbitration Act and has determined that the statute "evinces a core policy favoring arbitration as a means of resolving disputes."

In what may be foreshadowing, Mr. Cordray noted that the Dodd-Frank Act specifically authorized the agency to make a determination whether mandatory arbitration agreements in consumer financial agreements should be prohibited, conditioned, or limited an any way, based upon a study that the agency is to perform and report to congress on. The agency can adopt regulations that could prohibit or limit the use of arbitration agreements if the agency determines the measures are in the public interest and will protect consumers, as long as the findings are consistent with the study undertaken by the agency.

At this point, the study undertaken by the CFPB has focused on a "few key consumer markets, including credit cards and checking accounts." There is not mention of whether retail installment agreements or auto purchase agreements have been scrutinized, but any retail installment agreement relating to the financing of a motor vehicle purchase is within the purview of the agency. As to credit card agreements, the agency has determined that the arbitration clauses contained in the agreements "were almost always more complex and written at a more demanding grade level of readability that the other parts of the contracts." The agency also found that nearly ninety percent of the clauses barred class action participation.

To be sure, the agency has not completed its study nor has it signaled an intent to go beyond standard-form contracts where the terms are not subject to negotiation. Nevertheless, it should not surprise anyone if the agency acts to prohibit or limit arbitration clauses in consumer contracts.

Should you be interested, you can find Mr. Cordray's entire prepared remarks at http://www.consumerfinance.gov/newsroom/prepared-remarks-of-director-richard-cordray-at-the-field-hearing-on-arbitration/

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