

ANNUAL MEETING PROGRAMS

ALTERNATIVE DISPUTE RESOLUTION

by Eric Mogilnicki

Wilmer Cutler Pickering Hale and Dorr, LLP

Eric Mogilnicki of Wilmer Cutler Pickering Hale and Dorr, LLP made a presentation to the ADR Subcommittee regarding the recent proliferation of bogus arbitration providers. Facilitated by Internet websites and e-mail solicitations, a growing number of "debt elimination experts" are luring consumers into arbitration schemes purporting to eliminate their credit card and other debt obligations. See, e.g., <http://debteliminationexperts.com/homepage.php>. In return for payments of hundreds or thousands of dollars, these "experts" promise to provide immediate relief from banks and creditors, eliminate or drastically reduce debts, restore credit ratings, and transform debts into monies owed to the borrower.

The arbitration schemes operate by first sending "change of terms" notices purporting to add an arbitration clause to the debt agreement or designating a new arbitration forum. The forum, which typically lacks a street address and rules, in turn issues an "award" declaring the debt unenforceable. In many cases, the ruling also finds that the consumer is owed the dollar amount of the loan as a penalty for unlawful activity. Courts have refused to enforce the bogus awards, but the schemes often push already financially vulnerable consumers toward bankruptcy by wasting money and time while their debts continue to accrue interest and fees. At the end of the process, consumers may have judgments entered against them for attorney's fees and the original debt.

Some lenders report receiving more than a thousand change of terms notices in the last year, and one bank received more than 4,000. Lenders can combat the problem by warning their customer service representatives to be on the look out for such notices, tracking them closely, responding quickly to dissuade customers from participation, and challenging the awards through litigation. As this problem grows, we expect that the Federal Trade Commission, state Attorneys General, and other government agencies will begin to take action against these schemes.

ANNUAL MEETING PROGRAMS

CONSUMER PROTECTION VS. COMPETITION: THE RAGING DEBATE ON A LAWYER'S ROLE AND ETHICAL RESPONSIBILITIES IN RESIDENTIAL REAL ESTATE TRANSACTIONS

*by Richard P. Eckman
Pepper Hamilton LLP*

Proponents of requiring lawyer involvement in residential real estate closings squared off against representatives of the Federal Trade Commission ("FTC") and a trade association representing service providers to the real estate closing industry in a lively and engaging debate at a program sponsored by the Consumer Financial Services Committee at the Annual Meeting.

Dave Whitener, a law professor at the University of South Carolina School of Law and a real estate attorney who practices in South Carolina, a state that has been the hotbed of litigation protecting a lawyer's obligation to be involved in residential real estate transactions, lit up the audience with his "down home" humor and aggressive style in pointing out the reasons that lawyers should be required in such transactions and the protections built into South Carolina law, including its constitution, two state statutes, and three highly publicized South Carolina Supreme Court cases that require attorney involvement in residential closings. He pointed out that the unauthorized practice of law in South Carolina is a felony.

Ken Kendrick, of the Womble Carlyle firm's Atlanta office, joined Mr. Whitener in his defense of such practices. Mr. Kendrick discussed the decision of the Supreme Court of Georgia *In re UPL Advisory Opinion 2003-2*, 277 Ga. 472 (Ga. 2003) in which the Court upheld the Georgia Standing Committee on the Practice of Law's advisory opinion that concluded that the preparation and execution of a deed of conveyance on behalf of another by anyone other than a Georgia attorney is the unauthorized practice of law.

Representing the FTC was Maureen K. Ohlhausen, Deputy Director of the Office of Policy Planning, who took the position, which the FTC has espoused in a number of amicus curiae briefs it has filed in litigation around the country, that attorneys are merely trying to protect their own economic self interests in restricting such closing participation to lawyers, thereby increasing the costs to consumers. Both the FTC and the Department of Justice have issued joint letters, in addition to the briefs they have filed, to the Virginia State Bar, the North Carolina Bar, and the American Bar Association urging against restrictive bar opinions regarding such attorney only closing rules.

Finally, Tom Lammert, General Counsel of the National Real Estate Information Services, a closing service provider, speaking on behalf of the Title and Appraisal Vendor Management Association, the settlement vendor management group, discussed the benefits to consumers of lower costs and better service that are provided by non lawyers serving the real estate settlement industry and criticized states that do not allow lay closings as nothing more than economic protectionism.

For mortgage banking companies, financial institutions, and other lenders involved in real estate lending, the restrictive practices in some states have presented real barriers to providing efficient ways to close both purchase money and home equity loans. In fact, Richard Eckman of Pepper Hamilton LLP pointed out in his opening remarks to the program that lenders in at least one state, Delaware, have been the subject of investigations as to whether they are engaged in the unauthorized practice of law when they close home loans without the assistance of an attorney; Delaware being a state that by Supreme Court decision requires attorney involvement in real estate closings.

Clearly, the unauthorized practice of law issue for home closings is one that will continue to be the focus of industry, government and the private bar in the future as the issue of bundled closing costs, brought to the fore by the RESPA reform efforts, continue to evolve.

ANNUAL MEETING PROGRAMS

THE FACTS OF LIFE: IMPLEMENTING COMPLIANCE WITH THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003

by Patricia E.M. Covington Assistant Vice President & Deputy General Counsel CarMax Auto Superstores, Inc.

Mid-Saturday morning on August 6, the Committee dug into the topic that served as the mini-theme for its Annual meeting—the FACT Act. A panel representative of the banking, community bank, and consumer finance company industries, together with David Stein, counsel for the Federal Reserve Board, discussed the current status of the FACT Act rulemaking, as well as how their respective institutions are approaching and implementing compliance measures.

Kathryn Kohler, Assistant General Counsel for Bank of America Corporation, began the discussion by describing how Bank of America is managing the project. It has formed three groups—a steering committee, comprised of executives; a core team; and a working team that meets regularly. The working team is tasked with analyzing the requirements under the Act, identifying how the business will be impacted by the requirements, developing a timeline for the project, identifying lead times for implementation, and identifying resource requirements, among a sundry of other duties necessary for the organization to become compliant.

The Furnishing of Negative Information Rule was tackled next by David Stein. He reported on the flavor of comments the Federal Reserve received in response to the proposed Rule. He also clarified confusion regarding the Rule’s effective date. He explained that though the final rule was effective July 16, 2004, Section 217 of the FACT Act, which is the provision requiring the notice, does not become effective until December 1, 2004.

The next topic to be explored was the Identity Theft Rules. Patty Covington, Deputy General Counsel for CarMax, Inc., a retailer and automobile finance company, expressed concern over the proposed definitions of “identity theft” and “identity theft report.” She noted that the proposed definition of “identity theft” was very broad, not only because it included attempted fraud, but because it included what has been historically known as fraud—as distinguished from true name fraud or what is commonly thought of as identity theft. She further explained that a host of rights come with this designation (for example, fraud and active-duty alerts, blocking of information from credit reports, a prohibition on furnishing blocked information, responding to victim’s requests for document turnover, a prohibition on selling debts related to identity theft, and a prohibition on furnishing information related to identity theft to credit reporting agencies), and that the resulting

volume of issues would unduly burden the industry.

Michael Briggs, Chief Legal Officer for America's Community Bankers, discussed the Red-flag Guidelines. He noted that though there are no proposed rules, the industry should consider whether it prefers a laundry list of requirements or more general requirements. He remarked that though there is comfort in getting a list of specific requirements that an institution can check off for compliance, a general list would accommodate more flexibility. Further, a list of specific requirements may likely serve as a roadmap for the bad guys.

Kathy Kohler then analyzed the Affiliate Marketing Rule. She pointed out that there were significant constructive disclosure issues and that the exceptions under the proposed rule for established business relationships were too narrow and unduly restrictive and burdensome on the industry.

In addition, the panel outlined the requirements under the Disposal Rule. They discussed what may occur as relates to the Risk Based Pricing Rule, and the many issues that will flow from it. Finally, the panel summarized the proposed Medical Information Rule and described what may result in connection with the Furnisher Rules.

ANNUAL MEETING PROGRAMS

STORED VALUE CARDS PROGRAMS

by Barry Abbott, Howard Rice Nemerovski Canady Falk & Rabkin and David Lipkin, Law Offices of David B. Lipkin

The CFSC sponsored two panels on stored value cards at the Annual Meeting in Atlanta. The first was a program sponsored by the Cyberspace Law Committee and co-sponsored by both the Section of Science and Technology Law and the Committee. It featured our own Professor James L. Brown of the University of Wisconsin-Milwaukee, and was on *Getting Paid in the 21st Century: Gift Cards, Stored Value Cards, Mobile And Contactless Payments, and Other Species of Electronic Money Transmission*.

The second, actually a joint meeting of the Deposit Products and Payment Systems and the Internet Delivery/Electronic Banking Subcommittees, featured Barry Abbott of Howard Rice Nemerovski Canady Falk & Rabkin, Adrienne Hurt, Associate Director of the Federal Reserve Board's Division of Consumer and Community Affairs, Oliver Ireland of Morrison & Foerster LLP, Russell Schrader, Senior Vice President and Assistant General Counsel of Visa U.S.A. Inc. and Rick Osterman, Senior Counsel of the Federal Deposit Insurance Corporation and was on *Stored Value Cards: Recent Regulatory Developments*.

Both panel discussions stressed that stored value programs are proliferating quickly, but that (a) the terminology used to describe the products and programs has been confusing and sometimes has been used in conflicting ways, and (b) the legal and regulatory environment surrounding these products is complex and in flux.

The first panel spent much time discussing state laws, and especially the state money transmitter licensing laws with which non-bank issuers of stored value cards must typically comply. The panel also discussed the state escheat laws and the effect on stored value cards due to increasing state gift certificate legislation and regulation.

The second panel provided an overview of the various types of stored value programs currently available. In addition, Rick Osterman spent a significant amount of time discussing the FDIC's April 6, 2004, proposal to amend the agency's "deposit" regulations (and the FDIC General Counsel's Opinion No. 8 of 1996) concerning stored value cards, by adding 12 CFR §303.16 (69 Fed. Reg. 20558 (April 16, 2004)). Comments for the FDIC's proposal were due by July 15, 2004. Rick discussed some of the comments (all of which appear on the FDIC website), and indicated that the FDIC will spend significant time analyzing those comments before a final rule is issued.

Adrienne Hurt also discussed potential changes to Regulation E in connection with disclosures for, and coverage of, stored value cards. Adrienne indicated that the staff is continuing to review the interplay between Regulation E and stored value cards, and may be issuing a new proposal on the subject later in 2004 or early in 2005.

The panel also discussed the potential effect of the FDIC's "deposit" proposal on other regulations that use the term "deposit" as a triggering term, including Regulation D (for reserves), Regulation CC (with regard to the availability of funds) and Regulation DD (with regard to truth in savings disclosures). The panel also focused on the possible interplay between the FDIC's proposal and both the customer I.D. rules of §326 of the USA PATRIOT Act and the OFAC requirements. Finally, the panel discussed the OCC's recent Advisory Letter 2004-6 (May 6, 2004), providing guidance on Payroll Card Systems.

It appears clear from both panel discussions that stored value cards represent an important and growing area of consumer financial services law. It also appears rather clear that the law affecting these many products is complex, multifaceted and interrelated. This is an area that the Committee is likely to continue focusing upon at future meetings.

ANNUAL MEETING PROGRAMS

WAL-MART v VISA/MASTERCARD: WINNERS, LOSERS, AND COLLATERAL DAMAGE IN THE DEBIT CARD BUSINESS

by David Lipkin, Law Offices of David B. Lipkin

The CFSC in conjunction with the Committee on Antitrust Law offered a Program entitled, “Wal-Mart v. MasterCard/Visa: Winners, Losers and Collateral Damage in the Debit Card Business”. The Panel consisted of David B. Lipkin, Law Offices of David B. Lipkin, Jeffrey I. Schinder, Constantine & Partners, Russell W. Schrader, Senior Vice President and Assistant General Counsel of Visa U.S.A. Inc., Joseph F. Tringali, Simpson Thacher & Bartlett LLP, Jody Leidigh, Vice President of PNC Bank, N.A., and James L. Brown of the University of Wisconsin-Milwaukee. The panel offered perspectives from all points of view involving the case and, more importantly, its aftermath.

The Program was led off by its moderator, David Lipkin, who reviewed the issues presented by the case and the background on the growth and importance of debit card transactions in the financial services industry. Mr. Lipkin pointed out that the credit card market had become saturated, but that the growth in debit card usage was exploding, particularly the use of signature debit. Merchants who were accepting debit cards were forced to accept signature debit by the card associations’ “Honor All Cards” rules. This forced the merchants to process the transaction through the card associations, and to pay a significantly higher fee for the processing of the transaction, while at the same time waiting longer to receive their funds. Wal-Mart, one of the largest retailers, filed a class action antitrust suit against both MasterCard and Visa. The suit alleged a tying violation under the antitrust laws, *i.e.*, in order to purchase one service, credit card processing, the merchants were forced to accept another service, debit card processing, even though the merchants may not have wanted the latter service and it was more expensive. The complaint alleged that both Visa and MasterCard had monopoly power. Further, the suit alleged a conspiracy by both MasterCard and Visa to monopolize the debit card market.

The judge issued a ruling on summary judgment motions that found largely in favor of the plaintiffs on most key issues. This ruling caused the parties to enter into settlements just prior to trial. Under the terms of the settlements MasterCard and Visa will abolish the “Honor All Cards” rules and change their logo designs to clearly mark all debit cards issued with their logo as being “Debit” cards. Further, there was an immediate reduction in the charges for debit card processing by 1/3, with new rates to begin in 2004. Lastly, the card associations agreed to pay 3 billion dollars of damages over a ten-year period.

With this background, Jeff Schinder, who represented the plaintiffs, summarized the

theories and proof of the violations that led to the Judge issuing his ruling. He concentrated on the separation of the two products as distinct from each other and the advantages to the merchant and consumers of PIN debit processing through the ATM networks compared with the signature debit processing through merchant banks. This PIN debit service is more secure for the consumer and cheaper and faster for the merchant with settlement taking place overnight. Moreover, it has a significantly lower fraud exposure for the merchant. Jeff then turned to the effects of the settlement. He indicated that as of January 1, 2004 the Honor All Cards rules were eliminated. Visa and now MasterCard have negotiated special deals with Wal-Mart and several other merchants and there is now a free market for price negotiation for debit card processing. He also spoke of other effects.

Russ Schrader, who represents Visa in the government relations area, spoke about where Visa stands today. He shared a very successful first two quarters of 2004. The results were achieved despite the changes required by the suit. He stated that there are now two separate "Honor All Cards" rules, one for credit and one for debit. These preclude merchants favoring a credit or debit card issued by one bank over a credit or debit card issued by another bank where each bears the Visa logo. He reviewed the new logo for Visa Debit, which will clearly say "Debit" over the Visa flag logo. Then he spoke of the need to develop other products to continue the strong growth Visa has had. Much of this will be in the pre-paid card area.

Joe Tringali, who represented MasterCard in the litigation, then spoke. He noted that the Judge's decision on summary judgment did not find that MasterCard had monopoly power and that proof of a conspiracy would have had to have been made at trial. He pointed out that a number of large merchants had opted out of the settlement and were separately pursuing the case, but the judge has indicated some second thoughts on his findings and that the issue is not yet closed. As to MasterCard's future strategy, he reviewed the new design that MasterCard will use on its debit cards. He also talked of the need for new products and services, mentioning that electronic financial processing is still coming into its own.

Jody Leidigh, a Vice President in charge of all debit products for PNC Bank, the 11th largest debit card issuer, pointed out that the settlement had resulted in a major impact on her bottom line as the largest reduction in fees was to the interchange fee that banks received. However, she pointed out that in the battle between the card associations and the EFT Networks (signature vs. PIN debit) the Networks are raising their interchange to be more enticing to banks. Thus, she felt that over time there will be a movement toward the middle by both. Nonetheless, she said that banks must find new products and services that are desirable to their customer base and that can replenish the lost fees. Some will come from corporate products like payroll cards for the un-banked and health care benefit cards. Others will come from other pre-paid products sold directly to consumers.

Lastly, Professor Jim Brown, a consumer advocate with a special ability to get to the heart of a matter, spoke about consumer issues. He explained that what consumers want is the facility to handle their money and make purchases in the most convenient manner for them, and without excessive cost. This is especially true with regard to accessing their own money on deposit at their bank. The issue he raised was how the banks would charge their consumers to make up for their losses.

This was a very informative program that also led to some discussion of the role of processing companies. There is already one suit between First Data Corporation and Visa underway concerning Visa's processing rules. This is a promising area for a follow-up program in the future.