

Litigation & Enforcement Update

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Do-Not-Fax class action

- Premised on the Telephone Consumer Protection Act (TCPA)
- Claim: lender sent unsolicited fax advertisements to broker (where there was no preexisting business relationship)
- Relief: 47 U.S.C. §227(b)(3) permits recovery of \$500 *per violation*

- Intentional violation = treble damages (i.e., \$1,500 *per violation*)
- TCPA is State claim, not a Federal claim
- No private right of action?
 - *Chair King v. GTE Mobilenet of Houston* (Tex. 2006) 184 S.W.3d 707
 - *Kaufman v. ACS Systems* (2003) 110 Cal.App.4th 886

Foreign Language Disclosure

- Premised on California Civil Code § 1632
 - Claim: loan “negotiated primarily in foreign language”
 - Claim: no foreign language translation of loan agreement and disclosures provided
 - Remedy: rescission (assignee → originator)
 - Remedy: injunction
 - Remedy: attorney’s fees

- Licensee limitation?
- Foreign language disclosure laws also exist in Texas*, Arizona*, Connecticut, Delaware*, Kansas, Nebraska, Illinois, New Mexico, New York

UCL “Fraud” Class Actions

- California’s UCL can be used to pursue claims that lender failed to give an adequate disclosure or gave a misdisclosure
- Question is: can this be done on a class basis?
- In other words, can reliance be presumed?

- Split in authority: *In re Tobacco II* and *Pfizer versus McAdams*
- Now before California Supreme Court
- Ramifications?
 - *Andrews* copycats
 - *Novastar* copycats

Employment Class Actions

- Still on the rise, esp. after *Kenneth Cole*
- How do these claims work?
 - Start with classification question
 - Exempt vs. nonexempt:
 - Admin
 - Executives
 - Professionals
 - Outside sales
 - Highly skilled computer professionals

- Exempt ≠ no risk
 - E.g., timely payment of wages
- Nonexempt = OT and M/R breaks
 - Fed or State law – stricter standard applies
- Misclassification
 - Exposure = unpaid OT for 4 years + pay for missed meal & rest breaks + compensatory damages + punitives + attorneys' fees
 - By the way, you have the burden of proof

- Common pitfalls
 - Salary = exempt (wrong)
 - Job title = exempt (wrong)
 - Exempt = no need to track hours (wrong)

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DOES YOUR BOSS OWE YOU OVERTIME?

WAGE WARS

Billions are at stake
as companies are
forced to pay up

- Anecdote: 80% of new class actions filed in Los Angeles in 2007 have been employment claims...
- And the DOL's loan officer opinion letters have been routinely rejected...

BK Relief From Stay Attorney Fee Claim

- Putative class action against lender defendant for attempting to recover attorneys' fees incurred in obtaining relief from bankruptcy automatic stay.
- Original suit was based on alleged violation of the FDCPA and the bankruptcy laws (i.e., 11 U.S.C. § 506(b) and Fed. R. Bankr. P. 2016(a)).

- Plaintiff argued that trust deed beneficiary is barred from charging attorney fees incurred in connection with bankruptcy without “first getting an order from the bankruptcy court awarding it such fees.”
- Claims dismissed, and plaintiff amended complaint.
- Amended complaint alleges that defendants’ right to collect attorney fees is governed by State law.

- Plaintiff argued that defendants violated California Civil Code § 1717 and § 1021, by collecting attorney fees without proper notice, without establishing a right to recover the fees, and for motions that were unnecessary (i.e., it was not necessary for defendant to seek relief from the automatic stay).
- Case is set for class cert hearing in Oct, trial is in Nov

Summary

1. Check those fax lists
2. Check those foreign language disclosures
3. Check those TILs & GFEs
4. Get a relief from stay order specifically authorizing fees
5. Check in with HR