HUDSON COOK 25th ANNIVERSARY

Consumer Finance Issues Command Supreme Court's Attention in Volatile Term

October 2, 2020 | Mark E. Rooney

The Supreme Court will consider several cases affecting the consumer financial services industry in its upcoming term, which starts October 5. The cases involve substantive issues of liability to consumers, questions relating to arbitrability, and limits on government agency powers.

The issues are important and complex in their own right but their ultimate disposition may be made more complicated in the wake of Justice Ginsburg's death and her expected replacement by Trump nominee Judge Amy Coney Barrett. Justices generally are not involved in deciding cases if they did not take part in the oral argument. Under Supreme Court rules, a 4-4 tie vote among the participating justices means that the lower court's decision stands. Three of the cases highlighted below are scheduled for argument by December 9. If Judge Barrett is not Justice Barrett by then, the Supreme Court's decision in those cases may effectively be no decision at all.

And then there's the presidential election. Before *Bush v. Gore* in 2000, few could have dreamed up a scenario in which the Supreme Court effectively decided an election. But this year, armies of lawyers from both political parties are standing by, ready to litigate any ballot irregularity, perceived or actual—all the way to the top if necessary. In fact, President Trump in this week's debate said he's "counting on" the Supreme Court to play a role in the election. While a repeat of *Bush v. Gore* is unlikely, addressing petitions for certiorari relating to the election (even denying them all) may pose an additional burden on the court, triggering the postponement and re-scheduling of arguments and conferences. The court's schedule this term is already stressed by remote oral arguments and other accommodations in light of the global pandemic. The timing of a new justice's confirmation and the court's potential involvement in the election will add further uncertainty to an already unconventional Supreme Court term.

But the court will persevere. Despite the potential for turmoil, it's a good bet that the court will hear, and decide, the following cases this term. Here's a look at some of the cases to watch in the consumer financial services industry.

Facebook Inc. v. Duguid, No. 19-511. The long and often tortured saga of what constitutes an "automatic telephone dialing system" (ATDS) under the Telephone Consumer Protection Act (TCPA) may finally come to an end as the Supreme Court is poised to resolve this long simmering split of authority. Noah Duguid alleges that he never used Facebook, but the company sent him numerous text messages about issues with his account. The Ninth Circuit held that even though Facebook's equipment did not generate random or sequential numbers to be contacted, it was still an ATDS, and Facebook could still face TCPA liability. Other courts have held the opposite. The court's eventual decision is likely to either further embolden TCPA plaintiffs' attorneys or severely rachet down autodialer litigation. Oral argument

is scheduled for December 8.

Collins v. Mnuchin, No. 19-422. This case involves a constitutional challenge to the structure of the Federal Housing Finance Agency (FHFA), the executive branch agency that oversees Fannie Mae and Freddie Mac. The petitioners are shareholders in those two companies and argue that the FHFA—as an "independent" agency, with a single director, removable only for cause—wields too much executive authority without sufficient accountability to the president. If that premise sounds familiar, it's because the Supreme Court earlier this year struck down a similar agency leadership structure in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). There are two additional similarities to *Seila Law*. First, the position of the United States is that the agency is unconstitutionally structured; an outside lawyer has been appointed by the court to advocate for the constitutionality of the structure. And, second, if the structure is deemed unconstitutional, it is not clear whether the structural provisions can be severed from the rest of the statute, and what effect the court's ruling will have on prior actions by the FHFA. Argument is scheduled for December 9.

AMG Capital Management, LLC v. FTC, No. 19-508. At issue here is the FTC's authority to seek restitution in enforcement actions relating to allegedly false advertisements. The agency's governing statute only speaks of "injunctions and restraining orders" with respect to false advertisement cases, but the FTC in this case obtained a judgment of $1.27 billion in monetary relief. The issue is limited to false advertising enforcement and would not affect the FTC's ability to seek monetary redress for unfair or deceptive acts or practices. In the wake of *Liu v. SEC*, 140 S. Ct. 1936 (2020), which held that the SEC may seek appropriate disgorgement of ill-gotten profits, this will be the second time in two years that the Supreme Court has considered the validity of a key government enforcement tool. Oral argument has not yet been scheduled.

Henry Schein Inc. v. Archer and White Sales Inc., No. 19-963. This case is about whether the presence of a "carve out" provision in an arbitration agreement negates an otherwise clear agreement to delegate questions of arbitrability to an arbitrator, and it could have a significant effect on how consumer arbitration clauses are enforced. It arises in the context of a turf war among dental equipment distributors. The arbitration clause at issue stated that all disputes arising out of the relevant contract—except those involving injunctive relief and a few other categories of disputes—shall be decided by arbitration. Other provisions of the agreement made clear that an arbitrator would determine threshold issues of arbitrability. The complaint sought injunctive relief, prompting a dispute over whether the court or an arbitrator should serve as the "gatekeeper" of arbitrability. The Fifth Circuit below held that the agreement to delegate arbitrability issues to an arbitrator did not apply in cases, like this one, involving injunctive relief, in light of the carve-out provision. This is the second time this case has made it to the Supreme Court. In Justice Kavanaugh's first opinion in early 2019, the court held that, under the Federal Arbitration Act (FAA), courts must enforce agreements to delegate generally questions of arbitrability to an arbitrator. This time, the court will wade deeper into the issue to examine the relationship between carve-out and delegation provisions in an arbitration agreement. Given that the very purpose of arbitration agreements is to avoid the needless and unpredictable costs of litigation, a decision upholding the Fifth Circuit's view could seriously undermine the policy and economic considerations undergirding the FAA and embodied in countless consumer contracts. Oral argument is scheduled for December 8.

HUDSON
COOK

Celebrating its 25th anniversary in 2022, Hudson Cook, LLP is a national law firm representing the financial services industry in compliance, privacy, litigation, regulatory and enforcement matters.

7037 Ridge Road, Suite 300, Hanover, Maryland 21076
410.684.3200

www.hudsoncook.com