Supreme Court Rules Committee Hears Debate On New Proposed Class Action Rule

On January 24, 2005, the Illinois Supreme Court Rules Committee held a public hearing on the proposal to create a new Illinois Supreme Court Rule (Rule 225), regulating the certification and conduct of class actions. The highlights of the proposed new rule, and the one that generated the most lively debate, is a superiority requirement whereby the class action is allowed to proceed "only if the court determines that the putative class action is superior to other available methods for the fair and efficient adjudication of the controversy." The rule further provides that the matters to be considered by the court in making the superiority determination shall include "the extent to which the claims are based on Illinois law and involve Illinois parties"—another provision which generated heated debate at the hearings. The proposed rule further provides that unless the parties agree otherwise, a new order certifying a class shall be issued before the court decides any pending motions to dismiss or for judgment on the pleadings. The rule also provides that, except as required by the interest of justice, the court shall stay all discovery directed to the merits until the court has decided the class certification issue.

On balance, far more speakers opposed the proposed rule than supported it, even though, as the rule's proponents point out, the superiority requirement is similar to that which exists in federal court under Federal Rule of Civil Procedure 23. In view of the strong opposition, some proponents of the rule offered a compromise whereby the provisions with respect to staying discovery and deciding dispositive motions first be deleted as long as the superiority requirement remained.

The Rules Committee will now further debate the proposed rule and ultimately vote on whether to send the current proposal, or a revised proposal, or any proposal at all, to the Supreme Court.

Hugh C. Griffin | 312.443.0342 | hgriffin@lordbissell.com

Prescreening Without Liability

Prescreening, the process in which creditors provide credit criteria to credit reporting agencies and request lists of individual consumers meeting those criteria, is a common marketing tool for automobile dealers and financers. A prescreened list may include only the following: (1) a consumer's name and address; (2) an identifier which is not unique to the consumer; and (3) other information that does not identify the relationship or experience of the consumer to a creditor. While often an effective means of direct marketing, prescreening frequently leads to class actions based upon consumer credit statutes such as the Fair Credit Reporting Act (the "FCRA"). Fortunately, the FCRA and case law provide guidance which should allow a creditor to use prescreening as a marketing tool without exposing itself to liability for violations of the FCRA.

> "...a "firm offer" means that the offer of credit will be honored if the consumer meets the criteria used to select the consumer for the offer.

The FCRA regulates not only consumer reporting agencies that furnish consumer credit reports used for determining eligibility for credit, but also those who obtain and use credit reports for any purpose, including prescreening. The FCRA prohibits obtaining and using credit report information without a "permissible purpose." For example, a creditor could not seek to obtain consumer reports for the *sole* purpose of creating a list of potential marketing targets. However, making a "firm offer of credit" is a permissible purpose for obtaining a consumer report under the FCRA. Therefore, a creditor may obtain consumer credit reports in order to reach potential car buyers so long as the solicitation includes a firm offer of credit.

Under the FCRA, a "firm offer" means that the offer of credit will be honored if the consumer meets the criteria used to select the consumer for the offer. The FCRA offers no more detail as to what constitutes a firm offer, and various courts have interpreted the meaning of that term differently. Certain courts focus simply on whether an offer is firm in terms of a creditor's intention to honor an offer of credit in accordance with the creditor's own undisclosed, predetermined criteria. These courts do not require that a firm offer include specific terms of credit such as a particular amount of credit, rate of interest, or duration of credit.

Other courts, however, have found this focus too narrow. While agreeing that whether an offer would be honored is an element of a firm offer, these courts look more broadly to determine whether the offer was merely a guise to obtain consumer credit information for mere advertising purposes rather than a legitimate credit product with any real value to a consumer. These more discriminating courts look for specific terms in the offer, such as whether a specific and reasonable amount of credit was offered, the rate of interest and length of repayment period. The inquiry seeks to determine whether credit terms may be so onerous or ambiguous as to deprive the offer of any "real value" to a consumer.

Whether an offer has "real value" is a subjective examination, because at this time there is no clear, uniform standard for what qualifies as an offer of value. Nonetheless, creditors can protect

Liability - continued on page 4