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Client Alert

Lender Liability: California Appellate Decision Likely to Spur Class Actions Against Institutions That Finance Motor Vehicle Purchases

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In a significant decision, California's Fourth District Appellate Court interpreted the Rees-Levering Motor Vehicle Sales and Finance Act to require lenders to inform consumers whose cars are repossessed of the specific steps they must take, including how much they have to pay, to reinstate their conditional motor vehicle sales contracts.

Under *Juarez v. Arcadia Financial, Ltd.*, 61 Cal. Rptr. 3d 382 (June 26, 2007), lenders must include enough specific information in their Notice of Intent to dispose of a repossessed motor vehicle ("NOI") to allow defaulting buyers to determine "precisely what they must do in order to reinstate" their sales contracts.

The Rees-Levering Act (Cal. Civ. Code §§ 2981, *et seq.*) requires lenders to provide defaulting buyers who are party to a conditional vehicle sales contract with a written NOI in order for the person(s) liable on the contract to be liable for any deficiency after disposition of the repossessed motor vehicle. Among other statutorily required information, section 2983.2(a)(2) requires the NOI to state either that (1) there is a conditional right to "reinstate" the contract until the expiration of 15 days from the date of giving or mailing the notice and "all the conditions precedent thereto," or (2) there is no right of reinstatement, and the reasons therefore.

The *Juarez* Decision

The *Juarez* decision turned on whether the statutory clause requiring notice of "all the conditions precedent thereto" requires lenders to include in the NOI the specific dollar amount the defaulting buyer is required to pay to reinstate the contract, not just the amount necessary to redeem the motor vehicle. Although Arcadia's NOI contained both the statutorily required redemption and reinstatement sections, and notwithstanding that

Arcadia's NOI provided the specific dollar amount required to redeem the motor vehicle, the court focused on the information provided in the reinstatement provision in the NOI.

Like many lenders' NOIs, Arcadia's NOI did not specifically state the dollar amount required for reinstatement of the contract because typically when NOIs are issued the full amount owing is not known and/or will change over the course of time. Instead, Arcadia's NOI provided: "You may reinstate the contract within 20 days of the date of this notice under the following conditions: [¶] Payment of all past due installments, late payment penalties, repossession costs, resale expenses and storage fees (if any), and payment of repossession fee to local law enforcement agency."

The court held that the NOI was insufficient because "Arcadia's recitation of the general conditions for reinstatement does not adequately or reasonably apprise the consumer of 'all the conditions precedent' to reinstatement," as required by Section 2983.2(a)(2). The court further held that NOIs must provide sufficient information such that the defaulting buyers can "determine precisely what they must do in order to reinstate their contracts," including all of the following information:

- Amounts due to the lender and/or to a third party,
- To whom the amounts are due,
- Addresses and/or contact information for those parties,
- If, when, and by how much those amounts may increase as a result of additional payments coming due, or as a result of late fees or other fees and charges, and
- Any other specific actions the buyer must take.

The court further explained that "[t]he creditor must provide the consumer with *all* of the relevant information it possesses and/or information it has the ability to discern, concerning precisely what the buyer must do to reinstate his or her contract."

The court determined that Arcadia's NOI defeated the purpose of the Rees-Levering Act by putting the burden "on the consumer to gather sufficient, accurate information as to how he or she can fulfill the conditions of reinstatement." It reasoned that "an unscrupulous creditor could take advantage of this situation by simply evading a consumer's requests for the necessary information." Ultimately, the court concluded that Arcadia's use of a NOI with a "recitation of the general conditions for reinstatement" was unreasonable because "a creditor would *never* be required to inform the consumer of the amounts he or she must pay in order to reinstate the contract, *even if* the consumer called or wrote to inquire about this information."

Practical Arguments Rejected by the JUAREZ Court

Arcadia argued that there are many instances in which a lender will not know the necessary dollar amount required for reinstatement. The court countered that a lender is required to provide to a defaulting buyer the dollar amount due to either the lender or a third party when the lender knows, or reasonably should know, the amount due. Not only must the lender provide all relevant information it possesses, it must also provide "information it has the ability to discern" concerning precisely what the buyer must do to reinstate his or her contract.

Arcadia next argued that “[d]isclosure of various different reinstatement amounts due at different times might prove confusing to the buyer and burdensome to the creditor” and that lenders would be further burdened because “requiring ‘new additional disclosures’ will make compliance immeasurably more difficult for creditors.” The court countered that Arcadia’s general statements were more likely to confuse a defaulting buyer than would a detailed explanation and that “[t]he disclosures that we conclude must be included in the NOI are neither ‘new’ nor ‘additional.’ Rather, this is information that must be disclosed to the buyer at some point in time.” The court concluded that “there is no reason to believe a consumer is likely to be confused by a notice that informs the consumer that if he or she wishes to reinstate the contract, he or she must pay a certain sum by a certain date, and that if the payment is not made by that date, he or she will have to pay additional sums.” The court saw little practical difference in requiring Arcadia to provide specific information in the NOI or at a later time over the phone.

Plaintiffs’ Claim Under the Unfair Competition Law

The Juarezes asserted that Arcadia’s violation of the Rees-Levering Act also constituted a violation of the Unfair Competition Law (“UCL”), Bus. & Prof. Code §§ 17200, *et seq.* The trial court, finding that Arcadia’s NOI did not violate the Rees-Levering Act, granted Arcadia’s motion for summary judgment on the class UCL claims. The appellate court, after concluding that Arcadia’s NOI was insufficient under the Rees-Levering Act, reversed the trial court’s grant of Arcadia’s summary judgment on the class UCL claims. Lenders will have to await the trial court’s decision in order to reach a better understanding of the full impact of the *Juarez* decision on defaulting buyers’ potential class UCL claims.

Practical Consequences of *JUAREZ* for Lenders

The *Juarez* appellate court remanded the case to the trial court for further proceedings. Once litigation concludes at the trial level, lenders will have a better understanding of the full impact the *Juarez* decision will have on the industry. However, based on the appellate court opinion, for the many lenders who distribute NOIs that provide only “a recitation of the general conditions for reinstatement,” we expect to see an increase in consumer class action lawsuits targeted at the sufficiency of NOIs. For those NOIs determined to be invalid, deficiency balances will be deemed uncollectible and those who attempt to collect those deficiency balances likely will be subject to liability under Business & Professions Code sections 17200, *et seq.*

Many lenders have ceased the sale of repossessed vehicles until governing NOIs are revised. A practical response going forward will be for lending institutions to create due diligence checklists for the development of their NOIs.

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