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U P D A T E

News of Developments in the Financial Sector and Related Areas

* *IN THIS ISSUE* *

Enforceability of Arbitration Clause

Auditor Independence Rules

Protection of Trade Secrets

Recent Court Decision

Enforceability of Arbitration Clause

Green Tree Financial Corp.-Alabama et al. v. Randolph, 531 U.S. ___ (2000), is a case recently decided by the United States Supreme Court which upholds the enforceability of arbitration clauses in consumer loan contracts. In 1994, Randolph purchased a mobile home from a dealer and financed her purchase through Green Tree Financial Corp.-Alabama ("Green Tree Financial"). Randolph contended that Green Tree Financial required her to obtain "vendor's single interest insurance" which protects a lienholder against the cost of repossession in the event of default, but this requirement was not mentioned in the Truth in Lending Act ("TILA") disclosure. The retail installment contract signed by Randolph contained an arbitration clause requiring all disputes to be resolved by binding arbitration. Randolph brought a suit in district court in 1996 alleging that Green Tree Financial violated the TILA by failing to include the requirement of the vendor's single interest insurance in its TILA disclosure, and violated the Equal Credit Opportunity Act by requiring mandatory arbitration of all claims. Randolph also sought certification of a class action by individuals who had entered into similar contracts with Green Tree Financial. The district court granted the motion to compel arbitration by Green Tree Financial and declined to certify a class action. Randolph then appealed the case to the United States Court of Appeals for the Eleventh Circuit which reversed the decision of the lower court finding that the consumer loan agreement's arbitration clause that denied the consumer minimum guarantees of her ability to vindicate her rights under the TILA was unenforceable, and that the arbitration clause could have subjected Randolph to liability for costs, filing fees, arbitration costs and other expenses that would have made it impossible for Randolph to assert her claim. Green Tree Financial then appealed the case to the United States Supreme Court. In upholding the arbitration clause, the Supreme Court held that a party seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive had the burden of showing the likelihood of incurring such costs. In this case, Randolph did not meet that burden, and the fact that the arbitration agreement's silence with respect to costs and fees did not render it unenforceable.

Auditor Independence Rules

The Securities and Exchange Commission ("SEC") has issued a final rule on auditor independence in connection with management consulting and other non-audit services offered by accounting firms. A preliminary note intended as general guidance to the final rule provides that an accountant is not independent if the accountant:

- has a mutual or conflicting interest

with the client;

- audits his or her work;

- acts as an employee or a manager for the client, such as in the case where the accountant takes on outsourced management responsibilities; or

- acts as an advocate for the client.

The final rule also identifies nine non-audit service functions that may not be performed by independent auditors, seven of which are already covered by existing SEC or professional rules. Except in emergency situations, an auditor may not keep records for a client that are submitted or form the basis of a submission to the SEC. Although information technology consulting is allowed under certain conditions, an auditor may not operate a client's information technology system. The final rule is effective on February 5, 2001, and may be accessed on the SEC web site at *http://www.sec.gov/rules /final/33-7919.htm* (SEC Release Nos. 33-7919; 34-43602; 35-27279; IC-24744; IA-1911; FR-56; File No. S7-13-00 effective February 5, 2001.)

Protection of Trade Secrets

ConAgra, Inc. v. Tyson Foods, Inc., 342 Ark. 672 (2000) involved a case where ConAgra hired executives from Tyson who had information relating to the pricing programs and strategies utilized by Tyson. The issue in the case was whether or not the information was protected as trade secrets. Citing *Saforo & Associates, Inc. v. Porocel Corp.*, 337 Ark. 553 (1999), and other prior cases, the court noted the applicable criteria for determining whether company information qualifies as a trade secret. The six factors are as follows:

- the extent to which the information is known outside the business;

- the extent to which the information is known by employees and others involved in the business;

- the extent of measures taken by the business to guard the secrecy of the information;

- the value of the information to the business and to its competitors;

- the amount of effort or money expended by the business in developing information; and

- the ease or difficulty of which the information could be properly acquired or duplicated by others.

Utilizing this criteria, the court concluded that the information was not trade secrets because Tyson failed to take steps to guard the secrecy of pricing information and that the information was readily ascertainable by all of Tyson's customers; that Tyson had not entered into a covenant not to compete with the executives to be effective for a period of time after the executives had left Tyson; and that Tyson did not have a separate confidentiality agreement with the executives which extended the period of time for confidentiality of certain proprietary information once the executives had left their employment.

Recent Court Decision

Berkley v. H & R Block Eastern Tax Services, Inc., 30 S.W. 3d 341 (Tenn.Ct.App. 2000) held, among other things, that questions of the enforceability of an arbitration clause in a contract between the income tax preparer and the customer was subject to arbitration because the contract between the parties specifically contained a provision which stated that the parties agreed to arbitrate the question of the validity and enforceability of the arbitration agreement.

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