THE CONSUMER FINANCE PODCAST - RECENT TRENDS IN CLASS-ACTION CONSUMER FINANCE LITIGATION
HOST: CHRIS WILLIS
GUESTS: DAVE GETTINGS AND MARY KATE KAMKA
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[CHRIS WILLIS]

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, co-leader of the Consumer Financial Services Regulatory Practice at Troutman Pepper. We have a great episode for you today about all the recent developments in class-action consumer finance litigation. But before we jump into that topic let me remind you to visit and subscribe to our blog, ConsumerFinancialServicesLawMonitor.com, where you are going to get daily updates about everything interesting that's happening in consumer finance. And don't forget to check out our other podcast, *FCRA Focus,* which is released monthly, and we have a special treat today because one of our guests today is the host of that podcast. And don't forget if you like our podcast, let us know. Leave us a review on your podcast platform of choice, we'd really love to hear from you. So today, I'm joined by two of my colleagues who are two veteran class action litigation lawyers in the Consumer Financial Services Group here at Troutman Pepper, Dave Gettings and Mary Kate Kamka. So, Dave, Mary Kate, welcome to the podcast and thanks for being here today.

[DAVE GETTINGS]

Chris, thanks for having us we appreciate it.

[CHRIS WILLIS]

And Dave is doing me a special favor today because as I said he is the host of our *FCRA Focus* podcast which comes out monthly and we'll talk a little bit about that towards the end of the podcast, but Dave thanks for coming over to visit us here at *The Consumer Finance Podcast*.

[DAVE GETTINGS]

Yeah, happy to do it. If you had asked me three months ago if I would ever record two podcasts in the same day, I will tell you no, but here I am the day before Memorial Day weekend and recording a second podcast. What else would I rather be doing?

[CHRIS WILLIS]

Yeah, it's a great way to kick off the long weekend. And so, let's just dive right in, you know, class-action litigation is alive and well in the consumer financial services world, it's always been a major feature of our industry. But there are a number of interesting sort of trends, that we've been seeing play out over the last few years that I want to ask you and Mary Kate about. So, Dave let me start with you. You know, it feels like the *TransUnion vs. Ramirez* and before that *Spokeo,* were poised to be almost seismic sort of events in the class action litigation sphere, and now that we've got some time, you know, with *TransUnion vs. Ramirez* kind of under our belt and under the bridge for a while, what has been the long-term impact of that decision and *Spokeo* in the class-action world in consumer finance?

[DAVE GETTINGS]

I think the *Ramirez* case has actually had some bigger and more impactful impact than *Spokeo* probably, it's sort of done in my view what we thought *Spokeo* might do, but didn't quite do it, if that makes sense, it's sort of circular. I think since *TransUnion vs. Ramirez*, one, we've seen a lot more plaintiff's counsel file in state court because what they're doing is they are making the defendant remove because we typically prefer to be federal court and they think that by the defendant removing it may compromise some of the arguments that the defendant could make on standing either to the named plaintiff or to the class as a whole. But then, you know in addition to where the case is actually filed, we've actually seen a real, you know, palpable, impact on class certification from the *TransUnion* decision because the decision has given district courts, I think some real cover to dismiss claims or to decide that individual class members may not have standing which could preclude class certification, on certain claims, for example, under the FCRA 1681(g) claims, file disclosure claims, I think those have gotten a lot tougher both to certify and to get past summary judgments since *TransUnion* because they often allege really, really technical supposed injuries that of course now feels a little more comfortable dismissing or dealing with at dispositive motions.

[CHRIS WILLIS]

It's interesting because we've seen a number of those decisions also in the realm of targeted advertising against consumer financial services companies where the idea is - well it's discriminatory because when they were scrolling their Instagram feed or looking at Facebook and they didn't see your ad and you've seen a number of courts take the same approach that you just mentioned Dave, which is like where's the injury here? And start to dismiss some of those claims. And so, you see it like I think reflected in a lot of consumer finance litigation.

[DAVE GETTINGS]

Yea, it's also coming up I think in the privacy space and data breach cases, because data breach cases are sort of classic there is a data breach and there is a huge class but who has actually been harmed. And I do think the *TransUnion* case is developing some teeth in that area of law.

[CHRIS WILLIS]

Yea, that's very interesting set of developments, so thank you for that prospective. Mary Kate, I want to ask you about what seems like everybody's favorite thing to hate about consumer finance class-action litigation and that's discovery. And so, it's something like that everybody probably dreads dealing with because of the potential breath and burden associated with it. Can you share with the audience what you think are some of the key considerations in trying to limit, you know, objecting to and responding to discovery requests in putative class actions?

[MARY KATE]

Yea, absolutely, I think you hit the nail on the head, Chris, discovery is probably aside from liability the most terrifying part for a client when a class action is filed and that's for a number of

reasons. You know you mentioned burden and costs. The first primary concern I find clients have is confidentiality. So, courts are pretty lenient in discovery generally, and I think and even more so in class actions. So, a few years ago we had a lot of success phasing discovery in class actions which acted as a limitation, but I found that courts are more reluctant to do that now. And so given that leniency, companies are concerned about disclosing confidential business information, proprietary information and private contact information of consumers, employees, clients, etc. And courts generally do not see confidentiality as a valid reason to limit discovery. In most every class action you'll have a protective order and I find that courts will make you produce everything because the protective order serves to protect that. In addition to confidentiality the costs of discovery is often I would say, always much higher than an individual case and that's because there are costly email searches involved, typically costly redaction projects, if we're talking about class data, and costly motion practice, probably the exception to the rule that you would not have a discovery motion in a class action. And then there's just a practical burden for in-house counsel, you know, there's no question that class discovery is disruptive to a company, it usually involves or can involve deposing multiple 30(b)(6) witnesses and individual witnesses who are forced to miss their daily duties to get prepped for those depositions, not to mention the collection of documents from various business lines that often require additional employee attention. So, with those kinds of concerns in mind, I think we have a couple tips that we typically employ to try to minimize the cost and make discovery as efficient as possible. The first one would be to define a reasonable scope for discovery early and then limit any unnecessary objections not related to that scope. So over objecting on the other hand can at times prove more costly because when you over object it gives plaintiff's counsel and judges a very easy entrée to define the scope of discovery for you and in those circumstances they often have much less information about the claims and your business and are more likely to cast a broader net. A second tip is to understand early what information you will need to defend the class certification and make sure that gets produced. So, typically in class actions clients are concerned about, you know producing class data, because obviously confidentiality concerns, customer concerns, but often times it's necessary to produce at least a sample of that data in order to rebuke plaintiff's class allegations, you know, the plaintiffs bear the burden on class certification, evidence of individual facts or issues are often a very strong way to defeat those allegations. And then lastly, and I don't know if it seems a little counter intuitive but, be willing to compromise when a dispute arises as mentioned earlier, you're more likely to have more control over the ultimate scope of discovery if you do that. And so being creative and proactive in working with opposing counsel probably gives you your best shot at setting your own parameters.

[CHRIS WILLIS]

Yes, spoken like a real veteran, thank you Mary Kate and Dave let me like go to you and continue the subject of discovery. Are there some specific common discovery disputes that defendants should anticipate in consumer finance class actions and if so, like those land mines that we run over all the time, do you have any tips or tricks to either avoid them or handle them once they blow up on us?

[DAVE GETTINGS]

Yeah, so I can talk about some of the disputes and talk about some strategies that have worked but it changes all the time, I will say that. To what Mary Kate said I think one of the biggest issues is class member identities. So, you've got this plaintiff's counsel that repeatedly sues companies like yours or maybe even yours and they're asking you to disclose all consumers

that fit a certain category of information or a certain category. So, what they're asking you to do is give them a list of a thousand people that they can then use to sue you later on. So understandably that is a really, really sensitive topic and I can't tell you how many times we've had conversations with clients where they're right, the clients says, you know, we say, well we might want to produce some information and they say, they might turn around and sue us and I say well we've got a protective order and they say, well yeah, what does that mean? And it's a fair point, I mean protective orders are only as strong as the people that follow them. So, one thing we've done pretty well in dealing with discovery requests regarding class member identities is one, trying to work out samplings because, often times plaintiff's counsel don't really want that full list, they just want enough people to be able to argue for class cert but not, not get a million records. And so in those situations we worked on reasonable sampling proposals and we've also been pretty successful in creating these virtual white room experiences where we use technology to have a place where you can upload the sample of consumer data but it's locked down, meaning it can't be printed, it can't be copied, it can't be transferred, it can only be viewed on a secure computer and that's actually worked pretty well, because plaintiff's counsel get access to the information but the clients feel fairly comfortable that the information can't be used outside of discovery. And then you know, just to sort of talk about potpourri without taking too much time, one of the other big discovery disputes you get is those requests for all documents. You know, you're a consumer reporting agency and you get the request for, "please produce all documents related to consumer reports that you prepared." Well, that would be every document in the company and so you know, you have to try to find that balance between not over objecting as Mary Kate said, you know, not everything is unduly burdensome, save the unduly burdensome objections for the really unduly burdensome requests, so at the same time trying not to over object but also trying to reasonably protect your client and only produce what's relevant.

[CHRIS WILLIS]

Okay, thanks very much. And you know as much as I would love to talk about discovery, like literally this entire episode, there are some other things that I'd like to ask you about. And Mary Kate, one of the things that occurs to me is sometimes you'll get the class-action complaint where it kind of looks obviously like it's not a very good class action, and so sometimes we as defendants might be tempted to move to strike the class allegations or do something else, like right at the outset of the case to try to get the class sort of cut out of the case before a motion for class certification might even be filed. Is that a good idea, ever or sometimes? And what would be the considerations we should think about before we jump to the conclusion of doing something like that?

[MARY KATE]

So, that is a very attractive thing to do when you get a complaint is to say, hey this isn't a class action, let's get rid of it right now. And there are some pros to doing that. If you're successful, obviously you limit the scope of discovery which as we've been talking about a bit, is terrifying, you can also manage plaintiff's counsel's expectation about the true value of the case. Sometimes when you have class allegations in the complaint, you know cases are impossible to resolve because you guys are in two different, you know, planets, settlement wise. It can also foreshadow for the court some deficiencies in the class claims that actually might help you fight discovery battles later, so if you for example, are dealing with a plaintiff's counsel that you dealt with before or have a reputation about being super aggressive in discovery, sort of filing that motion can flag this issue for the court where you kind of explain, well this information is not

even relevant and that can give you a little bit of a leg up when you start arguing proportionality during discovery. So, like I said, it seems like an attractive option but there are some serious cons of doing that. So first of all, motions to strike class allegations are very easy for a court to deny, and that's because they typically will only grant them if Plaintiff has had an opportunity to adequate discovery. So even if there's you know, pretty blatant issues with their class allegations, a court has an easy way out of not ending that process by just saying, you know, I'll decide it after discovery. A second very important thing to consider is whether moving to strike the class allegations will take away one of your individualized issue defenses on class certification. So, for example, using Dave's example earlier when we were talking about Article III standing, that's an easy issue if you think your plaintiff has a standing issue to move to strike the class on that basis. That will likely get you put back in state court, best case scenario, but standing is a very strong class certification defense so that would be an example where you might wait and use it to defeat predominance as opposed to just trying to attack the case at the outset. So, when to do it is obviously going to be a judgment call based on the individual facts of the case, if there are blatantly obvious reasons for striking the class allegations and you think you're going be successful based on the research in that particular jurisdiction I'd do it, but for the most part, I would say, saving all individual issues for class certification can more often have a more powerful cumulative effect.

[CHRIS WILLIS]

Mary Kate, that seems very sensible and wise in terms of the counsel that you just provided there. But Dave let me go back to you. You know, it's probably easy to say that there are not many trials in class actions and so those that aren't terminated by a motion end up getting settled. And so that raises the inevitable question of like how do we structure a class settlement if we're inclined to do that? Do we just go with the traditional Rule 23(b)(3) opt out settlement, or is there some opportunity to do say a Rule 23(b)(2) settlement? Can you talk to the audience about what the differences are there and when a defendant might want to choose one versus the other?

[DAVE GETTINGS]

Yeah, of course, so the way I structure my settlements is I pay the least amount of money possible while getting the biggest release for the client possible. And so how do we get there? When talking about Rule 23(b)(2) versus Rule 23(b)(3) there's a couple of main considerations. The first is, you know how much money does the client want to pay, or is the client willing to pay, and how much is that release worth for the client? Because if it's, if it's a case where the client is genuinely concerned about the practice and genuinely concerned about the possibility with getting, getting hit with big rewards or big awards from class members, individual cases, the client may be willing to spend a lot of money in order to get a sizeable release. So, for example, in the FCRA world, a release of actual damages, and a release of statutory damages, and punitive damages, and class claims. And so, if the client is genuinely willing to pay for the release and is willing to pay the money to get that, then often a Rule 23(b)(3) settlement makes the most sense. Now a lot of times you're not able to get there because the plaintiff's counsel wants for those full releases more than the client's willing to spend. Or you know another good example, is it maybe a situation where the client absolutely does not want notice to go to the class because they don't want to alert a lot of people who may opt out about potential claims. And in that situation a Rule 23(b)(2) settlement may make more sense, where you negotiate an injunctive relief that would apply universally to the class, you separately later on negotiate the attorney's fees and the incentive award that might apply to plaintiff's counsel and if you can get

the court to agree in those situations for 23(b)(2), if you change your policy you may be able to get the class certified without sending notice to the class and without having an opportunity for class members to opt out and separately sue you on those issues, or at least know about the fact that they can sue you later on. So, you know, those are really the big considerations, there's not one size fits all approach. But it really comes down to scope of the release, how much are you willing pay and considerations regarding what injunctive relief you're willing to agree to and also notice to the class.

[CHRIS WILLIS]

And if we do go down the route of a Rule 23(b)(2), no opt out class action, I assume what that means is an individual class member's claims for damages wouldn't be barred by the class judgment or settlement, right?

[DAVE GETTINGS]

Yeah, that's typically the case. If you're trying to get a release that includes a full release of the individual claim, it's tougher to get that under 23(b)(2), courts generally hold that the 23(b)(3) settlement.

[CHRIS WILLIS]

Yeah, got it. So, Dave and Mary Kate, I want to thank both of you for being on the podcast today, and Dave, you particularly for coming to visit because as I mentioned at the top of the show, you're the host of Troutman Pepper's *FCRA Focus* podcast. And I wonder if you would just a second and tell the audience a little bit about that podcast and what they hear if they tune into it.

[DAVE GETTINGS]

FCRA Focus is a very descriptive term for a podcast that focuses solely on the FCRA. We talk about consumer reporting agencies and furnishers and what regulators are doing but all with respect to the FCRA so if you find you or someone that is really into credit reporting or working in that space, or maybe you're just looking for something to listen to after Dateline or Joe Rogan, you can come to *FCRA Focus* and learn a little bit about credit reporting.

[CHRIS WILLIS]

Thanks a lot, Dave. And to me *FCRA Focus* is a great showcase for the amount of FCRA expertise that lives within our Consumer Financial Services Group at Troutman Pepper and it's available on all popular podcast platforms, so I urge everybody to go and subscribe to it, the episodes come out monthly as I understand it. And so, I want to thank both you Dave, and you Mary Kate, for being on the program today for our very descriptively named *The Consumer Finance Podcast*. I would like to remind the audience to visit our blog at ConsumerFinancialServicesLawMonitor.com, subscribe there, visit us at troutman.com and subscribe to our consumer financial services email list so that you can get our alerts and our webinar invitations and please stay tuned for a great new episode of *The Consumer Finance Podcast* which comes out every Thursday. Thank you all for listening.