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"Come Out With Your Hands Up!" — Trade Secrets, Protective Orders and the Smoking Gun

by Ian Lyngklip

In This Issue

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If you think protective orders are esoteric, ethereal creations of the judiciary and academia, think again. As a consumer advocate, there are important public policy concerns you need to know about, as well as practical realities you need to consider.

Every time a court refuses to compel discovery of "pattern evidence," rejects your request to inspect a predatory lender's procedures, or orders that records remain "confidential" or "sealed" during the litigation, the court is *effectively* granting a protective order. In short, every order that denies an opportunity to conduct discovery is a protective order. These orders are neither esoteric nor ethereal. Rather, protective orders barring discovery put the "smoking gun" beyond the reach of the plaintiff. Likewise, protective orders which seal court records preclude other plaintiffs from using this same "smoking gun" evidence and prevent the public from protecting itself from further harm.

Properly used, protective orders shield parties from abusive discovery, and keep them from running amok in discovery practice. But, most often in consumer litigation these orders stand as the first line of defense of a bad actor who hopes to create a safe harbor for widespread wrongdoing. To an inexperienced attorney, the mere assertion that discovery materials are "confidential" can pollute the litigation with unnecessary motion practice and impenetrable procedure. Protective orders are the things that most often stand between the plaintiff and the "smoking gun" evidence of willful misconduct. If you stipulate to an unwarranted protective order, you agree to limit your ability to obtain and use the very information that you will need to effectively present your case.

If the information you are seeking is worth the battle for the defendant, it is doubly so for the plaintiff. It effects both the settlement value of your case and the ability to present evidence at trial.

By refusing to agree to overly broad orders, you will be able to present a better case, put more pressure on the defendant to settle, show the court during discovery that the defendant's conduct is egregious and unworthy of judicial protection, inform the public of widespread wrongdoing, and ultimately save yourself the cost of fighting for admission of the documents down the road. On the other hand, by agreeing to a protective order, you may keep public from knowing of wrongdoing, render evidence inadmissable, cost your client money, and place yourself in a poor posture for settlement and trial. This article addresses the proper limits on use of protective orders and some strategies to get past the defendant's unwarranted demands.

From the Editor

Nancy Barron is a partner in the San Francisco law firm, Kemnitzer, Anderson, Barron & Ogilvie

This is my 22th issue as your editor. It will be my last for now. Since January 2000, I have enjoyed working with more than 150 of you who have contributed to these pages. I want to thank every single person who has given time and talent to The Consumer Advocate. Just as I took the reins from the able hands of Dick Rubin, I am happy to report that I pass them on to two experienced editors, Deborah Zuckerman and Steve Gardner. Both Steve and Deborah have been a great help to me behind the scenes for years, so I expect the change to be seamless. Please welcome them to the job and send them your ideas and articles. After years of outsourcing layout and production, we now have the fulltime desktop publishing services of the talented Cynthia Reddersen in NACA's Washington, D.C. office. Cynthia will continue to work her magic, I'm sure.

This newsletter is just one way NACA seeks to serve its members. It is authored and edited by volunteers. I believe the process of sharing our knowledge, experience, opinions and ideas is what makes NACA unique. In "sixties" jargon, I sometimes think of it as an enormous legal co-op. The generosity of spirit and professional respect among our members has made our common advocacy stronger, more successful, and a lot more fun.

I have tried to balance our issues with a mixture of news items, legal briefs, policy pieces, legislative testimony, practice pointers and technogical advances in office management. This issue is no different, with a variety of articles which demonstrate the breadth of our common efforts in education, legislation and litigation on behalf of consumers.

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LYNGKLIP: *Continued from the Cover*

With this in mind, consumer advocates should be aware of the limits, uses and procedure governing these orders.

How the Problem Arises

Battles over protective orders arise following a plaintiff's request for discovery of the defendant's documents. If the result of those requests would amount to public disclosure of evidence of the corporate wrongdoer's pattern of willful misconduct, the fear of further civil or criminal action will drive the defendant to refuse to produce relevant evidence unless a protective order is entered. The proposed orders may limit the use and disclosure of the documents, seal the court's record, or require that any proceedings involving these documents be kept secret. All the while, the Federal Rules of Civil Procedure do not permit a defendant to use proof of its own wrongdoing or the possibility of further litigation as the justification for sealing the court's record from public scrutiny. As such, the rules - if properly construed - will rarely allow for many of the confidentiality dictates of the corporate wrongdoers. Simply put, protective orders cannot be issued for the sole purpose of hiding a "smoking gun".[1]

With this in mind, consider the following scenario: Upon filing of the lawsuit, plaintiff's counsel will forward discovery requests which - if carefully drafted - should result in the production of the "smoking gun" evidence of wrongdoing and a general practice of malfeasance. In response, the defendant will fail to respond to the discovery. After several weeks of patient waiting, plaintiff's counsel will call to follow up and be told that that answers are in the mail. Upon inspection, plaintiff's counsel learns that *no* documents of any importance or relevance have been produced, and that the defendant has asserted that all damning documets are "confidential" or "trade secrets" and will only be produced under a protectiive order. If only for the purpose of heading off a discovery motion, plaintiff will stipulate to a protective order requiring the documents be held as confidential, not used outside the litigation, and only be submitted to the court if the Plaintiff files a motion under seal requesting to be able to use them. This tactic is simply wrong, as well as unnecessary.

Rights affected: Think before you stipulate

Before you agree to a protective order, recognize that these orders severely affect not only your client's rights, but your rights, and those of the public at large. Most often, protective orders will either deny the plaintiff access to discovery or prevent disclosure of the evidence obtained. If the discovery you are seeking is "pattern" evidence of widespread misconduct, then such a protective order will insure that the evidence of misconduct will never see the light of day. Consequently, the effect of a protective order may be to insure that the defendant will continue its wrongful practices, unimpeded by the possibility that its conduct will be remedied through the justice system. By the same token, if the court orders that all materials be sealed permanently, then you effectively limit your own first amendment right to publicly speak about the defendant's misconduct, as well as the public's right to supervise the proceedings.[2]

So, for example, when the defendant *instructs* you that you will need to consent to an iron-clad protective order before you can see all the other certificates of title which it has forged, think twice about whether you wish to forfeit you client's right to put forward evidence obtained through discovery, your right to free speech, and the opportunity of the press to write about the misconduct and the court's handling of your case. At the same time, you limit the right of other plaintiffs who have been harmed to use the evidence from your clients.[3]

If these important constitutional considerations are not enough, consider the cost of these orders to you and your client down the road. Most often, the protective orders proffered by defendants will require that any materials disclosed through discovery must remain confidential and cannot be used in the litigation absent a court order. By agreeing to this, you have guaranteed that your trial preparation time will be consumed with motion practice over the relevancy of the "confidential" documents you have received, because you have effectively stipulated that the documents are presumptively irrelevant or cannot be admitted without a further order of the court. While defendants routinely require protective orders before producing any discovery, there is simply no basis for this procedure in the rules. Stipulating to an overly broad protective order may expedite getting the documents you need in the short run, but in the long run they are costly.

What is the court's authority?

Demands for protective orders often dissolve into unprincipled arguments over what one party does or does not feel like disclosing. The proper limits of the court's authority lie in Rule 26 of the Federal Rules of Civil Procedure and provide an answer to the defendant's

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demand for an overreaching protective order. Given the express limitations on the court's authority, you need not stipulate to a protective order which exceeds the scope of Rule 26 or which improperly limits anyone's constitutional rights.

While Rule 26 provides limits on the court's authority, additional constraints arise from the Constitution. In order to understand the court's authority and its limits, advocates must recognize the inherent tension between discovery rules designed to facilitate trial preparation and the need to have open proceedings as required by the constitution and common law. On the one hand, meritorious lawsuits should not be used as the justification for unwarranted prying into the private affairs of the litigants - a fact of which we are acutely aware when our own client's credit reports and tax returns are subpoenaed or made part of the public record.[4] On the other hand, when the courts uncover widespread wrongdoing, the public's right to access the court's findings becomes a constitutional matter.

That is to say, the courts serve as a branch of the government, which like all others, is open to public scrutiny. As such, the public and press alike have a right to review the activities of the courts to insure their integrity and proper functioning.[5] Evidence elicited from the proceedings belongs to the public at large and may be used in other proceedings. Thus, the courts recognize the public's right of access. At the same time, the courts have been willing to carve out exclusions from this general rule for activities which do involve the disposition of the merits of cases and controversies under Article III of the Constitution.

In order to reconcile this tension, the courts have been willing to recognize that discovery is generally a matter of public record, but not all discovered information will become evidence. While discovery is a part of the Government's legitimate function, and is presumptively subject to open access,[6] any limitations flow from the court's authority under Rule 26 to control and limit discovery using the court's *sound discretion*.[7] Under Rule 26, the courts enjoy discretion to limit requests for and the use of discovery materials which the parties have not yet put before the court for the purpose of determining the merits of the case or approving settlements.[8] Simply put, the parties may request that the court exercise its discretion to limit public access to the discovery phase of litigation where justice so requires. However, once the court begins the review of evidence in the exercise of its Article III powers, that evidence and the proceedings are presumptively public matters, absent some compelling justification.[9]

Once discovery material is set before the court for the purpose of resolving the case or controversy, the public's right to know becomes paramount. This right to know is expressed through the litigant's right to speak publicly about the proceedings, the press's right to access and write about the proceedings, the public's right to supervise the judicial activities of its lifetime tenured judges,[10] the need of the public to understand the operation of the courts,[11] and right of litigants to a public trial. As such, any limitations on the sealing of the court's records from public view becomes subject to constitutional scrutiny which requires a far higher justification than simply limiting the litigant's ability to publicize discovery documents which would not ultimately be admitted into evidence at the trial.[12]

Requirements for Issuance of a Protective Order

While Rule 26 provides a generously broad set of justifications for the issuance of a protective order, the Rule's requirements must be met.

Specific and Timely Objection

As with all other discovery matters, the responding party must respond to the discovery in a timely fashion and object to the disclosure in a timely fashion. The failure to raise timely objections to the discovery before it is due waives the objections. At the same time, any such objections must be specific and identify a clear basis for the objections. Generalized, boilerplate objections do not satisfy the discovery rules.[13]

Timely Motion

Rule 26's procedures for obtaining a protective order are not self-executing. A defendant cannot simply assert that the material sought is not discoverable, thereby seeking to withhold discovery based on an objection without also moving for the protective order. Even if such objections are accompanied by the offer to provide the documents once a protective order is entered, this does not constitute compliance with the rule. A party may not simply agree to make documents available at a later date restrictions which—in its unilateral judgment—it regards as reasonable compliance with discovery.[14]

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The fundamental principle of Rule 26 that defendants routinely ignore is that the withholding party must either provide the discovery or move the court to issue a protective order. Consequently, a party who refuses to provide discovery based on the assertion of the need for a protective order has engaged in self help, and usurped the court's authority. It is improper to refuse to provide the required discovery without having received, or at least applied for, a protective order. If a party fails to timely move for a protective order, the order should be denied.[15] The proper time for such a motion is before the discovery is due, rather than after.[16]

Good Cause

The party seeking the protective order must show good cause for the issuance and maintenance of the order.[17] As with all discovery, generalized blanket objections are not sufficient reason to withhold discovery.[18] Rather, the moving party must articulate "specific facts" showing "clearly defined and serious injury" resulting from the discovery sought; conclusary allegations of harm are not sufficient.[19] However, a party seeking to resist discovery may assert any of the reasons listed in Rule 26(c) as a basis for resisting disclosures. Most often in the context of consumer litigation, the defendant will assert that the documents constitute a trade secret.[20]

Information which allows a business to gain a competitive advantage through exclusive use is a trade secret.[21] While courts may protect against the dissemination of these secrets if obtained through discovery, there is no *absolute privilege* for trade secrets or similar confidential information.[22] Rather, trade secrets must be disclosed if they fall within the general scope of discovery unless the court issues its protective order. Therefore, a party may not unilaterally designate the information as a trade secret.[23]

To the contrary, the party seeking to withhold discovery of trade secrets must first establish that the information is, indeed, a trade secret or other confidential research, development, or commercial information. Additionally, the party must also demonstrate that disclosure of this information might be harmful. Only after the defendant establishes both trade secret and harm does the burden shift to the party seeking discovery to establish that disclosure is relevant and necessary to the action. If the information is necessary to the litigation, the court must then fashion its order by balancing the need for discovery against the possibility of harm.

Recommendations

In dealing with protective orders, plaintiff's counsel should heed the following caveats rather than simply signing away the right to litigate the case.

◆ The protective order should be the process of careful negotiation, not simple accession to the desires of the defendant. Review the limitations carefully and make sure the defendant's order complies with the law governing the protective orders. If the defendant could not properly obtain the relief by an adversarial motion, there is no need to stipulate to that relief.

◆ Never agree to the confidentiality of documents you have not seen. The protective order should have a procedure for designation and objection to the confidentiality of the documents. The agreement should require that the defendant retains the burden of moving to maintain confidentially in the event of disagreement over the designation applied to particular documents. Do not agree to shift the burden to the plaintiff. While you can agree to hold these documents as confidential during the objection procedure, the defendant must have a deadline for moving to keep the documents protected, and the failure to move in a timely manner waives confidentiality.

◆ Do not agree to seal the court's record at trial. Courts may only seal the record in the most extreme of cases, and in so doing, the public is denied its rights to know of wrongdoing and to supervise the courts. Moreover, during the discovery phase of the trial - long before the parties know how the case will be presented at trial- it is exceedingly unlikely that the court could know whether the documents will need to be sealed from public view. Rather, the protective order should require the defendant to move to seal the record upon notice that a confidential document will be used in a dispositive phase of the case.

◆ If the defendant refuses to agree to discovery without an unreasonable protective order, bring the issue to the court promptly. The passage of time favors the defendant, so you must act diligently to get the documents and do not waste excessive amounts of time negotiating fruitlessly. Simply narrow the issues of disagreement for presentation to the judge, and only bring those issue in disagreement to the court. The major points for negotiation are whether the trial record is to remain sealed, whether plaintiff can challenge an improper designation of confidentiality, and who will

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ultimately bear the burden of showing whether or not the documents are confidential.

CONCLUSION

The issuance of protective orders affects the rights of the parties, their attorneys and the public at large. Therefore, before an advocate agrees to the issuance of a protective order, the attorney should be certain that the protective order is justified by the disclosures, and that the order does not go beyond the bounds of what is proper. Advocates should never agree to allow the court to lend its imprimatur to orders which exceed the court's authority. While corporate wrongdoers may seek to have all of the "smoking gun" documents designated as secrets, many of these documents fail to meet the requirements of Rule 26(c). For the sake of the client, the public and your freedom of speech, the expediency of obtaining the documents should never be allowed to outweigh the requirements of the rule. After all, a spurious claim of trade secrets most often cloaks the smoking gun, and a concealed weapon can be the most dangerous kind.

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Coming next issue...

NACA's new
Membership Pledge and Form

Look for it in
The Consumer Advocate

The Finance Industry Fuels Revival of Trade School Scams

by Tom Domonoske

History repeats itself. Student loan scams are back. As the trade-school problem prevalent in the 1980s and early 1990s returns, it is important for consumer advocates to understand how the financial industry creates and enables the deceptive practice. This article explores the problem and considers what needs to be done about it.

"Unfair and deceptive vocational and correspondence school practices are a tremendous source of frustration, financial loss and loss of opportunity for consumers, particularly low-income consumers hoping to break out of poverty," states NCLC's Student Loan Law manual.[1] Focusing on the widespread abuses of the 1980s and early 1990s, the author continues, "The abuses were fueled by a federal student loan system that created a con artist's dream. Schools were able to pressure vulnerable and low-income consumers into signing documents, obligating them to thousands of dollars. Many schools promised that students would not have to repay loans until they got high paying jobs. The schools then literally took the money and ran, leaving loan collection to third parties and the government." *Id*.

The fuel that created the con artist's dream was the federal student loan program that fed the dollars into the system. The stream of available dollars was both the source of the problem and the solution. After the earlier problems were identified, the federal student loan program was modified to allow for discharge for closed schools, and to require FTC Holder rule language in loans made to for-profit schools under the Federal Family Education Loan program. The image of a stream of dollars functioning as liquid fuel that ignites explosive growth properly captures the financial industry term for the same concept; the availability of funding is called “liquidity.” When liquidity is properly controlled, the fuel is used for economic growth, and where it is uncontrolled it fuels economic dysfunction, fraud and abuse. Because of increased liquidity that is now being made available through private, non-federally guaranteed loans, and because that liquidity is not being properly controlled, the trade school problem has returned.

The new version of this problem is most pronounced in the computer training field, and two of the main players providing the necessary liquidity are Sallie Mae and Key Bank. Sallie Mae is commonly associated with the federal government and federally guaranteed student loans, and it enjoys a national reputation. Rather than a governmental entity, Sallie Mae is actually a private corporation with several subsidiaries, and only one of its subsidiaries retains its status as a government-sponsored-entity (GSE). Key Bank is a competitor of Sallie Mae in the business of arranging, pooling, selling and servicing student loans. Because their methods have differed, these two financial entities both achieved the same result: providing large amounts of cash to sham, illegal or incompetent computer training schools that left thousands of consumers with loans to repay for which they received little or no value.

Because of the business arrangements between the computer training schools and entities like Key Bank and Sallie Mae, all students affected by closed computer training schools should easily obtain relief under the FTC Holder Rule. Because Key Bank and Sallie Mae each refused to honor the FTC Holder Rule, victims of the schools were denied the benefit of the FTC Holder Rule. Lawsuits filed in several states are currently challenging the practice of both Key Bank and Sallie Mae. Unlike the prior trade school problem which could be corrected by modifications to the federally guaranteed loan programs, this new problem can only be addressed by challenging the actions of the private entities.

Extent of the Computer Training School Problem

The availability of private non-federally guaranteed student loans for trade schools has created the same problems as federally guaranteed student loans created in the 1980s. The con artists' dream world exists again, especially in the computer training field. The proliferation of trade schools is a nightmare for state regulators because those offices cannot adequately supervise the industry. Officials with the North Carolina Community College System, which is charged with regulating trade schools, recently identified approximately 300 unlicensed trade schools operating in that state. ""We still cannot track all of them," says Kenneth W. Chandler, the director for proprietary schools for the system. The system is budgeted at one and a half people to oversee licensing of proprietary schools, and officials say that's not enough to undertake significant investigations."[2] Consequently, state regulators cannot manage the growth of these trade schools and are unable to ensure basic eligibility criteria are met.

The growing number of closed computer training schools has drawn the attention of the state regulators. A

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2003 survey of the members of the National Association of State Administrators & Supervisors of Private Schools (NASASPS), that included only 23 states, showed that in 2002 over 100 computer training schools closed in their states.[3] Of those closed schools, only 25 schools provided any advance notice of the closing. For the remaining schools, the lack of advance notice meant that students came to a building expecting to attend class and found only locked doors.

The 2003 survey is extremely limited because it does not include states like California, Virginia, North Carolina, and Florida that have suffered extensive computer training school closings. The victims of one closed school in Virginia, Ameritrain, have a website, www.asfb.org (for "Ameritrain Students Fight Back") that also lists some of the closed schools in these other states. Consequently, the total number of closed schools and the total number of students affected by these closings is unknown. In the NASASPS survey, Texas predicts an "increased number of closings until only a small number of the most successful are left." At the time of the survey, Texas had 59 approved schools, of which 10 closed in 2002. Wisconsin and Georgia made the identical prediction.

The problem of school closures in the computer training field is normally associated with the poor economy and the downturn in the information technology field. However, the rise of the private non-federally guaranteed loans for computer training must be understood in relation to the protections provided by the federal guaranteed loan program. As a result of the prior abuses, the federal programs contain eligibility requirements regarding financial and administrative capacities; and it places restrictions on commissions, bonuses, and other incentives offered to school recruiters. In January 2001, a major computer training school, Computer Learning Center (CLC) of Virginia, was forced to close its doors and file for bankruptcy. CLC enrolled more than 3,800 students in about 25 schools around the country and employed 1,900 people. It closed after the Department of Education determined it no longer met fiscal responsibility standards, and after it had ordered it to rebate $187 million for illegal commissions given to admissions officers.[4]

The Department of Education's action against CLC shows why a start-up computer training school, especially an under-funded or an unlicensed school, needs to tap into non-federally guaranteed loans to prey on its victims. Entities like Sallie Mae and Key Bank have been providing sham schools with the liquidity that the federally guaranteed program denies them. Consequently, the current problem of school closures in the computer training field would not exist if entities like Sallie Mae and Key Bank were applying similar restrictions. Instead, both Sallie Mae and Key Bank were providing loans to unlicensed and under-funded schools, and were providing the total tuition amount to the schools before any classes were provided.

In the NASASPS computer training school survey, Maryland accurately described the problem. "Many of the newly approved schools first operated without approval, and they keep reverting to their non-compliant ways. Private lenders continue to exacerbate the situation and create substantial problems. Students are encouraged to enroll and pay for multiple programs to be taken sequentially. Student loans from SLM and Key Bank still are disbursed to the schools in single payments made in advance of training. . . Unapproved training providers also continue to have access to private lending." (As more fully explained below, SLM Financial, a division of Sallie Mae, has modified its payment process since that report appeared).

The computer training schools advertise their ability to tap into the liquidity provided by these private lenders by helping the students obtain their loans. One school's website contains the following:

> "Our education consultants can help Netcom Information Technology students obtain loans from various lenders.
>
> - Sallie Mae IT Training Loan
> - IT Skills Loan program
> - Key CareerLoan for IT
> - NetCom's TFC Loan program
> - WCC Training Fund Program
>
> With our multiple IT loan partnerships from various vendors above, your chances of getting approved for an IT loan increases dramatically.
>
> The quickest and easiest way to get preapproved is online—*Click here now*. Or you can contact one of our educational consultants today for help in financing your IT education. You can use the student loan calculator on the right to get an estimate on your monthly payments." [5]

One of the many computer training schools that closed was Solid Computer Decisions (SCD). In most states SCD was not licensed to operate as a school, and it always illegally promised people jobs if they signed up for the training. Many of SCD's victims were lured to it by job advertisements and never even intended to be enrolling in training or taking out a loan. The unsuspecting job seeker thought she or he was attending a job interview, but that was merely a pretense to subject them to a hard sales pitch. The aggressive sales pitch

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was this: to promise the job and a high salary, to explain that training was required, to urge the target not to worry about the cost, to promise the job seeker that SCD could arrange a loan, and to convince the target that the future salary would easily pay the loan. In this way, SCD turned job seekers into debtors and primarily solicited loans for Sallie Mae. After taking more than $21 million in loans from Sallie Mae, SCD simply closed its doors, filed bankruptcy, and left its victims out in the cold. For just this one school, these loans from Sallie Mae should have represented a $21 million investment providing substantial rewards to individuals, communities, and our overall economy. The $21 million potential investment in a stronger economy became instead a $21 million dagger cutting its way through individual finances. A large debt with no benefit can ruin a struggling family and, because the loans are not federally guaranteed, no other protection exists. Rather than job opportunities and economic growth, the credit provided by Sallie Mae to this one school shattered hopes and dreams in more than fifteen states.

If students at computer training schools were receiving valid training at reasonable prices, then the loans would each be a benefit to each student and to the economy as a whole. This type of good investment credit would increase the job skills of all students, and would increase both the earning and spending power of each student. Given the massive job loss in our country in the past two years, increasing the job skills in any community and the earning potential of employees is vital to the strength of our economy. Thus, proper liquidity made available to legitimate training schools is the type of credit that provides strength to our market economy and allows people to improve their situation. Similarly, providing liquidity to sham training schools fundamentally harms our system. The computer training school closures, and their consequences that reverberate throughout our system, are a function of private lenders providing liquidity to bad actors.

The Sallie Mae System

As one of Sallie Mae's fastest growing divisions, SLM Financial works closely with computer training school to obligate people on Sallie Mae's non-federally guaranteed student loans. SLM Financial, and certain banks involved in the process, use the trade schools to solicit loans. SLM Financial coordinates the entire process and provides all the loan documents to the training schools. The consumer-students interact only with the school, and SLM Financial and those banks then receive the benefit of an enforceable loan.

SLM Financial selects the schools that it will use to increase its portfolio and its contract with the schools allows it to monitor the school's accreditation. SLM

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Exerpts from Testimony Before the Subcommittee on Financial Institutions And Consumer Credit

Fair Credit Reporting Act: How it Functions for Consumers and the Economy

June 4, 2003

by Leonard A. Bennett, on behalf of NACA

[After introducing himself and NACA's interest to the committee, Len Bennett focused the argument…]

…The position of both the financial services industry and the credit bureaus is essentially the same - the FCRA system is perfect and you should not allow preemption to expire. The reality is far from these mis-truths. The Credit Reporting system remains seriously flawed and under present trends will only get worse. And the fear of the preemption sunset is blown out of proportion and would not jeopardize what national standards the FCRA has established.

Unlike some consumer protection statutes, the FCRA is not targeted to protect any particular group of Americans. It protects all of us. Wealthy and those of modest means alike. Husband and wife. Father and Son. It protects those of us in the South as much as those of you from any other region. I practice primarily in Hampton Roads, Virginia. As a result, I have had the privilege to represent countless members of the United States Armed Forces. I represented several consumers in pending cases while they proudly served our country in Iraq. And whether an enlisted or an officer, the law protects each the same. The FCRA's protections do not know party line or ideology. It is a unique statute for a unique problem. The law must protect our privacy. It should help maintain the security of our information. It could help expand a frictionless economy. And ideally it would better guarantee that those who have earned good credit are able to keep the fruits of their efforts and responsibility.

Beyond the importance of the FCRA to consumers, you must also consider its benefits to our economy and American business. In its original adoption of the FCRA, Congress found that "the banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. Section 1681(a)(1). In considering the 1996 Amendments to the Act, Representative Kennedy explained, "[i]f these reports are not accurate, or if they are distributed without a legitimate purpose, then our whole society suffers. Consumers may be unfairly deprived of credit, employment, and their privacy. And businesses may lose out on the opportunity to gain new customers." 140 Cong. Rec. H9809, September 27, 1994. These insights are still true today. Accurate information is critical for a functioning economy. I am a believer in the free market system. The more accurate the information, the better the decisions made by our economy's actors. One of the principals I was taught in my undergraduate years studying the stock and investment markets is a concept titled "the efficient market hypothesis." The idea is that the investment markets will be fluid and frictionless only if perfect and equal information is available to all market participants. The same may be said for the consumer credit markets. Businesses need more accurate and complete information with which to make better lending decisions. Whether for the financing of an automobile, a home, or a department store purchase, sellers and lenders need access to accurate credit information so that they may transact business safely and with lower risk. These include large consumer lenders such as the credit card industry or mortgage lenders. But, it also includes more modest-sized businesses without the large margins for error available to institutional creditors. Credit file inaccuracies are damaging to businesses in both directions. Inaccurate credit reports may misstate the quality of a consumer's credit in a manner which could cause a potential seller or lender to inappropriately extend credit. The rise in consumer bankruptcies is one of the results of this false positive. On the other side of the coin, inaccurate derogatory information will keep businesses from selling and financing goods and services to consumers with otherwise excellent credit. The growing flaws in the credit system are endangering American businesses in both ways. Credit risks are inappropriately getting credit, while responsible consumers are often saddled with inaccurate derogatory histories that keep them from doing the same. The irony of the credit industry's opposition to FCRA improvement is the fact that the industry stands to gain as much as any other participant in this debate.

You have heard or will hear from countless witnesses

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all who express the policy view of their respective organizations or trade groups. Few if any of your witnesses will have any live experience actually using or enforcing the statute. Throughout the history of the consumer credit laws, attorneys such as myself have been titled "private attorneys general" by courts and commentators. It is our role to bring private enforcement actions to ensure compliance with laws such as the FCRA. Without these efforts, the FTC would need an army of regulators to perform the function - a possibility an advocate of limited government such as myself could not accept. You have now met one of the individuals who actually goes into federal court to implement the laws that you enact. I and other members of NACA see the flaws in the FCRA firsthand. We face the walls and obstacles placed in the way of full enforcement by the credit bureaus and their army of lawyers. We face the limitations and restrictions of the FCRA on a daily basis. I would like to take this opportunity to better inform the sub-committee on the mechanics of the FCRA system and some of the flaws within it…♦

[You can find the full text of this extensive testimony on NACA's website, at this address: http://www.naca.net/BennettFCRATestimony.pdf]

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NACA Elections

The NACA Nominating Committee recommends the following candidates for the Board in 2003-2004:

Paul Bland

Cary Flitter

Laura McDowell

Janet Varnell

❖ ❖ ❖

The NACA Nominating Committee recommends the following as officers for 2003-2004:

Paul Bland as Co-Chair

Nancy Barron as Co-Chair

Bob Hobbs as Treasurer

Cathy Mansfield as Secretary

Vote and Make a Difference!

Frontline News

MINORITY AUTO BUYERS BENEFIT FROM NMAC SETTLEMENT

Nissan Motor Acceptance Corp. (NMAC) and minority car buyers recently finalized the settlement of a lawsuit charging that NMAC's credit financing policy resulted in African Americans and Hispanics paying more in finance charges than whites. Consumer and civil rights groups called the settlement a significant step in their efforts to eliminate the industry practice of hidden markups that lead to discriminatory auto lending rates.

The case, *Cason et. al. v. Nissan Motor Acceptance Corp.* was filed in U.S. District Court for the Middle District of Tennessee at Nashville.

The lawsuit, filed in 1998, alleged that car dealers were more likely to increase or "mark up" the interest rate charged to black or Hispanic car buyers. The suit also contended that when a markup was charged, the average markup for black and Hispanic car buyers was greater than for white buyers with similar financial backgrounds.

"This settlement is important as it marks the first time a finance company has stepped up to be part of the solution to discriminatory lending practices in auto financing," commented **Stuart Rossman**, an attorney with the National Consumer Law Center who represented the plaintiffs in this suit. "However," Rossman noted, "NMAC is only one small player in the auto finance industry. We are hopeful that this settlement will serve as a starting point for other lenders as we continue our work to eliminate discriminatory lending practices."

NACA member Stuart Rossman

Under the terms of the settlement, NMAC will offer preapproved "no markup" loans based on customer creditworthiness to hundreds of thousands of current and potential black and Hispanic Nissan owners. The company will also limit how much it raises the interest rates charged to car buyers above the minimum acceptable rate (the markup), and will contribute $1 million over the next five years to low-income and minority consumer education programs.

"This settlement provides real value for car buying consumers," said Rossman. "The preapproved loan program together with funding for consumer education gives us an important opportunity to demystify the financing process for car buyers...as a result of this settlement, hundreds of thousands of minority car buyers will be informed of the lowest interest rate they qualify armed with this knowledge, they will now be able to negotiate their finance rate just like they negotiate the car's purchase price."

"Recognizing that disparities exist in the auto financing arena is an important step toward ensuring fair treatment for all consumers, regardless of race and ethnicity. We hope and expect that the NMAC case will be a pioneering example that other companies in the industry will soon follow, " said Raul Yzaguirre, National Council of La Raza President.

"America's underserved consumers need to be armed with the realities of automotive financing. The NMAC settlement serves as a proper first step towards acknowledging the inequities within the industry," said Bonita Parker, National Director of Rainbow/Push, 1000 Churches Connected program a national financial literacy program for African American churches.

An important aspect of the settlement is the $1million in grants to national consumer and minority consumer education programs. Through this lawsuit, the plaintiffs sought a major commitment to consumer education around ways to avoid these charges. Funds will be granted to Consumer Federation of America's "America Saves" program, National Council of La Raza's financial education initiative and the Rainbow/Push Coalition's 1000 Churches Connected program.

NACA members **Wyman "Gil" Gilmore** and **Gary Klein** were among the plaintiff's co-counsel in this case.

A set of Frequently Asked Questions regarding the lawsuit and settlement agreement can be viewed at: http://www.nclc.org/initiatives/cocounseling/content/NMACFAQ.pdf

An outline of the settlement agreement can be viewed at: http://www.nclc.org/initiatives/cocounseling/content/-outline.pdf

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Frontline News

Mississippi Supreme Court Rules That Major Poultry Producer Cannot Force Family Farmers into Arbitration

The Supreme Court of Mississippi ruled on June 26, 2003 that Sanderson Farms, Inc. (Sanderson)—one of the top seven poultry producers in the United States—wrongfully denied family farmers Roy and Nelda Gatlin of Jones County, Mississippi, the right to have their day in court, when the company terminated the couple's production contract prematurely, then breached its promise to pay half the $11,000 estimated costs for an arbitration hearing.

The Court affirmed by a 6-3 vote the ruling of the Circuit Court of Jones County, which found that Sanderson had violated its own arbitration clause and, in so doing, waived its ability to force the farmers into arbitration. Trial Lawyers for Public Justice (TLPJ) Staff attorney **Michael J. Quirk**, wrote the Gatlins' brief on appeal, arguing that the arbitration clause was unconscionable for imposing significant costs and depriving the farmers of their right to recover punitive damages or participate in class actions.

"Arbitration costs exceeding $10,000 are shocking to the conscience," said Quirk. "The Court's decision tells companies that they cannot spring unexpected and excessive arbitration costs on family farmers to prevent them from getting access to justice."

Michael J. Quirk, Staff attorney for Trial Lawyers for Public Justice
Photo Credit: Herman Farrer

"The Court's decision, in both the majority and dissenting opinions, shows that arbitration should be used as an alternative method for resolving disputes, not as a weapon for depriving people of a forum for resolving disputes," said J. Dudley Butler of Jackson, Mississippi, co-lead counsel for the Gatlins. "Arbitration is a valuable tool when properly used, but is all too often abused by corporations seeking to insulate themselves from defenses such as fraud, duress, and unconscionability. Arbitration should be permitted only when the parties knowingly and voluntarily agree to it; it should not be imposed through power and chicanery."

Independent farmers Roy and Nelda Gatlin first contracted with Sanderson to raise broiler chickens in 1980, when the couple bought their farm in Jones County, Mississippi. Later, Sanderson authorized them to build two additional broiler houses on their farm, based on their ranking in the top 50% of the company's growers. The Gatlins pledged their farm, which included their home and four broiler houses, as security on a mortgage of over $250,000 so they could perform their contract with the company. In January 1997, Sanderson presented a new 15-year contract to Roy Gatlin, which for the first time contained a mandatory arbitration clause. The arbitration clause provided that costs arbitration were to be divided equally among the parties.

Some time after Gatlin and Sanderson signed the 15-year contract, Gatlin was told that Sanderson would find a way to terminate the contract because of Gatlin's earlier questioning of the company's management procedures. On Christmas Day, 1997, Sanderson called Gatlin and told him to come to its office the next day. Sanderson informed the Gatlins on December 26, 1997 that it was going to terminate their contract effective January 1, 1998, with 14 years remaining on the contract. Sanderson Farms then took its most recent shipment of chickens from the Gatlins and delivered them to another grower. The Gatlins immediately contacted every poultry processing company in their area, but all of them refused to deliver chickens to the Gatlins.

In February 1998, Roy Gatlin filed a demand for arbitration against Sanderson and paid half the $2,750 arbitration filing fee to the American Arbitration Association (AAA), the private legal system chosen by Sanderson Farms. But Sanderson refused to pay any of the filing fee when AAA requested payment of the balance, claiming that its arbitration clause's reference to the "cost of arbitration" did not include the filing fee. Gatlin paid the full $2,750 filing fee to AAA. In July 1999, less than two weeks before the arbitration hearing was to be held, Gatlin received a billing statement from AAA requiring him to pay an additional $8,250 in arbitration costs, including $6,900 in arbitrators' compensation and $1,000 in arbitrators' expenses. Adding this to his prior payments, Roy Gatlin would have been required to pay at least $11,000 even before getting his arbitration hearing. Unable to afford these costs, he was forced to abandon the arbitration.

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Home

NACA is a member-based organization which achieves its effectiveness through the participation of many good people. While the 12-member Board meets monthly or more to further the administration of NACA, discuss allocation of resources, and coordinate policy with the Executive Director, a great deal of exciting work goes on at the committee level. Non-Board members are welcome and encouraged to participate in committee work at every level. Variation in experience and time commitment is the norm, not the exception. Members interested in serving on the

Dear NACA Members:

As we approach our annual conference, I'd like to update you on of NACA's recent activities and plans for the upcoming year. I continue to be amazed by the breadth and depth of our members' accomplishments and excited about our potential for contributing to a nation where consumer justice is not merely a pipedream but a reality.

Legislative Activities

On mortgage lending issues, we continue to be actively involved in several ways. The federal Ney Bill attempts to undo all the good work consumer advocates have done in states on predatory lending seems to be dead for this Congressional year. Unfortunately, strong state mortgage legislation is being threatened by the Office of the Comptroller of the Currency (OCC), which has set its sights on preempting all state laws that affect national banks and their operating subsidiaries. We're currently engaged in a coordinated effort to stop the OCC, offering comments on their proposed regulations and are helping with amicus briefs on cases where OCC is attempting to expand its preemptive powers. Finally, and maybe most hopefully, we remain in active conversation with Fannie Mae and Freddie Mac about developing model state predatory lending legislation that we all can support. It is my optimistic belief, that because these companies have a special federal charter that gives them an important public purpose (although all too often they have to be reminded of this), we have a great opportunity to make this model legislation happen. Equally important, I remain hopeful that we can move these companies to adopt business practices that will strongly influence other businesses in the consumer marketplace.

We continue to be actively engaged in the FCRA legislative battle, where industry is seeking to prevent states from providing their citizens with additional credit reporting and financial privacy protections. A bad bill has passed the House, but we remain hopeful because we count among our potential allies, powerful Senators Shelby and Sarbanes. Additionally, we remain a central player in the morass that is RESPA reform. What started out as our attempt to force HUD to proactively fix the yield spread premium problem (after they harmed consumers and their advocates with their infamous 2001 Opinion Letter), has turned into a free-for-all as various industry groups are fighting tooth and nail amongst themselves to preserve their piece of the real estate settlement goldmine (again for more details see www.naca.net). We remain in there fighting for "fair and balanced" RESPA reform (I know enough lawyers so I feel safe in using that term), but with an administration not often sympathetic to the needs of American consumers, I remain extremely nervous about what HUD will ultimately do.

Because of the enormous potential of our organization to wage these important battles, we are now beginning to explore whether we need to hire a staff person to work exclusively on our legislative agenda. I am particularly interested in raising the political profile of what we all know to be the current biggest threat to consumer justice: mandatory arbitration. If we can develop a stable funding source (and with all your help, the possibilities are there), I believe this is something we can and will make happen.

Conferences

Because we seriously listen to your feedback, we have decided that the FCRA and Autofraud conference will be annual events that occur around the same time

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Board in the future most often begin by serving on one of more committees. Active involvement is clearly an example of getting back what one gives. The experience of working intensively with other seasoned advocates keeps the learning curve steep and the professional edge sharp. Volunteers, interested in working with any of the following committees are invited to email NACA Administrative Director Phyllis Roderer at phyllis@naca.net. —Ed.

each year. To provide sufficient time between the events, we intend to have the Autofraud Conference in February and the FCRA conference in May. The FCRA steering committee, led by the indomitable Ian Lyngklip, has already begun building on last year's conference and we can expect another great event. Aurora Harris has already begun the planning process for the Autofraud conference to focus on the financing of the car deal.

Membership Benefits

One of our central missions is to make NACA membership a valuable resource for all of our members. We are always looking for ways to help our members make their practice of law easier, more enjoyable and more profitable. To this end, you should or will be receiving our first venture into publishing, "Practice of Consumer Law," a joint effort with our close friends at NCLC. This book, free to all our members, has lots of incredibly helpful practical ideas, and if all goes well, will be supplemented on a yearly basis. In addition to this book, we have successfully moved all our discussion groups to our own server. This will enable us to attach important pleadings to our shared messages and allow us to build and develop carefully developed archives of important substantive material. Additionally, thanks to a generous cy pres award to NACA and NCLC from an anonymous member, we together will soon begin building a comprehensive database of information for members practicing Fair Credit law.

Finally, because of your concern about the increase and/or cancellation of malpractice insurance for private consumer lawyers, we have been working diligently to find a way to help our members obtain affordable insurance. While all the details have not been finalized, I am confident enough to announce that we have arranged to make malpractice insurance available to all interested members. We expect to have the opportunity to purchase this insurance by the time of the Annual conference. If you can't wait until then—feel free to contact me now.

Thank You

NACA continues to flourish because of the incredible generosity of our members. I'm repeatedly honored when we are told that we have been chosen as a cy pres recipient. In the last month, besides the anonymous cy pres donation, we received word of a wonderful award from Tom Campbell of Campbell and Baker in Birmingham, Alabama. Additionally, we recently received a tremendous cy pres award from Stacy Bardo, Brian Bromberg, Lance Raphael and Paul Sod. Their incredible kindness will allow NACA to fund all the scholarship requests we have received from our members for the Annual Conference.

Thank you all again and I look forward to talking with everyone in Oakland. ◆

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TECHNOLAWYER.COM:
NO STRINGS ATTACHED: CUTTING THE CORD WITH A WIRELESS LAW PRACTICE

by Ross L. Kodner

INTRODUCTION

Those frustrating cables -- they're everywhere! Intertwining and connecting seemingly plug-incompatible gadgets in our laptop cases; tangling purses and briefcases in a snakelike mass of plastic-encased cords; connecting Palms to PCs; going from headsets to cell phones; "conveniently" linking us to printers (when sometimes the cables weigh more than the laptop); stretching to scanners; retracting (or not) from telephones; coiling like a garden hose around the legs of our chairs while connecting us to a network. Arrgh! Enough!

It's time to banish the cable headache once and for all. Wireless technology is the answer. It's hard not to hear about the rise in wireless devices today. From network connections for our laptops and Palms to wireless earphones for our cell phones, wireless e-mail, wireless Internet "hot spots," the practice of "warchalking" sidewalks to note wireless Internet access points in metro areas—we're walking in a wireless wonderland, and just in the nick of time.

What kinds of wireless devices make sense for lawyers? Why, many pragmatic wireless devices and applications exist for lawyers and their staff, for firms of all sizes and for practices of all types. Several key wireless technologies recently have gone past being de rigueur and have morphed into "must haves." What sort of setup makes sense for you? Different methods for wireless connections, including WiFi (otherwise known as "Wireless Ethernet") and its short-range cohort, Bluetooth technology, have appealing features that may serve you well.

WIRELESS NETWORKING

Most law firms with more than one PC have them networked together to share data, programs, and peripherals such as printers and backup systems. Traditionally, this network has involved some kind of interconnecting device (typically referred to as a "hub" or a "switch") and cables to actually connect the device to the PCs. Firms that planned ahead and installed network cable outlets in many places throughout their offices have had the luxury of being able to sit and work, connected to their networks (and via them to the Internet) at any of these "cable points."

But what happens when one of the lawyers wants to sit in the library with laptop in hand and get work done, surf the Net, and so forth? How about the office's kitchen area? What if there aren't any cable points there? The localized nature of cable points has meant there has been no practical way to access from all points in an office the network documents, calendars, the Internet, or even e-mail. And that, today, just isn't acceptable.

Switch gears and consider computing in your home. In more and more families, all members have their own PCs. Add a speedy new cable modem to access the Internet and you end up with a chaotic logjam—everyone wants to access the Net at the same time. Spending hundreds, if not thousands, to run network cabling in an existing home is not an appealing option. In the interest of family harmony, if not just plain convenience, finding a way to wirelessly share printers and Internet connections becomes a necessity.

Wireless networking technology isn't new. For a number of years there have been methods, usually oriented to home users, for connecting PCs without the need for a physical cable connection. Until relatively recently, however, none of these methods has been very workable or reliable ... or affordable. With the advent of a new generation of wireless network technology, based on the virtually ubiquitous Ethernet system for connecting PCs and peripherals, a new era for wireless connectivity has dawned. Many predict that those leveraging some version of 802.11x wireless network technology (often referred to as WiFi) may eventually outnumber the corded set among us.

WiFi, currently available in several numerical flavors, is the most popular wireless networking technology. A cableless derivative of tried-and-true Ethernet network, it is now standard equipment in many laptops, some printers, some Palm-sized devices, and even some LCD projectors. The technology is successful because, well, it actually works. The most common form is called 802.11b. This system sends and receives information via a device called a wireless access point at 11 Mbps (megabits per second: remember to divide by 8 to get "megabytes per second"), with some systems capable of "turbo" mode at double that speed. If you purchased a laptop in the last 18 months that has wireless capability, it likely uses the 802.11b transmission standard. Practical operating

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ranges extend to about 1,000 feet under perfect conditions, but actually more like 200 feet inside a building—more than adequate to take one's laptop outside onto the deck at home or into the office's conference rooms.

A wireless access point is a small box that connects to your existing network. It adds the whole network to communicate wirelessly with the wireless-equipped devices on your network. Some wireless access points, often designed for home use, also incorporate a router to allow shared access to a cable modem or DSL Internet connection and often standard network hub capabilities to interconnect cabled network components. They sometimes include Internet firewall capabilities as well: consider them the multifunction devices of the networking world. Popular makers include Linksys, D-Link, U.S. Robotics, Netgear, Orinoco (Lucent Technologies), Cisco, 3COM, and even Microsoft. Typically, a wireless access point/cable and DSL router/network hub will cost between $90 and $200 for home-oriented units to as much as several thousand for high-capacity, high-security units intended for larger offices.

The next piece of the puzzle is the wireless "card"—the component either built into a PC or printer, or added to one that communicates with the wireless access point. More and more laptops, and even several higher-end Palm-sized devices, have wireless capability (generally following the 802.11b standard) built-in. If not, a wireless PC card can be added to a laptop for between $50 and $150. For desktop PCs, the options are internal PCI cards or external USB wireless adapters, which cost between $50 and $125. It is also possible to connect non-PCs wirelessly -- devices with thernet networkability such as printers, some scanners, and yes, even the new "Internet-enabled refrigerators." This is done with a device called a "wireless bridge," offered for about $100 by companies such as Linksys <http://www.linksys.com>.

Security is always an issue with a network, so it is even more so when all those bits and bytes float through the air. The 802.11b standard uses a security system called WEP (wired equivalent privacy). Unfortunately, this method hasn't lived up to its acronym and has been proven to be penetrable. Even though WEP is only somewhat effective at securing wireless network transmissions, it is still far better to turn it on than not. Also, every wireless network has a special identifier called an SSID. This is essentially an identifying code that is exchanged between the wireless access point and PCs trying to connect with it. It is critical to reset the SSID on a new wireless access point (and on the PCs connecting to it) to something other than the default setting. At a minimum, this can prevent unauthorized wireless-equipped users from "leveraging" your wireless network connections.

The newer 802.11g systems employ far more sophisticated security capabilities—WEP on steroids so to speak. While some clever hacker may someday demonstrate that the security of the "g" system can be broken, it hasn't happened yet. This, along with connection speeds nearly fives times faster, is a compelling reason to invest in a "g" system.

The future of WiFi? More and more companies are embedding WiFi capability into an ever-widening array of devices. Wireless access points in public locations are multiplying rapidly. Hotels are exploiting 802.11b technology to create wireless zones in their properties, which is much less costly than offering high-speed Internet access to guests by installing physical cabling to every guest room. Companies like Wayport are leading the charge in hotels. Many Starbucks locations around the country are offering T-Mobile's version of 802.11b access, with online charges offered daily or by monthly subscription. Services like Boingo <http://www.boingo.com/> offer a flavor of 802.11b at hundreds of access locations nationwide. Laptop maker Toshiba is teaming up with Circle K convenience stores to offer wireless zones. (Hmm ... high-speed Net access, a tank full of unleaded premium, and Twinkies: why does that combination seem so dangerous?) Expect to see more and more 802.11b access points nationwide.

A LONG VIEW ON A SHORT APPROACH

WiFi is not the only wireless system for connecting electronic gizmos. A standard called Bluetooth has been in the offing for years and is now coming to fruition. Bluetooth is a short-range transmission system intended for interconnecting personal devices into what some have referred to as a PAN (personal area network). Examples of Bluetooth capabilities include cordless communication between an earphone/headset and a cell phone. Or how about a cell phone and a PDA that "talk" to each other when they're in range and automatically synchronize their contact lists? Consider a Bluetooth-enabled PDA that can print its content to a Bluetooth-equipped laser printer. Bluetooth devices have an effective transmission range of about 30 feet. Future possibilities could include capabilities that would synchronize a PDA's street map software to a future Bluetooth-equipped car's in-dash navigation system.

Another short-range wireless connection approach is infrared (IR) technology. Familiar to many as the system that makes your TV's remote control work, the technology has been available in PCs for some time. Most PDAs have an infrared system. This can be used to beam information between PDAs or to connect PDA and PC, sans cables, to synchronize their information. Some printers also have IR capability, allowing an IR-equipped laptop or PDA to print without a bulky parallel cable or

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Endnotes

1. Hendricks & Moch, Protective Orders: The Industry's Silencer on the Smoking Gun, 73 Mich.B.J. 424 (May, 1994).

2. *United States v. Nixon*, 418 U.S. 683, 710, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974): "privileges contravene the fundamental principle that the public . . . has a right to every man's evidence."

3. *In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir. 1988). Protective orders should not be used to conceal wrongful conduct. In addition, a protective order cannot serve as more than a stopgap measure to seal discovery materials. Incriminating information will normally be disclosed at trial even if the information is effectively suppressed prior to that time.

4. *US v. Amodeo*, 71 F.3d 1044 (2nd Cir. 1995) at 1051 recognizing that personal financial information is presumptively private. Accord, *In re Boson Herald, Inc.*, 321 F.3d 174 (1st Cir. 2003). See e.g. *Gattegno v. Price Waterhouse Coopers, LLP*, 205 F.R.D. 70 (D. Conn. 2001).

5. *Siedle v. Putnam Inv., Inc.*, 147 F. 3d 7, 10 (1st Cir.); *In re Providence Journal Co., Inc.*, 293 F. 3d 1 (1st Cir 2002).

6. *FTC v. Standard Fin. Management Corp.*, 830 F2d 404, 408-409 (1st Cir. 1987); *US v. Amodeo*, 71 F.3d 1044 (2nd Cir. 1995); *Video Software Dealers Assoc. v. Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994); *US v. Myers (In re Nat'l Broadcasting Co.)*, 635 F.2d 945 (2nd Cir. 1980); *Brown and Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983); *In re. Knoxville News Sentinel Co.*, 723 470 (6th Cir. 1983); *Grove Fresh Distributors, Inc. v. Evefresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984); *American Tel. &Tel. C. v. Grady*, 594 F.2d 594 (7th Cir. 1978).

7. *Harris v. Amoco Production Co.*, 768 F.2d 669 (5th Cir. 1985). Courts interpreting F.R.C.P. 26(c) have afforded trial courts much discretion with regard to the granting and fashioning of protective orders. "If the party from whom discovery is sought shows 'good cause,' the presumption of free use dissipates, and the district court can exercise its sound discretion to restrict what materials are obtainable, how they can be obtained, and what use can be made of them once obtained."

8. "While District Courts have the discretion to issue protective orders, that discretion is limited by the careful dictates of Fed. R. Civ. P. 26 and 'is circumscribed by a long-established legal tradition' which values public access to court proceedings. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100, 80 L. Ed. 2d 127, 104 S. Ct. 1595 (1984)." *Bankers Trust, supra*.

9. *Press Enterprise Co v. Superior Court*, 464 U.S. 501, 509-510, 104 S. Ct. 819, 78 L.Ed. 2nd 629 (1984).

10. *US v. Amodeo*, 71 F.3d 1044 (2nd Cir. 1995) at 1048.

11. *Leucadia, Inc. V. Applied Extrusion Tecnologies, Inc.*, 998 F. 2d 157, 161 (3rd Cir. 1993).

12. *US v. Amodeo*, 71 F.3d 1044 (2nd Cir. 1995) a 1048 (comparing the discovery process by which no stone is left unturned to the litigation process through which the irrelevant evidence is discarded).

13. *Cipollone v. Liggett Group*, 785 F.2d 1108, 1121 (3d Cir. 1986); *Burns v. Imagine Films Entertainment*, 164 F.R.D. 589, 592-593 (W.D. N.Y. 1996); *Chubb Integrated Systems v. National Bank of Washington*, 103 F.R.D. 52, 58 (D.C. 1984).

14. *Wagner v. Dryvit Sys.*, 208 F.R.D. 606 (D. Neb. 2001) at 611. *(Citing, See, Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 42, 45-6 (D.C.D.C. 1984)).

15. *Brittian v. Stroh Brewing Co.*, 136 F.R.D. 408, 412 (D.NC 1991); *Nestle Foods Corp. v. Aetna Cas. and Sur. Co.*, 129 F.R.D. 483, 487 (D.NJ 1990).

16. *United States v. Panhandle Eastern Corp.*, 118 FRD 346 (D. DE 1988).

17. *In re "Agent Orange" Prod. Liab. Litigation*, 821 F.2d 139, 145 (2d Cir. 1987); *Glenmede Trust Co. v. Thompson* 56 F.3d 476 (3rd. Cir. 1995) I*n re Wilson*, 149 F.3d 249, 252 (4th Cir. 1998). *Harris v. Amoco Production Co.*, 768 F.2d 669 (5th Cir. 1985). *P&G v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). *Baxter Intern., Inc. v. Abbot laboratories*, 297 F.3d 544, 548 (7th Cir. 2002). *San Jose*

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Mercury News, Inc. V. United States Dist. Ct., 187 F.3rd 1096,1102 (9th Cir. 1999); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d. 1204, 1212 (8th Cir. 1973); Miscellaneous Dockeet Matter No. 1 v. Miscellaneous Docket, 197 F.3d 922, 926 (8th Cir. 1999); Phillips v. GM, 307 F.3d 1206 (9th Cir. 2002); *In re Standard Metals Corp.*, 817 F.2d 625,628 (10th Cir. 1987); *Farnsworth v. Procter & Gamble, Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985); *Chicago Tribune Co., v. Bridstone/Firestone, Inc.*, 263 F.3d 1304, 1313 (11th Cir. 2001).

18. *Pulsecard, Inc., v. Discover Card Services*, 168 F.R.D. 295, 303 (Kan. 1996). *See, St. Paul Reinsurance Co., Ltd. v. Commercial Financial Corp.,* 198 F.R.D. 508 (N.D. IA 2000).

19. *Avirgan v. Hull*, 118 F.R.D. 252, 254 (D.D.C. 1987). See, *e.g., Waelde V. Merck, Sharp, & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. 1981) (Movant must make a particularized showing and demonstrate specific examples of competitive harm" where good cause is predicated on claims of confidential trade secrets); *Deford v. Schmid Products Company*, 120 F.R.D. 648, 653 (D. Maryland 1987) (Movant must show that disclosure would cause significant harm to its competitive and financial position, supported by affidavits and concrete examples; conclusory allegations of potential harm are insufficient.); *Zapata v. IBP, Inc.*, 160 F.R.D. 625, 627 (D. Kan. 1995)("the initial inquiry is whether the moving party has shown that disclosure of the information will result in a 'clearly defined and very serious injury.'" See, *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 480 (S.D. N.Y. 1982)). The moving party must also make "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16, 68 L. Ed. 2d 693, 101 S. Ct. 2193 (1981).

20. Under Fed. R. Civ. P. 26(c)(7), the party opposing discovery has the initial burden to demonstrate that the information requested is a "trade secret or other confidential research, development, or commercial information," and also that its disclosure would be harmful to the party's interest in the property. *Sentry Ins. v. Shivers*, 164 F.R.D. 255, 256 (D. Kan. 1996). In determining whether good cause exists to issue a protective order that prohibits the dissemination of documents or other materials obtainein discovery, "the initial inquiry is whether the moving party has shown that disclosure of the information will result in a 'clearly defined and very serious injury.'" *Zapata v. IBP, Inc.*, 160 F.R.D. 625, 627 (D. Kan. 1995) (quoting *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 480 (S.D. N.Y. 1982)). The moving party must also make "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16, 68 L. Ed. 2d 693, 101 S. Ct. 2193 (1981). The burden then shifts to the party seeking discovery to show that the information is relevant to the subject matter of the lawsuit and is necessary to prepare the case for trial. *In re Remington Arms Co., Inc.*, 952 F.2d 1029, 1032 (8th Cir. 1991).

21. Whether a specific disclosure would constitute a trade secret is matter of state law. While some distinctions between the definition between states, most case law looks to the Uniform Trade Secrets Act for the applicable definition of a trade secret.

22. *Federal Open Market Comm. of Federal Reserve Sys. v. Merrill*, 443 U.S. 340, 362, 61 L. Ed. 2d 587, 99 S. Ct. 2800 (1979); *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 325 (10th Cir.1981).

23. *Wagner v. Dryvit Sys.*, 208 F.R.D. 606 at 612. (Citing, *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 42, 45-6 (D.C.D.C. 1984)). ♦

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The National Association of Consumer Advocates takes an active role in advocating consumer interests by filing amicus briefs in a number of leading consumer protection cases before the United States Supreme Court and other courts across the country. Whenever possible we will make these amicus briefs available for the benefit of our members on the newly revised website at www.naca.net, stored in PDF format.

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DOMONOSKE: *Continued from Page 9*

Financial closely tracks the volume of loans that each school generates for it, and provides recognition to the schools generating a large volume of loans. With these contracts, SLM Financial should be able to determine the legitimacy of the schools it is using to solicit its portfolio.

Furthermore, because of the FTC Holder Rule notice in each loan, SLM Financial would in theory have a strong incentive to ensure that the students do not have claims against the schools. The FTC Holder Rule is simple and clear that any claim or defense the student has against the school is claim or defense against the loan. Under this federally required clause, if the school closes, each of its students is theoretically protected. Additionally, if the school, like SCD, was not licensed or engaged in fraud, the loans would simply be unenforceable. Given that SLM Financial had the contractual ability to monitor schools like SCD, the FTC Rule properly places on SLM Financial the exposure flowing from the schools misconduct.

The problem is that SLM Financial has shown flagrant disregard of FTC Holder Rule. In each loan document that included the FTC Holder Rule, SLM Financial included an additional clause that negated the FTC Holder Rule. This clause states that the student agrees that the loan is enforceable even if the student is unhappy with the services provided by the school. When victims of a computer school fraud complained to Sallie Mae, Sallie Mae recited this provision back to them and demanded full payment of the loan. Consequently, students who received no training and no job were told by Sallie Mae they still had to pay all the loan. When students complained to various legislators, Sallie Mae quoted this paragraph and convinced Senators and members of Congress that the students still owed the full amount due.

SLM Financial also put a second clause in each of the loans: an arbitration clause with an anti-class action provision. With this arbitration clause, Sallie Mae has obtained a shield for the behavior of its fastest growing division. When students have filed lawsuits in an effort to enforce their federal rights, Sallie Mae and its related banks have enforced the arbitration clause. Lawsuits have been filed in several states and SLM Financial always enforces the clause. In this way, SLM Financial is able to avoid answering for its decision to use unlicensed computer training schools to increase its portfolio. In one of the cases filed in Virginia, *Glassman v. SLM Financial*, SLM Financial's lawyer agreed that the plaintiff might have a case if he had stayed in court, and then stated "I do not think there is any likelihood at all that an arbitrator is going to punish SLM Financial for the misdeeds of a bankrupt school."[6]

With the arbitration clause to shield it from judicial review, Sallie Mae has been incredibly upfront about its disregard for the FTC Holder Rule in the loan contracts. Beginning with the CLC closing in January 2001, Sallie Mae did not consider it had any obligation to forgive loans for classes that were never provided, and instead offered only minor interest deferments. "The deferment means students are not responsible to make payments during those periods on current or delinquent loans. Borrowers will not accrue interest during the two-month period either. Loans eligible for the deferment period are non-federal, non-guaranteed loans owned by Sallie Mae and serviced by its affiliate, SLM Financial." [7]

As more schools closed, Sallie Mae still refused to honor the FTC Holder Rule. For instance, in response to a student of SCD who asked SLM Financial to cancel the loan, SLM Financial's Quality Assurance Manager wrote as follows in a letter dated October 29, 2002.

> "Your allegations concerning SCD's licensing are completely irrelevant. The promissory note does not make any representation that SCD is a licensed school. Nor does the promissory note include any promises of employment opportunities with SCD upon the completion of the training. You chose to attend SCD on your own." [8]

To another SCD victim in a letter dated May 16, 2002, Sallie Mae's Senior Vice President wrote similarly.

> "Neither SLM Financial nor the Student Loan Marketing Association is responsible for SCD's alleged misrepresentations concerning post-training employment opportunities. Moreover, your allegations concerning SCD's licensing are completely irrelevant. The promissory note does not make any representation that SCD is a licensed school. Nor does the promissory note include any promises of employment opportunities with SCD upon the completion of training." [9]

On June 12, 2002, SLM Financial sent a similar letter to a student from a school called Advanced Computer Technology Training (ACTT) that stated the same defiance of the FTC Holder Rule. "You chose to attend ACTT on your own. SLM is a private loan company and has never been responsible for the actions of such schools as ACTT." [10]

Sallie Mae thus never planned on being responsible for any of the bad conduct of the schools it was using to solicit its loan portfolio. Because it intended to defy the FTC Holder Rule, it had no incentive to exercise its contractual rights to monitor the schools.

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The Key Bank System

Similar to Sallie Mae, Key Bank provides liquidity to computer training schools without regard to the misrepresentations made by the school or its unlicensed status. Similar to Sallie Mae, Key Bank does not want to be bound by the FTC Holder Rule even though it uses the schools to solicit its loans and to present its loan documents to the students. Key Bank's business plan is very simple: it simply refuses to place the FTC Holder Rule clause in the loan document. Key Bank claims that because the clause is not in any of the loans, none of the loans are subject to any claims based on the schools' misconduct.

Because the FTC regulates the sellers and not banks, the FTC places an affirmative duty on the school not to accept proceeds from a non-compliant loan, rather than placing a duty on the Key Bank not to prepare a non-compliant loan. Because of the relationship between the schools and Key Bank, no dispute exists that the loans from Key Bank are covered by the FTC Holder Rule.[11] Therefore, Key Bank's system places each school in violation of the FTC Holder Rule by not placing the Holder Notice in the contract. At the time each loan is disbursed, Key Bank knows each school is violating federal law by accepting the proceeds, and intends to deny the student the benefit of the FTC holder rule.

Key Bank's legal justification for knowingly placing the schools in violation of the FTC Holder Rule is simply that the FTC does not regulate banks and that Key Bank bears no responsibility for each schools' violation of the Holder Rule. Key Bank simply does not care that each loan is solicited by an entity that is violating federal law, and does not care that the students are being denied this fundamental federal consumer protection.

Similar to Sallie Mae, Key Bank's system disclaims any responsibility for illegal conduct by the schools. If the school is unlicensed or if it makes misrepresentations to trick the students into signing up for classes and taking the loan, Key Bank repeats its mantra that it is not responsible for the actions of the school. Because Key Bank intends to cutoff any liability for the schools' misconduct, it has no incentive to ensure it is providing liquidity to legitimate schools. Instead, contrary to the basic purpose of the FTC Holder Notice, Key Bank places the entire responsibility to police the conduct of the schools on the students. On its computer training loan program website, it informs all students that, "It is your responsibility to determine the quality of the institution and the programs offered."[12]

Given that satisfied customers are more likely to repay loans, Key Bank's willingness to fund bad loans seems at first glance to be counterproductive for its own bottom line. However, Key Bank does not intend to hold all the loans during their repayment period; instead it pools and sells its the loans to investors. Through a process called “asset-backed securitization,” Key Bank obtains full value for the loans by selling them to an investment trust. It sells the loans as if they were honest and legitimate transactions solicited by schools that were acting properly. Key Bank does not disclose the loans were based on illegal conduct or that the loans should be subject to all claims and defenses each consumer had against each school. Consequently, the investors pay full value without a disclosure of the inherent defects in the loan.

Thus, Key Bank's complete system is to create a product (a loan pool), through a series of unlawful transactions (school's violating the FTC Holder Rule), and sell that product for as much money as possible to an unsuspecting buyer (an investment trust comprised of duped investors). This is a classic fraud in the marketplace, like selling a car with a rolled back odometer, only done on a large scale through the securitization process. By providing liquidity that fuels the growth of computer training school abuses, Key Bank is harming legitimate training schools that lose potential customers to sham schools, harming the students who are left with loans but no training, and harming investors who buy into the investment trusts without complete disclosure of the violations of law.

Key Bank's practice is very successful because it does not incur the expense of monitoring and curbing the illegal behavior of the schools its uses to solicit its loans. In fact, by placing the schools in violation of the FTC Holder Rule by accepting the proceeds of a Key Bank loan, Key Bank is encouraging the schools to disregard consumer protection laws. By reducing its overhead to produce its product (the loan pool), it gains an advantage in the marketplace. Key Bank is committed to this system, and is aggressively defending the several cases that have been filed in an effort to curb its defiance of the FTC Holder Rule. It claims that its practice is normal banking practice.

The Efforts to Enforce the FTC Holder Rule

By refusing to honor the FTC Holder Rule, creditors like Key Bank and Sallie Mae exercise tremendous power to harm the lives of victims of these closed schools. Some of the students have been forced into bankruptcy, while others have been forced to refinance their debts to pay the high interest loan for which they received no benefit. If the victims simply assert the FTC Holder Rule and refuse to pay the loan, negative information is reported to their credit that ruins their credit score. By the

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simple act of reporting the loan debt on each victim's credit, Sallie Mae and Key Bank can coerce payment on these loans. Unless Sallie Mae and Key Bank choose to fully comply with the FTC Holder Rule, these victims will need consumer advocates to take up their cause to enforce their rights.

From interviews with dozens of these victims, finding consumer advocates to assert their rights is extremely difficult. They have tried state Attorney General offices, state Consumer Protection offices, the Better Business Bureau, state and federal legislators, and private lawyers. Given the arbitration clause in the Sallie Mae loans and the absence of the FTC Holder Rule in the Key Bank loans, most of the victims were unable to find private lawyers who were able to help them. The amount of misinformation being given out also hampers their efforts. For example, the official website for Central Piedmont Community College of North Carolina supposedly provides information to victims of SCD. It states:[13]

> ◆ Since SCD closed and took all of my money with them, am I still expected to pay for my student loan that I received from SLM, and/or Key Bank?
>
> Both financing institutions, Sallie Mae/SLM, and Key Bank, are holding students responsible for paying the loans back under the terms of the original loan agreement.
>
> ◆ As a student that did not receive what they paid for, nor what SCD promised, what legal rights do I have?
>
> CPCC in no way is involved in any legal dealings with the closing of Solid Computer Decisions. If a former student of SCD wishes to seek legal action, students are expected to handle that situation personally.

No mention is made of the FTC Holder Rule that is in all the Sallie Mae loans. Furthermore, because it is a state official website, its answer to the question, "Am I still expected to pay for my student loan?" appears to be state approval of the idea that the full loan must still be repaid.

Similarly, by letter dated August 23, 2002, one victim of a closed school received the following information from her United States Senator regarding her obligation to repay a loan for classes she never received. "Your loan, with SLM Financial, is a private loan and therefore does not carry the same rights for borrowers as would a government-backed student loan. Therefore, regardless of your school's actions, you are bound by the terms spelled out in the promissory note signed at loan issuance."[14] Consequently, even a United States Senator, who states he had repeated conversations with the Ombudsman for Salle Mae and with the Quality Assurance Division of SLM Financial, was misled about the existence and effect of the FTC Holder Rule in all the Sallie Mae loans.

Even the FTC has been unable or unwilling to make Sallie Mae comply with its own Holder Rule notice. Several victims and the National Consumer Law Center have alerted the FTC about the situation. Despite these efforts, on May 30, 2003, Sallie Mae Servicing sent a letter to the Better Business Bureau in response to a complaint made by a victim of Ameritrain in Georgia. After acknowledging that Ameritrain of Georgia closed before the student could complete her training, the letter stated "Sallie Mae Servicing is unable to accept any reduced amount as payment in full for you account. By signing the promissory note, [you] agreed to pay in full the principal and valid interest that accrues on the account."[15]

Non-litigation efforts to address Key Bank's system have been similarly unsuccessful. State Attorney General offices are told they have no power to regulate a national bank. Because of a forum shifting clause that requires all claims to be brought in the locality of the principal place of business of the holder of the note, and because the holder in a securitized transaction is hard to determine, private lawyers have a difficult time determining where any action should be filed. Consequently, victims of both Key Bank and Sallie Mae have spent months and even years trying to find an advocate to help them.

Lawyers in several states have filed lawsuits against both Key Bank and Sallie Mae on behalf of victims who obtained loans for computer training schools. In addition to raising the FTC Holder Rule issues, the lawsuits also raise claims under various statutes, including the Truth in Lending Act, the Equal Credit Opportunity Act, and state UDAP statutes. Fraud and conspiracy claims are also included. Some of the lawsuits include hundreds of named plaintiffs, some just one or two, and some are filed as class actions. The primary goal is to have Key Bank and Sallie Mae honor the FTC Holder Rule.

For the Key Bank lawsuits, NACA members **Dan Clark** (Florida), **Michael Ferry** (Missouri), **Ron Burdge** (Ohio), and **Dale Pittman** and **Tom Domonoske** (Virginia), have filed a series of cases against Key Bank and the other entities involved in the securitization process. Dan Clark has brought a national class action on behalf of students who were enrolled at Solid Computer Decisions, and most of the cases have been transferred to Ohio under a forum shifting clause. Other lawyers from states like Alabama and Maryland are bringing case and several state Attorney General offices are looking into the issue. Key Bank continues to assert

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that its system is normal banking practice and wants to win judicial approval for evading the FTC Holder Rule. If it is successful, all other private lenders can be expected to adopt its system.

For the Sallie Mae lawsuits, Dan Clark, Dale Pittman, and Tom Domonoske have filed a series of cases against Sallie Mae subsidiaries. In each Sallie Mae's lawyers have pursued arbitration and have succeeded in sending some cases to arbitration. At this time, none of the cases have actually proceeded to arbitration because settlement discussions are ongoing. Although Sallie Mae initially acted like Key Bank and claimed the right to continue in its defiance of the FTC Holder Rule, Sallie Mae has now changed its position and is acknowledging some responsibility under the FTC Holder Rule. It states it is willing to cancel loans for classes that were never provided. At issue still is how much responsibility Sallie Mae bears for misrepresentations of the school or for other types of claims against the schools, and whether Sallie Mae is providing that relief to all victims, or just those lucky enough to have found counsel willing to take the case.

The Effect of Sallie Mae Modifying Its Practices

As Sallie Mae recognizes some responsibility under the FTC Holder Rule for the actions of the schools, it then necessarily responds to how it provides liquidity to computer training schools. Sallie Mae has reported that it no longer provides loans to unlicensed schools and that it no longer provides the full amount of the tuition up front for a sequence of courses. In this way, the goal of the FTC Holder Rule is beginning to be implemented. As the negative effects of providing liquidity to bad actors is captured internally within the financial structure, Sallie Mae has the proper financial incentive to ensure that it is not creating the con artists' dream world that fuels the creation of sham schools. When Sallie Mae fully implements the FTC Holder Rule and recognizes that other claims against the schools, whether based on misrepresentations by the school or violations of state UDAP laws are also claims or defenses to the loans, it can be expected to adopt additional controls on who it funds.

Because Key Bank is still committed to outright defiance of the FTC Holder Rule, it has no incentive adopt any of these controls. As a consequence, sham computer training schools will continue to obtain liquidity from Key Bank to fuel their illegal behavior, and will reduce their use of Sallie Mae. An example of this switch already exists in Alabama with Aspreon Technologies that closed in May of this year. Like many other sham schools, Aspreon operated without a license but projected a huge expansion. After doing approximately $2 million of business in 2002, it announced a projected revenue of $200 million in 2003. It opened up locations outside of Alabama and then suddenly closed. Steve Halsey (Alabama) has identified over 110 students affected by the closure, and of that amount only 5 or 6 are Sallie Mae loans. When Sallie Mae stopped providing the full amount of the loan upfront, Aspreon placed the vast majority of its students with Key Bank, who would provide the full amount of the loan upfront. This ratio of approximately five or six Sallie Mae loans to more than 100 Key Bank loans is exactly the reverse of the clients of Dale Pittman's office. For loans made in 2001 and the first part of 2002, his office has seen approximately 100 Sallie Mae clients for each seven or eight Key Bank clients. As Sallie Mae continues to adopt appropriate controls, the bad actors will increase their reliance on Key Bank or entities who adopt Key Bank's current system.

Conclusion

Like many of the deceptive business practices consumer advocates face, trade school scams could not, and would not, happen without the essential fuel of easy money. Banks are behind these scandalous practices of empty promises and dream-defeating deception. By providing liquidity that fuels the growth of computer training school abuses, banks, such as Key Bank, which are part of the deceptive system, are harming legitimate training schools that lose potential customers to sham schools, harming the students who are left with loans but no training, and harming investors who buy into the investment trusts without complete disclosure of the violations of law. NACA attorneys are at the forefront of the effort to address these unlawful practices through litigation. The news that Sallie Mae is modifying its practices is one move in the right direction.

Unless and until Key Bank decides or is forced to honor the FTC Holder Rule, it will continue to have no incentive to monitor the computer training schools feeding on the liquidity it offers. The FTC Holder Rule has a simple theory—providing liquidity to bad actors is harmful to the economy. The only hope for the victims of the bad actors that will necessarily proliferate by defiance of the FTC Holder Rule are knowledgeable consumer advocates willing to represent these individuals, whether in court or in arbitration. Entities like Key Bank have plenty of lawyers eager to collect fees to help it implement and profit from its anti?consumer agenda. The corporatists who create these anti-consumer business practices and claim they are normal banking practices are truly different from the advocates who choose to help people harmed by such corporate practices. The corporatists, who are the necessary functionaries to implement such practices, drain the vitality from our economy by skewing the market forces that keep it

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healthy. The corporatists' agenda is not only anti-consumer, but the intentional spreading of dysfunction throughout the economy is fundamentally anti-American. To achieve the intended benefit of the laws designed to keep the economy strong, consumer advocates must stand up for the basic principle of the FTC Holder Rule, and challenge these practices, both in courts and in arbitration proceedings. As shown by the changes ongoing at Sallie Mae, corporate practices can be brought into compliance with the law, and the change in those practices does have a major effect in the marketplace.

Tom Domonoske holds a BA from Hastings College of Law. He has worked as a legal aide lawyer, and taught at the University of North Carolina Law School and Duke University Law School where he was a Senior Lecturing Fellow. He is now in private practice in Virginia, and a current member of the NACA Board of Directors.

ENDNOTES

1. Deanne Loonin, Student Loan Law, (2d ed.) (National Consumer Law Center) Section 9.1.1, p. 113.
2. http://triangle.bizjournals.com/triangle/stories/2003/02/24/story3.html
3. http://www.nasasps.com/conf-material.html
4. http://www.bizjournals.com/washington/stories/2001/01/29/daily3.html
5. http://www.netcominfo.com/education/studentloans.phtml
6. Case Number 3:03CV099, E. D. of Virginia, Richmond Division, oral statement by John A. Fraser, counsel for SLM Financial.
7. http://www.bizjournals.com/washington/stories/2001/02/05/daily4.html
8. Letter from Colleen K. Hart to Aric D. Williams
9. Letter from Robert S. Lavet to Stephen E. Lawing, Esq.
10. Letter from Colleen K. Hart to Adrian Robinson.
11. 16 C.F.R. 433.2(b) requires the Holder Rule in purchase money loans made by a lender when the lender has a business relationship with the seller or when the seller refers the consumer to the lender.
12. http://www.key.com/templates/t-ps2.jhtml?nodeID=H-1.35.a
13. http://www.cpcctraining.org/computertraining/SCD/-SCD%20Teach%20Out.htm
14. Letter from Senator John Edwards to Adrian Robinson.
15. Letter from James M. Austin, Corporate Borrower Services, Sallie Mae Servicing to Better Business Bureau. ♦

FRONTLINE NEWS: *Continued from Page 13*

"The Mississippi Supreme Court's ruling is truly a thrilling victory for the public interest," said Lawrence E. Abernathy III of Laurel, Mississippi, co-lead counsel for the Gatlins. "Companies cannot force family farmers out of court and into private arbitration, then break their promise to share in the arbitration costs."

TLPJ's key legal brief in *Sanderson Farms, Inc. v. Gatlin* is posted on its website, www.tlpj.org.

PERSEVERANCE PAYS OFF IN OHIO

Dean Young & **Rocco Yeargin** from the Akron, Ohio, office of Young and McDowall got a verdict in June 2003 against a man who had fraudulently transferred assets to avoid paying a previous judgment. In December 2000, the same law firm had received a judgment of approximately $200,000 against the dealership entity, Rolling Acres Dodge. In the June 2003 trial, the jury awarded $210,000, which will be trebled to $630,000 under Ohio's UDAP statute.

In order to avoid paying the December 2000 judgment against it, the owner of Rolling Acres Dodge set up another corporation, transferred assets, sold cars belonging to Rolling Acres Dodge, put the proceeds into the account of the new company, and eventually sold the dealership and filed for bankruptcy. **Laura McDowall** reports, "We filed this suit against the owner directly, alleging that he violated Ohio's UDAP statute by continuing to engage in consumer transactions while the judgment was unpaid. I would especially like to thank **John Blaufuss**, extraordinary lawyer from Toledo Ohio, who set up this cause of action in a case he handled, which allows us to treble the damages in our case." ♦

NACA Member John Blaufuss practices consumer law in Toledo, Ohio.

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USB connection. Very convenient to be sure, but it is also very short range, and it requires a direct line of sight between connected device, unlike Bluetooth and WiFi, which are radio frequency transmission systems with no direct line of sight required.

THE WIRELESS NET

Let's take wireless a step further into the realm of portable Internet Web and e-mail access. While the capabilities of cell-like Net arrangements, as well as paging systems, have been available for quite some time, we are just now seeing fast enough speeds to make the effort worthwhile. Using the platform of 2.5G and 3G cell transmission systems, companies like Verizon are offering relatively high-speed wireless Internet access in a growing number of metro areas around the country. This access really does work and uses a PC card with an antenna. However, it requires another monthly fee, and the coverage areas are currently limited. Expect this approach, with its staggering costly infrastructure, to likely lose out to much more economical wireless WiFi access points in many public locations. But if you need an often-on Internet connection, these systems are worth exploring.

Devices that look either like traditional alphanumeric pagers or like PDAs have become very popular. The most popular items in this category are made by RIM Technologies and use a thumb board to enter text (you type with your thumbs -- although it sounds silly, it's possible to quickly become quite speedy). The name "Blackberry" has become synonymous with these devices that send and receive Internet e-mail and can provide PDA-like functions. <http://www.blackberry.net/>. Blackberry is one of the software systems used by the RIM e-pager devices . Costs range from $300 to $600 for the devices with monthly service fees from $20-$60. A Blackberry competitor of note is the product from Good Technology with service offered by Cingular Wireless. This product is worth a look for its cradle-free real-time synchronization with firms using Microsoft Outlook and Exchange Server software <http://www.good.com/>.

CONCLUSION

So whether WiFi, Bluetooth, or Infrared, or Wireless Net or the Blackberry e-pager approach, the future of wireless technology is not only bright, but also growing explosively. The lure of a cordless world is one that few can resist and one that all well-connected lawyers should explore.

ABOUT THE AUTHOR

Ross Kodner, a lawyer, is the founder of MicroLaw, Inc., a legal technology consultancy <http://www.microlaw.com>. He is a member of the GP/Solo Technology & Practice Guide Editorial Board, and was also the recipient of the 1999 TechnoLawyer Legal Technology Consultant of the Year Award as well as 2002's Contributor of the Year Award. You can contact Ross via e-mail <mailto:rkodner@microlaw.com>.

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