



**Upton
& Hatfield^{LLP}**
ATTORNEYS AT LAW

Concord Office

10 Centre Street
PO Box 1090
Concord, NH
03302-1090
603-224-7791
1-800-640-7790
Fax 603-224-0320

Attorneys At Law

Robert Upton, II
Gary B. Richardson
John F. Teague
Russell F. Hilliard
James F. Raymond
Barton L. Mayer
Charles W. Grau
Margaret-Ann Moran
Thomas T. Barry*
Bridget C. Ferns
David P. Slawsky
Heather M. Burns
Matthew H. Upton
Lauren Simon Irwin
Kenneth J. Barnes
Matthew R. Serge
Justin C. Richardson
Beth A. Deragon

*Also Admitted In Virginia

Of Counsel

Frederic K. Upton

Hillsborough Office

8 School Street
PO Box 13
Hillsborough, NH
03244-0013
603-464-5578
1-800-640-7790
Fax 603-464-3269

Attorneys At Law

Douglas S. Hatfield
Margaret-Ann Moran
Paul L. Apple

North Conway Office

23 Seavey Street
PO Box 2242
North Conway, NH
03860-2242
603-356-3332
Fax 603-356-3932

Attorney At Law

Robert Upton, II

Portsmouth Office

159 Middle Street
Portsmouth, NH
03801
603-436-7046
Fax 603-431-7304

Attorneys At Law

Russell F. Hilliard
Justin C. Richardson

NEW HAMPSHIRE CREDIT UNION LEAGUE

2006 ANNUAL MEETING

LEGISLATIVE AND REGULATORY UPDATE

JUNE 9, 2006

RUSSELL F. HILLIARD, ESQ.

SUMMARY OF RECENT LEGISLATION AND LITIGATION

STATE LEGISLATION

During its recent session, the New Hampshire Legislature did not enact any measures having a particular impact on credit unions, with the exception of two new laws relating to identity theft, House Bill 1660 (Ch. 242) and Senate Bill 334 (Ch. 208).

House Bill 1660 requires businesses, including credit unions, to notify consumers of any security breach that compromises the confidentiality of their personal information. The law takes effect January 1, 2007.

Senate Bill 334 permits consumers to establish a “credit freeze” on their consumer reports, and requires consumer reporting agencies to provide notice of this right. It also permits victims of identity theft to request copies of their consumer reports, establishes a procedure to notify consumer reporting agencies when a person is deceased, and establishes a minimum penalty for negligence or willful violations of the Consumer Credit Reporting Law. This law also takes effect January 1, 2007.

CREDIT UNION COURT CASES

The following is a summary of all reported federal and state court cases in which a credit union was a party to date in 2006:

Bankruptcy / Credit Counseling. A bankruptcy court dismissed a Chapter 11 case because the debtor failed to comply with the pre-petition credit counseling requirement. The debtor appealed, arguing that the petition had to be filed on the eve of a mortgage foreclosure sale, and this was an “exigent circumstance” justifying a waiver of the counseling requirement. The appellate court held that the debtor’s delay in filing did not excuse complying with the credit counseling requirement, and it did not violate the debtor’s constitutional right of equal access to the courts. *Hedquist v. Mid-Minnesota Credit Union*, 2006 WL 1042429 (8th Cir.BAP April 21, 2006).

Bankruptcy / Fraud. A credit union filed a complaint against its member borrower who had filed bankruptcy, seeking to be excepted from discharge on the ground of fraud. The credit union alleged that the member had falsely represented that he would use the loan proceeds to purchase home improvement materials that he would then install in his home, but did not do so. The complaint was dismissed on the grounds that such a statement of purpose was irrelevant to an unsecured loan, and also was unrelated to the borrower’s financial condition. The dismissal was affirmed although the court indicated that the credit union could have attempted to demonstrate a link between the decision to approve the unsecured loan and the representation regarding the use of the proceeds. *Columbiana County School Employees Credit Union v. Cook*, 2006 WL 908600 (6th Cir. April 3, 2006).

Bankruptcy / Fraud. A credit union objected to a member's discharge from credit card and signature loans on the grounds of false statements regarding the debtor's financial condition. The court found that the credit union had relied on some false statements, and not on others, and allowed a portion of the debt to be discharged. *I.H. Mississippi Valley Credit Union v. Lindquist*, 2006 WL 372459 (Bankr.C.D.Ill. February 15, 2006).

Business Lending / Security Interests. A credit union that took a security interest in certain business assets (tractors) was sued by a bank that held a security interest in the same collateral from the original owner of the tractors. The credit union defended by challenging the validity of the bank's security interest, contending that it (the credit union) was a "buyer in the ordinary course of business" and thus protected from the bank's claim, that it had not been unjustly enriched, and that it was not negligent in failing to search the lien records before lending to the buyer. The trial court found that there were factual issues presented, and denied the credit union's motion to dismiss. *Integrity Bank Plus v. Elm River Credit Union*, 2006 WL 212193 (Dist. Minn. January 27, 2006).

Forgery and Theft. A member sued his credit union alleging that it was negligent in connection with certain forgeries and thefts from his account. The federal court complaint was dismissed on procedural grounds as the claimed loss was approximately \$540, and the minimum amount in controversy to file in federal court is \$75,000. *Walker v. Red River Employees Federal Credit Union*, 2006 WL 1005006 (E.D.Tex. April 18, 2006).

Arrest Warrant. A member sued her credit union for “malicious harassment” and “wanton misconduct” in connection with the execution of an arrest warrant against her for a \$1,300 overdraft of her checking account at the credit union. The member did not respond to a motion to dismiss submitted by the credit union, and therefore the motion was granted without any particular review of the merit of the claim. *Jones v. National Institutes of Health Federal Credit Union*, 200 WL 468006 (D.D.C. February 27, 2006).

Fair Debt Collection Practices Act Violation. A member sued his credit union for alleged violations of the FDCPA arising out of the credit union’s repossession of an automobile that had been pledged as collateral for a loan. The member contended that he was constitutionally entitled to a hearing before the vehicle was repossessed, and further argued that any debt to the credit union had been fully satisfied by payments he had made to his ex-wife. The credit union prevailed. *Rhines v. Norlarco Credit Union*, 2006 WL 1312964 (Ind.App. May 15, 2006).

Family and Medical Leave Act / Age Discrimination. An employee sued her former employer, a credit union, alleging discrimination on the basis of her age and violation of the FMLA. The credit union prevailed on the age discrimination claim because the former employee was replaced by an employee also in that protected age class. The credit union also prevailed on the FMLA claim, as the employee had never put the credit union on notice of her alleged serious health condition. *White v. Eastman Credit Union*, 2006 WL 752582 (E.D.Tenn. April 22, 2006).

Race Discrimination. African-American employee brought action against the credit union and its chief executive officer alleging retaliation and race discrimination.

The trial court dismissed the case, but the appellate court reinstated it, ruling that a fact issue existed as to whether the employer's true reason for demoting the employee was race discrimination. *Cornwell v. Electra Central Credit Union*, 439 F.3d 1018 (9th Cir. March 1, 2006).

Slip and Fall on Ice. A member sued a credit union because she slipped and fell on ice located on a sidewalk as she attempted to enter the credit union from the parking lot. The credit union requested dismissal on the grounds that the ice patch was open and obvious, and that the credit union had not been notified of the condition. The court ruled that the credit union did not have notice of the icy condition, and therefore was not liable for the plaintiff's injuries. *Coulter v. Michigan First Credit Union*, 2006 WL 664226 (Mich.App. March 16, 2006).

Right to Financial Privacy Act. Husband and wife credit union members sued the United States Army, their credit union, and a number of others for violation of their financial privacy rights. Their claim against the credit union arose out of its response to a subpoena issued to it by the government. Because the provisions of the Act do not apply in such circumstances, a judgment was rendered in favor of the credit union. *Flowers v. Fort Jackson Federal Credit Union*, 2006 WL 1233096 (9th Cir. May 3, 2006).

Removal of Directors. A state regulator and share insurance fund successfully appealed a decision in favor of a credit union. The regulator had entered into an agreement with the credit union board to correct certain questionable practices discovered during a routine examination, including self-dealing and misappropriation of funds by two of the directors. One of the two was then declared legally incompetent, and the remaining director appealed her removal. For technical procedural reasons not important

here, the appellate court reversed, and found that a single director was not authorized to challenge, on behalf of a credit union, such a regulatory order. *United Telephone Credit Union v. Ohio Division of Financial Institutions*, 2006 WL 1174507 (Ohio App. May 4, 2006).

FTC “Holder Rule”. A credit union member sued a number of entities in the Oregon federal court for claims arising out of an alleged criminal enterprise in the automobile finance and insurance industry, including claims against the credit union for derivative liability based on the FTC Holder Rule. The court found that the credit union was not liable under the Holder Rule because the member was not simply trying to defend an action by the credit union, but to recover damages, a remedy not available under the Rule. *Phillips v. First Technology Credit Union fka Oregon Metro Federal Credit Union*, 2006 WL 1113608 (D.Or. April 27, 2006).

Servicemembers Civil Relief Act. A member sued a number of entities, including his credit union, for violations of the SCRA for failing to reduce the interest rate on outstanding debts, submitting unfavorable credit reports that were retaliatory, and generally seeking damages and other relief. While most of the member’s claims were dismissed, the credit union had failed to lower the interest rate as required by the statute, and therefore the court refused to dismiss that portion of the complaint. *Rodriguez v. Valley First Credit Union*, 2006 WL 908613 (E.D.Cal. April 7, 2006).

Federal Jurisdiction. Husband of a member sued the credit union for violations of the Kentucky Consumer Protection Act and other alleged wrongs in federal court. The case was dismissed because there was already a pending state court

foreclosure action. *Ward v. Appalachian Federal Credit Union*, 2006 WL 897224 (E.D.Ky. April 6, 2006).

Automobile Leasing Cooperative. Credit unions that had lost money as a result of their participation in a cooperative that issued automobile leases brought an action against the directors of the cooperative and the accounting firm that audited the cooperative's financial statements. The claims were dismissed because the credit unions failed to present evidence that the accounting firm knowingly reported inaccurate financial information, and failed to establish that the cooperative directors acted with deliberate intent to cause injury to the cooperative. *BFG Federal Credit Union v. CU Lease, Inc.*, 2006 WL 544493 (Ohio App.9 Dist. March 8, 2006).

Field of Membership. A bank unsuccessfully sought to intervene in administrative proceedings before the state regulator involving a request of group-based credit unions to expand their fields of membership to geography-based community charters, as the bank failed to establish a direct interest by showing a causation of harm, and state law did not give bank standing to intervene. *Pennsylvania Bankers Association v. Trumark Financial Credit Union*, 893 A.2d 864 (PA March 1, 2006).

IRS Tax Levy. A member delinquent on taxes sued his credit union for complying with an IRS tax levy on wages and bank account. The claim was dismissed because the credit union complied with a lawful levy from the IRS. *Celauro v. Teacher's Federal Credit Union*, 411 F.Supp.2d 257 (E.D. NY January 28, 2006).

Repossession / Storage Lien. A credit union sued a tow truck operator, seeking possession of a vehicle that the operator had towed, stored, and retitled. The credit union won because the tow truck operator did not comply with the statutory notice

requirements in order to create a possessory lien for towing and storage fees. *Granite Credit Union v. Remick*, 2006 WL 722227 (UT App. March 23, 2006).

Repossession / Civil Rights. A member sued his credit union for violating his civil rights in connection with the repossession of his automobile. The claim was dismissed because a self-help repossession does not involve governmental action, and therefore there was no civil rights violation. *Adams v. Coastline-Community Credit Union*, 2006 WL 679770 (9th Cir. March 16, 2006).

Repossession / Liquidation. A credit union sued a member to collect on the deficiency on a car loan, but was placed in liquidation by NCUA before the case was concluded. The member filed a counterclaim relating to the manner of repossession, but the NCUA successfully moved to dismiss these counterclaims pursuant to a federal statute protecting the NCUA from such claims. *NCUA, liquidating agent for Lock Haven Area Federal Credit Union v. Fisher*, 2006 WL 618417 (M.D.Pa. March 10, 2006).