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2019 Consumer Financial Services Year in Review & A Look Ahead

Consumer Financial Services Practice

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2019 Consumer Financial Services

Year in Review, February 2020

Table of Contents

Executive Summary 03

About Us 04

Consumer Class Actions 05

Background Screening 16

Bankruptcy 21

Consumer Credit Reporting. 25

Debt Collection. 33

Payment Processing and Cards 46

Mortgage 49

Auto Finance 56

Regulatory Landscape. 60

Telephone Consumer Protection Act 73

Cybersecurity and Privacy 79

Student Lending 87

Uniform Commerical Code and Banking 96

Consumer Financial Services Law Monitor 102

Consumer Financial Services Webinar Series 103

Contacts 104

EXECUTIVE SUMMARY

2019 was a transformative year for the consumer financial services world. As we navigate an unprecedented volume of industry regulation, Troutman Sanders is uniquely positioned to help its clients find successful resolutions and stay ahead of the compliance curve.

In this report, we share developments on consumer class actions, background screening, bankruptcy, consumer credit reporting, debt collection, payment processing and cards, mortgage, auto finance, the consumer finance regulatory landscape, the Telephone Consumer Protection Act ("TCPA"), cybersecurity and privacy, student lending, and the Uniform Commercial Code ("UCC") and banking.

By remaining up-to-date on the latest industry trends and regulatory developments, Troutman Sanders is a trusted resource, relied on by our clients to help tackle issues today while preparing for what lies ahead. We hope this report is of value to you.

ABOUT US

Troutman Sanders' Consumer Financial Services practice consists of nearly 100 attorneys across the nation. They have extensive experience in the areas of litigation, regulatory enforcement, and compliance. Our trial attorneys have litigated thousands of individual and class action lawsuits involving cutting-edge issues across the country, and our regulatory and compliance attorneys have handled numerous 50-state investigations and nationwide compliance analyses.

Our attorneys work together in a multi-disciplinary manner to bring a higher level of specialized knowledge, practical guidance, and valuable advice to our clients. This results-driven collaboration offers seamless legal services to effectively and efficiently resolve clients' problems by addressing the many perspectives that may arise for a single legal issue before it turns into a larger problem, or that may lead to compliance solutions and regulatory strategies arising out of contentious litigation.

We are recognized in litigation relating to consumer claims, and our lawyers have significant experience representing clients in consumer class actions in matters involving the Fair Credit Reporting Act ("FCRA"), Fair Debt Collection Practices Act ("FDCPA"), and state law debt collection claims, TCPA, Truth in Lending Act ("TILA"), Real Estate Settlement Procedures Act ("RESPA"), West Virginia Consumer Credit Protection Act ("WVCCPA"), Unfair and Deceptive Acts and Practices ("UDAP") statutes, and Unfair, Deceptive and Abusive Acts and Practices ("UDAAP"), mortgage foreclosures, mortgage lending and servicing, Electronic Funds Transfer Act ("EFTA"), Electronic Signatures in Global and National Commerce Act ("E-SIGN"), Equal Credit Opportunity Act ("ECOA") and state law equivalent statutes, Fair and Accurate Credit Transactions Act ("FACTA"), federal and state odometer statutes, FTC Holder Rule, Home Affordable Modification Program ("HAMP"), Home Owner's Equity Protection Act ("HOEPA"), home warranties, Magnuson-Moss Warranty Act, mortgage foreclosures, mortgage lending and servicing, cybersecurity and privacy, Racketeer Influenced Corrupt Organizations Act ("RICO"), and the Servicemembers Civil Relief Act ("SCRA").

Our regulatory enforcement team is prepared to respond to the Consumer Financial Protection Bureau's oversight inquiries, civil investigative demands ("CIDs"), audit, supervision, examination and enforcement actions, including the request for production of privileged and highly confidential information that the Consumer Financial Protection Bureau ("CFPB") routinely demands to gauge compliance and procedures. Our enforcement team has spent years handling similar claims and CID, audit, supervision, examination and enforcement proceedings. We are also well-equipped to handle the Federal Trade Commission's ("FTC") investigations concerning a variety of matters, including consumer privacy and data security breaches. At Troutman Sanders, we easily transition from negotiation to litigation, if and when requested, with a team of highly skilled litigators with extensive experience in regulatory enforcement litigation matters.

Our team regularly advises and prepares our clients proactively for compliance matters to avoid costly government audits, investigations, fines, litigation, or damage to brand and reputation. Our compliance lawyers have handled a variety of matters for our clients, including facilitating compliance audits, both on-site and off-site, performing due diligence reviews, drafting training and compliance manuals and policies, and conducting multi-state analyses of state and federal laws.

Lawyers in each of our Consumer Financial Services team's core areas – litigation, regulatory enforcement, and compliance – work together to recommend creative approaches that efficiently address our clients' needs.

CONSUMER CLASS ACTIONS

New and Improved Rules for Class Certification: The December 2018 Amendment to Rule 23

One of the most significant changes to class action procedure in Federal Courts in 2019 occurred as a result of key changes to Rule 23 of the Federal Rules of Civil Procedure. These changes became effective on December 1, 2018, making 2019 the first full year that these amendments were in effect. The amendment of Rule 23 changed the following procedures:

The Rule 23 revisions have largely standardized and formalized what courts previously did on an ad hoc basis.

A. Modernization of Class Notice. Under the former Rule 23, courts were required to direct to class members “the best notice that is practicable under the circumstances.” The rule, however, did not clarify if there was a preferred means of communication. The Amendment has now clarified that the notice may be by “United States mail, electronic means, or other appropriate means.” This change recognized modern technology’s role in transforming society’s reliance on traditional modes of communication like first-class mail.

B. Preliminary Approval of Settlement. Under the new Rule 23(e)(1), courts must preliminarily approve the proposed settlement before notice is sent to putative class members. As part of this review, the parties “must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.” The court must direct notice to be given if – based on the information submitted – the court would likely (1) approve the proposed class settlement and (2) certify the class for purposes of judgment.

C. Settlement Approval Factors. To approve settlement, a court must determine that the settlement is “fair, reasonable, and adequate” to the class. The new rules have formalized the factors that the court must consider in this evaluation. These factors are:

(1) whether the class representatives and class counsel have adequately represented the class in the settlement;
(2) whether the settlement was negotiated at arm’s length;
(3) whether the class relief is adequate, considering the costs, risks, and delay of trial and appeal, effectiveness of distributing relief to the class, terms of any award of attorney’s fees, and any agreement required to be identified under Rule 23(e)(3); and
(4) whether the proposed settlement treats class members equitably relative to one another.

D. Settlement Objections. Next, the new rules require that objections to a proposed settlement must specifically state to whom the objection applies (such as the objector, a class subset, or the entire class) and must state with specificity the grounds for the objection. This amendment helps to clarify all objections to a proposed settlement.

E. Appeal of Class Certification Decisions. Finally, under the revised Rule 23(f), a party may request permission to appeal a decision granting or denying class certification within 14 days after the order is entered, but a party may *not* appeal the grant or denial of the preliminary motion seeking approval to issue notice of class settlement under Rule 23(e)(1).

The Rule 23 revisions have largely standardized and formalized what courts previously did on an ad hoc basis. However, the specific updated procedures should be noted by any entity that is engaged in class action litigation.

Supreme Court Remands Challenge to Cy Pres Disbursements in Class Action Lawsuits for Further Review of Plaintiffs' Standing in Light of *Spokeo*

On March 20, 2019, the Supreme Court decided *Frank v. Gaos*, 139 S. Ct. 1041 (2019). The Supreme Court was set to take a case challenging the use and limits of cy pres settlements in class action lawsuits. Cy pres awards consist of money awarded to legal aid and industry associations, and they are funded based on funds that remain after the class administration process has closed (*e.g.*, settlement class members who did not cash their checks). In a per curiam opinion, however, the Court never reached the cy pres settlement issue, but rather remanded the case so that lower courts could address the plaintiffs' standing in the wake of the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

Plaintiffs in *Gaos* were Google users who alleged the company violated the Stored Communications Act, 18 U.S.C. § 2701, *et seq.*, by transmitting their search terms to the server hosting the website they attempted to access by clicking Google search results. Aside from an alleged technical statutory violation, the extent to which plaintiffs had been injured by Google's alleged conduct was arguably de minimis.

Google ultimately failed to convince the district court that the plaintiffs lacked Article III standing due to a lack of injury-in-fact. The district court found that the plaintiffs had standing to sue under the Ninth Circuit's decision in *Edwards v. First American Corp.*, 610 F.3d 514 (9th Cir. 2010). *Edwards* provides that plaintiffs may demonstrate injury-in-fact to establish Article III standing by simply alleging a statutory violation with a corresponding right to sue. The district court went on to approve the cy pres settlement in *Gaos* (discussed below), which was appealed to the Ninth Circuit.

Upon completion of briefing at the Ninth Circuit, but before its ruling, the Supreme Court decided *Spokeo*. In *Spokeo*, the Supreme Court rejected Edwards, finding that a plaintiff does not necessarily possess Article III standing to sue simply by alleging a statutory violation; rather, a plaintiff must nonetheless allege that a concrete injury-in-fact occurred as a result of the violation. The Ninth Circuit did not address Spokeo in its Gaos decision, but rather affirmed the district court.

The Supreme Court, on the other hand, determined that *Spokeo* had to be addressed before it could reach the cy pres settlement issue. Class settlements require court approval and a federal court must have jurisdiction over a case to grant its approval. Because standing is required for a court to possess jurisdiction, the Supreme Court stopped short of reaching the cy pres settlement issue and remanded the case for further review of the plaintiffs' standing in light of *Spokeo*.

At least for now, the Supreme Court has left the cy pres settlement issue in *Gaos* unaddressed. Cy pres disbursements, which distribute unclaimed settlement proceeds to certain designated organizations when such funds cannot be feasibly distributed to class members, have been a staple of class action lawsuits since 2005, when Congress limited the use of "coupons" in settlements with the Class Action Fairness Act of 2005. Although cy pres deals have historically been small residual payments composed of funds left unclaimed by class members, recent years have seen an increase in multimillion-dollar cy pres awards, such as the $8.5 million deal at issue in *Gaos*.

The issue raised to the Supreme Court in *Gaos*, however, was not the size of the award, but the fact that it involved a "cy pres only" settlement—the result of $8.5 million being divided among 130 million potential class members, yielding only $0.04 per member. The unfeasibility of distributing such an award led the Ninth Circuit Court of Appeals to uphold the distribution of the settlement to various nonprofits and legal aid organizations instead, without any payments made directly to class members.

Critics of cy pres deals claim that they can be abused by parties to funnel money to specific organizations. Although cy pres funds do not often make up a significant portion of an organization's budget, legal aid organizations in particular have used significant cy pres awards to fund specific projects, such as Equal Justice Work's 1992 launch of the Equal Justice Works Fellowship.

Supporters of cy pres deals argue that legal aid organizations and other nonprofits are more appropriate benefactors of unclaimed settlement funds than the defendants, because of the monetary support such funds provide to these often-struggling organizations. For instance, the American Bar Association estimates that roughly $15.5 million in cy pres funds are distributed to legal aid organizations every year.

As cy pres settlements remain a considerable point of interest in class action litigation, we will continue to monitor developments in the law pertaining to their approval.

Supreme Court Confirms Inflexibility of Deadline to Appeal Class Certification Orders

In *Nutraceutical Corporation v. Lambert*, 139 S. Ct. 710 (2019), the Supreme Court held in a unanimous decision that the deadline to seek permission for an interlocutory appeal of a decision granting or denying class certification cannot be extended through equitable tolling. Rule 23(f) of the Federal Rules of Civil Procedure allows for an interlocutory appeal of class certification orders but mandates that permission must be sought from the appellate court within 14 days of the order.

When the district court decertified Lambert's class, he filed a motion for reconsideration. Fourteen days after the Court denied the motion for reconsideration, and four months after the decertification order, Lambert petitioned the Ninth Circuit for permission to appeal the decertification order. The Ninth Circuit allowed the appeal, holding that Rule 23(f)'s deadline should be tolled because Lambert had "acted diligently." The Supreme Court decisively disagreed, reversing the Ninth Circuit's decision to allow the appeal.

The Court first determined that Rule 23(f)'s time limitation was a non-jurisdictional claim-processing rule, but that "does not render it malleable in every respect." The Court searched the text of the rule for flexibility and found none. Instead, it found the "Rules express a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist." This is so because "Appellate Rule 26(b) says that the deadline for the precise type of filing at issue here may not be extended."

It is important to note that, although the Court found no flexibility in Rule 23(f)'s deadline, the opposing party must still raise an objection as to the timeliness of the appeal. Unlike jurisdictional rules, the deadline "can be waived or forfeited by an opposing party." In this case, equitable tolling could not save Lambert's untimely petition because Nutraceutical had objected to the timeliness of the petition.

This decision confirms how most have generally viewed the deadline for filing petitions under Rule 23(f), but still provides two key reminders for class action defendants. First, when appealing an order certifying a class, defendants must be vigilant in adhering to Rule 23(f)'s 14-day deadline. Second, when a plaintiff seeks permission to appeal an order under Rule 23(f), defendants should object to the timeliness if that petition was not filed within 14 days of the order, even if some intervening circumstances exist.

Unanimous Supreme Court Cements Rejecting a "Wholly Groundless" Loophole for Avoiding Class Arbitration

It is commonplace for businesses to include binding arbitration provisions in customer agreements. It is also common for these arbitration agreements to have a "delegation provision," where the parties agree to delegate to the arbitrator – not the Court – questions of whether the arbitration agreement applies to a dispute. But even when the parties agree to a delegation provision, do courts *always* have to compel disputes to arbitration when the parties disagree over whether the agreement applies? What if one party argues that it would be "wholly groundless" to compel a case to arbitration because the dispute is clearly outside the agreement's reach? On January 8, 2019, the U.S. Supreme Court unanimously resolved a circuit split in favor of arbitration, once again instructing courts to enforce arbitration agreements as written.

In *Schein v. Archer and White Sales, Inc.*, the litigants were parties to an arbitration agreement that required them to resolve disputes pursuant to the American Arbitration Association's rules. These rules gave the arbitrator (not the Court) the power to resolve questions of arbitrability – *i.e.*, whether the arbitration agreement applies to a particular dispute. When Schein sought to compel arbitration, Archer and White refused, claiming the dispute fell outside the scope of the arbitration agreement. They also argued that the arbitrator should not get to decide the reach of the arbitration agreement because it was "wholly groundless" to even claim the arbitration agreement applied.

This is where the circuit split comes in. Relying on Fifth Circuit precedent, the district court decided that, while it normally would be incapable of resolving questions of arbitrability when the contract delegates that gateway question to the arbitrator, it could do so when it would be "wholly groundless" to find the arbitration agreement applied. In other words, when a litigant argues the "wholly groundless" exception to a delegation provision, the district court could peek behind the curtain to look at the scope of the arbitration agreement. The Fifth Circuit affirmed the district court's decision in an opinion that ran contrary to several other circuits.

Given the circuit split, the U.S. Supreme Court granted review to decide whether a "wholly groundless" exception to a binding delegation provision is consistent with the Federal Arbitration Act. It decided that it is not. In the unanimous decision, Justice Brett Kavanaugh explained arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract." According to the Court, this is "true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." In sum, the Court unanimously rejected the notion that a court is allowed to decide whether a dispute is

subject to arbitration when the contract delegates that question to the arbitrator. Even if the argument for arbitration could be frivolous or unfounded, that is a decision for the arbitrator to make, not the Court. In Justice Kavanaugh's words, "when the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract."

Given this decision, if an arbitration provision includes a delegation provision, it will be exceedingly difficult for a litigant to argue that the case does not belong in arbitration – at least until the arbitrator decides whether the case is arbitrable.

The DOJ Signals Increased Willingness to Police Class Settlements

The United States Department of Justice has recently signaled increased willingness to object to consumer class action settlements. It has the authority to do so under the Class Action Fairness Act ("CAFA"), but the DOJ has declined to intervene in a single class action for the last decade. Since 2018, however, the DOJ has objected to three proposed settlements, including one in *Cowen v. Lenny & Larry's,* No. 1:17-cv-01530 (N.D. Ill. May 2, 2019), a class action concerning allegedly false nutritional information on Lenny & Larry's "The Complete Cookie" packaging.

In that case, the parties proposed a settlement with the following awards: a $350,000 cash award split among the class members; $113,000 worth of free cookies for the class members; $7,500 in incentive awards for the named plaintiffs; $3.15 million worth of free cookies for vendors to distribute to the general public; $350,000 in notice and administration costs; and a whopping $1.1 million in fees for the plaintiffs' attorneys. The DOJ objected to the settlement, arguing it was patently unfair to the class members, who would receive little direct benefit.

The DOJ has lodged very few objections to class action settlements since CAFA's passage. The objection in *Lenny & Larry's*, therefore, provides a helpful data point in anticipating the DOJ's assessment of settlement "fairness" in the future. In *Lenny & Larry's*, the DOJ's chief concern was that the proposed settlement did not adequately "reallocate value toward consumer class members." Rather, the bulk of the settlement would have gone to the general public or to the plaintiffs' attorneys.

The amount of attorneys' fees in a class action settlement has long been a primary consideration of district courts evaluating the fairness of settlements under Rule 23, but Congress amended the Rule in late 2018 to mandate this consideration of fees in the context of the whole settlement. The DOJ preemptively highlighted the attorneys' fees issue for the court in *Lenny & Larry's* and encouraged the Court to reject the parties' proposed settlement.

The DOJ also flagged the public "free cookie" portion of the settlement, arguing that this cy pres award "does nothing for the class, but it does advance Lenny and Larry's 'goodwill' and business interests." Moreover, that award would improperly benefit strangers to the suit while reducing the amount of the class members' recovery and benefiting the cookie company's public-facing interests. In response to the DOJ's objection, the parties in Lenny & Larry's amended the proposed settlement, and the Court ultimately approved it.

As plaintiffs and defendants negotiate class action settlements in the future, it will be important to consider the proportionality of awards to class members versus the general public and the plaintiffs' attorneys—for it appears the fairness watchdog who slept for many years may have awakened.

Circuit Courts Signal Unease with Application of *Bristol-Myers Squibb* to Nationwide Class Actions

Several federal courts have recently had to grapple with whether the Supreme Court's *Bristol-Myers Squibb* decision applies to nationwide class actions in order to argue that the forum court lacks personal jurisdiction over class members who are not residents of the forum state.

In that mass tort case, *Bristol-Myers Squibb v. Superior Court*, 137 S. Ct. 1773 (2017), the Supreme Court held that a state has no specific jurisdiction over claims brought by nonresident plaintiffs against a mass tort defendant. Exercising jurisdiction over a defendant in that instance would violate the defendant's Fourteenth Amendment due process rights, the Court said. Lower courts have since been asked to decide whether the holding of *Bristol-Myers* applies to claims brought by nonresident class members in class action cases.

Three 2019 district court decisions provide little indication of judges' leanings. The Eastern District of Texas in *Tredinnick v. Jackson National Life Insurance Co.* ruled in favor of the defendants in part and the plaintiffs in part, the District Court for the District of Columbia in *Molock v. Whole Foods Market, Inc.*, ruled in favor of the class plaintiffs, while the Northern District of Illinois in *Mussat v. IQVIA Inc.*, ruled in favor of the defendant. Parties may soon have some circuit court guidance on this issue, however, as in 2019, the Fifth, Seventh, and D.C. circuits heard oral argument and took these cases under advisement.

The Fifth Circuit heard oral argument in *Tredinnick v. Jackson National Life Ins. Co.* on April 30, 2019. There, defendant Jackson National argued that the district court should not have certified the class below because it did not satisfy the requirements of Rule 23 governing class actions. But if the panel was inclined to rule on the personal jurisdiction issue, the company said, jurisdiction depends upon the named parties in the complaint, not the putative class members, because they are not parties to the lawsuit until they are certified class members. The Fifth Circuit panel dialogued with both sides about the interplay of the Fourteenth Amendment's due process guarantee, Rule 23, and Rule 4(k)(1)(a), the federal service of process rule. Because the personal jurisdiction issue is tangential to the case and the plaintiffs argued Jackson waived any objection to jurisdiction, however, the panel may not reach the *Bristol-Myers* issue in *Jackson National*.

On September 25, 2019, the D.C. Circuit heard argument in *Whole Foods*, following the district court's refusal to dismiss the class action by employees against the company even though some of the putative class members are non-residents. On appeal, Whole Foods argued that the district court lacked jurisdiction over the claims brought by out-of-state class members. Whole Foods claimed Rule 23 of the Federal Rules of Civil Procedure, governing class action standing, cannot fully protect a defendant's Fourteenth Amendment due process rights regarding claims arising outside of the forum state, but the judges pushed back. They questioned why putative class members, who are not considered parties for purposes of the amount in controversy, claim preclusion, or several other key purposes, should be considered parties for determining personal jurisdiction over the defendant. Whole Foods argued that the jurisdictional stage is different because the Court can determine jurisdiction from the face of the complaint and consider the residence of the named parties, not the putative class members. However, the judges had trouble swallowing that argument if it means that foreign corporations without a "home state" in the U.S. could not be subject to class action suits in any forum.

Most recently, on September 27, 2019, the Seventh Circuit heard argument in *IQVIA*, which was appealed after the district court applied the reasoning of *Bristol-Myers* to a class action and struck the class definition to the extent that it encompassed nonresident plaintiffs. On appeal, the plaintiffs' counsel argued that *Bristol-Myers* allows a departure from the long-understood construction of Rule 4(k)(1)(a) as applied to class actions, but, like the D.C. Circuit, the Seventh Circuit judges seemed unconvinced. They expressed great doubt that the Supreme Court in *Bristol-Myers* was "ushering in" a new rule that would put an "extraordinary limitation" on jurisdiction in nationwide class actions, especially because the putative class members' names are not ascertainable, much less their residences, in the early stages of a class action. The judges seemed inclined to reverse the district court and subject IQVIA to the jurisdiction of Illinois, but it is possible that a procedural defect will prohibit the circuit court from ruling on the merits because the district court struck the class rather than granting or denying certification under Rule 23.

Each circuit court panel seemed hesitant to apply *Bristol-Myers* to class actions in what they view as a wholesale departure from the traditional class action jurisdictional framework. This issue is worthy of continued monitoring as more district and circuit courts grapple with the Supreme Court's ruling issue their decisions.

U.S. Supreme Court Holds that Class Arbitration Agreements Must Be Explicitly Authorized

In *Lamps Plus, Inc. v. Varela*, No. 17-988 (Apr. 24, 2019), the Supreme Court ruled that arbitration agreements must explicitly authorize class arbitration in order for the process to be invoked by one of the parties. The decision overturns a Ninth Circuit ruling that permitted an employee's arbitration to move forward on a class basis.

In *Varela*, Frank Varela, a Lamps Plus employee, filed a putative class action in the Central District of California alleging that Lamps Plus allowed a hacker to obtain his and other employees' tax information. The complaint alleged violations of state and federal law based on the compromise of employees' tax information. Lamps Plus moved to compel arbitration on an individual basis. The district court rejected Lamps Plus' attempt to arbitrate the matter individually but dismissed the case in favor of class arbitration. The district court found that "[t]he lack of an explicit mention of class arbitration" in the parties' contract did not constitute silence, "as the parties did not affirmatively agree to a waiver of class claims in arbitration." *Varela v. Lamps Plus, Inc.*, 2016 WL 9110161, at *7 (C.D. Cal. July 7, 2016).

Lamps Plus appealed, arguing that the parties did not agree to class arbitration. The Ninth Circuit affirmed, finding that the parties' arbitration agreement did not explicitly prohibit class

Arbitration provisions should be clear, up front, and explicit in any contract you have with a consumer or client.

arbitration and was, therefore, ambiguous. The Circuit Court applying California contract law principles, found that the agreement was ambiguous, and construed that ambiguity against Lamps Plus as the drafter. The Supreme Court reversed, finding that the Federal Arbitration Act ("FAA") "requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis."

The specific question before the Court was: "[W]hether, consistent with the FAA, an ambiguous agreement can provide the necessary 'contractual basis' for compelling class arbitration." *Id.* In concluding that it cannot, the Court relied on its 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*, 559 U.S. 662, where it held that a court may not compel arbitration on a class-wide basis when an agreement is silent on its availability. There are "crucial differences" between individual and class arbitration, the Court noted, meaning that courts cannot "infer consent to participate in class arbitration absent an affirmative contractual basis for concluding that the party agreed to do so. Silence is not enough; the FAA requires more." *Id.* at *6. The opinion highlighted the Supreme Court's recent jurisprudence on arbitration and emphasized the necessity of both parties' consent to arbitrate.

The decision in *Varela* is another in the Supreme Court's long line of cases favoring arbitration but only when it is explicit and clear in the contractual agreement. Moreover, the Court also seems more cautious in its treatment of class arbitration given its fundamental difference from individual arbitration and the associated contract language that would be necessary for class arbitration.

The case serves as a reminder that arbitration provisions should be clear, up front, and explicit in any contract you have with a consumer or client.

Split Persists Among Federal Courts as to Whether Evidence Submitted in Support of Class Certification Motions Must be Admissible

Federal courts disagree as to whether they can consider inadmissible evidence when deciding a class certification motion. Last year, the Ninth Circuit added to this uncertainty when it issued a decision in *Sali v. Corona Regional Medical Center*, 889 F.3d 623 (9th Cir. 2018), which held that class certification evidence need not be admissible. However, this is becoming the minority view among federal courts. For example, last summer, in *Lin v. Everyday Beauty*, No. 18-cv-729 (BMC), 2019 WL 3037072 (E.D.N.Y. July 11, 2019), the Eastern District of New York issued a decision – based on persuasive dicta from the United States Supreme Court and the Second Circuit – holding that only admissible evidence may be used to evaluate class certification.

Lin was an employment case alleging claims under the federal Fair Labor Standards Act and the New York Labor Law. The plaintiffs were former retail sales employees who sought to represent a class of approximately 350 of defendants' current and former beauty supply store employees during a six-year period. In support of their class certification motion, the named plaintiffs submitted five affidavits, which included facts about their own employment experiences, along with hearsay descriptions from eighteen other former employees and putative class members. These hearsay statements raised the issue of "whether evidence must be admissible to be considered on a Rule 23 motion."

The district court held that class certification evidence must be admissible. In reaching its conclusion, the court quoted a Second Circuit case observing that class certification should be decided in the same way as other threshold issues, such as personal or subject-matter jurisdiction. *See In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) ("A district judge is to assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit.").

The Court then noted that inadmissible hearsay cannot be considered when deciding such threshold issues. The Court also cited the Supreme Court's "indication" in *Wal-Mart v. Dukes* that the evidentiary standards for admissibility of expert testimony apply at the class certification stage. The Court reasoned that there is no logical basis for applying "only some of the Rules of Evidence to class certification motions" and that "[t]hey should either apply in full, or not at all."

Having resolved the legal issue of whether class certification evidence must be admissible, the district court denied certification, holding that "Plaintiffs cannot certify a class on mere speculation." The Court held that there was no evidence in the record that plaintiffs' allegations were common or typical of other employees' experiences. The Court went on to reason that even if the hearsay statements in the plaintiffs' affidavits were to be considered, the plaintiffs could still not show that approximately 350 former employees had sufficiently common or typical experiences to tie them together as a class.

Unless and until the United States Supreme Court issues a decision regarding whether class certification evidence must be admissible, there will surely continue to be disagreement among federal courts.

The Ongoing Effect of *Epic Systems v. Lewis* (2018)

In *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018), the Supreme Court upheld class action waivers in the context of employment contracts. The legal question at issue involved a conflict between two federal statutes, the Federal Arbitration Act ("FAA") and the National Labor Relations Act ("NLRA"). The plaintiffs argued that the NLRA, which gives workers a substantive right to collective litigation, trumps the FAA's requirement to enforce parties' arbitration agreements when the agreements contain class action waivers. The Supreme Court disagreed and found class action waivers enforceable. For the most part, circuit court decisions have served only to reinforce this decision, and only one has limited its application.

The vast majority of decisions referencing the *Epic Systems* decision cite only its general principles of statutory construction, which the Court discussed extensively in the decision. For example, several courts highlighted the Supreme Court's direction that Congress does not drastically alter changes to regulatory schemes in vague terms, or in other words, Congress does not "hide elephants in mouseholes." *See, e.g., Internal Revenue Serv. v. Murphy*, 892 F.3d 29, 49 (1st Cir. 2018). Other courts relied on *Epic Systems* in their explanation for how a court must harmonize two existing statutes that potentially conflict. *See, e.g., United States v. Rockymore*, 909 F.3d 167, 170 (6th Cir. 2018) (citing *Epic Systems* for the proposition that "[w]hen confronted with two [laws] allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among [legislative] enactments' and must instead strive 'to give effect to both.' "); *Carlson v. Postal Regulatory Comm'n,* 938 F.3d 337, 348 (D.C. Cir. 2019) (requiring a court to "interpret Congress's statutes as a harmonious whole rather than at war with one another."). Still others advanced the general holding in *Epic Systems* that "legislative history is now law." *See, e.g., United States v. Town of Colorado City*, 935 F.3d 804, 810 (9th Cir. 2019).

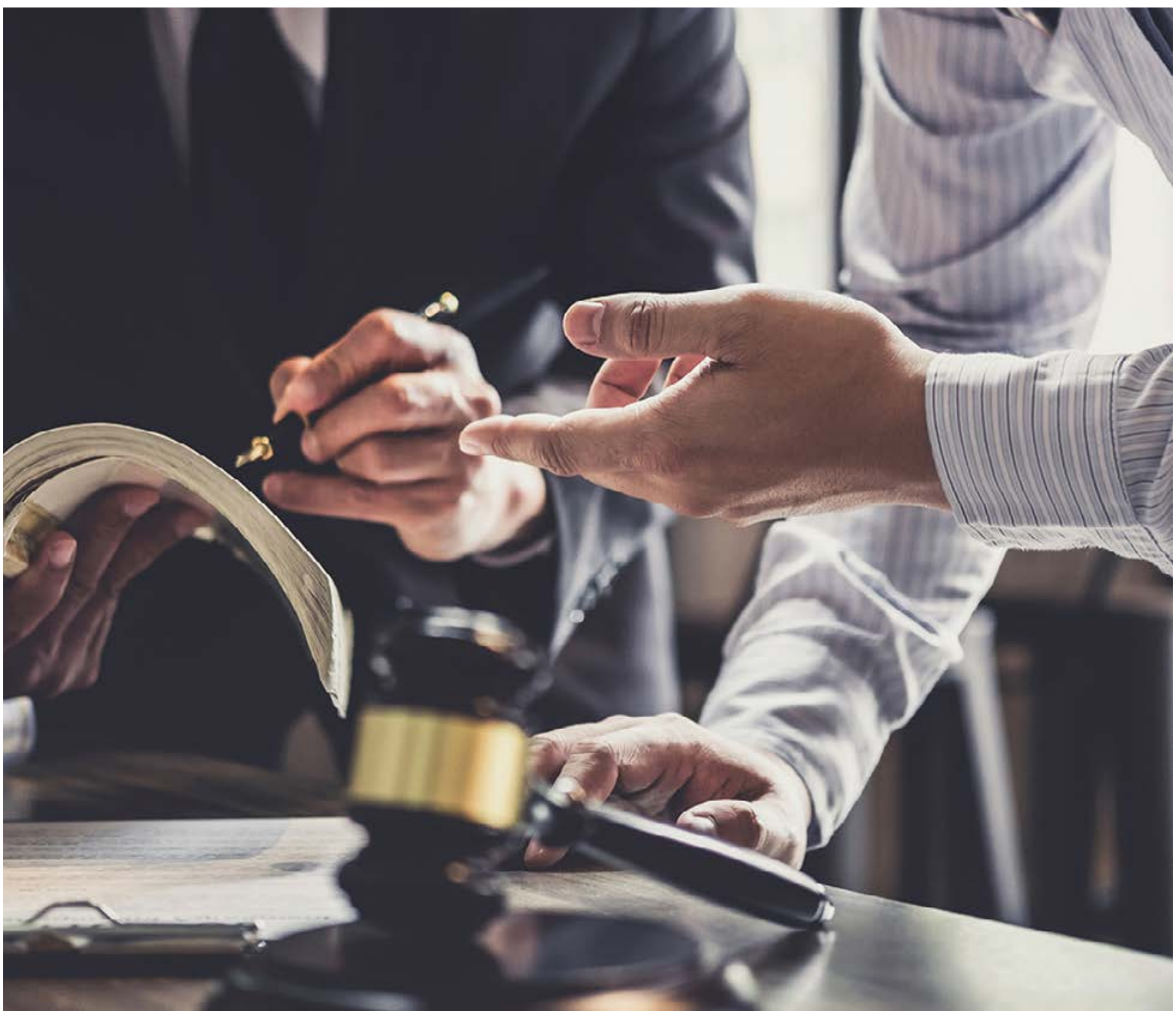
Furthermore, other Circuit courts have unsurprisingly relied on *Epic Systems* to reverse previous district court decisions that declined to enforce arbitration agreements that conflicted with federal laws expressly providing for plaintiffs' rights to collective action. *See, e.g., Everglades Coll., Inc. v. Nat'l Labor Relations Bd*., 893 F.3d 1290, 1293–94 (11th Cir. 2018) (reversing previous decision that the NLRA rendered class action waivers unenforceable); *McGrew v. VCG Holding Corp*., 735 F. App'x 210, 211 (6th Cir. 2018) (finding that "individual arbitration agreements are enforceable against both employees and independent contractors."). In one case, such a reversal had the extreme result of overturning a $10 million class arbitration award where the district court previously invalidated the parties' waiver agreement which forbade class or collective arbitration. *Herrington v. Waterstone Mortg. Corp.*, 907 F.3d 502, 506 (7th Cir. 2018).

Only one circuit decision has somewhat limited the application of the decision in *Epic Systems*. In *Matter of Henry*, 941 F.3d 147, 151 (5th Cir. 2019), the Fifth Circuit analyzed whether the Supreme Court's reasoning in *Epic Systems* that legislative history does not have the power of law invalidated a bankruptcy court's discretion to refuse to compel arbitration where doing so would conflict with the purpose of the United States Bankruptcy Code. The Court found that it did not. In so holding, the Court explained that *Epic Systems* did not completely eliminate legislative history as a valid tool for statutory interpretation. The Court further distinguished *Epic Systems* on the fact that the bankruptcy court's discretion at issue derived from the actual purpose of the Bankruptcy Code and not solely on legislative history.

In summary, the 2019 decisions exploring the Supreme Court's decision in *Epic Systems* have simply reinforced its principal holdings and provided little wiggle room for courts to limit class action waivers contained in arbitration agreements.

No Tolling of Class Claims: The Impact of *China Agritech v. Resh* (2018)

Last year, the Supreme Court decided *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018). In that case, the Court considered whether a putative class member may, after denial of class certification, commence a *new* class action



despite the expiration of the applicable statute of limitations instead of joining an existing lawsuit or promptly filing an individual action. In a unanimous opinion, the Court said "no." This answer has rippled into 2019 as courts across the country have addressed this issue over the past year.

In *China Agritech*, the Court considered the tolling rule first announced in *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974). In *American Pipe,* the Court had held that the statute of limitations was tolled during the pendency of a putative class action. As a result, if the class failed, the unnamed class members could join the action individually or file their own individual claims. More than four decades later, Justice Ruth Bader Ginsburg, writing for the Court in *China Agritech*, clarified that the rule from *American Pipe* does *not* toll the statute of limitations for a subsequent class action filed after expiration of the statute of limitations.

In 2019, federal courts have been using the holding from *China Agritech* to dismiss plaintiffs' class claims. For example, in *Blake v. JP Morgan Chase Bank NA*, 927 F.3d 701 (3d Cir. 2019), the United States Court of Appeals for the Third Circuit considered time-barred claims under the *China Agritech* rule. To avoid dismissal under the statute of limitations, the plaintiffs attempted to piggyback their class action on a previous class action that had raised the same claims against the defendant. The district court held that the previous class action did not toll the statute of limitations on class claims. Based on *China Agritech*, the Third Circuit affirmed, noting that *American Pipe* tolling was limited to individual claims. *Id.* at 709.

The United States Court of Appeals for the First Circuit held similarly. In *In re Celexa & Lexapro Marketing and Sales Practices Litigation*, 915 F.3d 1 (1st Cir. 2019), the First Circuit affirmed the district court's denial of class certification. In this case, the plaintiffs sued the defendants for allegedly engaging in fraud to pressure unsuspecting minors to take antidepressant drugs that the FDA had not approved for use by minors. Among other issues addressed on appeal, the First Circuit considered the plaintiffs' argument that class certification had been improperly denied. The Court recognized that one of the plaintiffs was a putative class member in a previous case alleging the same claims. Under *American Pipe*, this tolled the statute of limitations for eight months on that plaintiff's individual claim. The Court noted that the plaintiff could sue, due to *American Pipe*, but could not "parlay that dispensation into the much-delayed filing of a class action." *Id*. at 16. Accordingly, the Court affirmed the district court's denial of class certification. As the Court noted, "[t]o hold otherwise would be to allow a chain of withdrawn class-action suits to extend the limitations period forever." *Id*. at 17.

In summary, 2019 demonstrated that *China Agritech* is another powerful resource in defendant's tool chest for defeating class certification.

BACKGROUND SCREENING

Lawsuits alleging violations of the Fair Credit Reporting Act ("FCRA"), including background check-related litigation, have more than doubled in the last decade. That upward trend continued in 2019. While the volume has been remarkable, so too has been the impact of regulator activity and decisions from courts of appeals this year. The Seventh Circuit upheld a broad meaning for "convictions," while the Ninth Circuit narrowed the actions reportable in the FCRA's seven-year clock. The Northern District of Georgia limited the FCRA's applicability to independent contractors, holding that screening potential independent contractors does not prompt the protections for "employment purposes." Most notably, the Consumer Financial Protection Bureau published a report on background screening accuracy that could foreshadow increased enforcement actions in the future. These developments offer guidance on best practices for companies operating in the background screening arena nationwide.

CFPB Issues Report, Highlighting Regulatory Interest in Background Screening Accuracy

Maintaining its regular focus on the background screening industry, on October 3, 2019, the CFPB published a report entitled "Market Snapshot: Background Screening Reports." The report highlights increased demand for background screenings by employers, as well as consumer challenges arising from the vast array of data sources and consumer reporting agencies involved in those screenings. The report follows the CFPB's filing of a complaint against Fair Collections & Outsourcing for its alleged failure to guide its employees in how to properly investigate identity theft and background check disputes. Both the report and the complaint offer perspective into the CFPB's potential future regulatory actions, as well as how entities like credit reporting agencies and entities furnishing information to those agencies can minimize the risk of litigation.

Summary of the Report

The report detailed common reporting challenges that can result in adverse outcomes for consumers, especially in the reporting of criminal records. Challenges highlighted include:

- Inconsistent systems for information collection across sources. For example, court systems' access to public records, including criminal records, may vary across jurisdictions. Courts also may use varying terminology to describe the same public record.
- The lack of unique identifying information which can result in improperly affiliating consumers with someone else's information. In other words, some courts impose policies relating to redacting personal identifying information on public records, which makes it more difficult to match a particular consumer to a record and thus can lead to false matches.
- Duplicative reporting of criminal records, which results in multiple listings of the same convictions or arrests, leaving the impression a consumer has multiple offenses.
- Out of date, expunged, or sealed criminal information. For example, expunged records pose a particular problem because determining which records have been expunged based on court records often proves difficult.
- The inability of consumers to review reports or the underlying information prior to the dissemination of that information to employers. Given that employers may use one of several thousand background screening firms, consumers likely cannot identify the specific firm handling their screening. Even if the consumer can identify the firm, that firm may not have information on the consumer, or may not be able to provide the same information to the consumer as it provides to the employer.

- Delays in updating information possessed by consumer reporting agencies. If, say, an error exists in a court record itself, the process for the consumer to resolve the error varies by court and can prove difficult and time-consuming.

Approximately one month prior to issuing the report, the CFPB filed an action against Fair Collections & Outsourcing ("FCO"), the largest debt-collection company in the multi-unit-housing industry. The complaint alleged that FCO failed to maintain reasonable policies and procedures regarding the accuracy and integrity of information it furnishes during consumer disputes in contravention of FCRA Section 623. Specifically, the CFPB highlighted the gap between the number of FCO employees appointed to resolve disputes, and the number of actual disputes – approximately four employees handling 10,000 disputes per month. The rate at which FCO employees found the disputed information "accurate" (92.2%) raised an eyebrow.

In conjunction with the Market Snapshot report, the CFPB's complaint against FCO suggested a potential for increased regulatory action moving forward, especially targeting large companies tasked with handling vast swaths of consumer information. Though hastened handling of disputes and conclusions of "accurate" allowed FCO to tout similarly high efficiency, its numbers caught the CFPB's attention. While the outcome of the complaint is still pending, credit reporting agencies and furnishers should heed the lesson that disproportionately high output can also lead to high levels of regulatory scrutiny.

Key Takeaways

The CFPB's report provides a general overview of consumer reporting accuracy issues. While it does not provide any specific CFPB guidance, it does highlight the agency's interest and concerns with respect to accuracy in consumer reports. Background screening companies should carefully review the challenges highlighted by the CFPB as they could become the focus of future regulatory action.

The decision poses new compliance challenges for consumer reporting agencies determining which records to include in consumer reports.

Ninth Circuit Decision Establishes that Initial Charge, not Eventual Disposition, Triggers FCRA's 7-Year Reporting Ban

On May 14, 2019, the Ninth Circuit Court of Appeals held that the FCRA's seven-year reporting period for certain adverse actions runs from the "date of entry" of those actions, rather than from the "date of disposition." The decision poses new compliance challenges for consumer reporting agencies determining which records to include in consumer reports.

The case, *Moran v. The Screening Pros,* 923 F.3d 1208 (9th Cir. 2019), concerned the denial of the plaintiff's application for housing. Gabriel Felix Moran originally applied for housing in 2010. The background check run by The Screening Pros on behalf of the housing complex returned a misdemeanor narcotics charge from 2000 as well as that charge's dismissal in 2004. The issue in the case was whether the seven-year reporting period for adverse items under the FCRA, 15 U.S.C.§ 1681c(a)(5), ran from the date of the charge or from the date of dismissal.

In a 2-1 decision, the Ninth Circuit held that the seven-year period runs from the "date of entry" of an adverse item rather than the "date of disposition." In so holding, the Ninth Circuit reversed the lower court's ruling that the dismissal of the charge triggered the seven-year reporting period. The circuit court found that the tenant screening report's inclusion of a ten-year-old charge (and the six-year-old dismissal of that charge) could establish a prima facie case under the FCRA. The Ninth

Circuit also reversed the lower court's dismissal of analogous claims under California's Investigative Consumer Reporting Agencies Act ("ICRAA") and California's Unfair Competition Law claims.

The opinion provides a detailed analysis of how to properly report charges—specifically, when the reporting window begins to run, and whether a dismissal of an earlier charge constitutes an independent, reportable adverse item. The Court stated that a "charge is an adverse event upon entry so it follows that the date of entry begins the reporting window." The decision also clarifies that a dismissal of a charge, even if within the seven-year window, is not independently reportable as a separate adverse item. Instead, the dismissal is a reference to the original charge and may not be reported. In the Court's words:

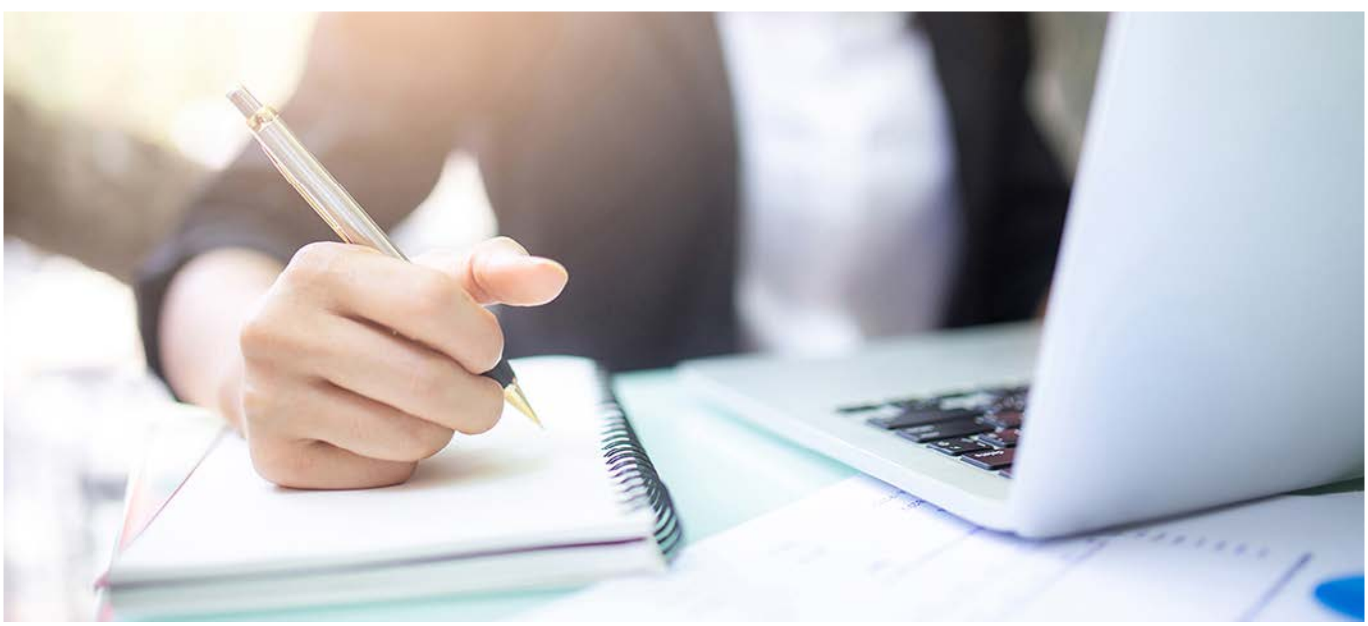
"Both events must be considered as part of the same criminal record and neither may be reported after seven years from the "adverse item," the charge. Reporting the dismissal alone would reveal the existence of the charge, which after seven years, constitutes outdated criminal history information. A related later event should not trigger or reopen the window, as the adverse event already occurred. To hold otherwise, thereby allowing this information to be reported through disclosure of a dismissal, would circumvent Congress's intent to confine adverse criminal information to a seven-year window."

Under this interpretation, consumer reporting agencies must ensure not only that they exclude criminal charges that exceed the seven-year period, but also that they exclude any later events related to or dependent upon the initial charge, even if the later events fall within the seven-year period. This consumer-friendly interpretation should inspire reporting agencies to examine their reporting policies for charges and dismissals to minimize risk of non-compliance.

Key FCRA Ruling from the Seventh Circuit: "Conviction" is Defined by Federal Law and Includes Guilty Pleas

On April 16, 2019, the U.S. Court of Appeals for the Seventh Circuit ruled that the definition of "conviction" under the Fair Credit Reporting Act should be interpreted under federal law, not the law of the state where the criminal record is generated. *See Aldaco v. RentGrow, Inc.*, No. 18-1932 (7th Cir.). The appellate court affirmed the holding that a guilty plea resulting in a sentence of supervision qualified as a "conviction" under federal law, including the FCRA.

In 1996, plaintiff Rafaela Aldaco pled guilty to battery and was sentenced to six months' supervision, a diversionary disposition under Illinois law. The Court entered a finding of guilt and then dismissed the charge after Aldaco served her sentence. The record was never expunged. Years later, Aldaco



applied to rent an apartment and the landlord outsourced a background check to the defendant, RentGrow d/b/a Yardi Resident Screening. The 1996 battery record was returned by RentGrow to the landlord who refused to rent to Aldaco specifically because of the record.

Aldaco then sued RentGrow in Illinois federal court, arguing that it violated the FCRA by disclosing the 1996 battery record, which was over seven years old. Importantly, the FCRA prohibits disclosure of arrest records and other adverse items more than seven years old, but it permits the reporting of convictions forever. *See* 15 U.S.C. § 1681c(a). Aldaco argued that "conviction" under the FCRA meant "as defined by state law" and that her sentence of supervision was not a "conviction" under Illinois law. The district court held that RentGrow was entitled to summary judgment, concluding that "conviction" should be interpreted under federal law, and that definition encompassed Aldaco's 1996 battery charge.

Seventh Circuit Affirmance

In a short opinion penned by Judge Frank H. Easterbrook, the Seventh Circuit looked to the U.S. Supreme Court's opinion in *Dickerson v. New Banner Institute,* 450 U.S. 103 (1983), as well as various other federal laws – including 18 U.S.C. § 922; The Controlled Substances Act; 5 U.S.C. § 7371(b); and 29 U.S.C. § 504(a) – to rule that: (1) federal law, not state law, supplies the meaning of "conviction," and (2) as a matter of federal law, a guilty plea without a formal judgment is a conviction.

According to the Seventh Circuit: "As far as we can tell, the word 'conviction' in federal statutes has been defined according to state law only with explicit direction from Congress." No such direction could be found in the FCRA, and Aldaco did not persuade the court why the FCRA's use of "conviction" should be interpreted differently. Thus, the Seventh Circuit held that RentGrow "did not violate § 1681c(a) by reporting [Aldaco's battery record] to the landlord."

Finally, the Court considered Aldaco's alternative claim that RentGrow violated the FCRA's reasonable procedures requirement in § 1681e(b) by inaccurately reporting the sentence length and failing to tell the landlord that her battery charge was dismissed after the supervision period. Rejecting both arguments, the Seventh Circuit held that "[n]either factor caused the landlord to deny Aldaco's apartment application" since any criminal record disqualified applicants under the landlord's criteria. As a result, the Court found that Aldaco could not have suffered any actual damages since there was no causal link between the alleged "inaccuracies" and Aldaco's denial of her apartment application.

Key Takeaways

The *Aldaco* decision is a defendant-friendly ruling that makes it clear that federal law, not state law, should be used to interpret undefined terms in the FCRA. Further, *Aldaco* reinforces the requirement that an FCRA plaintiff has actually suffered damages tied to the alleged violation in the case.

Another Court Rules Independent Contractor Not an Employee Under FCRA

In August 2019, the U.S. District Court for the Northern District of Georgia joined several other district courts in finding consumer reports obtained for independent contractors do not trigger the protections applicable for consumer reports obtained for "employment purposes" under the FCRA. Although the issue remains unsettled, the decision in *Walker v. REALHome Services and Solutions, Inc.,* No. 1:18-cv-03044 (N.D. Ga. Aug. 9, 2019) adds to the emerging trend in favor of not extending the protections of the FCRA to independent contractors.

Requirements for Reports Used for "Employment Purposes"

The FCRA provides for certain protections when a consumer report is obtained for "employment purposes." 15 U.S.C. § 1681b(b). This includes obtaining the consumer's written authorization in a "stand-alone disclosure" and providing a pre-adverse action notice and summary of rights if the consumer report will be used to make an adverse employment decision. Importantly, however, these requirements only apply if the report is obtained for “employment purposes,” which is defined by the FCRA as “a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.” 15 U.S.C. § 1681a(h). A growing consensus is emerging that the use of the phrase “as an employee” means those FCRA provisions were not intended to apply to independent contractors.

The Court’s Decision

Plaintiff John Walker, Jr. sought a position with defendant REALHome Services and Solutions, Inc. (“RHSS”) as a real estate agent. As part of the application process, Walker signed an Independent Contractor Agreement, which explicitly described him as an independent contractor. Although he was initially offered a position, the offer was rescinded allegedly based on RHSS’s review of Walker’s background check.

Walker alleged RHSS violated the FCRA’s “stand-alone disclosure” requirement by including a liability waiver in his background check consent form. He also alleged RHSS violated the FCRA’s pre-adverse action requirements by failing to provide him with a copy of his report or summary of his rights before rescinding his job offer. RHSS moved to dismiss, arguing Walker lacked standing to bring his “stand-alone” claim and that both of his claims failed because his position was that of an independent contractor and thus not subject to the FCRA’s protections at issue.

The magistrate judge recommended dismissing the complaint, concluding that “it is clear that the provisions of the FCRA urged by plaintiff here do not apply when consumer reports are obtained on persons seeking positions as independent contractors.” The district court agreed, holding that, when interpreting the phrase “an employee” in the FCRA, the Court was “required to apply the common law meaning of employment, which does not include independent contractors.” To support its conclusion, the Court cited published district court decisions reaching the same conclusion, including *Lamson v. EMS Energy Mktg. Serv., Inc*., 868 F. Supp. 2d 804 (E.D. Wis. 2012) and *Johnson v. Sherwin-Williams Co.*, 152 F. Supp. 3d 1021 (N.D. Ohio 2015).

Conclusion

The Court took a similar approach to the question as the Southern District of Iowa did in *Smith v. Mutual of Omaha Insurance Company* and cited to that opinion. While the court in *Smith* ordered limited discovery on whether the plaintiff was an employee or independent contractor, in the present case the Court found it was “undisputed that Plaintiff applied for an independent contractor position.” Both courts conclusively determined the FCRA’s “employment purposes” protections do not apply to independent contractors.

Although companies should welcome this emerging trend, they should be mindful that other courts may read “employment purposes” broadly and apply the protections to independent contractors. Indeed, there is some older authority for this position, although many courts are now rejecting it. Likewise, companies should be mindful that simply calling someone an “independent contractor” is not a panacea, as the Court may allow discovery into the nature of the relationship, like in *Smith*. Until the issue is ultimately decided, companies should consider complying with the FCRA’s authorization and pre-adverse action requirements even when hiring independent contractors to limit potential lawsuits.

BANKRUPTCY

2019 proved to be an important year in bankruptcy. This year we heard from the United States Supreme Court on standards for contempt sanctions for discharge injunction violations and amendments to the Bankruptcy Code, in addition to several noteworthy bankruptcy court opinions. What's more, after declining for eight consecutive years, total bankruptcy filings during 2019 increased as compared to 2018, including an increase in consumer filings.

Appropriate Standard for Civil Contempt Premised on Discharge Order Violations Decided by the Supreme Court

In *Taggart v. Lorenzen*, the Supreme Court overturned the Ninth Circuit and clarified the appropriate standard for issuing civil contempt sanctions premised on discharge order violations, holding that a party may be sanctioned for violating a discharge order "if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful." *See* 139 S. Ct. 1795, 1799 (June 3, 2019). The holding rejected the subjective standard applied by the Ninth Circuit, which held that a court could not hold a creditor in civil contempt "if the creditor has a 'good faith belief' that the discharge order 'does not apply to the creditor's claim.'" The holding also rejected the quasi-strict liability standard applied by the Bankruptcy Court, which held civil contempt sanctions were appropriate "irrespective of the creditor's beliefs, so long as the creditor was 'aware of the discharge' order and 'intended the actions which violate[d]' it."

Petitioner Bradley Taggart was a defendant in a pre-petition state court lawsuit filed by the respondents, his former business partners, alleging that Taggart breached the business' operating agreement. Before trial, Taggart filed for Chapter 7 relief, ultimately receiving a discharge of debts, including damages stemming from the civil litigation.

After Taggart received his discharge, the state court entered a judgment against him. The parties agreed the discharge order would typically discharge post-petition attorneys' fees stemming from pre-petition litigation unless Taggart "returned to the fray" post-petition. However, predictably, the parties disagreed over the extent of Taggart's post-petition case involvement and, therefore, his subsequent liability for these amounts. The state court found that Taggart had returned to the fray and that he was therefore liable for approximately $45,000 in attorneys' fees.

This ruling set off a wave of appeals, eventually culminating in the Supreme Court's decision. While the specifics of each appeal are interesting, the Supreme Court ultimately clarified that "[a] court may hold a creditor in civil contempt for violating a discharge order where there is not a 'fair ground of doubt' as to whether the creditor's conduct might be lawful under the discharge order." The Court explained that their reasoning "strikes the 'careful balance between the interest of creditors and debtors' that the Bankruptcy Code often seeks to achieve." As the Ninth Circuit did not apply the appropriate standard, the Supreme Court remanded the case for further proceedings consistent with its holding and the case remains ongoing.

The key takeaway from *Taggart* is that a creditor must have an objectively reasonable belief that its conduct does not violate a discharge order in order to avoid civil contempt liability. Claims of this type against creditors are frequent, and thanks to *Taggart*, creditors now have a consistent nationwide standard on which to base post-discharge activities.

Small Business Reorganization Act of 2019

In 2005, Congress amended the Bankruptcy Code and Title 28 of the United States Code, incorporating special provisions for "small business debtors" "largely derived from recommendations of the National Bankruptcy Review Commission" that were “designed to weed out small business debtors who are not likely to reorganize.”

In 2019, Congress concluded – in light of the fact that “small business chapter 11 cases continue to encounter difficulty in successfully reorganizing” despite the amendments set forth in 2005 – that it needed to pass legislation that “allows [small business] debtors ‘to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business.’” On August 23, 2019, President Donald J. Trump signed H.R. 3311, the Small Business Reorganization Act of 2019 (“SBRA”), into law.

The biggest change in the SBRA is that it enacts a new subchapter V for Chapter 11, applicable solely to small business debtors if they so elect. Further, the SBRA amends and/or affects various provisions elsewhere in the Bankruptcy Code, including rendering twenty-four paragraphs, subsections, and sections of Chapter 11 to be inapplicable in these “small business debtor reorganization” cases, of which six paragraphs, subsections, and sections may become re-applicable if the court “for cause orders.”

The highlights of Chapter 11, Subchapter V, include:

- A trustee appointed to a subchapter V case does not operate the business of the small business debtor; the debtor in possession does. Usually, trustees act as fiduciaries for creditors and exert more control over a debtor, including the operation of the debtor’s business.
- Contrary to the provision in 11 U.S.C. § 1121(c) which allows “any party in interest” to file a plan under certain circumstances, only the small business debtor may file a plan of reorganization in a subchapter V case, and it must do so “no later than 90 days after the order for relief.”
- The contents of a plan of reorganization under subchapter V are less stringent than plan requirements set forth in 11 U.S.C. § 1123. A plan under subchapter V need only include “(A) a brief history of the business operations of the debtor; (B) a liquidation analysis; and (C) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization.” Also, and where subchapter V plans diverge even further from plans under existing Chapter 11, loans secured by the principal residence of the debtor may be modified by the plan if the funds were “(A) not used primarily to acquire the real property; and (B) used primarily in connection with the small business…”
- Finally, under subchapter V, debtors are able confirm a plan over the opposition of an impaired class of creditors if the plan “does not discriminate unfairly, and is fair and equitable, with respect to each class” of creditors that haven’t accepted the plan.

A Verbal Agreement to Extend A Deadline to Object to Discharge Is Not Enforceable

The United States Bankruptcy Court for the Southern District of New York denied a motion to extend the time to object to a debtor’s discharge despite the debtor’s counsel agreeing to the extension but failing to move within 60-days of the first noticed § 341 meeting. *In re Bressler,* 600 B.R. 739 (S.D.N.Y. 2019).

In *Bressler*, a former chief investment officer and portfolio manager for Carbon Investment Partners, LLC filed for Chapter 7 bankruptcy after having a civil suit brought against him for fraud and breach of fiduciary duty. Prior to the petition, Carbon also commenced an arbitration proceeding against the debtor, which ultimately found the debtor liable for $16.8 million in damages owed to Carbon.

During the bankruptcy proceedings, the first § 341 meeting was noticed for November 16, 2018, which set the deadline to object for January 15, 2019. The § 341 meeting was not actually held until December 7, 2018. Before the deadline, Carbon and the debtor orally agreed to extend the discharge objection deadline. Carbon, however, did not file a motion to extend the discharge deadline until February 4, 2019, believing the deadline to object was 60 days from December 7, 2019 (when the meeting was held), or February 5, 2019.

In its motion, Carbon argued that the oral agreement between Bressler and Carbon was binding and enforceable and that Bressler was equitably estopped from arguing for a different deadline. Carbon further contended the Court had the power to equitably toll the deadline due to misconduct by Bressler.

Judge Martin Glenn disagreed and upheld the majority rule requiring creditors to object to a discharge within 60 days of the first noticed § 341 creditors meeting. *See* Fed. R. Bankr. P. 4004(a). First, the Court noted Bankruptcy Rules 4004(a) and 4007(c) were amended in 1999 to clarify the deadline to object to a discharge is 60 days from the *first* noticed § 341 meeting since they did not omit the phrase *"the first date set"* from the text. *Bressler*, 600 B.R. at 744. Second, Judge Glenn found Carbon's estoppel argument unpersuasive since the Court may *sua sponte* deny the motion without objection from Bressler, and Carbon could not reasonably rely on Bressler's oral extension since any extension requires court approval under the rules. *Id*. at 746. Third, the Court distinguished the cases cited by Carbon for equitable tolling of the deadline. Judge Glenn determined Carbon received proper notice of the first meeting date and was aware of Bressler's alleged fraud and fiduciary breaches since it filed suit against Bressler's pre-petition for those very causes of actions.

This case serves as a reminder that rules and statutes mean what they say, and best practices are to be conservative when analyzing the rules to avoid possible costly mistakes. It should be noted all was not lost for Carbon. The Chapter 7 trustee obtained an extension and filed an adversary proceeding against Bressler. After that, by subsequent motion based on newly discovered and concealed facts, Carbon was able to revive the objection deadline.

Failure to Establish Standing to File Proof of Claim

The United States Bankruptcy Court for the Southern District of New York expunged a mortgage servicer's proof of claim for filing inadequate documents in support of the claim under Fed. R. Bankr. P. 3001(c). *In re Benyamin*, 596 B.R. 789 (S.D.N.Y. 2019).

Best practices are to be conservative when analyzing the rules to avoid possible costly mistakes.

In Benyamin, the debtors Daniel and Lucy Benyamin, in 2003, signed a promissory note in favor of IndyMac Bank, F.S.B. secured by a mortgage on the property. 596 B.R. at 793. At some point after that, the Benyamins defaulted, and the lender began foreclosure proceedings in New York State court. *Id*. While the foreclosure was pending, in September 2017, the Benyamins filed a voluntary petition under Chapter 11. *Id*. Ditech Financial LLC, on December 26, 2017, filed a proof of claim, which included a copy of the promissory note endorsed in blank. *Id*. The Benyamins objected to the proof of claim, arguing Ditech did not have standing to file the proof of claim.

Ditech filed an untimely opposition to the claim objection, attaching assignments and a statement of possession by a Ditech employee. The Court rejected the proofs and expunged the proof of claim in July 2018. Ditech moved to reconsider, and during the reconsideration hearing, Ditech, for the first time, admitted it was the servicer for the Benyamins' loan, which Freddie Mac owned. The Court granted Ditech's reconsideration application and ordered an evidentiary hearing to determine Ditech's standing.

At trial, Ditech argued it was in constructive possession of the note on the day of the petition through its custodial agent, BNY Mellon, and presented evidence attempting to show it was the servicer on the date of the petition, which would also entitle it to file a proof of claim. The Court rejected these arguments and found Ditech did not prove it serviced the debtors' note and could not establish possession of the note at the time of the petition.

As to possession of the note, Judge Martin Glenn held the custodial agreement produced by Ditech inadmissible because it was undated, unsigned, and did not reference the note or the debtors. *In re Benyamin*, 596 B.R. at 796. Judge Glenn also determined that Ditech's witness did not have personal knowledge of the custodial agreement. *Id*. Judge Glenn further held that Ditech admitted it did not itself take actual possession of the note until the summer of 2018 from BNY Mellon, which post-dated the filing of the voluntary petition by the debtors. *Id*. As to whether Ditech serviced the loan, the Court found Ditech was a servicer for Freddie Mac but that Ditech had failed to produce evidence showing Freddie Mac owned the debtors' loan.

While Ditech took some peculiar actions in attempting to prove standing, this case serves as a textbook example for secured creditors to sufficiently demonstrate standing when filing a proof of claim.

CONSUMER CREDIT REPORTING

The credit reporting industry endured another busy legal year, with litigation under the Fair Credit Reporting Act outpacing other areas. Federal regulators continue to be active in this space, and this year also saw a significant increase in legislative activity at both the state and federal levels. Additionally, the Consumer Data Industry Association ("CDIA") issued numerous updates to its Credit Reporting Resource Guide.

Litigation Update

What is a "Consumer Reporting Agency"?

There were several cases throughout this year where courts defined the contours of a "consumer reporting agency" under the FCRA.

For example, in *Kidd v. Thomson Reuters*, 925 F.3d 99 (2nd. Cir. 2019), the Second Circuit considered the specific question of "[w]hether, to qualify as a 'consumer reporting agency' under the FCRA, an entity must specifically intend to furnish a 'consumer report.'" In that case, the plaintiff challenged Thomson Reuters' "Consolidated Lead Evaluation and Reporting" ("CLEAR") online research platform, arguing that CLEAR constitutes consumer reporting and Thomson Reuters acted as a consumer reporting agency. But Thomson Reuters explicitly prohibits the sale and use of CLEAR for any purpose regulated by the FCRA through various means: employee training, mandatory employee reporting, marketing materials, contractual requirements, mandatory customer certifications, customer vetting, investigations, and remedial actions.

The district court granted summary judgment in favor of Thomson Reuters, finding that "whether Thomson Reuters qualifies as a CRA turns in the first instance on whether its subjective purpose in assembling information concerning consumers is to furnish consumer reports to third parties." The Court rejected Kidd's interpretation that an entity's subjective intent is irrelevant to the question of whether it is a CRA under the FCRA. Here, because Thomson Reuters took "affirmative steps" to ensure that subscribers were not using CLEAR for FCRA-regulated purposes, Thomson Reuters did not act as a CRA. On appeal, the Second Circuit affirmed the district court's order granting summary judgment. To determine an entity's intent, the Second Circuit held that a court must consider "the totality of a defendant's actions." The Court agreed with the district court "that because it is undisputed that Thomson Reuters took numerous – and effective – measures to prevent CLEAR reports from being utilized as 'consumer reports,' no reasonable juror could conclude that Thomson Reuters intended to furnish such reports, and therefore it is not a 'consumer reporting agency' under the FCRA."

Similarly, in *Zabriskie v. Fannie Mae*, 912 F.3d 1192 (9th Cir. 2019), the Ninth Circuit held that Fannie Mae met neither prong of the FCRA's definition of a CRA. The Ninth Circuit first held that Fannie Mae did not assemble or evaluate consumer credit information, but rather offered tools to mortgage lenders so that they could evaluate mortgage loan applicants. The *Zabriskie* Court also found that Fannie Mae did not assemble or evaluate consumer credit information for the purpose of furnishing consumer reports to third parties, but instead it assembled such information only "to determine a loan's eligibility for subsequent purchase."

Verifying Furnisher Reporting

In *Humphrey v. Trans Union*, LLC, 759 F. App'x 484 (7th Cir. 2019), the Seventh Circuit affirmed judgment in favor of the national consumer reporting agencies, rejecting a plaintiff's attempt to impose FCRA liability upon the CRAs for reporting information the furnisher had verified as accurate. The *Humphrey* decision represents a significant victory for CRAs facing collateral attacks of the accuracy of the accounts they report.

In *Humphrey*, the plaintiff submitted multiple disputes with the CRAs, who then sent the furnisher Automated Credit Dispute Verifications.

Like other courts before it, the Seventh Circuit recognized that an attack on the validity of a debt is not the CRAs' fight to fight.

Each time, the furnisher confirmed to the CRAs that the information reported was accurate. The plaintiff then filed suit against the CRAs. The district court granted the CRAs' motion for judgment on the pleadings, and the Seventh Circuit affirmed. The Seventh Circuit flatly rejected the plaintiff's argument that the CRAs could face liability under the FCRA by continuing to report the debt even though the plaintiff claimed he had no obligations to make payments. Like other courts before it, the Seventh Circuit recognized that an attack on the validity of a debt is not the CRAs' fight to fight, ruling "a consumer may not use the Fair Credit Reporting Act to collaterally attack the validity of a debt by challenging a CRA's reinvestigation procedure."

Reporting Charged-Off Account With Monthly Payment Due Accurate

In *Ruvye Cowley v. Equifax Info. Servs., LLC, et al.*, the United States District Court for the Western District of Tennessee held it was not a violation of the Fair Credit Reporting Act for a creditor to report a charged-off account with a monthly payment due.

In March 2016, plaintiff Ruvye Cowley entered into a Retail Installment Contract/Security Agreement, under which she was provided with $1,400 in consumer financing and agreed to make 24 monthly payments of $72.04 to repay the loan. Cowley failed to timely make payments, and the creditor accelerated the debt. At some point, the creditor charged off and closed the account. Cowley eventually received a credit disclosure from a consumer reporting agency that included the tradeline with a scheduled monthly payment of $72. Cowley disputed the report, arguing that because the account was closed and charged off, the scheduled monthly payment should report as "$0.00." The creditor maintained that the tradeline was reporting accurately, so Cowley sued, claiming that the creditor violated the FCRA "by reporting a scheduled monthly payment when the account was, in fact, charged-off and closed."

The Court began by rejecting Cowley's requests to consider the CDIA's Credit Reporting Resource Guide to determine whether the account was reported inaccurately. Cowley argued that it was inaccurate to report a charged-off account with a monthly payment due of $72 because the CRRG requires a creditor who has charged off an account to report the balance due as "$0.00." The Court rejected this as an attempt to use inadmissible hearsay. The Court further noted that the CRRG contained industry guidelines, "not legal authority like regulations, laws or cases." Hence, Cowley could not use the CRRG to show that the creditor inaccurately reported her charged-off account.

Next, the Court held that the tradeline was reported accurately. To bring a valid FCRA claim, Cowley needed to show that her tradeline was reported inaccurately. She failed to do so. The Court noted that it was undisputed that Cowley was obligated to make 24 monthly payments, each in the amount of $72.04. Since this is what was reported, the tradeline was accurate.

The Court further noted that Cowley also failed to show that the tradeline was materially misleading because she "submitted no proof that the report misled a creditor." The Court frowned upon Cowley's attempt to maintain a lawsuit while providing "only her opinion without admissible evidence that the allegedly inaccurate report created a misleading impression of her consumer credit file." The Court noted that the United States Court of Appeals for the Sixth Circuit "has repeatedly found that a personal opinion, by itself, cannot support an inaccuracy claim under FCRA." Because Cowley failed to meet her burden, the Court granted summary judgment against her.

Court Excludes Evidence at Trial Regarding Defendant's Net Worth

In *Dodgson v. First Advantage Background Servs. Corp.*, No. 1:16-cv-1894, 2019 U.S. Dist. LEXIS 93646 (N.D. Ga. Mar. 7, 2019), the district court first denied summary judgment on the plaintiff's willfulness claim. Then, before trial, the defendant filed a motion in limine to exclude evidence of financial worth on the basis that punitive damages should not be available because there was no willful violation. The Court concluded that "because the report is technically accurate and thus may not serve as the basis for willful FCRA violation, punitive damages are not available and evidence regarding Defendant's current net worth or financial condition is irrelevant."

Regulatory Update

While private FCRA litigation has continued to grow nationwide, federal regulators have seemingly taken a behind-the-scenes approach to compliance enforcement. The Consumer Financial Protection Bureau and the Federal Trade Commission are the two federal regulators with primary responsibility for supervision and enforcement of the FCRA. 2019 saw that the CFPB in particular remains at work monitoring and enforcing credit reporting requirements.

The Supervisory Highlights recently released in 2019 by the CFPB provides detailed insight into the issues the agency is actively monitoring. Although there were few public enforcement actions in 2019, the CFPB's report details a multitude of regulatory activity spanning across all aspects of the consumer credit reporting space.

With respect to data furnishers, the CFPB's report shows an emphasis on monitoring for accuracy of reporting and sufficiency of policies and procedures. For example, the CFPB observed multiple cases of furnishers reporting large amounts of accounts with derogatory information despite having reason to believe that the information was inaccurate. It also found problems concerning the prompt updating of inaccurate information. The CFPB attributes many of these issues to inadequacy of the furnishers' policies and procedures. The Bureau found multiple instances where furnishers' policies and procedures were not appropriate given the nature, size, complexity, and scope of the furnishers' activities. There also were instances where furnishers' policies and procedures did not adequately differentiate between FCRA disputes and those made under the Fair Debt Collection Practices Act or that involved validation requests. In all cases, the CFPB required furnishers to make improvements to address the issues.

More so than data furnishers, the CFPB's Supervisory Highlights show substantial activity concerning the consumer reporting agencies. The report suggests there were sweeping failures by one or more of the national CRAs when it came to ensuring maximum possible accuracy of the credit information reported. In particular, the CFPB highlighted CRAs' exemption of smaller data furnishers from data validation testing which "posed and unreasonable risk of producing errors in consumer reports." The Supervisory Highlights also noted failures by one or more CRAs to conduct independent investigations into consumer disputes, to notify furnishers of disputes, and to provide notices to consumers of investigation results.

The compliance priorities demonstrated by the CFPB's Supervisory Highlights did make an appearance in the form of public enforcement actions this year. For example, the CFPB reached a stipulated final judgment with a background screening company over allegations of inadequate procedures to ensure accuracy in the information produced in consumer reports. That action levied a $2.5 million monetary penalty and provides for $6 million in relief to consumers. The CFPB also recently filed a complaint against a data furnisher in Maryland for failure to maintain reasonable policies and procedures regarding the accuracy of information it furnishes and handling of consumer disputes.

Continued monitoring and enforcement by the CFPB and FTC is expected, as highlighted in the recent joint workshop held by the agencies on the issues of accuracy in consumer reporting. During the workshop, the regulators focused on furnisher practices and compliance with accuracy requirements and navigation of the disputes process. Both government and private commentators expressed that, as consumer reporting becomes more expansive and utilized in the marketplace, ensuring accuracy is of paramount importance.

A major take-away from 2019 is that regulators are hard at work and focused on consumer reporting compliance issues – even if the number of high-profile public enforcement actions has decreased. In particular, the CFPB and FTC are greatly concerned with the accuracy of consumer reporting data and are looking to both furnishers and the CRAs to ensure compliance on that front. To that end, implementation of policies and procedures that maximize data accuracy will likely be a key focus of regulatory action in 2020 and beyond.

Federal Legislation Update

The Economic Growth, Regulatory Relief, and Consumer Protection Act went into effect this year amending the Fair Credit Reporting Act to include further consumer protection in light of highly-publicized data breaches.

Section 301 increases the period that a consumer reporting agency must include a fraud alert in a consumer file from 90 days to one year for consumers who have been victims of identity theft. Credit reporting agencies are also required to provide the consumer with free credit freezes upon request and to notify a consumer of their availability.

Section 302 provides free, limited credit monitoring to active duty military personnel. Credit reporting agencies are restricted from reporting medical debt owed by veterans to non-VA medical providers for VA-authorized medical care until the debt is more than one year old. The Act also provides a new dispute and verification process for veterans regarding inclusion of a veteran's medical debt in a consumer report.

Last year also saw several extensive proposals for reform to the FCRA. For example, the Clarity in Credit Score Formation Act of 2019, H.R. 3629, seeks to establish federal oversight of the development of credit scoring models by the CFPB. The bill would direct the CFPB to assess the impact of reporting non-traditional data on consumer reports, including those of traditionally underserved communities and populations, consumers residing in rural areas, immigrants, refugees, and non-permanent residents. Users and creators of credit scoring models would also be required to establish standards that validate the accuracy and predictive value of credit scoring models, and the CFPB would be required to regularly reconsider the appropriateness of any particular factor or weight given to any particular factor used in credit scoring models.

The Medical Debt Relief Act of 2019, S. 1581, would prevent a credit reporting agency from reporting medical debt for one year and would require a credit reporting agency to remove paid-off or settled medical debts from consumer credit reports after 45 days.

Most significantly, the House Financial Services Committee proposed four credit reporting reform bills for consideration by the entire House of Representatives, all proposed along party lines: (1) the Restricting Use of Credit Checks for Employment Decisions Act; (2) the Free Credit Scores for Consumers Act of 2019; (3) the Restoring Unfairly Impaired Credit and Protecting Consumers Act; and (4) the Improving Credit Reporting for all Consumers Act. Part of the Comprehensive Consumer Credit Reporting Act of 2019, these bills would involve extensive amendments to the FCRA, including adding new requirements to the FCRA dispute process, giving credit repair companies more tools to challenge information on credit reports, banning the use of credit reports in private employment decisions, reducing from seven to four years the point at which credit information becomes obsolete, and reducing from ten to seven years the length of time bankruptcies can remain on a record.

Finally, the Protecting Innocent Consumers Affected by a Shutdown Act and the Federal Worker Credit Protection Act of 2019 – the latter having been proposed to the House Committee on Financial Services – would specifically prohibit furnishing negative credit information of federal employees affected by a government shutdown.

State Legislation Update

Nevada

Effective October 1, 2019, Section Three of Nevada Senate Bill 311 allows divorced credit applicants with no credit history to request that a creditor deem the credit history belonging to the applicant's spouse as that of their own throughout the time of their marriage.

On the day SB 311 went into effect, the American Financial Services Association, the Nevada Credit Union League, and the Nevada Bankers' Association sued the state of Nevada, arguing that the FCRA and the Equal Credit Opportunity Act ("ECOA") preempt such legislation. SB 311 is currently in effect as litigation continues.

SB 311 was intended to give credit history to spouses who relied on their partners to handle the couple's credit endeavors throughout the marriage. According to the bill's sponsor, SB 311 was meant to assist a person who "may not be able to obtain credit, even though the person contributed to the development of the couple's credit history, because the credit history is entirely in the spouse's name."

The trade associations argue that SB 311 would force creditors to violate the FCRA by requiring them to access and use the non-applicant spouse's consumer report without a permissible purpose. Furthermore, they argue that the ECOA generally prohibits creditors from requesting information concerning the spouse of an applicant; however, by virtue of the bill's plain language, SB 311 requires creditors to obtain otherwise prohibited information about a spouse or ex-spouse.

New Jersey

Beginning October 17, 2019, an amendment to New Jersey Statute § 56:11-34 requires national credit agencies to, upon request, provide credit reports to New Jersey consumers in "Spanish or any other language that the Director of the Division of Consumer Affairs determines is the first language of a significant number of consumers in the state."

This amendment further provides that "the Director shall require that the information is made available in at least the 10 languages other than English and Spanish that are most frequently spoken as a first language by consumers in this State." As nearly a third of New Jersians speak a language other than English at home, the law states that it attempts to ensure consumers can assess the accuracy of their credit reports.

The Consumer Data Industry Association ("CDIA") sued the State of New Jersey on October 17, 2019, arguing the amendment is preempted by FCRA and violates the First Amendment as restraint on free speech.

Maine

Earlier this year, the Maine legislature passed LD 110 and LD 748, each taking effect on September 19, 2019. Specifically, LD 110 prohibits a consumer reporting agency from reporting medical debt on a consumer's credit report until 180 days have passed since the date of first delinquency. The law further prohibits reporting of medical debt if the consumer and creditor have settled or paid the account, and it requires the credit reporting agency to remove reports of that medical debt from consumer reports.

The second state law, LD 748, requires CRAs to reinvestigate any debt in which a consumer provides documentation to a CRA of "economic abuse." If the CRA finds that the debt is the result of economic abuse, it must remove any reference to the debt. "Economic abuse" means causing an individual to be financially dependent by maintaining control over the individual's financial resources, including unauthorized or coerced use of credit or property. Me. Rev. Stat. tit. 19-A, § 4002(3-B).

The CDIA sued the State of Maine, seeking a declaratory judgment that LD 110 and LD 748 are both preempted by the FCRA. It argues that compliance with the two laws will require CRAs to reject accurate credit information, impede their ability to report accurate data, and lead to increased cost, and decreased availability, of consumer credit. The CDIA asserts that the FCRA specifically prohibits states from attempting to regulate the contents of consumer credit reports and that the Maine statutes attempt to exclude information from being included in consumer reports where the FCRA expressly contemplates the inclusion of that information.

Iowa

Iowa Senate File 2177 became effective on January 1, 2019, providing for consumer security freezes throughout the state by:

1. Eliminating the requirement for consumers to submit requests for security freezes through certified mail, and instead allows for such

requests to be submitted by mail, telephone, email, or through a secure online connection;
2. Requiring CRAs to commence security freezes within three business days after receiving a request, as opposed to the previous five days;
3. Requiring CRAs to identify for consumers, under certain circumstances, any other "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis" (as defined by section 1681a(p) of the FCRA, 15 U.S.C. § 1681, et seq.), and inform them of appropriate contact information that would permit the consumer to place, lift, or remove a security freeze from such other CRA; and
4. Prohibiting CRAs from charging a fee for placing, removing, temporarily suspending, or reinstating a security freeze.

Consequently, CRAs will want to ensure their processes and procedures have been updated to account for such changes, and that employees have been trained to comply with them.

California

California amended its debt collection law—the Rosenthal Fair Debt Collection Practices Act—which is the state's version of the Fair Debt Collection Practices Act ("FDCPA"). The amended law became effective on January 1, 2019, requiring that debt collectors inform consumers if a debt has become time-barred, meaning the consumer cannot be sued over the debt.

The new law also bans collectors from actually filing a lawsuit or initiating arbitration or any other legal proceeding to collect a time-barred debt. Furthermore, debt collectors are required to include the notice in the first written communication sent to the consumer after the statute of limitations passes.

Updates to the CDIA Credit Reporting Resource Guide

Bankruptcy Reporting

The CDIA issued three updates to clarify reporting of accounts in bankruptcy. First, beginning the first month after a bankruptcy petition is filed, the Payment History Profile should be reported with "D" (plus history reported prior to bankruptcy filing) in the first position during the pendency of the bankruptcy. Second, the Consumer Information Indicator ("CII") "Q" is clarified to confirm that this code (1) removes previously reported Bankruptcy Indicators A through P and Z, as well as Personal Receivership Indicator 1A, and (2) reports bankruptcies that have been closed, terminated, dismissed or withdrawn without having been discharged. Lastly, the CDIA advises that the date of obsolescence for CII codes "I" through "P" and "Z" is advanced to April 2021.

Forbearance and Deferment in the Wake of Government Shutdowns

A government shutdown impacted thousands of Americans from December 23, 2018 to January 25, 2019. The 34-day shutdown caused many consumers to fall behind on their loan repayment plans. To assist furnishers and consumers in the aftermath of the shutdown, the CDIA issued guidelines providing furnishers with two options when adjusting a borrower's repayment plan: deferred payments and forbearance.

Forbearance plans allowed consumers to make reduced payments, interest-only payments, or no payments at all for a specified period both during and immediately after the shutdown. Alternatively, furnishers could report accounts as deferred in accordance with the Metro 2® Format. Once the account goes back into repayment, furnishers are to stop reporting Deferred Payment in the K4 Segment and report the Terms Duration, Terms Frequency, and Scheduled Monthly Payment Amount as outlined in the repayment agreement.

Student Loan Reporting

The CDIA worked with the Student Loan Servicing Alliance and others involved in the student loan industry to develop updated guidance for reporting federal student loans. For the most part, student loan reporting guidance is aligned with the CDIA guidance for other types of loans to promote consistency in data reporting. There are, however, quite a few ways in which federal student loans differ from other types of reporting accounts due to factors such as federal statutes, federal regulations,

and various policies governing the reporting of these loans.

Some of the updated reporting guidance for federal student loans include:

1. Instructions for reporting the loan terms and scheduled monthly payments due to income-based and other repayment plans;
2. Procedures to increase clarity in Account Status and Payment History reporting due to delayed delinquency reporting; and
3. Standardization of reporting loans in forbearance and deferment.

Since the publication of new guidance concerning federal student loans, the Metro 2® Task Force has begun working on guidance for private student loans.

Natural Disaster Reporting

The CDIA issued a reminder to report accounts that have been affected by natural and declared disasters with the Special Comment Code "AW," regardless of whether the account is reported with its current account status, as a deferred account status, or is derogatory. Debt buyers and collection agencies should continue to report the account status as code 93 and add "AW." If the debt purchaser or collection agency sells the account or returns the account to the creditor, the account status code should be "DA" to delete the account.

New Special Comment Code

In October 2019, the CDIA announced approval of a new Special Comment Code to include reporting a debt extinguishment: DE = Debt Extinguished Under State Law. In states where the statute of limitations completely extinguishes the debt, data furnishers should place the new comment code on time-barred accounts.

DEBT COLLECTION

Actions by federal regulators and litigation brought by consumers continue to affect how the Consumer Financial Services industry operates. In the Fair Debt Collection Practices Act context, 2019 saw the most significant efforts to modernize the debt collection rules in a generation as well as a variety of legal opinions that affect the way debt collectors interact with consumers.

In the biggest news of the year, on May 7, the Consumer Financial Protection Bureau released a 538-page Notice of Proposed Rulemaking (the "Rule") that would update the FDCPA. The Rule would be the first major update to the FDCPA since its enactment in 1977 and gives much-needed clarification on the bounds of federally-regulated activities of "debt collectors," as that term is defined in the FDCPA, particularly for communication by voicemail, email, and text messages. It is important to remember that the Rule is only a proposal, and it is already drawing fire from consumer advocates.

The FDCPA was enacted in 1977. In 2010, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress delegated rulemaking authority for the FDCPA to the CFPB. The rulemaking process began in 2013 when the CFPB released an Advanced Notice of Rulemaking, requesting public comment on changes to the debt collection regulatory framework. At that time, the CFPB signaled the rules would encompass first-party creditors (those entities collecting their own debt, in their own name) and third-party debt collectors (those collecting the debt of another). The CFPB received over 20,000 comments to this original proposal. In a change of strategy, the proposed Rule, as released, is directed only at "debt collectors" and not first-party creditors. In addition, while the Rule does hit several compliance hot spots in the FDCPA, overall the Rule is heavily focused on modernizing the FDCPA for voicemail, email, and text message communications.

The CFPB believes the Rule would provide consumers with clear protections against harassment by debt collectors and straightforward options to address or dispute debts by, among other things, setting clear, defined limits on the number of calls debt collectors may place to reach consumers on a weekly basis; clarifying how collectors may communicate lawfully using newer technologies, such as voicemail, email, and text messages, that have developed since the FDCPA's passage in 1977; and requiring collectors to provide additional information to consumers to help them identify debts and respond to collection attempts.

You can read more about the Rule here. Please click here to read Troutman Sanders' White Paper on the CFPB's New Debt Collection Rule.

Regarding 2019 litigation activity, federal circuits across the country continued to weigh in on the most current interpretation of the FDCPA, with the Supreme Court of the United States clarifying a longstanding circuit split in early December. Here are a dozen opinions from 2019 that matter:

Law Firm Not a 'Debt Collector' Under FDCPA, Says Fifth Circuit

According to the U.S. Court of Appeals for the Fifth Circuit, a law firm not specializing in debt collection activity is not a "debt collector" under the Fair Debt Collection Practices Act because it was not "regularly" engaged in debt collection.

In *Reyes v. Steeg Law*, plaintiff Nicole Reyes filed a class action lawsuit against Louisiana law firm Steeg Law, L.L.C., alleging FDCPA violations arising out of letters sent by the firm on behalf of the condominium association for the complex where Reyes owned a unit. The letters demanded payment for amounts due to the association within seven days, instead of the 30 days prescribed by the FDCPA. The firm also allegedly continued to communicate with Reyes after learning she was represented by an attorney.

The district court granted Steeg Law's motion for summary judgment, finding that the law firm did not meet the definition of a "debt collector" under the FDCPA because it was not "regularly" engaged in debt collection activity. Reyes appealed.

The Fifth Circuit began by noting that it had not developed a "bright-line rule" for determining when a law firm qualifies as a debt collector under the FDCPA and further indicated that it would continue to consider a variety of factors on a case-by-case basis.

To reach its decision, the Court analyzed the amount of "debt collection activity" conducted by the law firm. Steeg Law had sent 36 letters related to 34 liens in the year prior to Reyes filing her complaint. Further, about 1.3% of the firm's overall revenue was "attributable to fees accrued through the representation of condominium associations in perfecting and enforcing liens and recovering delinquent balances," and representing condominium association clients accounted for 1.5% of the firm's total billable hours.

Based on this data, the Court concluded that "[n] either this court's precedent nor common sense compel a determination that these circumstances constitute regularly engaging in debt collection activity." Thus, the district court did not err in holding that Steeg Law was "not a debt collector as defined by the [FDCPA]."

Interpreting the Supreme Court's Decision in Henson v. Santander, the Third Circuit Rules a Debt Buyer is a "Debt Collector" Under the FDCPA's "Principal Purpose" Definition

On February 22, 2019, the Third Circuit Court of Appeals issued a precedential ruling affirming a district court's finding that Crown Asset Management LLC is a debt collector under the Fair Debt Collection Practices Act. In doing so, the Third Circuit interpreted the Supreme Court's recent ruling in *Henson v. Santander, Consumer USA Inc.*, 137 S. Ct. 1718 (2018), and held an entity is a debt collector if its "important aim" and the reason for its existence is obtaining payment on the debts that it acquires.

In *Mary Barbato v. Crown Asset Management LLC, et al.*, No. 18-1042 (3d Cir. Feb. 22, 2019), the lawsuit arose out a credit card debt Barbato incurred and defaulted on prior to 2010. Following various other assignments and sales, Crown purchased Barbato's account, then referred it to Greystone for collection. After receiving collection letters and telephone calls from Greystone attempting to collect on the debt, Barbato filed a complaint alleging violations of the FDCPA. Crown and Barbato filed cross-motions for summary judgment on the issue of whether Crown and Greystone were debt collectors under the FDCPA.

Crown argued it was not a debt collector under the FDCPA because the principal purpose of its business is the "acquisition" of debts rather than the "collection" of debts that it outsources to other companies. Further, Crown was not collecting the debt on behalf of another because it owned the debt. As such, Crown argued, it does not fall under the definition of a debt collector in the FDCPA. Indeed, Crown had no contact with Barbato during the time period Greystone was attempting to collect the debt at issue.

In 2017, the district court issued an opinion denying Crown's motion for summary judgment, concluding that because Crown acquired Barbato's debt after default and its "principal purpose" was debt collection, it was a debt collector under the FDCPA. However, the Court also denied Barbato's motion for summary judgment because there was insufficient evidence to find that Greystone was likewise a debt collector under the FDCPA. The Court granted both parties leave to file renewed motions for summary judgment on the issue of Greystone's status as a debt collector.
Shortly thereafter, the Supreme Court issued its opinion in *Henson v. Santander*, in which it found that an entity that seeks to collect a debt that it owns is not a debt collector under the FDCPA's "regularly collects" definition. That provision of the FDCPA defines a debt collector as "any person … who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." Crown filed a motion for reconsideration with the district court based on the decision in *Henson*, arguing that because it owned Barbato's debt, it was a creditor, not a debt

Entities whose principal purpose is the purchase and collection of consumer debts may still be subject to the requirements of the FDCPA regardless of who is actually engaged in collection activity with a consumer.

collector, per *Henson*. Further, since the Supreme Court's decision in *Henson* rejected Third Circuit precedent that took into consideration the default-status of the debt when determining if an entity is a debt collector under the FDCPA, Crown argued the district court should reverse its decision because of its reliance on faulty legal grounds. The district court rejected Crown's argument and found that Crown was still a debt collector under the FDCPA's "principal purpose" definition. Crown filed for interlocutory appeal and the district court certified its decision on the issue of "whether *Henson* requires a finding that Crown is not a debt collector in this case when it was a third-party buyer of the debt, and the debt was in default at the time it purchased it."

The Third Circuit agreed with the district court and found that Crown was a debt collector under the FDCPA's "principal purpose" definition. In doing so, the Court focused on the meaning of the phrase "principal purpose" in the FDCPA, holding that "an entity that has the 'collection of any debts' as its 'important' 'aim' is a debt collector under [the principal purpose] definition … [a]s long as a business's raison d'etre is obtaining payment on the debts that it acquires, it is a debt collector."

The Third Circuit expressly rejected Crown's interpretation that the definition of debt collector was limited to those entities that are actually engaged in the "collection" of debts. Specifically, the Court determined that:

> [i]n contrast to the 'regularly collects' definition, where Congress explicitly used the verb 'to collect' in describing the actions of those it intended the definition to cover, in the 'principal purpose' definition, Congress used the noun 'collection' and did not specify who must do the collecting or to whom the debt must be owed.

Thus, in the Third Circuit's view, the fact that Crown used Greystone to collect on the debt was of no consequence because the noun "'[c]ollection' by its very definition may be indirect." Turning back to the "principal purpose" part of the definition of debt collector, the Court opined that a company purchasing debts specifically for the purpose of forgiving the debts or even re-selling the debts to other entities for a profit would not fall under the "principal purpose" definition. However, since the record reflected Crown's only business was the purchase of debts for the purpose of collecting on them, it fell well within the "principal purpose" definition.

This decision is significant because it limits the Supreme Court's decision in *Henson* to the interpretation of the "regularly collects" definition of a "debt collector" in the FDCPA. Entities whose principal purpose is the purchase and collection of consumer debts may still be subject to the requirements of the FDCPA regardless of who is actually engaged in collection activity with a consumer. In other words, while the Third Circuit's opinion was decided in the context of traditional debt buying, *i.e.*, third-party debt collectors, it does raise important considerations for any entity whose business model relies on the purchase and collection of consumer receivables. Finally, this decision did not speak to the "creditor as a debt collector under a different name" definition that is the third way in which an entity can fall under the purview of the FDCPA as a "debt collector."

Second Circuit Affirms Dismissal of FDCPA Suit Over Amount of Debt Disclosed in Letter

The United States Court of Appeals for the Second Circuit affirmed a district court's dismissal of a Fair Debt Collection Practices Act ("FDCPA") lawsuit over disclosure of the amount of debt owed.

Plaintiff Yuri Kolbasyuk sued debt collector Capital Management Services, LP ("CMS") over a dunning letter that CMS sent him. CMS had been hired to collect a debt that Kolbasyuk owed to Barclays Bank Delaware. The letter stated the present amount of debt (about $6,000) as well as the identity of the creditor. The letter identified that it was from a debt collector and provided the following disclosure:

> As of the date of this letter, you owe $5918.69. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For more information, write the undersigned or call 1.877.335.6949.

Kolbasyuk claimed that the letter violated sections 1692e and 1692g of the FDCPA because it failed to state "what portion of the amount listed is principal," "what 'other charges' might apply," "if there is 'interest,'" "when such interest will be applied," and "what the interest rate is." Kolbasyuk further claimed "that the letter conveyed the mistaken impression 'that the debt could be satisfied by remitting the listed amount as of the date of the letter, at any time after receipt of the letter.'"

The Second Circuit affirmed dismissal on both grounds.

First, the Court held that "a debt collection letter that informs the consumer of the total, present quantity of his or her debt satisfies 15 U.S.C. § 1692g notwithstanding its failure to inform the consumer of the debt's constituent components or the precise rates by which it might later increase." The Court noted that the FDCPA required a debt collector to disclose "the amount of the debt." 15 U.S.C. § 1692g(a). Based on dictionary definitions, these words meant the "total, present quantity of money" that the debtor was obligated to pay as of the date of the letter. The letter at issue met that definition. It stated the "total, present quantity of money" that Kolbasyuk was obligated to pay on the date that the letter was sent. Consequently, it satisfied the FDCPA.

Second, the Court held that the letter was neither deceptive nor misleading. Kolbasyuk argued that the letter violated Section 1692e because "[t]he least sophisticated consumer could reasonably believe that the debt could be satisfied by remitting the listed amount as of the date of the letter, at any time after receipt." The Court rejected this argument outright. Looking at the text of the letter, the Court observed that the letter specifically warned the debtor that "the amount due on the day you pay may be greater." Because of the disclaimer language, the ruling in *Avila v. Riexinger Associates, LLC*, 817 F.3d 72 (2d Cir. 2016), was inapplicable. Further, the Court reiterated its approval of the safe harbor language that the Seventh Circuit articulated in *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872 (7th Cir. 2000). Accordingly, the letter was not considered to be deceptive or misleading.

This is a victory for debt collectors as it also provides clear guidance on the FDCPA "amount" of debt owed disclosure requirement—it is the "total, present quantity of money" owed on the date the letter was sent. This case also is significant for again affirming the safe harbor language provided by the Seventh Circuit.

"No Harm, No Foul" – Seventh Circuit Affirms Spokeo Dismissal in FDCPA Case

In an excellent opinion from June, the United States Court of Appeals for the Seventh Circuit reiterated that the Fair Debt Collection Practices Act was *not* intended to penalize a company that made an honest mistake that resulted in no harm to the borrower.

In *Casillas v. Madison Avenue Associates, Inc.*, No. 17-3162, Slip Op. (7th Cir. June 4, 2019), Madison Avenue Associates, Inc. ("Madison") sent Paula Casillas a debt collection letter that described the process the FDCPA provides for verifying a debt. However, the letter inadvertently omitted listing the statutory requirement that Casillas had to communicate in writing to trigger the statutory protections of the FDCPA. Casillas noticed the error and, instead of contacting Madison to dispute her debt, filed a class action lawsuit.

The Seventh Circuit looked to the United States Supreme Court's decision in *Spokeo, Inc. v. Robins* for the rule of law that "a bare procedural violation, divorced from any concrete harm" does not satisfy the injury-in-fact requirement of Article III. 136 S. Ct. 1540, 1549 (2016). The Court noted that, while "Article III grants federal courts the power to redress harms that defendants cause plaintiffs," it is "not a freewheeling power to hold defendants accountable for legal infractions." *Casillas*, Slip Op. at 2. Further, because Congress itself is limited by the confines of Article III, Casillas could not demonstrate standing merely by alleging a procedural violation of a statute. *Id*. at 5.

The Court noted that Madison ran no risk of harm – she never alleged she even considered contacting Madison and never alleged that she tried to dispute or verify her debt orally. *Id*. at 6. Therefore, notice that the FDCPA required written verification instead of a phone call was irrelevant – "[s]he complained only that her notice was missing some information that she did not suggest that she would ever have used." *Id*. After evaluating the specific facts of the case (Casillas's receipt of an incomplete letter), the Seventh Circuit concluded that "[b]ecause Madison's violation of the statute did not harm Casillas, there is no injury for a federal court to redress." *Id*. at 2. In reaching this conclusion, the Seventh Circuit split with the Sixth Circuit, which evaluated a similar situation in *Macy v. GC Services Limited Partnership*, but reached the opposite conclusion. *Id*. at 9.

While this continues to be a developing area of the law, this case joins numerous others in which courts have relied on the Supreme Court's *Spokeo* decision to reiterate the need to show an injury-in-fact – a concrete harm – in order for a federal court to adjudicate a matter. A bare procedural violation is not enough – quite simply, "no harm, no foul."

7th Circuit: 'Secure Message' Email Not a 'Communication' Under the FDCPA – Electronic Delivery of Validation Notice Questioned

On August 8, 2019, in *Lavallee v. Med-1 Solutions, LLC*, No. 17-3244 (7th Cir. 2019), the Seventh Circuit Court of Appeals rejected a debt collector's argument that its email, which contained only a "secure message" hyperlink, was a "communication" under the Fair Debt Collection Practices Act because the email did not convey any information about the debt. The Court also found that the email did not adequately convey the required [§ 1692g disclosures] because the debtor had to follow a series of links to access the notice located on the debt collector's webpage.

Background

This action arose out of a November 2015 telephone conversation between Beth Lavallee and Med-1 Solutions, LLC, regarding two medical debts referred to Med-1 for collection. Lavallee believed this telephone conversation was the "initial communication" with this debt collector. She filed a lawsuit contending Med-1 failed to provide Lavallee with certain statutorily required disclosures, including the § 1692g validation notice, during or within five days after the telephone conversation.

In discovery, Med-1 produced evidence it had emailed Lavallee regarding her two debts several months prior to the November 2015 telephone conversation. The emails contained a "secure message" hyperlink, directing Lavallee to a Med-1 vendor's web server, which she could use to access information about her debt, including the § 1692g disclosures. Importantly, Lavallee, who denied receiving the emails, would have had to navigate through several links or buttons and download a .pdf document to gain access to the information and disclosures.

Med-1 argued these emails constituted the "initial communication" between the parties, so it was not required to provide Lavallee with the § 1692g disclosures following the November 2015 telephone conversation. Med-1 also claimed it provided the § 1692g disclosures in the emails because Lavallee had access to this information via the "secure message" hyperlink. On cross-motions for summary judgment, the Southern District of Indiana found the emails were ineffective methods of transmitting the § 1692g disclosures because there was no evidence Lavallee accessed the disclosures, and the requirement that a debtor click a hyperlink to access the disclosures made receipt of the notices unlikely. Med-1 appealed the decision.

Standing Analysis

Before turning to the "email as a communication" issue, the Seventh Circuit analyzed Lavallee's Article III standing to bring the lawsuit. The Court recognized it recently found a debtor lacked standing to bring a claim based on an alleged violation of § 1692g(a) in *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 333 (7th Cir. 2019).

The Court found *Casillas* factually distinguishable from the circumstances involving Lavallee. Unlike in *Casillas*, where the disclosure was provided but lacked the "proper procedure" for the debtor to exercise her dispute rights, Med-1 failed to provide Lavallee with the disclosure at all (following the November 2015 telephone call or in the emails). The Court found this lack of information especially material to Lavallee because Med-1 was actively collecting on the account when the emails were sent while providing the required disclosures could have delayed the collection actions until Med-1 obtained the proper verification. The Court found these facts provided sufficient "concreteness" to Lavallee's alleged injury to provide her standing.

An Email Containing A "Secure Message" is Not a "Communication" Under the FDCPA

Med-1 conceded it did not provide the necessary § 1692g disclosures during, or following, the November 2015 telephone call with Lavallee. However, Med-1 argued it was not required to do so because the call was not the "initial communication" between the parties; instead, the previously sent emails were the initial communications. Thus, the two main issues before the Court on appeal were: (1) did Med-1's emails constitute "initial communications" under the FDCPA; and (2) if so, did the emails sufficiently apprise Lavallee of her § 1692g rights? The Court answered both queries in the negative.

With respect to the first issue, the Court reasoned that Med-1's failure to include any information about Lavallee's debts in the body of the emails precluded a finding that the emails were "communications" under the FDCPA. To qualify as a "communication" under the FDCPA, an oral or written message must "convey … information regarding a debt." In other words, a message must "inform its reader that it … *pertains* to a debt." The Court found Med-1's emails, which only contained Med-1's email address, name, and the "secure message" hyperlink, did not suggest the emails were about a debt or even that they were from a debt collector.

Even if the Emails Were Communications, Med-1 Still Violated § 1692g

The Court also found the emails deficient under § 1692g because the disclosures were not contained within the body of the emails. Indeed, Lavallee would have had to navigate through several additional steps after clicking the "secure message" hyperlink to access the requisite disclosures. As the Court stated, "[W]e've already rejected the argument that a communication 'contains' the mandated disclosures when it merely provides a means to access them." *See Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872, 875 (7th Cir. 2000). Med-1 argued its emails were analogous to an envelope that enclosed a letter containing the § 1692g disclosures. The Court rejected this argument, instead finding Med-1's emails were more like "a letter that provides nothing more than the address of a location where the message can be obtained."

The Seventh Circuit's reasoning is consistent with the Consumer Financial Protection Bureau's released Proposed Rule on Debt Collection. As we previously reported, the CFPB has signaled it is open to allowing debt collectors to provide important disclosures via electronic means, including email. However, the Rule requires that a validation notice, if provided by email, must be included in the body of the email.

The CFPB has signaled it is open to allowing debt collectors to provide important disclosures via electronic means, including email.

Third Circuit Holds Displaying Scannable QR Code on Envelopes Violates FDCPA

Debt collectors beware: On August 12, the U.S. Court of Appeals for the Third Circuit held that a debt collector violates section 1692f(8) of the Fair Debt Collection Practices Act by displaying an unencrypted "quick response" (or "QR") code on the face of an envelope containing a debt collection letter that, when scanned, reveals the debtor's internal account number with the collection agency.

Section 1692f(8) of the FDCPA prohibits a debt collector from "[u]sing any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails." Five years ago, in *Douglass v. Convergent Outsourcing*, 765 F.3d 299 (3rd Cir. 2014), the Third Circuit held that a debt collector violates this section by displaying the debtor's account number on an envelope. In 2019, in *DiNaples v. MRS BPO, LLC*, the Third Circuit extended its rationale in *Douglass* by holding that QR codes on the face of an envelope, that display account numbers when scanned, violate the FDCPA.

Donna DiNaples filed a class action lawsuit against MRS BPO, LLC, a debt collector, alleging violations of the FDCPA for sending letters in envelopes bearing a QR code that contained the debtor's internal account number. While the QR code did not display the debtor's account number on its face, it could be scanned by a reader downloadable as an application on many devices, including smartphones. Following *Douglass*, the United States District Court for the Western District of Pennsylvania certified DiNaples's proposed class and granted summary judgment in her favor, finding there is no meaningful distinction between displaying an account number on an envelope or a QR code that reveals the same information when scanned by a reader. The Third Circuit affirmed this decision for three reasons.

First, the Third Circuit held that DiNaples has standing to sue, finding that the disclosure of account information in itself is a concrete harm under *Spokeo v. Robins*, 136 S.Ct. 1540 (2016), because it implicates core privacy concerns of the FDCPA. For this reason, DiNaples did not have to show actual or imminent harm – MRS made her account information available to the public, which is contrary to the purpose of the FDCPA and satisfies *Spokeo's* concrete injury requirement.

Second, recognizing the FDCPA's remedial purpose, the Third Circuit held that including the QR code on envelopes – like the account number – is "susceptible to privacy intrusions," particularly in the age of smartphones where a reader app is a quick download away. The Court declined to rule on whether the Third Circuit recognizes a "benign language exception" that many courts, as well as the Federal Trade Commission, have read into Section 1692f(8), finding that exception clearly does not apply here because the QR code is not "benign."

Finally, the Court rejected MRS's bona fide error defense, reiterating that it does not apply to an incorrect interpretation of the FDCPA but instead only to clerical or factual mistakes. MRS's argument that it committed a mistake of fact by "using industry standards for processing return mail" was rejected because, in the Court's view, this was a misunderstanding of its obligations under the FDCPA. Acknowledging that MRS "may not have intended to disclose that the contents of the envelope pertain to debt collection," the Court repeated that "the bona fide error defense does not protect every well-intentioned act."

Seventh Circuit Recognizes That FDCPA's Bona Fide Error Defense "Doesn't Demand Perfection"

In *Abdollahzadeh v. Mandarich Law Group, LLP*, the Seventh Circuit affirmed summary judgment for a debt collector under the Fair Debt Collection Practices Act, finding that its procedures to prevent the collection of a time-barred debt were reasonable enough to support a bona fide error defense.

As background, a consumer opened a credit card account in 1998. He defaulted, with his last full payment made in August 2010. In June 2011, the consumer attempted to remit another payment, but it never cleared. The delinquent account was sold to a debt buyer, who referred collection of the debt to a law firm. The debt buyer's data indicated that that the consumer's last payment on the account was in June 2011, even though that payment never cleared. In reliance on this information, the law firm sent a debt collection communication to the consumer and then sued him in Illinois state court.

Upon the consumer's motion, the state court ultimately dismissed this lawsuit because the last actual payment, the August 2010 payment, occurred outside of Illinois' five-year statute of limitations.

The consumer subsequently filed a federal court lawsuit against the defendant law firm under the FDCPA for attempting to collect a time-barred debt.

In its motion for summary judgment in the FDCPA case, the law firm argued that this was an unintentional bona fide error and that it had reasonable procedures in place to prevent the collection of time-barred debts. For example, the law firm relied on information provided by its client, the debt buyer, which was reaffirmed by an affidavit from the debt buyer used in the state court case. The relevant dates for the accounts were subjected to an automated "scrub" which flagged accounts for which the statute of limitations might have expired. An attorney also examined the account information available before filing the lawsuit to confirm that the statute of limitations had not expired.

The federal district court found that these procedures were sufficient for a bona fide error defense to the FDCPA, a decision that was affirmed on appeal. In its ruling, the Seventh Circuit repeatedly stressed that "reasonable procedures" were all that was required to invoke the bona fide error defense – not perfect procedures or independent verification of the debt information, as the consumer tried to argue.

Abdollahzadeh is yet another case that stresses the importance of robust policies and procedures designed to ensure compliance with the FDCPA. However, unlike some other cases, it provides concrete examples of what type of procedures are likely to be considered reasonable by a court.

7th Circuit Upholds Summary Judgment in FDCPA Case Where Consumer Failed to Prove that Credit Card Transactions Were for "Consumer" Purposes

The U.S. Court of Appeals for the Seventh Circuit recently affirmed judgment in favor of two debt collectors and against a debtor for claims arising under the Fair Debt Collection Practices Act and the Wisconsin Consumer Act ("WCA"). In its ruling, the Court held that the debtor did not create a triable issue of material fact to overcome summary judgment because he failed to provide sufficient evidence that the underlying transactions comprising the credit card debt were for "personal, family, or household purposes," and, therefore, were not considered "consumer debt" subject to the FDCPA or WCA.

The Kohn Law Firm, S.C. filed suit against debtor John H. Burton in Wisconsin state court to collect amounts due to its client debt collector, Unifund CCR, LLC. Burton denied any knowledge of the credit card debt and filed suit alleging violations of the FDCPA and WCA for filing the state court action without first providing the debtor notice of his right to cure the default.

The district court granted summary judgment to Kohn and Unifund on the basis that the debtor failed to establish that the debt at issue was a "consumer debt," incurred for personal, family, or household purposes.

On appeal, the Seventh Circuit examined the sufficiency of the evidence regarding whether the credit card debt was incurred for personal, family, or household purposes, *i.e.* "consumer debt." Burton advanced five pieces of evidence to support his argument that these were consumer debts, including:

(1) His statements that, to the extent he was liable for the debt, it was a consumer debt;
(2) The defendants' treatment of the debt as a consumer debt by including FDCPA disclaimers on the collection letters, suing Burton in his personal capacity, and sending communications to his personal address;
(3) Kohn's and Unifund's description of their consumer debt collection services on their websites;
(4) A Citibank employee's email description of the underlying account as a "consumer account"; and
(5) The billing statements listing purchases made on the credit card for personal, family, or household purposes.

The Court rejected Burton's evidence, specifically finding that:

(1) Any statements could not be reconciled with his total disavowals of the debt in the original state court action;
(2) FDCPA disclaimers on debt collection letters do not prove that a debt is a consumer debt because debt collectors may be exercising caution and including disclaimers on all communications with debtors simply to avoid any FDCPA liability. Furthermore, the defendants' suit against Burton in his personal capacity did not matter because a person can be sued in a personal capacity for a business debt, and sending correspondence to his personal address is of little consequence either because individuals can carry on business activities from their residence;
(3) The defendants' online marketing materials generally describing their debt collection services did not establish that the debt they attempted to collect in this case was a consumer debt;
(4) The district court correctly excluded the email from a Citibank employee (in which Burton wanted to use the email to establish that "Citi itself stated that the account was a consumer account") as inadmissible hearsay; and
(5) The billing statements on the Citibank account shed no light on why these charges were incurred. Specifically, because Burton could not explain whether these transactions were for a consumer as opposed to a business purpose, the billing statements did not provide enough information for a trier of fact to conclude these purchases were for personal, family, or household purposes.

Accordingly, the Court upheld summary judgment in favor of the two debt collectors and against the debtor.

Sixth Circuit Court of Appeals Affirms Summary Judgment for Debt Collector in FDCPA Case Concerning Additional Fees

Some good news for debt collectors came out of the Sixth Circuit Court of Appeals in August. In *Sparks v. EquityExperts.org, LLC*, the Sixth Circuit affirmed summary judgment for EquityExperts.org, LLC ("Equity Experts"), rejecting the consumers' allegations that Equity Experts violated the Fair Debt Collection Practices Act by collecting its fees directly from the consumers without authorization. The Court held that the agreement between Equity Experts and the original creditor to collect the debt expressly authorized the collection of additional fees from the borrowers, thus there was no FDCPA violation.

The Court upheld summary judgment in favor of the two debt collectors and against the debtors.

The case involved a Declaration of Covenants between the Sparkses and their homeowners' association ("Association"), which allows for the collection of costs, interest, and reasonable attorneys' fees to be charged to the property owner (the Sparkses) upon the start of any collection efforts. Sometime in 2016, the Sparkses fell behind on their payments to the Association, with a balance due of $220.00 as of December 12, 2016. Around this time, the Association sent the account to Equity Experts for collection, pursuant to a previous agreement between the two that engaged Equity Experts to act as the Association's exclusive collection agent. This agreement also set out a schedule of fees for Equity Experts' collection services, and it authorized Equity Experts to collect those fees directly from delinquent homeowners. The letters Equity Experts sent the Sparkses mentioned the $220.00 balance, along with additional fees based on the agreement with the Association, eventually totaling more than $1,000.00.

The Sparkses filed a complaint against Equity Experts alleging violations of the FDCPA, arguing on summary judgment that Equity Experts violated the FDCPA by collecting its fees directly from the Sparkses without authorization. The district court granted summary judgment in favor of Equity Experts, as the agreement between the Association and Equity Experts allowed fees to be collectible directly from the homeowner.

On appeal, the Sparkses challenged the district court's judgment in favor of Equity Experts, arguing that Equity Experts violated the FDCPA by falsely representing the character, amount, or legal status of the Association debt by adding the costs of collection and by collecting an amount that was not expressly authorized by the agreement creating the debt or permitted by law. The Sixth Circuit narrowed its focus to whether the agreement between the Association and Equity Experts expressly authorized the collection of the cost-of-collection fees.

In its opinion, the Court of Appeals found that the Declaration between the Association and the Sparkses expressly authorized the collection of the Association's costs, which was comprised of Equity Experts' fees. The Declaration provided that each assessment, together with interest, costs, and reasonable attorneys' fees, shall be a charge on the land and shall also be the personal obligation of the property owner. The Court further found that, per the agreement between the Association and Equity Experts, the costs of collection were Equity Experts' fees, as the agreement contained a set schedule of collection activities and associated fees, and that Equity Experts was authorized to charge those collection costs directly to the delinquent homeowner. In other words, the Declaration expressly authorized the Association to collect its costs, and Equity Experts' fees made up the Association's costs, and thus the Declaration expressly authorized the collection of Equity Experts' fees. Based on this conclusion, the Court affirmed summary judgment in favor of Equity Experts. This opinion shows the importance of agreements concerning collection costs under the FDCPA, as language concerning the authorization of collection costs being charged directly to the borrower can help shield entities from liability under the FDCPA.

Seventh Circuit Holds the Phrase "Current Balance" is Not Misleading Under FDCPA

The Seventh Circuit Court of Appeals upheld dismissal of a consumer's claim that the phrase "current balance" in a collection letter obscured the static nature of her debt. Plaintiff Patricia Ann Koehn alleged that the collection letter from defendant Delta Outsource Group, Inc. falsely implied that Koehn's static debt was subject to interest and fees in violation of the Fair Debt Collection Practices Act. The sole basis for her claim was the phrase "current balance" which, according to Koehn, would "mislead debtors to give such static debts greater priority than they otherwise would." The district court dismissed the case, finding that no significant portion of the population would be misled by the "current balance" language in the letter. Koehn appealed.

The Seventh Circuit upheld the district court's ruling and found the phrase "current balance" was not inherently misleading. In doing so, the Court refused to extend its prior decision in *Chuway v. National Action Financial Services, Inc*. to Koehn's case. In *Chuway*, the Seventh Circuit addressed a letter that instructed the consumer to call in order to obtain the "most current balance information." Based on this language, the Court concluded that the letter implied the amount due could be different from the "current balance" stated in the letter.

Unlike *Chuway*, the language in the letter sent to Koehn was "common and innocuous." The letter did not instruct the consumer to call for a "current balance" and did not contain any other language that could obfuscate the static nature of the debt. As the Court put it in affirming the dismissal of Koehn's claims, "[i]t takes an ingenuous misreading of this letter to find it misleading. And that same ingenuity would call into question the even simpler phrase that 'the balance is $__.' After all, the simple present-tense verb 'is' also implies 'current,' doesn't it?"

Plaintiffs' bar around the country has frequently relied on *Chuway* in support of their FDCPA claims predicated on the "current balance" language. The Seventh Circuit's present ruling and clarification of its prior holding in *Chuway* should help discourage such claims. In the Court's own words, "[d]unning letters can comply with the FDCPA without answering all possible questions about the future" and "[a] lawyer's ability to identify a question that a dunning letter does not expressly answer ('Is it possible the balance might increase?') does not show the letter is misleading … ."

Second Circuit Court of Appeals Affirms that "$0.00" Debt Itemization for Static Debts Does Not Mislead Consumers

On November 4, the Second Circuit Court of Appeals in *Dow v. Frontline Asset Strategies* affirmed the September 24, 2018 Order of the United States District Court for the Eastern District of New York, which granted defendant Frontline's motion for judgment on the pleadings. In its opinion, the Court reiterated its prior ruling from *Taylor v. Fin. Recovery Servs, Inc.*, 886 F.3d 212 (2d Cir. 2018), which held that "a collection notice that fails to disclose that interest and fees are not currently accruing on a debt is not misleading within the meaning of Section 1692e [of the Fair Debt Collection Practices Act]." 886 F.3d at 215.

Plaintiff Marlyn Dow had alleged that a collection letter which stated "as of the date of this letter, you owe $919.03," and as part of the debt itemization included "$0.00" for interest accrued and charges could erroneously mislead a consumer that the debt was dynamic rather than static.

The Court's ruling was succinct – "we do not find the notice to be misleading here given that these lines reflect $0 in interest or fees and charges had accrued." And the fact that a date was included in the notice had no effect on the Court's decision. The Court characterized such language as "stock language ... present in a number of collection notices."

Not only was the Court quick to shut the door on Dow's arguments, it essentially locked the door and threw away the key by stressing that Dow's position could ultimately hurt consumers. The Court stressed that "requiring debt collectors to draw attention to the static nature of a debt could incentivize collectors to make debts dynamic instead of static."

Supreme Court Refuses to Apply Discovery Rule to the FDCPA's One-Year Statute of Limitations

In December, the United States Supreme Court confirmed the one-year time limit for filing a Fair Debt Collection Practices Act suit generally begins to run when the alleged violation occurs, not when it is discovered.

In *Rotkiske v. Klemm et al.*, No. 18-328, citing the FDCPA's statutory provision that claims must be filed "within one year from the date on which the

violation occurs," the Court upheld a Third Circuit opinion last year that declined to revive a 2015 lawsuit brought by Kevin Rotkiske, who claims he only learned of an outstanding credit card judgment against him when he was rejected for a mortgage.

"It is not our role to second-guess Congress' decision to include a 'violation occurs' provision, rather than a discovery provision, in [the FDCPA provision]," Justice Clarence Thomas said in the majority (8-1) opinion.

"The length of a limitations period 'reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones,'" Justice Thomas said, citing the Supreme Court's 1975 opinion in *Johnson v. Railway Express Agency, Inc*.

"It is Congress, not this court, that balances those interests," he added. "We simply enforce the value judgments made by Congress."

Rotkiske originally brought the FDCPA action in 2015, roughly one year after he discovered that Paul Klemm obtained a judgment against him in a 2009 state court debt collection action. Rotkiske claimed Klemm served the collection complaint on the wrong person, with the result that Rotkiske did not learn of the 2009 judgment until 2014, after he was rejected for a home loan due to credit reporting reflecting the outstanding judgment. Rotkiske alleged Klemm deliberately made sure that he did not receive service in order to obtain a default judgment in violation of the FDCPA. Klemm moved to dismiss the complaint, arguing Rotkiske did not bring the action within the FDCPA one-year statute of limitations. The district court granted Klemm's motion and Rotkiske appealed to the Third Circuit Court of Appeals.

The Third Circuit agreed with the debt collector, finding that FDCPA says the occurrence rule — in which the statute of limitations begins the moment the alleged wrongdoing happens — applies to such claims.

Justice Ruth Bader Ginsburg wrote the sole dissent on the grounds that, in her view, Rotkiske "had preserved a fraud-based discovery rule argument in the Court of Appeals." Per Justice Ginsburg, "the ordinary applicable time trigger does not apply when fraud on the creditor's part accounts for the debtor's failure to sue within one year of the creditor's violation."

The *Rotkiske* decision resolves a split among federal circuit courts of appeals over whether the one-year statute of limitations begins to run from the time an alleged violation occurs, as opposed to when it is discovered. This ruling is a welcome limitation on debt collector liability under the FDCPA.

PAYMENT PROCESSING AND CARDS

Regulatory Developments

Regulatory developments continued to drive the payment industry in 2019. In 2019 we saw the growth of a multistate agreement that streamlines the licensing process for money transmitters and other money services businesses. Per the agreement, if one state reviews key elements of state licensing for a money transmitter, such as "IT, cybersecurity, business plan, background check, and compliance with the federal Bank Secrecy Act," other participating states agree to accept the findings. The agreement, originally announced in February 2018 by the Conference of State Bank Supervisors ("CSBS"), included seven states: Georgia, Illinois, Kansas, Massachusetts, Tennessee, Texas, and Washington. 2019 has seen this list grow to twenty-three total participating states, now including the following new participants: California, Connecticut, Iowa, Idaho, Kentucky, Louisiana, Mississippi, North Carolina, North Dakota, Nebraska, Ohio, Rhode Island, South Dakota, Utah, Vermont, and Wyoming. The multistate licensing agreement is part of Vision 2020, "a set of initiatives that CSBS and state regulators are implementing to harmonize the multistate licensing and supervisory experience for nonbank financial services providers, including fintechs." The growth of this agreement is not only an encouraging sign, but also a timely one in a regulatory climate where state attorneys general are taking notice of those processing transactions without a money transmitter license.

There have also been regulatory developments regarding money transmitter licenses at the state level this year. In particular, two states, Michigan and West Virginia, passed laws putting into effect "agent of the payee" exemptions to money transmitter licensing requirements, and Rhode Island implemented a new "Currency Transmitter License." While agent of the payee exemptions vary from state-to-state, the general purpose of these exemptions is to exempt from money transmitter licensure a person appointed by a payee to collect and process payments on the payee's behalf. With Michigan and West Virginia joining the fold, roughly twenty-two states have an agent of payee exemption in place, a number which signifies that states are recognizing and adapting to the changes in the payment processing industry.

In September, the Consumer Financial Protection Bureau issued its final guidance on its no-action letter, sandbox, and trial disclosure program policies. The CFPB's new no-action letter ("NAL") policy allows companies to provide innovative financial services and products by providing "increased regulatory certainty through a statement that the CFPB will not bring a supervisory or enforcement action against a company for providing a product or service under certain facts and circumstances." Additionally, the new NAL policy streamlines the review process of the CFPB's 2016 no-action letter policy and "focus[es] on the consumer benefits and risks of the product or service in question." The Compliance Assistance Sandbox ("CAS") policy gives companies the opportunity to test products and services where there is a lack of regulatory certainty. Under this new policy, "an approved applicant that complies in good faith with the terms of the approval will have a 'safe harbor' from liability for specified conduct during the testing period." Applicants approved under the CAS policy will be afforded protection from liability under the Truth in Lending Act, the Electronic Fund Transfer Act, or the Equal Credit Opportunity Act. CFPB's new trial disclosure program ("TDP") policy creates the "CFPB Disclosure Sandbox," which allows that "entities seeking to improve consumer disclosures may conduct in-market testing of alternative disclosures for a limited time upon permission by the Bureau." The new policy also streamlines the application and review process.

States have also been active in the pursuit of regulatory sandboxes this year. Arizona, which last year became the first state to launch a Fintech Sandbox, enacted HB 2177 to improve upon the sandbox. Among other things, the bill makes businesses that provide a "substantial component of a financial product or service" eligible to participate and now allows sandbox tests without the involvement of Arizona residents, provided that the transaction occurs in Arizona. Additionally, Arizona's attorney general also recently announced that the state's Office of Attorney General is participating in the CFPB's American Consumer Financial Innovation Network ("ACFIN"), a CFPB initiative whose purpose is to unite state and federal regulators in creating programs like Arizona's sandbox. Moving in this direction is Florida, where it was announced this year that, in an effort to bolster the state's fintech industry, the state plans to pursue legislation establishing a regulatory sandbox for Florida fintechs and that the state is joining the ACFIN.

In February, the Federal Trade Commission and the CFPB reauthorized the agencies' Memorandum of Understanding ("MOU") that governs the agencies' joint operations and focuses on joint law enforcement efforts, joint resolution efforts, joint rulemaking efforts, supervisory information and examination schedules, and consumer complaints. Per the FTC, the MOU is an agreement for "ongoing coordination between the two agencies under the terms of the Consumer Financial Protection Act" that aims to avoid the duplication of law enforcement and rulemaking efforts between the two agencies.

Litigation and Enforcement Actions

In April, the Eleventh Circuit, in affirming a $6.3 million settlement between Godiva Chocolatier, Inc. and a class of plaintiffs who alleged Godiva violated the Fair and Accurate Transactions Act ("FACTA"), struck a new chord on standing for FACTA claims, splitting with other circuits that have addressed the issue. The Court decided that Dr. Muransky, the class representative in the case, had standing to bring a claim that Godiva violated FACTA when Godiva printed on a receipt provided to Muransky more than the statutory maximum of the last five digits of Muransky's credit card number in contravention of FACTA's "truncation requirement." A recent benchmark for Article III standing was handed down by the Supreme Court in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) where the Court held that "Article III standing requires a concrete injury even in the context of a statutory violation." The Second, Third, Seventh, and Ninth circuits have all dismissed FACTA claims for lack of standing since *Spokeo*, with the Second and Third circuits ruling that claims similar to the claim brought against Godiva were merely technical violations that did not rise to an injury sufficient to confer Article III standing. The Eleventh Circuit, on the other hand, held that a plaintiff has standing to bring a FACTA claim by simply alleging a procedural violation and a "heightened risk of identity theft." With the circuits now split on this issue, perhaps the Supreme Court will soon follow up on its *Spokeo* decision and clarify the meaning of "concrete injury" in the context of statutory violations.

In August, the California Supreme Court answered a certified question from the Ninth Circuit Court of Appeals regarding California's Unruh Civil Rights Act ("Unruh") in *White v. Square, Inc*. "Does a plaintiff have standing to bring a claim under [Unruh] when the plaintiff visits a business's website with the intent of using services, encounters terms and conditions that allegedly deny the plaintiff full and equal access to its services, and then leaves the website without entering into an agreement with the service provider?" More specifically, the issue is "whether standing under [Unruh] extends to a plaintiff who intends to transact, but has not yet transacted, with an online business." In answering the question, the Court concluded that while "mere awareness of a business's discriminatory policy or practice is not enough for standing under [Unruh], entering into an agreement with the business is not required." The Court ultimately held that "a person who visits a business's website with intent to use its services and encounters terms or conditions that exclude the person from full and equal access to its services has standing under [Unruh], with no further requirement that the person enter into an agreement or transaction with the business." The California Supreme Court's decision to confer standing presents new challenges to payment processors, particularly in deciding whether to serve an industry. Since receiving an answer to its certified question, the Ninth Circuit has since reversed and remanded the dismissal of White's complaint, teeing up the district court's evaluation of this new issue as a pivotal one.

Passage of the SAFE Act could blaze a path where vendors are willing to pay higher transactions fees to grow their businesses via digital payments.

In October, the District Court for the Southern District of New York ("SDNY"), issued a final judgment that struck a fatal blow to the Office of the Comptroller of the Currency's attempt to provide special purpose national bank charters ("SPNBCs") to eligible non-depository fintech companies. The OCC's intent to accept applications for SPNBCs from fintech companies was announced last year and would have allowed fintechs the opportunity to access a nationwide market for their products and services. The OCC's charter plan was challenged by the New York State Department of Financial Services ("NYSDFS") on the grounds that the OCC does not have the authority under the National Banking Act ("NBA") to charter national banks that do not receive deposits. The SDNY agreed with the NYSDFS, holding that the NBA's "'business of banking' clause, read in light of its plain language, history and legislative text, unambiguously requires that, absent a statutory provision to the contrary, only depository institutions are eligible to receive national bank charters from the OCC." In light of the unfavorable ruling, the OCC has stated plans to appeal to the Second Circuit, thus providing a potential opportunity for the OCC's plan to come back to life.

Looking Ahead to 2020

In March, a New Jersey law went into effect that "bans retailers who sell goods or services from requiring buyers to use a credit card or prohibiting the use of cash as payment for the goods or services." The law does provide exceptions for certain entities in specific situations, but effectively bans discrimination against cash-paying retail customers otherwise. The question of how to balance between aiding low-income consumers who have do not access to bank accounts and cards and the ever-persistent march toward more digital payments looks to be one that regulators may be keen to take up going forward. Looking outside of New Jersey, for example, the City of Philadelphia in July put into a similar law banning retailers from refusing to accept cash and charging higher prices to cash-paying customers, and New York City looks to be considering a similar ban. Looking to 2020, whether other jurisdictions take up this trend is worth monitoring.

In September, the House of Representatives passed the SAFE Banking Act, a bill that would allow banks to provide services to legitimate cannabis businesses in states where cannabis is legal. While the bill does have some bipartisan support, its fate in the Senate, however, remains to be seen. The clarity that the bill would provide is apparent, as banks currently are generally unwilling to serve cannabis-related businesses out of concern that doing so would violate federal laws. Should the bill pass the Senate and gain presidential approval, it would give a largely cash-based industry access to banks and, ultimately, make use of the services provided by digital payment processors. Should the SAFE Act become law, it could pay major dividends to payment processors in terms of access to new consumers and the justification to charge higher rates on cannabis transactions. This has already been seen in the cannabidiol ("CBD") industry, where in October, Square, Inc. began allowing sellers of CBD to use its services. In exchange for taking on the regulatory risk of processing payments for CBD, a substance that is declassified at the federal level and regulated differently across state lines, Square charges vendors selling CBD products online a relatively high 4.20% transaction fee. Given that cannabis is and will likely remain heavily regulated, passage of the SAFE Act could blaze a path where vendors are willing to pay higher transactions fees to grow their businesses via digital payments.

We expect 2020 to be a very active year for the payments and card industry.

MORTGAGE

Significant Cases

New York Court of Appeals Court May Settle Foreclosure Statute of Limitations Issues

New York courts grapple with the issue of what constitutes revocation of the acceleration of mortgage debt. One aspect of New York statute of limitations case law is clear: lenders may revoke their election to accelerate a mortgage debt by an affirmative act occurring during the six-year statute of limitations period. *See, e.g., NMNT Realty Corp. v. Knoxville 2012 Trust,* 151 A.D.3d 1068, 1069-1070 (2d Dept. 2017); *Lavin v. Elmakiss*, 302 A.D.3d 637 (3d Dept. 2003)).

What constitutes revocation has remained an area of confusion and risk for lenders and servicers. In *Knoxville 2012 Trust*, the Appellate Division, Second Department, held that a voluntary discontinuance created a question of fact as to whether the lender decelerated the mortgage debt.

In *Engel*, though, the Second Department walked back its decision in *Knoxville 2012 Trust* by holding a stipulation of discontinuance did not revoke the lender's election to accelerate the entire mortgage debt because the order was silent on the issue of revocation.

The defendant argued that the lender's foreclosure action filed in July 2008 accelerated the debt and that the refiled foreclosure in February 2015 was time-barred under New York's six-year statute of limitations to enforce mortgage debts. *See* CPLR 213(4). The lender claimed the stipulation of discontinuance filed in January 2013 decelerated the mortgage debt. The trial court agreed and granted summary judgment to the lender.

On appeal, the Second Department held that, because the stipulation itself did not address revocation and did not otherwise indicate that the lender would accept payments from the borrower, the lender did not properly revoke its election to

accelerate the mortgage debt. The lender sought leave to appeal to the New York Court of Appeals, which was granted, and a decision is expected in the spring of 2020.

Eleventh Circuit Clarifies When A Consumer Has Private Right of Action under FDCPA and FCRA

The Eleventh Circuit Court of Appeals upheld a District Court's dismissal of a lawsuit alleging violation of the Fair Debt Collection Practices Act for reporting a debt to a credit bureau using a different name than its own but remanded the case for a determination on Federal Credit Reporting Act violations.

The decision included novel issues in the Eleventh Circuit and established the standard for bringing lawsuits when lenders use an alternative name in reporting on past due accounts and for evaluating whether a consumer has a valid claim if a lender uses false pretenses to request a credit report.

West Virginia Supreme Court Weighs In on Debt Collector's Bona Fide Error Defense Under WVCCPA

In *LTD Financial Services, L.P. v. Collins*, No. 18-0008 March 15, 2019, the West Virginia Supreme Court rejected a debt collector's bona fide error defense. Plaintiff Brian Collins alleged violations of Section 128(e) of the West Virginia Consumer Credit and Protection Act ("WVCCPA") arising from debt collection phone calls he received from LTD after he gave it notice that he was represented by counsel. LTD defended the lawsuit by claiming that the phone calls were the result of a bona fide error. Pursuant to West Virginia Code § 46A-5-101(8), if a debt collector establishes that a violation of the WVCCPA was unintentional or the result of bona fide error of fact notwithstanding the maintenance of procedures reasonably adapted to avoid the violation, no liability can be imposed.

At a trial on LTD's bona fide error defense, the collection agency testified that its policy was that "once [the collector] was informed that [respondent] was represented by counsel but … was unable to input counsel's correct telephone number, the [collector] should have entered a substitute telephone number for [respondent] … to prevent any future calls." LTD could not, however, point to where the policy was memorialized in its written policies and procedures and therefore did not meet their burden of their affirmative defense.

The West Virginia Supreme Court weighed in on the WVCCPA's bona fide error defense for the first time. First, the Supreme Court held that a plaintiff consumer has no burden to establish that the violation was intentional unless the statute specifically creates such a burden. Section 128(e) of the WVCCPA, unlike Section 125, does not require proof of intent.

Next, citing the lower court's finding that LTD did not claim the calls were unintentional, let alone produce evidence of such a defense, the Supreme Court held that the lower court did not improperly analyze the statute as providing only one possible affirmative defense. LTD failed to put on any evidence of the "unintentional" defense and could not carry its burden by pointing to the plaintiff's failure to prove intent.

Finally, the Court affirmed that LTD failed to establish the second of the two possible defenses – the affirmative defense of bona fide error of fact. Although there was oral evidence of the existence of a policy, because the policy was not written, LTD failed to establish that it had any policy or procedure. Further, notwithstanding the absence of policies and procedures, the Court held that that "failing to follow procedures is not a factual error."

In its decision, the West Virginia Supreme Court cited the lower court's interpretation of the bona fide error defense as providing a "two-tiered approach" to proving the defense: "First, a defendant must prove that it maintains procedures reasonably adapted to avoid violating the law. Once the maintenance of reasonable procedures is proven by a preponderance of the evidence, the next tier of inquiry is whether the violation alleged was "unintentional" or the result of a "bona fide error of fact." However, because LTD did not put on any evidence that the violation was unintentional, the Court was not required to squarely address the propriety of the lower court's "two-tiered approach." Accordingly, it remains unclear whether the West

Virginia Supreme Court would read the statute to require the existence of "reasonable procedures" as a threshold to invoking either the "unintentional" or the "bona fide error of fact" prongs of the defense.

New Jersey Creates Mortgage Servicers License Requirement

In late spring, the New Jersey legislature expanded the state's regulatory regime in an effort to curb foreclosures. Governor Phil Murphy signed the "Mortgage Servicers Licensing Act" in April. As the title indicates, the Act creates a licensing regime for servicers of residential mortgage loans secured by real property within New Jersey. As with many state licensing regimes, the Act exempts most banks and credit unions, as well as certain entities licensed under the New Jersey Residential Mortgage Lending Act. Consequently, the licensing regime principally impacts non-bank servicers who do not lend in New Jersey.

Also like other licensing regimes, the Act requires licensees to maintain and submit evidence of surety and fidelity bonds, designate qualified individuals to serve in various roles, such as "Qualified Individual" and "Branch Manager," and pay applicable licensing and renewal fees. Additionally, the Act:

- Creates new operational requirements for some servicers;
- Creates a list of prohibited activities for all servicers;
- Provides the New Jersey Department of Banking and Insurance ("Department") with investigative and examination authority; and
- Provides the Department with enforcement authority, which includes the power to impose civil penalties up to $25,000 per violation.

The Act is one of nine bills the Governor signed as part of a "bipartisan legislative package" designed to curb residential foreclosures within the state. Some of the changes covered by the eight other bills include:

- Codifying the state judiciary's Foreclosure Mediation Program (A664);
- Expanding the information that lenders must include with a notice of intention to the debtor to commence a foreclosure under the "Fair Foreclosure Act" (S3416);
- Requiring servicers to file a notice of intention to foreclose within 180 days prior to commencing foreclosure (S3411); and
- Placing limits on reinstatements of dismissed mortgage foreclosure actions (S3411).

The Supreme Court held that a plaintiff consumer has no burden to establish that the violation was intentional unless the statute specifically creates such a burden.

The new rules became effective on July 28, 2019, and Troutman Sanders financial services attorneys helped clients throughout the year to address the impact of the new legislation on their operations.

Branching Out – Western District of Virginia Defines "Branch Office" for Purposes of HUD's Face-to-Face Meeting Requirement

The U.S. District Court for the Western District of Virginia handed down a decision in late 2018 that brought some clarity to an otherwise broad statute. On December 18, 2018 the Court clarified the definition of "Branch Office" in the context of statutory prerequisites to foreclosure on loans insured by the Fair Housing Authority ("FHA").

One such prerequisite put forth by the Department of Housing and Urban Development ("HUD") is the "face-to-face meeting" requirement. This meeting, however, is not required in some circumstances, including when the mortgaged property is not located within 200 miles of the mortgagee, its servicer, or a branch office of either.

The decision came as the case was before the Court on a motion to dismiss for failure to state

a claim. The borrower had brought suit claiming improper foreclosure on her home because the lender failed to offer, attempt, or conduct a face-to-face meeting prior to foreclosing on the subject property. The borrower alleged that the exemption did not apply because there was an office of the lender within 200 miles of the property. This purported "branch office," however, was not open to the public and did not provide services related to mortgage origination or servicing.

Accepting the facts as the borrower had spelled them out in her complaint, the Court found that the borrower's broad interpretation of a "branch office" as including any business office such as the office at issue here "defie[d] common sense" and was inconsistent with the purposes of the regulation and the face-to-face meeting requirement.
The Court held that to be congruent with the regulation and the intent of the meeting requirement, a "branch office" must be both established and operated by the mortgagee and must transact mortgage-related business. Accordingly, the Court dismissed the borrower's complaint with prejudice.

This definition is beneficial to the mortgage industry, especially in Virginia, by providing a limiting principle on an otherwise amorphous phrase.

Fourth Circuit Overturns 22-Year-Old Anti-Modification Precedent Set Forth in *Witt v. United Cos. Lending Corp*

In an *en banc* decision, the Fourth Circuit overturned twenty-two-year-old precedent to permit a Chapter 13 debtor to bifurcate his undersecured home mortgage loan into separate secured and unsecured claims. *See Hurlburt v. Black*, 925 F.3d 154 (4th Cir. 2019).

In 2004, plaintiff Larry Hurlburt purchased his home from Juliet Black for $136,000. To finance the purchase of the home, Hurlburt executed a promissory note for the principal amount of $131,000 in Black's favor, which was secured by a purchase-money deed of trust naming Black as beneficiary. Under the terms of the note, Hurlburt was required to re-pay the principal amount, plus 6% per annum, over 119 monthly interest-only installments, with a final balloon payment due in May 2014. Ultimately, Hurlburt failed to pay the balance and Black initiated a foreclosure. Consequently, Hurlburt filed for bankruptcy pursuant to Chapter 13 of the U.S. Bankruptcy Code in the Eastern District of North Carolina. Thereafter, Black filed a proof of claim in the bankruptcy proceeding for the amount of $180,971.72, declining to identify the amount of the claim that was secured or unsecured because she alleged she did not know the collateral's value.

Hurlburt filed a Chapter 13 Plan seeking to bifurcate Black's claim into separate secured and unsecured claims. Under the Plan, Hurlburt proposed to pay Black the value of the property less a county tax lien, estimated at $41,132.19. The rest of Black's claim would be treated as an unsecured claim, meaning Black would receive no payment. Understandably, Black objected.

The Bankruptcy Court held that the proposed plan modified Black's rights and violated 11 U.S.C. § 1322 under *In Re Witt*, which prohibited the bifurcation of undersecured loans when the only security for the loan is a lien on the debtor's principal residence. *See Hurlburt v. Black (In re Hurlburt)*, 572 B.R. 160, 169 (Bankr. E.D.N.C. 2017), citing *Witt v. United Cos. Lending Corp.*, 113 F.3d 508 (4th Cir. 1997). The District Court affirmed, *Hurlburt v. Black (In re Hurlburt)*, No. 7:17-cv-169-FL (E.D.N.C. Dec. 19, 2017), as did a panel of the Fourth Circuit. *See Hurlburt v. Black (In re Hurlburt)*, 733 Fed. App'x 721 (4th Cir. 2018) (unpublished) (per curiam). However, on January 8, 2019 the Fourth Circuit vacated its opinion and granted Hurlburt's request for rehearing *en banc*. *Hurlburt v. Black (In re Hurlburt)*, 747 Fed. App'x 168 (4th Cir. 2019) (mem.).

In overturning *Witt* and remanding the case to the district court, the *en banc* panel of the Fourth Circuit found (over dissent) that the plain reading of Section 1322(c)(2) of the Bankruptcy Code creates an exception to the general prohibition on modifying loans secured by a principal residence by allowing modification/bifurcation as long as the last payment on the loan is due before the date on which the final payment under the Chapter 13 plan is due.

The *Hurlburt* decision has the potential to create significant repercussions for both Chapter 13 debtors and lenders. As the dissenting judges noted, overturning *Witt* opens the door to "mischief in bankruptcy courts" as the new ruling creates "obvious incentives to delay filing for bankruptcy or stall proceedings until their final mortgage payment is less than sixty months away" so that the debtor's final home mortgage payment falls before the last payment under the Chapter 13 plan. *Hurlburt v. Black*, 925 F.3d 154 (4th Cir. 2019). As a result, lenders will likely consider this potential for "mischief" in their loan underwriting and approval process.

New Legislation Rulemaking

CFPB Issues Interpretive Rule on Screening and Training Requirements for Mortgage Loan Originators

On November 15, 2019, the Consumer Financial Protection Bureau issued an Interpretive Rule clarifying the screening and training requirements for financial institutions which employ loan originators with temporary origination authority that became effective as of November 24, 2019.

As the CFPB explains in the Interpretive Rule, the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 ("SAFE Act") established a national system for licensing and registration of loan originators. It envisions two categories of loan originators – those working for state-licensed mortgage companies and those working for federally-regulated financial institutions.

Subsequently, Section 106 of the Economic Growth, Regulatory Relief, and Consumer Protection Act ("EGRRCPA") amended the SAFE Act and established a third category of loan originators – those with temporary authority to originate loans. This category includes loan originators who were previously registered or licensed, are employed by a state-licensed mortgage company, are applying for a new state loan originator license, and meet other criteria specified in the statute. Loan originators with temporary authority may act as a loan originator for a temporary period of time, as specified in the statute, in a state while that state considers their application for a loan originator license, the CFPB explained.

Under the SAFE Act requirements, in order to issue a loan originator license, states are required to ensure that an individual has never had a loan originator license revoked or been convicted of enumerated felonies within specified timeframes, and has demonstrated financial responsibility, character, and fitness. In addition, he or she must complete 20 hours of pre-licensing education, and have passed state specific testing requirements.

Under Regulation Z, which implements the Truth in Lending Act, employers of loan originators are required to perform nearly identical screening and ensure certain training of employees before permitting them to originate loans. Regulations Z's language is ambiguous as to whether these requirements apply to the class of loan originators with temporary authority under the EGRRCPA.

The Interpretive Rule makes clear that a loan originator organization is not required to comply with the Regulation Z requirements if the individual loan originator employee qualifies for temporary authority to originate loans. Because the state will perform the screening and training as part of an individual's license application, the Regulation Z requirements would result in a duplication of efforts and would not provide additional consumer protections that could justify the burden on the loan originator organizations.

The CFPB plans to incorporate the content of the Interpretive Rule into the Official Interpretations.

CFPB Signals its Intent to Wean the Mortgage Industry Off the QM Patch

On July 25, 2019, the Consumer Financial Protection Bureau released an Advance Notice of Proposed Rulemaking ("ANPR") asking for the mortgage industry's opinion on the scheduled expiration of a provision in its Ability to Repay/Qualified Mortgage Rule ("Rule") commonly known as the "QM patch." The QM patch allows certain mortgage loans that are eligible for purchase or guarantee by Fannie Mae and Freddie Mac ("GSEs") to qualify as a Qualified Mortgage ("QM") loan under the Rule. The QM patch is scheduled to expire on January 10, 2021.

To encourage lenders to originate loans that comply with the QM loan standards, the Rule gives QM loans safe harbor from legal liabilities associated with not complying with the Rule. Also, to help avoid restrictions in lending behaviors as the industry became familiar with the Rule, the CFPB created the QM patch. It allows lenders to receive the safe harbor protection without meeting the QM loan's 43 percent debt-to-income ("DTI") limit. It also allows lenders to use the GSE's standards for verifying and calculating income instead of the QM loans standards.

Despite the Bureau's original expectation that lenders' use of the QM patch would decrease with time, it has remained a "large and persistent" part of "originations in the conforming segment of the mortgage market." By the CFPB's estimates, nearly one million loans purchased or guaranteed by GSEs met the QM patch standards but did not meet the QM loan standards due to having DTIs greater than 43 percent. This accounted for 16 percent of all closed-end first lien residential mortgages originated in 2018. While a significant figure, this estimate likely fails to fully represent lenders' sizable reliance on the QM patch. First, the CFPB's estimate did not account for QM patch loans purchased or guaranteed by the GSEs that did not meet QM loan standards for reasons other than the DTI limit. Second, the Bureau's estimate did not account for loans that did not meet the QM loan standards for any reason but were sold to non-GSE entities as QM patch loans.

While conceding it may provide a short extension to help the market transition away from the QM patch, the CFPB appears very intent on letting the QM patch expire. The CFPB believes that making the QM patch permanent "could stifle innovation and the development of competitive private-sector approaches to underwriting." It further believes the QM patch "may be contributing to the continuing anemic state of the private mortgage-backed securities market."

Considering the significant number of loans and originating lenders that would be impacted by expiration of the QM patch, the CFPB's ANPR asked for industry feedback on potential changes to the QM loan standards to compensate for the QM patch expiring. Some include:

- Replacing the DTI limit or creating alternatives to the DTI limit;
- Either increasing or decreasing the DTI limit from 43 percent or creating a set of compensating criteria that would permit a lender to exceed 43 percent; and
- Updating the standards used by lenders to calculate and verify debt income.

There is at least one legislative effort underway in Congress, H.R. 2445, to permit lenders to make QM loans utilizing other industry underwriting standards. Absent the CFPB or Congress taking action, the expiration of the QM patch could significantly reshape lending strategies for many mortgage lenders in 2021.

What to Expect in 2020

Mortgage Industry Observers Expect the CFPB Will Propose Alternative Protections for Borrowers Who Fail to Meet the Standard Qualified-Mortgage Metrics Before 2021

In light of the significant number of loans and originating lenders that will be impacted by the GSE Patch's expiration, many mortgage industry observers expect that the CFPB will propose an alternative means to encourage and protect lending to borrowers who fall outside of the QM loan standards before the Patch expires in early 2021. Indeed, in 2019, the CFPB asked for industry feedback on alternatives, some of which included: replacing the DTI limit or creating alternatives to the DTI limit; increasing or decreasing the DTI limit from 43 percent or creating a set of compensating criteria that would permit a lender to exceed 43 percent; and updating the standards used by lenders to calculate and verify debt income.

Regardless of whether the CFPB enacts alternative protections for high-DTI borrowers, any change to the GSE Patch will noticeably impact the mortgage lending landscape, and industry participants should assess how its expiration will impact their business models.

What Constitutes an Affirmative Act? Anticipated Ruling from New York Court of Appeals May Provide an Answer

The New York Court of Appeals, New York's highest court, is poised to answer a question that has become a source of confusion and risk to lenders and servicers: What exactly constitutes revocation of acceleration? New York, like many states, has a statute of limitations governing a lender's ability to foreclose after it accelerates the mortgage debt. Lenders, however, may revoke their election to accelerate the debt by affirmative act.

The CFPB appears very intent on letting the QM patch expire.

For several years, New York's Second Department, the state's intermediate level appellate court, has examined what constitutes revocation of acceleration of a mortgage debt. In 2017, the Second Department held that a voluntary discontinuance or dismissal order could revoke the lender's election to accelerate the mortgage debt, but found it was a question of fact. N*MNT Realty Corp. v. Knoxville 2012 Trust*, 151 A.D.3d 1068, 1069-1070 (2d Dept. 2017).

Then, the Second Department walked back its decision in *Knoxville 2012 Trust*.

In *Freedom Mortgage Corporation v. Engel*, the Court held that a lender's stipulation of discontinuance was insufficient to revoke acceleration because the "stipulation was silent on the issue of revocation … and did not otherwise indicate that the plaintiff would accept installment payments from the defendant." *Freedom Mtge. Corp. v. Engel*, 63 A.D.3d 631 (2d Dept. 2018). The lender sought leave to appeal to the New York Court of Appeal, which was granted. A decision is expected in the spring of 2020.

Accepting less than the full accelerated debt is consistent with other states. For example, in Texas, a lender waives earlier acceleration when it puts a borrower on notice of its abandonment or "by requesting payment on less that the full amount of the loan." *Boren v. United Stated Nat'l Bank Ass'n,* 807. F.3d 99 (5th Cir. 2015) (quoting *Leonard v. Ocwen Loan Servicing, LLC*, 2015 U.S. App. LEXIS 9827 (5th Cir. 2015).

Ultimately, the Court of Appeals' decision should clarify what a lender or servicer must do to avoid a statute of limitations defense.

AUTO FINANCE

Lawsuits against the auto finance industry continued apace in 2019. As predicted, however, the bigger challenge came from state regulators, who jumped to the forefront in the wake of federal regulators' retreat. State attorneys general were active in both the enforcement and compliance spaces, requiring auto finance companies to refocus on state-by-state compliance strategies.

Litigation

In January, Connecticut-based Sensible Auto Lending LLC settled allegations that it knowingly facilitated the sale of defective vehicles by four Massachusetts used car dealerships. An investigation by the Massachusetts attorney general found that Sensible had provided financing for defective and inoperable vehicles, despite being aware of consumer complaints against four dealerships it partnered with and high default and repossession rates.

One dealership, F&R Auto Sales Inc., frequently misrepresented vehicle safety and reliability and refused to make repairs when customers found problems with their vehicles. The A.G. determined not only that Sensible was aware of these complaints and the high default rates, but also that Sensible failed to detail the cost of specific insurance policies that customers were required to purchase, in violation of the Massachusetts Cost of Consumer Credit Disclosure Act. These insurance policies protect lenders when a vehicle is damaged, but Sensible used its claims to recover credit losses. Consumers, as a result, saw their annual percentage rates exceed the Massachusetts statutory cap of twenty-one percent.

Sensible agreed to pay $733,925 in relief to consumers who were "cheated" by those dealerships between August 2012 and December 2016. Sensible also must waive all outstanding payments owed by the hundreds of customers who purchased vehicles from those dealerships and must track consumer complaints, repossession rates, and delinquency rates of the dealerships with which it partners.

In March, two plaintiffs filed suit against Florida Fine Cars, Inc., a Miami dealership, alleging violations of the Fair Credit Reporting Act and the Florida Fair Credit Reporting Act, on behalf of themselves and all other persons who visited the dealership's website and had a hard credit pull instead of a soft credit inquiry as noted on the dealership's financing page. The plaintiffs contended that, during calls with the dealership, they were directed by a representative to click the "financing" link and fill out a form on the website for a soft credit inquiry in order to prequalify for a loan, but instead had a hard credit pull appear on their credit reports. The dealer won dismissal of the case in May, however, citing its arbitration provision in its sales contracts. The matter is on appeal to the Eleventh Circuit.

In late March, an auto finance company asked for approval of a $4 million class settlement in a case brought under the Telephone Consumer Protection Act ("TCPA"). Class plaintiff Robert Ward alleged that defendant Flagship Credit Acceptance, LLC called him in violation of the TCPA, as he is not a Flagship customer. The proposed settlement required Flagship to establish a settlement fund of $4 million to fund the terms of the parties' proposed settlement agreement, including payment of (1) all claims; (2) all administrative, notice, and claims expenses; (3) an incentive award to the class representatives; and (4) a $1.3 million award for attorneys' fees.

Though Ward himself asserted a wrong number claim, the class was collectively defined as "all persons whom Flagship called on their cellular telephone through the use of any version of TCN, a LiveVox or Aspect dialing system, and/or with an artificial or prerecorded voice at any time from May 5, 2013 to the date of preliminary approval." The Court issued its preliminary approval on September 18, 2018. From a class of approximately 330,000, the Settlement Administrator received 118,924 claims forms, narrowed further to 57,318 that were identified as valid and non-duplicative. Each of these class members are slated to receive $43.40 from the Settlement Fund.

Later in the year, the District of New Jersey offered some good news to auto finance companies on the hotly-debated subject of product add-ons.

On October 17, 2019, U.S. District Judge Anne E. Thompson dismissed a putative class action for an alleged violation of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 *et seq*. ("CFA") as against an auto financing lender in the matter of *Page v. GPB Cars 12, LLC,* No. 19-cv-11513, 2019 WL 5258164 (D.N.J. Oct. 17, 2019). Plaintiff Rachel A. Page alleged that she executed a retail installment sales contract for the purchase of a pre-owned Toyota Prius. Financing for the sale was provided by co-defendant Nissan Extended Services North America, G.P. ("NESNA"). Page alleged that the sales contract included financing for the purchase of a tire and wheel protection plan for $1,000. Page further alleged that the add-on, executed concurrently with the sales contract, contained a cancellation provision that guaranteed her a full refund on the purchase price of the protection plain if she submitted a cancellation request within a specified period after the date of purchase. Further, the add-on required NESNA to complete the refund within forty-five days of a timely cancellation request and, if it failed to do so, Page was guaranteed a 10% penalty payment for each thirty-day period that the refund remained unpaid by NESNA. Page asserted a class action for violation of the CFA as against NESNA for the alleged failure to adhere to these provisions.

Page attempted to characterize the alleged conduct by NESNA as constituting a "false promise" or an "unconscionable commercial practice" in violation of the CFA. However, on a Rule 12(b)(6) motion, the court dismissed the CFA claim against NESNA. The Court quoted *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 18, 647 A.2d 454, 462 (1994), wherein New Jersey's Supreme Court held that an alleged mere "breach of contract, is not per se unfair or unconscionable ... and ... alone does not violate a consumer protection statute [as the CFA]." *Cox*, 138 N.J. at 18. Accordingly, Judge Thompson held that the allegations against NESNA were akin to breach of contract claims and did not support a cognizable claim for violation of the CFA, warranting dismissal.

Government Enforcement Actions

The Federal Trade Commission was largely silent in the area of auto finance in 2019. The agency's lone auto finance-related action came in June, when it announced a settlement with LightYear Dealer Technologies, LLC, doing business as DealerBuilt, a company that sells software and data services to auto dealers. The FTC alleged that DealerBuilt's poor data security practices resulted in a breach that exposed the personal information of millions of consumers. A hacker gained unauthorized access to the data of millions of consumers during at least a 10-day period and downloaded the data of 69,283 individuals. DealerBuilt's customer base is comprised of nearly 320 dealership locations across the country.

The FTC's complaint against DealerBuilt alleged that its failures led to a breach of the company's backup systems, allowing a hacker to gain access to the unencrypted personal information of about 12.5 million consumers, including their Social Security numbers, driver's license numbers, and birthdates, as well as wage and financial information. DealerBuilt, however, did not detect the breach until it was notified by one of its auto dealer customers. The FTC contended that the company did not take measures that would have detected the problem and failed to implement reasonable practices to protect personal data stored on its network.

The settlement required DealerBuilt to implement an information security program with certain required elements, including maintenance of an information security program and providing the program (and any evaluations of the program) to the company's governing body every 12 months, designating an employee to coordinate and be responsible for DealerBuilt's information security program, as well as a number of yearly assessments and evaluations. The settlement with the FTC should be viewed as a useful guide to what the agency's data security orders require and, more importantly, to what the agency expects from all companies—including financial services companies that themselves do not directly interact with consumers—even outside of a settlement context, to protect data privacy.

The FTC contended that the company did not take measures that would have detected the problem and failed to implement reasonable practices to protect personal data stored on its network.

State Regulatory Activity

Most of the regulatory action in 2019 was at the state level. In March, the New Jersey Attorney General's Office filed suit against two automobile dealerships alleging that the dealerships should be closed and their owner barred from the industry because they targeted financially vulnerable consumers with a variety of unconscionable and deceptive business practices.

According to the AG's Office, Nu 2 U Auto World and Pine Valley Motors, Inc., both owned by Kenneth R. Cohen, allegedly sold high-mileage used vehicles at inflated prices, financed sales through in-house loans with high interest rates that created a substantial risk of default, then "churn[ed]" the vehicles by repossessing and selling the same cars over and over again. The state sought penalties and restitution for consumers and went so far as to seek closure of both dealerships. Enforcement actions such as this show the need for auto finance companies to vet dealerships thoroughly, as more and more states are taking a hard look at the practices of dealers.

In April, the Minnesota Department of Commerce issued guidance clarifying the Department's stance on what constitutes a "sales finance company" that is regulated under Minnesota law and required to obtain a license. The guidance formalized the Department's stance that companies that purchase motor vehicle retail installment contracts from Minnesota retail sellers must obtain a motor vehicle sales finance company license from the state, regardless of whether the purchasing company has any physical presence in Minnesota.

This guidance marks a change from the state's historical interpretation of the sales finance company laws, in which companies without a physical presence in Minnesota were not required to obtain a license. It is worth noting that certain entities, such as banks, trust companies, savings associations and regulated lenders, are exempt from licensing requirements under the Minnesota sales finance statutes and remain exempt even under the new guidance. The Department gave companies a July 1, 2019 deadline to file applications for a sales finance license.

In West Virginia, Governor Jim Justice signed HB 3143 in March, amending select provisions of the West Virginia Consumer Credit Protection Act ("WVCCPA") that affect the permissible interest rates for certain types of loans. The bill clarifies that the licensing provisions of the WVCCPA do not apply to any "collection agency" as defined by the Collection Agency Act of 1973 and, further, increases the dollar threshold for certain loans to which maximum finance charges apply. HB 3143 widened the dollar threshold for loans with a maximum finance charge of 27% from loans in the range of $2,000 to $10,000 to loans in the range of $3,500 to $15,000. However, for loans that have a maximum finance charge of 18%, the dollar threshold increased from loans over $10,000 to loans over $15,000.

The bill further increased the dollar threshold for regulated consumer loans not secured by real estate. For these loans, lenders have the option of receiving an interest rate up to 31% per year on an unpaid balance of the principal amount together with a nonrefundable loan processing fee of not more than 2% of the amount financed. The bill increased the threshold of these loans from $2,000 or less to $3,500 or less.

Looking Ahead to 2020

For the auto finance industry, the usual suspects raised their heads in 2019. Consumers have, as expected, contested sales practices, and auto finance companies continue to deal with compliance issues in post-sale collection. As a general theme, companies continue to face state-by-state compliance issues. Look for these challenges to continue in 2020, as the grind of consumer litigation continues. States will continue to step in as the federal regulators recede from the landscape.

REGULATORY LANDSCAPE

Consumer Financial Protection Bureau

Constitutional Challenges

The year started with the Supreme Court's denial of the petition for certiorari challenging Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the CFPB. In its response to the petition for certiorari, the Department of Justice argued, in part, that this case "would be a poor vehicle for considering the constitutionality of the Bureau's structure." However, the arguments put forth by the DOJ suggest that it may support Supreme Court consideration under a different set of facts.

In May, a Ninth Circuit panel held that the CFPB's single-director structure does not violate the Constitution. In upholding the CFPB's structure, the Ninth Circuit panel followed the D.C. Circuit's *en banc* decision in *PHH Corp. v. Consumer Financial Protection Bureau*. Notably, the D.C. Circuit's *PHH Corp*. decision drew a sharp dissent from then-Judge and now-Justice Brett Kavanaugh, who argued that the CFPB's structure presents "an overwhelming case of unconstitutionality."

Repeal Efforts

In May, Sen. Ted Cruz (R-Tex.) announced that he is reintroducing a bill titled the "Repeal CFPB Act" that would eliminate the CFPB. The bill would repeal the Consumer Financial Protection Act of 2010, eliminating the CFPB and any rulings passed by the agency. The bill remains in the Senate Committee on Banking, Housing, and Urban Affairs.

Policy Announcements

In April, the CFPB announced a policy change regarding the "notification of purpose" section of the agency's Civil Investigative Demands, or "CIDs." The CFPB stated that, going forward, CIDs will contain: (1) more information about the provisions of law that the targeted business might have violated; (2) more information about the business' activities that are subject to CFPB authority; and (3) information about whether determining the extent of the CFPB's authority over the business' activities is one of the "significant" purposes of the investigation.

In accordance with the Regulatory Flexibility Act ("RFA"), the CFPB announced its plan for periodic review of the regulations it oversees. The CFPB began the process with a review of the Overdraft Rule, which amended Regulation E implementing the Electronic Funds Transfer Act. The CFPB invited public comment on both its RFA review plan as well as its review of the Overdraft Rule. The comment period closed July 1, 2019, and no final rule has been issued.

In September, the CFPB issued three new policies to promote innovation and facilitate compliance: Policy on No-Action Letters ("NALs"), Policy to Encourage Trial Disclosure Programs ("TDPs"), and Policy on the Compliance Assistance Sandbox ("CAS"). According to CFPB Director Kathleen Kraninger, the policies are meant to "foster innovation that ultimately benefits consumers."

Proposed Rules and Rulemaking

In May, the CFPB released a new proposed rule that would govern debt collection. Continuing a process begun in 2013, the rule would mark the first major update to the Fair Debt Collection Practices Act in more than 40 years, and gives much-needed clarification on the bounds of federally-regulated activities of "debt collectors," as that term is defined in the FDCPA, particularly for communication by voicemail, email, and text messages. The comment period has closed, but there has not yet been a final rule or another proposed rule issued.

The CFPB also issued a Notice of Proposed Rulemaking to amend disclosure requirements under the Home Mortgage Disclosure Act. Currently, the HMDA requires financial institutions to disclose loan-level information about mortgages to reporting agencies in order to assist public officials in policy-making decisions. The CFPB processes this data and makes it available to the public. The CFPB also issued an Advance Notice of Proposed Rulemaking seeking information related to the costs and benefits of reporting certain data points under the HMDA.

Payday Lending Compliance Guide

In February, the CFPB released a compliance guide for small entities that summarizes payment-related provisions of the Payday Lending Rule. The Payday Lending Rule governs payday loans, vehicle title loans, and certain high-cost installment loans. The Guide should be reviewed in conjunction with the Rule and does not include interpretations issued or released after February 2019.

UDAAP Symposium

The CFPB hosted a symposium with private attorneys to discuss the term "abusive" in "unfair, deceptive, and abusive acts and practices." This was the first in a symposia series meant to help the CFPB explore consumer protections in the changing financial services marketplace. Since the meaning of abusiveness is "less developed than the meaning of unfairness or deception," the purpose of this symposium was to provide a public forum for the CFPB and the public to hear various perspectives regarding the definition of "abusive." The symposium was intended to help create a transparent dialogue to help the CFPB develop additional policy processes, including future rulemakings.

Servicemembers and Veterans

In August, the CFPB along with the Office of the Arkansas Attorney General, filed a proposed settlement with Andrew Gamber, Voyager Financial, and SoBell (collectively "the defendants"). In a jointly filed complaint the CFPB and Arkansas alleged that, under the defendants' scheme, contracts were established whereby investors provided lump-sum payments to consumers who were obligated to repay a much larger amount by assigning to investors part of their monthly pension or disability payments for five to ten years. Most of the consumers were veterans with disability pensions from the Department of Veterans Affairs or pensions administered by the Defense Finance and Accounting Service.

The CFPB and Arkansas argued that the contracts were invalid and not enforceable because federal law prohibits agreements under which another person acquires the right to receive a veteran's pension payments. Additionally, the CFPB and Arkansas alleged that the defendants made multiple misrepresentations relating to the contract.

Under the proposed settlement, the defendants will be permanently banned from the industry and are required to pay redress of $2.7 million, a civil monetary penalty of $1 to the CFPB, and a payment of $75,000 to the Arkansas AG's Office.

Student Lending

A report issued by the CFPB Private Education Loan Ombudsman recommends actions against scammers who seek to take advantage of and abuse student loan borrowers by offering no-value and sometimes harmful services. In addition to statistical reporting, the Report focuses on the Bureau's efforts to target scam student loan debt relief companies. Some results of that effort include the following settlements.

In January, Navient Corp., the nation's largest student loan servicer, moved for summary judgment on two enforcement claims brought against it by the CFPB. The CFPB alleged that Navient engaged in abusive and unfair practices under the Consumer Financial Protection Act. In its motion for summary judgment, Navient asserted that the CFPB failed to raise "any real doubt" around whether borrowers were told about income-driven plans and failed to identify a single borrower supporting its allegations. The U.S. District Court for the Middle District of Pennsylvania denied Navient's motion.

In May the CFPB and Conduent Education Services, LLC ("CES"), a student loan servicing company formerly operating as ACS Education Services, reached a $3.9 million deal for the company's alleged failure to provide accurate balances on more than 200,000 student loans. The CFPB found that CES engaged in unfair practices that violated the Consumer Financial Protection Act of 2010 by failing to adjust in a timely manner principal balances of student loans made under the Federal Family Education Loan Program.

In June the CFPB announced a settlement that effectively forgives $168 million in private student loans owed by former students of ITT Technical Institute, the for-profit college that filed for bankruptcy in 2016 in the face of regulatory scrutiny concerning its recruitment and student loan practices. The settlement is with Student CU Connect CUSO, LLC ("CU Connect"), which was created to fund and manage loans for ITT students. Under the settlement, CU Connect must stop collecting on and discharge all outstanding CU Connect Loans. The order also requires CU Connect to provide notice to all consumers with outstanding CU Connect Loans that their debt has been discharged and is no longer owed and that CU Connect is seeking to have the relevant tradelines deleted.

In October, the CFPB and the states of Minnesota, North Carolina, and California filed a lawsuit in federal court in California against a student loan debt-relief operation. The CFPB alleges that since 2015, the companies deceived consumers by misrepresenting that they could qualify for loan forgiveness in a matter of months, when forgiveness typically takes at least 10 years of on-time payments and is determined by the Department of Education rather than the companies. Additionally, the complaint alleges the companies made false or misleading claims and withheld information from consumers. The Court granted a temporary restraining order against the student loan debt-relief operation.

Payday Lenders

D and D Marketing Inc. d/b/a T3 Leads ("T3"), an online lead aggregator for payday and installment loans, agreed to pay $4 million to settle a 2015 suit filed by the CFPB. The lead aggregator also agreed to a permanent ban on lead generation, lead aggregation, and data brokering for certain high interest consumer loans. In the complaint, the CFPB asserted that T3's lead generators incorrectly represented themselves as lenders or falsely suggested that the lenders connected to the consumer via T3 met certain standards or would offer consumers the best rates or lowest fees.

FTC

Government Shutdown

The year began with the federal government shutdown that caused a temporary suspension of all FTC investigations. During the shutdown, the FTC did not staff its consumer hotline, engage in settlement negotiations, hold events or respond to Freedom of Information Act requests, and ceased all other consumer protection activity.

Summary of 2018 Enforcement Actions

In February, the FTC issued its annual report for fiscal year 2018 and announced that enforcement actions from July 2017 through June 2018 yielded more than $2.3 billion in refunds to allegedly defrauded U.S. consumers. To put the total sum in perspective, the $2.3 billion figure was almost eight times the FTC's annual budget for the fiscal year ($306 million). The figure includes refunds from the FTC's much-publicized settlement with Volkswagen that required the company to offer a buyback program for owners of diesel cars fitted with illegal emissions defeat devices. Of the $2.3 billion, $122 million was mailed directly by the FTC to approximately 2.2 million consumers. Those direct checks were generated by more than 38 separate enforcement actions.

Joint Efforts between FTC and CFPB

In February, the FTC and CFPB also reauthorized their Memorandum of Understanding, or "MOU," that governs the FTC's and CFPB's joint operations. The MOU focuses on five key areas of cooperation: (1) joint law enforcement efforts; (2) joint resolution efforts; (3) joint rulemaking efforts; (4) supervisory information and examination schedules; and (5) consumer complaints. According to the FTC, the MOU is an agreement for "ongoing coordination

The CAN-SPAM Rule establishes requirements for unsolicited commercial e-mail messages and provides consumers with the right to opt out of receiving those e-mails.

between the two agencies under the terms of the Consumer Financial Protection Act," aiming to avoid duplication of law enforcement and rulemaking efforts between the FTC and CFPB.

Advertising and Marketing

Late last year, the Department of Veterans Affairs (the "VA") and the FTC signed an updated Memorandum of Agreement, pledging ongoing efforts in the oversight and enforcement of laws pertaining to the advertising, sales, and enrollment practices of institutions of higher learning and other establishments that offer training for military education benefits recipients. Critically, the revised Memorandum of Agreement highlights the terms under which the VA can refer potential violations to the FTC.

The FTC announced that it is retaining the CAN-SPAM Rule as is, deciding to keep the Rule unchanged as a result of a regulatory review, and requiring any business that sends marketing email to redouble efforts to comply with the CAN-SPAM Rule. The CAN-SPAM Rule establishes requirements for unsolicited commercial e-mail messages and provides consumers with the right to opt out of receiving those e-mails. The CAN-SPAM Rule preempts conflicting state laws, establishing uniform federal requirements. While CAN-SPAM issues do not generally trigger consumer litigation, lack of compliance can lead to complaints filed by consumers and agency action by the FTC.

In February, the FTC announced that it had finalized a consent order settling its claims against online lender SoFi in connection with SoFi's allegedly misleading advertising of its student loan refinancing products. At least some of SoFi's advertising included a disclaimer explaining how the average savings were calculated, but the FTC contended that this "fine print" information was "buried" behind terms and conditions and did not mitigate the more prominent advertising claims. The FTC used the disclaimer's explanation against SoFi as evidence in support of its deceptive advertising claim. Due to limits on the FTC's authority, it was unable to impose any monetary penalties, but the settlement includes regulatory oversight provisions and prohibits SoFi from making misrepresentions regarding the consumers' savings through its credit products unless it has "competent and reliable" evidence to back up the claims.

Debt Collection

In February, the Second Circuit Court of Appeals affirmed a judgment holding the owners of thirteen debt collection companies personally liable for $10 million. The case involved debt collection companies operating pursuant to the same strategy: employee collectors would contact debtors – and even family and friends of debtors – and identify themselves as "processors," "officers," or "investigators" from a "fraud unit" or "fraud division." The trial court granted the FTC's motion for summary judgment and ordered disgorgement of $10,852,396 against the corporate defendants as well as their owners.

On appeal, the Second Circuit affirmed the district court's disgorgement order, concluding that an individual may be liable under both the FTCA and FDCPA if he has knowledge of the violations and either participates directly in the practices or has authority to control them. The Court also held that knowledge could be established by a showing that the individual was recklessly indifferent to the deceptive nature of the practices and intentionally avoided learning the truth.

Effects of Bankruptcy Filing

In February, the U.S. Bankruptcy Court for the Southern District of Florida ruled that the owner of a computer-financing scheme cannot hide behind a bankruptcy filing to shield himself from complying with a contempt order that required him to pay $13.4 million for violating an FTC order. A federal court entered a $13.4 million judgment against the company and its owner for the harm consumers suffered related to the marketing of computers by targeting customers with poor credit. When Joseph K. Rensin, sole owner and CEO of BlueHippo Funding, LLC and its subsidiary BlueHippo Capital, LLC (collectively "BlueHippo"), refused to pay the $13.4 million contempt judgment, the FTC sought to have him jailed until he paid the amount owed. Determined to evade the judgment, Rensin filed for bankruptcy. The bankruptcy court held that the 2016 contempt judgment could not be discharged because Rensin "was at the helm of and guided BlueHippo in its every action in connection with this fraud."

Payment Processing

In May, the FTC announced that it had settled charges against payment processor Allied Wallet along with its CEO and owner, and two other officers. The charges stemmed from the FTC's claim that the defendants knowingly processed payments for merchants that were engaged in fraud, including some that were currently subject to law enforcement actions by the FTC and the Securities and Exchange Commission. The stipulated settlement order prohibits Allied Wallet and its individual owners and managers from processing payments for certain types of merchants, imposes stringent screening and monitoring requirements on payment processing for certain other categories of merchants, and imposes a $110 million judgment against Allied Wallet and its owner.

Data Security and Privacy

This year saw a significant focus on the data security and privacy of consumers, including multiple proposed changes to rules, policy announcements, as well as settlements and enforcement actions.

First, the FTC issued a press release seeking comment on proposed changes to the Safeguards Rule and the Privacy Rule under the Gramm-Leach-Bliley Act of 1999 (the "GLBA Act") to increase data security for financial institutions and better protect consumers.

The Safeguards Rule, which went into effect in 2003, requires financial institutions to develop and maintain comprehensive data security programs. The FTC's proposed amendment to this Rule will require U.S. financial institutions to encrypt all customer data, use multifactor authentication to access customer data, and implement controls to prevent unauthorized access to customer information.

Under the Privacy Rule, which went into effect in 2000, financial institutions are required to inform customers about their information-sharing practices and allow customers the right to opt out of the sharing of their information with third parties. Pursuant to the Dodd-Frank Act in 2010, the CFPB has the majority of the rulemaking authority in this area, but the FTC's proposed amendments would clarify the application of the Rule's privacy notice requirements to motor vehicle dealers, over which the FTC retains authority. The FTC also has sought to increase the scope of the definition of "financial institution" in both Rules to include so called "finders" – entities that charge a fee to connect consumers who are looking for loans to lenders.

The FTC also published a request for public comment on its implementation of the Children's Online Privacy Protection Act ("COPPA") Rule. COPPA regulates how websites and online services collect data and personal information from children. The FTC's COPPA Rule requires that operators who collect personal information from children under the age of 13 provide notice to parents and obtain verifiable parental consent before collecting, using, or disclosing personal information from those children. The FTC is also seeking comment on whether the 2013 revisions to the Rule have resulted in stronger protections for children and greater parental control over the collection of personal information from children, as well as whether these changes have had any negative consequences. On October 7, 2019, the FTC held a public workshop to examine the Rule. The deadline to comment was December 9, 2019.

Second, FTC Commissioner Christine Wilson said that federal privacy laws should preempt state privacy laws that have been unworkable for businesses. Wilson stated that the efforts of states to pass individual privacy laws would lead to a patchwork that is "very unworkable for the industry." Wilson and FTC Chairman Joe Simons want Congress to delegate more power to the FTC to make rules and impose fines for first offenses in a federal privacy law. Companies such as tech groups agree, but privacy advocates argue against federal preemption that does not leave some privacy enforcement powers to the states.

Finally, amidst policy discussions and rulemaking, the FTC continued to take action on data and privacy security. For example, in April, the operators of two websites agreed to settle claims with the FTC relating to allegations that they failed to take reasonable steps to secure consumers' data, which allowed hackers to breach both websites. The cases were filed against i-Dressup.com, a website that allows users of all ages to play dress-up games, design clothes, and decorate personal online spaces, and the operator of ClixSense.com, a website that pays users to view advertisements, perform online tasks, and complete surveys. The FTC alleged that the websites' inadequate security procedures led to subsequent data incidents. Additionally, the FTC alleged that i-Dressup failed to comply with the COPPA and that ClixSense's representations to consumers regarding security were false and deceptive. As part of the proposed settlement, for any company he controls, ClixSense's operator is required to implement a comprehensive information security program. Both operators are required to obtain independent biennial assessments and provide an annual certification of compliance to the FTC.

The FTC also announced a settlement with LightYear Dealer Technologies, LLC, doing business as DealerBuilt, a company selling software and data services to auto dealers. The FTC alleged that DealerBuilt's poor data security practices resulted in a breach that exposed the personal information of millions of consumers. DealerBuilt did not detect the breach until it was notified by one of its auto dealer customers. DealerBuilt's settlement with the FTC requires the company to put into place an information security program with certain required elements and provides insight into the type of program that the FTC expects every company to have in place.

In June, the Consumer Education Foundation, a California-based nonprofit consumer organization, filed a petition with the Federal Trade Commission requesting the investigation of the use of so-called

"Secret Surveillance Scores" in the consumer market. The complaint alleges that consumer data points are covertly tracked and amassed by private firms to create a single Secret Surveillance Score that is generated by software algorithms to provide a "digital mugshot." Neither the algorithm nor the Secret Surveillance Score is disclosed to the consumer. The petition argues that the use of Secret Surveillance Scores is an unfair and deceptive practice under Section 5 of the FTC Act and requests the FTC to enjoin companies from using Secret Surveillance Scores if it is determined that their use violates Section 5 of the FTC Act. There has been no update on this investigation.

In July, the FTC filed an administrative complaint against Cambridge Analytica, alleging that the company deceived consumers by falsely claiming it did not collect any personally identifiable information from Facebook users when it, in fact, collected users' Facebook User ID and other personal information such as gender, birthdate, location, and their Facebook friends list. The FTC's complaint also alleges that Cambridge Analytica falsely claimed that it was a participant in the E.U.-U.S. Privacy Shield framework after its certification lapsed in May 2018. Cambridge Analytica worked with a Facebook application called GRSApp or "thisisyourdigitallife" app, which paid users a nominal fee to take a personality survey and in turn, collected personal information. The CEO of Cambridge Analytica and the developer of GRSApp entered into a proposed settlement with the FTC in which they are prohibited from making false or deceptive statements regarding the extent to which they collect, use, share, or sell personal information, as well as the purposes for which they collect, use, share, or sell such information. The proposed consent order was made available for public comment from August 1 through September 3, 2019. The FTC will now decide whether to make the orders final.

There was a wave of FTC crackdown efforts against companies for falsely claiming participation in international privacy agreements. In addition to the action taken against Cambridge Analytica, in August, the FTC approved a final consent order settling charges that SecurTest, Inc., a background screening company, falsely claimed to be complying with international privacy frameworks. The FTC filed a complaint alleging that, although SecurTest initiated a Privacy Shield application with the U.S. Department of Commerce in September 2017, the company did not complete the steps necessary to be certified as compliant. According to the complaint, because SecurTest had failed to complete its certification, it was "not a certified participant in the frameworks."

Credit Repair Company

In June the U.S. District Court for the District of Connecticut granted a temporary restraining order to the FTC to stop the operations of Grand Teton Professionals, a credit repair company. The FTC previously filed a complaint against Grand Teton and related entities, including its owners in their individual capacities – alleging that they operated an illegal credit repair scheme that charged improper upfront fees and falsely claimed to repair consumers' credit. The FTC complaint contains multiple allegations, including claims that the defendants, including its two owners, illegally obtained at least $6.2 million from consumers. Under the terms of the temporary restraining order granted by the Court, Grand Teton has temporarily ceased operations and the defendants' assets are frozen.

Robocalls

In June, the FTC announced a partnership with law enforcement to target illegal robocalls, including 94 actions aimed at operations around the nation that are responsible for more than a billion robocalls. "Operation Call it Quits" is aimed at reducing the number of pre-recorded telemarketing calls and includes new information aimed at educating consumers. The partnership also aims to promote the development of technological solutions to block robocalls and prevent caller ID spoofing. As part of "Operation Call it Quits," multiple civil cases were filed in federal court and the FTC announced settlements with Lifewatch, Inc.; Redwood Scientific; and Life Management Services, imposing judgments of $25.3 million, $18.2 million, and $23.1 million, respectively.

FDCPA Statute of Limitations

In October, the U.S. Supreme Court held oral argument for *Kevin C. Rotkiske, Petitioner v. Paul Klemm, et al.*, regarding a consumer's appeal from the Third Circuit's ruling that his claims under the Fair Debt Collection Practices Act were time-barred despite being brought within one year of discovering the violation. The circuits have been split on whether the one-year statute of limitations under the FDCPA begins to run when an alleged violation takes place or when it is discovered. The split has caused uncertainty about potential liability under the FDCPA. As of the date of printing, an opinion had not yet been issued by the Court.

STATE ATTORNEYS GENERAL

Stances on Federal Regulations and Legislation

In June 2018, the attorneys general of twenty states stated their opposition to two bills – the Protecting Consumers' Access to Credit Act of 2017 (HR 3299) and the Modernizing Credit Opportunities Act of 2017 (HR 4439) – that would expand the scope of federal preemption to include non-bank entities. In a letter to Congressional leadership the AGs stated that "[t]he states have long held primary responsibility for protecting American consumers from abuse in the marketplace," and attacked the legislative efforts as likely to "allow non-bank lenders to sidestep state usury laws and charge excessive interest that would otherwise be illegal under state law." The Protecting Consumers' Access to Credit Act of 2017 passed the House and was introduced in the Senate; the Modernizing Credit Opportunities Act of 2017 remains in the House Committee on Financial Services.

2019 also saw an increase in regulatory action by state AGs, including multiple multi-district settlements, as well as other efforts discussed more fully in the next section.

Attorneys general have weighed in in favor of other legislation. For example, the attorneys general of all 50 states, as well as the District of Columbia, Puerto Rico, the Virgin Islands, and Guam, have offered their support to the Telephone Robocall Abuse Criminal Enforcement and Deterrence ("TRACED") Act (S. 151). The TRACED Act is aimed at significantly reducing robocalls. The AGs sent a letter on March 5 to the U.S. Senate Committee on Commerce, Science, and Transportation in which the AGs asserted that the legislation takes "meaningful steps to abate the rapid proliferation of these illegal and unwanted robocalls." The TRACED Act passed the Senate and remains in the House Committee on Energy and Commerce.

In May, a bipartisan group of attorneys general from thirty-eight states signed on to a letter backing the Secure and Fair Enforcement ("SAFE") Banking Act (H.R. 1595). The SAFE Banking Act was introduced to provide businesses access to banks and other financial services in those states where marijuana has been legalized. The proposed law also offers banks protections from federal regulators who could punish banks for working with cannabis businesses. The bill passed the House and remains in the Senate Committee on Banking, Housing, and Urban Affairs.

A group of 21 states and the District of Columbia submitted a comment letter opposing the CFPB's effort to revise and boost its Policy on No-Action Letters ("NAL Policy") and the creation of a CFPB Product Sandbox. The NAL Policy and Product Sandbox are meant to allow companies to provide innovative financial services and products under a relaxed regulatory regime. In a February 11 letter, the states express concern that relaxed regulation could lead to consumer harm and are asking the CFPB to reevaluate its proposed policies given the significant risks to consumers and the entire U.S. financial system. The states asserted that various issues would undermine the potential effectiveness of the proposed policy, potentially leading to consumer harm.

Excessive Fines Clause

In February, the Supreme Court issued an opinion holding that the Excessive Fines Clause has been (or should be) made applicable to the states through the Fourteenth Amendment. In its opinion vacating and remanding an Indiana Supreme Court decision, the Supreme Court of the United States held that the Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the states

under the Fourteenth Amendment's Due Process Clause. This opinion provides the consumer finance industry with significant protection from fines and penalties sought by states.

Multi-State Settlements

In a display of states' increased action within consumer financial services law, there were multiple multi-state settlements in 2019. A few are highlighted below.

In January, 49 state attorneys general announced a settlement with Career Education Corporation ("CEC"), a for-profit education company, to resolve claims that CEC engaged in unfair and deceptive practices such as unscrupulous recruitment and enrollment practices. The settlement requires CEC to forgo any collection efforts against $493.7 million in outstanding loan debt held by nearly 180,000 former students. It also imposes a $5 million fine on the company. California was the only state not participating.

Consistent with state data breach notification laws, the Neiman Marcus Group LLC publicly announced in January 2014 that its customers' payment card information had potentially been compromised at 77 Neiman Marcus retail locations between March 2013 and January 2014. In total, 370,000 credit cards were compromised as a result of the intrusion, and at least 9,200 credit cards are known to have been used fraudulently. In February, almost five years later, state attorneys general from 43 states and the District of Columbia entered into an Assurance of Voluntary Compliance with Neiman Marcus, closing the multistate investigation after Neiman Marcus agreed to pay a $1.5 million civil penalty.

In May, medical software company Medical Informatics Engineering, Inc. and its subsidiary NoMoreClipboard, LLC settled a first-of-its-kind lawsuit brought by several state attorneys general alleging violations of the Health Insurance Portability and Accountability Act following a data breach. The lawsuit alleged that the defendants fell short of their obligations under HIPAA and various state laws to maintain the security of private individual health information contained within its systems. The multi-state settlement, in the form of a consent judgment, includes a $900,000 civil penalty as well as injunctive measures requiring the defendants to assess and improve their information security protocols.

Automotive Industry

In January, a Connecticut-based automobile finance company settled a claim by the Massachusetts Attorney General's Office. The Massachusetts AG claimed that the finance company facilitated the sale of defective vehicles by a group of Massachusetts car dealerships by supplying the dealerships with financing, despite knowing about consumer complaints and high rates of default and repossession of vehicles sold by the dealerships. As part of the settlement, Sensible Auto Lending LLC agreed to provide debt relief in the amount of $733,925.

In March, the New Jersey Attorney General's Office filed suit against two automobile dealerships and their owner in the Superior Court of New Jersey, alleging that the dealerships should be closed and their owner barred from the industry because they targeted financially vulnerable consumers with a variety of unconscionable and deceptive business practices. The case is still pending in New Jersey state court.

Data Security and Privacy

In April, the Washington State Legislature passed H.B. 1071, a bill designed to strengthen the state's data breach notification law. Once signed by Governor Jay Inslee, the bill took effect, expanding the definition of "personal information," shortening the deadline to notify impacted residents and to notify the attorney general, amending notification content requirements, and introducing new requirements when log-in credentials are compromised. Companies tracking data breach notification requirements as part of their incident response plans, policies, and procedures should be prepared to update their materials to account for these changes.

In July, Bombas, a manufacturer of socks, settled with the New York attorney general over failing to give proper notification of a breach of customers' credit card data in 2014. Bombas initially addressed the breach in 2014 when it determined that hackers had gained access to the information of nearly 40,000 customers, including names, addresses, and credit card numbers, by inserting a malicious code into Bombas' e-commerce platform, Magento. Of the nearly 40,000 customers impacted, approximately 3,000 were residents of New York State. As a result of its settlement with the State of New York, Bombas agreed to pay $65,000 in penalties for the violation and agreed to implement new data security policies aimed at preventing data breaches in the future.

Objections to Proposed Class Settlements

In May, and fresh off the heels of an in-depth report detailing Arizona Attorney General Mark Brnovich's leadership and consistent scrutiny of class action settlements, the Department of Justice and twelve state attorneys general, led by Arizona, independently filed objections to a proposed nationwide class action settlement between consumers and Dial. The class settlement focused on misleading advertisements related to the effectiveness of triclosan, the active ingredient in Dial Complete hand wash. This is at least the fourteenth instance where Brnovich has led a bipartisan group of state attorneys general in objecting to a proposed class action settlement.

Robocalls

Mirroring FTC efforts regarding robocalls, in August, state attorneys general from all fifty states and the District of Columbia, in conjunction with large telecom companies, unveiled a new agreement to combat robocalls. This is the latest step from the government and the telecom industry to address this growing problem as Americans get nearly 5 billion automated calls every month. Participating companies include heavyweights AT&T, Verizon, T-Mobile, Sprint, and CenturyLink, among others. While the agreement may not stop illegal calls altogether, it will help in efforts to track the originators and facilitators of illegal robocalls.

The Road Ahead: Local and Joint Local-State Action

Many state attorneys general and state regulators have heightened their supervisory and enforcement activity in the wake of a perceived slackening of enforcement at the federal level. This increase in action is now extending to local governments, many of which have begun to partner with states or take independent action to fill the perceived federal regulatory enforcement void. Recent local and joint local-state actions include actions in areas including opioids, electronic cigarettes, climate change, and illegal immigration. While each of these examples will be discussed briefly, the takeaway is that the regulatory landscape is again changing. The story for regulatory observers over the past three years has been a ramp-up in activity by state attorneys general and other state regulators. The story for 2020 and beyond appears to be a similar ramp-up in regulatory activity by localities on their own and in conjunction with the states.

Opioids

Thousands of localities bringing lawsuits can result in high cost and complex litigation and negotiation processes. In the wake of what has become known as the opioid crisis, local governments initiated thousands of lawsuits against large pharmaceutical companies and distributors. These suits were filed by localities seeking to recoup costs they claimed to have incurred as a result of their citizens' increased reliance on opioids and the resulting addictions and overdoses. Specifically, localities claim to have expended significant resources due to their citizens' increased need for medical care, rehabilitation services, law enforcement, public safety, and other community services.[1]

While state attorneys general have intervened in these cases, they were initiated by localities represented by private law firms, resulting in thousands of lawsuits filed in federal court and, ultimately, multidistrict litigation ("MDL") taking place in the U.S. District Court for the Northern District of Ohio. Defendants in these cases are not negotiating with a single federal agency but face the demands of individual localities and states, all of which do not always seem to have the same goal.

The difficulties associated with such negotiations are highlighted by the opposition to a settlement framework proposed in October. This framework was the result of talks between multiple attorneys general, three pharmaceutical distributors, and a multinational corporation that develops medical devices, pharmaceuticals, and consumer packaged goods. The result was a settlement framework that would have the four defendants paying a total of $48 billion. However, private attorneys representing local governments, and at least one attorney general, vehemently rejected the deal. Further complicating the issue, it is unclear that localities will accept negotiations made through the states because of concerns about how resulting funds would be allocated.

There have been some successful settlements with localities. For example, two Ohio counties reached a $260 million settlement with drug companies, avoiding the first trial in the MDL. However, there is little indication that a global settlement is near, and the judge presiding over the MDL is persistent in his efforts to ensure the case is moving forward through bellwether trials – discrete trials meant to test selected arguments – ultimately forcing those involved in the smaller trials to negotiate in smaller groups or bring the issues to a jury.

Electronic Cigarettes

The electronic cigarette (e-cigarette) industry is being targeted for regulation to address what has been termed the youth vaping epidemic. While some localities, and at least one state, have filed suit against e-cigarette companies, much of the state and local oversight has come in the form of laws and ordinances regulating the industry. As many as 220 localities have passed restrictions on the sale of flavored tobacco products, which are largely used in conjunction with e-cigarettes.

Some of the most prominent localities to pass these bans include Los Angeles County, the City of San Francisco, Chicago, and New York City. These regulations vary in their breadth and application, with some limiting the sale of certain products to specified stores, and others prohibiting their sale altogether. Some bans apply only to e-cigarette-related products while others extend to more traditional tobacco products. However, all the local regulations preceded state or federal action on the matter.

[1] *See, e.g., Luzerne County, Pennsylvania v. Purdue Pharma L.P., et al.*, Case No. 3:17-cv-02043-RDM, ECF. 1, (M.D. Pa. November 8, 2017)

While there have been indications that the federal government is backing away from imposing similar regulations, states seem to be on the same page as localities. At least eight states enacted emergency regulations addressing e-cigarettes in various forms. Most of those regulations were halted by courts, which held that state executive branches had overstepped their emergency authority, but many states are considering traditional legislation that would enact state-wide bans on flavored tobacco products. Again, the proposed legislation varies in breadth and application. Recently Massachusetts became the first state to pass a law that bans the sale of flavors, including mint and menthol, of both traditional and electronic cigarettes. The passage of this law is a clear sign that some states are willing to take up the regulation of e-cigarettes on their own, if the federal government does not do so.

Climate Change

State and local government action is not limited to consumer protection regulations. Rather, states and localities have made it clear that they will not hesitate to regulate when the federal government chooses not to intervene in various areas where states and localities believe they have an interest. A prime example of this is New York State's passage of the Climate Leadership and Community Protection Act ("CLPA").[2] The CLPA requires the state to reduce its greenhouse gas emissions by 85%, requiring massive efforts across multiple industries.

In order to reach this goal, the CLPA authorizes the promulgation of rules and regulations to ensure compliance with statewide emission reduction limits. These regulations will have a clear impact on some industries that are reliant on the consumption of gas and diesel, such as the automotive industry. However, the impact will go far beyond that, affecting businesses that will be forced to move to green energy sources and requiring the retrofitting of countless homes and buildings to comply with the laws.

While the CLPA is a massive undertaking for New York State, it is aided by the efforts of New York City. New York City's City Council passed the Climate Mobilization Act also aimed at curbing greenhouse gas emissions. The City's legislation imposes laws that aid the goals of the CLPA. For instance, it includes a bill that requires large and medium-sized buildings to reduce their emissions 40% by 2030 and 80% by 2050. The actions of the state and city exemplify the willingness of local and state governments to coordinate efforts in the absence of federal regulation, and it suggests these efforts could have a very large impact on industries in the state.

Illegal Immigration

In the examples discussed thus far, state and local agencies have taken action where the federal government has refrained from regulating. However, when it comes to the issue of illegal immigration, localities have acted, or refused to act, despite the

[2] https://council.nyc.gov/data/green/

existence of clear federal policy already occupying the space. Specifically, in "sanctuary cities," officials refuse to hand over illegal immigrants to federal agencies for deportation. There have been efforts to refuse federal funding to these cities, which has brought to the forefront issues relating to localities' roles in policy decisions.

For example, the City of Evanston, Illinois challenged a condition of a federal grant requiring the city to describe its laws, policies, or practices relating to its communication with federal immigration authorities.[3] In September, the U.S. District Court for the Northern District of Illinois issued a permanent injunction against the imposition of the challenged condition upon Evanston and any member of co-plaintiff U.S. Conference of Mayors, that had been allocated, applied for, or had been awarded the federal grant in the past two years, and in all future years.

The Court's decision to grant the injunction was based on statutory interpretation and a holding that the attorney general lacked statutory authority to impose the challenged condition. Courts have ultimately come out on both sides of issues relating to federal grants and sanctuary cities, in some cases allowing federal departments to give preferential treatment in awarding grants to cities that cooperate with immigration authorities.[4] However, the takeaway is not whether or not federal grants can impose immigration policy-related conditions, but that localities sometimes are willing to take certain actions despite clear federal policy to the contrary.

Second Amendment Sanctuary Localities

At the end of the year, a number of localities in Virginia made it clear that they will take steps when they oppose proposed state action. Specifically, in an attempt to buck potential state legislative action on gun control, a number of Virginia localities have identified themselves as "Second Amendment Sanctuaries." While the 2020 legislative session has not begun, county residents have attended local board meetings in record numbers, largely to show their support for the sanctuary resolutions.

The resolutions' language varies by county. Some resolutions express the locality's "intent to continue to take lawful actions to protect and support the rights of its citizens to keep and bear arms as guaranteed by the United States and Virginia Constitutions, and not to aid in unconstitutional efforts to restrict these rights."[5] Other resolutions more clearly articulate how the counties intend to push back against legislative action. For example, Gloucester County, Virginia's resolution states that it intends to "use such legal means at its disposal … including through legal action, the power of appropriation of public funds, and the rights to petition for redress of grievances."[6]

Regardless of the language used in the resolutions, counties do not have legal standing to refuse to enforce state law. This is recognized in the text of Bath County, Virginia's resolution, which notes "the Board has no legislative, regulatory, or enforcement authority related to the purchase, possession, transfer, ownership, carrying, storage or transporting of firearms, ammunition, or components or combination thereof" and "has no authority over the independent execution of the duties of the constitutional officers involved in law enforcement." [7] Even where these resolutions lack legal bite, they are a clear sign to state legislators that localities may be willing to take public measures to oppose state action, when their interests do not align with those of the state. The ultimate effect of these resolutions on state legislators in Virginia will be seen during the 2020 legislative session.

[3] *City of Evanston et al. v. William Barr*, Case No. 1:18-cv-4853 (N.D. Ill. July 16, 2018)

[4] *See e.g. City of Los Angeles v. William Barr*, Case No. 18-55599 (9th Cir. July 12, 2019)

[5] A Resolution Affirming the Constitutions of the United States and Virginia and Declaring Bath County as a Second Amendment Sanctuary County, Bath County Board of Supervisors, December 10, 2019, *available at* http://bathco.hosted.civiclive.com/public_information/agendas_and_public_notices; *see also*.

[6] Resolution of Gloucester County Board of Supervisors, Gloucester County Board of Supervisors, December 3, 2019, *available at* https://gloucester.granicus.com/GeneratedAgendaViewer.php?view_id=10&clip_id=2194.

[7] A Resolution Affirming the Constitutions of the United States and Virginia and Declaring Bath County as a Second Amendment Sanctuary County, *see supra* n. 7 (internal quotations omitted).

TELEPHONE CONSUMER PROTECTION ACT

The TCPA in Flux

The effects of the D.C. Circuit's March 2018 decision in *ACA International, et al., v. Federal Communication Commission, et al*., 885 F.3d 687, 695 (D.C. Cir. 2018), are still being seen today. Despite the D.C. Circuit's ruling over a year and a half ago, the FCC has not stepped in to fill the many voids created by the *ACA* decision. As the industry awaits rulemaking from the FCC, the TCPA remains in a state of flux.

This year we have also seen multiple First Amendment challenges to the TCPA and courts weighing in on Article III standing in the TCPA context.

Varying ATDS Standards in the Wake of *ACA*

Since the D.C. Circuit's decision in *ACA International*, there is significant ambiguity as to the definition of an automatic telephone dialing system ("ATDS"). Courts across the country have applied different standards when determining whether a telephone qualifies as an ATDS.

The Third Circuit, along with multiple district courts, has interpreted the statutory definition of an ATDS narrowly. These courts require the telephone equipment at issue to have the ability to generate random or sequential numbers and dial those numbers. *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018); *Snow v. GE*, No. 5:18cv511, 2019 U.S. Dist. LEXIS 99760, at *16-17 (E.D.N.C. June 14, 2019); *Richardson v. Verde Energy USA, Inc.*, 354 F. Supp. 3d 639, 650 (E.D. Pa. 2018).

On the other end of the spectrum, the Ninth Circuit, in *Marks v. Crunch San Diego, LLC,* held that the statutory definition of an ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator. 904 F.3d 1041, 1052 (9th Cir. 2018). *Marks* is a controversial decision that many district courts have rejected.

Additionally, some district courts have held that predictive dialers – devices that do not generate random or sequential numbers – do not qualify as an ATDS. *See e.g.*, T*hompson-Harbach v. USAA Fed. Sav. Bank*, 359 F. Supp. 3d 606, 626 (N.D. Iowa 2019); Marshall v. CBE Grp., Inc., No. 2:16-cv-02406-GMN-NJK, 2018 U.S. Dist. LEXIS 55223 (D. Nev. Mar. 30, 2018). While other courts still focus on whether the call was placed automatically or required human intervention. *See e.g., Glasser v. Hilton Grand Vacations Co., LLC,* No. 8:16-cv-952, 2018 U.S. Dist. LEXIS 162867, at *8 (M.D. Fla. Sept. 24, 2018); *Ammons v. Ally Fin., Inc*., 326 F. Supp. 3d 578, 588 (M.D. Tenn. July 27, 2018).

These cases demonstrate the state of flux regarding what equipment constitutes an ATDS and how the same telephone equipment may be interpreted differently in different jurisdictions. Until the FCC steps in and provides guidance, we will continue to see the TCPA in conflict.

Exceptions and Exemptions to the TCPA

2019 proved to be a robust year for litigation of exceptions and exemptions from the TCPA, including multiple cases that addressed the non-commercial purpose and emergency purpose exceptions to TCPA liability. By way of background, the TCPA contains separate exemptions for calls made to residential telephones, faxes, and cellular telephones. While "health care messages," for example, have been found to be validly exempt from TCPA prohibitions against residential lines, only the non-commercial and emergency purpose exceptions have been found to apply to all three types of telephone recipients (landline, cell, and fax) regulated by the TCPA.

In *Savett v. Anthem, Inc.*, No. 1:18-cv-274, 2019 WL 5696973, at *4–5 (N.D. Ohio Nov. 4, 2019), the

Northern District of Ohio confirmed that "[t]he FCC does not define 'commercial purpose,' but has stated that the non-commercial purpose exemption serves to exempt 'prerecorded messages that are non-telemarketing, informational calls, such as calls by or on behalf of tax-exempt non-profit organizations, calls for political purposes, and calls for other noncommercial purposes, including those that deliver purely informational messages such as school closings.'" *Id*. at *4 (citing *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, 1831 (2012)).

Relying on several 2017 cases that applied the non-telemarketing exception, the *Savett* court held that "[a]ll of Anthem's calls[, including flu shot reminders, welcome calls, and telehealth reminder calls,] fall under the non-telemarketing exemption … . At no point, however, was Anthem selling any product or using the calls as a pretext to sell a product in the future. The calls all 'lack[ed] the commercial components inherent in ads.'" *Id*. at *5 (citing *Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218, 222 (6th Cir. 2018)). Notably, the Western District of New York declined to apply the same logic in a cellular telephone case. *See Gerrard v. Acara Sol. Inc.*, 1:18-cv-1041, 2019 U.S. Dist. LEXIS 108038, 2019 WL 2647758 (W.D.N.Y. June 27, 2019) (denying motion to dismiss based on non-commercial exception).

Similar to *Savett*, in *Robert W. Mauthe, M.D., P.C. v. Optum Inc*., 925 F.3d 129, 134-35 (3d Cir. 2019), the Third Circuit declined to find third-party liability under the TCPA for faxes sent to the plaintiff because "the faxes did not attempt to influence the purchasing decisions of any potential buyer, whether a recipient of a fax or a third party. Moreover, the fax sent to Mauthe did not encourage him to influence the purchasing decisions or those of a third party." Accordingly, the Third Circuit declined the plaintiff's request to find an advertisement where none existed. Id. In so doing, there could be no liability under the TCPA's ban against unsolicited fax advertisements.

In addition to excepting non-commercial purpose calls, the TCPA also contains explicit exemptions from liability for calls made with an emergency

The TCPA also contains explicit exemptions from liability for calls made with an emergency purpose.

purpose, and 2019 also contained notable decisions affirming the breadth of these exemptions. For example, in *Brooks v. Kroger Co*., No. 3:19-cv-00106-AJB-MDD, 2019 WL 3778675, at *3 (S.D. Cal. Aug. 12, 2019), plaintiff Derrick Brooks claimed that Kroger called him "for marketing purposes" using an automatic telephone dialing system, or "ATDS," in violation of the TCPA when it called to warn him about salmonella-tainted beef that had been sold by the retailer. Brooks filed a class action lawsuit against Kroger over the calls. The Court rejected Brooks' claims, noting that the TCPA includes an explicit "emergency" purpose exception to the statute. *See* 47 U.S.C. § 227(b)(1)(A)(iii) (excluding a "call made for emergency purposes" from the statute); *id*. (b)(1)(B) (same). An emergency purpose is "any situation affecting the health and safety of consumers." 47 C.F.R. § 64.1200(f)(4). According to the Court, a call made to warn about a health risk – such as salmonella-tainted beef – regarded a situation affecting the health of consumers. Perhaps most importantly, the Court also refused to narrow the TCPA's emergency exception. It found that "Kroger had a bona fide emergency in its tainted and potentially life-threatening beef, and thus called potential consumers of that beef to warn them." Doing so was not a violation of the TCPA.

As litigants eagerly await additional clarity from the FCC on the definition of ATDS and reassigned number liability, litigating legal loopholes to the TCPA has proved a fruitful alternative for TCPA defendants in 2019.

Wrong Number Calls Post-*ACA*

Previously, the FCC had adopted a "One Call Safe Harbor" rule under which liability arose under the TCPA after one wrong number call. But this rule was struck down by the D.C. Circuit in *ACA Int'l v. FCC,* 885 F.3d 687, 706 (D.C. Cir. 2018). Since the ruling in ACA Int'l, the FCC has not provided any new guidance on this issue.

However, in an attempt to alleviate the problems posed by wrong number calls, the FCC issued an Order in December of 2018 which establishes a single, comprehensive database of reassigned numbers. The database will track permanently disconnected numbers, which will be provided by telephone providers on a monthly basis, and there will be a 45-day waiting period before such numbers may be reassigned. By checking numbers against the database, callers will be able to limit their risk of liability for wrong number calls. The rule also provides for a safe harbor from liability for any calls to reassigned numbers caused by database error.

The database was initially intended to be available by late 2019. However, the organization charged with providing recommendations on certain technical aspects of database establishment, operation, and funding – the North American Numbering Council's ("NANC") Numbering Administration Oversight Working Group ("NAOWG") – has yet to present its findings. In an Order issued September 12, 2019, the FCC extended the deadline for the NANC to file its recommendations until January 13, 2020. Once these recommendations are received, it will then take several additional months for the plan to be fully implemented. Accordingly, the wrong number database is not likely to be available for use until sometime late next year.

While awaiting the creation of the FCC's database, wrong number litigation has continued to increase. This includes numerous cases dealing with the issue of whether wrong number TCPA claims can be maintained as a class action. Several courts have found that they cannot, finding that individual issues involving consent would predominate over common issues. *See, e.g., Hunter v. Time Warner Cable Inc.*, No. 15-cv-6445 (JPO), 2019 U.S. Dist. LEXIS 137495, at *45-46 (S.D.N.Y. Aug. 14, 2019) (denying class certification on the grounds that common issues regarding how class members were called or the shared source of records related to those call would be "overshadowed by the individual inquiries that would be required to determine whether the alleged wrong-number recipients identified by Plaintiffs were eligible for class membership or ineligible on grounds of consent."); *Revitch v. Citibank*, N.A., No. C 17-06907 WHA, 2019 U.S. Dist. LEXIS 72026, at *12-13 (N.D. Cal. Apr. 28, 2019) (denying class certification based on a finding that adjudicating whether or not members of the class consented to the calls at issue lacks a common method of proof and would "devolve into individualized inquiries which would overwhelm the trial"). In other instances, however, defendants have agreed to limit their potential exposure and settle wrong number class actions. *See, e.g., Williams v. Bluestem Brands, Inc.*, No. 8:17-cv-1971-T-27AAS, 2019 U.S. Dist. LEXIS 56655 (M.D. Fla. Apr. 2, 2019) (approving a settlement of $1,269,500); *Busch v. Bluestem Brands, Inc.*, No. 16-cv-0644 (WMW/HB), 2019 U.S. Dist. LEXIS 177161, at *11 (D. Minn. Oct. 11, 2019) (approving a settlement of $5,250,000).

Can Consent to Receive Calls be Irrevocable?

Although the fact that a consumer has provided consent is a defense to claims under the TCPA, parties may generally revoke their consent "through any reasonable means clearly expressing a desire to receive no further messages from the caller." *ACA Int'l v. FCC,* 885 F.3d 687, 692 (2018). But a split in authority exists as to whether consent can be revoked where the consent was given as part of the consideration for a contract.

The debate begins with *Reyes v. Lincoln Auto. Fin. Servs*., 861 F.3d 51, 56 (2d Cir. 2017), in which the Second Circuit found that the "TCPA does not expressly permit a party who agrees to be contacted as part of a bargained-for exchange to unilaterally revoke that consent," and declined to "read such a provision into the act." The Court therefore held that the consent provided by the plaintiff in a contract for the lease of an automobile was irrevocable and precluded liability under the TCPA. *Id*. at 57-58.

Since the *Reyes* decision, courts outside the Second Circuit have been divided on the issue of whether consent can ever be irrevocable. This trend continued in 2019.

In *Singer v. Las Vegas Ath. Clubs*, 376 F. Supp. 3d 1062, 1073-74 (D. Nev. 2019), the District of Nevada refused to follow *Reyes*, determining that even contractual consent may be revoked in any reasonable manner. Similarly, the District of Delaware found that the Third Circuit had rejected the arguments regarding contractual consent accepted in *Reyes* and held that a plaintiff may unilaterally revoke consent. *Franklin v. Navient Corp.*, Civil Action No. 17-1640-RGA, 2019 U.S. Dist. LEXIS 150902, at *16 (D. Del. Sep. 5, 2019), *citing Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 273-74 (3d Cir. 2013).

The Southern District of Florida, however, reached the opposite conclusion. In *Lucoff v. Navient Sols., LLC*, 393 F. Supp. 3d 1119 (S.D. Fla. 2019), the plaintiff was a member of a TCPA class action that had previously settled. Under the terms of the settlement agreement in the earlier matter, the plaintiff provided express consent to receive future calls. *Id*. at 1127. In granting summary judgment in favor of the defendant, the Southern District of Florida stated that it was persuaded by the *Reyes* decision and found that "under common law, Plaintiff's consent was irrevocable" and the defendants "did not violate the TCPA as a matter of law when they contacted Plaintiff using autodialed and prerecorded calls." *Id*. at 1128.

We will continue to monitor how courts treat the issue of contractual consent and continue to argue that *Reyes* correctly determined that such consent, once given, cannot be unilaterally revoked.

Article III Standing and the TCPA

We have also seen two significant TCPA standing decisions come out of the Eleventh Circuit this year. These decisions have large implications for cases pending in district courts within the Eleventh Circuit, including Florida – a hotbed of TCPA litigation. The decisions will also provide TCPA defendants nationwide with additional arguments to overcome a TCPA claim.

In *Salcedo v. The Law Office of Alex Hanna, et al*., the Eleventh Circuit held that receiving a single unsolicited text message was an insufficient harm to create Article III standing. 936 F.3d 1162, 1172 (11th Cir. 2019). In *Salcedo*, the plaintiff alleged that he received a single text message from the defendant that caused him "to waste his time answering or otherwise addressing the message." *Id*. at 1167. The plaintiff also alleged the text message "resulted in an invasion of [his] privacy and right to enjoy the full utility of his cellular telephone." *Id*. Notably, the plaintiff did not allege that the text message cost him money or caused him to incur additional costs from his cell phone carrier. *Id*. at 1168. Based on these alleged harms, the Court

Salcedo provides TCPA defendants with another argument to disrupt individual and class actions under the TCPA.

assessed the plaintiff's standing in view of Eleventh Circuit precedent, the intent of Congress, and the historical assessment of standing. Ultimately, the Court held that the plaintiff's "allegations of a brief, inconsequential annoyance are categorically distinct from those kinds of real but intangible harms," such that the plaintiff lacked Article III standing. *Id*. at 1172.

Salcedo provides TCPA defendants with another argument to disrupt individual and class actions under the TCPA. While it could be very powerful, especially in the Eleventh Circuit, we are interested to see how district courts actually apply it.

First Amendment Challenges to the TCPA

Several cases involving challenges to the constitutionality of the TCPA have been decided in the past year. The arguments, based on the First Amendment, are two-fold. The first is that the TCPA's prohibition on making calls with an ATDS is an unconstitutional restriction of free speech. The second contends that § 227(b)(1)(A)(iii) of the TCPA contains an impermissible content-based restriction on speech because it creates an exception for calls "made solely to collect a debt owed to or guaranteed by the United States."

In a pair of decisions, the Ninth Circuit found that the government debt exception, which was added by the 2015 amendment to the TCPA, is a "content-based speech regulation that fails strict scrutiny, and thus is incompatible with the First Amendment." *Gallion v. United States*, 772 F. App'x 604, 605 (9th Cir. 2019); *see also Duguid v. Facebook, Inc*., 926 F.3d 1146, 1156 (9th Cir. 2019). But the Ninth Circuit declined to invalidate the statute as a whole. Rather, it severed the government debt collection exception from the TCPA and found that the remainder of the statute to be constitutional. *Gallion*, 772 F. App'x at 606; *Duguid*, 926 F.3d at 1157.

A similar result was reached in *Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 171-72 (4th Cir. 2019), in which the Fourth Circuit also struck down the government debt collection exception but found the remainder of the TCPA to be constitutional once this provision had been severed from the statute.

On October 17, 2019, the defendant in *Duguid* filed a Petition for Writ of Certiorari seeking to bring the First Amendment challenges to the TCPA before the Supreme Court. A similar petition was filed by the defendant in *Gallion* on November 1, 2019. We will continue to monitor and provide updates should the Supreme Court choose to hear these appeals and provide a final determination as to the constitutionality of the TCPA.

Shocking Jury Verdicts

The TCPA damage provision allows for the greater of actual damages or $500 per violation of the statute. Treble damages are permitted upon a finding of willfulness. 47 U.S.C. § 227(b)(3)(B). While there is no attorneys' fees provision, unlike almost every other consumer-facing statute, there is also no cap on the amount of damages available to a plaintiff or a class. As a result, jury verdicts can reach astonishing figures. This year alone we saw multiple eight- to nine-figure jury verdicts.

In a TCPA class case litigated in the District of Oregon, *Wakefield v. ViSalus Inc.*, the jury awarded more than $925 million. In *Wakefield*, the plaintiff alleged the defendant placed multiple telephone calls to the purported class members advertising the defendant's product. After a three-day jury trial, the jury found the defendant liable for more than 1.85 million calls. The minimum statutory damages, at $500 per call, resulted in an award totaling $925,220,000. Plaintiff moved for a finding of willfulness, but the court held that the defendant's actions did not warrant enhanced damages.

Wakefield v. ViSalus, Inc., No. 3:15-cv-1857-SI, 2019 U.S. Dist. LEXIS 104862, *7 (D. Ore. June 24, 2019).

In July of this year, the United States Court of appeals for the Eighth Circuit affirmed a $32 million award in another TCPA class case, *Golan v. FreeEats.com, Inc*., 930 F.3d 950, 962-63 (8th Cir. 2019). In *Golan*, a jury found the defendant liable under the TCPA for 3.2 million calls. The district court found the statutory damages of $500 per call to be unconstitutional and reduced the award to $10 per call. Ultimately, this led to a reduction of the damages award from $1.6 billion to $32 million. In affirming the reduction of the award, the Eighth Circuit aptly noted that “$1.6 billion is a shockingly large amount” in light of the conduct of the defendant who “plausibly believed it was not violating the TCPA.” *Id*. at 962.

The Fourth Circuit also had the opportunity to weigh in on a TCPA jury verdict in the *Krakauer v. Dish Network LLC* class case, 925 F.3d 643 (4th Cir. 2019). In *Krakauer*, the jury held that Dish was liable for telemarketing calls placed to the class. The jury awarded $400 per call, resulting in a $20.47 million verdict. The district court then found the violations by Dish were both willful and knowing and trebled the damage award to $61 million. In affirming the district court, the Fourth Circuit examined the facts that led to the trebling of damages, including for example “the half-hearted way in which Dish responded to consumer complaints” and the various lawsuits and enforcement actions brought against Dish for telemarketing activities that did not result in any serious change in Dish’s business practices. *Id*. at 662-63.

These jury verdicts are evidence of the significant risk defendants face in taking a TCPA case to trial. The statutory damage scheme allows for shockingly high damage awards that are undoubtedly disproportionate to any harm suffered by a consumer.

CYBERSECURITY AND PRIVACY

CALIFORNIA CONSUMER PRIVACY ACT OF 2018 (CCPA)

Overview

On June 28, 2018, the California Legislature passed the California Consumer Privacy Act of 2018 ("CCPA"), an expansive new privacy law that creates obligations for many businesses that collect personal information about California consumers. The CCPA provides consumers access and control over their personal information and allows them to have a say, under certain circumstances, in how organizations collect, use, and disseminate this data. More specifically, California residents now have rights that are similar in principle to those afforded to European Union residents under the General Data Protection Regulations ("GDPR"), including the right to access information, right to delete information, and right to opt out of the sale of their personal information.

Amendments

Over the course of 2019, more than a dozen bills were introduced to amend the CCPA. On October 11, California Governor Gavin Newsom signed only five of those bills into law, which made the following notable changes to the CCPA:

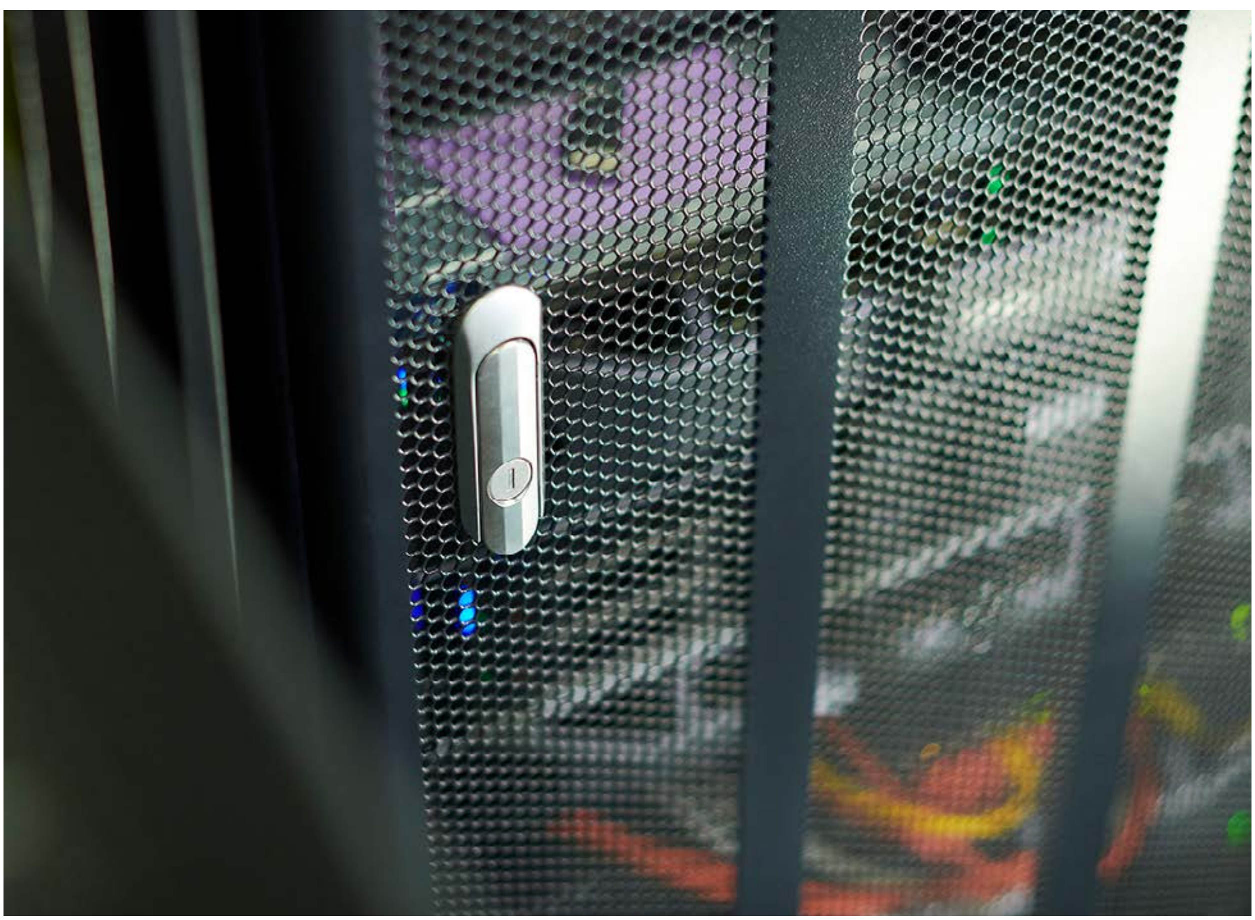
- Assembly Bill 25 temporarily excludes, until January 1, 2021, personal information collected in the employment context from the scope of the CCPA, except with respect to the CCPA's private right of action relating to data breaches and notice obligations.
- Assembly Bill 874 streamlines the definition of "publicly available" to mean information that is lawfully made available from federal, state, or local government records (*i.e.*, it removes the conditions previously associated with the definition). This amendment also clarifies that the definition of "personal information," as opposed to "publicly available" information, excludes deidentified or aggregate consumer information.
- Assembly Bill 1146 creates an exception to the right to delete for personal information that is necessary to maintain in order to fulfill the terms of a written warranty or a product recall in accordance with federal law. Additionally, it creates an exception to the right to opt out for vehicle information or ownership information retained or shared between a new motor vehicle dealer and the vehicle's manufacturer, if the information is shared for the purpose of a vehicle repair covered by warranty or a recall.
- Assembly Bill 1355 broadens the existing exemption for information regulated by the Fair Credit Reporting Act and creates a limited and temporary exemption for personal information collected in the business-to-business context.
- Assembly Bill 1564 requires businesses to provide two methods for consumers to submit requests for information, including, at a minimum, a toll-free telephone number, but provides that, for a business that operates exclusively online and has a direct relationship with a consumer from whom it collects personal information, the business is only required to provide an email address for submitting CCPA requests. Notably, this amendment may actually conflict with what is currently contemplated by the proposed implementing regulations for the CCPA.

Drafts Regulations

On October 10, 2019 – just one day before the amendments referenced above were signed into law – California Attorney General Xavier Becerra released the long-awaited draft of the proposed regulations implementing the CCPA ("Draft Regulations"). The guidance within the Draft Regulations are specific to: (a) notices businesses must provide to consumers; (b) practices for handling consumer requests; (c) practices for verifying the identity of consumers making those requests; (d) practices regarding the personal information of minors; and (e) financial incentive offerings.

It is worth noting that since the regulations are in draft form, they are subject to change. The attorney general expects to issue the final regulations in Spring 2020. Notable changes created by the Draft Regulations are mentioned below.

- If a business intends to use a consumer's personal information for a purpose that was not previously disclosed in the just-in-time notice, the Draft Regulations require the business to "directly notify the consumer of [the] new use and obtain explicit consent from the consumer to use it for [the] new purpose."
- Businesses must provide more detailed privacy policies, including information "for each category of personal information collected," including the sources from which that personal information was collected and the business or commercial purpose(s) for which the information was collected.
- Businesses which do not collect information directly from consumers would not need to provide just-in-time notices "before or at the point of collection." However, before these businesses can sell consumers' personal information, they must either: (1) contact the consumer directly to provide certain notices; or (2) contact the source of the personal information to: (a) confirm the source provided the just-in-time notice, and (b) obtain a signed attestation from the source describing how the source gave the notice at collection and including an example of the notice. Businesses would be further required to make the attestation available to consumers upon request for at least two years.
- The CCPA requires businesses to designate certain methods to submit CCPA requests. Pursuant to the Draft Regulations, businesses would be required to respond to consumer requests no matter how such requests are submitted.
- The Draft Regulations contemplate implementing verification methods depending on the "type, sensitivity, and value" of the personal information at issue.



It is apparent that the attorney general took into consideration many of the issues raised at the initial CCPA public forums and in the written comments submitted in 2019. Nonetheless, the Draft Regulations have likely resulted in more compliance confusion rather than providing the clarification that most industries and organizations were desperately seeking. For more information on the Draft Regulations, please view Troutman Sanders' Bloomberg article, *INSIGHT: Five Reasons to Comment on Draft CCPA Regulations*, which can be found at https://news.bloomberglaw.com/privacy-and-data-security/insight-five-reasons-to-comment-on-draft-ccpa-regulations.

What to Expect Moving Forward

It is expected that the final regulations implementing the CCPA will be issued in Spring 2020. Given that Attorney General Becerra is not allowed to bring an enforcement action until six months after the final regulations are issued, or July 1, 2020, whichever is sooner, it is likely that enforcement will begin in July. The attorney general addressed the six-month gap between the effective date and enforcement date head-on and warned that this delay in enforcement should not be considered a "safe harbor" period. When asked in a December 2019 interview regarding how he will handle enforcement generally, Becerra stated, "We will look kindly, given that we are an agency with limited resources, and we will look kindly on those that … demonstrate an effort to comply."

CCPA COPYCAT LAWS

Since the CCPA was first signed into law, many states proposed laws similar to the CCPA, which have been dubbed "CCPA copycats." These laws mimic many of the CCPA's provisions. Below are a few notable examples of such.

Nevada

On May 29, 2019, Nevada Governor Steve Sisolak signed into law Senate Bill 220, which took effect October 1, 2019 – three months before the CCPA – and is much narrower in scope than the CCPA. The most notable difference between Senate Bill 220 and the CCPA are the number of rights afforded to consumers. Whereas the CCPA attempts to provide broad rights to California consumers, Senate Bill 220 provides Nevada consumers only the right to opt out of the sale of their personal information. Moreover, Senate Bill 220 defines "sale" and the types of "covered information" more narrowly than the CCPA. For example, the definition of "covered information" under Senate Bill 220 includes "[a]ny other information concerning a person collected from the person through the Internet website or online service of the operator and maintained by the operator in combination with an identifier in a form that makes the information personally identifiable." However, this definition does not include household or device data, which is covered by the CCPA. Additionally, "sale" under Senate Bill 220 is limited to the exchange of covered information for monetary consideration to a recipient for that recipient to license or sell that covered information to additional parties. The CCPA's definition of "sale" includes non-monetary or other valuable exchanges. For more information on Senate Bill 220, please view Troutman Sanders' Law360 article, *Key Differences In Nev. And Calif. Data Privacy Laws*, which can be found at https://www.law360.com/articles/1170094/key-differences-in-nev-and-calif-data-privacy-laws.

Illinois

In Illinois, House Bill 3358, the Data Transparency and Privacy Act ("DTPA"), is currently moving through legislative committees outside of the Illinois House of Representatives. It contains CCPA-like rights such as the right for a consumer to know their personal information collected and the right to opt out of the sale of their personal information. However, the DTPA defines "sale" more narrowly than the CCPA. Also, unlike the CCPA, which can apply to online and offline businesses, the DTPA applies only to entities that own a website or operate an online service. Moreover, the DTPA provides a right to transparency, where a covered entity must inform a consumer of all categories of personal information and deidentified information that it processes. The CCPA does not have a similar requirement to disclose de-identified information. Similar to the CCPA, the state's attorney general has the exclusive authority to enforce the DTPA. The DTPA is expected to pass and be signed into law.

If signed, the DTPA will take effect on July 1, 2020. For more information on the DTPA, please view Troutman Sanders' Law360 article, I*ll. Privacy Bill Is Not As Robust As Calif. Law*, which can be found at https://www.law360.com/articles/1228378.

New York

In New York, Senate Bill S5642, the New York Privacy Act ("NYPA"), is currently moving through committees in the New York Senate. It is broader than that CCPA in many ways. Similar to the CCPA, the NYPA allows consumers rights to know their personal information collected and request their personal information be deleted. However, while the CCPA is primarily enforced by the California attorney general, the NYPA creates a private right of action for consumers to seek injunctive and compensatory relief against business that violate the law. Also, unlike the CCPA, the NYPA does not impose a minimum size on which companies would be covered under the law. Moreover, the NYPA creates a fiduciary duty of companies towards consumers whose data they hold.

Others

Other states that have been working on their own "CCPA copycats" include Hawaii, Massachusetts, Minnesota, New Jersey, Pennsylvania, Rhode Island, and Washington. Many of these proposed laws include consumer rights, such as the right to know personal information collected, the right to opt out of the sale of personal information, and the right to request the deletion of personal information.

UPDATES ON FEDERAL PRIVACY LITIGATION

Over the past two years, lawmakers across the political spectrum and a range of committees have offered their own privacy proposals and bills, seeking to pass an expansive CCPA-style federal law. But none of those proposals have gained significant traction or seen a vote. In late 2019, Democrats and Republicans in the Senate released opposing partisan privacy bills. Due to partisan gridlock, it is unlikely that any major shifts in federal privacy law will occur anytime soon.

CHANGES TO DATA BREACH & SECURITY LAW

California IoT Law

On January 1, 2020, California's new Internet of Things ("IoT") Law took effect. Codified at Cal. Civ. Code §§ 1798.91.04 and 1789.91.05, this new law aims to protect the security of the IoT device itself and any information contained in it. The law requires all IoT devices sold in California, no matter where they are manufactured, to be equipped with reasonable security features (1) appropriate to the nature and function of the device, (2) appropriate to the information it may collect, contain, or transmit, and (3) designed to protect the device and any information contained therein from unauthorized access, destruction, use, modification, or disclosure. The law defines "connected device" as "any device, or other physical object that is capable of connecting to the Internet, directly or indirectly, and that is assigned an Internet Protocol address or Bluetooth address." A device will be deemed to include a reasonable security feature if (1) the preprogrammed password is unique to each device manufactured, or (2) the device contains a security feature that requires a user to generate a new means of authentication before access is granted to the device for the first time.

California's new IoT law does not provide for a private right of action. Only the attorney general, city attorney, county counsel, or district attorney can bring an action under the law. The law does not specify what types of penalties are enforced for violations. The law does not apply to connected devices subject to security requirements under federal law and does not limit law enforcement from obtaining information from connected devices. Furthermore, the law broadly covers not only consumer devices, but also industrial IoT devices, retail point-of-sale devices, health-related devices that connect to the internet, and other non-consumer devices that receive an IP address or Bluetooth address. In order to comply with the new state law, and to avoid manufacturing special versions of products for California, some companies are implementing this change in all products sold nationwide.

Breach Notification Law(s) – California, New York, and Other States

California

In October 2019, California's breach notification law was amended, under Assembly Bill 1130, to expand the types of personal information to include, with an individual's name: (1) additional government identifiers, such as tax identification number, passport number, military identification number, or other unique identification number issued on a government document; and (2) biometric data generated from measurements or technical analysis of human body characteristics (*e.g.*, fingerprint, retina scan, or iris image) used to authenticate a specific individual. The amendment, which took effect January 1, 2020, specifies that in breaches involving biometric data, the reporting entity must provide "instructions on how to notify other entities that used the same type of biometric data as an authenticator to no longer rely on [that] data for authentication purposes."

The CCPA specifically incorporates Cal. Civ. Code § 1789.81.5(d)(a)(A), which Assembly Bill 1130 expanded. The amendment increases litigation risks following a data breach as it provides consumers affected by a breach caused by a company's failure to maintain reasonable safeguards a right to bring a civil action for statutory damages.

New York

On October 23, 2019, the New York Stop Hacks and Improve Electronic Data Security Act ("SHIELD Act") went into effect. The law broadened the definition of "private information" to include (1) "account numbers, credit or debit card number in combination with any required security code, access code, or password or other information that would permit access to an individual's financial account", (2) biometric information (*e.g.*, fingerprint, retina, or iris image) used to authenticate identity; and username or email address in combination with password or security questions and answers. The law also expanded the definition of breach to include "access" of computerized data that compromises private information, whereas previously, a breach was defined only as unauthorized "acquisition" of private information from any data system.

The law also broadened the scope of the breach notification requirement to "any person or business" that owns or licenses private information of a New York resident, not just to those that conduct business in New York State. Accordingly, anyone that owns or licenses computerized data that includes private information of a resident of New York are required to "develop, implement, and maintain reasonable safeguards to protect the security, confidentiality and integrity" of New York residents' private information. The law provides that a business will be compliant if it implements a "data security program" that incorporates a detailed series of administrative, technical, and physical safeguards. Businesses are also compliant with the SHIELD Act if they are already compliant with other regulations, including the GLBA, HIPAA, HITECH, or NYSDFS Cybersecurity Requirements for Financial Services Companies.

Others

Other states, including Arkansas, Illinois, Maine, Maryland, Massachusetts, New Jersey, Nevada, Oregon, Texas, Utah, Virginia, and Washington, have also amended their breach notification laws to expand the definition of personal information, include new reporting requirements, or implement specific timing requirements for when individuals and regulators must be notified.

NOTABLE LITIGATION IN 2019

A number of notable and interesting lawsuits arose in 2019. Some cases were monumental in interpreting Illinois's Biometric Information Privacy Act ("BIPA") while other cases preempted the intriguing issues revolving around privacy and use of technology. 2019 was a memorable year for some preeminent litigation happening around the country. The following are some highlights:

BIPA Cases:

Injury: In *Rosenbach v. Six Flags Entertainment Corp*., 2019 IL 123186 (2019), the Illinois Supreme Court held that a plaintiff does not need to allege "actual injury or adverse effect" in qualifying as an "aggrieved person" to bring a claim under Illinois' Biometric Information Privacy Act ("BIPA"). The Court held that a plaintiff who alleges a BIPA violation regarding his or her personal biometric data satisfies the "aggrieved" party pleading requirement. (Jan. 2019)

In *Patel v. Facebook Inc*., No. 18-15982 (9th Cir. 2019), the Ninth Circuit granted a plaintiff's class certification, allowing the lawsuit to go forward for allegations of violation of BIPA. The Ninth Circuit reasoned that Facebook's use of facial recognition technology without the consumer's consent was an invasion of the user's privacy. On December 2, 2019, Facebook filed a petition for writ of certiorari asserting that the Ninth Circuit was wrong in granting the class certification. (Aug. 2019)

No arbitration: In *Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645 (2019), the Illinois appellate court held that the employees' class action claims for violations of BIPA were independent of wage and hour violation. The court found that BIPA is a privacy law that applies both in and out of the workplace, and therefore affirmed the lower court's ruling on denying arbitration. In this instance, the employer collected employee's biometric data for timekeeping. (April 2019)

No preemption: In *Richard Rogers v. BNSF Railway Company*, No. 19-cv-3083 (N.D. Ill. Oct. 31, 2019), the Court ruled that BIPA is not preempted by federal statutes that regulate rail or ground transportation. The Court stated that BIPA is a generally-applicable statute that applies to the railroad industry. This ruling may signal a trend of cases involving privacy protections to proceed when a plaintiff's allegations suggest a statutory violation. (Oct. 2019)

Standing/Harm:

No risk of harm: In I*n re 21st Century Oncology Customer Data Sec. Breach Litig*., 380 F. Supp 3d (2019), the Middle District of Florida Court denied the defendant cancer treatment center's motion to dismiss the plaintiff's complaint. In discussing the question of whether the plaintiff has adequately alleged an injury in fact based on an increased risk of identity theft, the Court discussed that the Eleventh Circuit has not yet determined whether an increased risk of identity theft is a cognizable injury. The Court provided three "guiding factors' for whether such risks qualify as an injury: (1) the motive of the party for the access of sensitive personal information; (2) the type of information exposed; and (3) whether the information was actually accessed and if there was evidence of misuse from the same breach. (March 2019)

Insufficient alleged injury: In *Manigault-Johnson v. Google, LLC,* 2019 U.S. Dist. LEXIS 59892 (D.S.C. Mar. 31, 2019), the Court sided with Google's YouTube by dismissing the plaintiffs' allegation that the company violated children's privacy by tracking them for advertisement targeting purposes. The Court reasoned that the allegations, even if true, would not find that Google violated state law because the plaintiffs could not sufficiently show "highly offensive" intrusion for how young viewers would have been injured. The Court also explained that plaintiffs' "intrusion-upon-seclusion" claim was based on nothing more than violations of the Children's Online Privacy Protection Act ("COPPA"), which does not contain a private right of action. (March 2019)

Sufficient injury alleged: In *McDonald v. Kiloo Aps*, 385 F. Supp. 3d 1022 (E.D. Cal. 2019), the Court denied the defendants' motion to dismiss the plaintiff's allegation of violations for collecting data from children's devices without appropriate consent for targeted advertising. The plaintiffs alleged that the defendants impermissibly sold the data embedded in the games to third parties. The Court ruled that the plaintiffs' allegations were sufficient to state a claim, showing its reluctance to dismiss the claim given that privacy expectations were developing with respect to data ownership, control, and collection. (May 2019)

In *National Treasury Employees Union v. Office of Personnel Management*, No. 17-5217 (D.C. Cir. 2019), the D.C. Circuit allowed the plaintiff to proceed with the lawsuit, stating that the potential risk of identity theft and misuse of personal information from the defendant's inadequate protection practices resulting in a breach of cybersecurity laws was sufficient to establish standing. (June 2019)

The D.C. Circuit Court also held in *Jeffries v. Volume Services America, Inc. d/b/a Centerplate*, No. 18-7139 (D.C. Cir. 2019) that the plaintiff had sufficient standing and adequately pled harm for alleged violations under the Fair and Accurate Credit Transactions Act when she found her 16-digit credit card number and the expiration date on a receipt. The Court reasoned that the receipt contained information prohibited by statute that could enable identity theft. (July 2019)

Class Decisions:

No commonality: In *Dancel v. Groupon, Inc.,* 2019 U.S. Dist. LEXIS 33698 (N.D. Ill. Mar. 4. 2019), the Court denied the plaintiff's motion for class certification. The plaintiff, an Instagram user, alleged that Groupon utilized geo-tagging features to use her pictures for Groupon's deal page for commercial purposes without her consent. She attempted to certify a class for Instagram accounts whose photos were used on Groupon for Illinois businesses. The Court, however, ruled that the plaintiff could not satisfy the commonality issue for the class because the use of an individual's identity had to be made on a username-by-username basis, where the photo may not even be an image of the individuals. (March 2019) (In October 2019, the Seventh Circuit remanded the plaintiff's appeal after finding that Groupon's notice of removal did not allege the citizenship of any diverse member of the putative class.)

Settlement Fairness: In *Frank v. Gaos*, 586 U.S. ___ (2019), the Supreme Court remanded the case to the lower courts to decide whether the plaintiffs had standing to bring the privacy class action involving Google's disclosure of search histories to third parties without consent. As part of the remand, the Court vacated the previous *cy pres* class action settlement, appealed by objecting class members, as it could not decide if the settlement was "fair, reasonable, and adequate." The settlement did not include whether Google was prohibited from continuing the unlawful practice. (April 2019)

No adequacy, but Injunctive Relief Class Certified: In *Adkins v. Facebook, Inc*., 2019 U.S. Dist. LEXIS 206271 (N.D. Cal. Nov. 26, 2019), the Court certified a class of current Facebook users seeking to change Facebook's security practices over a claim of data breach. The Court only certified an injunctive class and denied to certify two other classes seeking cash for future credit monitoring and damages from time spent devoted to the data breach. The Court reasoned that the named plaintiff could not adequately represent a class for credit monitoring because he never paid any money as a result of the breach. The Court also reasoned that the issue of lost time was too specific to the named plaintiff. (Nov. 2019)

STUDENT LENDING

Introduction

Student loan debt is a big deal in the United States. About 44 million borrowers collectively owe about $1.5 trillion in student loan debt. Student loan debt exceeds credit card and car loan debt, with approximately 30% of all adults having incurred some student loan debt. Remarkably, approximately 11% of student loans are delinquent or in default, with the percentage of borrowers falling behind on payments steadily increasing each year – 2015 (18%), 2016 (19%), and 2017 (20%). Some experts believe that another financial crisis similar to 2008 is on the horizon but with defaulting student loans instead of mortgages acting as a significant catalyst.

With student loan debt playing an enormous role in individuals' lives, it is no surprise that the year 2019 saw many interesting developments in student lending law. The developments include decisions regarding the treatment of student loans in bankruptcy, efforts to obtain forgiveness of student loans and modified payments, and, of course, the onslaught of litigation involving companies in the student lending space. The year also saw an interesting tension between federal regulation of companies involved in student lending and regulation by state-level actors. This tension has included lawsuits filed by state attorneys general, open letters regarding perceived federal inaction, and tussles over federal preemption. The section below discusses each of these items. While it is difficult to predict what will come in 2020, we are confident that there will be continued developments in each of these areas over the next twelve months.

Developments in Treatment of Student Loans in Bankruptcy

There has been significant discussion of student loans in the bankruptcy context. This discussion revolves around what a debtor must demonstrate in order to discharge student loan debt.

Section 523(a)(8) of the Bankruptcy Code allows a discharge of this debt for "undue hardship." The Bankruptcy Code, however, is silent as to the definition of "undue hardship." As a result, bankruptcy courts have developed a body of case law regarding what a debtor must show to establish undue hardship in the student loan context.

The seminal case is *Brunner v. New York State Higher Educ. Serv. Corp. (In re Brunner)*, 831 F.2d 395 (2d Cir. 1987), in which the Second Circuit set forth the "*Brunner* test" to determine undue hardship. The *Brunner* test has three elements: Debtors must show that (1) they have made a good-faith effort to repay the debt; (2) they cannot maintain an acceptable standard of living if forced to continue repaying it; and (3) their situation is not likely to improve. Courts often implement a "certainty of hopelessness" standard for this last element.

The American Bankruptcy Institute ("ABI") Commission on Consumer Bankruptcy stated in a comprehensive report issued in April 2019 that, although the *Brunner* test was effective while the debt could be straightforwardly discharged after debtors waited five and then seven years, the *Brunner* test has become onerous now that the debt cannot be discharged outright at all. Therefore, the ABI urged a return to legislation passed in 1990, which lengthened the period before a student loan became freely dischargeable from five to seven years after it first became due.

Congress deviated from the Seven-Year Rule in 1998 when it eliminated the time period after which student loans became freely dischargeable and enacted a rule that student loans were not dischargeable at any time absent the debtor's showing of undue hardship. In 2005, Congress expanded the 1998 rule by adding private educational loans to the list of non-dischargeable student loans.

A bankruptcy court lacks the authority to enforce discharge injunctions issued by bankruptcy courts in other districts.

According to the ABI report, "*Brunner's* three-factor undue-hardship standard can allow appropriate bankruptcy relief during a period when discharge of student loans is not otherwise available." That would mean the precedents governing student loan debt would apply for the first seven years, but after that, debtors would have a straightforward path to eliminating it in bankruptcy, as with most other types of debt.

Taking what it calls a "practical, middle-ground approach" to the problem, the Commission recommends simply returning to an earlier set of rules that allowed student loan debt to be discharged in a consumer bankruptcy case, if the case was filed seven years after the debt first became payable.

The courts have also waded into this debate on the dischargeability of student loan debt. The Court of Appeals for the Fifth Circuit, for example, ruled on July 30, 2019 in *Thomas v. Department of Education* that it is up to Congress, not the courts, to change the rules for discharging student debt in bankruptcy. The Circuit Court affirmed the lower court decision preventing the debtor from eliminating her student loans in a Chapter 7 bankruptcy case.

The three-judge panel explained that Congress' intent in changing the bankruptcy law regarding discharge of federal student loans was to limit discharging student loans to cases of "undue hardship." The panel stated, "No doubt because so many student loans are ultimately backed by the taxpayers, Congress intended to make student loan debt harder to discharge than other types of consumer debt, and the courts' adoption of a linguistically accurate and demanding standard fulfills that intent."

The Circuit Court explained that "[p]olicy-based arguments do not change this interpretation; the role of this court is to interpret the laws passed by Congress, not to set bankruptcy policy." The Circuit Court added, "And the fact that student loans are now mountainous in quantity poses systemic issues far beyond the capacity or authority of the courts, which can only interpret the written law."

On October 22, 2019, the Court of Appeals for the Fifth Circuit issued another significant ruling regarding student loans. In *Crocker v. Navient Solutions*, the Circuit Court determined that a bankruptcy court lacks the authority to enforce discharge injunctions issued by bankruptcy courts in other districts. It also ruled, however, that student loans obtained from a for-profit corporation whose loans are not part of any governmental loan program can be dischargeable.

The Fifth Circuit concluded that the loans in question—those from for-profit institutions that the borrower used to pay expenses of education—"do not qualify as 'an obligation to repay funds received as an educational benefit, scholarship, or stipend' because their repayment was unconditional." Since there is no classification under 11 U.S.C. § 523(a)(8) in which the plaintiffs' student loans fall, the debts were validly discharged.

The *Crocker* decision may prove to be a double-edged sword for student lenders. It may make it more difficult for plaintiffs to certify classes pertaining to the alleged violations of a discharge injunction. At the same time, though, it may provide new arguments for plaintiffs to allege that certain education-related loans are dischargeable.

Based on the developments this past year, 2020 is shaping up to be an interesting year in the area of discharging student loan debts. Given the enormity of student loans nationwide, we expect to see advocacy groups and consumer litigants test the limits of the dischargeability of student loans.

Developments in Forgiveness of Student Loans

Not only did we see an uptick in challenges to the dischargeability of student loan debt this past year, we saw many efforts at forgiveness of student loan debt outside of the bankruptcy context. This included government enforcement actions and federal rulemaking.

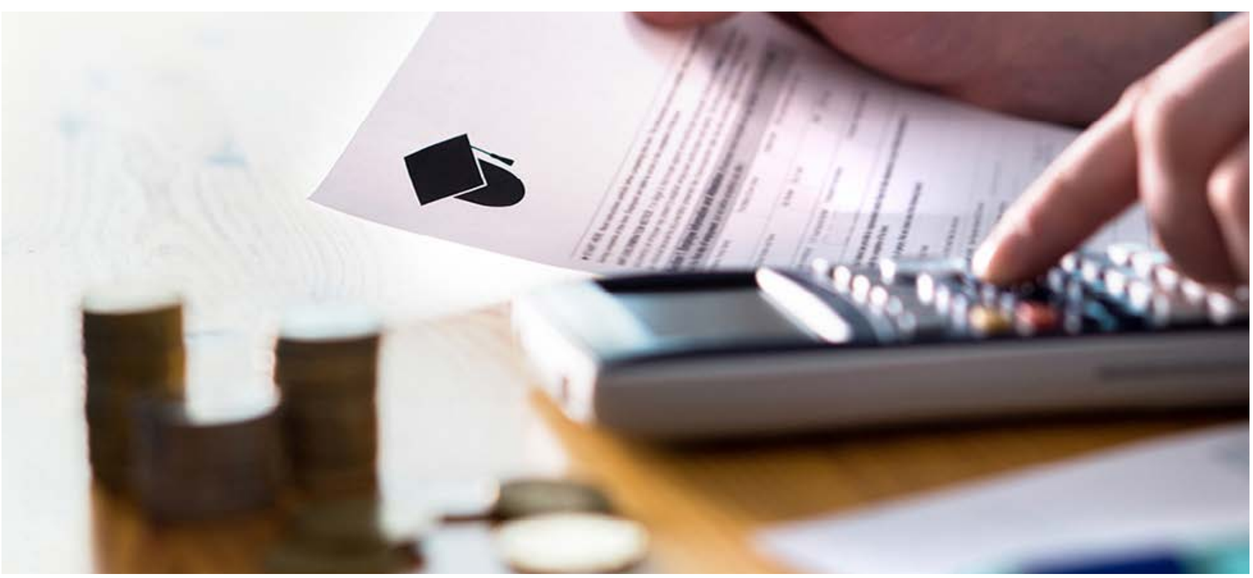
For example, on June 14, the Consumer Financial Protection Bureau announced a settlement that effectively forgives $168 million in private student loans owed by former students of ITT Technical Institute, the for-profit college that filed for bankruptcy in 2016. The bankruptcy filing was in the face of regulatory scrutiny concerning its recruitment and student lending practices. The settlement is with Student CU Connect CUSO, LLC ("CU Connect"), which was created to fund and manage loans for ITT students. The district court quickly approved the settlement with its entry of the final order on June 20. Forty-four states plus the District of Columbia have also settled with CU Connect on the same terms.

Specifically, the CFPB filed a complaint in the Southern District of Indiana alleging that CU Connect provided substantial assistance to ITT in strong-arming students into CU Connect Loans, which were characterized by high interest rates and high default rates. According to the CFPB, the students were "unaware of the terms, conditions, risks, or even existence of their CU Connect Loans."

Under the settlement, CU Connect must stop collecting on all outstanding CU Connect Loans, discharge all outstanding CU Connect Loans, and ask all consumer reporting agencies to which CU Connect furnished information to delete tradelines relating to CU Connect Loans. The order also requires CU Connect to provide notice to all consumers with outstanding CU Connect Loans that their debt has been discharged and that CU Connect is seeking to have the relevant tradelines deleted.

On the rulemaking side, on August 21, 2019, President Trump signed a Presidential Memorandum outlining the process by which totally and permanently disabled veterans can discharge their federal student loans.

Under federal law, borrowers who have been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected condition and who provide documentation of that determination to the Secretary of Education are entitled to the discharge of such debt. For the last decade, veterans seeking loan discharges have been required to submit an application to the Secretary of Education with proof of their disabilities obtained from the Department of Veterans Affairs. Only half of the approximately 50,000 totally and permanently disabled veterans who qualify for the discharge of their federal student loan debt have availed themselves of the benefits provided to them.



The Memorandum directs the Secretary of Education to develop as soon as practicable a process, consistent with applicable law, to facilitate the swift and effective discharge of applicable debt. In response, the Department of Education said that it will be reaching out to more than 25,000 eligible veterans. Veterans will still have the right to weigh their options and to decline federal student loan discharge within 60 days of notification of their eligibility. Veterans may elect to decline loan relief either because of potential tax liability in some states or because receiving loan relief could make it more difficult to take future student loans. Eligible veterans who do not opt out will have their remaining federal student loan debt discharged.

The Continued Rise of Income Share Agreements

For those students that are able to pay their debts without seeking discharge or forgiveness, Income Share Agreements ("ISAs") have become an increasingly popular means of financing higher education. ISAs are tied to the amount of income student borrowers earn following graduation. Students who fail to meet minimum income standards are not required to make payments until the threshold is met. Likewise, if a student borrower leaves the workforce, then the repayment plan is "paused" until he or she returns to the workforce.

The ISA programs are advertised as not accruing interest on the amount borrowed. However, repayment plans are based on a term of months or years, and a certain percentage of income is used to calculate the monthly payment. ISAs have been created by various colleges across the United States and are used to help reduce or eliminate student loans. Education providers who use ISAs include traditional four-year research institutions and "last-mile training providers" preparing workers for the most in-demand jobs.

On June 25, a group of twenty education organizations and individuals sent a letter to Congress urging it to regulate the use of ISAs. The letter was sent to the House Financial Services Committee and Senate Finance Committee, requesting legislation "that provides protections for student consumers and a legal framework to guide the work of institutions and providers."

The letter suggests legislation that would "establish a definition of ISA, provide a proper disclosure framework for student consumers, set a national minimum income threshold, create adequate protections around stackability, provide clarity on tax treatment for both students and institutions funding ISAs, and identify a federal regulator." The education groups suggest that strong, transparent protections will deter the risk of abuse. ISAs would supplement existing income-based repayment options.

The Onslaught of Litigation Involving Student Lending

Because student loans can be difficult to have discharged or otherwise forgiven, 2019 continued to see a trend of litigation being used as a tool to attack the administration of student loans, the enforceability of those loans, and agreements related to student lending. In 2019, for example, there was significant litigation against student lending and student loan debt relief companies, as well as against the U.S. Department of Education regarding student lending.

On October 30, 2019, the CFPB, along with the states of Minnesota, North Carolina, and California, filed a lawsuit in California federal court against a student loan debt-relief operation. The CFPB alleged that the companies charged over $71 million in unlawful advance fees in connection with the marketing and sale of student loan debt-relief services to consumers.

Specifically, the CFPB alleges that since 2015, the companies deceived consumers by misrepresenting that they could qualify for loan forgiveness in a matter of months, when forgiveness typically takes at least 10 years of on-time payments and is determined by the Department of Education rather than the companies. Further, CFPB alleged that the companies falsely told consumers or led consumers to believe that their payments to companies would go toward their student loan balances. In actuality, initial fees, typically totaling about $900 to $1,300, were paid for the companies' services and were levied well before consumers had made a payment under their new loan agreement. The CFPB also alleges that the companies failed to inform consumers that they automatically request their loans be placed in forbearance (increasing the total amount owed) so that consumers are more likely to be able to pay the companies' substantial fees.

On October 22, 2019 a proposed class of over 7,000 former college students filed a lawsuit against Education Secretary Betsy DeVos and the Department of Education ("DOE") in the United States District Court for the District of Massachusetts, citing the department's "enduring refusal to discharge the federal student loans" for students. The plaintiffs, and others allegedly similarly situated, assert DeVos and the DOE violated the Administrative Procedure Act by refusing to cancel the federal student loans and continuing to collect on them, despite the former students having a "borrower defense," which voids their loans. Everest Institute, described by the plaintiffs as an "abusive for-profit school," operated in Massachusetts by Corinthian Colleges Inc., a nationwide chain that went bankrupt and closed in 2015. Critics charge that Corinthian Colleges made false representations about job placement rates, and upon graduation students were burdened with student loan debts they could not afford to pay back.

Private litigants have also gotten into the act, frequently filing lawsuits against private companies related to student lending in an attempt to collaterally attack the underlying student loan. For example, 2019 saw a number of lawsuits under the Telephone Consumer Protection Act ("TCPA") against student lenders and student loan servicers. The ultimate goal of these lawsuits is frequently to settle for an amount that "wipes out" the underlying student loan obligation. These lawsuits, however, are not always successful for the plaintiffs.

For example, in August 2019, the Southern District of Florida issued a positive decision for student loan servicers defending TCPA lawsuits who place calls pursuant to contractually granted consent. In *Lucoff v. Navient Sols., LLC*, the Court affirmed and adopted the Magistrate's Report and Recommendation and held that consent granted as part of a bargained for exchange cannot be unilaterally revoked. In a well-reasoned Order, the Court explained that under *ACA Int'l*, "the 2015 FCC Ruling [stating consumers may revoke consent by any reasonable means] does not apply in circumstances where the consumer has given consent as consideration in a bargained-for contract." The Court then discussed the Second Circuit's decision in *Reyes*, which held that under common law, consent can "'become irrevocable' when it is provided in a legally binding agreement, in which case any 'attempted termination' is not effective." The Court also examined other decisions in Florida, including *Medley v. Dish Network*, a 2018 Middle District of Florida decision holding that consent provided as part of a contract for services, and not gratuitously, could not be unilaterally revoked.

Similarly, in *Gaza v. Navient Solutions LLC,* the Middle District of Florida ruled that collection calls were exempt from the TCPA because they were made to collect on a loan owed to the United States Government – in this case, the Department of Education. The Court agreed, citing the plain statutory language of the TCPA which prohibits calls using "any automatic telephone dialing system or an artificial or prerecorded voice … [to a cell phone] … unless such call is made solely to collect a debt owed to or guaranteed by the United States." *See* 47 U.S.C. § 227(b)(1)(A)(iii).

In an interesting twist on the use of consumer protection statutes in the student lending space, in *FMS Investment Corp. v. United States,* several private collection companies sued the federal government, contending that a recent Next Generation Financial Services Environment ("NextGen") government contract solicitation was unlawful because it restricts competition and violates state and federal laws governing debt collectors, including the Fair Debt Collection Practices Act. NextGen intends to modernize the student loan industry by, among other things, establishing a single website portal for the management of student loans under one central "brand."

The private collection companies lost that suit on July 31, 2019 when the United States Federal Claims Court denied their motion for a permanent injunction halting the solicitation and granting the government's motion for judgment on the administrative record. In its ruling, the Court found that the government had adequately justified its basis for combining loan servicing and collections and that NextGen did not per se violate the FDCPA or various state laws governing debt collection. Rather, at this stage, the government was entitled to a presumption that it would execute NextGen in a legal fashion and was "not required to set out exact state-by-state engagement strategies."

Federal Regulation

During 2019, the student lending industry also saw turbulence with respect to federal regulation in that sphere. On the one hand, we saw some activity from the Federal Trade Commission and the Consumer Financial Protection Bureau in bringing enforcement actions against private companies in the student lending space. Not everyone, however, was pleased with the level of federal involvement in student lending. While the FTC and CFPB brought some enforcement actions, some critics believe these agencies were not doing enough.

In August, the Department of Education also issued new regulations, intending to create clearer and more consistent procedures for borrower defense to repayment claims. Borrower defense to repayment claims – an administrative claim procedure that allows student loan borrowers to dispute loan liability based on alleged misconduct by the educational institution – have increased significantly in the last several years, resulting in these new regulations intended to respond to and manage that increase.

With respect to enforcement actions, federal enforcement efforts in the student lending sphere have largely focused on companies that advertise and provide debt relief products or services to student loan borrowers. For example, in 2019, the FTC brought or obtained settlements in five actions against student loan debt relief companies accused of charging improper fees and/or unlawful telemarketing, obtaining judgments totaling over $43 million. The actions, part of the FTC's "Operation Game of Loans", alleged that the companies charged consumers illegal upfront fees, made false promises, and misled borrowers into believing the companies were affiliated with the government or loan servicers, in violation of the FTC's Telemarketing Sales Rule and the FTC Act.

In November, CFPB, joined by a few state and local agencies, sued another group of debt relief companies and their owners, alleging various violations of the Consumer Financial Protection Act, the Telemarketing Sales Rule, and various state laws. Specifically, the CFPB contends that the defendants mispresented the reason for fees

Some critics have suggested that the federal government has not been doing enough to regulate the student loan servicing industry.

that were charged, overstated their ability to help borrowers and requested that loans be placed in forbearance – without telling borrowers – so that the borrowers could afford the defendants' fees. This lawsuit, which alleges that the defendants improperly collected over $71 million in illegal advance fees, remains pending.

In contrast to the enforcement actions above, some critics have suggested that the federal government has not been doing enough to regulate the student loan servicing industry. In February, the Department of Education's Office of Inspector General issued a report finding that Federal Student Aid ("FSA") lacked sufficient policies and procedures to address servicers who were not complying with federal laws and regulations. Similarly, in June, a group of consumer advocates sent an open letter to CFPB Director Kathy Kraninger, suggesting that the CFPB was not adequately addressing "racial disparities in student loan outcomes." And, in August, a group of Congressional representatives joined the chorus, sending a letter to Kraninger expressing concern that the CFPB was not doing enough to "fulfill its mission to protect student loan borrowers." As examples, the letter noted that the CFPB had not issued a report of student loan complaints since 2017 and the post of Student Loan Ombudsman had remained vacant since its previous holder, Seth Frontman, vocally resigned in August 2018 while suggesting that the CFPB had abandoned its central purpose of protecting consumers.

Not long after the congressional letter, the CFPB took additional action. It announced the appointment of Robert G. Cameron, an individual previously employed by a large student loan servicer, as the Bureau's private education loan ombudsman. Then, in October, the CFPB released its student lending annual report, indicating that the number of student loan complaints handled by the CFPB had actually *decreased* between 2018 and 2019 by approximately 25% for private student loans and 8% for federal student loans. Whether this decrease is because the actual number of complaints has decreased or because consumers are electing to use other avenues to address their complaints remains unclear.

While the CFPB was somewhat active in the student lending sphere this year (although, not active enough for some critics), its future role in student lending remains uncertain. That is especially true in light of the Constitutional challenge to its authority now pending before the U.S. Supreme Court in *Selia Law, LLC v. Consumer Financial Protection Bureau*.

Selia Law arose from the CFPB's investigation of a law firm that provided debt relief services to determine whether the law firm was violating federal telemarketing laws. The law firm objected to the CFPB's investigative demands and filed a lawsuit contending that the CFPB structure is unconstitutional on the ground that the Bureau it is headed by a single director with an unprecedented amount of unilateral power who can only be removed for cause by the U.S. President. The U.S. Court of Appeals for the Ninth Circuit decided the issue in favor of the CFPB, finding its structure constitutional. The U.S. Supreme Court granted the law firm's petition for appeal.

In an interesting twist, the CFPB, under the Trump administration, determined, in the midst of the appeal, that it would no longer defend its own constitutionality. Instead, the U.S. Supreme Court invited seasoned appellate attorney Paul D. Clement to brief and argue the case for the CFPB as amicus curiae. The appeal has now been fully briefed – including over twenty amicus briefs coming from both consumers and financial industry players – with oral argument scheduled for March 3, 2020.

As the calendar turns to 2020, the scope of federal regulation in the student lending sphere remains difficult to predict. There are several developments that could shift the landscape. How broadly the new borrower payment defense regulations are implemented, interpreted, and enforced will likely have consequences. The outcome of the *Selia Law* case will also undoubtedly have significant ramifications for the future of the CFPB and regulation of all financial services industries, including student lending. Similarly, given the Department of Education's heavy involvement in the industry, the outcome of federal elections will also almost certainly play a significant role in the student loan landscape moving forward. Student loan reform has become a key platform issue for many candidates, such that sweeping changes could be on the horizon regardless of the presidential election's outcome.

State-Level Enforcement

Because of the perceived gap in federal regulation in the student lending industry, state attorneys general have taken on a more significant role in bringing enforcement actions against student loan lenders and servicers. Many of these actions have attacked the basic functions of student loan servicing, such as how borrowers are offered payment alternatives, and have resulted in millions of dollars in settlements nationwide.

In April, a group of twenty-one state attorneys general publicly objected to a perceived policy shift at the Department of Education, suggesting that the Department was withholding data about federal student loans from state-level officers that it had, in the past, freely disclosed. The attorneys general suggest that the change in policy is part of a deliberate effort to shield federal student loan servicers from state-level oversight by withholding information that states had previously used.

In June, multiple state attorneys general reached a settlement, including $5.3 million in debt relief, with the now-bankrupt ITT Technical Institute, arising from allegations that ITT pushed students into unfavorable loans with a preferred lender. In particular, the attorneys general suggested that ITT would offer students a "temporary credit" to cover education costs not addressed by existing financial aid, and then when the "temporary credit" was due, pressure the students into taking out unfavorable loans to repay the "temporary credit" with a preferred lender.

In October, the New York attorney general sued another large national student loan servicer over its handling of the federal Public Service Loan Forgiveness Program, bringing claims under the Consumer Financial Protection Act and state laws. In its lawsuit, the attorney general contended that the servicer's practices contributed to the vast majority of applicants to the program being denied. The lawsuit remains in the early stages.

Also in October, the Massachusetts attorney general sued the Department of Education, seeking cancellation of all federal education loans connected with a now-closed for-profit college. The attorney general contended that the Department did not timely consider a group application for loan forgiveness submitted by the attorney general's office in 2015, and continues to try to collect debts that should have been discharged. This lawsuit also remains pending.

State level enforcement of student lending is likely to increase in 2020 with the rush to fill perceived gaps at the federal level. Further, because states are now passing their own student lending laws (as discussed below), the number of legal tools state-level authorities can use to take enforcement action is increasing. A corresponding increase in attorney general enforcement actions utilizing these new or enhanced enforcement mechanisms is almost certain.

State Regulation

State attorneys general are not the only state-level actors that have been active in the student lending space. Perceiving a vacuum in the regulation of the student loan industry at the federal level, state legislatures have increased activity in this area. In 2019, several states – including Connecticut, Maine, New Jersey, and New York – passed new legislation aimed at regulating student loan servicers. Legislation is pending in other jurisdictions.

Key features of the new laws, which vary considerably state-by-state, include the appointment of a state-level consumer loan ombudsman to address borrower complaints, new licensing requirements, and statutory directives concerning payment applications, loss mitigation activities, credit reporting, and communications with borrowers. Other laws seem to be modeled after mortgage loan servicing regulations, such as by mandating response times for customer communications, detailing how payments must be applied and imposing requirements with respect to loss mitigation efforts.

Some laws seek to considerably enhance consumer protections by, for example, affirmatively *requiring* credit reporting by student loan servicers, going beyond what federal law presently requires. In addition, some states have created a new private cause of action for enforcement of the newly enacted student lending laws, several of which provide for recovery of attorneys' fees and punitive damages. Only time will tell how rigorously these state laws will be enforced or whether they will lead to an outgrowth of litigation.

Federal Preemption of State Law

Given these new state laws, some of which tread on areas traditionally within the scope of comprehensive federal regulation (such as credit reporting), federal preemption of state level attempts to regulate loan servicing is likely to be a hot issue in 2020. In 2018, the Department of Education took the position that state-level regulation of federal student loan servicers is preempted by federal laws, setting the stage for legal disputes about how far states can go to regulate student lending.

For example, in June 2019, the Seventh Circuit reversed the dismissal of a lawsuit against a national student loan servicer, finding that a borrower's state-law claims under the Illinois Consumer Fraud and Business Practices Act ("ICFA") and common law were not preempted by the federal Higher Education Act.[8] Although the HEA contains an express preemption provision related to "disclosures," the Seventh Circuit held that the loan servicer could still be held liable for allegedly making "affirmative misrepresentations" intended to steer a borrower into a repayment plan that benefitted the servicer more than the borrower. Meanwhile, other courts, such as a federal court in the District of Columbia, have previously held that at least some aspects of state regulation are preempted with respect to certain federal student loans.

Similar preemption issues are still being considered in other appellate courts, including the Third Circuit, in the case of *Commonwealth of Pennsylvania v. Navient Corporation*, and the Eleventh Circuit in the case of *Lawson-Ross v. Great Lakes Higher Education Corp*. The Eleventh Circuit is likely to issue its ruling first, as it has heard oral arguments, whereas the Third Circuit appeal is still being briefed.

In sum, lawsuits on this topic are likely to only increase in 2020, as more states attempt to become involved in the regulation of an industry that in large part involves loans by the federal government.

[8] *Nelson v. Great Lakes Educational Loan Services* (June 27, 2019).

UNIFORM COMMERCIAL CODE AND BANKING

BANK LITIGATION IN 2019 AND GOING FORWARD: BRUSH THE DUST OFF YOUR COMMERCIAL CODE VOLUME

Most lawyers get a glazed look in their eyes when recalling law school study of commercial transactions and the Uniform Commercial Code ("UCC"). But bank litigators are brushing up on the UCC given the rash of fraudulent schemes involving sizeable theft in wire and check transactions. Class action lawyers continue to be creative, and litigation involving overdraft charges and other fees imposed on consumers have spawned lawsuits advocating new theories of liability.

Business Email Compromise Cases On the Rise

Wire fraud cases, arising from what the FBI calls "business email compromise," are on the rise. In 2018, the FBI reported that business email compromise and other internet-enabled theft, fraud, and exploitation resulted in $2.7 billion of financial loss in 2018. FBI - IC3 Annual Report Released. Surprisingly, even sophisticated parties and publicly-traded companies are getting caught. In this type of scheme, once the money is wired, it is typically not recovered, and tracing the funds can become difficult. Who bears liability in these cases, and what claims can be asserted? These questions arise regularly in wire fraud cases, which often involve very large numbers and imposition of loss on unsuspecting parties.

In a typical business email compromise scheme, the fraudster impersonates a senior executive or trusted business partner, reaching out to a member of the staff, and changing an account number or providing new wiring instructions to pay a debt, conduct a real estate closing, or fulfill a purchase order. The recipient of the email does not notice what can be very subtle differences in an email address, such as a hyphen, a capitalized letter, or an underscore, and complies with the request, believing the person to be the CEO or trusted partner. The money is wired by the sending bank to the fraudster's account at the receiving bank (which usually has no idea its customer is a fraudster), and there is very little that the sending or receiving bank can do to claw it back.

Lawyers for parties who are victims of wire fraud frequently attempt to craft claims alleging common law negligence outside of the actual wire transaction itself, to avoid the preemption challenges which regularly appear in these cases. For example, we frequently see cases alleging the beneficiary bank was negligent in opening the account of the fraudster or failed to take prompt action to stop withdrawals from the fraudster's account after the beneficiary bank was on notice of the wire fraud. Typically, however, the victim has no relationship with the beneficiary's bank which can give rise to a common law duty of care. Standing and causation arguments can also be raised as defenses.

Both banks are insulated by the UCC and standard of care scheme therein, and common law claims of negligence and breach of contract are ordinarily preempted.

Article 4A of the Uniform Commercial Code defines the duties, liabilities, and rights of parties to a funds transfer. States enacted Article 4A of the Uniform Commercial Code to provide norms and ensure predictability with respect to fund transfers:

> A deliberate decision was … made to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability, rather than to rely on broadly stated, flexible principles. In the drafting of these rules, a critical consideration was that the various parties to funds transfers need to be able to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately. This

> consideration is particularly important given the very large amounts of money that are involved in funds transfers.

§4A - 102, Cmt.

Typically, common law claims are displaced by the UCC. Unless a party can allege negligence by the bank occurred outside of the four corners of the wire transfer transaction, there is usually preemption. If the negligence occurred before or after the wire transfer process, a common law negligence claim may be appropriate. But these factual circumstances are very rare, and other common law defenses such as causation and standing can bar the claims.

Recently, the United States Court of Appeals for the Eleventh Circuit analyzed claims of negligence and Article 4A in the context of a business email fraud scheme. *See Peter E. Shapiro, P.A. v. Wells Fargo Bank N.A.*, No. 18-15014, 2019 U.S. App. LEXIS 35604 (11th Cir. Nov. 27 2019) (unpublished). The case involved familiar parties: two lawyers involved in a closing, a fraudster, and the two banks involved in the wire transaction. A Florida lawyer engaged by family members to handle the sale of a car dealership in upstate New York received payment instructions by email from a lender's lawyer directing that the wire of funds for a loan payoff be sent to a bank account at M&T in New York. 2019 U.S. App. LEXIS 35604 at *2-3. Then the Florida lawyer received another set of wire instructions by email purporting to be from the same lender's lawyer, but actually from a fraudster, this time directing the wiring of funds to an account at Wells Fargo instead. *Id*. The Florida lawyer did not speak to the sender of the instructions and caused his bank to wire $504,611.13 to the fraudster's Wells Fargo account. *Id*. Wells Fargo received the wire transfer and processed it relying on the account number, notwithstanding that there was a name mismatch in the wire between the beneficiary name and the name on the account the funds were wired to. 2019 U.S. App. LEXIS 35604 at *4.

The Florida lawyer sued Wells Fargo alleging that it should not have processed the wire because the bank's automated systems knew that the beneficiary identified in the wire was not the owner of the Wells Fargo account identified in the payment order, asserting claims of common law negligence and violation of the Florida statute codifying UCC Article 4A. The Florida statute and Article 4A state expressly that, "if the beneficiary's bank does not know that the name and number refer to different persons, it may rely on the [account] number as the proper identification of the beneficiary of the order." *See* Fla. Stat. § 670.207(2)(a). The district court dismissed the common law negligence claim on preemption grounds and granted summary judgment for Wells Fargo on the Article 4A claim. The Eleventh Circuit affirmed. *See* 2019 U.S. App. LEXIS 35604 at *24.

The Eleventh Circuit found that Article 4A displaced the common law negligence claim given that it specifically defines the duties, rights, and liabilities of the parties in a misdescription-of-beneficiary case. 2019 U.S. App. LEXIS 35604 at *20. The Court found that the Florida lawyer's argument that Wells Fargo had a duty to refuse to accept the wire because of the misdescribed beneficiary conflicted with the express language of the UCC. 2019 U.S. App. LEXIS 35604 at *2-3. The Court found that the lawyer's UCC claim also failed. Article 4A provides that in cases involving payment orders that identify both an account name and account number, where the bank lacks "actual knowledge" that the account name and number do not match, the beneficiary bank (Wells Fargo) may rely on the number as the proper identification of the beneficiary of the order. 2019 U.S. App. LEXIS 35604 at *13-14. The Court relied on the comments to section 4A-207:

> A very large percentage of payment orders issued to the beneficiary's bank by another bank are processed by automated means using machines capable of reading orders on standard formats that identify the beneficiary by an identifying number or the number of a bank account. The processing of the order by the beneficiary's bank and the crediting of the beneficiary's account are done by use of the identifying or bank account number without human reading of the payment order itself. The process is comparable to that used in automated payment of checks. The standard format, however, may also allow the inclusion of the name of the beneficiary and

other information which can be useful to the beneficiary's bank and the beneficiary but which plays no part in the process of payment. If the beneficiary's bank has both the account number and name of the beneficiary supplied by the originator of the funds transfer, it is possible for the beneficiary's bank to determine whether the name and number refer to the same person, but if a duty to make that determination is imposed on the beneficiary's bank the benefits of automated payment are lost.

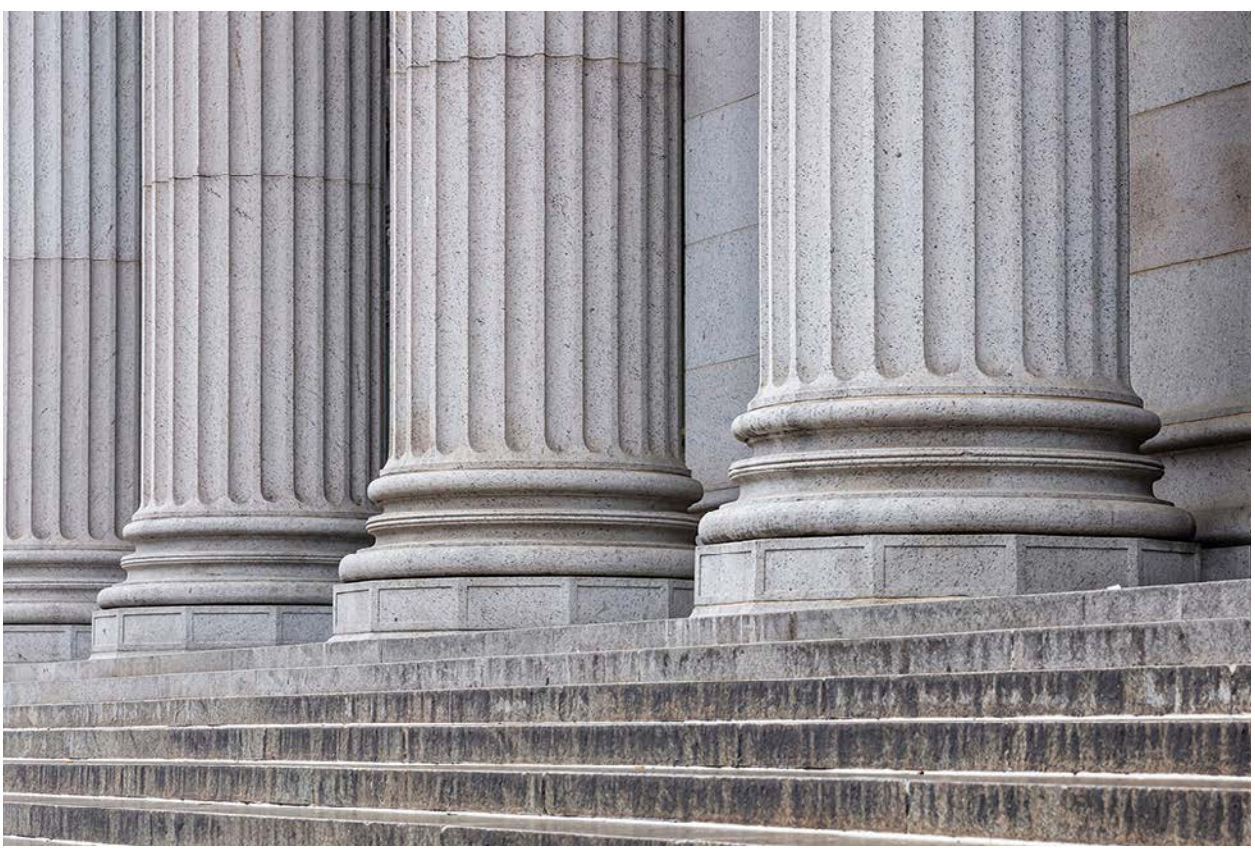
2019 U.S. App. LEXIS 35604 at *11-12. Noting that Article 4A states expressly that a beneficiary's bank does not need to determine whether the name and number refer to the same person, the Court found that no violation of UCC Article 4A had occurred. 2019 U.S. App. LEXIS 35604 at *18.

The Same Preemption Principles Apply in Check Cases

Although fraudulent schemes have increased in sophistication along with technological advances, more traditional fraud persists, including those involving dishonest bookkeepers and employers looking to the deep pockets of banks to recover losses. Common law claims usually are the first causes of action raised by the employer, and banks can typically defend and prevail by arguing that the common law claims are "displaced" or "preempted" by the UCC. A recent Maryland case provides a good case study.

In *Mar-Chek, Inc. v. Manufacturers and Traders Trust Co.*, GJH-18-3765, 2019 U.S. LEXIS 116005 (D. Md. 2019), Mar-Chek hired Mitul Shah to perform bookkeeping services for the company. Although Shah was eventually promoted to be Mar-Chek's chief financial officer, Shah was not authorized to sign checks or authorize outgoing wires.

In February 2007, Shah opened bank accounts in the name of Mar-Chek at Provident Bank. To open the account, Shah completed paperwork that falsely represented that he was authorized to open the account and handle transactions through it. Shah completed and executed an account-opening form provided by Provident entitled "Resolution for Corporate Deposit Account." The Resolution falsely



stated that Mar-Chek authorized Shah to act on behalf of Mar-Chek in all respects concerning the account. Shah later opened accounts at M&T in a similar manner.

Once Shah opened the accounts and added himself as a signatory who could act on the account's behalf, he wrote and personally endorsed checks from the Mar-Chek accounts to himself and others and sent electronic/wire transfers for his personal benefit without Mar-Chek's authorization. Shah concealed the payments in Mar-Chek's accounting software by making the payments appear as if vendor invoices were being paid or loan payments were being made.

From 2007 until 2015, Shah improperly transferred in excess of $2 million from Mar-Chek accounts and caused in excess of $1.5 million in damages to Mar-Chek before it was uncovered by Mar-Chek. Mar-Chek sued M&T Bank for breach of contract and negligence alleging that the bank's mishandling of the deposit account allowed Shah's embezzlement to continue unabated.

M&T moved to dismiss Mar-Chek's state-law breach of contract and negligence claims on preemption grounds under the UCC. M&T argued that once the plaintiff's common-law claims were construed properly as UCC claims, they were barred by a five-year statute of limitations.

The Maryland federal court agreed with the bank and found the claims to be time-barred. The court held:

> The UCC preempts common law claims when it provides an adequate remedy. UCC 3-401 states that "a person is not liable on an instrument unless the person is represented by an agent or representative who signed the instrument and the signature is binding on the representative person under Section 3-402." Section 3-402 provides that an instrument executed on behalf of a principal by an agent is enforceable against the principal only if it contains an "authorized signature. The reverse principle that "an unauthorized signature" is ineffective is codified in UCC 3-403 (observing that UCC 3-403 sets forth the "generally accepted rule that the unauthorized signature … is wholly inoperative as that of the person whose name is signed."

The Maryland court dismissed the claims against the bank pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that the UCC rules governing check and wire transfers occupied the field so that the plaintiffs were preempted. The Court summarized:

> Here, Mar-Chek asserts various common law claims that turn on harm suffered because the Defendants honored transactions (either by check or by wire) that were initiated by an unauthorized person. Articles 3, 4 and 4A of the UCC therefore provide an adequate remedy for the damages Mar-Chek allegedly incurred when the Defendants allowed Shah to open accounts on Mar-Chek's behalf, personally endorse checks, and initiate wire transfers despite his lack of authorization to do so.
>
> Mar-Chek's position that its common law claims relate only to the banks' conduct during the account openings, not the fraudulent checks or wire transfers, ignores that Mar-Chek's alleged damages arise solely from Shah's unauthorized endorsement of checks or initiation of wire transfers. Mar-Check argues unconvincingly that the UCC does not provide it with an adequate remedy because the transactions performed by Shah in the Mar-Check accounts appeared properly payable under the guidelines of the UCC. This conclusion is contradicted by the allegations in the Complaint. According to the Complaint, the Defendants failed to follow proper procedures and missed red flags when it allowed Shah to open accounts on Mar-Check's behalf and add himself as an "authorized signer."

The case is an excellent example of how the "preemption" defense continues to be the most powerful weapon available to bank defendants in check and wire fraud cases.

The First Circuit panel concluded that the "flat excess overdraft fees" charged by the bank did not qualify as usurious "interest" but instead constituted deposit account service charges.

First Circuit Rules National Bank's Overdraft Fees are Not "Interest" for Purposes of Usury Law

On March 26, 2019, the First Circuit affirmed a lower court decision dismissing a putative class action brought against Citizens Bank NA. *Fawcett v. Citizens Bank N.A*, 919 F.3d 133 (1st Cir. 2019). The First Circuit panel concluded that the "flat excess overdraft fees" charged by the bank did not qualify as usurious "interest" but instead constituted deposit account service charges.

The lead plaintiff was a Citizens Bank checking account customer who alleged that the bank charged her more than $800 in "sustained overdraft fees" over an 18-month period beginning in 2015. The bank's policy was to charge this type of fee periodically in amounts of up to $30 each when an account remained in a negative balance for a certain number of days after an initial overdraft.

Fawcett contended that, when compared to the amount Citizens was "loaning" her to cover shortfalls in her account, the "sustained overdraft" fees imposed often exceeded 1,000 percent on an APR basis. Since the federal statute limits national banks to the maximum rate of interest of their home states, and Citizens Bank was in Rhode Island, the rate ceiling was 21 percent.

The court analyzed the charges and noted that when a Citizens Bank customer overdraws her account, the bank has two options: it can either (1) cover the overdraft or (2) decline to cover and return the check. Citizens Bank charges a fee in both instances. If it returns a check, it charges a $35 "returned item fee." If the bank honors the check, it charges a $35 "overdraft fee." If the account remains overdrawn after the bank has honored the check and charged the initial overdraft fee, the bank then charges a "sustained overdraft fee" three times: $30 four business days after the overdraft, another $30 after seven business days, and a final $30 after ten business days.

In considering whether the fees constituted usurious interest, the First Circuit started by noting the import of deferring to an agency's interpretation of its own regulation citing *Auer v. Robbins*, 519 U.S. 452 (1997). The First Circuit considered OCC regulations promulgated under the National Bank Act as well as a 2007 Interpretative Letter issued to a national bank by the OCC.

The Court summarized four points of contrast between the bank's service fees and interest on a loan: "Flat excess overdraft fees arise from the terms of the bank's deposit agreement with its customers, are connected to deposit account services, lack the hallmarks of an extension of credit, and do not operate like conventional interest charges."

The First Circuit held that Citizens Bank's "sustained overdraft fees" are not "interest" under the National Bank Act. In the Court's view, analyzing regulatory text and history and following reasoning from the OCC's 2007 Interpretive Letter 1082, the NBA allows a national bank to charge interest at the rate allowed by the laws of the state where the bank is located. The NBA does not define the term "interest." The Supreme Court has held that the term "interest" is ambiguous; as a result, the courts should give deference to the agency in charge of regulating national banks—the OCC.

The applicable OCC regulation (12 CFR § 7.4001) states that the term "interest" includes "any payment compensating a creditor or prospective creditor, for an extension of credit, making available a line of credit, or any default or breach by a borrower of a condition upon which credit was extended."

If a bank's charge does not constitute "interest," then the OCC's regulatory guidelines for "deposit account service charges" apply.12 C.F.R. § 7.4002(b)(2). Fees for service charges are not subject to usury limits. A bank may, at its discretion, impose a deposit account service charge and set its amount, as long as the bank acts within the bounds of "sound banking judgment and safe and sound banking principles."

For these reasons, the First Circuit found that the overdraft charges comprised "deposit account service charges" and did not constitute unlawful interest.

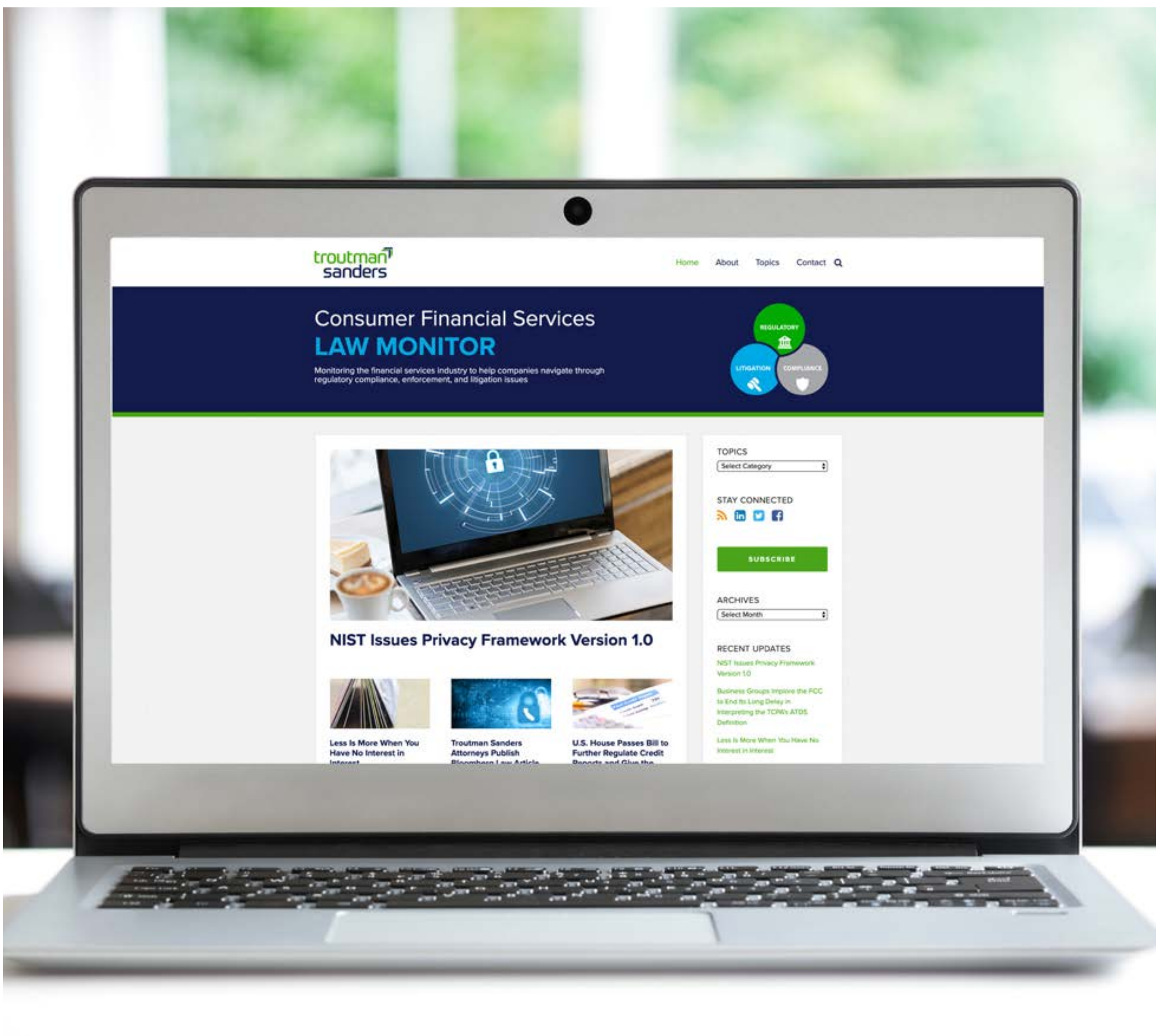
Summary

Given the rise in business email compromise, increasing sophistication of fraudulent actors, and creative class action lawyers scrutinizing overdraft charges and every other fee taken by banks in the consumer sphere, brushing the dust off the commercial code volume is a good idea. Consider whether the defenses of preemption and displacement of common law claims are applicable. Dig deep into agency regulations and court opinions reviewing them and be diligent about staying on top of supervisory guidance and regulatory developments.

CONSUMER FINANCIAL SERVICES LAW MONITOR

The Consumer Financial Services Law Monitor blog offers timely updates regarding the financial services industry to inform you of recent changes in the law, upcoming regulatory deadlines and significant judicial opinions that may impact your business. We report on several sectors within the consumer financial services industry, including payment processing and prepaid cards, debt buying and debt collection, credit reporting and data brokers, background screening, cybersecurity, online lending, mortgage lending and servicing, auto finance, and state AG, CFPB and FTC developments.

We aim to be your go to source for news in the consumer financial services industry. Please email cfslawmonitor@troutman.com to join our mailing list to receive periodic updates or visit the blog at www.cfslawmonitor.com.



CONSUMER FINANCIAL SERVICES WEBINAR SERIES

Our complimentary webinar series offers monthly CLE programming related to a variety of consumer financial services topics, including:

- Cybersecurity and Privacy
- Telephone Consumer Protection Act (TCPA)
- Fair Credit Reporting Act (FCRA)
- Fair Debt Collection Practices Act (FDCPA)
- Fair Housing Act (FHA)
- Mortgage Litigation and Servicing
- Bankruptcy
- Background Screening
- Electronic Funds Transfer Act (EFTA)
- State Attorneys General Investigations
- Consumer Financial Protection Bureau (CFPB) Enforcement and Regulatory Guidance
- Federal Trade Commission (FTC) Enforcement and Regulatory Guidance
- Case Law Updates

We are very interested in ensuring that we deliver the best webinar content to help you navigate the most complex business issues including litigation, regulatory enforcement matters, and compliance.

Email cfslawmonitor@troutman.com to submit topic suggestions.

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