2016 CONSUMER FINANCIAL SERVICES YEAR IN REVIEW AND A LOOK AHEAD

CONSUMER FINANCIAL SERVICES PRACTICE

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TROUTMAN SANDERS

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CONTENTS

Troutman Sanders Named Among *Law360* 2016 Consumer Protection Practice Groups of the Year

Troutman Sanders LLP recently announced that its Consumer Financial Services practice was selected as one of *Law360's* 2016 Practice Groups of the Year.

Troutman Sanders was recognized in *Law360's* Consumer Protection category for excellence in representing and advising clients with respect to high-stakes litigation and regulatory matters, as well as compliance issues.

In an interview with *Law360* about this recognition, which ran on Jan. 19, 2017, partners Michael Lacy and Ashley Taylor discussed the practice's philosophy and recent, significant wins on behalf of firm clients. Lacy described the multifaceted team as one that "came together organically, drawing on the experience of lawyers who practiced consumer law before it was in vogue, attorneys coming off stints in government and a robust banking practice."

The article highlighted the team's ability to unite skill sets to successfully resolve complex matters, many of which involve the Consumer Financial Protection Bureau and state attorneys general as well as claims related to the Fair Credit Reporting Act and the Telephone Consumer Protection Act.

Of the practice's collaboration across areas of litigation, compliance, and enforcement, Taylor said, "The in-house counsel is not thinking, does this fit in litigation, compliance or regulatory? They have an issue or they see something on the horizon. So we started to work as a group, the same way the client tackles issues when they sit around the conference room."

Lacy also commented on the recent growth of the practice, which now includes 80 attorneys, and told *Law360* that for the Consumer Financial Services team, the future looks bright.

The full article can be read here.

Background Screening

One of the biggest events in consumer financial services litigation in 2016 was the Supreme Court's long-awaited decision in *Spokeo, Inc. v. Robins*, No. 13-1339 (May 16, 2016). *Spokeo*, a Fair Credit Reporting Act ("FCRA") case, tested the requirements for Article III standing to bring a case in federal court. Robins alleged Spokeo, an online information directory, maintained a public profile for him that contained inaccurate information, including incorrectly ascribing to Robins a higher salary job and education level than he actually had. Spokeo moved to dismiss, arguing Robins had not alleged he was harmed by the information Spokeo maintained. The district court granted that motion, finding Robins had failed to allege sufficient injury-in-fact as required for Article III standing. The Ninth Circuit Court of Appeals reversed, and Spokeo appealed to the Supreme Court.

The Supreme Court vacated and remanded, finding the Ninth Circuit failed to fully undertake the required standing analysis and, in particular, failed to address whether Robins alleged a concrete and particularized injury. The Court recognized that Congress can identify and elevate intangible harms to create standing for statutory violations, but cautioned that a mere violation of a statutory right does not mean a plaintiff automatically has standing. The Court gave examples of non-concrete, statutory violations such as reporting a consumer's incorrect ZIP code and held that, while theoretically a statutory violation, such reporting would result in no harm and, as such, would not sustain an action in federal court.

In the months following *Spokeo*, commentators and attorneys from both the defense and plaintiffs bars have argued over the scope and import of the ruling. At the same time, district courts have sought to apply *Spokeo* to a variety of claims under different consumer protection statutes, including the FCRA, the Telephone Consumer Protection Act ("TCPA"), and the Fair Debt Collection Practices Act ("FDCPA"), among others. The results have been mixed, with some courts finding that *Spokeo* compels dismissal (or remand, if applicable), and others recognizing the holding of *Spokeo*, but finding dismissal inappropriate in the cases before them.

For example, in *Nokchan v. Lyft, Inc.*, the court dismissed an FCRA class action alleging the transportation network company gave prospective drivers a background check disclosure form with extraneous information (*i.e.*, not consisting solely of the disclosure). The court granted Lyft's motion to dismiss, finding it was a mere allegation of a technical statutory violation without any real harm from not receiving the required disclosure. Importantly, the court noted the possibility that such a technical violation *could* result in actionable harm, but found that Nokchan had not pled any, previewing the fact that *Spokeo*'s application has proven tremendously case-specific.

Likewise, and beyond the FCRA context, in *Kelen v. Nordstrom Inc.*, a district court in the Southern District of New York dismissed a putative class action alleging violations of the Truth in Lending Act ("TILA"). Kelen alleged Nordstrom had inaccurately or incompletely disclosed information regarding the amounts of late payment or returned payment fees she might expect on her Nordstrom credit card, as required by TILA. She did not allege, however, that she had ever been charged such a fee, instead claiming that the inaccurate disclosure itself harmed her and other consumers. The court rejected that argument, finding that under *Spokeo*, claims of a mere statutory violation are insufficient to satisfy Article III.

Still other district courts, sometimes wrestling with the same claims, have come to the opposite conclusion. For example, in *Rodriguez v. El Toro Investors Ltd.*, the court found that a putative FCRA class action did satisfy *Spokeo* and the Article III requirements. The claims there were similar to *Nokchan*, with Rodriguez alleging that a prospective employer had failed to provide an FCRA-compliant disclosure form in the hiring process. The *Rodriguez* court, unlike *Nokchan*, found it had jurisdiction. It based its conclusion on the fact that the extraneous information included in the background check disclosure might "detract from the warnings that Congress found so vital" or mislead consumers about their statutory rights, creating a "substantial risk of harm."

Similarly, in *Flaum v. Doctor's Associates, Inc.*, Subway restaurant moved to dismiss a Fair and Accurate Credit Transactions Act ("FACTA") class action alleging the restaurant had improperly printed his credit card's full expiration date on a receipt. Subway argued that Flaum had not identified actual harm, but instead merely the risk of identity theft, which it contended was insufficient. The court disagreed, finding that FACTA created a substantive legal right for Flaum to receive a receipt with truncated credit card information and that he had suffered a concrete injury when Subway gave him an improper receipt.

Ultimately, the cases—and the divergent outcomes—illustrate that the inquiry post-*Spokeo* is highly case-specific and truly depends on what the plaintiff alleges or, in some cases, what ultimately happened. In *Meyers v. Nicolet Restaurant of De Pere, LLC*, the Seventh Circuit Court of Appeals went so far as to base its standing analysis on what had happened to Meyers. Meyers alleged, like in *Flaum*, that Nicolet Restaurant had violated FACTA by failing to truncate the expiration date of his credit card on a printed receipt. Unlike the court in *Flaum*, however, the Seventh Circuit found that standing was lacking because Meyers had noticed the issue immediately, and no one had seen the receipt, obviating any concerns about identity theft, the stated goal of the statute's truncation requirement. Notably, *Meyers* set forth the same claim as *Flaum* but resulted in a different outcome—a common trend in *Spokeo* jurisprudence.

The potential ramifications of *Spokeo*, including outright dismissal of a claim, have led many plaintiffs' attorneys to begin filing cases in the first instance in state court, allowing them to shield their claims in one of two ways. First, if the defendant does not remove the case to federal court, the plaintiff may be able to shield her claim under sometimes more relaxed state law rules for standing. Second, if the defendant does remove the case to federal court and then moves to dismiss under *Spokeo*, the plaintiff might invoke 28 U.S.C. § 1447(c), which states that if the federal court finds that it lacks jurisdiction, it "shall" remand. Harboring under that provision, plaintiffs have successfully avoided dismissal by arguing that the proper procedural remedy, in the event that Article III standing is lacking, is remand.

This outcome was typified in the recent case of *Lee v. Hertz Corp.*, where a California district court fully accepted Hertz's argument that the putative FCRA class claims brought against it (lack of a compliant disclosure and failure to provide pre-adverse action notice) were not coupled with sufficient allegations of concrete and particularized injury. Because the case was before the court on removal, however, the ultimate outcome was remand rather than dismissal, as Hertz had urged.

Spokeo has presented itself most often in the context of defense motions to dismiss, but has also seen application in other contexts. In *Hawkins v. S2Verify*, a district court in California considered (and rejected) a *Spokeo* argument in the context of class certification, finding that Hawkins had suffered a sufficiently concrete injury. In *Schumacher v. SC Data Center*, the parties reached a class action settlement, which the defendant then sought to avoid on the basis of *Spokeo*; the court rejected that effort, saying that the relevant question was not whether it had jurisdiction over the FCRA claims, but whether it had the authority to enforce the settlement agreement.

Spokeo itself continues to progress after the Supreme Court's decision. Following remand, the Ninth Circuit Court of Appeals heard oral argument on December 13, 2016, to consider whether Robins has adequately alleged a concrete injury. The parties remain sharply divided, and a number of amici have filed briefs with the court. A decision is expected in 2017 and, given the stakes, it is likely that whatever side is unsuccessful before the Court of Appeals will again petition for certiorari to the Supreme Court.

Looking ahead into 2017, we expect the trends brought by *Spokeo* to continue. First, we expect to see an increased incidence of consumer statutory claims filed in state courts in an effort to shield claims from outright dismissal. Second, we expect to see a continued trend toward *Spokeo* challenges in federal court cases, both in motions to dismiss as well as class certification analysis. We also expect to see a continued divergence in outcomes, both as district courts vary in their interpretations of *Spokeo* and as unique factual situations present themselves. We would also expect that in addition to the Ninth Circuit weighing in on *Spokeo* post-remand, other courts of appeals may begin to define the contours of the *Spokeo* holding as district court decisions are appealed.

Credit Reporting and Consumer Reporting

Key Trends

The number of lawsuits filed under the Fair Credit Reporting Act ("FCRA ") grew at an aggressive rate in 2016. Compared to 2015, FCRA lawsuits were up approximately 8.4%, with almost 3,700 lawsuits filed throughout the course of the year. While filings under other consumer protection statutes, such as the Fair Debt Collection Practices Act ("FDCPA") remained relatively steady or fell, the FCRA continued to gain steam.

Disclosure Forms Still a Source of Trouble

Class actions related to background screening disclosure form issues were again prevalent during 2016. Section 1681b(b)(2)(A) of the FCRA requires employers provide prospective applicants with a disclosure before obtaining a pre-employment background check from a consumer reporting agency. This disclosure must be in a single document that consists "solely of the disclosure" that a consumer report may be obtained for employment purposes.

For example, Petco Animal Supplies Inc. was hit with a putative class action in the Southern District of California in June, challenging the company's form of disclosure for employment background checks. "By embedding its purported disclosure in an employment application and including extraneous information within and around the disclosure, defendant disregarded well-established case law and regulatory guidance from the FTC," the complaint read. The complaint alleged the background check disclosure was "hidden" among other pages of "fine print" and did not constitute the "stand alone" disclosure required by law.

Similarly, Penn National Gaming was served with a class action complaint in the Philadelphia County Court of Common Pleas, alleging that the company's online job application allegedly did not contain any standalone disclosures about consumer report investigations, but did contain a clause embedded with other material that said applicants were subject to a background check. "By systematically inserting a liability release and other extraneous information into plaintiff's and other class members' disclosures, defendant willfully violated the [FCRA]," stated the complaint.

In August, Sprint escaped a proposed FCRA class action when it settled on an individual basis a lawsuit accusing the telecommunications provider of including extraneous information in its disclosure form. Specifically, the plaintiff alleged Sprint's form included a blanket authorization whereby the applicant authorized the release of "any information related to my previous employment, results of any pre-employment drug screening test, criminal convictions, education, driving records, residences or character." In addition, the form allegedly included a notice that the authorization would serve as the applicant's authorization "to any persons, companies, government agencies, or other entities to furnish Sprint any and all such information pertaining to me that might be in their possession." The authorization also required the applicant to authorize the Social Security Administration to "release information regarding [his] social security number and information regarding [his] identity to Sprint," to agree to furnish any additional information necessary to complete the background investigations, and also agree to submit to a drug screen. After almost a year of litigation, the parties reached a settlement.

In the past year, courts have also been faced with the issue of what it means to be a "single document" in the digital age. For instance, in *Burnthorne-Martinez v. Sephora USA, Inc.*, the defendants' disclosure to the plaintiff appeared on a single webpage. The first section of the webpage was entitled "Certification and Release," while the second section was entitled "Background Release Form Disclosure and Consent." The plaintiff argued the webpage comprises a single document, and the inclusion of a "Certification and Release" section on the same webpage as the background check disclosure ran afoul of the FCRA's "solely of the disclosure" requirement. In its analysis, the Court found that neither the plaintiff nor the defendant offered any authority for what constitutes a "single document" "for the purposes of web-based applications." According to the opinion, the fact that the webpage includes a single "submit" button supports the conclusion that it constitutes a "single document." On the other hand, however, the defendant included two separate sections on that webpage, which the Court believed counseled in favor of compliance. Although the Court declined to make any finding at the pleading stage, the case is an important reminder to all employers who use digital background check disclosure forms that they are not immune from FCRA requirements.

Continued Litigation Over Common FCRA Claims

In 2016, individual and class actions continued to be brought under typical FCRA causes of action, such as section 1681e(b), which provides that "whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." One recent case of interest from the Northern District of Illinois granted a motion to dismiss claim under section 1681e(b), finding that a credit score purchased by a plaintiff was not a "consumer report" under the FCRA because it was not disclosed to any third party. The court held that the plaintiff "would not have a viable cause of action under § 1681e(b) because he was the only recipient of the TransUnion consumer credit score. Because no third party ever received that score, it is not considered a 'consumer report' by the Seventh Circuit and therefore does not trigger the protections of §1681e(b)."

Complaints were also filed pursuant to section 1681k of the FCRA, which requires a consumer reporting agency to "maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date." Recent cases have held that the "complete and up to date" requirement only requires a consumer reporting agency to report the current status of an item in a report. It does not ensure that the current information is necessarily accurate. For instance, in *Kelly v. Business Information Group*, the District Court for the Eastern District of Pennsylvania declined to read a requirement into section 1681k(a)(2) that the record be accurate, holding that section 1681e(b) is instead concerned with "maximum possible accuracy" of reports. Section 1681k(a), the Court concluded, was designed to address a different concern. The District Court for the Southern District of New York in *Jones v. Sterling Infosystems* similarly cautioned against conflating the obligations under section 1681k and section 1681e(b) of the FCRA.

Cases also continued to be filed against furnishers of information under section 1681s-2(b), challenging the reasonableness of the furnisher's investigation into disputed items. Consumers continue to challenge the nature of the investigations performed by furnishers, the failure to review all documentation (both submitted to the furnisher by the consumer reporting agency as associated images to an ACDV and the furnisher's own files), and the failure to appropriately use compliance condition codes to indicate the consumer is disputing the account. This year also saw continued litigation over the proper manner in which accounts involved in a bankruptcy are to be reported by furnishers, especially in situations involving Chapter 13 bankruptcy discharges. "Permissible purpose" claims against mortgage servicers and creditors under section 1681b continued to be filed, with a large number of class action cases challenging "soft pulls" of credit information by lenders and servicers with respect to consumers that had previously received a discharge in bankruptcy. We expect those claims to continue on an individual and class basis through 2017.

The CFPB Continues to Keep a Close Watch on FCRA Compliance Issues

In addition to the rise of individual and class action lawsuits under the FCRA, regulatory supervision of entities governed by the FCRA was also prevalent in 2016. In its recent bulletins and *Supervisory Highlights* publications, the Consumer Financial Protection Bureau ("CFPB") reiterated the importance of FCRA compliance for a broad spectrum of FCRA-regulated entities and specifically highlighted its interest in and supervision of furnishers of information.

Furnishers of consumer information are required to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information they furnish and are also required to promptly update information that is determined to be incomplete or inaccurate. In its first bulletin published in 2016, the CFPB reminded companies of this obligation. Specifically, the CFPB emphasized that furnishers' obligation to maintain written policies and procedures regarding the accuracy and integrity of information furnished applies to furnishing information to *all consumer reporting agencies (CRAs),* including furnishing to "specialty CRAs." The bulletin states that the Bureau's supervisory experience suggests that some financial institutions are not compliant with their obligations under Regulation V with regard to furnishing to specialty CRAs.

In its March 2016 *Supervisory Highlights* publication, the CFPB expounded on its concern with furnishing information to specialty CRAs. CFPB examiners conducted compliance reviews at certain depository institutions to determine whether the institutions were complying with their furnisher-specific obligations under the FCRA and its implementing Regulation V. The reviews focused on furnishers that provide consumer information to nationwide specialty consumer reporting agencies (NSCRAs).

Examiners found that certain furnishers had policies and procedures generally pertaining to FCRA furnishing obligations, but that they "failed to have policies and procedures addressing the furnishing of information related to deposit accounts." Examiners also found that one or more of the furnishers "lacked processes or policies to verify data furnished through automated internal systems." While certain furnishers had automated systems to inform the NSCRAs when an account was paid in full or when a balance reached zero, the furnishers did not have controls to check whether that information was actually furnished. Thus, CFPB supervision directed the furnishers to establish and implement policies and procedures to monitor the automated functions of its deposit furnishing process.

On a related note, the examiners also found that one or more furnishers of deposit account information failed to correct and update the account information they had furnished to NSCRAs and did not institute reasonable procedures regarding accuracy. For instance, when consumers had paid charged off accounts in full, certain furnishers would update their systems of record to reflect the payment but would not update the change in status from "charged off" to "paid-in-full" and send the update to the NSCRAs. The examiners concluded that "[n]ot updating an account to paid-in-full or settled-in-full status could adversely affect consumers' attempts to establish new deposit or checking accounts."

This regulatory focus on furnishers has been a consistent trend over the past few years. In 2015, for example, the CFPB brought a number of strict enforcement actions that resulted in big fines, including a $6.4 million fine against CarHop, one of the country's biggest "buy-here, pay-here" auto dealers, and its affiliated financing company, Universal Acceptance, for providing "damaging, inaccurate consumer information to credit reporting companies."

Looking Ahead

We expect the FCRA to continue to be a central source of plaintiffs' individual and class-wide consumer protection act claims in 2017. Based on previous trends, FCRA disclosure form issues will again be heavily litigated in 2017. As employers update their hiring processes with new technology, compliance issues in the digital age will also be brought to the forefront. Employers of all sizes should take heed and implement the necessary requirements now to ensure their background screening forms comply with the FCRA.

Through the CFPB's recent publications and numerous enforcement actions, it is also clear that any company that supplies information to CRAs is in an area of top federal concern and that a key regulator is continuing to keep a close watch on these companies. However, the new presidential administration undoubtedly creates uncertainty over the CFPB's future direction. Republican senators are urging the new President to remove CFPB Director Richard Cordray. A new Director could order a halt to litigation and enforcement proceedings, whether pending or threatened. The impact of the new administration will be closely monitored and scrutinized throughout 2017.

Debt Collection

Troutman Sanders has unique industry-leading expertise within the debt buying and collection ecosystem, with experience gained trying Fair Debt Collection Practices Act ("FDCPA"), Telephone Consumer Protection Act ("TCPA"), and Fair Credit Reporting Act ("FCRA") cases to verdict, as well as advising large, mid-size, and smaller companies regarding their compliance and regulatory strategies. We continue to monitor the ongoing regulatory, supervisory, and enforcement activities of the Consumer Financial Protection Bureau ("CFPB"), the Federal Trade Commission ("FTC"), the Federal Communications Commission ("FTC"), and state attorneys general to identify and advise on new compliance risks and strategies.

Key Trends

In 2016, the CFPB reported that it has handled approximately 285,800 debt collection complaints since July 21, 2011, making debt collection the most-complained-about industry. Within the debt collection context, consumers' most common complaint concerned attempts to collect on a debt that the consumer says is not owed, which was the focus of approximately 39% of all debt collection complaints. Other notable complaints concerned accounts being forwarded to third parties without receiving any prior notice from the original creditor about an outstanding balance, and consumers being bothered by frequent and repeated calls at home and at work, even after informing the collector that contact at work was prohibited by their employer.

2016 also saw the continued explosion of TCPA litigation. In 2016 alone, there were 4,860 TCPA lawsuits filed.

2016 Highlights

CFPB Seeks to Limit Arbitration Agreements

In early 2016, the CFPB proposed a rule that would prohibit covered providers of certain consumer financial products and services from using arbitration agreements that would prevent consumers from filing or participating in class action lawsuits. Under the proposal, companies can still include arbitration clauses in their contracts, but these clauses must state explicitly that they cannot be used to stop consumers from taking part in class action lawsuits. The Bureau expects to issue its final rule in February 2017 (assuming this rulemaking is not paused by the new Trump Administration).

Second Circuit Recognizes "Current Balance" Claim

In March, the United States Court of Appeals for the Second Circuit ruled that Section 1692(e) of the FDCPA requires debt collectors, when they notify consumers of their account balance, to disclose that the balance may increase due to interest and fees. In *Avila v. Riexinger & Assocs., LLC*, 817 F.3d 72 (2d Cir. 2016), a plaintiff brought a suit against a debt collector alleging a violation of the FDCPA for failing to inform the plaintiff that interest and other fees would apply to the plaintiff's account. The plaintiff contended that the debt collector's use of the statement "current balance" was false because, at the time the plaintiff had received the letter, the current balance would constantly increase. Thus, the plaintiff would be unaware of how much they would need to pay to settle the debt. The Second Circuit agreed with the plaintiff, stating that a debt collector was mandated to (1) inform consumers that interest and other fees would be charged; and (2) inform the consumer of the amount the consumer must pay by a certain time before interest and fees would be incurred. Following the Court's decision, the Second Circuit has experienced an explosion of lawsuits on the issue, particularly in New York, including consumer attorneys taking the position that collection letters should expressly state when no interest or fees are being charged.

Third Circuit Finally Limits Window Envelope Claims

The Third Circuit has for several years been an outlier with respect to window envelope cases, declining to follow the Fifth and Eighth circuits in adopting the so-called "benign language" exception to 15 U.S.C. § 1692f(8)'s prohibition against extraneous language or symbols on debtor communications, and holding in *Douglass v. Convergent Outsourcing*, 765 F.3d 299 (3d Cir. 2014), that the visible use of the debtor's account number violated the FDCPA. The United States District Court for the Eastern District of Pennsylvania recently clarified this position in *Anenkova v. Van Ru Credit Corp.*, 2016 U.S. Dist LEXIS 108950 (August 17, 2016), granting summary judgment in Van Ru's favor with respect to claims that a letter vendor's internal tracking number embedded in a barcode violated the FDCPA. Troutman Sanders represented Van Ru in this case, obtaining an excellent and well-reasoned opinion in Van Ru's favor from a district court in the Third Circuit adopting the "benign language" exception.

CFPB Proposes New Debt Collection Rules

In July, the CFPB released an outline of new rules targeting third-party debt collection operations. The CFPB's outline focuses on rules pertinent to third-party debt collectors—those who operate on behalf of creditors—and debt buyers. Rules relevant to creditors, first-party collectors, and banks are expected to follow at a later date. The CFPB's recent outline targets various areas, including:

- **Debt Validation:** Under the proposed rules, debt collectors would have a much higher burden to substantially prove a debt is valid before starting collection.

- **Limits on Contact:** Once a debt is considered valid, the new rules seek to limit a collector to no more than six communication attempts per week. Further, if a consumer wants a collector to stop calling a certain number, the new rules would make it easier to make such a request.

- **Consumer Disputes:** If a consumer disputes the validity of a debt, the proposed rules would require collectors to provide clearer and easier ways for that person to communicate the grounds for their dispute. This includes a proposed "tear off" portion of a collection notice whereby a consumer can denote why the amount is wrong or why they believe the debt is invalid. It also includes a proposal to allow consumers to dispute a debt over the phone. The latter proposal would represent a major change from existing law because, presently, most disputes must be handled in writing. Furthermore, if a consumer disputes a debt, collectors would be required to stop collection efforts until they gather enough evidence to substantiate the debt. Additionally, under the proposed rules, if a disputed debt is sold, the new collector would inherit the dispute and would still have to provide validation.

- **Deceased Consumers:** Also under consideration is a 30-day waiting period after a consumer's death before collectors can contact surviving family members. The CFPB said the proposal would clarify that "it is generally permissible for collectors to contact surviving spouses, parents of deceased minors, and individuals who are designated as personal representatives of an estate under state law." The CFPB is also proposing a 30-day waiting period for loans following the death of a debtor, stopping all collection attempts from a surviving spouse or child during that period.

ACA Challenges the FCC's 2015 Omnibus TCPA Order

In October, the D.C. Circuit heard oral arguments in *ACA International, et al. v. FCC*, appealing the FCC's 2015 declaratory order. The landmark July 2015 declaratory order was the result of the FCC's recent expansive interpretation of the TCPA. The order expanded the reach of the TCPA in multiple ways and significantly increased risks for businesses of all types attempting to contact consumers by telephone. Among other things, the 2015 order cast a wide net in interpreting what technologies constitute an automatic telephone dialing system (ATDS). An ATDS cannot be used to call a cellular telephone number without the prior express consent (in written form for telemarketing calls) of the subscriber or customary user of the number. ACA International is challenging the FCC's 2015 Omnibus TCPA Order on multiple grounds, and a decision is expected in 2017.

United States Court of Appeals Deems CFPB Leadership Structure Unconstitutional

Also in October, the United States Court of Appeals for the District of Columbia handed a major victory to mortgage lender PHH, declaring the CFPB's leadership structure unconstitutional and vacating a $103 million fine against PHH. The case was one of the first occasions that a company fought back against the CFPB. The issue began in June 2015, when Director Richard Cordray exercised his authority to layer an additional $103 million fine against PHH on top of an existing $6.4 million penalty order by an administrative law judge. PHH challenged Cordray's authority to levy the additional fine and the constitutionality of the CFPB. In a unanimous decision of the three justices on the bench, the court ruled that the CFPB's current structure gives the director far more power than in any other agency in the government.

United States Supreme Court Grants Certiorari for Review of "Crawford" Claims

The United States Supreme Court granted the petition for certiorari in *Midland Funding, LLC v. Johnson*, an appeal from the Eleventh Circuit bringing to a head two issues that has been boiling for several years: (1) whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding violates the FDCPA; and (2) whether the Bankruptcy Code, which governs the filing of proofs of claim in bankruptcy, precludes the application of the FDCPA to the filing of an accurate proof of claim for an unextinguished time-barred debt.

In *Johnson*, the Eleventh Circuit revisited the issue of whether debt collectors are barred by the FDCPA from filing proofs of claims in bankruptcy when those claims are based on unenforceable consumer debts under state law. The Eleventh Circuit affirmed its prior decision in *Crawford*, concluding that when a "creditor is also a 'debt collector' as defined by the FDCPA, the creditor may be liable under the FDCPA for 'misleading' or 'unfair' practices when it files a proof of claim on a debt that it knows to be time-barred, and in doing so 'creates the misleading impression to the debtor that the debt collector can legally enforce the debt.'"

When the Eleventh Circuit held that a debt collector violated the FDCPA by filing a proof of claim on a debt that it was time barred from litigating, a litany of litigation was born. Since then, however, many courts have rejected *Crawford*, including the Fourth, Seventh, and Eighth circuits. Most litigation on the issue has been stayed since the Supreme Court agreed to hear the case, and appeals (all from rulings favorable to the debt collection industry) remain pending before the First, Third, Fifth, and Sixth Circuit Courts of Appeals. The CFPB filed a brief in support of the consumer where it revealed it recently sued a debt collector for "abuse of process" related to 142,000 proofs of claim. In its brief, the CFPB argues that the FDCPA prohibits a debt collector from filing a proof of claim in a bankruptcy for a debt that the debt collector knows is time-barred. The CFPB also argued that because a debt collector implicitly represents that it has a good faith basis to believe its claim is enforceable in bankruptcy when it files a proof of claim, the filing is misleading and unfair in violation of the FDCPA when the collector knows the claim is time-barred and therefore unenforceable in bankruptcy. Several briefs supporting Midland's position have been filed, including ones from the U.S. Chamber of Commerce, DBA International, and ACA International. The Supreme Court heard oral argument on January 17, 2017.

Treasury Department Issues Proposed 1099-C Regulations

In December, the Treasury Department issued proposed amendments to the regulations governing the reporting of discharges of indebtedness that will impact the filing of Forms 1099-C for the 2016 calendar year. In summary, the Treasury Department has proposed repeal of the presumption that a Form 1099-C must be filed if a creditor (such as a financial institution) has not received a payment on an indebtedness during a 36-month testing period. The issuance of 1099-C forms remains relevant as courts continue to find that a 1099-C disclosure in a communication to a consumer may result in a false, deceptive, or misleading statement regarding potential tax consequences in relation to a proposed settlement of a debt.

Operation Collection Protection Concludes

Operation Collection Protection, the Federal Trade Commission's coordinated effort against unlawful debt collection practices, continued into 2016. Originally announced in late 2015, the FTC partnered with law enforcement, the U.S. Department of Justice, the CFPB, attorneys general from 47 states and the District of Columbia, and local law enforcement authorities for the initiative. Before concluding in late 2016, the FTC and its partners in Operation Collection Protection filed more than 165 enforcement actions against debt collectors. The FTC also won three summary judgments as a result of these enforcement actions in cases which included allegations of false threats of arrest, lawsuits, and wage garnishment.

Looking Ahead to 2017

Beyond the possible adoption of the aforementioned new rules concerning debt collection, 2017 may prove to be a year of marked transformation across the debt collection landscape. The Supreme Court is expected to decide *Midland Funding, LLC v. Johnson*, which should clarify the interplay between the FDCPA and the Bankruptcy Code. The *ACA International* challenge remains pending with the D.C. Circuit and may alter the TCPA landscape significantly. On January 13, 2017, the United States Supreme Court agreed to hear a case presenting the question whether a bank that purchases delinquent debts and begins collecting on those debts can be held liable under the FDCPA. The Court will review the Fourth Circuit's decision in *Henson et al. v. Santander Consumer USA, Inc.*, to dismiss a FDCPA class action against Santander. The appeal is expected to determine whether a financing company that attempts to collect delinquent debts originated by a third party is a "debt collector" subject to the FDCPA.

The recent presidential election promises still further changes. Indeed, some of these changes are already becoming clear, with FCC Chairman Tom Wheeler announcing in mid-December that he would step down from his post on January 20, 2017, and a Republican vocal critic of the FCC's actions being appointed as the new Chairman. Wheeler's term was not set to expire until 2018. However, it is tradition for a sitting chair whose term extends into a new presidential administration to resign when the new President is from an opposing political party.

Beyond Wheeler's resignation in December, the Republican-led Senate was scheduled to vote on the reconfirmation of Democratic Commissioner Jessica Rosenworcel for another five-year term with the FCC, but it took no action. Rosenworcel finished her term on January 3. Thus, Wheeler's departure will leave the agency shorthanded and, more importantly, with one Democratic and two Republican commissioners.

Payment Processing and Cards

In 2016, Troutman Sanders' Consumer Financial Services practice tracked rules, lawsuits and enforcement actions against payment processors and companies in the payments industry. The Consumer Financial Protection Bureau ("CFPB"), Federal Trade Commission ("FTC"), and state attorneys general brought nearly all of the enforcement actions, but private litigants also filed lawsuits against companies in the payments industry. The enforcement actions and lawsuits were based upon the processing of payments for merchants who allegedly violated state laws like state usury laws, state laws that prohibit online gambling, and common law fraud. The federal regulators, namely the CFPB and FTC, alleged that payment processors violated the prohibition of unfair, deceptive, and abusive acts or practices (UDAAP) and the prohibition of unfair and deceptive acts and practices (UDAP) arising out of merchants' alleged violations of the foregoing laws. The Bureau and FTC have also alleged that the processors engaged in UDAAP and UDAP by failing to conduct appropriate ongoing due diligence on the merchants or failing to stop processing for merchants who had high chargeback rates. Both the CFPB and consumers filed lawsuits against companies who are in the factoring industry, with the CFPB alleging that a company engaged in deceptive and misleading advertising and services. Private litigants around the country have been alleging that the factoring companies' purchase of accounts receivable at discounted rates amount to usury loans. These private lawsuits have not been particularly successful.

Rulemaking was also a large issue in 2016. States either amended or interpreted their money transmitter rules to define payment processors as money transmitters who must be licensed money transmitters under state law. Merchants' challenges to state laws prohibiting them from assessing surcharges against consumers have made it to the United States Supreme Court. States and the federal government are at odds on the issue of whether the Office of the Comptroller of the Currency ("OCC") should allow fintech companies, which includes payment processors, to obtain a special charter. The CFPB was also active with respect to rulemaking, issuing a final prepaid card rule, proposing an arbitration rule and continuing to assess new potential debt collection rules.

Key Trends

As in years past, the CFPB continued to focus its 2016 enforcement efforts on entities that allegedly processed payments for merchants in the payday lending and online lending industries, concentrating its investigations on high chargeback rates or circumstances under which the CFPB believed that the merchants were violating state usury laws. The Bureau did not stop with the lending industry with respect to enforcement actions against payment processors. The Bureau expanded the scope of its UDAAP authority to include data security. Specifically, the Bureau also executed a consent order with a payment processor, stating that the processor engaged in UDAAP when the payment processor allegedly represented to consumers that it had certain data security mechanisms in place when it really did not have such mechanisms. The Bureau has also been investigating claims that merchants have been violating the Electronic Funds Transfer Act by failing to obtain consent from the consumers before making automated ACH debit transactions.

The CFPB was not the only regulator to sue payment processors. The FTC sued payment processors arising out of merchants' alleged violations of the Telemarketing Sales Rule and for processing payments for merchants who were allegedly defrauding consumers. Like the CFPB, the FTC has been active with respect to investigating payment processors for continuing to process for merchants with high chargeback rates.

State attorneys general executed settlement agreements with online money lenders for violating state usury laws, and the Vermont Attorney General executed a settlement agreement with a payment processor for processing payments for a payday lender who allegedly violated that state's usury laws.

The rationale in all of the cases against payment processors is that the processors knew, or should have known, that the payments were unlawful under state law or otherwise arose out of the merchant's unlawful conduct. The regulators have also stated that the processor did not conduct sufficient initial or ongoing due diligence with respect to the merchants for whom they processed payments.

2016 Highlights

In June, the CFPB sued a payment processor, Intercept, alleging that it has violated UDAAP by processing payments with high chargeback rates. Intercept and the Third Party Payment Processors Association ("TPPPA"), represented by Troutman Sanders, have moved to dismiss the case. In the motion to dismiss, the TPPPA argued that the Bureau violated the due process rights of Intercept by bringing an enforcement action under its UDAAP authority without concurrently alleging that Intercept made a false or deceptive statement; or violated a previously existing federal law, state law, or industry rule. The motion to dismiss is pending and is set for oral argument in February 2017.

The Bureau executed a consent order with Dwolla, Inc., arising out of Dwolla's alleged false representations to consumers stating that its data security practices exceeded industry standards and were compliant with the Payment Card Industry Data Security Standard. Dwolla also claimed that it encrypted all sensitive personal information and that its mobile applications were safe and secure. According to the Bureau, these statements were false. Notably, Dwolla did not have a data breach, but the Bureau nonetheless brought the enforcement action.

In September, the United States Supreme Court agreed to hear the appeal of a case that retail merchants filed against the State of New York and the City of New York challenging the constitutionality of a New York state law prohibiting merchants from assessing surcharges against customers who make purchases using a credit card. The challenged law states that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." The Supreme Court's resolution of this case will affect the interpretation of laws in other states that prohibit or otherwise regulate surcharges.

The Division of Consumer Services of the Department of Financial Institutions in the State of Washington issued an interpretive statement whereby merchant payment processing constitutes money transmission under state law. As a result, payment processors must be licensed as money transmitters under state law unless a waiver is granted by the state. Washington is not alone, as other states are also requiring payment processors to be licensed as money transmitters. This requirement creates uncertainty for payment processors and places them in a legal quagmire because engaging in unlicensed money transmission is a federal crime.

Looking Ahead to 2017

In 2017, we anticipate that the states will be more active with respect to enforcement of usury laws and the amendments to or interpretations of their money transmitting rules requiring payment processors to have money transmission licenses. Although many expect that the new administration will slow down the regulatory and enforcement actions against payment processors, the payments industry will still have to comply with the CFPB's prepaid account rules and Director's promise to continue to charge ahead, notwithstanding the different political climate. Similarly, the FTC also plans to charge ahead with enforcement actions against merchants and payment processors, although the balance of power will lean to the right. Tribal lending will also be a large issue in 2017, as the regulators have challenged whether some tribal lenders are really "arms of the tribe" that are immune from state enforcement actions and compliance with consumer finance federal statutes.

The Evolving Regulatory Landscape

Industry Developments in 2016

A number of high profile decisions and settlements changed the landscape for regulators, including the CFPB, FTC, and state attorneys general. In October, the D.C. Circuit issued its highly-anticipated decision in *PHH Corporation v. Consumer Financial Protection Bureau*. Judge Kavanaugh, writing for the panel, found that the Bureau has too much unilateral, unchecked power and held unconstitutional the provision that the Bureau's Director can only be removed by the President "for cause." The decision stopped short of shutting down the Bureau, however, and limited its remedy by striking the "for cause" portion of the law, holding that the President can remove the CFPB Director at will. The CFPB filed in December for rehearing *en banc*, so this may not be the last word on the CFPB's constitutionality. As will be discussed in greater detail below, it also remains to be seen how the CFPB will change with the incoming Trump Administration.

Notable, too, in 2016, were a number of high profile settlements. At the end of the year, the FTC, along with a coalition of 13 states and the District of Columbia, announced a settlement agreement with Ashley Madison over allegations that the online dating site deceived customers and failed to protect their information after a massive July 2015 data breach. The settlement requires the company to implement a comprehensive data security program, including third-party assessments. The parties agreed to a fine of $17.5 million, with approximately $15.8 million suspended.

The ongoing saga of fantasy sports in New York appeared to end in November, when the New York Attorney General announced a settlement with DraftKings and FanDuel. The announcement marked the final step in a circuitous route to settlement, from cease-and-desist letters in 2015, to partial settlement in March 2016, to the state legislature's legalization of daily fantasy sports contests in June. The companies agreed to pay $6 million each in penalties and fines to settle false advertising allegations. In addition to the monetary payments, the settlement requires both companies to disclose on their websites the rate of user success in contests, including the percentage of winnings won by the top 1%, 5%, and 10% of site users.

Some commentators have suggested that if the Trump Administration reins in regulators at the federal level, state regulators will fill in those gaps. In September 2016, the New York Department of Financial Services provided an example that other states may follow, when it announced sweeping regulations to combat cyber attacks against financial institutions. The new requirements would compel banks, insurance companies, and other financial services institutions to establish and maintain cyber security programs and to take other measures to protect against data breaches and cyber attacks. Other measures would include appointing overseers for outside vendors and limiting employees' access to customers' private information, such as Social Security numbers. The Department issued a revised draft of the regulations in December, pushing back the regulations' effective date to March 2017.

Lastly, George Jepsen, Attorney General of Connecticut, began a one-year term as president of the National Association of Attorneys General in June. Jepsen also serves on the Board of Directors of the NAAG Mission Foundation and is a member of the Internet Safety/Cyber Privacy and Security Committee. As Attorney General, Jepsen has made health care one of his main initiatives. He has vigorously pursued health care issues, focusing on reducing health care costs by increasing transparency and competition, as well as preventing and deterring health care fraud.

Troutman Sanders Highlights in 2016

Beginning in July 2015, USA Living was the target of a multistate investigation brought by 30 states and the District of Columbia and separate investigations brought by the Attorneys General of Colorado and Texas over USA Living's consumer sales and lending practices. USA Living filed for bankruptcy in August 2015 and has since closed its stores. Troutman Sanders represented USA Living in connection with a negotiated settlement process that culminated in June 2016 and included a penalty of $40 million in the form of a subordinated unsecured claim. Our attorneys were able to resolve the matter with the entire multistate committee, following a three-day in-person mediation session in Washington that included representatives of the states, as well as representatives of the secured lenders and creditors committee.

Troutman Sanders represented the Third Party Payment Processors Association ("TPPPA") in connection with filing an amicus curiae brief with the U.S. District Court of North Dakota in the matter of *Consumer Financial Protection Bureau v. Intercept Corp. et al.* In 2016, the CFPB sued a payment processor, Intercept Corporation, and two of its executives, alleging the company violated the Consumer Financial Protection Act. The TPPPA, an industry group for firms that facilitate transactions between merchants and customers' bank accounts, argued that the CFPB's complaint against Intercept lacked any sort of evidence that the defendant violated any federal law, regulation or industry rule. Our attorneys assisted the TPPPA in drafting and filing the amicus brief.

Additionally, Troutman Sanders worked with a third-party debt collection agency to develop an internal audit policy based on an on-site review, during which our attorneys carefully assessed the company's audit practices and procedures. Following the on-site review, our professionals provided a report confirming that the company was taking the proper steps internally to ensure compliance with the relevant consumer financial law requirements impacting their business units and to meet the standards set forth by both the CFPB and state regulators. We also continued to advise a third-party collection agency regarding issues arising out of a previously negotiated settlement with the CFPB and provided guidance for the necessary follow-up materials to be provided to the Bureau.

Finally, the Firm represented a payment processor in a state attorney general investigation over a data security event affecting over 100,000 consumers. Our attorneys responded to the attorney general's inquiries and successfully negotiated a settlement. Our clients continue to seek our representation for high-profile negotiations and settlements involving state attorney general investigations and actions by the CFPB and FTC.

Outlook for 2017

Substantial and meaningful changes are coming in the consumer protection domain in 2017. While these changes might not garner headlines, they will be significant and long-lasting. Expect the overall perspective on consumer protection to change with the Trump Administration, which emphasize free markets and deregulation. The FTC currently has two seats unoccupied in its five-commissioner committee, and President Trump likely will fill these seats with conservatives who share his free market view and who will encourage the curtailment of regulations already on the books and slow the adoption of new regulations. On the bench, look for the President to appoint traditional judicial conservatives to fill vacancies from district courts all the way up to the Supreme Court.

The CFPB in particular faces considerable uncertainty in 2017. Challenges to the Bureau's constitutionality will persist, as *PHH Corporation v. CFPB* (discussed above), with a petition for *en banc* review currently under consideration by the D.C. Circuit, could reach the Supreme Court. With the addition of a new Trump appointee on the Supreme Court, the Bureau likely will face an uphill climb to find five justices willing to rule in its favor. The practical effect of any ruling likely will be mooted, however, by an expected overhaul of the CFPB. A five-member bipartisan committee, similar to the FTC, has been proposed to replace the current single-director structure, decentralizing Director Cordray's power. In addition, Dodd-Frank opponents likely will shift the Bureau's funding from the Federal Reserve to Congress – a move that could stonewall the CFPB's initiatives. In the immediate future, there is speculation that, if Director Cordray is replaced by a Trump appointee, the Bureau or the Department of Justice may abandon the *en banc* review request in *PHH Corporation v. CFPB* and eventual appeal to the Supreme Court. Democratic attorneys general from 16 states and the District of Columbia filed a motion to intervene in the case on January 23, 2017, citing statements from members of the Trump administration indicating that Trump wants to fire Director Cordray. Led by NAAG president George Jepsen, the attorneys general argue that the current ruling, if allowed to stand, would undermine the power of the states to effectively protect consumers against abuse in the consumer finance industry.

From the legislative branch, H.R. 5, the Regulatory Accountability Act of 2017, a bill to reverse *Chevron* deference has already passed the House and has a higher likelihood of becoming law with a Republican occupying the White House. If it does, administrative law will change radically. President Trump has also pledged to sign the REINS Act should it reach his desk; this legislation would require any executive branch rule or regulation with an annual economic impact of $100 million or more to pass a Congressional vote before being enacted. The REINS Act faces an uphill battle in the Senate, however, and will need the support of eight Democratic senators to pass. With deregulation in the air in Washington, state attorneys general will step in to take the lead in consumer protection initiatives. Companies can no longer focus on federal compliance issues alone and, instead, will need a comprehensive state consumer law strategy.

About Troutman Sanders Consumer Financial Services Practice

Our Philosophy of an Integrated Approach – Litigation, Enforcement and Compliance

Troutman Sanders' Consumer Financial Services practice provides legal experience and knowledge in the areas of litigation, enforcement and regulatory compliance. Our trial attorneys have litigated thousands of individual and class action lawsuits involving cutting-edge issues across the country.

Instead of having three separate groups within the firm, our team of compliance, litigation, and enforcement lawyers works together in one multi-disciplinary practice 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.

Troutman Sanders is recognized in litigation relating to consumer claims and our lawyers have significant experience representing clients in such areas as Consumer Class Action Defense, Consumer Credit Regulations (such as Regulation B), 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), Fair Credit Reporting Act (FCRA), Fair Debt Collection Practices Act (FDCPA) and state law debt collection claims, Federal and State Odometer Acts, 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, Privacy, Racketeer Influenced Corrupt Organizations Act (RICO), Real Estate Settlement Procedures Act (RESPA), Servicemembers Civil Relief Act (SCRA), Telephone Consumer Protection Act (TCPA), Truth in Lending Act (TILA), Unfair and Deceptive Acts and Practices (UDAP) statutes, and Unfair, Deceptive and Abusive Acts and Practices (UDAAP).

Troutman Sanders also has experience in handling state investigations in the consumer protection field. Our attorneys have extensive experience in the private sector across many industries, representing clients in matters involving individual and multistate attorneys general investigations. Our approach, which we describe as "legal diplomacy," combines a thorough knowledge of the law with an understanding of the policy and personality factors that can affect decision-making by state attorneys general. We maintain regular contact with the attorneys general and have built solid working relationships with key staff in attorney general offices throughout the nation.

With our unsurpassed experience handling multistate enforcement actions and litigations in particular, Troutman Sanders is able to assist companies in navigating the anticipated increase in state government activity. Certain states have developed specialized areas of focus in recent years, including in privacy, debt collection, and telephone solicitation. We track the trends set by every state, allowing us to proactively advocate for our clients before government bodies and anticipate and address enforcement issues before they result in regulatory action or litigation.

Lawyers in each of our Consumer Financial Services team's core areas – litigation, regulatory compliance, and enforcement – work together to recommend creative approaches that efficiently address our clients' needs. By limiting the resources spent on fighting legal battles, our clients can concentrate on growing and expanding their businesses.

Consumer Financial Services Law Monitor

The Troutman Sanders 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 late-breaking judicial opinions that may impact your business. Email us to join our mailing list to receive periodic updates or visit the blog at www.cfslawmonitor.com.