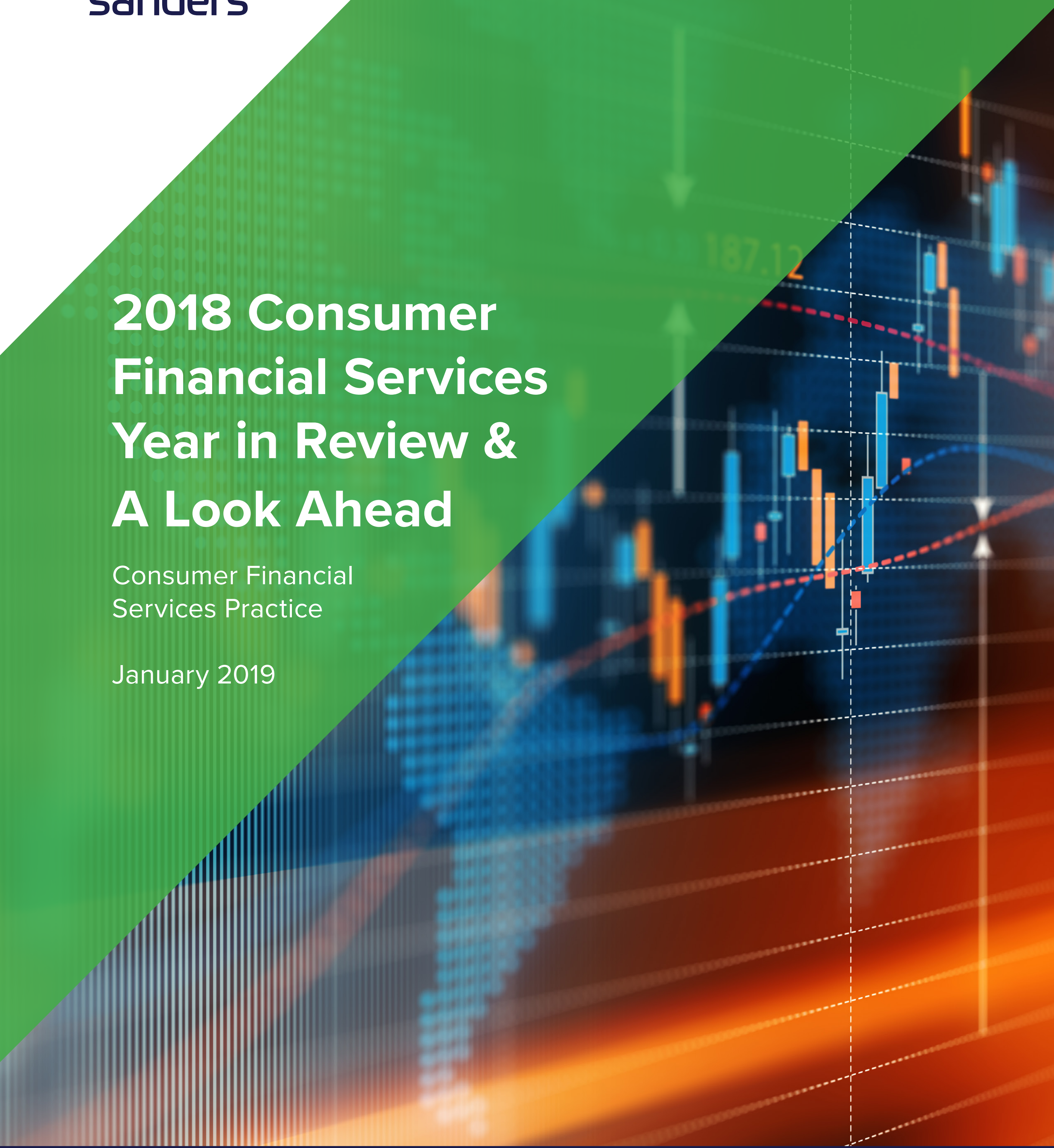
2018 Consumer Financial Services Year in Review & A Look Ahead

Consumer Financial Services Practice

January 2019



2018 Consumer Financial Services

Year in Review, January 2019

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EXECUTIVE SUMMARY

2018 was a busy year in the consumer financial services world. As we navigate the continuing heavy volume of regulatory change and forthcoming developments from the Trump administration, Troutman Sanders is uniquely positioned to help its clients successfully resolve problems and stay ahead of the compliance curve. Troutman Sanders was also recently recognized as one of *Law360*'s Consumer Protection Practice Groups of the Year for 2018.

In this report, we share developments on consumer class actions, background screening, bankruptcy, Fair Credit Reporting Act ("FCRA"), Fair Debt Collection Practices Act ("FDCPA"), payment processing and cards, mortgage, auto finance, the consumer finance regulatory landscape, cybersecurity and privacy, and the Telephone Consumer Protection Act ("TCPA").

By remaining up-to-date on the latest industry trends and regulatory developments, Troutman Sanders is a trusted resource that our clients rely on 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 FCRA, 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 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"), and the Servicemembers Civil Relief Act ("SCRA").

Our regulatory enforcement team is prepared to respond to the Consumer Financial Protection Bureau ("CFPB") 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 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 Federal Trade Commission ("FTC") investigations concerning a variety of matters, including consumer privacy and data security breaches. At Troutman Sanders, we can move seamlessly 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

Class actions have continued to dominate court dockets, with thousands of new filings occurring in 2018. Based on the attractive statutory damages and attorneys' fees provisions available under many of the heavily-litigated consumer statutes, the plaintiffs' bar shows no sign of slowing down.

While the total number of class actions helps to illustrate the high risk to regulated companies, there have been a number of developments this year that lend support to the defense of these cases. These developments include new limitations on piggyback class actions, affirmation of the enforceability of arbitration agreements, dismissals based on lack of Article III standing for named plaintiffs or unnamed class members following *Spokeo*, and developments in *Bristol-Meyers Squibb* personal jurisdiction arguments in the class action context.

Supreme Court Limits Plaintiffs from Bringing Piggyback Class Actions After the Statute of Limitations Has Run

The Supreme Court's decision in *China Agritech Inc. v. Resh* is a significant victory for defendants in federal class action lawsuits because it prevents plaintiffs from bringing successive class actions after the statute of limitations has run on the basis of the claim that the statute of limitations was tolled during each of the prior class actions.

Under the Supreme Court's previous decision in *American Pipe & Construction Co. v. Utah*, the Court held that the filing of a class action tolls the limitations period for the individual claims of a purported class member if those claims fall within the scope of the pending class action. Prior to the Court's decision, there was a split among the circuit courts as to whether a plaintiff who files a subsequent class action against a defendant can receive the benefit of *American Pipe* tolling from a previous class action against that same defendant. The First, Second, Third, Fifth, Eighth, and Eleventh circuits had held that American Pipe tolling only tolled the limitations period for subsequent individual (non-class) claims. In contrast, the Sixth, Seventh, and Ninth circuits had held that *American Pipe* allowed for tolling of individual and class claims in subsequent class actions.

The Court explained that allowing a previous class action to toll the statute of limitations from running on subsequent individual claims is in the interest of efficiency and economy.

On June 11, the United States Supreme Court decisively held in an 8-1 opinion that *American Pipe* does not provide tolling for subsequent ("piggyback") class actions in federal question cases. In the Supreme Court's view, neither *American Pipe* nor the Federal Rules of Civil Procedure should be read to "permit plaintiffs to exhume failed class actions by filing new, untimely class claims." The Court explained that allowing a previous class action to toll the statute of limitations from running on subsequent individual claims is in the interest of efficiency and economy. However, the Court held that there is no analogous "efficiency" rationale for allowing *American Pipe* to toll the limitations period on claims asserted in a subsequent class action. The Court reasoned that allowing tolling in subsequent class claims would encourage potential named plaintiffs to "piggyback" by waiting to see the outcome of a previous class case and that it would also effectively "allow the statute of limitations to be extended time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation."

While the Supreme Court's decision in *China Agritech* is a significant win for defendants, as with all significant Supreme Court decisions, we expect the plaintiffs' bar to adapt. For example, plaintiffs may attempt to file more simultaneous class actions with multiple named plaintiffs in the hope that one of those cases will make it past class certification. Waiting for the first case to resolve is no longer a safe strategy, as the subsequent claim may become time-barred while the first action runs its course. Or, plaintiffs may be more inclined to attempt to intervene in ongoing class actions – especially if they see defects in the current named representative's claims. They may argue that if they intervene in a case, they receive the benefit of tolling for the entire duration of the ongoing class action, despite the fact that the initially named representative had defective claims.

Supreme Court Upholds Class Action Waivers in Employment Contracts, Adding to its Decisions Consistently Enforcing Arbitration Provisions

On May 21, the U.S. Supreme Court, in a 5-4 decision penned by Justice Neil Gorsuch, held that employers can include a clause in their employment contracts that requires employees to arbitrate their disputes individually and to waive the right to resolve those disputes through class actions and other joint proceedings. The Court ruled such requirements are enforceable under the Federal Arbitration Act ("FAA").

The decision is a major victory for employers, as arbitration can be a tool to mitigate lawsuits and class actions. The ruling, moreover, takes its place in a lengthy and growing list of rulings by the Supreme Court enforcing arbitration agreements and the proarbitration policies of the FAA over the resistance of some lower federal courts and state courts.

The Court addressed three cases in this decision: (1) a class action from the Fifth Circuit against Murphy Oil USA Inc. brought under the Fair Labor Standards Act ("FLSA"); (2) a wage and hour class from the Seventh Circuit against Epic Systems, a healthcare software company, alleging that it violated the FLSA; and (3) a class action from the Ninth Circuit claiming Ernst & Young violated the FLSA and California labor laws by misclassifying employees to deny them overtime wages.

According to the majority opinion, the FAA mandates enforcing the terms of an agreement to arbitrate, given that the FAA was enacted "in response to a perception that courts were unduly hostile to arbitration." The FAA thus instructed courts to "respect and enforce the parties' chosen arbitration procedures" – such as the agreement to "use individualized rather than class or collective action procedures." In light of the FAA's language, Justice Gorsuch wrote: "The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written."

The appellee-employees argued that the National Labor Relations Act ("NLRA"), passed in 1935, rendered class action and other joint-proceeding waivers unenforceable in arbitration agreements because the NLRA gives workers the right to organize "and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Supreme Court rejected that position, stating, "The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum." The majority refused to defer to the conclusion of the National Labor Relations Board ("NLRB") that the NLRA trumps the FAA. The Court found that such Chevron deference was inappropriate since the NLRB was interpreting the NLRA "in a way that limits the work of" the FAA.

The *Epic Systems* decision is good news for employers nationwide as it enhances their ability to limit exposure to employee claims in class arbitration, class actions, and other joint proceedings. Moving forward, we see several potential developments. Undoubtedly, more employers will include class and joint-proceeding waivers in their arbitration agreements, and will make those agreements mandatory for new hires. This will become the norm for employers. Additionally, the logical underpinnings and reasoning in the *Epic Systems* decision have ramifications beyond the employment context. Pro-employee advocates have long argued that employment law or the relationship between employer and employee somehow justified different treatment than other contractual relationships meaning that the FAA did not apply or these special circumstances trumped the FAA. Likewise, in the consumer context, many pro-consumer advocates have raised a host of similar arguments that the relationship between consumers and businesses (such as credit card companies, auto finance entities, and debt collectors) provides justification for courts to disregard plainly worded arbitration provisions embedded in applicable contracts under supposed public policy rationales. *Epic Systems* reiterates the Supreme Court's view that the FAA will govern the interpretation of arbitration provisions, including in the class action context, by reviewing the plain language used by the parties and will reject arguments that amount to a rewriting or failure to enforce the clear language in arbitration provisions. Indeed, consumer-facing companies of all types can take additional comfort in the efficacy of arbitration agreements in designing and implementing arbitration programs for consumer claims.

As a result of the U.S. Supreme Court's ruling, on October 30, United States House of Representatives members Jerrold Nadler (D-N.Y.) and Bobby Scott (D-Va.) introduced the Restoring Justice for Workers Act. The proposed legislation would outlaw use of class action waiver provisions in employment contracts and would bar agreements that require future employment disputes to be arbitrated, giving workers greater leeway to pursue work-related claims in court. The proposed bill would amend the FAA and the NLRA to ensure that disputes between employers and workers can be resolved in court and ensure that workers can band together in class or collective actions. No action has yet been taken on the proposed legislation.

7th Circuit Joins Other Circuits in Holding that Availability of Class Arbitration Is for District Court—Not the Arbitrator—to Decide

In a decision that reversed a $10 million "collective action" arbitration award, the Seventh Circuit held that whether class or collective arbitration is authorized by an arbitration agreement is a "gateway" decision to be made by the district court, not the arbitrator. The case is *Herrington v. Waterstone Mortgage Corp.*, No. 17-3609 (7th Cir. Oct. 22, 2018). This decision aligns the Seventh Circuit with all other federal courts of appeals that have addressed this issue, including the Fourth, Sixth, Eighth, Ninth, and Eleventh circuits.

Plaintiff Pamela Herrington filed a class action against her former employer for violations of the FLSA. The employer moved to compel arbitration based on the arbitration clause in Herrington's employment agreement, which stated: "[s]uch arbitration may not be joined with or join or include any claims by any persons not party to this agreement." The District Court enforced the arbitration agreement, but found the provision prohibiting class or collective action claims invalid based on Seventh Circuit authority that was subsequently overruled. See *Lewis v. Epiq Sys. Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2016) (holding that the National Labor Relations Act prohibits agreements that require single-claimant arbitration of employment claims); see also Epiq Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (holding that class action waivers in employment agreements did not violate the NLRA).

After the District Court ordered the case to arbitration, Herrington joined 174 other plaintiffs who pursued their claims as a collective action. The arbitrator awarded Herrington and the other joined plaintiffs more than $10 million in damages.

The employer appealed the District Court's order compelling arbitration, and the Seventh Circuit vacated the award and remanded the case. In doing so, the Seventh Circuit explained that "the availability of class or collective arbitration is a threshold question of arbitrability." Like the questions of whether the parties have a valid arbitration agreement and whether a dispute is covered by the agreement, the question of whether class or collective claims are authorized by an arbitration agreement is a "gateway issue" to be decided by the district court and not the arbitrator. In reaching this conclusion, the Court emphasized the importance of closely examining the parties' express agreement to arbitrate. The Court acknowledged that "the structural features of class arbitration make it a 'fundamental' change from the norm of bilateral arbitration."

Where parties intend to limit their arbitration agreement to bilateral arbitration, this decision highlights the importance of clearly expressing that intent in the language of the arbitration clause.

Eleventh Circuit Agrees, but Finds Parties Intended to Arbitrate Availability of Class Arbitration

The same question was addressed by the Eleventh Circuit in an opinion that illustrates the importance of careful drafting of arbitration agreements. The court in *JPay, Inc. v. Kobel*, 904 F.3d 923 (11th Cir. 2018) determined that the availability of class arbitration is a gateway question of arbitrability presumptively for the court to decide, but that the parties can agree to arbitrate the availability of class arbitration.

The underlying dispute arose out of allegations that JPay, a company that provides services to the family and friends of prison inmates, including electronic money transfers, was charging excessive fees and then using those funds to provide kickbacks to correctional facilities. The plaintiffs served a demand for class-wide arbitration on JPay in October 2015. JPay responded by filing a complaint in Florida state court that sought to defeat the ability of the claimants to pursue class-wide arbitration and instead compel bilateral arbitration. The matter was eventually removed to the Southern District of Florida, where the district court found that "the availability of class arbitration is a substantive 'question of arbitrability,' presumptively for the court to decide, and that the Terms of Service did not clearly and unmistakably evince an intent to overcome this presumption and send the question to arbitration."

The Eleventh Circuit affirmed the district court's decision that availability of class arbitration is a question of arbitrability for the Court to decide because it "determines what type of proceeding will determine the parties' rights and obligations." Further, due to the stark differences between bilateral and class arbitration, the court concluded that "contracting parties would expect a court to decide whether they will arbitrate bilaterally or on a class basis."

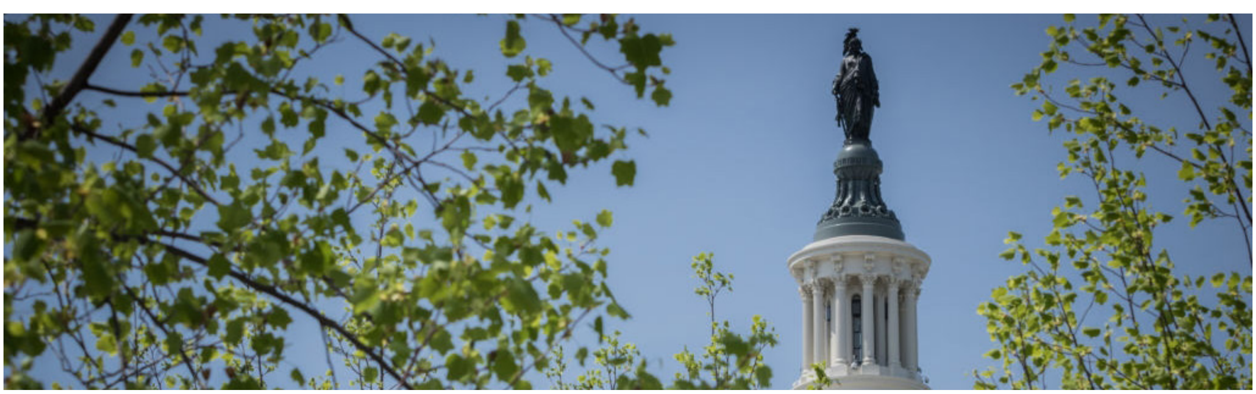
However, the Court disagreed with the district court's decision that the parties' agreement did not clearly express an intent to submit questions of arbitrability to the arbitrator. Instead, the agreement indicated the parties' intent to submit the issue to the arbitrator, defeating the general presumption that the Court should decide the issue. The agreement's multiple references to the American Arbitration Association, its statement that "[t]he ability to arbitrate the dispute, claim or controversy shall likewise be determined in the arbitration," and the fact that the agreement was written in broad terms with respect to what type of dispute were arbitrable, all signaled to the Court that the parties intended that questions of arbitrability be submitted to the arbitrator. Notably, the agreement did not specifically delegate the question of availability of class arbitration. However, according to the Eleventh Circuit, the broad language of the delegation provision encompassed that question.

Although the Eleventh Circuit's holding that the availability of class arbitration is a gateway issue presumptively for the court to decide tracks decisions from other circuits, this decision is notable for the Court's willingness to find the parties had agreed to delegate that question absent express language delegating the class question. Because other courts may require the parties to expressly delegate the question of class arbitration to the arbitrator, companies should be careful to include specific language in class action waivers that delegate the question to the arbitrator.

Supreme Court Unanimously Decides that State Courts Have Jurisdiction Over Class Actions Brought Under the Securities Act of 1933

In a unanimous decision on March 20, the United States Supreme Court held in *Cyan, Inc. et al. v. Beaver County Employees Retirement Fund*, that state and federal courts retain concurrent jurisdiction to adjudicate class actions brought under the Securities Act of 1933 (the "Securities Act") and such claims may not be removed to federal court. The opinion, delivered by Justice Elena Kagan, affirms the decision of the California Court of Appeals First Appellate District and settles a long-standing circuit split over whether the Securities Litigation Uniform Standards Act of 1998 (the "SLUSA") divested state courts of subject matter jurisdiction over "covered class actions" where plaintiffs allege only Securities Act claims and no state law claims.

The decision was largely based on the statutory interpretation and legislative history of SLUSA—namely, its amendments to the jurisdictional provisions of the Securities Act. Indeed, the crux of this case lies in the interpretation of SLUSA's amendment stating: "The district courts of the United States … shall have jurisdiction … concurrent



with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter." 15 U.S.C. § 77v(a).

Defendants argued that this provision strips state courts of concurrent jurisdiction over Securities Act claims because of the "except as provided" clause's reference to "covered class actions." Plaintiffs argued that this provision maintains state courts' jurisdiction over all suits – including "covered class actions" – alleging only Securities Act claims. Notably, the U.S. government, which filed an amicus brief at the Court's request, took a third approach, arguing that SLUSA does not deprive state courts of concurrent jurisdiction over cases brought under the Securities Act but does allow defendants to remove these cases to federal court.

The Court found that class actions asserting only Securities Act claims are unaffected by SLUSA, and thus, can be brought in state court – Section 77p "says nothing, and so does nothing, to deprive state courts of jurisdiction over class actions based on federal law." The Court concluded that "SLUSA's text, read most straightforwardly," leaves state court jurisdiction intact and, if Congress wanted to deprive state courts of jurisdiction, it could have inserted an exclusive federal jurisdiction provision. Additionally, the Court held that SLUSA does not permit defendants to remove class actions alleging only Securities Act claims from state to federal court. Finally, the Court concluded that "[i]f further steps are needed, they are up to Congress."

The practical impact of the Court's ruling is a likely increase in Securities Act claims brought in state court, with defendants potentially having to litigate these federal securities claims in federal and state courts simultaneously and in various venues. Given that plaintiffs may continue to argue for the application of certain state courts' more lenient pleading standards and discovery procedures, defendants may be exposed to protracted, expensive, and cumbersome litigation in various courts across the country.

Unanimous Supreme Court Cements Strength of Arbitration Agreements by Rejecting a "Wholly Groundless" Loophole for Avoiding Arbitration

It is commonplace today 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.,* 202 L. Ed. 480 (2019), 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 peak 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 certiorari to decide whether a "wholly groundless" exception to a binding delegation provision is consistent with the Federal Arbitration Act. And it decided that it is not. In the unanimous decision, Justice 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." Ultimately, post-*Schein*, 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 post-*Schein* – at least until the arbitrator decides whether the case is arbitrable. Although the case was not itself a class action, it will affect putative class actions that defendants claim are subject to arbitration, including the issue of who makes that determination.

First Circuit Rules All Class Members Must Suffer an Injury to Certify a Class

The First Circuit's decision in *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018) is a victory for class action defendants because it prevents certification of a class when it is evident that many class members had not suffered an injury. In *Tyson Foods*, the Supreme Court had declined to resolve the issue of whether a class may be certified if it contains members who were not injured and have no legal right to damages. This welcome decision from the First Circuit has created a circuit split on the issue.

The claims at issue arose because the defendant drug manufacturer pulled a medication from the market only months before the drug's patent expired. It then began selling a similar but not identical substitute, effectively extending the patent protection for several more years. The plaintiffs

The relevant question on appeal was whether "the procedural violation caused a real harm or a material risk of harm."

brought suit alleging violations of the consumer protection and antitrust laws of twenty-five states and the District of Columbia. The thrust of their allegations was that the defendant replaced the medication as a way to maintain control over the market by preventing other manufacturers from introducing generic versions of the original drug. The class consisted of individuals who had purchased the original drug before its patent expired and subsequently purchased the replacement.

The district court granted class certification despite the inclusion of uninjured class members. It determined that approximately ten percent of the class members had not suffered any injury attributable to the defendants' allegedly anticompetitive behavior because they would have continued to purchase the original "brand name" drug even if a cheaper generic version had become available. These class members who had not suffered any injury could be weeded out by a claims administrator who would evaluate each claim according to a formula proposed by the plaintiffs and approved by the Court. However, the First Circuit found "this approach to certifying a class at odds with both Supreme Court precedent and the law of our circuit." The proposed claims process gave the defendant no meaningful opportunity to contest whether an individual would have purchased a generic drug had one been available.

After finding Article III standing satisfied, the First Circuit viewed the issue of uninjured class members through the prism of Rule 23(b)(3) predominance. The Court emphasized that, under Rule 23(b)(3), a class cannot be certified if common issues predominate over those of individual class members. Because the proof of an injury was a required element of the plaintiffs' claims, the need to identify the thousands of class members who had suffered no injury would predominate and make adjudication unmanageable unless there was some mechanism that could "manageably remove uninjured persons from the class in a manner that protects the parties' rights." Based on a finding that the process adopted by the District Court failed to accomplish this, the First Circuit determined that no class could be certified.

As the First Circuit recognized, the circuits are split on how to resolve the issue of uninjured putative class members. The Second, Third, Fifth, and Eighth circuits and the D.C. Circuit have ruled that individual inquiries necessary to determine which class members were injured would preclude certification. Conversely, the Seventh and Ninth circuits have signaled a willingness to permit the certification of classes containing members who have not suffered any harm without there being any process in place to eventually remove the uninjured persons from the class. Defendants should continue to challenge certification on the grounds that putative class members suffered no injury. Class action defendants should carefully examine the standing of both named and unnamed plaintiffs in defending certification and the merits.

Ninth Circuit Dismisses Putative Class Action Where Named Plaintiff Lacked Standing

Likewise, the standing of the named plaintiff should be challenged at all stages if the alleged injury is in question. The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision granting summary judgment to State Farm Automobile Insurance Company in a putative class action brought under the FCRA. The decision presents another helpful application of the Supreme Court's 2016 *Spokeo* decision. The decision highlights the importance of continuing to challenge the standing of the named plaintiff at all stages of a case even in the face of a statutory violation.

In *Dutta v. State Farm Mutual Automobile Insurance Company*, 895 F.3d 1196 (9th Cir. 2018), plaintiff Bobby S. Dutta alleged that State Farm violated section 1681b of the FCRA by failing to provide him with a copy of his consumer report, notice of his FCRA rights, and an opportunity to challenge inaccuracies in the report before State Farm denied his employment application. As background, Dutta applied for employment with State Farm through the company's Agency Career Track ("ACT") hiring program. State Farm examines the 24-month credit history of every ACT applicant, and if an applicant's credit report indicates a charged-off account greater than $1,000, the applicant is automatically disqualified.

It was undisputed that Dutta's credit report included a charged-off debt exceeding $1,000, although Dutta claims there were other inaccuracies on his credit report. Dutta was ultimately denied admission to the ACT program based on his poor credit history. State Farm allegedly initially phoned Dutta and told him that his employment application was rejected but did not send a pre-adverse action notice until three days later. Upon receipt of the notice, Dutta contacted State Farm to challenge the report's accuracy.

Dutta filed the instant class action, alleging that State Farm violated the FCRA by denying his employment application without providing him sufficient notice as required by the Act. To support his class claims, Dutta claimed State Farm systematically made employment decisions before timely providing applicants with the proper FCRA disclosures. He further alleged that State Farm routinely used credit reports to make hiring decisions and then provided notice to the consumers.

State Farm moved to strike the class claims or, alternatively, to dismiss the class claims for want of standing. After the *Spokeo* decision came down, State Farm moved for summary judgment, in part, on the basis that Dutta had failed to establish an injury-in-fact and thus lacked Article III standing. The district court agreed with State Farm and dismissed Dutta's lawsuit. Dutta appealed to the Ninth Circuit.

The Ninth Circuit affirmed the district court's decision on standing grounds. As the Court noted, "[t]his appeal is another installment in the development of the jurisprudence evolving from the Supreme Court's decision in *Spokeo* ... ." The relevant question on appeal was whether "the procedural violation caused a real harm or a material risk of harm." In other words, "Dutta's claim as pleaded – i.e., that State Farm violated his statutory rights to information concerning use of his consumer credit report and an opportunity to discuss the report with State Farm prior to any adverse action being taken against him – must be evaluated to determine whether it presents a concrete harm."

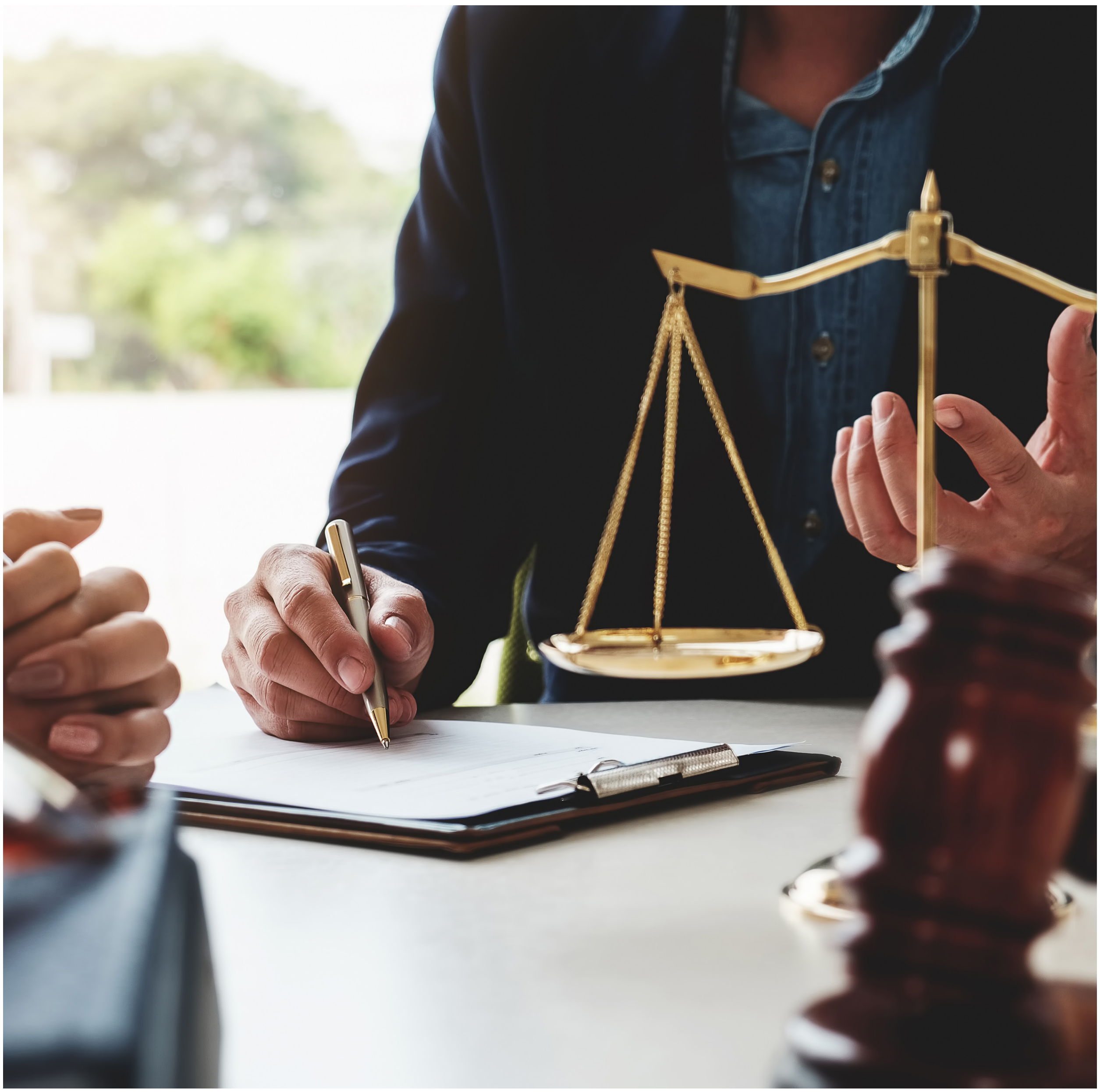
The Court first recognized that the "interest in ensuring that employment determinations are not affected by incorrect credit information is real and not 'purely procedural.'" But Dutta failed to show how the "specific" violation of section 1681b of the FCRA actually harmed him. Indeed, the credit report included accurate reporting – "the charged-off debt fell within State Farm's established 24-month look back period for eligibility to participate in the ACT program." This "24-month ACT look back period alone disqualified Dutta from continuing in the ACT program." Regardless of the alleged other inaccuracies or Dutta's explanation regarding the same, State Farm would have still denied Dutta employment. Thus, the Court held that "[c]onsequently, although Dutta made a plausible showing of State Farm's procedural violation of FCRA, he failed to establish facts showing he suffered actual harm or a material risk of harm" and thus failed to establish a concrete injury.

The Ninth Circuit's decision in Dutta provides compelling authority for defendants to challenge FCRA hyper-technical claims premised on hypothetical harms. Indeed, FCRA class actions typically revolve around certain key technical issues, with section 1681b dominating the field. Class action plaintiffs often allege that employers failed to provide applicants with copies of their consumer reports or a copy of the required Summary of Rights. Courts have previously allowed these actions to move forward even when the consumer report is completely accurate, and the plaintiff has suffered no harm. In fact, the plaintiffs in some cases may still even have been hired. Dutta, however, may help to curb these types of claims. The Ninth Circuit affirmed that despite a technical FCRA violation, where demonstrably accurate data leads to an adverse employment decision, plaintiffs lack standing to prosecute their case. This can also be used as a way to challenge the standing of putative class members, which can defeat certification.

Courts Split on Application of *Bristol-Meyers Squibb* to Class Actions

District courts wrestling with the question of whether they can exercise personal jurisdiction over claims of out-of-state putative class members brought against an out-of-state defendant continue to reach different conclusions. In *Bristol-Meyers Squibb* – a mass tort action, not a class action – the Supreme Court determined that exercise of personal jurisdiction over non-resident claims violated the due process clause of the Fourteenth Amendment. In dissent, Justice Sonia Sotomayor noted the limitation of the holding, highlighting that "[t]he court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum state seeks to represent a nationwide class of plaintiffs, not all of whom were injured there."

This holding has been extended to the class action context in several decisions, most notably in the Northern District of Illinois. *In Practice Management Support Services v. Cirque Du Soleil*, Inc., 310 F. Supp. 3d 840 (N.D. Ill. 2018), the district court in the Northern District of Illinois limited



membership in a TCPA class to residents of Illinois. It was "not clear how Practice Management can distinguish the Supreme Court's basic holding in *Bristol-Meyers* simply because this is a class action." The court observed that Rule 23 class action requirements must be interpreted in keeping with Article III constraints and, under the Rules Enabling Act, cannot "abridge, enlarge, or modify any substantive right." Consequently, if a Rule 23 class action cannot abridge, enlarge, or modify a substantive right, then bringing a Rule 23 class action cannot make a material distinction for purposes of determining a defendant's due process rights as protected by the requirement that a court have personal jurisdiction over the defendant. Indeed, the Northern District of Illinois has been active in applying *Bristol-Meyers* to class actions, having recently done so in unpublished decisions in *DeBernadis v. NBTY, Inc., Anderson v. Logitech, Inc., and Mussat v. IQVIA, Inc.*, among others. Defendants facing nationwide class actions in the Northern District of Illinois should consider raising this defense.

However, other courts have limited the holding in *Bristol-Meyers* to mass tort actions. In *Molock v. Whole Foods Mkt, Inc.,* 297 F. Supp. 3d 113 (D.D.C. 2018), the Court determined that *Bristol-Meyers* did not apply to a nationwide class of Whole Foods employees. The Court distinguished mass torts from class actions and found that the "additional due process standards for class certification under Rule 23" provide the "due process safeguards not applicable in the mass tort context." However, the Court did dismiss the claims of two non-resident named plaintiffs under the standards set forth in *Bristol-Meyers*. Therefore, even if a defendant cannot obtain the dismissal of all out-of-state putative class members, they may still be able to dismiss named plaintiffs, which could create additional problems for the plaintiffs at the certification stage.

The D.C. Circuit's decision rejecting the application of *Bristol-Meyers* to federal class actions joins a similar group of decisions across the country, including T*ickling Keys, Inc. v. Transamerica Financial Advisors, Inc.*, 305 F. Supp. 3d 1342 (M.D. Fla. 2018) in the Middle District of Florida. The Court looked to the limited facts of *Bristol-Meyers* and the distinction between a mass tort and a class action in declining to extend *Bristol-Meyers* to a class action. The Southern District of Florida followed suit in *Becker v. HBN Media, Inc.,* 314 F. Supp. 3d 1342 (S.D. Fla. 2018), relying on the reasoning in *Tickling Keys*.

Conclusion

Class actions will continue to dominate the dockets of courts across the country. The foregoing decisions demonstrate the evolving nature of the law surrounding class actions within multiple dimensions. Keeping abreast of the developments in class action jurisprudence is essential to mounting the best defense when faced with a such a high-exposure lawsuit.

BACKGROUND SCREENING

2018 was another busy year for background screening and other FCRA litigation, with a variety of noteworthy events. A significant ruling from the Supreme Court of California served as a wake-up call for consumer reporting agencies ("CRAs") operating in that state. Other events and decisions highlighted the critical importance of effective background check procedures in reducing litigation risk, as well as promoting positive business practices.

Supreme Court of California Affirms Application of Investigative Consumer Reporting Agencies Act ("ICRAA") to All Consumer Reporting Agencies

For virtually all employers, the background check process is a business necessity and safeguard. The heavy litigation and regulation of background checks – including via the FCRA and its state analogs – can make this necessary process challenging, especially given the age of relevant legislation and its ambiguous provisions. In 2018, this struggle came to a head in California, where the state's highest court affirmed the constitutionality of California's ICRAA despite overlap with the state's Consumer Credit Reporting Agencies Act ("CCRAA"). *See Connor v. First Student, Inc.*, No. S229428, 2018 Cal. LEXIS 6266 (Cal. Aug. 20, 2018). The Supreme Court ultimately held that: (1) partial overlap between two statutes does not render one superfluous or unconstitutionally vague; (2) the ICRAA and CCRAA can coexist, as both acts are sufficiently clear; and (3) each act regulates information that the other does not, which supports concurrent enforcement of both statutes.

The *Connor* decision makes clear that all CRAs providing consumer reports for employment and tenant screening must carefully review their products to assure compliance with the ICRAA and the CCRAA.

In *Connor,* a class of current and former bus drivers alleged the defendant employers and CRAs violated the ICRAA when the employers obtained background checks on the drivers without providing them notice and without obtaining the drivers' prior written authorization to obtain such reports as required by the ICRAA.

The Supreme Court in *Connor* resolved a conflict between two courts of appeal which had left many CRAs wondering whether the ICRAA applied even if they did not obtain the information from personal interviews (i.e., the definition of "investigative consumer report" used under the FCRA to impose additional requirements under 15 U.S.C. §1681l is similar to those included in the ICRAA). Under California law, consumer reports are classified under the CCRAA and/or the ICRAA, depending largely on the means used to collect the information contained in those "consumer reports." The CCRAA has always been limited to consumer reports containing specific credit information, and it expressly excludes character information obtained through personal interviews. And, certain reports containing information gathered through personal interviews are subject to the ICRAA only. However, both statutes govern reports that contain information relating to character and creditworthiness, based on public information and personal interviews, that were used for employment background purposes.

Critically, however, the specific obligations and limitations, and the remedies for violations of each act are different. The ICRAA, for instance, imposes stricter requirements and penalties than the CCRAA. Under the ICRAA, an investigative consumer reporting agency (or user of information) may be liable to the consumer who is the subject of the report if the agency (or user) fails to comply with any requirement under the ICRAA in an amount equal to $10,000 or actual damages sustained by the consumer, whichever is greater, plus the cost of the action and reasonable attorneys' fees.

Before the California Supreme Court, the defendant employers in *Connor* raised two principal contentions. First, the defendants argued the CCRAA and the ICRAA were initially intended to be exclusive of each other. The Supreme Court rejected that argument, holding that while the legislature amended the ICRAA to expand its scope, it did not concurrently amend the CCRAA to limit its scope. Thus, the Supreme Court found that potential employers could comply with both statutes without undermining the purpose of either. Second, the defendants in *Connor* argued that if the legislature intended the ICRAA to apply to employment screening reports that previously were exclusively subject to the CCRAA, then it would have amended the CCRAA to conform to this understanding. However, the Supreme Court found the limiting language of the CCRAA obviated the need to amend the statute in response to the changes it made to the ICRAA. Thus, the Supreme Court confirmed that the ICRAA is also applicable in the employment screening context, despite its overlap with the CCRAA. And, the Supreme Court likewise confirmed that the ICRAA is also applicable in the tenant screening context, and more generally when its threshold definitions are satisfied.

As a practical matter, the Supreme Court's decision removes the cloud of uncertainty regarding whether the ICRAA is enforceable against consumer reporting agencies preparing reports in California. Companies that fall under the purview of the ICRAA must comply with its provisions, regardless of whether the report also triggers the requirements of the CCRAA.

The ICRAA contains a number of distinct technical requirements that should be the subject of a compliance review after the decision in *Connor*. To use but one example, under the ICRAA, "public record" information (such as civil actions, tax liens, and outstanding judgments) cannot be included unless the background checking agency has verified the accuracy of the information during the 30-day period before the report is issued. That requirement counsels in favor of the implementation of procedures to address any delay of 30 days or more in receiving public records updates from the providers of such records.

Thus, the Supreme Court confirmed that the ICRAA is also applicable in the employment screening context, despite its overlap with the CCRAA.

The $70 Million Value of a Proper Background Check

2018 also confirmed the inherent value and necessity of the background check process for all employers. In January, a Florida jury in the Seventeenth Judicial Circuit Court of Florida awarded $70.6 million to yacht worker Samantha Baca on her claim that the boat's owner failed to protect her from being sexually assaulted by a co-worker. *See Baca v. Island Girl Ltd.*, No. CACE-16-003324.

Baca formerly worked as a stewardess on the Endless Summer yacht, owned by the defendant, Island Girl. She was sexually assaulted by a deckhand in February 2015 while the yacht was docked in Ft. Lauderdale. In December 2016, the deckhand pled guilty to sexual battery and subsequently served a two-year prison sentence and was then deported.

In her lawsuit against Island Girl, Baca alleged that the yacht owner failed to conduct a background check on the deckhand and failed to enforce its rule prohibiting crew members from returning to the boat intoxicated. The complaint accused Island Girl of "negligently hiring, selecting and retaining crew members with dangerous propensities." During the trial, Baca's attorney argued that Island Girl should have known that the deckhand was unfit for his duties "and/or posed a risk of perpetrating unwanted sexual contact" against the victim.

Ultimately, a jury awarded Baca $70.6 million, which included $70,000 in lost wages, $4.2 million in lost future wages, $290,050 in past and future medical expenses, and $66 million for physical and emotional pain and suffering. Island Girl filed various post-trial motions, including a motion to set aside the verdict, a motion for new trial, and a motion for remittitur, which the trial court denied. Island Girl also appealed to the Florida Court of Appeals, but the case was ultimately settled before resolution of the appeal.

The $70.6 million verdict serves not only as a stark reminder of the critical role of background checks in ensuring the safety of employees, but also the high cost of omitting them.

Evidence of Effective Procedures and a Lack of Injury Defeat FCRA Claim

Despite a dearth of appellate decisions, there were some noteworthy rulings in the background screening space at the district level. For instance, a district court in Ohio dismissed a plaintiff's claims under the FCRA because he could not show that the report caused him an injury or that the background screening company failed to maintain reasonable procedures to ensure accuracy. The case is *Black v. General Info. Sols., LLC,* Case No. 1:15-cv-1731 in the Northern District of Ohio.

Plaintiff Thomas Black brought a putative class action against General Information Solutions ("GIS") under the FCRA arising out of a background check in conjunction with an employment application. The employer hired GIS to perform a background check on Black, and GIS assigned this task to one of its vendors. The vendor, and subsequently GIS, reported a felony robbery conviction. However, the robbery charge had not resulted in a conviction and had been dismissed.

Black originally faxed his dispute to the wrong number, so GIS never received it. When Black sent the dispute to the correct number, GIS immediately conducted an investigation and only seven days later deleted his entry and issued a corrected report. The employer was still filling positions and requested references from Black. However, Black never provided the verifiable references. The employer provided testimony that Black would have been considered if he had provided the references.

In considering GIS' motion for summary judgment, the Court raised the issue of standing sua sponte. Because Black missed out on a job opportunity based on his own failure to provide the requested references, the Court found that it was "apparent that Mr. Black has provided no evidence to show that he suffered any such harm as a result of GIS' alleged violation of the FCRA." With no injury resulting from the report, he did not have standing to bring a suit. This lack of injury also prevented him from proving all of the elements of his claim under § 1681e(b), since a plaintiff must prove that a report caused an injury in order for them to recover.

Importantly, the Court also determined that GIS was not liable for a willful violation under §1681e(b), despite an inaccurate report, because it had "very effective procedures in place to ensure the accuracy of the consumer reports." Specifically, the Court looked at GIS' and the vendor's "remarkably low" dispute rates, the responsiveness to the dispute, and the lack of evidence of similar disputes. Moreover, GIS trained its employees on FCRA compliance and assessed the quality of its reports. Although the vendor's researcher failed to follow the procedures in this instance, the "failure of one individual investigator to follow the established procedures . . . is not sufficient to create liability against the background check company."

This decision shows the importance of employers' maintaining proper hiring procedures. Creating and implementing effective procedures can allow for a company to escape liability even if an individual employee fails to follow those procedures.

Cindy Hanson of Troutman Sanders LLP represented GIS in its successful defense of this case.

Continued Settlements in FCRA "Stand-Alone" Disclosure Cases

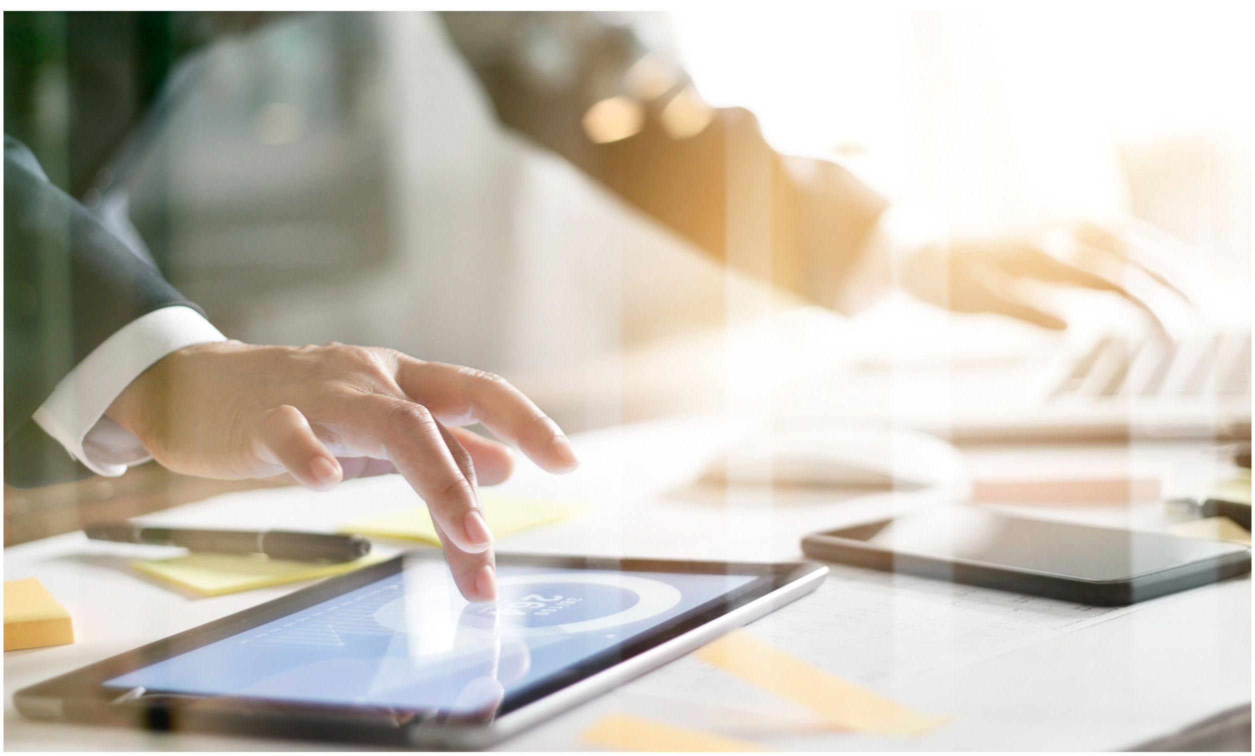
Despite over a decade of litigation on the issue, 2018 continued to see companies paying large settlements for failing to adhere to the FCRA's "stand alone" disclosure requirement. The FCRA mandates that employers who seek to procure a consumer report must present "clear and conspicuous" disclosures that are contained in a document that consists solely of the disclosure. While the FCRA allows the disclosure form to also include an authorization – which is also required before procuring a report – courts have continued to penalize employers who include anything extraneous.

As noted in our 2017 publication, the Ninth Circuit in *Syed v. M-I, Ltd. Liab. Co.*, 853 F.3d 492 (9th Cir. 2017), held that the inclusion of a liability waiver in the same document as the FCRA disclosure violated the FCRA's "stand alone" requirement. 2018 showed that companies are still at risk of significant judgments and/or settlements for violating this FCRA mandate:

- Costco paid nearly $2.5 million to end an FCRA class action lawsuit alleging the company failed to use proper stand-alone disclosure notices to obtain background reports about job applicants.
- Petco Animal Supplies, Inc., agreed to pay $1.2 million to resolve the claims of approximately 37,000 individuals, based on allegations that its web-based application contained an FCRA disclosure containing a broad authorization for "any person" to provide "any and all information" to the consumer reporting agency, in addition to information relating to the laws of seven different states.
- Omnicare, Inc. agreed to pay approximately $1.3 million to over 50,000 class members based on allegations that its FCRA disclosure and authorization form contained a liability waiver.
- Frito-Lay, Inc. agreed to pay about $2.4 million to resolve the claims of roughly 38,000 class members, based on allegations that the company included additional language in its FCRA disclosure form such as a statement that "I have been given a standalone consumer notification that a report will be requested and used[.]"

The lesson learned from these settlements is to act quickly in updating your FCRA disclosure and authorization forms.

Troutman Sanders has extensive experience performing cost-effective compliance audits that reduce these types of significant litigation risks moving forward.



BANKRUPTCY

Second Circuit Declines to Enforce Arbitration Provision in Bankruptcy

Bankruptcy courts continue to provide significant developments in the laws impacting consumer financial services. Indeed, the intersection between bankruptcy and consumer protection statutes continues to gain importance as bankruptcy courts wrestle with the same issues as their district court counterparts, including enforceability of arbitration provisions. In chapter 7 cases, trustees have looked to credit consumer protection claims arising out of alleged pre-petition conduct for potential assets for distribution to creditors. In all, no overview of significant developments in consumer financial services is complete without consideration of bankruptcy related opinions.

In *Anderson v. Credit One Bank NA*, the Second Circuit analyzed the conflicting policies of the FAA which favors arbitration, and the United States Bankruptcy Code, which favors centralizing the resolution of debtor/creditor disputes in the bankruptcy court in a dispute concerning credit reporting. After Orrin Anderson failed to pay his credit card debt to Credit One Bank, the bank sold the account and reported to credit reporting agencies that the account had been sold and "charged off." Anderson later filed a Chapter 7 bankruptcy petition and obtained a discharge. Anderson requested that Credit One amend the credit report to reflect the discharge, and the bank refused. Anderson reopened the bankruptcy case and brought a putative class action against Credit One, alleging that its refusal to amend the credit report violated his discharge.

Credit One moved to enforce the arbitration provision contained in Anderson's cardholder agreement. The bankruptcy court, as affirmed by the district court and the Second Circuit, denied the request. The Second Circuit set forth a two-step test to be applied by a bankruptcy court to determine the enforceability of an arbitration provision. First, the bankruptcy court must decide whether the matter is a "core" or a "noncore" proceeding. If the matter is noncore, arbitration provisions generally should be enforced. If, however, the matter is a core proceeding, the bankruptcy court must consider the nature of the claim and the facts of the case to determine whether arbitration would "create a 'severe conflict' with the purposes of the Bankruptcy Code." If such a severe conflict is presented, the bankruptcy court has the "discretion to conclude that 'Congress intended to override the Arbitration Act's general policy of favoring the enforcement of arbitration agreements.'"

In *Anderson*, the parties agreed that their dispute was a core proceeding and, as such, the bankruptcy court needed to determine whether enforcing the arbitration provision in the credit card agreement would create a "severe conflict" with the purposes of the Bankruptcy Code.

The Second Circuit noted the importance of the discharge injunction to the bankruptcy process and the bankruptcy court's right to enforce its own orders, and it concluded that arbitration of an alleged discharge order violation would "'seriously jeopardize' a particular core bankruptcy proceeding" because "1) the discharge injunction is integral to the bankruptcy court's ability to provide debtors with the fresh start that is the very purpose of the code; 2) the claim involves an ongoing bankruptcy matter that requires continuing court supervision; and 3) the equitable powers of the bankruptcy court to enforce its own injunctions are central to the structure of the code." Ultimately, the Second Circuit held that arbitration of Anderson's claim would "present the sort of inherent conflict with the Bankruptcy Code that would overcome the strong congressional preference for arbitration" and concluded that the bankruptcy court did not abuse its discretion by refusing to enforce the arbitration provision in the cardholder agreement.

West Virginia Reporting of Payments through Chapter 13 Does Not Violate the FCRA

In *Barry v. Farm Bureau Bank*, the Southern District of West Virginia ruled on July 6 that the reporting of an account being paid through a Chapter 13 bankruptcy plan as having an outstanding balance or past due payments does not violate the FCRA. See Case No. 2:16-cv-09515, Dkt. No. 134, (S.D.W. Va. July 7, 2018).

Plaintiffs Angela and Robert Barry alleged that Farm Bureau Bank FSB continued to report their account as having an outstanding balance with past due payments after they had disputed the account with the credit bureaus. Specifically, the Barrys alleged that their account is being paid through their confirmed Chapter 13 bankruptcy plan; thus, the account "should be showing paid on time through a Chapter [13] plan or it should stop as of the date of the filing [of] the Chapter 13 [confirmation], and indicate it is being paid through the plan."

The Court granted Farm Bureau's motion for summary judgment, answering the question of whether the FCRA prohibits the reporting of historically accurate information of a delinquent account after a Chapter 13 bankruptcy plan is confirmed but before the debt is discharged.

Farm Bureau argued the information it provided to the credit bureaus before and after the credit disputes was accurate. The Court agreed, ruling that the confirmation of a Chapter 13 bankruptcy plan does not change the debt's legal status. For example, a Chapter 13 bankruptcy plan allowing payments "at a lower monthly rate does not concurrently insinuate that the account cannot become delinquent" because under the bankruptcy plan, payments are no longer being made according to the loan's terms.

The Court relied on previous decisions from the Northern District of California in finding that a confirmed Chapter 13 bankruptcy plan does not absolve a debt owed to a financial institution because a bankruptcy petition could be dismissed if the debtor does not comply with the plan, resulting in the debt owed as if the bankruptcy was never filed. Therefore, the Court concluded that "it would not be inaccurate to report a debt's balance as outstanding or the account as delinquent subsequent to a Chapter 13 plan's confirmation, but before the debt has been discharged, if the debtor no longer makes the payments required under the loan schedule."

The Court also rejected the proposition that the failure to report an account as included in a Chapter 13 bankruptcy proceeding is incomplete for purposes of the FCRA, holding that "even if Plaintiff is correct that Plaintiff's credit report did not reflect the terms of Plaintiff's Chapter 13 bankruptcy plan, this would not be an inaccurate or misleading statement that could sustain a FCRA claim … ."

Whether a Debt Discharged in Bankruptcy Confers Standing to Sue under the WVCCPA

Also in West Virginia, the Circuit Court for Berkeley County issued an outlier ruling in *Cookus v. Westlake Services, LLC,* regarding whether a debtor whose debt was discharged in bankruptcy has standing to bring suit under the WVCCPA. The WVCCPA is a remedial statute designed to protect West Virginia consumers from improper debt collection. It gives "consumers" – natural persons that owe or allegedly owe a debt – standing to file a lawsuit. Prior to this ruling, West Virginia state and federal courts have mostly come down on one side of this issue, ruling that if a debt was discharged in bankruptcy, then the debtor is no longer obligated to pay the debt and, and such, the debtor is not a consumer with standing to sue under the WVCCPA. Claims under the WVCCPA regarding discharged debts have been dismissed in both West Virginia state and federal courts.

However, Judge Gray Silver III determined that the natural obligation to repay the debt still exists after bankruptcy as evidenced by the fact that Congress saw fit to remind debtors that they may still voluntarily repay their debts. He also argued that because these debts can be revived if the bankruptcy action is reopened, "it is absolutely incorrect to state that an obligation ceases to exist as of the date of the discharge, otherwise the obligations could not be reasserted in any way." The discharged debtor in Cookus had standing to sue under the WVCCPA.

The majority approach appears more equitable for both parties to the debt. It is only fair that if a debt collector cannot sue to collect a debt, then the debtor should not be able to sue the debt collector for improper collection of that same debt. The debtor chose to discharge the debt and could have chosen instead to reaffirm the debt in the very same bankruptcy action.

This issue has not yet reached the West Virginia Supreme Court of Appeals, and until then there is no definitive answer as to how a bankruptcy discharge affects claims under the WVCCPA. However, Judge Silver has recently retired from the bench and the majority of case law (including subsequent case law in the Circuit Court of Berkeley County) favors dismissal of WVCCPA claims with respect to discharged debts.

Amendments to the Federal Rules of Bankruptcy Procedure

Amendments to the Federal Rules of Bankruptcy Procedure took effect December 1. The majority of the 2018 amendments relate to electronic filing and to conform to the Federal Rules of Civil and Appellate Procedure. Pursuant to Rule 5005, electronic filing is now required, unless nonelectronic filing is permitted by local rule or for good cause. As the Advisory Committee noted, "[e] lectronic filing has matured. … The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by an individual not represented by an attorney."

Rules 8002, 8006, 8007, 8010, 8011, 8013, 8016, and 8017 all involve appellate procedure. Rule 8002 clarifies the timely filing of a notice of appeal by inmates. It also defines "entry" of judgment based on the date that the judgment, order, or decree is entered on the docket. In adversary proceedings where Rule 58 of the Federal Rules of Civil Procedure requires a separate document, a judgment, order, or decree is entered upon the earlier of (1) when it is set forth on a separate document; or (2) 150 days from the entry on the document. Many of these rules have been modified in order to conform to the Federal Rules of Civil or Appellate Procedure. For instance, Rules 8007 and 8010 are designed to conform to Rule 62 of the Federal Rules of Civil Procedure to amend "supersedeas" and permit a party to obtain a stay by providing a "bond or other security." Rule 8016 has been amended to conform to Rule 28.1 of the Federal Rules of Appellate Procedure to reduce word limits permitted in briefs and cross-appeals.

The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by an individual not represented by an attorney.

Rule 8018.1 is a new rule added this year, and it authorizes a district court to treat an appeal from a bankruptcy court judgment as proposed findings of fact and conclusions of law, if the district court concludes that the bankruptcy court lacked constitutional authority to enter the judgment. The Advisory Committee has instructed that this rule was added "to prevent a district court from having to remand an appeal whenever it determines that the bankruptcy court lacked constitutional authority to enter the judgment, order, or decree appealed from." Once the district court elects to proceed in this manner, it may permit the parties to file objections to specific proposed findings and conclusions, and to respond to another party's objections.

Modified Periodic Statements Required by Regulation Z of the TILA

Effective in April, the CFPB, amended its mortgage servicing rules regarding the requirements for periodic statements for residential mortgage loans to eliminate a blanket exemption from providing periodic statements to consumers who are debtors in bankruptcy under Title 11 of the United States Code. The newly modified 12 C.F.R. § 1026.41 now requires servicers to transition to

or from a modified periodic statement upon the occurrence of an enumerated triggering event. When a consumer enters bankruptcy under Title 11 of the U.S. Code—a triggering event—a servicer is exempt from providing the next periodic statement or coupon book that would be required. Thereafter, the servicer must provide a modified periodic statement. A periodic statement must contain a bankruptcy notice that identifies the consumer's status as a debtor in bankruptcy or the discharged status of the mortgage loan and also must contain a statement that the periodic statement is for informational purposes only. 12 C.F.R. § 1026.41(f)(2). A periodic statement may omit the amount of a late payment fee or the imposition of such a fee, the length of a consumer's delinquency, a notification regarding the risks if the delinquency is not cured, and the total payment amount needed to bring the account current. *Id.* § 1026.41(f)(1). For those debtors under Chapter 12 or 13 bankruptcy, additional modifications to the periodic statement are permissible. *Id.* § 1026.41(f)(3)(i)-(ii).

The Bureau did not dispense entirely with the exemption from providing periodic statements to debtors in bankruptcy. Under the new regulation, a servicer is still exempt from issuing periodic statements where a consumer has filed for bankruptcy under Title 11 (or who has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. §§ 727, 1141, 1228, 1328) and:

(1) has requested not to receive periodic statements or coupon books;
(2) the consumer elects in his or her bankruptcy plan to surrender the property secured by the mortgage loan;
(3) the bankruptcy court enters an order providing for the avoidance of the lien securing the mortgage loan or requiring a servicer to cease providing a periodic statement or coupon book; or
(4) the consumer submits a statement of intention to surrender the property pursuant to 11 U.S.C. § 521(a) and has not made a partial or periodic payment since commencing bankruptcy.

See 12 C.F.R. § 1024.41(e)(5)(i).

CONSUMER CREDIT REPORTING

The credit reporting industry endured another busy legal year, with the number of lawsuits filed under the FCRA continuing to increase. Developments continue to impact entities at all levels of the credit reporting ecosystem – furnishers, users, and CRAs. This year also saw additional regulations in the FCRA space, including changes to the FCRA Summary of Rights form used by both CRAs and users of consumer reports.

General FCRA Developments

The CFPB released a new model summary of FCRA rights that went into effect on September 21. The model Summary of Rights form is used by both CRAs and employers doing background checks. The new Summary of Rights form stems from Congress's Economic Growth, Regulatory Relief and Consumer Protection Act, which was passed in May. Among other changes, it amended the FCRA to require new language to be added to the FCRA Summary of Rights form, regarding a consumer's right to obtain a security freeze. The new Summary of Rights should be implemented by users in pre-adverse action process where they provide an FCRA Summary of Rights form and by CRAs who provide the form at various times, including, for example, to consumers when making a file disclosure pursuant to 15 U.S.C. § 1681g(c)(2).

2018 also saw new decisions expanding the threshold applicability of the FCRA in new ways. For example, in *Jones v. U.S. Dept. of Agriculture*, No. 2:17-cv-11530 (E.D. Mich. Feb 7, 2018), a district court in Michigan waded into the ongoing issue of whether the federal government could be liable for FCRA violations, paving the way for additional cases alleging waiver of sovereign immunity. Despite ultimately paying delinquent bills owed to the U.S. Department of Agriculture, plaintiff Kiysha Jones alleged the Government inaccurately reported information regarding the debt to the CRAs, and that the United States Department of Agriculture ("USDA") failed to conduct a reasonable investigation in response to her dispute. In rejecting the USDA's argument that the FCRA does not waive sovereign immunity, the Court noted that such a waiver by statute must be unequivocal. Focusing on the FCRA's liability scheme, the Court reasoned that the statute allows a consumer to hold any "person" liable, which the statute defines to include "any … government or government subdivision or agency," thus resulting in a waiver of sovereign immunity. While the Court recognized that other courts have declined to find a waiver of sovereign immunity in the FCRA, because to do so would expose the United States to punitive damages or subject government employees to criminal penalties, *see, e.g., Tice v. United States Dep't of Treasury*, No. 2:16-cv-1813, 2017 U.S. Dist. LEXIS 161169, at *12 (D.S.C. Mar. 30, 2017), the Court concluded that those considerations do not change the express waiver language that is contained in the FCRA.

FTC: New Rules and Enforcement Highlights

The FTC continued to be active in the realm of credit reporting. The FTC proposed a rule requiring CRAs to provide free credit monitoring service to active duty military members that would electronically notify these consumers of "material additions or modifications" to their file within 24 hours, defined as: (1) new accounts opened in the consumer's name; (2) inquiries or requests for a credit report, other than inquiries made for the purpose of making a firm offer of credit or insurance or for the purpose of reviewing an account of the consumer; (3) changes to a consumer's name, address, or phone number; (4) changes to credit account limits; and (5) negative information, defined to include delinquencies, late payments, insolvency, or any form of default. The deadline to submit comments on the proposed rule was January 7, 2019.

Importantly, CRAs may condition providing the free electronic monitoring service on the consumer

The new law mandates that the three major credit reporting agencies set up webpages to allow consumers to request one-year fraud alerts and credit freezes.

providing proof of identity, contact information, and proof of active duty status; however, the rule creates limitations on the use of the information collected from consumers as a result of requesting this service, as well as on the content and format of the communications sent to those requesting this service. Finally, CRAs cannot ask or require the consumer to agree to terms and conditions in connection with obtaining this service.

The FTC is also directing consumer attention on the newly effective Economic Growth, Regulatory Relief, and Consumer Protection Act, which went into effect on September 21. The new law mandates that the three major credit reporting agencies set up webpages to allow consumers to request one-year fraud alerts and credit freezes. The FTC offers links to those webpages at https://www.consumer.ftc.gov/. The law requires any credit freeze to be free of charge – nationwide. Prior to the new law, some credit freezes involved fees under state law. The new law also allows consumers to freeze a child's credit file until the child is 16 years of age. Further, consumers are entitled to request one-year fraud alerts, which were previously set at 90 days. An initial fraud alert is still free, and identity theft victims can still get an extended fraud alert for seven years. For military servicemembers, the new law provides more: Within a year, credit reporting agencies must offer free electronic credit monitoring to all active duty military.

In the enforcement arena, the FTC obtained a $5.2 million judgment against Credit Bureau Service, LLC f/k/a MyScore LLC ("CBS") and its owner, Michael Brown, on charges that they deceived consumers with fake rental property ads and deceptive promises of "free" credit reports, and then improperly enrolled consumers in an expensive monthly credit monitoring service. The case is *FTC v. Credit Bureau Center, LLC*, No. 1:17-cv-00194 (N.D. Ill. June 26, 2018). The summary judgment order stated that CBS and Brown violated the FTC Act, the Restore Online Shoppers' Confidence Act, the FCRA, and the Free Annual File Disclosures Rule. In addition to the monetary award, the Court entered a permanent injunction banning the defendants from selling any credit monitoring service with a negative option feature and from misrepresenting material facts about any product or service, and it barred the defendants from using billing information to obtain payments from consumers without first obtaining their express informed consent.

Credit Reporting Issues Continue to Spur Litigation

This year also saw continued litigation involving credit reporting disputes, reminding CRAs and furnishers alike that compliance with both their internal and external reporting and dispute-related procedures is key in establishing solid defenses and avoiding liability when it comes to consumer litigation.

In *Garland v. Marine Credit Union*, the United States District Court for the Eastern District of Wisconsin granted summary judgment in favor of the defendants, holding they did not violate the FCRA as a matter of law because the dispute involved a legal issue. In the lawsuit, the plaintiff challenged the reporting of debts subject to an action the consumer filed under Section 128.21 of the Wisconsin Statutes to repay her debts over a three-year period. The plaintiff sued the CRAs and the furnisher, claiming that the reporting of certain debts violated the FCRA. The defendants successfully argued they were entitled to report any portion of the debts not included in the plan or which accrued after the plan was approved. In deciding Garland's motion for summary judgment, the Court entered judgment in favor of the defendants, concluding that the Wisconsin statute in question only applies to claims that arose prior to the proceeding and that were included in the amortization plan, but is silent as to interest or late charges, and cannot result in a discharge of the debt. The Court held that judgment was proper in favor of the defendants, as there was no factual issue regarding the reporting of the dispute information on Garland's credit report. The Court held that Garland's claim was a legal dispute on the effect of the Sec. 128 proceeding to her overall debt and that the plaintiff could establish that the reported information was factually inaccurate.

In *Walton v. EOS CCA*, No. 17-3040 (7th Cir. Mar. 21, 2018), the United States Court of Appeals for the Seventh Circuit affirmed a lower court decision finding that a debt collector's verification and investigation of a consumer's disputes through its review of records obtained from the creditor was both satisfactory under the FDCPA and reasonable under the FCRA.

The case arose out of a debt Walton owed to AT&T. After notifying Walton of her delinquency, AT&T assigned the debt to EOS for collection. However, the records AT&T transferred to EOS contained the wrong account number for Walton's debt. EOS mailed Walton a letter in an attempt to collect the debt. Walton recognized the inaccurate account number and disputed the debt with EOS over the phone and by letter. EOS confirmed the account information through a review of the records it received from AT&T and sent Walton a letter that verified that the information included in its debt collection letter was accurate. Walton alleged EOS' review of the account documents without specifically verifying the underlying debt with AT&T was a violation of the FDCPA.

Following Walton's dispute, EOS reported Walton's debt to national CRAs with a notation that the debt was disputed. Walton then disputed EOS' reporting of the debt with these entities. The ACDVs generated by the CRAs and sent to EOS stated that Walton claimed the account was not hers. The district court found that EOS satisfied its legal obligations under the FDCPA and FCRA in reviewing Walton's disputes and granted EOS' motion for summary judgment. Walton appealed, and the Seventh Circuit affirmed, following the Fourth and Ninth circuits with regards to Walton's FDCPA claim, finding that a debt collector is only required to verify that the amount of debt and debtor information in its collection communications is the same information the creditor claims is owed. The debt collector is not required to investigate whether the obligation the creditor claims is owed is valid in itself.

On Walton's FCRA claims, the Court found EOS' investigations of Walton's credit disputes reasonable based on the information included in the ACDVs received from the CRAs. Specifically, the Court found Walton's first dispute, which stated

the AT&T account did not belong to her, provided so little information that EOS' review of its internal information alone was reasonable. The Court also found that once EOS learned that Walton disputed the debt based on the inaccurate account number, it took the reasonable and appropriate action to request deletion of its reporting of Walton's debt.

Felts v. Wells Fargo Bank, N.A., 893 F.3d 1305, 1309 (11th Cir. June 27, 2018), involved a challenge to the reporting of a forbearance plan. The District Court for the Middle District of Florida granted the defendants summary judgment, finding the furnisher's investigation into the accuracy of its reporting of the plaintiff's mortgage was reasonable. This decision is important because the reasonableness of an investigation is often deemed to be an issue of fact for the jury. The Eleventh Circuit evaluated a $25-per-month mortgage forbearance plan and concluded that reporting the borrower as delinquent despite her forbearance payments was accurate and not materially misleading. Felts argued that Wells Fargo failed to conduct a reasonable investigation into the accuracy of its reporting, but the Court held she could not prevail absent some fact establishing that Wells Fargo's reporting was actually inaccurate.

Another action addressed a claim challenging a CRA's technical reporting of a short sale. In that class action case, the consumers alleged violations of the FCRA when they were denied mortgages because their mortgage loan files erroneously showed prior foreclosures when the consumers had actually undergone short sales. The CRA provided a number-coding manual using 68 as a code for short sale, and the number 9 with the 68 meant the matter settled. Fannie Mae's own system apparently had a confusing reading of the 9 that implied foreclosure – something the CRA had no control over. By treating the data the same way, consumers with short sales were lumped in with consumers who had foreclosures. Consumers who have previous foreclosures have to wait seven years prior to obtaining a new mortgage through Fannie Mae whereas consumers with a short sale only have to wait two years.

The consumers argued that even after notifying the CRA of this issue, the CRA did not correct the reporting error. The Ninth Circuit affirmed the inaccurate reporting of the consumers' short sales was due to Fannie Mae's mistreatment of the CRA's data, and not from the CRA's own inaccuracies, noting that the CRA "could not be expected to anticipate that Fannie Mae would choose to interpret Defendant's credit reports contrary to its explicit instructions."

Continued Developments in Permissible Purpose Litigation

Courts have continued to address the issue of what constitutes a "permissible purpose" for obtaining a consumer's credit report under the FCRA, placing important limitations on the use of that term by the plaintiffs' bar. In the Ninth Circuit, Troutman Sanders prevailed on an appeal after obtaining a judgment in favor of a loan servicer in a class action concerning post-bankruptcy discharge "account-review soft pulls" In *Vanamann v. Nationstar Mortg.*, LLC, 735 Fed. Appx. 260, 2018 U.S. App. LEXIS 13010 (9th Cir. 2018), the complaint alleged that "account-review soft pulls" of consumer data after a consumer's bankruptcy discharge were per se impermissible and constituted a willful violation of the FCRA. Having won summary judgment on willfulness grounds in Nevada federal court, we successfully persuaded the Ninth Circuit that, under *Safeco Insurance Company v. Burr,* 551 U.S. 47 (2007), there was no federal guidance (FTC or courts of appeals) regarding the alleged practice and the FCRA did not explicitly or clearly address the issue. The Ninth Circuit ultimately held that the servicer's interpretation was not objectively unreasonable, and thus not a willful violation. This is a first-of-a-kind decision in FCRA "permissible purpose" jurisprudence.

Vanamann is a significant victory for any company that uses analytics as part of its collection strategy as it supports a relatively broad interpretation of the FCRA's "account review" permissible purpose section (15 U.S.C. § 1681b). This ruling is technical, but many creditors, collection agencies, and loan servicers use consumer report information in analytics used to drive collection strategy and this ruling could be significant and positive to those users. The Ninth Circuit held, in part: "The provision authorizing credit checks for 'review . . . of an account' 'in connection with a credit transaction'—however broad or narrow that provision may be—permits Nationstar's interpretation." (quoting 15 U.S.C. § 1681b(a)(3)(A)).

In *Daniel v. Goodyear Tire/CBSD,* No. 18-1136, 2018 U.S. App LEXIS 29345 (6th Cir. Oct. 17, 2018), the Sixth Circuit affirmed dismissal of an FCRA claim brought by a consumer alleging that a card issuer had accessed her credit report without a permissible purpose. Daniel alleged that she learned in April 2013 that the defendant card issuer had requested her credit report in June 2012, even though she allegedly never applied for credit, employment, or insurance. Daniel, however, did not contact the card issuer until sixteen months later, by which time it no longer had any records related to the alleged credit inquiry or potential credit application. Based on these factual allegations, Daniel brought claims for willful and negligent violation of the FCRA for accessing her credit file without a permissible purpose.

In affirming the district court's dismissal, the Sixth Circuit held that Daniel had not stated a claim for willful violation of the FCRA, as her allegation that the credit issuer had no record of a credit application in her name more than two years after the alleged inquiry did not constitute reckless disregard of the FCRA. The Court further determined that Daniel had not stated a claim for damages for negligent violation of the FCRA. Despite claiming that she suffered mental anguish and was "frustrated" that the credit issuer's representative provided an "unapologetic and nonchalant" response, she did not allege behavior that could give rise to emotional distress that would constitute a claim for damages under the FCRA.

In *Long v. Bergstrom Victory Lane, Inc.,* No. 18-cv-688, 2018 U.S. Dist. LEXIS 171750, 2018 WL 4829192 (E.D. Wis. Oct. 4, 2018), the Eastern District of Wisconsin relied on Seventh Circuit precedent to hold that the broad scope of the FCRA's "permissible purpose" language can override an attempted restriction requested by the consumer. Plaintiff Emily Long claimed that she visited the defendant automotive dealership with pre-qualified financing already arranged from a specified lender, and that she granted permission to the dealer only to run her credit report for use with her specific lender and no other entity. Despite the alleged instructions, the dealer submitted her credit application to multiple other companies, which Long claimed amounted to an impermissible purpose that intentionally disregarded the restricted scope of authority granted. The Court held that the dealership acted within the scope of the permissible purpose granted by Long, relying upon the permissible purpose enumerated in § 1681b(a)(3)(A), which authorizes a consumer report to be provided by a CRA when a person "intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer." Specifically, § 1681b(a)(3)(A) granted the "authority to search out lenders for Long so that she could obtain financing for a vehicle—a statutorily-defined permissible purpose."

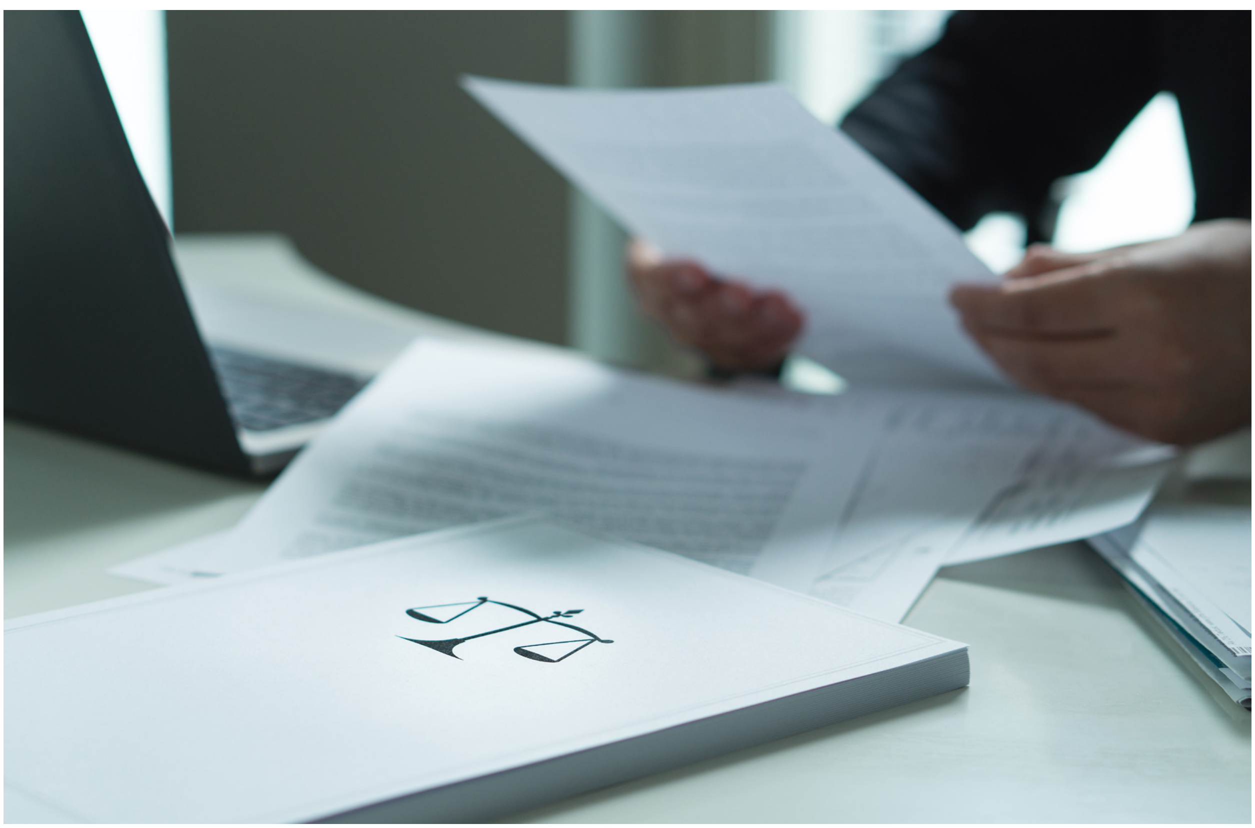
In a still developing story, DirecTV is in the midst of defending a class action in the Central District of California, alleging that the direct broadcast satellite service provider violates the FCRA and California state law by conducting hard credit pulls without any authorization, prior relationship, or interactions initiated by consumers, which necessarily adversely affected their credit scores. The case is *Adler v. DirecTV LLC et al.*, No. 2:18-cv-1665 (C.D. Calif.). The Court recently denied the defendants' motion to dismiss for lack of subject-matter jurisdiction and for failure to state a claim in relation to the FCRA claims. Notably, the court rejected the defendants' argument that allegations of diminished credit scores, shock and embarrassment, and invasion of privacy were insufficient to show an injury-in-fact so as to confer Article III standing, instead reasoning that alleged hard credit pulls without a preexisting relationship or initiation by the consumer of credit-related interaction "violates the privacy interests recognized by the FCRA and amounts to a concrete injury as opposed to a bare procedural violation." The Court also found that the plaintiff stated a claim for a willful violation of the FCRA, finding that the allegation of hard pulls against thousands of similarly situated consumers' credit reports could qualify as reckless conduct, which in turn could be deemed willful under the FCRA.

Litigation Addressing the "Source" of Information Under § 1681g Has Not Seen its End

In 2017, the Fourth Circuit unanimously reversed and dismissed a nearly $12 million FCRA class action judgment, finding that plaintiff Michael T. Dreher lacked Article III standing to bring his claims. *Dreher v. Experian Info. Sols., Inc.*, 71 F. Supp. 3d 572, 579-80 (E.D. Va. 2014), vacated on other grounds, 856 F.3d 337 (4th Cir. 2017). Dreher's complaint alleged that a CRA violated FCRA § 1681g when it identified a defunct credit card company, rather than the name of the current servicer, as the source of a tradeline on Dreher's credit report. Dreher argued the failure to list the servicer as a "source" in the tradeline was a willful violation of § 1681g(a)(2). The district court granted Dreher summary judgment on his willfulness claim and instead of trying the case to a jury, the parties stipulated to an award of $170 in statutory damages for each class member. On August 26, 2015, the district court entered a final judgment totaling over $11.7 million. The CRA appealed to the Fourth Circuit, where the case was reversed and dismissed because Dreher lacked Article III standing since he suffered no injury-in-fact.

Fast forward to 2018, and the Eastern District of New York essentially reached the opposite conclusion in *Shimon v. Equifax Info. Servs. LLC*, No. 18-cv-2959, 2018 U.S. Dist. LEXIS 174665 (E.D.N.Y. Oct. 8, 2018), where the Court held that for purposes of 15 U.S.C. § 1681g, the "source" of information is the party that provides the information directly to the CRA. According to the Court in Shimon, providing the name of the court where a record originated did not comply with the FCRA and instead, the CRA should have provided the record retrieval service it used. Although the Court disagreed with the CRA's interpretation of the term "source" it did conclude, as a matter of law, that the interpretation was not objectively unreasonable and ultimately granted the CRA's motion to dismiss the consumer's claim for a willful violation of the FCRA.

In light of the *Shimon* decision, CRAs should closely review the nature of the information they disclose as a "source" in their file disclosures under Section 1681g.



DEBT COLLECTION

According to statistics gathered by WebRecon, the number of FDCPA actions filed annually is declining, with almost 500 fewer FDCPA actions filed in federal court from January 1 through November 1, 2018 as compared to the same time period in 2017. Despite this decrease, FDCPA actions continue to make up the overwhelming majority of consumer protection-based actions filed in federal court. Thus, it remains vitally important for entities that are subject to the restrictions of the FDCPA to stay apprised of the current trends in FDCPA litigation.

American Consumer Debt Reaches Record High

In an ominous sign, Americans' total debt hit another record high, rising to $13.5 trillion in the last quarter, as student loan delinquencies jumped, according to Reuters. Specifically, flows of student debt into serious delinquency – of 90 or more days – rose to 9.1 percent in the third quarter from 8.6 percent in the previous quarter, reported the Federal Reserve Bank of New York, propelling the biggest jump in the overall U.S. delinquency rate in seven years.

Total household debt, driven by $9.1 trillion in mortgages, now stands $837 billion higher than its previous peak in 2008, just as the Great Recession took hold and induced massive deleveraging across the United States. In fact, indebtedness has risen steadily for more than four years and sits more than 21% above its 2013 low point, and the $219 billion rise in total debt in the quarter that ended on September 30 amounts to the biggest jump since 2016.

"The new charts in our report help to better understand how the debt and repayment landscape have shifted in the years following the Great Recession," Donghoon Lee, research officer at the New York Fed, announced in a press release published on November 16. "Older borrowers now hold a larger share of total outstanding debt balances, while the shares held by younger borrowers have contracted and shifted toward auto loans and student loans."

Kathy Kraninger Succeeds Mick Mulvaney as Director of the CFPB

On December 6, Kathy Kraninger, the former associate director of the Office of Management and Budget ("OMB"), was confirmed as the new director of the CFPB, replacing Mick Mulvaney who has since been named as acting White House chief of staff.

Kraninger, 43, is a Pittsburgh native and graduate of Marquette University and Georgetown Law School. Her primary experience includes serving as the Clerk for the Senate Appropriations subcommittee on Homeland Security, including overseeing the Department of Homeland Security ("DHS") budget (and the budgets for four other agencies) while at OMB. Kraninger also served as deputy assistant for policy at DHS.

The CFPB post has been subject to significant drama since former Democratic director Richard Cordray departed, with Cordray appointing deputy director Leandra English to fill his seat. Within hours of Cordray's resignation announcement, however, Trump appointed Mulvaney under the Federal Vacancies Act to succeed Cordray. English then sued, but the federal district court denied her request for a temporary restraining order and preliminary injunction. Following Kraninger's nomination, English dropped her lawsuit.

In one of her first official acts as director, Kraninger halted former director Mulvaney's efforts to change the name of the CFPB to the Bureau of Consumer Financial Protection; a move which was estimated to cost the Bureau between $9 million and $19 million to effectuate. However, the decision only applies to products and materials used by the CFPB. For legal filings, reports, and other official dealings, the CFPB will go by the moniker Bureau of Consumer Financial Protection.

Kraninger is also expected to continue former director Mulvaney's goal to update the CFPB's policies and enforcement protocol regarding the use, or planned implementation, of new technologies in the debt collection industry, especially as it relates to communications with consumers by methods other than telephone calls. However, Kraninger has signaled that she will likely strive to strike a balance between the zealous enforcement and policy initiatives of former director Cordray and the more laiseez faire approach of former director Mulvaney. In an internal email, Kraninger stated she expects the Bureau to "do our work with an open mind an without presumptions of guilt, . . . to always carefully weigh the costs and benefits to consumers [for] enforcement activities and regulatory rulemaking . . . [, and to] vigorously enforce the law . . . ."

Kraninger stated she expects the Bureau to "do our work with an open mind an without presumptions of guilt, . . .

CFPB Anticipates Rulemaking Activity in 2019

The CFPB continues to engage in research and pre-rulemaking activities for debt collection, according to its Fall Rulemaking Agenda issued on October 17. Notably, the Bureau expects to issue a Notice of Proposed Rulemaking, or "NPRM," addressing issues including communication practices and consumer disclosures by March 2019.

According to the Bureau, under Mulvaney's interim leadership, its overall priorities in the regulatory agenda for the coming months included:

- Meeting specific statutory responsibilities;
- Continuing selected rulemakings that were already underway; and
- Reconsidering two regulations issued under the prior leadership: the Home Mortgage Disclosure Act and rule for Payday, Vehicle Title and Certain High-Cost Installment Loans.

An NPRM on the reconsideration of the small dollar lending rule addressing its merits and changes to the compliance date (currently August 2019) is expected no later than early next year, according to the latest agenda.

The CFPB releases regulatory agendas twice a year in voluntary conjunction with a broader initiative led by the OMB to publish a Unified Agenda of Regulatory and Deregulatory Actions across the federal government.

Second Circuit Rules Debt Collectors Need Not Disclose Absence of Interest and Fees

On March 29, the Court of Appeals for the Second Circuit rendered a long-awaited opinion in what is commonly called a "reverse-*Avila*" or "current account balance" case, holding that it is not a violation of the FDCPA for a debt collector to state a consumer's balance without mentioning interest or fees, when no such interest or fees are accruing.

In *Christine Taylor, et al. v. Financial Recovery Services, Inc.*, No. 17-cv-1650 (2d Cir. Mar. 29, 2018), both plaintiffs incurred debts with a bank, which after default were placed with Financial Recovery Services ("FRS") for collection. At the time of placement, the bank instructed FRS not to accrue any interest or fees on the accounts. FRS thereafter sent a series of collection notices to both plaintiffs, each notice containing the identical balance due as the previous notice. None of the notices contained a disclosure that interest and fees may accrue on the balance of the account. Neither plaintiff made any payments on their accounts and each ultimately filed for Chapter 7 bankruptcy protection.

Due to the lack of a specific disclosure regarding whether interest and fees were accruing, the plaintiffs argued the letters could be interpreted to have more than one meaning, and they filed suit claiming violations of Section 1692e and 1692g of the FDCPA. The plaintiffs relied heavily on the Second Circuit's holding in *Avila v. Riexinger & Associates, LLC*, 817 F.3d 72 (2d Cir. 2016), where the Court held a debt collection letter violates the FDCPA if it states a “current balance” of a consumer’s debt without disclosing that interest and fees are accruing on that balance, when they are in fact accruing such that paying the balance listed on a letter would not pay a debt in full.

The District Court’s Decision Granting Summary Judgment in Favor of the Debt Collector

In May 2017, the District Court granted summary judgment to FRS, holding its letters did not violate the FDCPA and noting the collection notices were not false, misleading, or deceptive as a matter of law. The Court further found that the plaintiffs failed to present evidence that the balances on the face of the notices were inaccurate. Since the balances were accurate, the Court found it “irrelevant” whether or not the balances, in fact, accrued interest or fees after being referred to FRS. Furthermore, the Court pointed out that the statements were not misleading because the balances owed were stated numerous times within each letter and the balances remained the same in successive letters.

In analyzing the “least sophisticated consumer” standard, the Court stated that “[t]he letters are not misleading to the least sophisticated consumer, who (i) might not understand or even consider the concept of interest and when it accrues; (ii) could reasonably take the language at face value as the amount owed; or (iii) might infer from the unchanging amount in each of the coupons and successive letters that interest was not accruing.” Importantly, the Court noted that “[o]nly a consumer in search of an ambiguity and not the least sophisticated consumer relevant here, would interpret the letters to mean that interest was accruing.” (Emphasis added).

In distinguishing this case from the holding in *Avila*, the District Court recognized that the plaintiffs provided no evidence that paying the balance on their respective letters would not satisfy their debts.

The Second Circuit’s Decision Rejecting the Plaintiffs’ Interpretations of the FDCPA

On appeal to the Second Circuit, the plaintiffs argued that FRS’s collection notices were misleading within the meaning of Section 1692e “because the least sophisticated consumer could have interpreted them to mean either that interest and fees on the debts in question were accruing or that they were not accruing.” Relying heavily on *Avila*, the plaintiffs argued a debt collector commits a per se violation of Section 1692e whenever it fails to disclose whether interest or fees are accruing on a debt. The Second Circuit made clear the plaintiffs were mistaken, noting the violation in *Avila* arose because “[a] reasonable consumer could read the notice and be misled into believing that she could pay her debt in full by paying the amount listed on the notice” where such payment would not have settled the debt in that case.

In *Taylor*, however, the Court noted no interest or fees were accruing, so the balances included in the collection notices sent to the plaintiffs correctly stated the payment needed to satisfy the debt in full, and that no language regarding interest and fees was required. Unlike *Avila* where the Court found the message prejudicially misleading, in *Taylor* prompt payment of the stated balance would have satisfied the plaintiffs’ debts. In the words of the Court:

> Thus, the only harm that *Taylor* and Klein suggest a consumer might suffer by mistakenly believing that interest or fees are accruing on a debt is being led to think that there is a financial benefit to making repayment sooner rather than later. This supposed harm falls short of the obvious danger facing consumers in *Avila*.
>
> It is hard to see how or where the FDCPA imposes a duty on debt collectors to encourage consumers to delay repayment of their debts. And requiring debt collectors to draw attention to the fact that a previously dynamic debt is now static might even create a perverse incentive for them to continue accruing interest or fees on debts when they might not otherwise do so. Construing the FDCPA in light of its consumer protection purpose, we hold 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. Opinion at 6-7.

In holding that the letters were not misleading under the FDCPA, the Court mirrored its decision with the Seventh Circuit's holding in *Chuway v. National Action Financial Services, Inc.,* which stated the following:

> [I]f a debt collector is trying to collect only the amount due on the debt the letter is sent, then he complies with the [FDCPA] by stating that the creditor has "assigned your delinquent account to our agency for collection," and asking the recipient to remit the balance listed and stopping there, without talks of the "current" balance.

362 F.3d 944, 949 (7th Cir. 2004).

The Second Circuit further read sections 1692e and 1692g of the FDCPA in harmony, meaning that if no interest and fees are accruing on the balance, then collection notices are not misleading under section 1692e and the balance is accurately stated under section 1692g. Conversely, if interest and fees are accruing and no disclosure is given in the notice, then it would run afoul of both sections 1692e and 1692g.

The plaintiffs also unsuccessfully raised two additional arguments before the Court. First, they argued the bank continued to accrue interest on their accounts even after they were placed with FRS for collection. The Court refused to consider this argument because the plaintiffs failed to raise this issue before the district court, so it could not be raised on appeal.

Second, the plaintiffs argued that even though the bank may not have accrued interest, it nonetheless retained the right to do so and could start adding interest onto the accounts at any point in the future. The Court rejected this argument because it would be so far in the future that it would have no effect on the notice sent by FRS. Further, since nothing was being added to the account balances, the plaintiffs' debts were static so they could satisfy them by prompt payment.

The *Taylor* opinion is a response to the flood of "current account balance" lawsuits filed in the wake of the *Avila* decision. Its commonsense approach gives debt collectors a clear answer to what should be a straightforward question of statutory interpretation. It can also be interpreted as a statement by the Second Circuit regarding the confusing tangle of opinions that have come out of the Eastern District of New York on the issue. Debt buyers and collectors should be refreshed by any opinion that recognizes when an idiosyncratic interpretation of the FDCPA affects their business by encouraging consumers to delay repayment of their debts.

Second Circuit Again Rules for Debt Collectors in Reverse-*Avila* Cases

In the wake of *Taylor*, on October 29, the Second Circuit Court of Appeals issued another long-awaited ruling in a FDCPA case involving the disclosure of the amount due in a collection letter. In *Derosa v. CAC Financial*, the Court affirmed summary judgment in favor of the debt collector and held that, if a debt is not accruing interest or fees, no obligation exists to affirmatively disclose this fact. This decision follows the Court's previous ruling in *Taylor v. Financial Recovery Services, Inc.* where the Court reached the same conclusion in a closely analogous case.

In *Derosa*, CAC Financial Corporation sent a collection letter to consumer Darian Derosa, listing an amount due. Derosa sued CAC, alleging that the letter was deceptive in violation of the FDCPA because it did not disclose whether interest and fees were accruing. To rebut Derosa's allegations, CAC submitted a declaration stating that interest and fees were not accruing at the time the letter was sent. In response, Derosa submitted her own declaration asserting that her account had previously accrued interest and fees and that the credit card agreement allowed for their accrual. The Eastern District of New York granted summary judgment in favor of CAC and Derosa appealed.

The Second Circuit referred back to *Taylor* in which it had already held that if a debt is not accruing interest and fees, a collection letter does not need to disclose this fact:

> In *Taylor v. Financial Recovery Services, Inc.,* 886 F.3d 212 (2d Cir. 2018), this Court was faced with the same question that we are faced with today: are collection notices that do not identify whether interest and fees are accruing a "per se violation" of the FDCPA? *Id.* at 214. *Taylor* answered that question in the negative: if a debt is not accruing interest and fees, "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 the FDCPA. *Id.* at 215.

Thus, the only remaining issue was whether Derosa created a genuine dispute of material fact as to whether interest and fees continued to accrue when the letters were sent.

The Court noted that just because an account accrues interest and fees under ownership of the original creditor does not necessarily mean that the same would be true when ownership transfers to a third party. CAC adduced evidence that the amount due was static, and the two collection letters sent to Derosa listed the same amount. Derosa's assertions to the contrary, which were solely based on the past accrual of interest and fees, were merely speculative and insufficient to create a genuine dispute of fact.

We have previously reported about multiple decisions by district courts within the Second Circuit involving similar "reverse-*Avila*" or current balance claims. As each decision comes out, the plaintiffs' bar tries a different tack with a new iteration of this type of letter claim. *Taylor* and *Derosa* will hopefully put an end to such filings and be the death knell of still pending claims.

Supreme Court to Decide Whether FDCPA Applies to Non-Judicial Foreclosure Proceedings

The U.S. Supreme Court announced on June 28 that it had granted a petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit in *Obduskey v. McCarthy & Holthus LLP, et al.* and to resolve a circuit split on whether the FDCPA applies to non-judicial foreclosure proceedings.

In *Obduskey*, the Tenth Circuit, agreeing with the U.S. Court of Appeals for the Ninth Circuit and numerous district courts, ruled that a law firm hired to pursue a non-judicial foreclosure under

Colorado law was not a debt collector as defined under the FDCPA and, further, the law firm's non-judicial foreclosure activities did not constitute "debt collection" under the FDCPA. The Tenth Circuit focused on what it called the "critical difference" between judicial and non-judicial foreclosures—namely, that a non-judicial foreclosure does not automatically result in the right to collect a deficiency judgment against the mortgagor. Instead, it only results in the enforcement of a security interest and the right to collect the proceeds of sale of the collateral, which would then be applied against the debt. To obtain a deficiency judgment, a mortgagee in Colorado would have to file a separate judicial action.

The Tenth Circuit reasoned that because "debt is synonymous with 'money,'" the FDCPA applies "only when an entity is attempting to collect money." The Court rejected the argument that Section 1692i of the FDCPA, which refers to "legal actions by debt collectors" and dictates the venue for such actions, is evidence that Congress intended the FDCPA to apply to non-judicial foreclosures. Instead, the Court found that "action" is generally understood to imply a "judicial proceeding," and a non-judicial proceeding "plainly" did not fall under that definition. Thus, the Court held that non-judicial foreclosures are not covered under the FDCPA.

Contrary to this analysis, the U.S. Courts of Appeals for the Fourth, Fifth, and Sixth circuits, as well as the Colorado Supreme Court, have held that the FDCPA applies to non-judicial foreclosure proceedings because every foreclosure action is undertaken for the purpose of obtaining payment on the underlying debt. The respondents to the petition for certiorari argued that these decisions involved sharply different factual circumstances in that they involved judicial or quasi-judicial foreclosures, and that as a result their holdings are entirely consistent with the Tenth Circuit's ruling in *Obduskey*. Petitioners countered by asserting that the precise fact-pattern in every case in the split, including *Obduskey*, involved entities pursuing foreclosure without seeking a deficiency judgment.

As such, in addition to resolving the question of whether the FDCPA applies to non-judicial foreclosures, the Supreme Court's decision in *Obduskey* could clarify whether the FDCPA applies to all foreclosure proceedings – judicial and non-judicial. Alternatively, the Court could issue a narrower decision that focuses on whether the foreclosing entity has demanded payment from a debtor in a way that is aggressive or unlawful under the FDCPA—which could place it under the definition of a "debt collector."

Some courts, including the U.S. Court of Appeals for the Third Circuit, have expressed concern that if the FDCPA does not apply to non-judicial foreclosure proceedings, it would immunize debt secured by real property where the foreclosing entity demands payment or uses foreclosure as a threat to elicit payment. The Tenth Circuit in *Obduskey* considered this issue and found that the law firm handling the foreclosure did not demand payment or use foreclosure as a threat to elicit payment, but had only sent one letter notifying the mortgagee and the plaintiff, Dennis *Obduskey*, that it had been hired to commence foreclosure proceedings.

The CFPB recently filed an amicus brief that argued the Supreme Court should affirm the Tenth Circuit's decision on appeal and find that the respondent law firm is not a debt collector and that its non-judicial foreclosure activities did not constitute debt collection under the FDCPA. Similar to the Tenth Circuit, the CFPB argues in its brief that respondent's non-judicial foreclosure action against *Obduskey* was not "debt collection" under the FDCPA because the FDCPA's text is clear that enforcement of a security interest, without very specific other prohibited activity mentioned in Section 1692f(6), does not constitute debt collection. Further, the CFPB argues that the respondent's actions were specifically required by Colorado state law. Therefore, to find its actions in violation of the FDCPA would throw the FDCPA into conflict with state law and would have hindered the respondent from complying with state law.

Courts Remain Split on 1099 Claims

Two recent decisions from the Seventh and Third Circuit courts of appeals reflect that courts are still grappling with the legal issue of whether a debt collector's inclusion of certain language in collection correspondence regarding the potential for tax

Therefore, it is expected that this issue will resonate within the federal judicial system for the foreseeable future.

consequences should a debtor choose to settle his debt for less than the claimed amount due violates the FDCPA.

In *Dunbar v. Kohn Law Firm, S.C.*, 896 F.3d 762 (7th Cir. 2018), the Seventh Circuit considered whether the following tax disclosure language included in a debt collection letter offering to settle the debt violated the FDCPA: "This settlement may have tax consequences." The plaintiffs argued that the language was false and misleading under the FDCPA because they were insolvent at the time they received the letters and therefore, would not have had to pay taxes on any discharged debt. The plaintiffs also claimed that the tax disclosure language could convince the unsophisticated consumer to pay the outstanding debt in full in order to avoid any unwanted tax consequences.

In a well-reasoned opinion affirming the lower court's dismissal of the action, the Seventh Circuit found that the debt collector's use of the conditional word "may" clearly signaled that "tax consequences are possible in the case of some debtors, not that tax consequences are possible or likely (much less certain) in this particular debtor's circumstances." 896 F.3d at 765-66 (emphasis in original). The Seventh Circuit also found that, due to the mutable nature of solvency, it was entirely possible that the plaintiffs could have incurred tax consequences if they chose to settle the debt and then became solvent. As such, the debt collection letters at issue were literally true and were not misleading to the objective unsophisticated consumer.

In a somewhat contrary opinion, the Third Circuit in *Schultz v. Midland Credit Mgmt. Inc.*, No. 17-2244, 2018 U.S. App. LEXIS 27232 (3d Cir. Sept. 24, 2018), found that the tax disclosure language that stated "[w]e will report forgiveness of debt as required by IRS regulations. Reporting is not required every time a debt is canceled or settled, and might not be required in your case" was a potential violation of the FDCPA. Plaintiffs alleged this language was false and misleading under §§1692e(5) and 1692e(10) because the defendant knew that the plaintiffs' debt was less than $600 and therefore, any debt forgiveness that resulted from acceptance of the settlement offer would not result in tax liability under the IRS regulations. *Id.* at *6. The defendant countered that the disclosure's conditional language made the letter neither false nor misleading. The lower court disagreed with the plaintiffs' interpretation of the letter and dismissed their complaint.

On appeal, the Third Circuit reversed the lower court's dismissal and, following the plaintiffs' argument, held that the tax disclosure language was inapplicable to the plaintiffs since their debt was less than $600. *Id.* at *9-10. The Court found that it was "reasonable to assume that a debtor would be influenced by potential IRS reporting that, if that reporting cannot come to pass, it could signal a potential FDCPA violation regardless of the use of conditional language." *Id.* at *11-12. The Court then went on to imply that debt collection companies should be more familiar with the circumstances of debtors' accounts, stating, "[w]hile we recognize … many debt collection companies … use … form letters when contacting … debtors, we must reinforce that convenience does not excuse a potential violation of the FDCPA." *Id.* at 165.

As is apparent from the aforementioned decisions, as well as numerous district court decisions from across the county on the issue, there is no clear consensus on the propriety of tax disclosure language. This issue is compounded further by the wide variations in tax disclosure language debt collectors employ in their collection and settlement letters. Therefore, it is expected that this issue will resonate within the federal judicial system for the foreseeable future.

PAYMENT PROCESSING AND CARDS

Regulatory Developments

Regulatory developments continued to drive the payment industry in 2018. One of the biggest developments during 2018 was that the Office of the Comptroller of the Currency ("OCC") announced its intent to accept applications for special purpose national bank charters ("SPNBCs") from eligible non-depository financial technology ("fintech") companies. This development signals a significant shift in the current banking marketplace, which is good news for fintech companies, as it opens an avenue to reaching a nationwide market. For traditional banks, this development signals emerging new competition from fintech. The OCC is expanding SPNBCs to eligible fintech companies to bring these companies within the U.S. bank regulatory system, which in turn will increase consumer protection, foster healthy competition, and encourage technological innovation in the banking industry. By granting SPNBCs to fintech companies, the OCC will expand its oversight of technology-based products and services that are reshaping the banking industry. The OCC will make SPNBCs available to those fintech companies engaged in one of the two core banking functions of paying checks or lending money, subject to the OCC's approval. The OCC's decision to accept SPNBC applications from fintech companies presents a new opportunity for fintech participants and the financial industry.

There are mixed feelings about granting charters to fintechs that operate as nonbanks. In September, the New York Department of Financial Services sued the OCC to void awarding national bank charters to online lenders and payment companies. The Department of Financial Services argued that issuing SPNBCs was unconstitutional and put consumers at risk. The basis of the suit was that the OCC exceeded its authority under the National Bank Act and violated the Constitution's 10th Amendment by usurping state powers. Similarly, in October, the Conference of State Bank Supervisors ("CSBS") filed a complaint against the OCC arguing that the issuance of SPNBCs by the OCC exceeds the authority granted by Congress.

There were new updates to the Prepaid Card Rule, which was originally issued by the CFPB in 2016. At the beginning of 2018, the CFPB finalized changes to the Prepaid Card Rule. The original 2016 rule put in place requirements for treatment of funds on lost or stolen cards, error resolution and investigation, upfront fee disclosures, access to account information, and overdraft features. The new rule provides the following changes: (1) adjusts error resolution requirements; (2) provides more flexibility for credit cards that are linked to digital wallets; (3) provides an exclusion from the rule for loyalty, award, or promotional gift cards; (4) provides flexibility regarding the pre-acquisition disclosures for certain prepaid accounts; and (5) provides flexibility in submitting prepaid account agreements to the CFPB. The new rule also delayed its compliance date until April 2019.

In February, the CSBS announced that seven states entered into a compact that should streamline the process of applying for state money transmitter licenses. The participating states – Georgia, Illinois, Kansas, Massachusetts, Tennessee, Texas, and Washington – will accept each other's findings regarding certain "key elements of state licensing." Key elements include IT, cybersecurity, business plan, background check, and compliance with the federal Bank Secrecy Act. By joining the compact, a company that has obtained a money transmitter license from one of the compact states will be able to obtain a license from any other compact state without the delay and expense of duplicative review and approval requirements. The CSBS's announcement also noted that more states are expected to join the compact, which is only the "first step among state regulators in moving towards an integrated, 50-state system of licensing and supervision for Fintechs."

There were also new regulatory developments at the state level. In July, the New York Financial Services Superintendent approved BitPay, Inc. for a virtual currency license. BitPay is a crypto payment processor. The license allows BitPay to offer clearing and settlement services to merchants willing to accept payment in bitcoin or issue payments in bitcoin. BitPay is the first wholesale payment processor to be approved for this license. Businesses based in New York can leverage BitPay to accept bitcoin and bitcoin cash for purchases from users globally, and residents with bitcoin and bitcoin cash are able to make purchases.

In September, the CFPB proposed the creation of the Disclosure Sandbox. This was one of the first actions to come from the CFPB's Office of Innovation, which was established in July. The purpose of the Disclosure Sandbox is to ensure that markets for consumer financial products and services operate transparently and efficiently. The proposed policy is designed to encourage companies to test new disclosures by: (1) streamlining the application and review process; (2) granting or denying applications within 60 days of submission; (3) establishing a two-year timeline for testing the new disclosures; (4) specifying procedures for companies to continue to use the disclosures that test successfully; and (5) coordinating with state regulatory agencies so that companies that fall within the purview of state regulators can participate in the CFPB's Disclosure Sandbox without applying separately to the CFPB.

The Federal Reserve Board published a final rule in September that amends Subpart C of Regulation CC to address situations when there is a dispute between banks as to whether a check has been altered or was issued with an unauthorized signature, when one bank has transferred an electronic or substitute check to the other bank and the original paper check is not available for inspection. The risk of liability under the old rules was split – the paying bank was responsible for forged checks and the depositary bank was responsible for altered checks. The new rule adopts a rebuttable presumption of alteration, rather than forgery, in disputes between banks over whether a substitute check or electronic check contains an alteration or an unauthorized signature. The presumption shifts the burden to the bank that warrants that a check has not been altered, which could be a depositary bank or collecting bank. Under the new rule, the presumption will cease to apply if the original check is made available for examination by all parties involved in the dispute. The presumption applies only to disputes between institutions; it does not apply to disputes between a bank and a customer. The amendments to Regulation CC became effective January 1, 2019.

Litigation and Enforcement Actions

In March, the FTC filed an Agreement Containing Consent Order against PayPal, Inc. The Agreement requires PayPal to correct the issues in violation of the Gramm-Leach-Bliley Act, ("GLB") the Privacy Rule and Regulation P, the Safeguards Rule, and the FTC Act through PayPal's ownership and operation of Venmo, a peer-to-peer payment service. The FTC's complaint stated that PayPal is a "financial institution" under the GLB Act because PayPal "is significantly engaged in 'transferring money,' one of the activities listed as financial in nature under the Bank Holding Company Act of 1956, and in data processing and transmission, financial activities listed by the CFPB in Regulation Y, as covered by GLB." The conclusion that PayPal is a "financial institution" allowed the FTC to extend its complaint against PayPal to include allegations that it violated the Privacy Rule and Reg P by failing to provide a clear and conspicuous initial privacy notice to its customers, failing to provide an accurate privacy notice, and failing to deliver the initial privacy notice so that each customer could reasonably be expected to receive actual notice. PayPal allegedly violated the Safeguards Rule by failing "to have a written information security program," failing "to assess reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information," and failing "to implement basic safeguards to protect the security, confidentiality, and integrity of consumer information." The Complaint and Agreement Containing Consent Order reveal that the FTC is continuing to pay close attention to privacy and data issues and the representations that a company makes about its security systems and data integrity.

Under the terms of the consent order, Citibank must correct its practices and pay $335 million in restitution to affected consumers.

In May, the Supreme Court issued its ruling in *Murphy v. NCAA*, overturning the Professional and Amateur Sports Protection Act of 1992 ("PASPA"), a federal law that prohibited most states from allowing sports-related gambling. States that do not have legalized gambling can begin passing their own laws to legalize sports gambling within their state. The ability for states to now pass their own sports gambling laws creates a great opportunity for payment processors. Consumers may want payment options that are low-cost, provide instant clearing, or allow for payment with credit.

In June, the CFPB settled with Citibank with respect to a violation of the TILA by failing to reevaluate and reduce the APRs for almost two million consumer credit card accounts, and by failing to have reasonable written policies and procedures in place to conduct APR reevaluations. Under the terms of the consent order, Citibank must correct its practices and pay $335 million in restitution to affected consumers.

In July, the CFPB filed a proposed settlement with TCF National Bank regarding its marketing and sale of overdraft services. Banks must first obtain a consumer's consent before charging overdraft fees on one-time debit purchases and ATM withdrawals. In the suit, the CFPB alleged that, when TCF was attempting to obtain customer consent, it obscured the fees it charged and made consenting to overdraft fees seem mandatory for new customers to open an account. TCF agreed to pay $25 million in restitution to customers who were charged overdraft fees, and it agreed to an injunction to prevent future violations.

Credit card surcharge litigation is back in the Second Circuit for constitutional review. Merchants often prefer that customers pay for their purchases with cash so the merchant can avoid transaction fees associated with credit card purchases. To encourage payment in cash, many merchants post prices reflecting increased rates for credit card purchases, and states have been closely regulating this method of pricing. In New York, the "no credit card surcharge" law (N.Y. Gen. Bus. Law § 518) made its way to the United States Supreme Court in *Expressions Hair Design v. Schneiderman* two terms ago. In October, the New York Court of Appeals issued an interpretation of § 518 concluding that if a store chooses to post lower prices for cash customers, it must also post the price charged to credit card customers. This interpretation prohibits merchants from posting a single cash price for items while indicating an additional amount will be added to credit card purchases. The Second Circuit will now decide whether § 518 as interpreted by the New York Court of Appeals is a valid restriction on commercial speech.

MORTGAGE

Sixth Circuit Offers Guidance on Identifying Nominal Defendants and Amount in Controversy

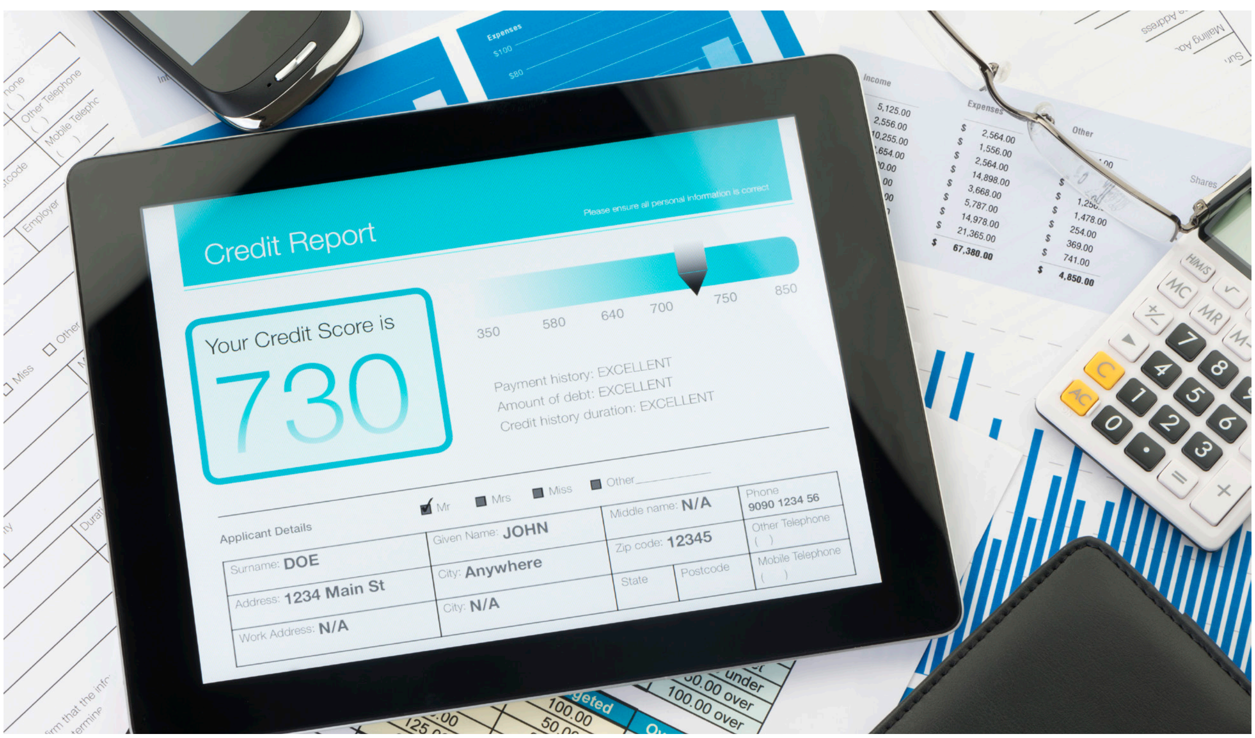
For many jurisdictions across America, there is no binding precedent for determining the amount in controversy in foreclosure-related cases. In *Beasley v. Wells Fargo Bank, N.A.*, 2018 U.S. App. LEXIS 19944 | 2018 FED App. 0356N (6th Cir.) | 744 Fed. Appx. 906. | 2018 WL 3478882, the Sixth Circuit offered guidance by asserting its preference to use the property's fair market value in assessing amount in controversy for removal purposes.

The borrower in *Beasley* filed a wrongful foreclosure lawsuit against Wells Fargo in state court. Wells Fargo removed the action to federal court and obtained judgment on the pleadings. Beasley appealed to the Sixth Circuit, claiming that removal was improper because (1) Wells Fargo failed to obtain the consent of co-defendant, Small Business Administration ("SBA"); and (2) the amount in controversy was less than $75,000.

The Sixth Circuit upheld the district court's determination that SBA was a nominal defendant because Beasley asserted no claims and sought no damages from SBA. Furthermore, Beasley had not served SBA with the complaint prior to removal.

The Sixth Circuit affirmed the district court's ruling that the amount in controversy exceeded the $75,000 minimum amount. Beasley argued that the amount in controversy should be the difference between the property's fair market value and the price obtained at the foreclosure sale. The Court disagreed, ruling that the amount in controversy should be based on the property's fair market value in light of the plaintiff's request for injunctive relief barring any further foreclosure activity.

The Beasley opinion provides useful instruction for financial institutions faced with removal complications in mortgage litigation.



CFPB Provides Implementation Guidance for Amendments to Mortgage Servicing Rules

Recognizing the unintended consequences of the CFPB's 2016 Mortgage Servicing Final Rule that altered mortgage servicing rules under Regulation X (implementing RESPA, and Regulation Z (implementing TILA), the CFPB amended certain provisions of both regulations to provide mortgage servicers with additional clarity and compliance guidance. On March 29, the CFPB went a step further by releasing two implementation tools to provide additional guidance for compliance efforts.

First, the CFPB updated its Small Entity Compliance Guide to reflect the status of the law that became effective on April 19. The new version incorporates the amendments related to the timing requirements of the transition to or from modified periodic billing statements when a consumer is in bankruptcy. Further, the new version removes aspects of mortgage servicing rules that are no longer in effect such as the exemption from sending periodic billing statements to all accounts impacted by the consumer's bankruptcy.

In addition, the CFPB published a Mortgage Servicing Coverage Chart that explains each section of the mortgage servicing rules in Regulations X and Z, and how they are applied or excluded. The updated Guide and Coverage Chart are routinely relied upon by mortgage servicers to interpret the CFPB's mortgage servicing rules and serve as an excellent source for ensuring compliance.

Seventh Circuit Holds that Borrower Failed to Show Harm Caused by Servicer's QWR Response

RESPA provides borrowers with useful tools—qualified written requests and notices of error—to request their loan servicers to respond to servicing questions or investigate potential servicing disputes. These communications, however, are often used to try to slow down or even stop a foreclosure sale. Borrowers can sue under RESPA if they believe that their QWRs or notices of error were not properly handled. Often, these claims are filed even though a borrower suffered no damages. In *Moore v. Wells Fargo Bank, N.A.*, No. 18-1564, 2018 U.S. App. LEXIS 31534, 2018 WL 5816723 (7th Cir. Nov. 7, 2018), the Seventh Circuit examined whether "a borrower can recover damages under 12 U.S.C. § 2605(f) when the only harm alleged is that the response to his qualified written request did not contain information he wanted to help him fight a state-court mortgage foreclosure he had already lost in state court." The Seventh Circuit answered in the negative.

Although the district court found insufficient evidence of a RESPA violation, the appellate court assumed for the purpose of its opinion that at least some part of Wells Fargo's correspondence may have violated RESPA. Even if a violation had occurred, however, the Seventh Circuit ruled Moore failed to demonstrate any actual harm caused by the servicer's alleged failure to comply with the statute.

Specifically, the Court rejected Moore's argument that the fees he paid to an attorney to review the servicer's response "could be a cost incurred as a result of an alleged violation" of RESPA. The mere filing of a lawsuit does not constitute sufficient harm. The Seventh Circuit also rejected Moore's claims for physical and emotional distress related to the upcoming foreclosure because his "stress had essentially nothing to do with any arguable RESPA violations." Rather, "the obvious sources of his stress were the facts that he was not able to make timely payments toward his mortgage, that the lender had won a judgment of foreclosure, and that sale and eviction were imminent."

Consumers Cannot Escape the Filed Rate Doctrine When It Comes to Lender-Placed Insurance

In *Patel, et al v. Specialized Loan Servicing LLC*, et al, No. 16-12100 (11th Cir. 2018), the Eleventh Circuit upheld the District Court's opinion and rejected class claims against a loan servicer alleging artificially inflated lender-placed insurance premiums (also known as "lender-placed insurance"). In reaching its conclusion, the Court relied on the filed-rate doctrine that "precludes any judicial action which undermines agency rate making authority."

In *Patel,* the plaintiffs claimed that loan servicers and the insurance companies breached the implied covenants of good faith and fair dealing by purchasing lender-placed insurance policies that were "artificially inflated" and "unreasonably high." The plaintiffs also claimed that the premiums reflected the "costs of kickbacks" and thus constitute deceptive and unfair trade practices. In rejecting the plaintiffs' claims, the Eleventh Circuit held that the allegations were "textbook examples of the sort of claims" barred by the filed-rate doctrine.

The filed-rate doctrine is a common law rule which provides that any entity that is required to file tariffs governing the rates, terms, and conditions of service must adhere strictly to those terms. This principle forbids a regulated entity from charging a rate other than the one on file with the appropriate federal regulatory authority. This general principle is codified in the Communications Act, 47 USC § 203, which requires interstate communications common carriers to file tariffs and not to deviate from them.

In addition to discussing Erie principles applicable to the case, the Eleventh Circuit considered whether the allegations in the complaint facially attacked a filed-rate. As the plaintiff alleged that the harm suffered was in the form of "artificially inflated premiums" and "unreasonably high lender-placed insurance premiums," the Court concluded that the plaintiffs were attempting to challenge the rates that insurance providers filed with state regulators and the claims were therefore barred.

The *Patel* opinion is critical to future lender-placed insurance litigation over rates as mortgage lenders may be insulated from liability if those rates are filed and approved by the applicable administrative bodies.

Seventh Circuit Declines to Extend "Debt Collector" Status to Property Preservation Company Hired by Mortgage Servicer

Loan servicers routinely engage property preservation companies to undertake a variety of services for the purpose of preserving the real property that serves as the security for home mortgage loans. Typically, these property preservation companies are retained when borrowers are in default. Often, property preservation companies reach out to homeowners as part of their preservation efforts. In S*chlaf v. Safeguard Prop., LLC,* 899 F.3d 459, 464 (7th Cir. 2018), the borrowers alleged that the property preservation company violated the FDCPA in its communications with the borrowers.

The district court ruled that the property preservation company was not a debt collector because its principal purpose was not debt collection. The district court also declined to rule the preservation company "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."

While noting that its holding was limited to the situation before it, the Seventh Circuit affirmed the district court, holding first that the property preservation company was not engaged in debt collection when it was simply leaving at the property a door hanger that asked the homeowner to call his loan servicer. The court added that the door hangers did not contain a demand for payment and made no reference to the debt. The court noted that the primary purpose of the contact inspection is to assist the servicer in property preservation, not debt collection. Even though the information collected by the property preservation company could aid the servicer in its debt collection efforts, the servicer was required by HUD regulations to verify occupancy. Moreover, the decision to commence with debt collection remained in the hands of the servicer.

AUTO FINANCE

In 2018, the auto finance industry found itself targeted at both the state and federal levels – as usual.

California Expands Protections for Servicemembers

On September 19, California Governor Jerry Brown signed Assembly Bill 3212 that provides several benefits and protections to servicemembers under the state's Military and Veterans Code. AB 3212 extends the length of time that servicemembers are protected against foreclosure, eviction, repossession, and default judgments. It also extends the period of protection to servicemembers' families and veterans to whom the protections apply.

The bill updates current law to "close loopholes that have been used to take advantage of servicemembers and extends the protections of California law to cover all servicemembers in California" according to California Attorney General Xavier Becerra who applauded Gov. Brown for signing the bill into law. The bill was authored by Assemblywoman Jacqui Irwin, who posted this on her Facebook page following the bill signing: "Our soldiers deserve to return home to a thankful community, not a foreclosure notice or a debt collector at their door."

The amendments come on the heels of federal action in the state. In March, the Department of Justice filed suit in the Central District of California against a sub-prime auto lender for allegedly repossessing the vehicles of members of the armed forces protected by the federal SCRA, 50 U.S.C. § 3952. In October 2017, the DOJ announced a settlement with Westlake Services LLC and its subsidiary, Wilshire Consumer Capital LLC for $760,788 to resolve similar allegations relating to approximately 70 vehicle repossessions allegedly performed without a court order and in violation of the SCRA.

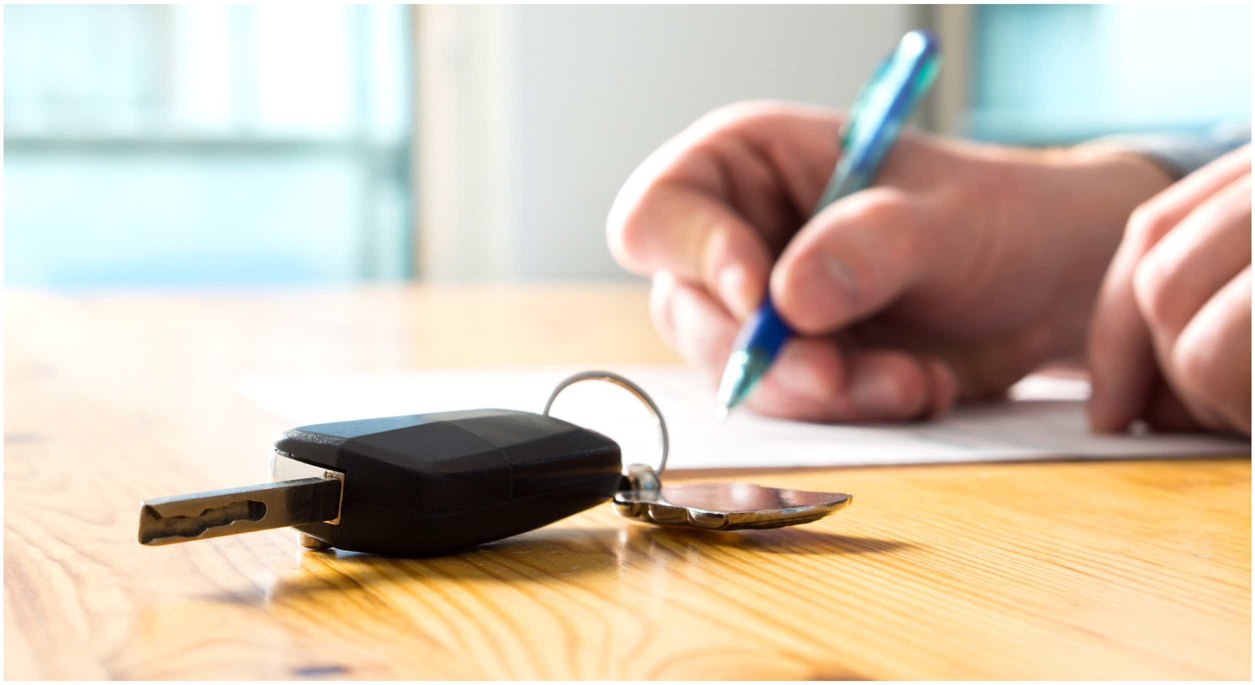
Expansions to the state law include:

- Extension of the right to terminate leases after entry into military service to include vehicle leases.
- Prohibition of a creditor or consumer reporting agency from making an annotation in the servicemember's record that the person is on active duty status. A violation of this provision is a misdemeanor, punishable by either imprisonment of not more than one year or a fine not to exceed $1,000, or both.
- Express prohibition of a debt collector from contacting the servicemember's military unit or chain of command in connection with the collection of any obligation unless the debt collector obtains written consent from the servicemember after the obligation becomes due and payable. A violation of this new provision is a misdemeanor, punishable by either imprisonment of not more than one year or a fine not to exceed $1,000, or both.
- Clarification that penalties may not be imposed on the nonpayment of principal or interest during the period in which payments are deferred on an obligation pursuant to a court order.
- Extension of most protections to 120 days after military service ends (prior provision extended protections for 60 days after the end of military service).

This expansion effort is just one of many recent examples of aggressive state action. It signals changes to state laws—other states will inevitably use California's law as a model for their own expansion efforts.

New York Issues Guidance Directed at Fairness in Auto Lending

In August, the New York Department of Financial Services ("DFS") issued guidance on New York's Fair Lending Law, directed at institutions that engage in indirect automobile lending (both supervised



institutions and sales finance companies). New York's Fair Lending Law makes it a discriminatory practice for any creditor to "discriminate in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any form of credit, on the basis of race, creed, color, national origin, sexual orientation, military status, age, sex, marital status, disability, or familial status."

The DFS guidance restated a previously issued list of actions for lenders developing a fair lending compliance program, including that all consumer applications that are rejected or withdrawn should receive an automatic and timely review by a supervisor and the need for on-going monitoring of the lender's application, underwriting, and pricing policies. A particular focus of this updated guidance was a reminder that a lender could be liable for discrimination resulting from a dealer's markup and compensation policies. The guidance notes that dealer markup is part of the credit transaction and so must be done on a non-discriminatory basis. DFS recommended six compliance actions to address lender risk in this area, including the following:

(1) The lender should learn about a dealer and its business practices before entering into a third-party loan origination agreement. The lender should periodically evaluate its relationship with a dealer to determine whether practices need to be revised or the relationship terminated, and make provisions for such evaluations in the lender's compliance procedures.

(2) The lender should review any policies or procedures a dealer uses when arranging financing for customers and advise the dealer of any areas of weakness or concern.

(3) The lender should regularly assess its and a dealer's product marketing and advertising strategies to ensure those strategies comply with the principles and provisions of fair lending laws and the fair lending plan.

(4) The lender should consider reducing dealer discretion by placing limits on dealer markup, or eliminating dealer discretion to mark up by using a different method of dealer compensation, such as a flat fee for each transaction, that does not potentially result in discrimination. Limits on markup do not, however, guarantee protection from fair lending liability.

(5) The lender should monitor both its whole portfolio and specific dealers for compliance with fair lending policies and procedures. Depending on the size and complexity of the

lender, this may require conducting regular statistical and regression analyses of loan data. These analyses can test for potential evidence of discrimination based on prohibited factors in the credit transaction and product pricing. Legitimate reasons for differences in the interest rate include differences in creditworthiness among applicants or demonstrable differences in business or economic climate at the time of the offers.

(6) The lender should take prompt corrective action if it finds any differences in interest rates that are unexplained by objective credit factors, such as restricting or eliminating a dealer's ability to mark up, terminating the lender's relationship with a dealer, and providing restitution to affected consumers.

In issuing this guidance, DFS has made clear that auto finance practices are a continued area of focus for the state. DFS Superintendent Maria T. Vullo voiced that this was a direct effort to fill the possible void left by federal regulators, saying: "As the federal government stands down on protecting consumers from financial frauds and abuses, DFS stands up to safeguard New Yorkers from unfair lending practices." This guidance will almost certainly be something DFS will point to in any enforcement in this area. Lenders should take this opportunity to ensure they have strong policies and procedures in this area.

Uneven Federal Regulation: Repeal of CFPB Auto Finance Bulletin, FTC Compliance Sweep, ABA Resolution 104B Withdrawn, and Planned Changes to MLA Guidance and Supervision

Auto finance at the federal level was a mixed bag for 2018. Some aspects, such as the repeal of the CFPB's 2013 Auto Finance Bulletin, were a continuation of the trend away from aggressive federal oversight. However, 2018 also had a major compliance sweep of car dealerships by the FTC and an attempt by the American Bar Association, although ultimately unsuccessful, to pass a resolution urging further regulation of the auto finance industry.

On May 21, President Donald Trump signed a bill repealing the CFPB's Bulletin 2013-02, a controversial bulletin addressing auto finance. The House passed a resolution officially disapproving of the Bulletin in early May, following in the footsteps of the Senate, which passed the same resolution a few weeks earlier.

In August, the Trump Administration announced its decision to end the CFPB's supervision of Military Lending Act ("MLA") violations.

Bulletin 2013-02 set forth the CFPB's interpretation of the ECOA as applied to pricing in indirect automobile lending. The Bulletin targeted dealer markups, a practice whereby an automobile dealer charges a consumer a higher interest rate than the rate at which an indirect lender is willing to purchase the consumer's retail installment contract. The Bureau expressed concern that indirect lenders afforded too much pricing discretion to dealers, potentially opening the door to discrimination against protected groups, including women, African-Americans, and Hispanics. Further, the Bureau also announced in the Bulletin its intent to use a disparate treatment or disparate impact theory to hold an indirect auto lender liable for allowing prohibited pricing differences created by a dealer's conduct.

In August, the Trump Administration announced its decision to end the CFPB's supervision of Military Lending Act ("MLA") violations. Acting Director Mick Mulvaney expressed the belief that the CFPB lacks the statutory authority to include MLA compliance in its supervisory work. Instead, Mulvaney suggested that under the proposed changes, the CFPB would only be able to take action against lenders if it receives a complaint.

Sen. Claire McCaskill (D-Mo.), a member of the Senate Armed Forces Committee, together with 48 other Democratic and independent senators signed a letter to the Trump Administration requesting that it abandon the proposed roll-back in MLA supervision. Additionally, 30 state attorneys general, joined by the AGs of the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, sent a letter to Mulvaney "to express our concern about recent reports that the [Bureau] will no longer ensure that lenders are complying with the [Act] as part of its regular, statutorily mandated supervisory examinations." A senior pentagon official reported that the Department of Defense was not consulted regarding the proposed MLA changes.

Also in August, the Trump Administration proposed ending the MLA's restrictions on GAP insurance – an add-on to car insurance that covers the difference between the amount a car owner owes on the car and the car's actual value. Current interpretive guidance concerning the Department of Defense's regulations implementing the MLA block creditors from offering servicemembers GAP insurance in connection with credit intended to finance vehicle purchases.

The FTC announced in mid-July that it conducted the first compliance sweep of car dealerships since the effective date of its revised Used Car Rule requiring use of a new Buyers Guide sticker. The sweep took place between April and June in 20 cities nationwide. The FTC coordinated its efforts with 12 partner agencies in seven states to ensure that dealers are displaying a revised version of the Buyers Guide, which contains warranty and other information for consumers.

In the sweep, inspectors found that approximately 70 percent of vehicles displayed Buyers Guides and roughly half of those displayed the revised Buyers Guide. Inspectors reviewed 94 different dealerships and reported that 33 dealerships posted the revised Buyers Guide on more than half of their vehicles, but only 14 dealerships had revised Buyers Guides on all of their used vehicles for sale. The FTC Act provides for penalties of up to $41,484 per violation for those dealerships that do not properly comply with the Used Car Rule.

Looking forward in July, the American Bar Association ("ABA") proposed Resolution 104B to urge policymakers to adopt specific regulations governing auto dealerships and vehicle financing. While the Resolution failed to win approval, it is not necessarily dead.

As proposed, Resolution 10B would do five things:

(1) Urge federal, state, local, territorial, and tribal governments to "adopt and enforce stronger fair lending laws targeted to discrimination in the vehicle sales market";
(2) Urge Congress to amend the ECOA to require the collection of the applicant's race and national origin in vehicle financing transactions;
(3) Urge Congress and all state, local, territorial, and tribal legislative bodies and government agencies to adopt laws and policies that "require a flat percentage fee for dealer compensation" and "disclosure of dealer compensation" in vehicle financing transactions;
(4) Urge federal, state, local, territorial, and tribal governments to adopt legislation "requiring the separate posting of pricing of add-on products by dealers on each vehicle before a consumer negotiates to purchase a vehicle"; and
(5) Encourage state, local, territorial, and tribal bar associations to "offer programming to educate lawyers and consumers about abusive, deceptive, or fraudulent vehicle sales transaction financing and sales practices."

The Resolution was withdrawn before a planned vote by the ABA membership at an annual meeting on August 6 in the face of significant opposition. Many in the auto finance industry believe that this Resolution would have encouraged policymakers to adopt unwarranted and redundant restrictions on the industry. Although the Resolution is off the table for now, it may reemerge in some form. When a resolution is "withdrawn" from consideration (this can simply mean the proposal was procedurally flawed in a curable way), the proponents of the Resolution are free to submit it again. As such, automobile dealers and lenders should remain watchful of proposals for additional regulation.

REGULATORY LANDSCAPE

This update highlights significant recent developments and emerging trends at: (1) the CFPB; (2) the FTC and (3) among state attorneys general. The updates highlighted below do not include those discussed elsewhere in this publication, such as the adoption of the Used Car Rule, the discussion of the FCRA Summary of Rights, and the FTC's consent order with PayPal.

CFPB

State of the Credit Card Market Report

At the end of 2017, the CFPB released "The Consumer Credit Card Market," its report on the state of the industry. The CFPB found that the credit industry has continued to expand since the release of its last report. Outstanding credit card debt increased by nine percent, and the total value of consumer credit lines is now $4 trillion – an increase from 2015 but still below the $4.4 trillion high of 2008. 2016 saw 110 million new credit card accounts being opened by consumers – the most cards opened in any year since 2007. In addition, there was a 21 percent increase in secured card applications in 2016, with 6.4 million consumers applying for a secured card. Newly opened secured accounts increased from 2015 to 2016 by seven percent. The report also found that credit card issuers are changing the way they communicate with existing and potential customers. As technology continues to evolve, more consumers are engaging online with credit card companies.

Ongoing Constitutional Challenge

In January, the United States Court of Appeals for the District of Columbia issued its en banc decision in the closely-watched P*HH Corp. v. Consumer Financial Protection Bureau* case. The D.C. Circuit upheld the constitutionality of the structure of the CFPB, reversing its 2016 panel decision.

The Court held that the Dodd-Frank Act provision "shielding the Director of the CFPB from removal without cause is consistent with Article II." In the 68-page opinion, the Court ruled that the original panel's decision was incorrect in finding that the CFPB's structure was unconstitutional: "Applying binding Supreme Court precedent, we see no constitutional defect in the statute preventing the President from firing the CFPB Director without cause."

The Court then held: "Congress's decision to provide the CFPB Director a degree of insulation reflects its permissible judgment that civil regulation of consumer financial protection should be kept one step removed from political winds and presidential will. … Congress made constitutionally permissible institutional design choices for the CFPB with which courts should hesitate to interfere."

Proposed Rulemaking on FDCPA

In October, the CFPB issued its Fall Rulemaking Agenda. Notably, the agenda stated that by March 2019, the CFPB plans to formulate a Notice of Proposed Rulemaking addressing the applicability of the FDCPA to modern debt collection practices. The CFPB plans to address issues such as communication practices and consumer disclosures, which continue to be leading sources of complaints.

Enforcement Actions

This year marked the lowest yearly total of CFPB enforcement actions since the Bureau was founded in 2011. Under prior director Richard Cordray, the CFPB earned a reputation as an extremely aggressive regulator. However, since acting director Mick Mulvaney took office at the end of 2017, the agency has significantly scaled back on enforcement actions. Mulvaney has said that, in general, the CFPB will only go after egregious cases of consumer abuses. “Good cases are being brought. The bad cases are not,” he said at an event in Washington in March.

The CFPB’s new direction regarding enforcement actions was foreshadowed in January when Mulvaney, in a letter to Fed Chairwoman Janet Yellen, requested no funding for the CFPB’s second fiscal quarter budget. Mulvaney noted that the agency already had $177.1 million in its coffers — more than enough funds to cover the agency’s expenses.

Strategic Plan

In February, the CFPB released its strategic plan for 2018 through 2022. The plan, which will take two years to implement, calls for placing new restrictions on the CFPB’s enforcement authority. Under the proposal, which also is included in President Trump’s 2019 budget plan, the CFPB would be funded by Congress rather than the Federal Reserve. This change would arguably give lawmakers more oversight and influence over the agency’s priorities – addressing a common complaint from critics of the CFPB. The CFPB’s 2019 budget also would be capped at its 2015 level – $485 million.

The strategic plan listed three long-term strategic goals and objectives:

GOALS	OBJECTIVES
Goal 1	Ensure that all consumers have access to markets for consumer financial products and services.
Goal 2	Implement and enforce the law consistently to ensure that markets for consumer financial products and services are fair, transparent, and competitive.
Goal 3	Foster operational excellence through efficient and effective processes, governance, and security of resources and information.

Regarding the CFPB’s enforcement goal, the Bureau noted that an important objective of the Dodd-Frank Act is to ensure federal consumer laws are enforced consistently for banks and nonbanks alike.

The strategic plan deviates considerably from the draft of the report that was released last October prior to Mulvaney assuming leadership of the CFPB. The revised strategic plan echoes Mulvaney’s previous statements that the CFPB would dampen aggressive enforcement and regulatory actions that he viewed as the hallmark of the previous administration. As the report states, the CFPB will now seek to operate “with humility and moderation.”

Increased Reliance on State Attorneys General

In February, acting CFPB director Mick Mulvaney delivered remarks at the winter meeting of the National Association of Attorneys General in which he outlined the CFPB’s strategic vision and enforcement priorities. In his comments, Mulvaney stressed that, moving forward, the CFPB will rely much more on state attorneys general for the enforcement of consumer protection laws. “We’re going to be relying on you folks a lot more,” he said. “We’re going to be looking to the state regulators and the states’ attorneys general for a lot more leadership when it comes to enforcement.”

Complaint Snapshot

In October, the CFPB released its Complaint Snapshot, which supplements the Consumer Response Annual Report and provides an overview of trends in consumer complaints received by the Bureau. The Snapshot revealed that the CFPB has received 1.5 million complaints since January 1, 2015. Of those complaints, the most come from consumers in California, Florida, Texas, New York, and Georgia. Conversely, the CFPB received the fewest number of complaints from consumers in Wyoming.

In general, U.S. consumers complain more to the CFPB about credit or consumer reporting (i.e., that there is incorrect information on the report) and debt collection (i.e., that there are attempts to collect on debt allegedly not owed) than any other issues. The most common complaints in the top states are as follows:

STATE	TOP COMPLAINT
Georgia	Credit or consumer reporting
Florida	Credit or consumer reporting
Texas	Debt collection
California	Credit or consumer reporting
New York	Credit or consumer reporting

CFPB's 2013 Auto Finance Guide Repealed

In a 51-47 vote in April, the U.S. Senate voted in favor of invalidating 2013 guidance from the CFPB that targeted purported discrimination in the automobile finance market. The resolution passed on party lines, with Sen. Joe Manchin (D-W.Va.) the lone Democrat to join Republicans in voting to overturn the guidance. Then, in May, the House used the Congressional Review Act to repeal the Auto Guide. Later that month, President Trump signed the congressional resolution and officially repealed the Auto Guide. Upon signing this resolution, President Trump will have used the Congressional Review Act to invalidate 16 agency rules.

Internal Shuffling and Reorganization

In June, the CFPB's Consumer Advisory Board's twenty-two members were informed that they would no longer serve on the Consumer Advisory Board and could not reapply for their former positions. Through June 5, the CFPB had four advisory bodies: the Academic Research Council, the Community Bank Advisory Council, the Credit Union Advisory Council, and the Consumer Advisory Board. By law, the CFPB must meet twice a year with the Consumer Advisory Board to discuss trends in the financial industry, regulations, and the impact of financial products and practices on consumers. Tellingly, the CFPB's acting director, Mick Mulvaney, has canceled several meetings between the CFPB and its advisory groups during his short tenure.

In May, per multiple reports, Mulvaney announced plans to fold the CFPB's Office of Students and Young Consumers into its preexisting Office of Financial Education, itself a part of this agency's Consumer Education and Engagement Division. During this reorganization, the Office of Financial Education will also subsume the Student Loan Ombudsman, a position created by the Dodd-Frank Act. Because of this rejiggering – to be effectuated concurrently with the hiring of more political appointees and the creation of an office of cost-benefit analysis set to report to Mulvaney alone – the current staff of the Office of Students and Young Consumers will be reassigned to yet unknown positions.

FTC

New Leadership

In April, the Senate voted unanimously to confirm five nominees to the FTC, which brought the agency back to full capacity. Chairman Joseph J. Simons (R), Commissioner Noah Joshua Phillips (R), Commissioner Rohit Chopra (D), and Commissioner Rebecca Kelly Slaughter (D) were all sworn in on May 2. Commissioner Christine S. Wilson (R) was sworn in on September 26. Commissioner Terrell McSweeny (D) resigned in April, and Commissioner Maureen Ohlhausen (R) resigned in September after President Trump tapped her for a federal judgeship.

Data Privacy & Security

In January, as part of the FTC's "Operation Tech Trap" initiative, the FTC and the State of Ohio entered into a settlement agreement with thirteen defendants. According to the complaint, the defendants contacted consumers through online advertisements that appeared to be pop-up security alerts from well-known companies such as Microsoft or Apple. The complaint alleged that the ads falsely warned consumers that their computers were infected with a virus or had been hacked, and urged consumers to call a toll-free number. Once consumers called the number, telemarketers, who claimed to be affiliated with tech companies, *The report set forth several recommendations to the mobile device industry, including educating consumers and providing them with better information about the security update process.*

gained access to the consumer's computer and ran "diagnostic tests" that appeared to show that the consumer's computer had major problems. The telemarketers then sold the consumer a one-time "fix" or a long-term service plan, costing hundreds of dollars. The defendants entered into a settlement agreement with the FTC and Ohio, which was approved by the Ohio district court on January 26. The settlement imposes a $12.4 million judgment that will be suspended upon payment of $122,376.39. The Ohio defendants entered into a separate settlement that imposes a $12.4 million judgment that will be suspended upon payment of $27,000.

In January, the FTC issued a report summarizing the themes and key takeaways from a workshop it hosted with the National Highway Traffic Safety Administration on privacy issues related to connected and autonomous cars. The report noted several important themes that emerged from the workshop, including that the data collected from vehicles will include not only aggregate and non-sensitive data but also "sensitive personal data" about the occupants of vehicles, including "fingerprint and iris pattern" data used for authentication purposes; and that connected and autonomous vehicles will present cybersecurity risks that can potentially be exploited. The report stressed that the industry should voluntarily adopt "best practices" for mitigating cybersecurity risks.

In February, the FTC issued a report discussing issues relating to mobile security updates. The report found that while the mobile device industry has taken steps to expedite the security update process, more can be done to streamline the process and make it easier for consumers to ensure their devices are secure. The report set forth several recommendations to the mobile device industry, including educating consumers and providing them with better information about the security update process.

In March, the FTC issued its annual report, the Consumer Sentinel Network Data Book. The report aggregated data on the 2.68 million consumer complaints that it received in 2017. This number was a decrease from a peak in consumer complaints during 2015. According to the report, the top ten complaint categories are as follows: debt collection; identity theft; imposter scams; telephone/mobile services; banks and lenders; prizes and sweepstakes; shop-at-home/catalog sales; credit bureaus, information furnishers, and report users; auto-related; and television/electronic media.

Consumer Credit Scores and Reporting

In June, the FTC issued a public notice regarding the Economic Growth, Regulatory Relief, and Consumer Protection Act, which went into effect on September 21. The new law mandates that the three major credit reporting agencies set up webpages to allow consumers to request one-year fraud alerts and credit freezes.

In July, the U.S. District Court for the Northern District of Illinois granted summary judgment in favor of the FTC against Credit Bureau Service, LLC f/k/a MyScore LLC and its owner, Michael Brown, on charges that they deceived consumers with fake rental property ads and deceptive promises of "free" credit reports, and then improperly enrolled consumers in an expensive monthly credit monitoring service. Judgment was entered in the FTC's favor for $5.2 million.

In November, the FTC proposed a rule requiring consumer reporting agencies to provide free credit monitoring service to active duty military members that would electronically notify these consumers of "material" changes to their file within 24 hours. The deadline to submit comments on the proposed rule was January 7, 2019.

Student Loan Scams

In June, the FTC reached a settlement agreement with defendants Salar Tahour and his companies, M&T Financial Group and American Counseling Center Corp., who operated as Student Debt Relief Group, SDRG, Student Loan Relief Counselors, SLRC, StuDebt, and Capital Advocates Group and marketed themselves as student loan debt relief servicers. According to the FTC, the companies engaged in a scheme that defrauded consumers out of $7.3 million. Per the terms of the settlement order, the defendants are permanently banned from offering any type of debt relief product or service and must pay a monetary judgement of over $12 million – $11,694,347.49 of the judgment representing the estimated amount of injury caused to consumers by the defendants' actions.

STATE ATTORNEYS GENERAL

New Leadership

2018 was a major election year for state attorneys general, during which the state attorney general community saw the emergence of new leaders. With those leadership changes, there are currently twenty-two Democratic attorneys general, twenty-seven Republican attorneys general, and one Independent attorney general in office. Of the thirty elections, Democrats won sixteen and Republicans won fourteen.

Notably, Democrats won new attorney general offices in Colorado, Michigan, Nevada, and Wisconsin. Democrats also maintained control of attorney general seats in New York, California, Illinois, and nine other states plus the District of Columbia. Considering these results along with the eight states where current Democratic attorneys general were not up for election and the two states where Democrats have been or will be appointed as attorneys general, the party tide has shifted in the attorneys general space—particularly in states with Republican governors like Massachusetts, Iowa, and Maryland. Republicans won fiercely contested races in Florida, Ohio, Georgia, South Dakota, and South Carolina.

"Predatory" Lending

In January, the Georgia Attorney General announced a settlement with a debt collector, Williamson and McKevie, LLC. The Attorney General alleged that the debt collector violated the federal FDCPA and the Georgia Fair Business Practices Act. Under the terms of the settlement, which was entered as an assurance of voluntary compliance, Williams and McKevie must stop collecting on 10,922 accounts that represent approximately $8.8 million in consumer debt and must also pay a $20,000 civil penalty. In addition, Williams and McKevie agreed to a five-year monitoring period during which it will be subject to an additional $230,000 civil penalty if it violates any provision of the settlement.

Data Security and Privacy

In 2018, attorneys general from thirty-one states signed a letter urging Congress to scrap a proposed federal breach notification law that was introduced by Rep. Blaine Lukemeyer (R-Mo.) and Rep. Carolyn Maloney (D-N.Y.) in an effort to create a national data breach notification and security standard.

In March, several bipartisan attorneys general launched investigations of Facebook in connection with Cambridge Analytica, a data firm that worked with the Trump presidential election campaign. Investigations involved issues such as the clarity of Facebook data use disclosures and the consequences of the collection and use of personal information. Notably, forty-one attorneys general wrote to Facebook CEO Mark Zuckerberg seeking answers about how Facebook oversees developers and the research practices it uses to acquire consumer data.

Opioid Epidemic

The opioid crisis persisted as a major policy and legal issue for state attorneys general in 2018. Attorneys general from Texas, Florida, and Kentucky filed lawsuits related to issues arising from this epidemic. Additionally, in September, attorneys general from West Virginia, Nebraska, Arkansas, Colorado, Florida, Idaho, Louisiana, Michigan, Mississippi, Missouri, and Utah sent a letter to the U.S. Drug Enforcement Administration asking for a reduction in proposed opioid manufacturing quotas.

Catholic Church Abuse Scandal

In August, the Pennsylvania Attorney General issued a nearly 900-page grand jury report relating to widespread sexual abuse of children in Pennsylvania's Roman Catholic dioceses. Since then, at least fourteen other attorneys general have publicly acknowledged that they have launched separate clergy abuse investigations. These states include Missouri, New York, New Jersey, Kentucky, New Mexico, Illinois, Iowa, Nebraska, Wyoming, Vermont, Florida, Michigan, the District of Columbia, and Virginia.

TELEPHONE CONSUMER PROTECTION ACT

The TCPA and the ATDS

There were many changes in 2018, and the TCPA was no exception. The following will highlight some of the most important TCPA changes in 2018 as they relate to the definition of an autodialer and will include discussion of potential changes to the TCPA.

The TCPA Restricts the Use of an ATDS

By way of background, the TCPA was enacted in 1991 under the power of the Federal Communications Commission ("FCC"). The TCPA was the first major federal legislation to regulate the telemarking industry and was enacted in response to "voluminous consumer complaints about abuses of telephone technology. Mims v. Arrow Fin. Services, LLC, 565 U.S. 368, 370-71 (2012). The TCPA restricts calls both "to any residential telephone line" and to "any telephone number assigned to a … cellular telephone service." 47 U.S.C. § 227(b)(1)(A)(iii),(B).

Generally, the TCPA makes it unlawful to call a telephone (mainly cell phones) using an automatic telephone dialing system, or "ATDS." The statute defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). There are, however, exceptions and "carves out", which should be reviewed when managing any TCPA case.

The 2015 Order "Clarified" What Constitutes an ATDS

Since the TCPA's enactment, the FCC has issued a series of rulemaking and declaratory rulings on the TCPA's reach, including the statute's restrictions on use of an ATDS. See In Re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14,014-15, ¶ 165 (2003). The FCC issued a 2003 declaratory ruling stating that predictive dialers meet the definition of an ATDS. The FCC reasoned that the basic function of such equipment is the capacity to dial numbers without human intervention. In Re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14,092, ¶ 132 (2003). The FCC again held that predictive dialers are covered by the TCPA in a 2008 declaratory ruling. In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (2008 Declaratory Ruling), 23 FCC Rcd. 559 (2008).

Fast forward to 2015 where, in a Declaratory Ruling and Order (the "2015 Order"), the FCC ratified the 2003 and 2008 rulings and sought to clarify which devices for making calls qualify as an ATDS. With regard to whether equipment has the "capacity" to perform the enumerated functions, the FCC declined to define a device's "capacity" in a manner confined to its "present capacity." Instead, the FCC construed a device's "capacity" to encompass its "potential functionalities" with modifications such as software changes. 2015 Declaratory Ruling, 30 FCC Rcd. at 7974 ¶ 16.

The FCC also addressed the precise functions that a device must have the capacity to perform for it to be considered an ATDS. The FCC reaffirmed prior orders deciding that "predictive dialers"—equipment that can dial automatically from a given list of telephone numbers using algorithms to predict "when a sales agent will be available"—qualify as autodialers. *Id.* at 7972 ¶ 10 & n.39. The FCC further explained that the "basic functions of an autodialer are to 'dial numbers without human intervention' and to dial thousands of numbers in a short period of time." *Id.* at 7975 ¶ 17. At the same time, the FCC also declined to clarify that "a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention." *Id.* at 7976 ¶ 20.

The FCC's definition of an ATDS was problematic because it was so broad such that potentially everything could be considered an autodialer. The 2015 Order essentially was an overreach with respect to the potential capabilities of an ATDS and encouraged lawsuits. In fact, FCC Commissioner Ajit Pai issued a dissent regarding the FCC's 2015 Order, calling the decision an overreach with respect to potential capabilities of an ATDS.

ACA International v. FCC Overturns Previous FCC Rulings

Arguably the most important change in the TCPA occurred in March 2018 when the expansive definition of the ATDS in the 2015 Order was vacated by the D.C. Circuit Court of Appeals in ACA International, et al. v. Federal Communication Commission et al., 885 F.3d 687, 695 (D.C. Cir. 2018), noting that the previous 2003 and 2008 FCC predictive dialer rulings were inconsistent with the language of the 2015 Order regarding the required functionalities of an ATDS. The ACA ruling stated that the 2015 Order was unreasonable in that it could leave room to conclude that even ordinary smartphones qualified as autodialers.

Since ACA, several courts have held that the definition of ATDS does not include predictive dialer systems that cannot be programmed to generate and dial random or sequential numbers. Other courts have held that ACA has not impacted the FCC's prior rulings. A full list with brief description is below.

The following are cases (and a brief summary of their holdings) where the courts held that ACA overturned the FCC rulings and predictive dialers are not an ATDS unless random or sequential number generation occurs.

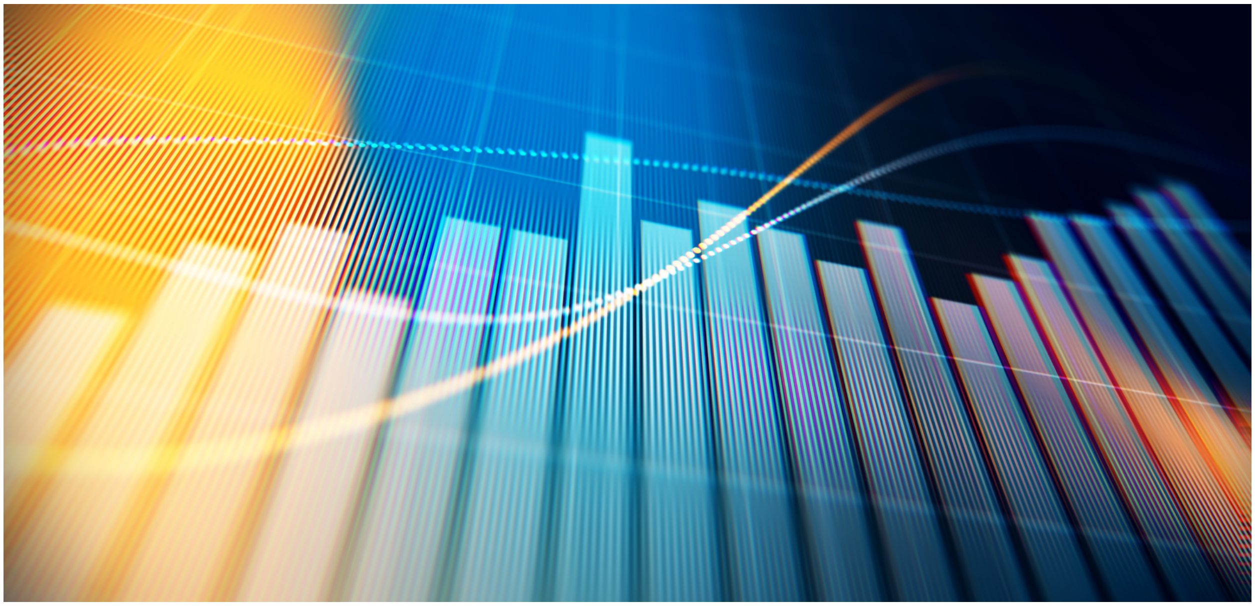
- Marshall v. CBE Group, No. 2:16-cv-2046, 2018 WL 1567852, * 11 (D. Nev. March 30, 2018). The plaintiff failed to establish a genuine issue of material fact as to the defendant's system's capacity to store or produce telephone numbers to be called using a random or sequential number generator, and to dial such numbers. The Court held that plaintiff could not rely on the FCC's definition of an ATDS to the extent it includes systems that cannot be programmed to dial random or sequential numbers, as is the case with some predictive dialers.
- Herrick v. GoDaddy.com LLC, No. 2:16-cv-254, 2018 WL 2229131, * 12 (D. Ariz. May 14, 2018). Defendant prevailed on summary judgment. In light of ACA, the Court found that defendant's system was not an ATDS. The Court viewed the issue of "capacity" in the terms of present capacity, and it rejected the idea of broadening the definition of an ATDS to include potential capacity. The Court held that the text messaging system at issue did not have the ability to store or produce numbers to be called using a random or sequential number generator and did not have the capacity to do so without substantial intervention. Additionally, the system's inability to dial numbers without human intervention meant that it was not an ATDS.
- Sessions v. Barclays Bank Delaware, No. 1:17-cv-1600, 2018 WL 3134439, * 1212 (N.D. Ga. June 25, 2018). The court agreed that ACA "invalided all of the FCC's pronouncements as to the definition of 'capacity' as well as its descriptions of the statutory functions necessary to be an ATDS."
- Pinkus v. Sirius XM Radio, No. 16 C 10858, 2018 U.S. Dist. LEXIS 125043 (N.D. Ill. July 26, 2018). ACA invalidated the 2003 Order and 2008 Declaratory Ruling in so far as they provide, as did the 2015 Declaratory Ruling, that "a predictive dialer qualifies as an ATDS even if it does not have the capacity to generate phone numbers randomly or sequentially and then to dial them." When determining if the system at issue was an ATDS, the court looked to the statutory language and determined "that an ATDS must have the capacity to generate telephone numbers, either randomly or sequentially, and then to dial those numbers."
- Gary v. TrueBlue, Inc., No. 2:17-cv-10544, 2018 WL 3647046, *7-8 (E.D. Mich. Aug. 1, 2018). ACA vacated the 2003 and 2008 Orders. Dialing from a list of numbers does not qualify as the use of an ATDS. Defendant's system is not an ATDS because it sends text messages to a set list. The system requires human intervention, preventing the system from qualifying as an ATDS.
- Keyes v. Ocwen Loan Servicing, No. 2:17-cv-11492, 2018 U.S. Dist. LEXIS 38445, at *15 (E.D. Mich. Aug. 16, 2018). ACA set aside the FCC's "declarations regarding the capacity and functions of an ATDS," and ACA was binding on

the Court. Defendant's system required more than a flip of a switch to qualify as an autodialer. Defendant's system did not "possess the functions necessary to be an ATDS" because it "dials from a set list, but that is not the same as dialing numbers using a random or sequential number generator."

- Washington v. Six Continents Hotels, No. 2:16-cv-3719, 2018 U.S. Dist. LEXIS 145639 (C.D. Calif. Aug. 24, 2018). Although defendant's motion to dismiss was denied, ACA set aside the treatment of autodialers from all previous FCC rulings.
- Gonzalez v. Ocwen Loan Servicing, LLC, No: 5:18-cv-340-Oc-30PRL, Doc. No. 11, (M.D. Fla. Sept. 5, 2018). The Court denied defendant's motion to dismiss but held that a predictive dialer is only an ATDS when it has the "present ability to generate random or sequential telephone numbers."
- Fleming v. Associated Credit Servs., No. 16-3382 (KM) (MAH), 2018 U.S. Dist. LEXIS 163120 (D.N.J. Sept. 21, 2018). ACA invalidated all prior FCC ATDS rulings. An ATDS is a device that has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers.
- Dominguez v. Yahoo, Inc., 894 F.3d 116, 120 (3rd. Cir. June 2018). The Court held that in light of the ACA decision, it will interpret the statutory definition of an autodialer as it did prior to the 2015 Order. Plaintiff in this case did not provide any "evidence that creates a genuine dispute of fact as to whether the email SMS service had the present capacity to function as an autodialer by generating random or sequential telephone numbers that had been [input] individually and manually into its system by the user." The Dominguez Court focused on the present capacity to generate random or sequential numbers, not the present capacity to function as a predictive dialer.
- Lord v. Kisling, No. 1:17-cv-1739, 2018 U.S. Dist. LEXIS 116288 (N.D. Ohio July 12, 2018). The Court held that the plaintiff's failure to allege random or sequential number generation was fatal to a TCPA claim. The Court stated the fact that the dialing system may be able to send "bulk or mass messages without human intervention is irrelevant." Instead, the plaintiffs needed to show that defendant's dialing system had "the ability to store or produce telephone numbers using a random or sequential number generator." As a result of plaintiffs' failure to allege the dialing system could store or produce telephone numbers using a random or sequential number generator, the Court dismissed the TCPA claim.
- Stewart L. Roark v. Credit One Bank, N.A., No. 0:16-cv-173, 2018 WL 5921652 (D. Minn. Nov. 13, 2018). Court used ACA as a guide for its analysis. Defendant's dialing system does not violate the TCPA because it was not used to generate and dial random or sequential numbers. The Court declined to follow the Ninth Circuit Marks decision, finding that the Second Circuit King v. Time Warner Cable Inc. (Case No. 15-2474-cv) and the Third Circuit Dominguez decision to be more persuasive.

In contrast, the following cases held that ACA did not overturn the prior FCC Rulings, along with a brief summary of their holdings.

- Maddox v. CBE Grp., Inc., No.: 1:17-cv-1909-SCJ, 2018 WL 2327037 (N.D. Ga. May 22, 2018). The defendant moved for summary judgment on TCPA and FDCPA claims. The Court found that the FCC's 2003 Order was still good law but that the system required human intervention to operate and did "not use any kind of predictive or statistical algorithm to engage in predictive dialing or minimize waiting times."
- Ramos v. Hopele of Fort Lauderdale, No. 17-62100, 2018 U.S. Dist. LEXIS 139947 (S.D. Fla. Aug. 16, 2018). FCC rulings survived post-ACA, but the text dialer system in this case was not an ATDS.
- Glasser v. Hilton Grand Vacations Co., No. 8:16-cv-952, 2018 U.S. Dist. LEXIS 162867 (M.D. Fla. Sep. 24, 2018). ACA left intact FCC rulings that the basic function of an autodialer is to dial numbers without human intervention. The Court, however, ruled that the dialer in this case was not an ATDS.
- Reyes v. BCA Fin. Servs., Inc., No. 1:16-cv-24077, 2018 U.S. Dist. LEXIS 80690 (S.D. Fla. May 14,



2018). The Court further found that ACA did not have any impact on previous pronouncements as related to predictive dialers, that it was limited to the 2015 Order only.

- Swaney v. Regions Bank, No. 2:13-cv-00544, 2015 U.S. Dist. LEXIS 184751 (N.D. Ala. May 22, 2018). The parties filed cross-motions for summary judgment on the issue of whether defendant's system qualified as an ATDS. The Court found that ACA did not affect the 2003 Order and, as such, focused on whether human intervention was required at the initiation of the call. The Court held that "Plaintiff presented sufficient evidence to demonstrate that the system at issue has the capacity to dial numbers (i.e., send text messages) without human intervention" and therefore granted plaintiff partial summary judgment on the issue of whether defendant's system was an ATDS.
- McMillion v. Rash Curtis & Associates, No. 16-cv-03396, 2018 U.S. Dist. LEXIS 101700 (N.D. Calif., June 18, 2018). The Court granted the plaintiffs' motion for summary judgment in April 2018, finding that the telephony used by the defendant constituted an ATDS. The defendant moved for reconsideration after the ACA decision. The court found that ACA did not constitute a change in controlling law, preventing the reversal of the Court's findings on summary judgment. The Court additionally found that ACA touched only on the 2015 Order but did not affect the validity of the 2003 or 2008 Orders. Furthermore, even if ACA affected the 2003 or 2008 Order, the decision had "no bearing on pre-existing Ninth Circuit precedent," relying on the 9th Circuit's decisions in Satterfield v. Simon & Schuster, Inc., 569 F.3d 946 (9th Cir. 2009) and Meyer v. Portfolio Recovery Assocs., 707 F.3d 1036 (9th Cir. 2012).
- Ammons v. Ally, No. 3:17-cv-505, 2018 WL 3134619, *5 (M.D. Tenn. June 27, 2018). The Court found that ACA only relates to the FCC's 2015 Order and did not affect the 2003 Order, and prior pronouncements on predictive dialers remained in effect.
- O'Shea v. Am. Solar Sol., No. 3:14-cv-894, 2018 U.S. Dist. LEXIS 110402 (S.D. Calif. July 2, 2018). Defendant argued that the predictive dialer it used was not an ATDS in light of the ACA decision. The Court relied on Swaney and Reyes to hold that predictive dialers are ATDSs and denied defendant's motion for leave. The Court also stated that "[t]he ACA decision left intact the holding of both the FCC's 2003 and 2008 Order."
- Pieterson, et al. v. Wells Fargo Bank, N.A., No. 17-cv-2306 (N.D. Calif. July 2, 2018). The Court denied a motion to stay, noting that while the ACA vacated the 2015 Declaratory Ruling, "it did not clearly intend to disturb the FCC's 2003 and 2008 Orders."
- Somogyi v. Freedom Mortg. Corp., No. 17-6546 (JBS/SJ) 2018 U.S. Dist. LEXIS 12697 (D.N.J.

The goal of the Hobbs Act is to ensure the TCPA has a single, nationwide meaning and not divergent meanings depending on what a particular court might say.

Aug. 2, 2018). The Court held that the FCC's 2003 Order regarding predictive dialer still stands, even post-ACA. The Court also held plaintiff alleged sufficient facts as to defendant's use of an ATDS to defeat a motion to dismiss. Specifically, the plaintiffs alleged that defendant "need only press one button on a computer screen, at which point the dialing system chooses who to call, dials the numbers, and [t]he software decide[s] who [to] call next."

- *Abante Rooter and Plumbing, Inc. v. Alarm. Com.*, No. 15-cv-6314, 2018 WL 3707283, *6 (N.D. Calif. Aug. 3, 2018). The Court held that ACA "invalidated only the 2015 FCC Order" but did not rule on the validity of the 2003 or 2008 orders.

The Supreme Court's Review of PDR Network LLC, et al. v. Carlton & Harris Chiropractic

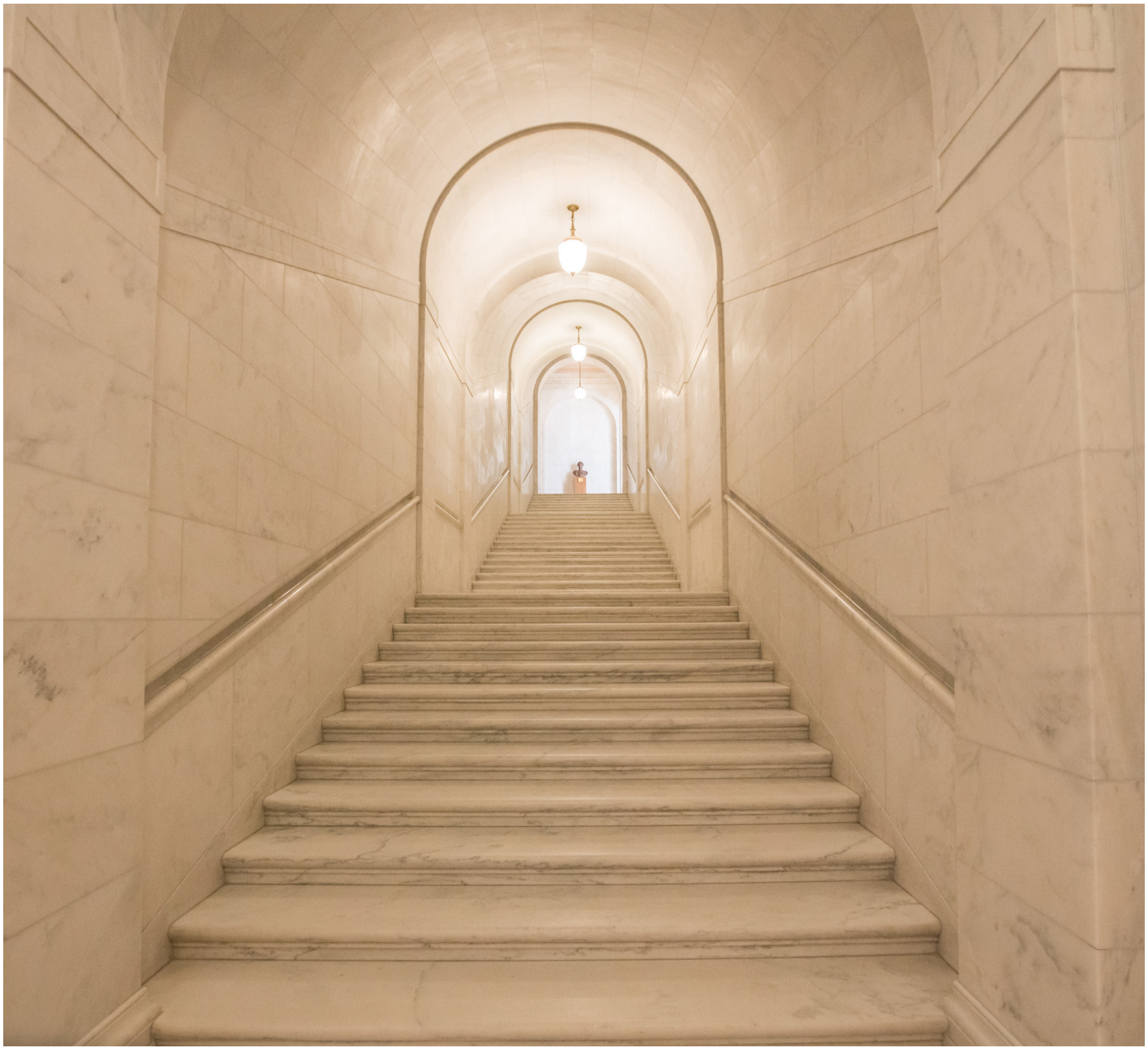
We also saw in 2018 that the Supreme Court's decision to grant certiorari could have a lasting impact on the future of the TCPA. As you may recall, the district court in PDR Network LLC, et al. v. Carlton & Harris Chiropractic held, in dismissing the case, that an unsolicited free e-book fax sent by a major health information provider must have a commercial goal to be considered an advertisement under the TCPA. The Court, however, declined to defer to a 2006 FCC Rule that interpreted the terms "unsolicited advertisement." The district court found that it was not required to automatically defer to the FCC's interpretation of "unsolicited advertisement" under the Chevron doctrine because the statutory definition was "clear and easy to apply." *See Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, No. 3:15-14887, 2016 U.S. Dist. LEXIS 135310, at *10 (S.D.W.Va. Sept. 30, 2016). Under the Chevron doctrine, Courts can review agency interpretations as they come up during litigation albeit under a deferential standard of review.

The Fourth Circuit reversed the dismissal, holding that the Hobbs Act deprived district courts of jurisdiction to consider the validity of orders like the 2006 FCC Rule, and that the district court's reading of the 2006 FCC Rule was at odds with the plain meaning of the text of the FCC's ruling. The Fourth Circuit held that it, and the district court, must follow the FCC interpretation. Under the Hobbs Act, said the Fourth Circuit, FCC interpretations can only be challenged by an appeal of the FCC order itself – not collaterally during routine litigation. The goal of the Hobbs Act is to ensure the TCPA has a single, nationwide meaning and not divergent meanings depending on what a particular court might say. The Supreme Court granted PDR Network's petition for certiorari, but limited its grant to the question of "[w]hether the Hobbs Act required the district court to accept the FCC's legal interpretation of the TCPA.

The Supreme Court's decision could determine whether the TCPA is to be construed narrowly and uniformly in accordance with an FCC interpretation or diversely and, in some important instances, more broadly by the courts.

The FCC's 2018 Declaratory Ruling Regarding Junk Faxes

In November, the FCC issued an Order eliminating the prior rule requiring opt-out notices on faxes sent with the recipients' prior permission or consent. See 47 CFR § 64.1200(a)(4)(iv). The FCC stated in its Order that it took this action in response to the decision in Bais Yaakov of Spring Valley, et al. v. Federal Communications Commission, 852 F.3d 1078, 1083 (D.C. Cir. 2017). In that case, the Court held that it "is unlawful to the extent that it requires opt out notices on solicitated faxes." The Court specifically held that the FCC did not have authority to require the opt-out notices on solicited faxes and that the 2006 Solicited Fax Rule was unlawful.



The REAL PEACE Act

Lawmakers have also taken additional steps to stop “robocalls” in 2018. Senators Dianne Feinstein (D-Calif.), Richard Blumenthal (D-Conn.), and Amy Klobuchar (D-Minn.) introduced the REAL PEACE Act, which is short for “Robocall Elimination At Last Protecting Every American Consumer’s Ears” and proposes to eliminate the long-standing exemption of common carriers from the jurisdiction of the FTC and its enforcement powers. The exemption limits the FTC’s ability to stop illegal robocalls and spam calling. To that end, the FTC will have more authority to crack down on these types calls and hold bad actors accountable.

Although the FCC already had exclusive jurisdiction to regulate common-carrier services provided by telecom companies (which includes the services abused by bad actors that make illegal robocalls and spam calls), the REAL PEACE Act essentially gives the FTC additional power to solve the problem. Apparently, the Act was introduced because the FTC got more than 4.5 million complaints about robocall companies.

Troutman Sanders will continue to monitor this new bill.

CYBERSECURITY AND PRIVACY

Since the European Union ("EU") adopted Article 29 in 1997, a debate has raged over which side of the pond has the better approach to privacy. We have written several articles over the past 21 years discussing the merits of each side. In the last few years, a push to adopt EU-like policies has intensified the debate in the United States and created more public awareness of the issues. Although the conversation on this side of the pond has not been nearly as draconian as the views in Europe, some American "consumer advocates" view data collection as being intrusive and offensive without understanding the key factors driving the debate.

One issue at the center of this long debate is the balance between using the right privacy tools and enabling business and technological innovation.

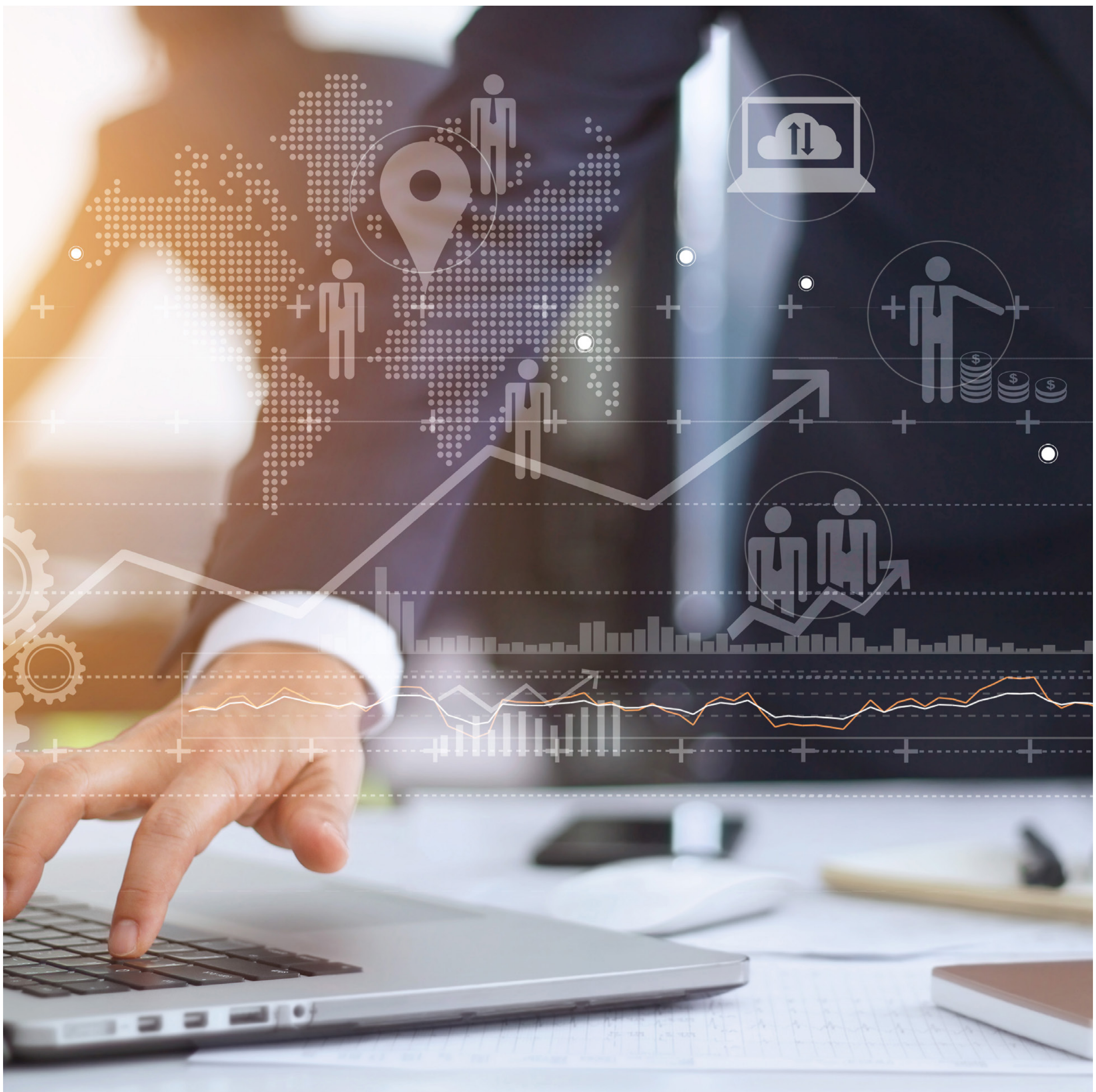
One issue at the center of this long debate is the balance between using the right privacy tools and enabling business and technological innovation. The current criticisms fail to appreciate that the next technological paradigm is completely dependent on both the quality and quantity of data. As connected things ("Internet of Things" or "IoT") explode in popularity, they make new technologies such as augmented reality ("AR") and autonomous vehicles possible. Indeed, data scientists have repeatedly observed that machine learning and artificial intelligence are heavily dependent on the quality of the data, and not just the quantity of data. Where real-time data is available across a wide variety of different product types across everyday life, they enable AR and automation that more reliably improves the human user experience. In realizing these goals, businesses must also adopt privacy compliance regimes that promote good data hygiene and constructive use of data. Such systems must ultimately involve consumer participation.

Given the lack of clear regulation and guidance, companies will likely continue to collect, use, and share geolocation and other user data. The functionality demanded by consumers will require such data. As interconnectivity grows, so do the opportunities to develop better products, and the companies that fail to leverage those opportunities may find themselves falling behind their competitors. Companies developing products on the cutting edge of technology should stay informed of recent enforcement actions, legal cases, and laws to determine how their offerings within the ecosystem may be impacted. Ultimately, the need for in-depth privacy by design and defense will continue to be a differentiator in the market and a key indicator of long term financial success.

Our vision is not just focused on U.S.-centric requirements, but also global requirements. U.S. companies whose data collection practices may impact EU residents now face heavy fines for non-compliance with the European Union's Global Data Protection Regulation ("GDPR"), which went into effect on May 25, 2018. Since then, the effects of the GDPR could not be more pronounced. In its wake, several U.S. states and cities followed with their own versions of legislation and proposals that capture elements of the GDPR. It is just a matter of time until these state initiatives begin to unnecessarily complicate the data use landscape. Although similar to what we have experienced since 2005 with data breach requirements, these state-focused regulations on privacy will likely prove to be even more disruptive.

It remains to be seen whether localized efforts in the U.S. will create enough momentum to help push through a serious federal proposal. Data breach laws and cybersecurity requirements, for example, are more fragmented amongst the states as ever. Ironically, the efforts already made by states in lieu of federal regulation might become some of the biggest obstacles against a truly comprehensive federal regulation. Businesses yet to implement sound data governance practices should take immediate action before compliance becomes a business impossibility.

For a full retrospective into the details and implications of federal regulatory decisions made in 2018 affecting cybersecurity and data privacy, including the California Consumer Privacy Act of 2018, please refer to our full annual publication, "Data Privacy: The Current Legal Landscape (2018 Reviewed)," available at www.troutman.com/files/upload/Data%20Privacy%20Newsletter_Jan2019.pdf.



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. Email cfslawmonitor@troutman.com to join our mailing list to receive periodic updates or visit the blog at www.consumerfinancialserviceslawmonitor.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.