FINANCIAL SERVICES REPORT

Quarterly News Fall 2016

IN THIS ISSUE

MOFO METRICS

1: Number of people killed by sharks every two years

20: Number of people killed by horses each year

20: Number of people killed by cows each year

30: Number of people killed by dogs each year

40: Number of people killed by jellyfish each year

50: Number of people killed by ants each year

100: Number of people killed by bee stings each year

2,900: Number of people killed by hippos each year

Editor's Note

So much for summer! The weather is cooling, the kids are back to school, and we better not see you wearing white so long after Labor Day! For those of you having a little trouble getting back in the swing of things, we thought we'd lead with just a few of the animals making headlines recently: a skateboarding cat made her way into the Guinness Book of World Records by performing 20 skateboarding tricks in one minute; a bear spent the day hanging out on a Colorado University campus; and a cockatoo stole its owner's breakfast. If you are thinking of another career path, a traveling cat circus is seeking a stage assistant.

If you'll be sticking with your day job, read on for news about the CFPB's largest assessment of civil money penalties, the Supreme Court's decision to hear the latest effort of municipalities to hold mortgage lenders responsible for lost tax revenue due to foreclosures, and the latest on the Privacy Shield.

MORRISON FOERSTER

BELTWAY

The Risk of Being a Third Wheel

The FDIC recently released proposed guidance addressing banks' obligations when they participate in third-party lending programs. The proposed guidance reminds banks of their duty to establish risk-management programs to evaluate whether to enter into third-party lending programs and how to manage risks for such programs. Want to know more? Read our Client Alert.

For more information, contact Don Lampe at dlampe@mofo.com.

Sometimes it's Hard to Be a Banker

In July 2016, the OCC issued its Semiannual Risk Perspective Report. The report addresses the key risks facing federally chartered banks and notes that strategic risk remains an "ongoing concern." The Report also identifies other risks, including: credit risks, commercial real estate concentration, operational risks (to address cybersecurity and reliance on third parties), and compliance risks (BSA/AML, implementation of the CFPB integrated mortgage rule, and implementation of DoD rules implementing the Military Lending Act).

For more information, contact Oliver Ireland at oireland@mofo.com.

I Want to Be a NACHA Man

The Electronic Payments Association recently issued two papers--one for financial institutions and one for businesses--to provide guidance on account validation services for ACH payments. The papers discuss the importance of using account validation to better ensure transactions are not returned and to reduce potential fraudulent payments. They also discuss a number of validation methods, including manual methods, third-party validation services, ACH validation tests, and use of micro-deposits to verify an account number.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

Is it Safe to Swim in the Online Banking Water?

Not wanting to be left behind in the rush to address online marketplace lending, the Treasury issued a white paper on online marketplace lending activities, including recommendations to the industry and government on how to facilitate "safe growth" of online lending. The white paper addresses small business credit as well as consumer credit and recommends the development of "protections" for loans made to small businesses. In addition, the white paper recommends the establishment of a "working group" comprised of the federal banking agencies, as well as other federal agencies, to monitor developments in the online lending marketplace.

For more information, read our Client Alert or contact Sean Ruff at sruff@mofo.com.

Everyone Into the Pool

In August 2016, FinCEN issued proposed changes to its anti-money laundering rules addressing the duty of banks and credit unions that don't have a federal functional regulator to have anti-money laundering (AML) and customer identification programs (CIP). The comment period ends on October 24, 2016. The proposed rule provides that the all banks and credit unions, even those that lack a federal regulator, are subject to AML and CIP requirements. This would include private banks, non-federally insured credit unions, and certain trust companies. According to FinCEN, the proposed amendments would remove a gap in coverage for such institutions.

For more information, contact Marc-Alain Galeazzi at mgaleazzi@mofo.com.

BUREAU

Different Product, Same Telemarketing Practices

After Regulation E's prohibition on permitting overdraft services for ATM and one-time debit transactions without the customer's specific opt-in took effect in 2010, some financial institutions started marketing overdraft services as they might once have done for credit-card add-on products. The CFPB's July 2016 settlement echoes the allegations in the Bureau's add-on product consent orders, claiming that the Bank used telemarketers to persuade customers to opt into overdraft services and fees, allegedly incentivizing telemarketers with higher hourly rates after they hit specified enrollment targets, and enrolling customers in overdraft services without their consent. The settlement bars the Bank from using telemarketers to sell overdraft services, requires increased telemarketer oversight, and imposes a $10 million fine. The Order does not require the Bank to refund overdraft fees to its customers.

For more information, contact Michael Miller at mbmiller@mofo.com.

Proposed Short Leash for Short-Term Lenders

The CFPB has issued a Notice of Proposed Rulemaking for short-term loans. Under the Proposed Rule, it would be an abusive and unfair practice to make a covered loan unless the consumer has the ability to repay the loan or the loan meets the requirements necessary to be considered conditionally exempt from the ability-to-repay determination. The Proposed Rule would also create new requirements for recurring loan payments: if a lender has initiated two consecutive failed payment transfers on a covered loan, it would be prohibited from initiating another payment transfer unless it provides disclosures and obtains additional authorization from the consumer. Read our Client Alert for a closer look at the proposed rule and its implications for consumer lending.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

Bureau Settles Self-Serve Lawyering Claims

Three individuals connected with debt settlement firm World Law Group reached a settlement with the Bureau in July 2016, agreeing to a $107 million suspended judgment in exchange for turning over the frozen assets in their personal bank accounts, a commercial property, and at least a dozen vehicles. The Bureau's August 2015 Complaint alleged that World Law Group deceived more than 20,000 consumers into believing that the firm would provide legal services to assist in settling debt in order to circumvent the Telemarketing Sales Rule's ban on charging consumers advance fees for debt-relief services. Instead, the Complaint alleged that few customers ever interacted with a lawyer, and customers were instead given forms for legal filings and instructed to file them *pro se*.

For more information, contact James McGuire at jmcguire@mofo.com.

"Drastic Overhaul" of Debt Collection

In July 2016, the CFPB outlined proposals for regulation of debt collection that would, according to Director Richard Cordray, "drastically overhaul" the debt collection market. The outline marks the next step toward implementation of a final rule. The proposal would limit collection communications to six per week through any point of contact, require debt collectors to include more specific information about the debt in initial debt collection letters, and require a new series of mandatory disclosures to assist consumers in understanding and managing debt collection processes, among other wide-ranging proposals. The outline covers proposals for third-party debt collection. Director Cordray indicated the Bureau

would address first-party debt collection on a "separate track."

For more information, read our Client Alert or contact Don Lampe at dlampe@mofo.com.

My CFPB Complaint was Useful (1) Funny (0) Cool (3)

The CFPB, once again striving to be the Yelp of the consumer financial world, is now offering consumers an option to provide feedback on a company's response to and handling of complaints submitted through the Bureau's Consumer Complaints Database. Consumers would have the ability to rate the company's handling of the complaint on a one-to-five scale and provide a narrative description of the rating. The feedback will be shared with the company. The Bureau's notice in the Federal Register does not specify whether half-stars will be available.

For more information, contact Jessica Kaufman at jkaufman@mofo.com.

Lender, Lender, Who's the True Lender?

In a blow to some online lenders, a federal court awarded the CFPB a victory in its lawsuit against CashCall Inc., granting the CFPB's motion for summary judgment. *Consumer Fin. Protection Bureau v. CashCall, Inc.*, No. 2:15-cv-07522, slip op. 213 (C.D. Cal. Aug. 31, 2016). The Court found that CashCall, a California corporation, not Western Sky, a loan origination company based on a South Dakota Native American reservation, was in fact the true lender in the case. CashCall had claimed Western Sky was the lender, which meant state usury caps did not apply. The Court's finding otherwise supports the Bureau's claim that CashCall's servicing and collection of loans with interest rates that exceeded state usury caps constituted unfair and deceptive acts and practices ("UDAAP").

For more information, contact James McGuire at jmcguire@mofo.com.

CFPB Collects Largest. Penalty. Ever.

On September 8, 2016, the CFPB, the OCC, and the City and County of Los Angeles entered into a Consent Order with Wells Fargo in which Wells Fargo agreed to pay civil money penalties totaling $185 million. The CFPB's portion of those penalties is $100 million, which is the largest fine the Bureau has imposed since opening its doors in July 2011. The agencies alleged that in response to an incentive compensation program, Wells Fargo employees opened new deposit and credit accounts, issued debit cards, and initiated online banking services without the knowledge of customers.

For more information, read our Client Alert or contact Obrea Poindexter at opoindexter@mofo.com.

MOBILE & EMERGING PAYMENTS

Is the OCC Innovating Along with Fintech?

The OCC provided more substantive details regarding its plans for regulation of the burgeoning financial technology sector at a forum in late June. The "Forum on Supporting Responsible Innovation in the Federal Banking System" invoked the spirit of the United Kingdom's Financial Control Authority's approach to regulating Fintech while maintaining an open atmosphere for innovation. The OCC's guiding principles for the forum were based on fostering an atmosphere of responsible innovation, using the experience and expertise of current agencies to guide the regulatory process, ensuring consumer safety and protection, and mitigating risk. The forum featured a variety of industry experts and insiders divided into three separate panels encompassing the financial services and technology industries.

For more information, contact Trevor Salter at tsalter@mofo.com.

Digital Heist of Digital Currency

Advocates for the continuing integration of bitcoin into the global financial market were dealt a severe setback on August 2, 2016, when hackers stole some $70 million worth of the digital currency from Hong Kong-based bitcoin exchange Bitfinex. News of the hack resulted in a rapid 13 percent drop in bitcoin's value against the U.S. dollar, and forced Bitfinex to halt all trading, withdrawals, and deposits of the digital currency. This latest incident in a string of bitcoin exchange hacks raises questions about the future of the cryptocurrency as consumers and regulators alike worry about its long-term safety and viability.

For more information, contact Jeremy Mandell at jmandell@mofo.com.

MORTGAGE & FAIR LENDING

Miami Brings the Fair Lending Heat

In *Wells Fargo & Co. v. City of Miami*, Case No. 15-1111, and *Bank of America Corp. v. City of Miami*, Case No. 15-1112, the city claims that lenders intentionally targeted minorities for predatory loans (reverse redlining), extended credit on unequal terms, and engaged in other practices that had a disparate impact on minorities. The theory is that, through an attenuated chain of events, these alleged practices eventually caused Miami to lose out on property tax revenues. The cases are far-reaching, but the issues on appeal are narrow and technical: (1) what does it mean to be an "aggrieved person" under the Fair Housing Act and (2) what showing of "proximate cause" is required under the statute? The Court will hear oral argument on November 8, 2016.

For more information, contact Angela Kleine at akleine@mofo.com.

Mortgage Mystery Shoppers

CFPB "mystery shoppers" and secret recordings were part of the CFPB's factual allegations in a recent mortgage discrimination settlement. The DOJ and CFPB announced a settlement with BancorpSouth Bank to resolve alleged violations of the Fair Housing Act and Equal Credit Opportunity Act). The complaint alleges that from at least 2011 to 2013, BancorpSouth illegally redlined mortgage loan applicants, denied African Americans loans more often than white applicants, charged African American customers more for loans, and implemented an explicitly discriminatory loan denial policy. The settlement marks the first time the CFPB has publicly disclosed using "mystery shoppers," among other novel methods of investigation.

For more information, read our blog post or contact Nancy Thomas at nthomas@mofo.com.

HAMP Is Dead, Long Live HAMP!

On August 2, 2016, the CFPB published guidance titled CFPB's Principles for the Future of Loss Mitigation. The guidance outlines a recommended framework for new industry-driven foreclosure relief programs. It largely follows the July 25, 2016 white paper jointly issued by the Department of the Treasury, HUD, and the Federal Housing Finance Agency, in which the agencies called for industry stakeholders to design and implement a loss mitigation framework tailored to the post-crisis mortgage market. Both the guidance and the white paper come as the Home Affordable Modification Program is set to expire on December 31, 2016.

For more information, read our Client Alert or contact Don Lampe at dlampe@mofo.com.

More MLA

On August 26, 2016, the Department of Defense issued an interpretive rule providing guidance on the DoD's regulations implementing the Military Lending Act (MLA). The interpretive rule aims to clarify certain ambiguities in the DoD's July 2015 final rule, which significantly expanded the scope of the MLA to cover new types of creditors and new credit products. Presented in a series of questions and answers—19 in total—the interpretive rule by no means resolves all ambiguities present in the July 2015 final rule. The interpretive rule does, however, provide much needed clarity on a handful of issues that are critical to creditors' compliance with the MLA.

For more information, read our Client Alert or contact Leonard Chanin at lchanin@mofo.com.

Small But Mighty

In August 2016, the CFPB, OCC, and Federal Reserve jointly published a notice of proposed rulemaking (NPR) to amend their respective regulations exempting certain small loans from the special appraisal requirements that apply to lenders in connection with making higher-priced mortgage loans (HPMLs). Under the current HPML rules, the small loan exemption threshold is adjusted annually based on any annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W), as calculated and published by the Bureau of Labor Statistics. This new NPR proposes to amend the official commentary to HPML rules to clarify how the threshold is calculated when the CPI-W does not increase in a given year.

For more information, read our Client Alert or contact Ryan Richardson at rrichardson@mofo.com.

Special Servicing Edition, Read All About It!

This summer the CFPB released a "Special Edition" of its Supervisory Highlights, focused on mortgage servicing. The Bureau report discusses its recent mortgage servicing exam findings and Supervision's

approach to mortgage servicing exams, including a description of recent changes to the mortgage servicing exam procedures. In summary, the CFPB remains focused on loss mitigation and, in particular, good servicer-borrower communications throughout the entire loss mitigation process. The Bureau concludes its highlights by noting continued compliance risks and reminding servicers that "improvements and investments in servicing technology, staff training, and monitoring can be essential to achieving an adequate compliance position."

For more information, contact Angela Kleine at akleine@mofo.com.

OPERATIONS

Fed Issues GSIB Proposals

The Federal Reserve Board issued Proposed Rules intended to reduce the potential risks posed to the U.S. financial system by too-big-to-fail banks, including rules requiring certain systemically important banks to include provisions in their contracts that would significantly limit their counterparties' default rights in over-the-counter swaps, repurchase and reverse repurchase agreements, securities lending and borrowing transactions, commodity contracts, and forward agreements. The Proposed Rules are intended to facilitate the orderly liquidation of systemically important financial institutions by ensuring the cross-border application of U.S. special resolution regimes to certain transactions with U.S. global systemically important banks (GSIB) and to facilitate the resolution of GSIBs under a "single point of entry" strategy.

For more information, read our Client Alert or contact Julian Hammar at jhammar@mofo.com.

Volcker Rule Reprieve

As anticipated, the Federal Reserve Board issued an Order extending the Volcker Rule conformance period for investments in and relationships with covered funds and foreign funds that were in place prior to December 31, 2013 ("legacy covered funds"). The Order extends until July 21, 2017 the deadline for banking entities to conform their investments in and relationships with legacy covered funds to the Volcker Rule's requirements. This is the last extension of the conformance period permitted by statute. The Order did not extend the conformance period for a banking entity's investments in or relationships with non-legacy covered funds. Such investments in or relationships with non-legacy covered funds were required to come into conformance by July 21, 2015. The Board had announced in 2014 that it planned to extend the conformance period with respect to legacy covered funds to the maximum extension permissible under the statute.

For more information, read our Client Alert or contact Marc-Alain Galeazzi at mgaleazzi@mofo.com.

PREEMPTION

What's New Is Old Again

Negligence claims against a national bank are preempted when they would impose an obligation on banks that would significantly interfere with their deposit-taking authority. So held a federal court in Illinois that considered claims based on alleged double depositing by a consumer. *1409 West Diversey Corp. v. JP Morgan Chase Bank, N.A.*, No. 16 C 256, 2016 WL 4124293 (N.D. Ill. Aug. 3, 2016). Plaintiff claimed the national bank's negligence had allowed an employee to deposit checks remotely using the national bank's app on her phone and then deposit the checks a second time with a currency exchange, leaving the plaintiff obligated to pay the checks twice. The court dismissed plaintiff's negligence

claim, finding plaintiff's theory would allow state common law to "micro-manage the deposit procedures of banks" and leave national banks "fac[ing] a myriad of conflicting laws across this country relating to deposit procedures." *Id*. at *2.

For more information, contact Nancy Thomas at nthomas@mofo.com.

Homeowner's Bill of Rights Preempted

The NBA and OCC regulations preempt a claim for violation of the California Homeowner's Bill of Rights (HBOR) based on an alleged failure to provide a requested NPV calculation statement. *Narvasa v. U.S. Bancorp*, No. 2:15-cv-02369-KJM-EFB, 2016 WL 4041317 (E.D. Cal. July 28, 2016). A federal court in California first considered whether the charter of the originating financial institution or the charter of the successor entity governed the preemption analysis. The court sided with what it referred to as a "growing number of district courts" finding the charter of the successor entity applied to claims challenging conduct by the successor entity. The court then held that claims for violation of the HBOR and the California Unfair Competition Law as well as common law claims were preempted by OCC regulations because they sought to impose state-law disclosure requirements on a national bank.

For more information, contact Nancy Thomas at nthomas@mofo.com.

PRIVACY

Unfairness Hurts

The FTC Commissioners overruled an FTC Administrative Law Judge (ALJ) and held that LabMD's data security practices were unfair, in violation of Section 5 of the FTC Act. LabMD, a clinical testing laboratory that tested samples for physicians, had argued, and the ALJ had agreed, that the FTC had failed to present evidence that consumers had suffered, or were likely to suffer, any tangible injury as a result of a LabMD insurance-related report that was apparently made available on a peer-to-peer file-sharing network. The ALJ found that this type of evidence was necessary to satisfy the first prong of the FTC's three-prong "unfairness" test, which requires that a practice cause or be likely to cause substantial injury to consumers. The Commissioners, however, found that the ALJ applied the wrong standard and that the disclosure of the sensitive personal information in the file was, in and of itself, a substantial injury. It appears likely that LabMD will appeal the case to a circuit court.

For more information, see our Client Alert or contact Julie O'Neill at joneill@mofo.com.

Safety First

As discussed in previous Reports, the Safe Harbor Framework for data transfers between the U.S. and EU was invalidated by the European Court of Justice (ECJ) last fall. Officials from both sides spent months negotiating the replacement EU-U.S. Privacy Shield, which was agreed to at the end of June 2016, approved July 12, 2016, and took effect on August 1, 2016 when the Department of Commerce began taking certification applications. The Privacy Shield Framework imposes new requirements, including that companies ensure that any company to which they transfer personal information from the EU provides the same level of protection to the information. It also contains commitments from the U.S. government regarding redress alternatives for EU citizens. The European regulators remain critical of the Privacy Shield as implemented, but have agreed to hold off on challenging Privacy Shield for a one year period.

For more information, contact Miriam Wugmeister at mwugmeister@mofo.com.

Who Will Be Left Standing?

One area where the Supreme Court's ruling in *Spokeo v. Robins* may prove to make a meaningful difference is in cases involving serial plaintiffs. In *Groshek v. Time Warner Cable*, for example, the plaintiff applied for a job with Time Warner Cable and then alleged that the company obtained a consumer report without appropriate disclosures under the Fair Credit Reporting Act (FCRA). The plaintiff intended to argue that the invasion of his privacy was sufficient to allege a concrete harm to establish standing, but the court was having none of it, noting, for example, that the plaintiff "has not alleged that the defendant used the consumer report against him in any way." Time Warner Cable had alleged in its motion to dismiss that the plaintiff had applied for more than 500 jobs in the previous two years without ever intending to accept any job offers, but rather to make a decent living extracting FCRA settlements. The court did not specifically reference this allegation in its order, but perhaps its significance was not lost on the court in considering the plaintiff's standing claim.

For more information, contact Angela Kleine at akleine@mofo.com.

A Costly Theft

In June 2016, the SEC announced that a financial services firm would pay $1 million to resolve SEC charges relating to the actions of a former employee who had downloaded data regarding approximately 730,000 accounts to his personal server. The server was then hacked. The SEC allegedly that the firm failed to have appropriate controls in place, including a lack of written policies and procedures reasonably designed to protect customer information and a lack of access controls on internal portals through which employees could access customer information. The SEC alleged that these practices violated its GLBA safeguards rule, Regulation S-P.

For more information, contact Nate Taylor at ndtaylor@mofo.com.

Speaking of Safeguards…

The FTC has been conducting regular reviews of its rules and guidelines on a rotating basis since 1992, and the FTC's GLBA safeguards rule has now come up for review. As noted in the FTC's Federal Register Notice, the FTC is seeking public comment on the rule. The FTC's safeguards rule applies to the handling of customer information by all financial institutions over which the Commission has jurisdiction under the GLBA. The rule requires all covered financial institutions to develop, implement, and maintain a comprehensive information security program. The FTC has proposed a number of issues for comment, with a particular focus on the costs and benefits of the rule. The request for comment also focuses on other issues, such as whether companies should be required to have incident response plans as part of their information security programs and whether the rule should incorporate other standards or frameworks, such as the NIST Cybersecurity Framework or the Payment Card Industry Data Security Standards. Comments are due by November 7, 2016.

For more information, contact Nate Taylor at ndtaylor@mofo.com.

Protecting Against Big-Time Fraud

After a spate of attacks that resulted in costly fraud at a number of non-U.S. institutions, the FFIEC issued an Alert to U.S. financial institutions reminding them of the "need to actively manage the risks associated with interbank messaging and wholesale payment networks." The FFIEC recommends that financial institutions have in place multiple layers of security controls and, in particular, that their risk management processes address the risk posed by compromised credentials. Specific steps identified in the Alert include conducting ongoing information security risk assessments; performing security monitoring, prevention, and risk mitigation; protecting against unauthorized access, such as by limiting the number of credentials with elevated access; and implementing and testing controls around critical systems regularly.

For more information, contact Nate Taylor at ndtaylor@mofo.com.

The Stranger

Is a barcode personal information? A recent district court said no in a case in which plaintiff alleged that a barcode visible in the envelope's return-address field was personal information such that the letter violated the FDCPA's strict provisions on information that can be printed on envelopes enclosing debt collection letters. *Anenkova v. Van Ru Credit Corp.*, No. 15-4968, 2016 WL 4379296 (E.D. Penn. Aug. 17, 2016). The court concluded that the "benign language" exception in the FDCPA applied to the barcode, explaining even if someone "could decipher the components of the twenty-five digit code, no prohibited information would be revealed."

For more information, contact Nate Taylor at ndtaylor@mofo.com.

ARBITRATION

Second Circuit Won't Substitute Arbitration Forums

In *Moss v. First Premier Bank*, No. 15-2513-cv(L), 2016 U.S. App. LEXIS 15917 (2d Cir. Aug. 29, 2016), the district court ordered a borrower from a pay day lending company to arbitrate her claims. The arbitration agreement specified NAF as the arbitrator, but NAF no longer accepts consumer arbitrations in accordance with the terms of a consent order it entered into with the Minnesota Attorney General. The Second Circuit reversed, refusing to substitute the arbitral forum. The court found that the borrower was free to pursue her claims in federal court.

For more information, contact Natalie Fleming-Nolen at nflemingnolen@mofo.com.

The Eleventh Circuit Also Refuses to Substitute

In another case involving a payday loan, *Parm v. Nat'l Bank of Cal., N.A.*, No. 15-12509, 2016 U.S. App. LEXIS 15919 (11th Cir. Aug. 29, 2016), the Eleventh Circuit also refused to substitute an arbitral forum. There, the arbitration clause required arbitration in accordance with the rules of the Cheyenne River Sioux Tribe, which the district court found had no mechanism to arbitrate claims. The circuit court affirmed the district court's refusal to compel arbitration. The court noted that substitution of arbitral forums is permitted under Section 5 of the FAA, but under Eleventh Circuit precedent, this provision only applies if the choice of forum was a purely logistical issue, and not an integral part of the agreement. The court found that the forum was integral to the parties' agreement, so the consumer could proceed to federal court.

For more information, contact James McGuire at jmcguire@mofo.com.

Circuit Split Deepens on Class Action Waivers in Employee Contracts

In a split decision, the Ninth Circuit held that arbitration provisions that forbid class or collective actions by employees violate the National Labor Relations Act because such clauses preclude employees from a form of collective action against their employer. *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 U.S. App. LEXIS 15638 (9th Cir. Aug. 22, 2016). The decision turned on the distinction between "substantive" rights, which cannot be waived even if included in arbitration provisions, versus "procedural" rights which can be waived in arbitration clauses. The majority found the right to act collectively against an employer, including through lawsuits, is a "substantive" right under the NLRA. The Seventh Circuit has ruled similarly, while the Second, Fifth and Eighth Circuits have gone the other way.

For more information, contact Tritia Murata at tmurata@mofo.com.

TCPA

No Harm? No Problem.

An Illinois federal court held that a bare violation of the TCPA is sufficiently concrete and particularized to establish Article III standing, even if the plaintiff or class members suffered no tangible harm, such as lost cell phone battery life or financial losses. *Aranda v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2016 WL 4439935, at *6 (N.D. Ill. Aug. 23, 2016). The court denied summary judgment for defendant, reasoning that Congress established a "substantive, not procedural" right to be free from "unsolicited telephonic contact" without regard to tangible harm. *Id.* Because that right was common to every class member, the court also denied the defendant's motion to decertify the class. *Id.* at *6-7.

For more information, contact Tiffany Cheung at tcheung@mofo.com.

The Human Touch

The LiveVox Human Call Initiator system is not an "automatic telephone dialing system" under the TCPA, according to a federal court in Florida. *Pozo v. Stellar Recovery Collection Agency*, No. 8:15-cv-929-T-AEP (M.D. Fla. Sept. 2, 2016). Because the manual clicker system required the defendant's agents to click a dialog box to initiate calls, the court held it was "not capable of making any calls without human intervention." Nor did the system have "potential" autodialing capabilities because there was no evidence the system could be modified to autodial. Accordingly, summary judgment was granted for defendant.

For more information, contact David Fioccola at dfioccola@mofo.com.

This newsletter addresses recent financial services developments. Because of its generality, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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