2020 Consumer Financial Services Year in Review & A Look Ahead

Consumer Financial Services Practice

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2020 Consumer Financial Services

Year in Review, February 2021

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EXECUTIVE SUMMARY

2020 was a transformative year for the consumer financial services world. As we navigated an unprecedented volume of industry regulation, Troutman Pepper leveraged our decades of experience and legal know how to help clients find successful resolutions and stay ahead of the compliance curve.

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

By remaining up to date on the latest industry trends and regulatory developments, clients seek out and rely on Troutman Pepper as a trusted resource to help tackle today's issues, while preparing for what lies ahead. We hope this report brings you value.

ABOUT US

Troutman Pepper's Consumer Financial Services practice consists of nearly 100 attorneys nationwide, who bring extensive experience in 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 multidisciplinary attorneys work together 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. As such, we address the many perspectives that may arise for a single legal issue before it becomes a larger problem, or that may lead to compliance solutions and regulatory strategies developing out of contentious litigation.

Our nationwide reputation in consumer claims litigation derives from our attorneys' extensive experience representing clients in consumer class actions involving the Fair Credit Reporting Act (FCRA), Fair Debt Collection Practices Act (FDCPA) and state law debt collection claims, TCPA, Truth in Lending Act (TILA), Real Estate Settlement Procedures Act (RESPA), West Virginia Consumer Credit Protection Act (WVCCPA), Unfair and Deceptive Acts and Practices (UDAP) statutes, 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, cybersecurity and privacy, Racketeer Influenced Corrupt Organizations Act (RICO), and the Servicemembers Civil Relief Act (SCRA).

Our regulatory enforcement team comes well prepared to respond to the Consumer Financial Protection Bureau's (CFPB) oversight inquiries, civil investigative demands (CIDs), audit, supervision, examination, and enforcement actions, including the request for production of privileged and highly confidential information routinely demanded by the CFPB 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 Pepper, we 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.

We regularly advise and prepare our clients proactively for compliance matters to avoid costly government audits, investigations, fines, litigation, or damage to brand and reputation. Our compliance attorneys 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 multistate analyses of state and federal laws.

Attorneys 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 and achieve their goals.

AUTO FINANCE

The COVID-19 pandemic brought considerable instability for automotive retailers in 2020, with many retailers reporting a substantial drop in sales. Litigation and enforcement actions saw a similar drop in 2020, with fewer major class actions against auto finance companies and a decrease in regulatory activity, as well. However, perhaps presaging an increased focus on fair lending issues cutting across all consumer finance sectors, one of the most notable 2020 regulatory enforcement actions highlighted alleged disparate impact in auto financing.

Highlights from 2020

In May, a New York franchise dealer agreed to pay $1.5 million to the Federal Trade Commission (FTC) to settle charges that the dealership discriminated against African American and Hispanic American consumers, as well as engaged in other unfair and deceptive practices. In a complaint filed in the U.S. District Court for the Southern District of New York, the FTC alleged that the dealership, Liberty Chevrolet, d/b/a Bronx Honda, charged minority consumers higher financing markups and fees in violation of the Equal Credit Opportunity Act (ECOA) and Regulation B (Reg B). The agency alleged that the dealership charged African American consumers approximately $163 more in interest than similarly situated white consumers, and it charged Hispanic American consumers approximately $211 more in interest.

The settlement arose out of a common practice in the motor vehicle sales industry, where dealers arrange financing and charge a higher finance charge rate than the minimum required by the automobile finance company or bank. In return, the finance company or bank pays the dealer additional compensation in connection with the financing. Federal banking regulators, the FTC, and the Consumer Financial Protection Bureau (CFPB) have taken the position that this practice creates a risk of “disparate impact” on protected groups, as the subjective pricing decisions by dealers could lead to higher finance charges for protected groups.

One of the most notable 2020 regulatory enforcement actions highlighted alleged disparate impact in auto financing.

The complaint against Bronx Honda further detailed allegations that it engaged in illegal practices that forced consumers to pay higher prices than expected, including allegations that the dealership:

- failed to honor advertised sale prices and used a variety of methods to increase vehicle prices;
- altered the deal paperwork during the sale process to change the prices of vehicles without notifying the buyer;
- doubled up on taxes and fees without consumers’ knowledge; and
- represented that “certified pre-owned” vehicles required thousands of dollars in fees for purchase.

According to the agency, the allegations resulted in violations of the FTC Act and the Truth-in-Lending Act, as well as the ECOA. The settlement will provide redress for affected consumers and will prevent Bronx Honda from misrepresenting vehicle prices or terms in the future. Further, the dealership will be required to establish a fair lending program designed to cap the amount of interest markup charged to consumers.

The Consumer Financial Protection Bureau (Bureau) also actively participated in the enforcement space. In October, the Bureau announced that it entered a consent order with Nissan Motor Acceptance Corporation (Nissan) to resolve allegations that the auto finance company violated the Consumer Financial Protection Act (the Act). The order required Nissan to pay a $4 million penalty and offer $1 million in restitution to affected customers.

The CFPB contended that Nissan violated the Act in four ways: (1) by repossessing vehicles between 2013 and 2020 even though customers had already made payments or taken action that should have prevented repossession; (2) by requiring customers to pay a $7.95 fee to make payments by telephone and failing to give customers an option to pay by telephone with significantly lower fees; (3) by requiring customers to pay a storage fee to Nissan's repossession agents for the return of personal property recovered from repossessed vehicles; and (4) by including statements in Nissan's loan modification agreements that appeared to limit customers' bankruptcy protections.

In addition to the monetary penalty, the order required Nissan to issue refunds to customers and pay customers for each day Nissan wrongfully withheld vehicles. Nissan also agreed to prohibit its repossession agents from charging fees for the return of personal property recovered from repossessed vehicles, to conduct a quarterly review of repossessions, to clearly disclose to consumers the fee for pay-by-phone options, and to refrain from using language in its contracts that suggests consumers have relinquished any rights in bankruptcy.

Finally, November saw the dismissal of a putative class action against State Farm Mutual Auto Insurance, where the plaintiff alleged that the insurance company violated New York law by charging an additional fee to receive a paper statement or to pay by U.S. mail. According to the putative class plaintiff, her insurance installment plan provided for three separate fee options, including a $3 fee for accounts that did not have automatic billing, a $2 fee for automatic monthly payments with print billing, and a $1 fee for automatic monthly payments with paperless billing.

Judge Cathy Seibel of the Southern District of New York dismissed the case, finding that State Farm's installment plan fees did not violate New York law because they were based on permissible incentives expressly provided for under the applicable statute. The court noted that, under a plain reading of the payment plan agreement, State Farm was permitted to charge a $3 default fee, with fee reductions permissible incentives under New York General Business Law § 399. The court further noted that the State Farm website disclosed that consumers' selection of a paperless option might result in reduction of the installment fee.

Looking Forward to 2021

Look for regulators to make up for lost time in 2021, as federal agencies begin to investigate COVID-related practices in the auto finance space. Additionally, as Trump-era policies come to a close and consumer-friendly regulators begin to take office in the Biden administration, look for increased attention on practices and procedures in consumer lending.

Fair lending likely will be a theme for regulators in 2021. Disparate impact, redlining, and fair lending initiatives are expected to return to the forefront in 2021, as the incoming Biden administration looks to reinvigorate Obama-era policies.

BACKGROUND SCREENING

Introduction

Following a trend from previous years, 2020 included a significant number of initiated actions alleging violations of the Fair Credit Reporting Act (FCRA), including substantial developments in the area of background screening. On remand from a 2019 Ninth Circuit Court of Appeals decision, a district court in the Central District of California found a background screening agency did not negligently violate the FCRA despite an inaccurate interpretation of criminal history reporting requirements. Further, a Consumer Financial Protection Bureau (CFPB) enforcement action from the Southern District of New York enumerated that three-factor matching, not two-factor, is necessary for compliant name-matching procedures to avoid the likelihood of false positives when dealing with common names. In Oakland, California, there is now a citywide ban on criminal background checks for most rental house applicants. The Eastern District of Pennsylvania found a plaintiff lacked Article III standing for a purely procedural FCRA violation and dismissed a putative class. Finally, the Eleventh Circuit affirmed a $250,000 compensatory damages award and permitted a $1 million punitive damages award in an individual mixed-file FCRA action.

Oakland's Ban on Criminal Background Checks for Renters Threatens Screening Agencies

On February 4, 2020, the Oakland City Council in California forbade the use of criminal background checks in most housing applications under the Fair Chance Housing Ordinance (FCHO). The law allows formerly incarcerated individuals an increased opportunity to compete for rental housing, reintegrate into their communities, and avoid homelessness.

The property owners and managers who typically have ordered background checks on tenant-applicants obviously must adapt. The law also targets the groups actually conducting the background checks — consumer reporting and tenant screening agencies. Sections of the ordinance contain language that could subject a company or agent screening a potential tenant to hefty fines or even criminal charges.

Section 8.25.060 H. of the FCHO, "Civil Damages" states:

> Any Housing Provider who violates, and any person who aids a Housing Provider to violate, any provision of this Ordinance shall be liable for the following monetary damages . . .

The ordinance allows would-be tenants to seek actual damages, including mental or emotional distress, one month's rent, and/or the Department of Housing and Urban Development's Small Area Fair Market Rent of the unit at issue. The court presiding over a potential dispute also has discretion to triple those sums or award punitive damages. Considering high rent prices in the Bay Area, these awards could prove substantial.

The following section on "Criminal Penalties," 8.25.060 I., might also apply to tenant screeners:

> (1) Infraction. Any Housing Provider who violates, or any person who aids a Housing Provider to violate, any provision of this Ordinance shall be guilty of an infraction for the first offense.
>
> (2) Misdemeanor. Any Housing Provider who knowingly and willfully violates, or any person who knowingly and willfully aids a Housing Provider to violate, any provision of this ordinance shall be guilty of a misdemeanor.

If the FCHO prohibited conducting background checks for all forms of Oakland housing, compliance would prove simple. Yet, the ordinance's exceptions muddy the waters. For instance, the ordinance permits background checks on applicants for "a dwelling unit in a residential property that is divided into a maximum of three units, one of which is occupied by the owner as his or her principal residence." Does this exception apply to in-law units on the same lot, but disconnected from the

main structure itself? With what frequency must an owner live in the unit to claim principal residency? Can property managers or "supers" who live in and oversee a connected dwelling claim the exception and run background checks, or do they fall outside the definition of an "owner" or "housing provider?" All of these unanswered questions pose risks to companies in this space.

Further compliance challenges stem from the interplay among the Oakland ordinance and state and federal laws. The FCHO provides that "it shall not be a violation of this Ordinance for a Housing Provider to comply with Federal or State laws that require the Housing Provider to automatically exclude tenants based on certain types of criminal history, e.g. Ineligibility of Dangerous Sex Offenders for Admission to Public Housing (42 U.S.C. § 13663(a)) and Ineligibility of Individuals Convicted for Manufacturing Methamphetamine on Premises of Federally Assisted Housing for Admission to Public Housing and Housing Choice Voucher Programs (24 C.F.R. § 982.553))." But what other automatic exclusion provisions could govern? If a housing provider situated in Oakland orders a background check on a tenant-applicant, how must it limit the scope of its request? And if it fails to limit its check adequately, what independent steps must a screening business entity take to ensure compliance?

Key Takeaways

The rollout of the FCHO has the potential to alter considerably the dynamics and procedures of housing in Oakland. There is potential for housing advocacy organizations, tenant-applicants, developers, and screeners to drum up novel theories based on the ordinance's ambiguities. Only time will tell which of those theories will prove successful.

The rollout of the FCHO has the potential to alter considerably the dynamics and procedures of housing in Oakland.

CFPB Provides Guidance on What Constitutes an Adequate Basis to Attributing a Criminal Record to an Individual

A major background check vendor settled charges by the Consumer Financial Protection Bureau (CFPB) that matching practices — the bases by which it attributes a criminal record to a specific individual — violated the Fair Credit Reporting Act (FCRA). At bottom, the settlement attempts to establish a standard that name and date of birth (DOB) matching alone is insufficient to comply with the FCRA's accuracy requirements; "three-factor" matching (name, DOB, and address for example) is the minimum compliant matching standard. The settlement also covered other noteworthy business practices in the background check industry.

On November 22, 2019, the CFPB filed a complaint against Sterling Infosystems, Inc. in the U.S. District Court for the Southern District of New York alleging violations under the FCRA and simultaneously filed a proposed stipulated final judgment and order.

The 10-page complaint against Sterling alleged the company violated sections 1681e(b), 1681k(a), and 1681c(a) of the FCRA as described below:

1. Alleged Failure to Employ Reasonable Procedures to Assure Maximum Possible Accuracy (1681e(b))

In the complaint, the CFPB alleges that the following procedures, or lack of procedures, led Sterling to report erroneous adverse items of information on consumer reports:

(a) Matching Based on Two Identifiers: Between December 16, 2012 and October 2014, Sterling matched criminal records using two identifiers (which could include (i) first and last name and (ii) date of birth). This policy allegedly created a heightened risk of false positives because many commonly named individuals (*e.g.,* John Smith) share the same first and last name and date of birth. Because of the widespread lack of access to social security numbers in criminal records, background check companies need to determine whether a given record applies to a given consumer using matching criteria. The CFPB takes

the position that two-factor matching consisting of name and date of birth is inadequate.

(b) Insufficient Training on New Policies: Beginning in October 2014, Sterling adopted its first companywide common name matching criteria, which required a match on three personal identifiers. But continuing after October 2014 through July 31, 2016, Sterling kept reporting instances of erroneously matching criminal records on common-name applicants due to supposedly insufficient training on the new common-name matching policy. The CFPB seems to take the position that three-factor matching can be adequate.

(c) Junior/Senior Issue: Other instances of reporting errors involving both common and uncommon names were the result of another policy, where Sterling permitted matching criminal records with male applicants based solely on matching first and last name and matching the address. This too created an allegedly heightened risk of false positives because some males with the same first and last name (*i.e.,* a junior and senior) live at the same address.

(d) High-Risk Indicators: On one of its platforms, Sterling included in the Social Security Trace portion of its reports the notation ***HIGH-RISK INDICATOR*** next to an address, followed by a descriptor placing the address into a particular category. These categories included psychiatric hospital, nursing and personal care facility, corrections institution, and social service facility, among others. Sterling included a statement that the SSN Trace should not be used for an FCRA purpose. Sterling allegedly did not implement any procedures to verify the accuracy of these high-risk designations.

2. Alleged Failure to Maintain Strict Procedures Ensuring that Adverse Public Record Information Contained in Consumer Reports was Complete and Up to Date (1681k(a))

The CFPB alleges that Sterling violated section 1681k(a) of the FCRA because: (1) Sterling has not, in many instances, notified applicants that it was reporting public record information about the application at the time that information was being reported, and (2) for the same reasons as described above, Sterling failed to maintain "strict procedures" to ensure that the public record information it reported is "complete and up to date."

3. Alleged Reporting of Outdated Adverse Information (1681c(a))

Finally, the CFPB alleges that Sterling violated section 1681c(a) in the following ways:

(a) Outdated Addresses: In the Social Security Trace portion of its reports, Sterling reported the ***HIGH-RISK INDICATOR*** next to an address at which the applicant lived and was "last seen" more than seven years before generating the report. Per the CFPB complaint, "such a designation may be an adverse item of information because it could cast the consumer in a negative or unfavorable light."

(b) Outdated Adverse Criminal Information: Beginning in May 2012 and continuing through February 2013, Sterling used the "disposition date" as the start date for the seven-year calculation. The CFPB alleges that "date of entry" should be used on records of arrest, and "date of criminal charge" should be used for other non-conviction criminal record information.

The parties' proposed stipulated final judgment and order provides for the following:

1. Monetary Payment:

- $6,000,000 paid into a redress fund. The redress fund will be paid pro rata to approximately 7,100 consumers who successfully disputed criminal records.
- $2,500,000 paid as a civil penalty.

2. Conduct Requirements:

- The proposed order does not include any specifics in this section. Rather, the proposed order only repeats the requirements of the FCRA under sections 1681e(b), 1681k(a), and 1681c(a).
- The only specifically defined change in conduct is that Sterling will not report high-risk indicators for the next five years.

3. Compliance Committee:

- Sterling must establish a compliance committee.
- The compliance committee must meet at least once every two months and maintain minutes.
- The compliance committee will be responsible for monitoring and coordinating Sterling's adherence to the order.

4. Role of the Board

- Sterling's board of directors is ultimately responsible for compliance with this order and must review all CFPB submissions under this order.

5. Reporting Requirements:

- For five years, Sterling must provide a written compliance progress report that details the manner and form in which Sterling has complied with each paragraph of the order.

Key Takeaways

Three-factor matching has become the minimum compliant standard for consumer reporting agencies operating in the background check space. Other screening agencies can use the *Sterling* settlement agreement as a guidepost for shaping their own compliance policies.

Pennsylvania District Court Finds Lack of Article III Standing in Purely Procedural FCRA Violation and Dismisses Putative Class

On July 27, 2020, the Eastern District of Pennsylvania confirmed that a plaintiff lacks Article III standing to state a claim for violation of the Fair Credit Reporting Act (FCRA), premised solely on the failure to receive a copy of the background report and the statute's procedurally required summary of rights. In *Davis v. C&D Sec. Mgmt.*, No. No. 2:20-cv-01758-MMB, 2020 U.S. Dist. LEXIS 132291 (E.D. Pa. July 27, 2020), Davis applied for employment as a security guard with the defendant and was ultimately denied for the position twice. She brought suit on behalf of a putative class claiming that C&D Security failed to provide her with notice, a copy of her report, and a summary of her rights under the FCRA.

Following Third Circuit precedent in the context of Article III standing, see *Finkelman v. Nat'l Football League*, 810 F.3d 187, 193 (3d Cir. 2016), the court held that Davis lacked an injury-in-fact since she ultimately became aware of her rights and timely brought suit against the employer. It confirmed the U.S. Supreme Court's maxim in its landmark *Spokeo* decision that a bare procedural violation, divorced from any concrete harm, cannot satisfy the injury-in-fact requirement of Article III.

Further, the court found that because Davis failed to establish her own standing, she may not seek relief on behalf of the putative class, delaying the issue until class certification was held as futile given that additional facts or discovery would not cure the standing deficiencies.

Key Takeaways

This decision highlights the critical role of Article III standing in both the individual and class contexts, and it reiterates that companies defending class actions should consider standing issues at the forefront of the matter rather than, in some situations, reserving them for the certification stage.

California District Court Grants Summary Judgment in Favor of Background Screening Agency in Fair Credit Reporting Action

On July 30, 2020, a California district court, in *Morgan v. The Screening Pros LLC, et al.*, No. 2:12-cv-05808 (C.D. Cal. July 30, 2020), granted summary judgment in favor of background screening agency The Screening Pros LLC since there was no willful or negligent violation of the FCRA, despite The Screening Pros' incorrect interpretation of § 1681c(a)(5) of the Fair Credit Reporting Act (FCRA). Plaintiff Gabriel Moran sued The Screening Pros for allegedly violating the FCRA, along with two California consumer protection statutes, after it issued a tenant screening report regarding Moran.

Morgan alleged his February 2010 housing application to Maple Square, a low-income housing development in Fremont, California, was denied following his background check. Maple Square hired The Screening Pros to conduct a background check on Moran. The 2010 tenant screening report issued by The Screening Pros contained criminal conduct stemming from a 2000 arrest and subsequent misdemeanor convictions. The 2010 report also indicated the charges were dismissed in March 2004. Moran claimed he sought to expunge the convictions from his record. Moran alleged the tenant screening report contained inaccuracies and ultimately filed suit against The Screening Pros in 2012.

After The Screening Pros filed a motion to dismiss, the district court granted The Screening Pros' motion for some of the FCRA claims and all claims relating to the California consumer protection statutes, the Investigative and Consumer Reporting Agencies Act, and the Consumer Credit Reporting Agencies Act. After The Screening Pros filed a motion for reconsideration, a motion for judgment on the pleadings, and a motion for summary judgment. The district court granted the motion for reconsideration for the first two FCRA claims and granted summary judgment for the third FCRA claim.

Most importantly, the district court reconsidered its decision to deny The Screening Pros' motion regarding Moran's FCRA claim under 15 U.S.C. § 1681c(a)(5).

The section states in relevant part:

> (a) [N]o consumer reporting agency may make any consumer report containing any of the following items of information:
>
> > (5) [a]ny other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.

The district court reconsidered its treatment of the section's definition of the seven-year reporting period for criminal record information, which runs from the date of the reported event. The district court concluded that when dismissing a criminal charge before trial, the date of the reported event should be considered the date of disposition — *i.e.*, the date of the dismissal of the charge. The district court concluded that given the allegations in Moran's complaint, the reporting of a charge filed in 2000, but not ultimately dismissed until 2004, did not violate § 1681c(a)(5) because the dismissal fell within the seven-year period preceding the issuance of the background report.

Moran appealed the district court's decision to the Ninth Circuit Court of Appeals, raising several issues related to both the FCRA claims and the California state consumer protection statutes. Most important to Moran's FCRA claim, the Ninth Circuit reversed the district court, holding the seven-year reporting window for a criminal charge begins on the date of entry, rater than the date of disposition. Thus, the 2000 charges on The Screening Pros report fell outside of the permissible seven-year window, and Moran had adequately stated an FCRA claim on the basis of the improperly reported information on the 2010 screening report.

On remand, The Screening Pros filed a motion for summary judgment, in relevant part, seeking judgment on Moran's FCRA claims. The district court granted summary judgment in favor of The Screening Pros, holding that Moran failed to established that The Screening Pros willfully violated the FCRA. It also held that the violation under § 1681c(a)(5) was not negligent and as such, Moran could not establish a claim under 15 U.S.C. § 1681e, among others.

The district court's holding that The Screening Pros' violation of §1681c(a)(5) was not negligent was supported in large part by the fact that this was an issue of first impression in the Ninth Circuit. There was no evidence the 2010 The Screening Pros report was factually inaccurate. The district court noted that at the time the report was issued, the only guidance on this issue was from the FTC, which indicated the seven-year reporting period ran from the date of the disposition. The FTC guidance was rescinded only *after* The Screening Pros issued the report. Additionally, the district court referenced that the FCRA had been interpreted for decades in a way, which supported The Screening Pros' original reporting. Simply put, the plain language of the FCRA and its requirement that any violation be "negligent" to create a private right of action, forced the district court to conclude that under these circumstances The Screening Pros incorrect interpretation of § 1681c(a)(5) was not negligent and could not support a FCRA violation.

Key Takeaways

The Ninth Circuit's decision interpreting §1681c(a)(5) of the FCRA should provide clarity when reporting criminal history. While the decision in *Moran* is certainly favorable to those running the background checks, courts are not likely to be as lenient moving forward given the holding in *Moran* was largely predicated on the fact that previous guidance on interpretation of the section was rescinded only *after* the tenant background report was issued.

Eleventh Circuit Affirms $250K Compensatory Damages Award and Allows a $1M Punitive Damages Award in Individual Mixed-File FCRA Action

On January 9, 2020, the U.S. Court of Appeals for the Eleventh Circuit issued its decision in *Williams v. First Advantage Lns Screening Solutions*, a case watched closely by the background screening industry. In *Williams*, the court affirmed a $250,000 compensatory damages award and reduced a $3.3 million punitive damages award to $1 million in an individual mixed-file claim brought under 15 U.S.C. § 1681e(b) of the Fair Credit Reporting Act (FCRA). The decision addressed a basic legal requirement in the background screening industry — connecting background information to common names. The matching procedures in *Williams* are similar to those scrutinized by the CFPB in the complaint

Three-factor matching has become the minimum compliant standard for consumer reporting agencies operating in the background screening space.

filed against Sterling Infosystems, Inc. (discussed herein). In that action, the CFPB also addressed procedures in attributing public records to persons with common names when other definitive unique identifiers (particularly a social security number) are absent, coming to similar conclusions as the *Williams* court.

Background

In *Williams v. First Advantage*, plaintiff Richard Williams sued defendant First Advantage for alleged FCRA violations of twice attributing the criminal background information of another individual to the plaintiff. In two criminal background reports developed a year apart, the defendant reported criminal background information related to a "Ricky Williams" to the plaintiff's potential employers.

In its case background description, the *Williams* court focused heavily on the defendant's procedures for connecting criminal background information with individuals with common names. In order to attribute criminal background information to an individual with a similar name, the defendant's employees preparing the report were required to attempt to locate three identifiers, such as name, date of birth, social security number, or a driver's license number. If the employee could not to locate a third identifier, he/she must note his/her inability to do so and obtain approval by a supervisor prior to releasing the report. Trial evidence showed that in both instances, the defendant's employees who prepared Williams's reports only relied on two identifiers.

Further, the plaintiff disputed the criminal information contained in the first report, which was later removed. However, *different* criminal background information related to "Ricky Williams" appeared on the plaintiff's second criminal background report developed a year later. Importantly, the employees who developed the second report lacked access to information pertaining to the disputed criminal history in the first.

At trial, the plaintiff argued that he suffered lost wages of $78,272 and suffered additional emotional and reputational harm as a result of the reporting. The jury found the defendant willfully failed to follow procedures to assure the maximum accuracy of the information in the plaintiff's consumer report, as required by § 1681e(b) of the FCRA. The jury awarded the plaintiff $250,000 in compensatory damages and an astonishing $3.3 million in punitive damages. In response, the defendant filed a motion for judgment as a matter of law, which the trial court subsequently denied. The defendant appealed.

Decision

The defendant raised three arguments on appeal. The first two arguments concerned the motion for judgment as a matter of law: (1) the jury's award of $250,000 should be vacated because the plaintiff failed to show reputational harm; (2) the plaintiff had failed to establish a willful violation of the FCRA; and (3) the $3.3 million punitive damages award was unconstitutional under the due process clause.

In a brief analysis, the court affirmed the district court's denial of the defendant's motion for judgment as a matter of law regarding the plaintiff's showing of reputational harm and willfulness under the FCRA. The court's analysis with respect to willfulness is particularly notable, considering the extent to which the defendant's procedures were scrutinized. The court recognized that despite having a policy requiring a third identifier for screenings involving common names absent supervisor approval for the use of two, evidence in the case indicated this did not occur in common practice. The defendant's vice president of operations stated at trial that locating a third identifier was "king of aspirational." The court understood this to infer that the defendant consciously disregarded a known risk of violating

the FCRA. The court further pointed out the defendant failed to follow its own procedure during the preparation of both reports related to the plaintiff. Finally, the court looked to the defendant's lack of a procedure for flagging disputed criminal background information to avoid repeat occurrences. It found this evidence sufficient to support a willful violation of the FCRA.

The court spent the majority of its 77-page opinion analyzing the constitutionality of the jury's $3.3 million punitive damages award. The ratio of punitive damages to compensatory damages in *Williams* was 13:1. The court noted the Supreme Court has previously found an award of punitive damages with a 4:1 ratio is "close to the line" of unconstitutionality, and an award that exceeds a single-digit ratio is likely a violation of the due process clause. However, after a lengthy review of relevant case law, the court determined in candor that it is "ultimately up to the reviewing court to eyeball the punitive damages award and, after weighing the egregiousness of the particular misconduct and the harm it caused, decide whether the award is grossly excessive."

In the end, the court ruled that a 4:1 ratio was appropriate in this case and reduced the jury's punitive damages award to $1 million based on the amount of compensatory damages awarded and its assessment of the reprehensibility of the defendant's conduct. The court's reprehensibility analysis focused primarily on the defendant's use of only two identifiers when attributing the criminal history of Ricky Williams to the plaintiff, as well as its failure to flag this information once alerted to its inaccuracy to avoid future mispairing.

Based on two concurring opinions filed with the majority decision, the $1 million award was a compromise by the three-judge panel. One judge on the panel would have affirmed the $3.3 million award, while another opined that $500,000 was the proper figure. As one of the judges noted, "[t]he only way to resolve such a disagreement is to meet in the middle — as we have done."

In its punitive damages analysis, the court noted the tension between competing analyses of the defendant's error rate with respect to mispairing individuals with criminal background history and the extent to which this placed the defendant on notice of its conduct. Based on evidence at trial, the national rate for all errors in reporting raised through the defendant's dispute resolution process between 2010 and 2013 was .38% — less than one half of 1%. In mitigating the alleged reprehensibility of its conduct, the defendant argued that this figure was rather low.

The plaintiff, on the other hand, argued that based on the high number of reports issued by the defendant, errors still affected some 13,000 individuals. Importantly, however, the plaintiff did not show the extent to which those 13,000 individuals had similar experiences to the plaintiff. The court concluded that the extent to which the court could determine that the defendant was on notice was limited because the plaintiff "failed to bore down into the numbers." Indeed, the court expressly stated that a high frequency of related experiences would be something the "plaintiff should have seized on and proved at trial if he wanted to justify an award of extraordinarily high punitive damages."

Key Takeaways

Challenges to matching procedures utilized by the background screening industry continue to be an area of focus in FCRA litigation. The Eleventh Circuit's *Williams* decision represents a noteworthy development on that front.

BANKRUPTCY

Consumer Filing Numbers in 2020: Interpreting Numbers and Explaining Trends

Conventional wisdom seemed all but certain that 2020 would see a sharp rise in new bankruptcy cases – what with the advent of COVID-19 and the resulting economic shutdown that caused record unemployment, it seemed imminent that bankruptcies would rise, and rise fast.

In fact, while commercial Chapter 11 filings remain steady, consumer filings are low compared to 2019. On average, consumer filings in 2020 dropped by over 20% compared to prior years, while commercial filings increased compared to numbers in 2019.

While unemployment and market uncertainty in 2020 made it seem inevitable that bankruptcy numbers would skyrocket, it seems an anomaly that numbers have continued to stay low. Any number of reasons could be responsible for the decline – government-mandated stimulus payments, federal programs such as the CARES Act, or perhaps people are just spending less because they have less money. Whatever the reasons though, it seems a logical prediction that consumer bankruptcy filings will increase eventually, and increase quickly, if the economy does not rebound. For instance, with a myriad of federal moratoriums set to come to an end soon (a halt on student loan repayments, moratoriums on mortgage foreclosures and evictions, etc.), many people will find themselves with soaring bills every month, but no additional income.

Some experts say that a boom in commercial bankruptcies often precedes a surge in consumer bankruptcies – if this trend holds true, we can expect to see consumer filing numbers increase rapidly in 2021.

Supreme Court Holds Denial of Motion for Relief from Stay is Immediately Appealable: *Ritzen Group, Inc. v. Jackson Masonry, LLC*

In early 2020, the U.S. Supreme Court issued a unanimous decision resolving the issue of whether a bankruptcy court's denial of a motion for relief from stay constitutes a final, immediately appealable order under 28 U.S.C. § 158(a).

In *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S.Ct. 582 (2020), Ritzen Group, Inc. (Ritzen) filed a breach of a contract claim against Jackson Masonry, LLC (Jackson) in state court. Before the matter could go to trial, Jackson filed for Chapter 11 bankruptcy, which triggered an automatic stay of the state court proceedings pursuant to section 362 of the Bankruptcy Code.

Ritzen then filed a motion for relief from the automatic stay, which the bankruptcy court denied. Under 28 U.S.C. § 158, a party is required to file a notice of appeal of the bankruptcy court's final order within 14 days after entry of the order. Ritzen did not appeal within the requisite 14-day period. Instead, Ritzen filed a proof of claim, which was subsequently disallowed due to the bankruptcy court's finding that Ritzen breached the contract. After the bankruptcy court's confirmation of Jackson's reorganization plan, Ritzen filed a notice of appeal, appealing the denial of the motion for relief from stay. The district court denied the appeal as untimely, finding that Ritzen failed to appeal the order denying relief from automatic stay within 14 days of entry (as required for appeals from final orders). Ritzen then appealed to the Court of Appeals for the Sixth Circuit, which affirmed the lower court's ruling.

The Supreme Court granted certiorari to determine the issue of whether an order denying relief from an automatic stay is a final order for the purposes of an appeal, and therefore immediately appealable.

In its ruling, the Court distinguished between differences in what constitutes an appealable, final order in most civil cases as opposed to the unique nature of a bankruptcy case versus bankruptcy proceedings. In particular, Justice Ginsburg noted that bankruptcy proceedings encompass numerous, independent "units" that are separate and apart

from the resolution of the bankruptcy claim itself. As such, a ruling on a motion for relief from stay is just such a separate and independent proceeding, making an order denying relief from stay final and appealable. In holding so, the Supreme Court agreed with the appellate court, finding that Ritzen's appeal was untimely for failure to appeal with 14 days of entry of the final order.

Recent Updates in Second and Third Circuits - In Rem Relief From Automatic Stay Concerning Multiple Bankruptcy Filings

Generally, in rem matters are highly fact-intensive, and require a review of all the circumstances surrounding the subject property and related bankruptcies. All circuits grant in rem relief where the debtor has filed more than one bankruptcy if they find a scheme to stop the lender from exercising its rights against real property. Bankruptcy Code Section 362 (d)(4) provides that a creditor may request relief from stay if the court finds the filing was part of a scheme to delay, hinder, or defraud creditors involved in either (a) transfer of all or part of the interest in real property, (b) multiple bankruptcy filing affecting real property.

Different circuits take different approaches to apply these standards. The most recent case in the Second Circuit analyzing in rem relief is *In re McKenzie*, No. 19-10130, 2019 WL 1750910, at *4 (Bankr. S.D.N.Y. Mar. 25, 2019). This unpublished decision involved a serial filing debtor who had filed four bankruptcies, three of which were tactically timed days before a scheduled foreclosure sale. The debtor's previous cases were dismissed for not attending the creditors' meeting or failing to file information, as required under 11 U.S.C. § 521(a)(1). The debtor had pre-petition debt exceeding $700,000, without any payments towards the debt in years. The debtor also misled the court by stating he had filed one previous bankruptcy within the past eight years, when he had filed three. *Id.* The court reasoned the debtor had not made a good-faith attempt at prosecuting his bankruptcies, which demonstrated a clear pattern of repeat filings as part of a scheme to hinder, delay, or defraud and granted in rem relief was granted. *Id.*

The Third Circuit, however, takes one of the more pro-consumer positions when it comes to serial filings. For example, in *In re Olayer*, 577 B.R. 464, 468–69 (Bankr. W.D. Pa. 2017), the court held that the mere existence of "multiple bankruptcy filings do[es] not alone justify relief unless they are part of such a scheme because strategically timing a bankruptcy to stay foreclosure proceedings can be a legitimate tactic within a debtor's arsenal."

Nonetheless, more recently, one court within the Third Circuit held where a lender could show a transfer of ownership interest in real property without its consent, the court will grant relief because the "scheme … implie[d] a level of insidiousness and deceitfulness." *In re City of Pittsburgh Prop. Dev., Inc.*, 580 B.R. 130, 134 (Bankr. W.D. Pa. 2018) (granting in rem relief based on the debtor's transfers and inability to rebut the presumption of a scheme).

The CARES Act and its Effects on the SBRA and Consumer Bankruptcies

The most impactful event of 2020 is inarguably the COVID-19 pandemic. In an effort to aid those suffering from job losses and business closures, in March 2020, the U.S. government enacted the Coronavirus Aid, Relief and Economic Security (CARES) Act.

Even in times of relative strong economic growth, many who face financial hardship consider using protections offered by the bankruptcy process. With the economy facing a massive contraction, such a course of action is even more desirable. With that in mind, the CARES Act includes provisions to aid individuals and small businesses seeking relief granted by filing bankruptcy.

The SBRA

The Small Business Reorganization Act of 2019 (SBRA)[1] was signed on August 23, 2019, and took effect on February 19, 2020.[2] The SBRA enacted a new subchapter V for Chapter 11[3], and amended and/or affects various provisions elsewhere in the Bankruptcy Code, including rendering 24 paragraphs, subsections, and sections of Chapter 11 to be inapplicable in SBRA cases,[4] of which six paragraphs, subsections, and sections may become re-applicable if the court "for cause orders."[5]

The CARES Act includes provisions to aid individuals and small businesses seeking relief granted by filing bankruptcy.

The CARES Act passed a month after SBRA took effect, and it expanded the group of businesses that can benefit from the SBRA, replacing the term "small business debtor"[6] with "debtor"[7] and increasing the Subchapter V debt threshold to $7.5 million.[8] This provision only applies to cases filed after the CARES Act was signed into law on March 27, 2020, and expires one year after the enactment of the CARES Act.

The $7.5 million limit is an aggregate of noncontingent liquidated secured and unsecured debts as off the date of filing, but excludes debts owed to insiders or affiliates. To qualify under the SBRA, at least half of the debt must be derived from commercial or business activities. If one is a group of affiliated debtors with more than $7.5 million in secured and unsecured debts (excluding debts owed to insiders or affiliates), they are ineligible for filing under SBRA.

The Bankruptcy Code essentially requires that, absent consent, a senior class must be paid in full before junior classes of creditors and equity holders can receive any money or property under a Chapter 11 plan. However, the SBRA allows debtors to confirm a plan over the opposition of an impaired class of creditors if the plan "does not discriminate unfairly, and is fair and equitable, with respect to each class" of creditors that hasn't accepted the plan.[9]

[1] The SBRA "is largely derived from [the] recommendations" of National Bankruptcy Conference (NBC) and American Bankruptcy Institute (ABI). H.R. Rep. No. 116-171, at 4 (2019).
[2] *See* Troutman Sanders' 2019 Year in Review for an in-depth analysis as to the SBRA and its effect on Chapter 11 of the Bankruptcy Code.
[3] 11 U.S.C. § 103(i).
[4] 11 U.S.C. § 1181(a).
[5] 11 U.S.C. § 1181(b).
[6] "Small business debtor" is defined in 11 U.S.C. § 101(51D).
[7] "Debtor" is defined in 11 U.S.C. § 101(13).
[8] 11 U.S.C. § 1182(1)(A).
[9] 11 U.S.C. § 1191.

Consumer Bankruptcy

When a debtor seeks protection under Chapter 13 of the Bankruptcy Code, they generally enter into a repayment plan lasting three to five years, depending on the debtor's "current monthly income."[10] The CARES Act expanded the scope of the exclusions from the definition of "current monthly income," and included payments "relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID–19)."[11] What this means is that the relief payments cannot be considered as a potential reason to force a three-year plan to extend to five, and also, debtors will be able to keep more money in their pocket during the pendency of their bankruptcy.

Pursuant to the CARES Act, debtors who filed their bankruptcy before the enactment of the Act and are experiencing, or experienced, financial hardship due to the pandemic can apply to modify the length of their plan to seven years. This will, in effect, also increase the amount of money a debtor will be able to keep in their pocket during the pendency of their bankruptcy by reducing the ongoing monthly payment amount.

Just like the amendments to the SBRA, the amendments that affect consumer bankruptcies expire after one-year.

[10] "Current monthly income" is defined in 11 U.S.C. § 101(10A).
[11] 11 U.S.C. § 101(10A)(B)(ii)(V).

CONSUMER CLASS ACTIONS

Courts Continue to Divide on Whether to Apply *Bristol-Meyers Squibb* to Putative Class Actions

In 2017, the Supreme Court held that a state does not have specific jurisdiction over claims brought by a nonresident plaintiff against a nonresident mass tort defendant. *Bristol-Myers Squibb Co. v. Superior Court,* 137 S. Ct. 1773, 1782 (2017) (*Bristol-Myers*). In the wake of this decision, circuit and district courts have varied in their willingness to extend that holding to consumer class actions. More specifically, courts divide on whether *Bristol-Myers* prevents the forum court from exercising personal jurisdiction over disputes brought by class members who have no connection to the forum state and whose claims against the nonresident defendant do not arise from the defendant's activities in the forum state.

In 2020, lower courts' application of *Bristol-Myers* has generally fallen into three categories: (1) the decision does not apply outside the context of mass tort cases, (2) specific jurisdiction over a defendant regarding potential class members' claims cannot be decided until class certification, and (3) the decision applies to class actions because the due process concerns presented in mass actions apply to nationwide class actions in federal courts. This article references examples of decisions made in 2020 that fall into these three categories.

In the first category, the Seventh Circuit affirmatively held that *Bristol-Myers* does not apply to nationwide class actions filed in federal court under a federal statute. *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 443 (7th Cir. 2020). In *Mussat*, an Illinois medical services corporation received two unsolicited faxes from the defendant that failed to include an opt-out notice required by the Telephone Consumer Protection Act, 47 U.S.C. § 227. Plaintiff filed a putative class action on behalf of customers nationwide who received similar unsolicited faxes. Relying on *Bristol-Myers*, the district court struck the class definition because absent class members would need to show minimum contacts between the defendant and the forum state when the defendant is not subject to general personal jurisdiction in the forum state.

The court found that the differences between mass tort actions and class actions render Bristol-Myers *inapplicable.*

The Seventh Circuit reversed the decision to strike the class definition because *Bristol-Myers* pertained to a mass tort action — not a class action. The court explained that "rules for class certification support a focus on the named representative for personal jurisdiction." It further held that "*Bristol-Myers* neither reached nor resolved the question whether, in a Rule 23 class action, each unnamed member of the class must separately establish specific personal jurisdiction over a defendant." For these reasons, the court found that the differences between mass tort actions and class actions render *Bristol-Myers* inapplicable.

In the second category, two circuit courts held that questions relating to absent class member jurisdiction must be decided at the time of class certification, and not before. In *Molock v. Whole Foods Market Group, Inc.*, the D.C. Circuit analyzed a putative nationwide class action by employees who claimed Whole Foods manipulated an incentive-based bonus program. *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 299 (D.C. Cir. 2020). Whole Foods moved to dismiss the nonresident putative class members' claims because the D.C. court lacked both general and specific personal jurisdiction over their claims. The district court denied the motion to dismiss and held that *Bristol-Myers* does not apply to class actions. The D.C. Circuit affirmed the decision, but on the grounds that ruling on personal jurisdiction at the pleadings stage was premature because putative class members "become parties to an action —

and thus subject to dismissal — only after class certification." Thus, *Bristol-Myers* should apply to class actions at the pleadings stage. Otherwise, hypothetical named plaintiffs would be entitled to extensive class discovery on claims over which the court may not have jurisdiction.

The Fifth Circuit took a similar approach in *Cruson v. Jackson National Life Insurance Company*, 954 F.3d 240, 252 (5th Cir. 2020). There, the court held that any decision relating to a court's jurisdiction over the claims of nonresident putative class members must be made at the time of certification. And a nonresident defendant does not waive its *Bristol-Myers* personal jurisdiction defense relating to absent class members if it fails to raise it in a Rule 12 motion since the defense does not become available until a class is certified.

In the third category, at least one district court found that *Bristol-Myers* applies to class actions and allows dismissals of such claims in a Rule 12 motion. In *Carpenter v. Petsmart, Inc.*, 441 F. Supp. 3d 1028, 1035 (S.D. Cal. 2020), a judge in the Southern District of California granted a motion to strike nationwide class allegations because the forum state did not have specific personal jurisdiction over a defendant for the claims of unnamed class members that would not be subject to specific personal jurisdiction for their own individual claims. The court explained that specific personal jurisdiction analysis is "defendant-focused, with an emphasis 'on the relationship among the defendant, the forum, and the litigation'" and "must arise out of contacts that the defendant himself creates with the forum state." Given that the claims at issue in *Carpenter* related to products sold nationwide, the mere sale of some products in California did not give the California district court specific personal jurisdiction over the claims of class members who lack any connection to California.

Given the continued variance in treatment of *Bristol-Myers* in circuit and district courts and the likelihood that the Supreme Court will eventually consider whether to extend its reasoning to nationwide class actions, practitioners representing nonresident defendants (*i.e.*, defendants over whom the forum state lacks general personal jurisdiction) should continue to raise a *Bristol-Myers* defense in nationwide class actions either at the pleading stage or in opposition to class certification where jurisdiction over nonresident class members can be questioned.

Consumer Class Actions: Increased Judicial Scrutiny of Proposed Class Action Settlements

This year saw continued judicial scrutiny of proposed class action settlements, an unsurprising shift following the amendment of Federal Rule of Civil Procedure 23 in 2018. Courts continue to grapple with Rule 23's new requirements for "fair, reasonable, and adequate" settlements, sometimes surprising class action practitioners with new views on what have been routine matters for many years.

In 2018, Rule 23 was amended to include explicit standards for class action settlements. The Rule now requires a court to confirm that a proposed settlement meets the following criteria:

(1.) the class representatives and class counsel have adequately represented the class;

(2.) the proposal was negotiated at arm's length;

(3.) the relief provided for the class is adequate, taking into account:

(a.) the costs, risks, and delay of trial and appeal;

(b.) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(c.) the terms of any proposed award of attorney's fees, including timing of payment; and

(d.) any agreement required to be identified under Rule 23(e)(3); and

(4.) the proposal treats class members equitably relative to each other.

Three important applications of Rule 23 turn on who will receive payment from the settlement. When deciding who should receive payment this year, courts have (1) reconsidered incentive payments to class representatives, (2) continued to scrutinize whether an identified *cy pres* recipient is proper, and (3) continued to scrutinize "clear sailing" provisions on attorneys' fees.

1. Courts reconsidered incentive payments to class representatives

Perhaps the most groundbreaking class settlement opinion in 2020 was the Eleventh Circuit's decision in *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020), in which that court held class representatives may not receive incentive payments. The panel reversed the district court's approval of a class action settlement because the settlement provided a $6,000 incentive payment to the class representative. The appeals court held that paying a representative for time and work in bringing a lawsuit are unlawful under two aged Supreme Court decisions: *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central RR & Banking Co. v. Pettus*, 113 U.S. 116 (1885). Those decisions highlighted the potential of these awards to create a conflict of interest between the class representative and other class members, and the Eleventh Circuit majority concluded that they are still good law, notwithstanding the "ubiquity" of incentive awards. While the court held an award of attorneys' fees and litigation expenses for the class representative is appropriate, it prohibited any incentive payments for "personal services and private expenses." The judge dissenting on this issue expressed concern that future class representatives will hesitate to bring class actions if they cannot expect compensation for time spent litigating the case.

Response to *Johnson* has been mixed. The District of New Jersey expressly disapproved of the Eleventh Circuit's reasoning and approved a settlement, including an incentive award of $5,000 for each plaintiff. *Somogyi v. Freedom Mortg. Corp.*, Civil No. 17-6546 (RMB/JS), 2020 WL 6146875 (D.N.J. Oct. 20, 2020). Relying on the "ubiquity" reasoning the Eleventh Circuit rejected, the District of New Jersey cited "substantial precedent" approving of these awards and stated it will continue to approve incentive awards until the Third Circuit or Supreme Court expressly prohibits them. By contrast, the Southern District of New York agreed with *Johnson*'s reasoning. *Hart v. BHH, LLC*, No. 15cv4804, 2020 WL 5645984, at *5 (S.D.N.Y. Sept. 22, 2020). That court called attention to incentive awards as "judicially forged," out of step with *Trustees* and *Pettus*, and called this issue one "deserving of congressional attention."

While *Johnson* may signal a major change in the payment of incentive awards in class settlements, it could also prove to be a lone decision going against the tide of well-entrenched court approval of these awards for many years.

2. Courts continue to scrutinize proper *cy pres* recipients

Courts this year also continued to carefully scrutinize the recipients of *cy pres* awards

within Rule 23's "fair, reasonable, and adequate" framework. Specifically, they focused on whether the *cy pres* recipient — whether a charity or another type of entity — has a hand in remedying the type of harm the defendant allegedly caused. In *Ward v. Flagship Credit Acceptance LLC*, No. 17-2069, 2020 WL 759389 (E.D. Pa. Feb. 13, 2020), the Eastern District of Pennsylvania denied approval of a proposed class action settlement in part because the parties did not explain why the identified *cy pres* recipient's mission "relates to or furthers the interests of the class members who were harmed by" the defendant's actions. That court further noted that the propriety of *cy pres* awards in general is uncertain since the case bringing the issue before the Supreme Court, *Frank v. Gaos*, 139 S. Ct. 1041 (2019), was not decided on those grounds. Moreover, some Supreme Court justices have expressed concern about whether these awards meet all of the Rule 23 requirements for class actions, casting them into further doubt.

3. Courts continue to scrutinize "clear sailing" provisions

Class settlements under Rule 23 must also be free of improper collusion, which could produce in an unfair settlement for the class members. In a clear sailing provision, a defendant promises not to object to class counsel's request of a certain attorneys' fee award. These provisions are not *per se* collusive, but they are widely considered to bring some element of collusiveness into the negotiations between class counsel and the defendant's counsel. To ensure a class settlement is "fair, reasonable, and adequate," a court must ensure that the settlement was not subject to undue collusion between the parties that might affect the rights of the class members.

The Ninth Circuit highlighted clear sailing provisions as sources of possible unfairness in *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2011). Since the 2018 amendments to Rule 23, California courts especially have expressed concern about these provisions affecting "fair, reasonable, and adequate" class settlements. In late 2019 and throughout 2020, California federal courts overwhelmingly cited clear sailing provisions as worthy of heightened scrutiny, but often found they were not the product of excessive collusion affecting the arm's length nature of the negotiations.

When crafting class actions settlements, class counsel and defense counsel should carefully consider the precedent of the circuit where the actions are pending. Ultimately, the court must conclude that every aspect of the settlement protects the rights of the class members, and the carve-outs from the settlement for class representatives, *cy pres* recipients, and class counsel must be fair and reasonable under the circumstances.

Ninth Circuit Holds Equitable Relief Not Available to a Class Seeking $32 Million

On June 17, 2020, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court's dismissal of a $32 million claim for restitution on behalf of a class of California plaintiffs. In *Sonner v. Premier Nutrition Corporation f/k/a Joint Juice, Inc.*, No. 18-15890, Slip Op. (9th Cir. June 17, 2020), the Ninth Circuit considered the applicability under diversity jurisdiction of the federal common law doctrine prohibiting equitable remedies — like restitution — when there was an adequate remedy at law, *i.e.*, damages.

Plaintiff Kathleen Sonner represented a certified class of plaintiffs against Premier Nutrition Corporation (Premier). Sonner sued Premier for falsely advertising Joint Juice as a dietary supplement beverage that supports and nourishes cartilage, lubricates joints, and improves joint comfort. Sonner contended that Joint Juice failed to provide its advertised health benefits. Sonner sought injunctive relief and restitution under the California's Unfair Competition Law (UCL) and California's Consumers Legal Remedies Act (CLRA) together with damages due to Premier's failure to correct the alleged CLRA violations. Sonner demanded a trial by jury.

The case was litigated for more than four years, including through class certification and summary judgment motion practice. On the eve of trial, Sonner made the strategic decision that she would rather ask the judge to award the class $32,000,000 as restitution, rather than having to persuade a jury to award that amount in damages. Accordingly, she sought leave to amend her

complaint to dismiss her damages claim. Premier opposed the motion under the "inadequate-remedy-at-law" doctrine because, without the damages claim, the proposed complaint failed to allege claims for restitution since an adequate legal remedy — damages — was available for the injury. After oral argument, the court allowed Sonner to amend her complaint and thereafter vacated the jury trial.

Premier moved to dismiss the $32 million restitution claim because the class had an adequate remedy at law — *i.e.*, damages. The district court agreed and dismissed the case. Sonner appealed.

On appeal, the Ninth Circuit considered whether the federal common law doctrine prohibiting equitable claims when an adequate legal remedy was available applied to the case. The court found that it did. Accordingly, Sonner was required to demonstrate that she lacked an adequate remedy at law before securing $32,000,000 in equitable restitution for the class. She could not make this showing. Sonner sought the same amount in restitution as she sought in damages on behalf of the class — $32,000,000. The court found that Sonner failed to show how the same amount of money for the exact same harm was inadequate. Hence, the district court correctly dismissed Sonner's class claims for equitable restitution on behalf of the class.

This case was important to class litigation since its holding dismissed class claims based on an inability to obtain equitable relief under federal common law due to the availability of an adequate remedy at law.

2020 Developments in Decisions Regarding Article III Standing

Ninth Circuit Holds All Class Members in Rule 23 Class Must Have Standing at Final Judgment to Recover Monetary Damages and Affirms Multimillion Dollar FCRA Jury Verdict

On February 27, 2020, the U.S. Court of Appeals for the Ninth Circuit issued its decision in *Ramirez v. TransUnion LLC*, a class-action case watched closely by consumer reporting agencies and other persons regulated by the Fair Credit Reporting Act (FCRA). In *Ramirez*, the court held for the first time that all class members of a class certified under Rule 23 must possess Article III standing at the time of final judgment in order to recover monetary damages.

The Ninth's Circuit's Ramirez *decision presents considerable implications for future class-action litigation.*

Background

In 2002, TransUnion launched a product intended to aid businesses with avoiding severe penalties for engaging in business with individuals identified by the government as posing a national security threat — *i.e.*, terrorists, drug traffickers, etc. TransUnion partnered with a third-party company to match consumer names with those appearing on the Treasury's Office of Foreign Assets Control (OFAC) list of Specially Designated Nationals (SDNs). The product searched the first and last names of consumers against OFAC's list of SDNs, and if the name was identical or similar, TransUnion placed an alert on the individual's credit report indicating the match. TransUnion adopted a policy of not disclosing OFAC matches to affected users.

Following a 2010 Third Circuit decision, finding the OFAC product was subject to the FCRA and in response to concerns expressed by government officials of consumer confusion regarding the label appearing on their credit reports, TransUnion adopted a new policy by which to communicate with consumers regarding the OFAC match. Starting in January 2011, when a consumer requested a consumer disclosure, TransUnion sent (1) a copy of their credit report omitting the OFAC alert; and (2) a separate letter notifying the consumer of the OFAC match, sent within one day of the credit report. TransUnion did not include a summary-of-rights form with the OFAC notice letter. By July 2011, TransUnion stopped this approach and sent credit reports displaying the OFAC alert to consumers.

Plaintiff Sergio Ramirez received the two aforementioned communications from TransUnion

when he requested a consumer disclosure after he learned of the OFAC alert while attempting to procure an auto loan. In February 2012, Ramirez sued TransUnion on behalf of a putative class of 8,185 individuals. Ramirez asserted FCRA claims against TransUnion for willful violations of sections 1681e(b) and 1681g. The district court later certified the class pursuant to Rule 23. Following a jury trial, the jury found in favor of the class on all claims, awarding $8 million in statutory damages and $52 million in punitive damages. TransUnion appealed to the Ninth Circuit.

Decision

TransUnion argued (in part) that the verdict could not stand because all class members, with the exception of Ramirez, lacked Article III standing. For the first time, the Ninth Circuit held that all class members must possess Article III standing in order to recover monetary damages in federal court. Previously, the court had addressed this issue only at earlier stages in class actions. Thus, the court determined that the primary question was whether each of the 8,185 class members possessed Article III standing to bring each of the three FCRA claims. The court concluded that they did.

The court first analyzed class members' standing to pursue their claim under section 1681e(b) of the FCRA. The class alleged that TransUnion failed to follow reasonable procedures to assure maximum possible accuracy when it collected the OFAC information using name-only searches and placed the inaccurate information on their reports without additional verification. TransUnion argued that in order to suffer a concrete injury under Article III, each class member must show that TransUnion disclosed their credit report to a third party. In the absence of disclosure to a third party, TransUnion argued that no injury occurred.

The court acknowledged the U.S. Supreme Court's finding in *Spokeo* that a statutory violation in and of itself is insufficient to confer standing and that a concrete injury is necessary in all cases. However, it went on to conclude that class members had nonetheless suffered a concrete injury under section 1681e(b). In support, the court cited (1) the severity of the nature of the inaccuracy; (2) the compounded risk by sharing the information with its third-party partner; and (3) the ease of availability of class members' reports to potential creditors and employers. Thus, the nature of the injury in *Ramirez* played a critical role in the court's standing analysis. According to the court's holding "a real risk of harm arose when TransUnion prepared the inaccurate reports and made them readily available to third parties, and certainly once TransUnion sent the inaccurate information to the class members and some class members' reports were disseminated to third parties." The court's language, therefore, acknowledges that third-party disclosure is still

required to successfully assert a 1681e(b) claim, barring the unique circumstances presented in *Ramirez*.

Likewise, the court found that class members had standing to pursue their two claims under section 1681g. Under those claims, the class members alleged that TransUnion failed to (1) disclose they were OFAC matches upon request of their credit reports (in violation of section 1681g(a)); and (2) provide a summary-of-rights form when it mailed the OFAC notice letter (in violation of section 1681g(c)(2)). According to the court, by sending a report without the OFAC alert and a separate OFAC notice letter without sufficient instruction for addressing the alert, TransUnion's "conduct posed a serious risk that consumers not only would be unaware that this damaging label was on their credit reports but also would be left completely in the dark about how they could get the label off their reports."

Post-*Spokeo* requirements for Article III standing continue to evolve. The Ninth Circuit's *Ramirez* decision presents considerable implications for future class-action litigation, especially as it pertains to claims under the FCRA. In light of the Supreme Court's prior treatment of Article III standing, this decision should be construed narrowly. Indeed, following the Ninth Circuit's denial of TransUnion's petition for rehearing or rehearing *en banc*, TransUnion filed a petition for a writ of certiorari in the U.S. Supreme Court on September 2, 2020. As of the time of writing, that petition is still pending.

Growing Trend of Courts Recognize "Class Member" Standing as a Significant Class Certification Hurdle: Fifth Circuit Decertifies FDCPA Letter Class with Observation That Class Presented Substantial Questions of Standing

In *Flecha v. Medicredit, Inc.*, the Fifth Circuit decertified a Fair Debt Collection Practices Act letter class and noted that the putative class "present[ed] substantial questions of Article III standing." In doing so, the Fifth Circuit became part of a growing trend of circuit courts raising significant questions as to whether a class can be certified when many members lack constitutional standing.

In *Flecha*, plaintiff Nina Flecha failed to pay for medical care that she received. To assist the medical care provider with debt collection, defendant Medicredit sent Flecha several collection letters. The collection letter at issue stated that, "[a]t this time, a determination must be made with our client as to the disposition of your account." Flecha sued Medicredit, alleging a class claim that Medicredit violated the FDCPA by sending her a letter with a false threat of legal action when the medical care provider never intended to sue her.

Flecha sought class certification, arguing that everyone who received the same collection letter similarly was falsely threatened with legal action. The district court granted class certification to all Texans who had received the same letter. On appeal, the Fifth Circuit decertified the class, finding that Flecha had not met the requirements for class certification.

To begin, the Fifth Circuit reasoned that Flecha failed to show that the claims of the class could be answered with common answers. To prove her claim, Flecha needed to show that Medicredit's letter threatened legal action, and, with respect to each class member, that the medical care provider did not intend to pursue legal action against that individual. The Fifth Circuit noted that Flecha did not provide any proof of the medical care provider's intent to pursue legal action, much less classwide proof. Accordingly, she failed to demonstrate commonality. The Fifth Circuit noted that, under the same reasoning, Flecha's class likewise failed to meet either the typicality or predominance requirements. Therefore, the Fifth Circuit reversed the district court's class certification order.

Due to decertification of the class, the Fifth Circuit noted that there was no need to separately decide whether the class lacked standing. However, the Fifth Circuit acknowledged that it had not yet decided whether standing must be proven for putative class members, and instead, it indicated that other circuits have done so. The Fifth Circuit cited *Denney v. Deutsche Bank AG* for the proposition that "no class may be certified that contains members lacking Article III standing." In *Flecha*, the class standing issue was significant because "there are undoubtedly many unnamed class members here who lack the requisite injury to establish Article III standing." The Fifth Circuit reasoned as follows:

> After all, the putative class sweeps in "all persons in Texas...who received a form collection letter" from Medicredit. As a result, the putative class inevitably includes people who received the letter, <u>but ignored it as junk mail or otherwise gave it no meaningful attention — and therefore lack a cognizable injury under Article III</u>. (emphasis added)

As such, while the Fifth Circuit did not dismiss the class claims for lack of standing (because it already had decertified the class, and thus, there were no class claims to dismiss), it strongly indicated that letters received but ignored are not sufficient to prove an injury under Article III standing.

This case is significant in two regards: (1) The Fifth Circuit has now joined other circuits in questioning whether a class can be certified when the named plaintiff has standing, but many class members do not, and (2) the Fifth Circuit recognized that a failure to read a letter precludes the recipient from having standing to bring an FDCPA claim based on that same letter.

Pennsylvania Federal Court Finds Lack of Article III Standing in Purely Procedural FCRA Violation and Dismisses Putative Class

Many courts continue to weigh in on the concept of Article III standing and technical violations of statutes. In one such example, on July 27, 2020, the Eastern District of Pennsylvania confirmed that a plaintiff lacks Article III standing to state a claim for violation of the Fair Credit Reporting Act (FCRA) premised solely on the failure to receive a copy of the background report and the statute's procedurally-required summary of rights. In *Davis v. C&D Sec. Mgmt.*, No. No. 2:20-cv-01758-MMB, 2020 U.S. Dist. LEXIS 132291 (E.D. Pa. July 27, 2020), Davis applied for employment as a security guard with defendant and was ultimately denied for the position twice. She sued on behalf of a putative class claiming that C&D Security failed to provide her with notice, a copy of her report, and a summary of her rights under the FCRA.

Following Third Circuit precedent in the context of Article III standing, *see Finkelman v. Nat'l Football League*, 810 F.3d 187, 193 (3d Cir. 2016), the court held that Davis lacked an injury-in-fact since she ultimately became aware of her rights and timely brought suit against the employer. It confirmed the U.S. Supreme Court's maxim in its landmark *Spokeo* decision that a bare procedural violation, divorced from any concrete harm, cannot satisfy the injury-in-fact requirement of Article III.

Further, the court found that because Davis failed to establish her own standing, she may not seek relief on behalf of the putative class. Delaying the issue until class certification was held as futile given that additional facts or discovery would not cure the standing deficiencies.

This decision highlights the critical role of Article III standing in both the individual and class contexts — and reiterates that companies defending class actions should consider standing issues at the forefront of the matter rather than, in some situations, reserving them for the certification stage.

CONSUMER CREDIT REPORTING

COVID-19, the CARES Act, and CDIA Guidance

COVID-19 has affected all aspects of life and business, and credit reporting is no exception. Indeed, the CARES Act included amendments to the Fair Credit Reporting Act (FCRA) that require specific credit reporting of accounts that are affected by the COVID-19 pandemic. This reporting applies to any account where a consumer has been given an "accommodation" by the data furnisher during the covered period.[12]

An "accommodation" includes "an agreement to defer one or more payments, make a partial payment, forbear any delinquent amounts, modify a loan or contract, or any other assistance or relief granted to a consumer who is affected by the coronavirus disease 2019 (COVID-19) pandemic during the covered period."

The new amendment to the FCRA has three basic requirements: (i) any account that is current where a consumer has been given an accommodation must continue to be reported as current; (ii) if the account was delinquent before the accommodation, the account should be reported as delinquent during the accommodation period; (iii) if a consumer brings a delinquent account current during the accommodation period, the account should be reported as current. Importantly, these reporting requirements to do not apply to accounts that have been charged off.

The amendment to the FCRA appears in 1681s-2(a)[13] and has important implications for data furnishers:

First, the FCRA amendment not only applies to reporting of federally backed mortgages and student loans, which are specifically affected by other provisions of the CARES Act, it also applies to any creditor who offers an accommodation on privately owned debt. Indeed, the definition of accommodation in the amendment is not limited to those accommodations that are mandated by the CARES Act for federally backed debt.

Second, Section 1681s-2(a)(1) does not mandate credit reporting, only the accuracy of credit reporting. However, this is at odds with the amended language in subsection (F)(ii), which states (if there is a forbearance granted) that "the furnisher shall . . ." report. Section 4022 of the CARES Act requires that servicers of federally backed mortgage loans provide forbearances for up to 180 days upon request from consumers and affirmation that they've been affected by the coronavirus. The practical result is an affirmative credit reporting requirement.

Finally, there is no private right of action for consumers under 1681s-2(a)(1), but this section has not previously dictated such specific reporting requirements as those brought on by the CARES Act. This also presents the question of whether failure to report in accordance with 1681s-2(a)(1)(F) could render a response to a consumer's credit report "inaccurate" for the purposes of a reinvestigation under 1681s-2(b). The likelihood of private actions based on the CARES Act is high, considering similar situations where the lack of affirmative information in dispute responses has created sources of new litigation (e.g., litigation over the use of Compliance Condition Codes to notate accounts were in dispute). The "shall" language is also at odds with initial guidance from Fannie Mae, Freddie Mac, and the Veterans Administration (the entities which own the mortgages subject to the mandatory forbearances under the CARES Act) which instructed data furnishers to suppress credit reporting for loans in forbearance as a result of COVID-19. That guidance was eventually modified, but the confusion is emblematic of the uncertainty the CARES Act brought to the credit reporting space.

[12] The "covered period" runs from January 31, 2020 until either (i) 120 days after the enactment of the CARES Act or (ii) 120 days after the national emergency regarding COVID-19 is lifted, whichever is later. As of this writing, the COVID-19 national emergency is still in effect.

[13] The full citation to the amendment of the FCRA by the CARES Act is 15 U.S.C. § 1681s-2(a)(1)(F).

CDIA Guidance

The Consumer Data Industry Association (CDIA) has issued guidance elaborating on the three basic reporting scenarios contemplated in the CARES Act, and the best ways to report the accommodation on an account. The guidance walks through the details of the three reporting scenarios under the CARES Act's FCRA amendment: (i) an account that was current before the accommodation must remain current; (ii) a delinquent account with an accommodation is reported as delinquent; and (iii) a delinquent account brought current during an accommodation period is then reported as current.

As is often the case with statutory amendments, the language of the CARES Act did not explicitly instruct data furnishers on what Metro II codes to use in reporting accommodations. This is where the CDIA stepped in. This guidance was particularly important as it relates to Special Comment Codes (SCC), which are the primary data point for reporting the "accommodation" required under the CARES Act.

In particular, two SCCs are at issue: "CP" (forbearance) and "AW" (natural or declared disaster). Per the CDIA's Credit Reporting Resource Guide (CRRG), the SCC of "AW" is to be used when an account has been affected by a natural and/or declared disaster.[14] The COVID-19 pandemic qualifies as a natural/declared disaster, making the reporting of "AW" appropriate. The SCC of "CP" is to be used when a consumer, for any reason, is given a forbearance.[15] Per the CRRG, "[f]orbearance is a period of time during repayment in which a borrower is permitted to temporarily postpone making regular monthly payments." *Id.* Providing certain types of accommodations to borrowers pursuant to the CARES Act would make reporting "CP" appropriate – however, not all of the accommodations contemplated by the CARES Act would make reporting "CP" appropriate (e.g., a loan modification that reduces regularly monthly payments, but does not postpone payments).

While there is no private right of action under Section 1681s-2(a), the statutory language includes affirmative "shall" report language that could lead to scrutiny from federal and state regulators if not carried out accurately. Additionally, the California Consumer Credit Reporting Agencies Act, which is not preempted by the FCRA, provides borrowers with a private right of action for inaccurate credit reporting, without requiring the submission of either a direct or indirect dispute before having a viable claim.

[14] See CRRG FAQ 58
[15] See CRRG FAQ 45

Looking Forward

While much of the action in the credit reporting space this year has been focused on the CARES Act and the effects of the pandemic, 2021 is likely to bring upon the next chapter, when the accounts given accommodations under the statute return to their normal status. In the mortgage context, for example, the industry is likely to see many accounts with large outstanding amounts due, and the reporting of those accounts in light of the CARES Act's clear intention to protect consumers may present challenges for data furnishers.

Litigation Updates

FCRA new case filings increased notably in 2020. In fact, WebRecon recently stated the FCRA is the only statute to have increased filing every year in recent history, with its statistics showing a 5.3% increase in new FCRA filings in 2020 compared to 2019 based on a total of 5,223 FCRA lawsuits being filed in 2020.

Furnisher Litigation

With this increase, we have seen new (and sometimes misplaced) theories advanced by plaintiffs' counsel. Below we will discuss some of the more common fact patterns raised in recent FCRA cases, including disputes based on: (1) reporting a non-zero scheduled monthly payment on a paid off and/or closed account; (2) the reporting of a delinquent payment status on paid off accounts; and (3) the continued reporting of an account in dispute notation when a consumer purportedly no longer disputes how their account is being reported. Each of these theories, as well as recent decisions, are discussed below.

Account No Longer in Dispute

Perhaps the most paradoxical of the new trend of FCRA cases is the "no longer in dispute" theory. Under this fact pattern, at some point in the past the consumer disputes the reporting of an account with the furnisher and/or a CRA. Adhering to the requirements of Section 1681s-2(a)(3) of the FCRA, the furnisher then reports the account as disputed with an appropriate Compliance Condition Code (CCC).

There is nothing new or novel to this point, but here is the twist – at some point the consumer claims to no longer dispute their reporting. Then, despite failing to notify the furnisher that they no longer dispute the reporting, the consumer *disputes that the account is reporting as disputed* with a CRA. When the furnisher does not remove the CCC to report the account as disputed, presumably because the consumer never advised the creditor that the account is no longer disputed, the consumer sues under Section 1681s-2(b) of the FCRA. Plaintiffs in these cases allege the furnisher failed to conduct a reasonable investigation of the dispute based on the continued reporting of the account as disputed.

Several recent decisions have rejected this theory. In *McGee v. Equifax Info. Servs., LLC*, the court held that when a furnisher receives a dispute regarding the accuracy of the information it is reporting, it is required to retain the disputed notation on the account until the consumer "directly tell[s] the furnisher that it no longer disputes the debt." No. 1:18-cv-04144-MHC-CMS, 2019 U.S. Dist. LEXIS 111356, *7-8 (N.D. Ga. Mar. 19, 2019), report and recommendation adopted, 2019 U.S. Dist. LEXIS 110666 (N.D. Ga. Apr. 9, 2019).

Similarly, in *Roth v. Equifax Info. Servs., LLC*, the court dismissed the plaintiff's Section 1681s-2(b) claim because "[p]laintiff never directly told [the furnisher] that it no longer disputed the debt, and therefore [the furnisher] is required under FCRA to retain that disputed status." No. 2:16-cv-04325 JWS, 2017 U.S. Dist. LEXIS 75977, *9 (D. Ariz. May 17, 2017).

Following *Roth* and *McGee*, the plaintiffs' bar has begun trying to distinguish those decisions on the basis that the plaintiffs in those cases disputed their reporting directly to a data furnisher, not directly to a CRA. However, two recent decisions issued by the court that decided *McGee* address and strongly reject this exact argument. *See* Non-Final Report and Recommendation, *Natosha Briscoe v. Equifax Information Services, LLC*, et al. (N.D. Ga., Oct. 27, 2020). *See also*, Non-Final Report and Recommendation, *Sommer Foreman v. Equifax Solutions, LLC, et al.* (N.D. Ga., Nov. 10, 2020). However, plaintiffs in both cases have filed objections to the Report and Recommendation, which has not been address by the court as of this writing.

The Settles *court noted that the plaintiff did "not allege that any creditor was misled by the information reported and the Court finds it implausible that a creditor would be misled."*

While the "no longer in dispute" theory has been rejected by several courts, we continue to see this fact pattern repeated, usually in highly generic, recycled complaints. Demonstrating this development, the magistrate judge in *Briscoe* expressed skepticism of these claims, pointing out numerous "substantively similar, if not identical . . . multiple other complaints that Plaintiff's counsel has recently filed in this Court on behalf of his clients, alleging substantially identical 'facts.'"

Delinquent "Current" Payment Status on Paid Off Accounts

The past year also saw an influx of complaints alleging that the "current pay status" reported by a furnisher was inaccurate when an account that was delinquent when closed is reported with a historical delinquency status. The apparent ambiguity relied upon for this theory stems from the CRRG's direction regarding the Payment Rating code. The CRRG states, "[t]he Payment Rating contains a code that properly identifies whether the account was current, past due, in collections or charged off prior to the status and within the current month's reporting period."

The common fact pattern under this theory involves a delinquent account that is paid off while the account is still delinquent. Accordingly, the furnisher reports the current status as Account Status 13: Paid or Closed account/zero balance. The furnisher is also required by the CRRG to report a Payment Rating. Therefore, the furnisher reports the prior status within the current reporting period – that the loan was delinquent before being paid in full. However, the consumer then disputes the reporting to a CRA, claiming the "current account status" shows their account as delinquent when it has been paid in full.

For example, in *Settles v. Trans Union, LLC*, No. 3:20-cv-00084, 2020 U.S. Dist. LEXIS 220341 (M.D. Tenn. Nov. 24, 2020) the plaintiff was overdue on his account by 120 days when his account was closed. His credit report showed that his account was closed, and the account balance was $0. However, the pay status reflected 120 days past due. Plaintiff brought suit, claiming that this was materially misleading because the account could not be past due, while also having a $0 balance. The district court for the Middle District of Tennessee held the reporting was not inaccurate or misleading. The court noted that it must look at the accuracy of the report as a whole, taking into account relevant context. The court also listed several cases holding that reporting historical data is not inaccurate, and applied that principle to this case.

Additionally, the court took pains to distinguish *Settles* from *Macik v. JP Morgan Chase Bank, N.A.*, No. 3:144-cv-0044, 2015 WL 12999728 (S.D. Tex. May 28, 2015), report and recommendation adopted, 2015 WL 12999727 (S.D. Tex. Jul. 31, 2015). The *Settles* court found that although the court in *Macik* held that the report at issue was misleading, that was not applicable to *Settles*. The difference being the loan in *Macik* had been paid in full before the account closing, while in *Settles* the loan was never paid off - instead the plaintiff defaulted. In finding that the report was not misleading, the *Settles* court noted that the plaintiff did "not allege that any creditor was misled by the information reported and the Court finds it implausible that a creditor would be misled." The court then granted a motion to dismiss.

The district court for the District of Arizona faced a similar situation in *Gross v. CitiMortgage, Inc.* The plaintiff also had an account that was charged off after being 180 days or more past due. "CitiMortgage reported a balance of $38,010 that was over 120 days (or over 180 days, depending on the date of the report) past due each month from August 2013 to March 2018, then a zero balance beginning in April 2018 when the balance was charged off." The court relied on the technical

accuracy of the report, stating that because CitiMortgage had accurately reported each amount, the dates, and even that the plaintiff disputed the information, CitiMortgage had complied with the FCRA as a matter of law. This case is currently on appeal, so stay tuned for how the Ninth Circuit resolves this issue.

These decisions underscore that the inclusion of accurate historical account information on credit reports is allowable and not misleading, even when the current account information is different than the historical information, and may even appear contradictory on its face.

Non-Zero Scheduled Monthly Payment on Charged-Off or Paid and Closed Account

Courts also considered numerous cases throughout 2020 about whether reporting a non-zero scheduled monthly payment on a charged-off or paid and closed account is inaccurate or incomplete under FCRA. Jurisdictions are seeing a large uptick in suits based on this theory, often with numerous suits being filed by the same law firm against the same creditor.

For example, in *Rider v. Equifax Info. Servs. LLC*, No. 2:19-cv-13660, 2020 WL 2572270 (E.D. Mich. May 21, 2020), plaintiff obtained her credit report and allegedly noticed a tradeline indicating a $151 monthly payment due on an account that had been paid off and closed. Rider disputed the tradeline, arguing that because the account was paid off and closed, the monthly payment due should be reported as "$0." After her creditor allegedly failed to provide her with the results of its investigation and to update the purportedly inaccurate information, plaintiff filed suit against her creditor. The creditor subsequently filed a motion to dismiss.

Before ruling on the creditor's motion to dismiss, the court summarized four (out of eight) decisions from 2020 by the Eastern District of Michigan addressing similar motions brought by the same creditor against plaintiffs represented by the same counsel. The court explained that two judges in the district had "found the plaintiff's allegations about the non-zero tradeline made it plausible that the tradeline was 'inaccurate or incomplete' under the FCRA." *See Lawson v. Mich. First Credit Union*, No. 20-cv-10460, 2020 WL 2131805 (E.D. Mich. May 5, 2020); *Tillman v. Equifax Info. Servs., LLC*, No. 19-12860, 2020 WL 249004 (E.D. Mich. Jan. 16, 2020). However, two judges in the district had "found that the plaintiff's evidence would not permit a reasonable jury to find the tradeline inaccurate or incomplete" under the FCRA. See *Euring v. Equifax Info. Servs., LLC*, No. 19-cv-11675, 2020 WL 1508344 (E.D. Mich. Mar. 30, 2020); T*hompson v. Equifax Info. Servs., LLC*, No. 2:18-cv-12495-TGB, 2020 WL 806032 (E.D. Mich. Feb. 18, 2020).

The court explained that in *Euring* and *Thompson*, the judges granted the creditor's motion for summary judgment because "the tradelines indicating a non-zero monthly payment amount included clarifying information – a denotation of 'historical' or 'closed' – that made it unreasonable to find the non-zero amount inaccurate or incomplete." However, in *Lawson* and *Tillman*, the judges denied the creditor's motions to dismiss because "the plaintiffs' complaints did not state whether the tradeline had additional clarifying information and so it was plausible that the non-zero amount was unadorned and thus was inaccurate or incomplete."

In *Rider*, the court found that tradelines were reported accurately and granted the creditor's motion to dismiss. No. 2:19-cv-13660, 2020 WL 3036337 (E.D. Mich. June 5, 2020) ("Opinion and Order Granting Defendant's Motion to Dismiss"). The court held the tradelines were not inaccurate or incomplete under the FCRA as they included clarifying language that the account had a $0 balance, was closed on a certain date, had an account status of "closed" or "paid account/zero balance."

These decisions emphasize the importance of including clarifying information when reporting a monthly payment due on a tradeline for an account that has been charged-off or paid and closed. Moreover, courts are likely to deny early dispositive motions as a plaintiff's allegations regarding a non-zero monthly payment on a charged-off or paid and closed account, without any clarifying information, raise a plausible claim that, if true, could demonstrate the tradeline is inaccurate or misleading under the FCRA.

Consumer Reporting Agency Litigation

In January 2020, the Eleventh Circuit in *Williams v. First Advantage LNS Screening Solutions* affirmed a $250,000 compensatory damages award and reduced a $3.3 million punitive damages award to $1 million in an individual mixed-file claim brought pursuant to section 1681e(b) of the FCRA. The plaintiff sued First Advantage in connection with twice attributing the criminal background information of another individual with a similar name to the plaintiff. To attribute such information to an individual with a similar name, First Advantage employees preparing the report were required to attempt to locate three identifiers, such as name, date of birth, Social Security number, or a driver's license number. Where the employee was unable to locate a third identifier, he or she must note that they were unable to do so and obtain approval by a supervisor before releasing the report.

The court's decision addressed a basic legal requirement in the background screening industry: connecting background information to common names. The court recognized that despite having a policy requiring use of a third identifier for screenings involving common names absent supervisor approval for use of two, evidence in the case indicated this did not occur in common practice. The court further pointed out that First Advantage failed to follow its own procedure during the preparation of both reports related to the plaintiff. Based on this evidence, the Eleventh Circuit affirmed the district court's denial of First Advantage's motion for judgment as a matter of law with respect to willfulness under the FCRA. As evidenced by *Williams*, challenges to matching procedures utilized by the background screening industry continue to be an area of focus in FCRA litigation.

In December 2020, the Supreme Court granted cert in *Ramirez v. TransUnion LLC*, which is a class action case that involves a product offered by TransUnion to identify consumers with names designated by the Department of the Treasury's Office of Foreign Assets Control (OFAC) as posing a national security threat. In the district court litigation, class members argued at trial that TransUnion failed to follow reasonable procedures to assure the maximum possible accuracy of the warning due to the name-only search used to establish matches. A jury ultimately awarded a $60 million verdict to the class members, finding that TransUnion failed to comply with certain disclosure requirements under the FCRA. TransUnion appealed on various grounds, including that many of the class members lacked Article III standing.

On appeal, the Ninth Circuit held that "every member of a class certified under Federal Rule of Civil Procedure 23 must satisfy the basic requirements of Article III standing." The court went on, however, to rule that a "material risk of harm" was sufficient to confer standing to each class member. The "material risk of harm" for over 75 percent of class members was an internal report at Trans Union that was not disclosed to any third party. The Ninth Circuit held that "a real risk of harm arose when TransUnion prepared the inaccurate reports and made them readily available to third parties," even though the first time many class members will have known they were injured at all will be when they receive a check in the mail. The class representative's factual allegations contrasted with those of the vast majority of the class, as his report had purportedly been disclosed to a third party and resulted in an adverse decision (not being able to purchase a car).

The issue now presented to the Supreme Court is "whether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered." Troutman Pepper will continue to monitor for developments in the Supreme Court.

Federal FCRA Preemption

Preemption by the FCRA of state laws and regulations governing credit reporting is likely to be an ongoing issue as states respond to the pressures of COVID-19 and its effect on consumers.

For example, in *Consumer Data Industry Association v. Frey*, the district court for the District of Maine found that two 2019 amendments passed by the legislature amending the Maine Fair Credit Reporting Act were preempted by the federal FCRA. The first amendment, titled "An Act Regarding Credit Ratings Related to Overdue Medical Expenses,"

restricted when medical debt can be included in a consumer report. The second amendment, titled "An Act to Provide Relief to Survivors of Economic Abuse," required consumer reporting agencies to reinvestigate, and possibly remove, debt that was the result of economic abuse.

The trade association's main argument was that the two amendments are preempted by 15 U.S.C. § 1681t(b)(1)(E), because this language "encompass[es] all claims relating to information contained in consumer reports, with the phrase relating to information contained in consumer reports effectively acting as a description of the subject matter § 1681c regulates." The state argued that the language is much narrower, and that § 1681c should be read as a list of limited subject matters, and preemption should only apply when a state's law or regulation is in one of those limited areas.

The court sided with the trade association, finding that "the amended language and structure of § 1681c(a) and § 1681t(b) reflect an affirmative choice by Congress to set uniform federal standards regarding the information contained in consumer credit reports." The case is currently on appeal, so expect to see the issue of federal preemption continue to be relevant as the pandemic drags on through the winter.

Several trade associations in Nevada did not have similar luck when a district court dismissed a lawsuit filed against the Commissioner of the Financial Institutions Division of the Nevada Department of Business and Industry and the Nevada Attorney General. In *American Financial Services Association, et al. v. Sandy O'Laughlin and Aaron D. Ford*, Case No. 2:19-cv-01708 (D. Nev.), the trade associations sued in response to a 2019 Nevada law that allowed an applicant for credit who had no credit history, but was married, to request the creditor deem the applicant's history to be identical to the applicant's spouse. The lawsuit argued the law – SB 311 – was preempted by the FCRA and Equal Credit Opportunity Act, violated privacy rights and data security rules, and was generally impossible to comply with. In dismissing the case, the court found the matter was not ripe for judicial review, because the trade groups had not shown that violation of the new law was imminent and the lack of enforcement undercut the purported need to further regulation. However, given that the court did not address the substantive issues raised, there is likely to be continued litigation over the law.

The Consumer Financial Protection Bureau and the Federal Trade Commission turned their attention to addressing recurring compliance issues.

Regulatory Updates

While COVID-19 added an interesting facet to credit reporting this year, it does not appear that the virus deterred the focus of federal regulators on FCRA compliance. Instead, both the Consumer Financial Protection Bureau and the Federal Trade Commission – the primary regulators entrusted to supervise and enforce the FCRA – turned their attention to addressing recurring compliance issues and discouraging repeat offenders.

Furnishers

The CFPB again emphasized the need for furnishers to have institutional policies and procedures in place to ensure the accuracy and integrity of information being reported. Notably, in its Supervisory Highlights[16] and Quarterly Consumer Credit Trends Report[17] released this fall, the CFPB highlighted the issues the agency continues to monitor, while also reiterating the fate that befalls furnishers who fail to comply with accuracy and dispute investigation requirements. As the entities furnishing information to consumer reporting

[16] *See Generally Supervisory Highlights, Vol. 22*, Consumer Financial Protection Bureau (Sept. 2020).
[17] *See Generally Quarterly Consumer Credit Trends, Payment Amount Furnishing & Consumer Reporting*, Consumer Financial Protection Bureau (Nov. 2020).

agencies play a vital role in the consumer reporting ecosystem, the CFPB's 2020 focus appears to be the deterrence of blatant habitual FCRA offenders. Significantly, where an entity's credit reporting policies and procedures were brazenly allowing repeated violations of the FCRA, the CFPB brought a suit the culminated in a $500,000 monetary penalty.

That furnisher, Afni, Inc., reached a settlement with the CFPB in November 2020 following the discovery of credit reporting issues, including allegedly inaccurate reporting of the date of first delinquency that the furnisher knew or had reasonable cause to believe was inaccurate; technical glitches resulting in mass misreporting of data; records used in completing investigation of consumer disputes; meeting of dispute response deadlines; handling of frivolous consumer disputes; and a lack of adequate policies and procedures.[18] Beyond financial penalties, the settlement terms required Afni to conduct monthly reviews of consumer disputes and responses to assess whether its handling of consumer disputes complies with the FCRA, Regulation V, and its own policies and procedures, as well as retain an independent consultant to conduct similar reviews.

Making a point of the findings in the Afni case, the CFPB clarified expectations on the reporting of delinquencies in its Supervisory Highlights, detailing the statutory obligation of furnishers to report the date of delinquency within 90 days, and specifying the period to be reported as delinquent. This recitation of duty was followed with a clear warning that failure of third-party debt collectors to "establish and follow reasonable procedures to obtain the actual [information] from the clients"[19] would prove detrimental and was poignantly followed with a note that one or more of the habitual violators eventually ceased operations, albeit no further explanation for the closure(s) was provided. In addition, CFPB examiners also noted that providing the charge-off date as the date of first delinquency, which is generally several months after the commencement of delinquency, was inaccurate. While that reporting seems beneficial to consumers, the CFPB's examination of that point nevertheless underscores their clear intent to enforce to accurate reporting.

[18] https://www.law360.com/articles/1332618/cfpb-settlement-shows-common-fcra-compliance-flaws.

[19] *See Supervisory Highlights, Vol. 22*, Section 2.1.2, Consumer Financial Protection Bureau (Sept. 2020).

Also noted in the CFPB's Supervisory Highlights was that recent examinations for direct and indirect disputes indicated that furnishers were failing to review "underlying account information and documentation, account history notes, or dispute-related correspondence provided by the consumer" in analyzing what reasonable investigative steps should next be taken. As an ominous forewarning, the CFPB pointed to inadequate staffing and corporate structures that created high daily dispute resolution requirements as reasons for the furnishers' shortcomings.

In continuing their focus on accuracy, the quarterly consumer credit reports trend explored the prevalence of actual payment information in consumer credit reporting. For consumers seeking credit, actual payment information plays a role in determining the credit products they are marketed and the terms of credit they receive, hence the CFPB's study on the topic. Focusing on credit furnishers, the study revealed that since 2012, there was an upward trend of furnishing actual payment data when it came to auto, student loan, and mortgage tradelines, with more than 90 percent of these tradelines containing actual payment information by March 2020. Also, the share of mortgage tradelines with actual payment data increased from less than 70 percent in 2012 to 95 percent in 2020. However, during the same period, the share of retail revolving and credit card loans with actual payment information significantly declined by more than half from its peak 88 percent in 2013 to 40 percent in 2020. While the FCRA does not require financial institutions include actual payment data information to credit reporting companies, the report does indicate that such information is being monitored closely by CFPB examiners and could be a signal of future scrutiny for furnishers.

To exemplify the enforcement of these policies, on December 22, 20202, the CFPB filed a consent order following its investigation into the credit reporting practices of a leading originator and servicer of nonprime auto loans and leases. Finding that between January 2016 and August 2019, the entity, which furnishes monthly credit information relating to the auto loans it services, allegedly violated the FCRA by furnishing credit information that it knew or reasonably should have known was inaccurate; failing to promptly update and correct information it furnished that it later determined was incomplete; failing to provide the date of first delinquency on certain delinquent or charged-off accounts; and failing to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of information provided to CRAs. Articulating the need to prevent incorrect, negative reporting, the CFPB entered a consent order requiring the auto lender to take proactive measures to ensure that such violations would not occur again and imposed a hefty monetary penalty of $4.75 million.

Likewise, the FTC also took aim at furnishers providing inaccurate information. Specifically, the FTC brought an action against a debt collection company that used the questionable tactic of "debt parking" to coerce debtors to pay them. The FTC alleged that the debt collector at the center of the suit obtained more than $24 million from consumers by placing highly questionable debts onto consumers' credit reports. Essentially, the consumer would access their credit report in connection with buying a car or home, opening a credit card, or seeking employment, only to find that a purported debt existed. Feeling pressured to pay off the debt to obtain the credit opportunity they were seeking, the consumer paid the debt even though the debt was likely not valid. Taking obvious concern with this practice, the FTC provided harsh settlement terms to deter similar practices. The settlement terms including the requirement that the company contact credit reporting agencies and request all debts reported by the company be deleted from consumers' credit reports. The FTC established that, despite the disruptions of the pandemic, harmful credit furnishing practices would not be tolerated.

The CFPB did provide some reprieve for furnishers in the form of a non-binding April 1, 2020 Policy Statement regarding credit reporting during COVID-19. While detailing the duty of furnishers to now report as current certain COVID-19 related loans as outlined in the CARES Act amendments to the FCRA, the CFPB also described its intent to provide regulatory relief by not enforcing the FCRA's statutory investigation timeframe against furnishers or consumer reporting agencies acting

in good faith. Key in this Policy Statement was the clear indication from the CFPB that they were aware of the difficulties and impediments to normal business operations presented by the pandemic and its resulting economic crisis. In promulgating this understanding, the CFPB encouraged furnishers and consumer reporting agencies (CRAs) to alleviate some operational stress by not investigating disputes submitted by credit repair organizations or those disputes it reasonably determined to be frivolous or irrelevant.

This Policy Statement was met with criticism, including from consumer advocates as well as state attorneys' general. To combat this, the CFPB provided a follow-up response clarifying that credit reporting agencies and furnishers are expected to investigate disputes as quickly as possible, but that exceptional times call for analysis of circumstances on an individual, case-by-case basis.

Nonetheless, while it appears that the CFPB may have provided respite for furnishers in dispute processing time, one overarching theme remains – accuracy of furnished information is, above all else, a priority.

Consumer Reporting Agencies

Regulators have been keeping a close eye on CRAs during the pandemic. On April 1, the CFPB issued a "non-binding general" policy statement acknowledging possible operational challenges facing CRAs, including with respect to their reinvestigations of consumer disputes. For instance, the CFPB advised it will not take any adverse enforcement or examination-related actions against a CRA that does not meet the 30-day investigation requirement under the FCRA if it makes a good faith effort to investigate disputes as quickly as possible, and its operations are affected by the COVID-19 pandemic. Moreover, if a consumer provides additional information that is relevant to the investigation of his or her dispute, and provides that information within 30 days of raising a dispute, CRAs will be allowed to investigate the dispute within 45 days of the dispute's report date instead of 30 days.

At the end of April, 21 state attorneys general (AGs) sent a letter to the national CRAs "to remind"

The CFPB encouraged furnishers and consumer reporting agencies to alleviate some operational stress by not investigating disputes submitted by credit repair organizations.

them "of their continuing obligation during the COVID-19 crisis to comply with" the FCRA and the AGs' previous agreements with the CRAs, including "CRAs' obligations to conduct meaningful and timely investigations of consumer disputes of credit information."

Legislative Updates

Federal Legislation

The House of Representatives again indicated a desire to move on credit reporting reform, passing several pieces of legislation, none of which ended up moving through the Senate.

H.R. 3621, the Comprehensive Credit Reporting Enhancement, Disclosure, Innovation, and Transparency (Comprehensive CREDIT Act) passed the House on January 29, 2020. It was a package of six smaller credit reform bills: H.R. 3642, the Improving Credit Reporting for All Consumers Act; H.R. 3622, the Restoring Unfairly Impaired Credit and Protecting Consumers Act; H.R. 3614, the Restricting Use of Credit Checks for Employment Decisions Act; H.R. 3621, the Student Borrower Credit Improvement Act; H.R. 3629, the Clarity in Credit Score Formation Act; and H.R. 3618, the Free Credit Scores for Consumers Act.

The package proposed a broad variety of extensive reforms, from directing the CFPB to set standards for accuracy and predictive value, providing a new right to appeal when consumers try to remove errors, limiting the length of time that adverse credit information remains on consumer reports, restricting the use of credit checks for employment

decisions, to directing CRAs to give consumers free copies of their credit scores that are used by creditors when consumers accesses their annual consumer report. H.R. 5332, the Protecting Your Credit Score Act was also quite broad. The bill provided for a single online portal that would give consumers unlimited free access to their credit information, including credit reports and scores. It also would have amended 1681ec, requiring CRAs to match a consumers social security number with the information in the credit report, if their social security number is not available, the CRA must use the full name, date of birth, current address, and one previous address. Periodic audits of CRAs' systems would also have been required on a schedule set by the CFPB. It also would have made changes to the dispute process – requiring furnishers to conduct an investigation when the consumer submits new information and requiring CRAs to provide more information to consumers for reinvestigations. Importantly, the private right of action under the FCRA would have been expanded, allowing consumers to seek injunctive relief and entitling them to attorneys' fees if the court grants the injunction.

The Disaster Protection for Workers' Credit Act was introduced in both the House and the Senate (S.3508 and H.R. 6370). The bill would have put a four-month moratorium on negative credit reporting. If people are facing the effects of COVID-19 beyond that, the length could be extended. Additionally, consumers would get free and unlimited access to their credit information for a year after the COVID-19 crisis. The House bill also included a provision preventing negative information from medical debt for the treatment of COVID-19 from impacting consumers' credit information.

On a similar note, H.R. 6470, the Medical Debt Relief Act was also introduced in the House. The bill would have amended the FCRA to enforce a one-year delay before medical debt could be reported on a consumer's credit report. It would also have removed fully paid off and settled medical debts from consumers' credit reports.

H.R. 7301, the Emergency Housing Protections and Relief Act, also passed the House on June 29, 2020. The bill provided for forbearance on multifamily mortgage loans, and when that forbearance is provided, the servicer of the loan could not report any adverse information to a CRA.

State Legislation

In response to COVID-19, state legislatures and administrations implemented changes that affect credit reporting.

California

California's financial relief package for its residents includes no negative credit reporting for anyone taking advantage of the relief. Residents using the programs related to COVID-19 will be protected from credit score changes – so missed payments and late payments will not be shared with CRAs. The Business, Consumer Services, and Housing Agency also issued guidance to financial institution,s encouraging them to offer payment accommodations – allowing borrowers to defer or skip payments or extend the payment due date –to avoid delinquencies and negative credit reporting because of COVID-19.

New York, New Jersey, Michigan, Montana

New York Gov. Andrew Cuomo issued an executive order about credit reporting in response to COVID-19. The New York Department of Financial Services then released guidance for New York-regulated mortgage servicers, encouraging them to give consumers no negative credit reporting of late payments for 90 days.

Following suit, other states, including New Jersey, Michigan, and Montana, took an approach similar to New York's. New Jersey announced that more than 40 federal and state-chartered banks, credit unions, and servicers committed to not sharing late or missed payments with credit reporting agencies for borrowers taking advantage of COVID-19 related relief. Michigan partnered with certain financial institutions to develop a voluntary plan protecting homeowners, which included no adverse credit reporting for borrowers seeking a 90-day forbearance. Montana prohibited credit reporting for non-payment, although the executive order only continued through April 24, 2020.

Illinois

Illinois took a more targeted approach. The Illinois Department of Financial and Professional Regulation encouraged lenders to offer forbearance on payments without interest and late fees, and to use a disaster code in conjunction with a deferment, which has a neutral impact on the consumer's credit. It also offered some relief for credit reporting affected by mortgages and student loans. The consumer must contact creditors directly and must monitor their credit through the pandemic. The department is also monitoring for compliance.

Pennsylvania

Pennsylvania implemented the "PA CARE Package," which included no adverse credit reporting for consumers accessing relief on consumer loans. It is aimed at financial institutions and banks, which must offer additional assistance to consumers in a number of areas (including expansion of small and medium business loans, 90-day window of relief from fees and charges, and a moratorium on foreclosure, eviction, or vehicle repossession for 60 days) in order to commit to the "PA CARE Package" initiative.

CDIA Guide Updates for 2020

In addition to the CARES Act guidance discussed earlier in this section, the CDIA recently updated its Metro 2 Formal e-Learning Course for data furnishers, and reiterated its commitment to providing support to data furnishers.

CYBERSECURITY AND PRIVACY

CCPA

Overview

On June 28, 2018, the California Legislature passed the California Consumer Privacy Act of 2018 (CCPA), an expansive new privacy law that creates obligations for many businesses that collect personal information about California consumers. The CCPA went into effect on January 1, 2020, and enforcement began July 1, 2020. The CCPA provides consumers access and control over their personal information and allows them to say, under certain circumstances, how organizations collect, use, and disseminate this data. More specifically, California provides its residents certain rights, including the right to access information, the right to delete information, and the right to opt out of the sale of their personal information.

Amendments

Over the course of 2019 and 2020, more than a dozen bills were introduced to amend the CCPA. To learn more about the amendments modifying the CCPA in 2019, go to https://www.consumerfinancialserviceslawmonitor.com/2019/10/california-governor-signs-ccpa-amendments-into-law/.

Late September 2020, California Governor Gavin Newsom signed a new bill into law amending the CCPA. Assembly Bill 713 establishes new exemptions for certain types of medical and health information. In particular, the amended law provides (1) further exemptions for de-identified patient information, (2) expanded consumer privacy notice requirements concerning de-identified patient information, (3) a research exemption, and (4) a limited exemption for Health Insurance Portability and Accountability Act of 1996 (HIPAA) business associates. To read more about these changes, check out our alert at https://www.troutman.com/insights/ccpa-amendment-further-harmonizing-with-hipaa-and-providing-additional-exemptions.html.

Note: *Governor Newsom also signed Assembly Bill 1281. This bill sought to extended exemptions for employment and business-to-business information until January 1, 2022; however, the bill's operation was contingent upon voters not approving the California Privacy Rights Act (CPRA). To learn more about the CPRA, continue reading below.*

Regulations

On August 14, 2020, California's Office of Administrative Law (OAL) approved the CCPA's regulations' final text. In October 2020, the California Department of Justice released a third set of proposed modifications to the regulations. The third set of proposed regulations would create the following notable changes:

- Add additional notice requirements and guidance to businesses collecting personal information offline from consumers so that the notice facilitates their awareness of the right to opt out.
- Clarify the requirements relating to the "Do-Not-Sell" button for submitting a request to opt out, providing that it "shall be easy for consumers to execute and shall require minimal steps to allow the consumer to opt out." To read the full notice, visit https://www.oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-notice-of-third-mod-101220.pdf.

Enforcement

On July 1, 2020, the California Attorney General Xavier Becerra issued a statement on the first day of enforcement for the CCPA — despite calls by businesses to delay enforcement due to the COVID-19 pandemic. Attorney General Becerra encouraged every Californian "to know their rights to internet privacy and every business to know its responsibilities." Troutman Pepper's privacy regulatory team identified several areas of enforcement likely to catch the California Office of the Attorney General's (OAG) attention, which arguably holds sole regulatory enforcement under the CCPA, at least until the CPRA comes into effect. Enforcement areas of the OAG will likely relate to:

- Businesses that fail to post a "clear and conspicuous link" on the business' internet homepage titled, "Do Not Sell My Personal Information," the absence of such a link will likely be the low-hanging fruit for the OAG when it comes to selecting initial enforcement targets.
- Companies with privacy policies failing to track CCPA requirements will present a red flag to the OAG that those companies are otherwise not meeting CCPA disclosure requirements. Such privacy policy deficiencies will make the company a prime target for a civil investigative demand and possibly an enforcement action, including notices that must be provided "at or before the point of collection."
- Service providers who are unaware and fail to routinely assess their operations to ensure that they do not behave in a manner or use downstream customer data (sent by "businesses" under the CCPA) in contravention of the service provider role.
- Businesses collecting children's personal information and health-related data. The OAG appears willing to follow the growing national trend of focusing on children's privacy and health-related data, previously expressing that enforcement will be "aggressive, early, [and] decisive."

To read more on the highlights provided above, check out Troutman Pepper's California Consumer Privacy Act Enforcement Series by visiting https://www.consumerfinancialserviceslawmonitor.com/2020/08/13935/.

CCPA Copycat Laws

Arizona

In Arizona, SB 1614 and HB 2729 are currently moving through committees. Much like the CCPA, SB 1614 provides certain individuals several rights, including the right of access, right of deletion, right of opt out, and a prohibition by businesses to discriminate against individuals exercising their rights under the bill. However, unlike the CCPA, SB 1614 does not provide a private right of action or specific notice requirements. Arizona's HB 2729 is also like the CCPA in that it allows for a right of access, right of deletion, right of portability, and the right of opt out. HB 2729 does not provide a private right of action, certain notice requirements, or a prohibition from businesses discriminating against individuals exercising their rights under the bill. HB 2729 provides additional rights to that of the CCPA, including the rights of rectification and restriction.

Illinois

In Illinois, several bills are in committee. HB 5603 is the most CCPA-like bill currently introduced in the state, as it provides all the same rights seen under the CCPA. SB 2263 differs from the CCPA in that it allows for additional rules relating to an individual's right of rectification, it does not provide a private right of action, and it also requires businesses to perform risk assessments. Notably, however, SB 2263 does not create opt-in restrictions for minors age 16 or less. SB 2330 is also under consideration, and it differs from the CCPA in that it does not provide limitations relating to opt-in rights for minors. It also offers additional rights, including a right of rectification, restriction, and requiring businesses to perform risk assessments.

Others

Other states working on their own "CCPA copycats" include Iowa, Maryland, Minnesota, New Jersey, and (again) Washington. Many of these proposed laws include consumer rights, such as the right to know personal information collected, the right to opt out of the sale of personal information, and the right to request the deletion of personal information.

CPRA

Just when organizations started to feel comfortable with CCPA, Californians voted the CPRA into law, which amends the CCPA by expanding consumer privacy rights and moving the CCPA closer in the direction of the EU General Data Protection Regulation (GDPR). Thus, CPRA is not a new law, but rather an expansion of the obligations and disclosures already mandated by the CCPA.

For those familiar with privacy legislation, many of the changes imposed by the CPRA will come as no surprise. Indeed, as with the CCPA, much of the CPRA is based on the Fair Information Practice Principles, which form the basis of many privacy

Troutman Pepper's compendium provides an overview of the operational impact of the CPRA on existing CCPA compliance frameworks.

laws, both globally and in the U.S. (*e.g.*, GDPR, Gramm-Leach-Bliley Act, and Fair Credit Reporting Act).

Troutman Pepper's compendium — available at https://www.troutman.com/insights/californians-pass-cpra-expanding-consumer-privacy-protections.html — provides an overview of the operational impact of the CPRA on existing CCPA compliance frameworks. It focuses on issues, such as notable updates to existing definitions, the addition of new consumer rights, modifications to existing CCPA rights, and newly introduced concepts (at least for the CCPA), including data minimization and limitations on the use of "sensitive personal information."

A copy of the CPRA text, as submitted to the Office of the California Attorney General on November 4, 2019, is attached at the end of the compendium for easy reference. It is assumed that those reading this compendium are familiar with the basic requirements of the CCPA. Readers can access the articles and resources published by Troutman Pepper relating to the CCPA by clicking on the links below.

Scope of the CCPA and Compliance Strategies

- "Calif. Privacy Law Takeaways From 9th Circ. Facebook Case," *Law360*, April 27, 2020.
- "INSIGHT: So the CCPA Is Ambiguous — Now What?" *Bloomberg Law*, June 14, 2019.
- "Is Your Business in Need of a CCPA Intervention," International Association of Privacy Professionals, July 2019.
- "Key Differences In Nev. And Calif. Data Privacy Laws," *Law360*, June 19, 2019.
- "Ill. Privacy Bill Is Not As Robust As Calif. Law," *Law360*, December 17, 2019.

Service Providers

- "Calif. Privacy Law Means New Approach To Vendor Contracts," *Law360*, September 27, 2019.

Implementing Regulations

- "INSIGHT: Five Reasons to Comment on Draft CCPA Regulations," *Bloomberg Law*, October 22, 2019.
- "CCPA Modified Draft Regulations: Two Steps Forward, One Step Back," *The Recorder*, February 10, 2020.
- "Calif. AG's Latest Privacy Law Revisions Miss Some Spots," *Law360*, March 19, 2020.

CCPA Notice and Cure Provision Relating to Data Breaches

- "INSIGHT: First CCPA-Related Case Foreshadows Five Issues," *Bloomberg Law*, February 10, 2020.
- "INSIGHT: FTC Report Offers Road Map to Mitigate CCPA Data Breach Class Actions," *Bloomberg Law*, March 5, 2020.

California Consumer Privacy Act Enforcement Series

- Enforcement Area No. 1: The Infamous "Do-Not-Sell" Button, July 14, 2020.
- Enforcement Area No. 2: Treating the CCPA Like a Check-the-Box Exercise, July 20, 2020.
- Enforcement Area No. 3: Service Providers, July 27, 2020.
- Enforcement Area No. 4: Businesses Collecting Children's Personal Information and Health-Related Data, August 3, 2020.
- Enforcement Area No. 5: Failing to Provide Adequate Notice at Collection, August 10, 2020
- Enforcement Area No. 6: OAG's Reaction to CPRA Referendum, August 17, 2020.

Updates on Federal Privacy Legislation

Over the past few years, lawmakers across the spectrum and a range of committees have offered their privacy proposals and bills, seeking to pass an expansive CCPA-style federal law; none have

gained significant traction or seen a vote. On July 28, 2020, U.S. senators asked to include a privacy bill in a COVID-19 stimulus package, but that attempt failed. Additionally, California Attorney General, Xavier Becerra gave a presentation in September on data security, privacy rights, and the CCPA before the U.S. Senate Committee on Commerce, Science, and Transportation. Presenters discussed the recently introduced Setting an American Framework to Ensure Data Access, Transparency, and Accountability Act (SAFE DATA Act). While the SAFE DATA Act does not address the highly contentious preemption issue, Becerra says that states need a privacy playbook, and not federal privacy legislation that "preempt smart, nimble privacy protections that let states meet the varying challenges coming[.]"

Information Security/Incident Response

The Working from Home Revolution

Not only has the COVID-19 pandemic transformed how we physically interact with the world around us, but the pandemic also changed the way we interact with the digital world. As we shift, so do the risks. Many public and private organizations released guidance for this new reality. For instance, the National Security Agency (NSA) released best practice guidelines this year for those working remotely during the pandemic. The guidelines provided information on "how to identify and mitigate personal network compromises to secure data and protect government furnished equipment when used for telework." While the guidelines were intended for government employees, the NSA shared that "the techniques listed provide valuable insight to prevent compromises on any network." The NSA divided its guidelines into the Compromised Personal Network Indicators and Mitigations CSI, and the Out-of-Band Network Management CSI. For leaders interested in further mitigating their organizations' cyber risks, we recommend reading our blog post at https://www.consumerfinancialserviceslawmonitor.com/2020/06/cisa-shares-5-ways-business-leaders-could-reduce-their-organizations-cyber-risks/.

OFAC Guidance

The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) published an advisory in October 2020, relaying that it is issuing sanctions against ransomware cyber actors and to those who provide material support in their endeavors. The advisory clarified that "[c]ompanies that facilitate ransomware payments to cyber actors on behalf of victims, including financial institutions, cyber insurance firms, and companies involved in digital forensics and incident response, not only encourage future ransomware payment demands[,] but also may risk violating OFAC regulations." OFAC recommends that financial institutions should implement a risk-based compliance program to mitigate sanctions-related exposure. To read our discussion on the advisory, go to https://www.consumerfinancialserviceslawmonitor.com/2020/10/ofac-warns-companies-about-facilitating-ransomware-payments/.

Changes to Data Breach and Security Law

California IoT Law

California's Internet of Things (IoT) law took effect January 2020. Codified at Cal. Civ. Code §§ 1798.91.04–1789.91.06, this law aims to protect IoT devices' security and any information in it. The law requires all IoT devices sold in California, no matter where they are manufactured, to be equipped with reasonable security features (1) appropriate to the nature and function of the device, (2) appropriate to the information it may collect, contain, or transmit, and (3) designed to protect the device and any information contained therein from unauthorized access, destruction, use, modification, or disclosure. The law defines "connected device" as "any device, or other physical object that is capable of connecting to the Internet, directly or indirectly, and that is assigned an Internet Protocol (IP) address or Bluetooth address." A device will be deemed to include a reasonable security feature if (1) the preprogrammed password is unique to each device manufactured, or (2) the device contains a security feature that requires a user to generate a new means of authentication before granting access to the device for the first time.

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

Similar legislation has been enacted in Oregon. Moreover, Congress recently passed the Internet of Things Cybersecurity Improvement Act (H.R. 1668), mandating the creation of baseline security standards for all federal government purchases of internet-connected devices.

Breach Notification Law(s): California, New York, Vermont, Washington, Other States

California

California residents recently passed the CPRA. Most of the CPRA's provisions will not take effect until January 1, 2023. Part of the CPRA contains an expanded definition of personal information for purposes of a private right of action for data breaches. This expanded definition includes email addresses when combined with a password that would permit access to an account. The CPRA also weakens the previously-allowed breach cure period, stating that the "implementation and maintenance of reasonable security procedures and practices pursuant to Section 1798.81.5 following a breach does not constitute a cure with respect to that breach," such that the business could avoid a private suit.

New York

The security and breach notification provisions of the New York Stop Hacks and Improve Electronic Data Security Act (SHIELD Act) went into effect in March 2020. The law broadened the scope of the breach notification requirement to "any person or business" that owns or licenses private information of a New York resident, not just to those that conduct business in New York state. Accordingly, anyone who owns or licenses computerized data that includes private information of a New York resident must "develop, implement, and maintain reasonable safeguards to protect the security, confidentiality, and integrity" of New York residents' private information. The law provides that a business will be compliant if it implements a "data security program" that incorporates a detailed series of administrative, technical, and physical safeguards. Businesses also comply with the SHIELD Act if they are already compliant with other regulations, including the GLBA, HIPAA, HITECH, or NYSDFS Cybersecurity Requirements for Financial Services Companies.

Vermont

Effective July 1, 2020, SB 110 amends Vermont's Security Breach Notice Act by expanding the definition of Personally Identifiable Information (PII) to include a name combined with a specific data element, such as an individual taxpayer identification number or biometric data. The law also expands the definition of information affected by a breach to include login credentials, such as a consumer's username and password. Further, the law permits substitute notice in limited circumstances, such as when the lowest cost of providing direct notice via writing, email, or telephone would exceed $10,000 or when the data collector lacks sufficient contact information.

Washington

HB 1071, effective March 1, 2020, expands the definition of personal information to include a name combined with a specific data element, such as a passport number, date of birth, or medical information. The law also shortens both the consumer and regulatory notice period to just 30 days. The prior notification period for affected consumers and the Washington state attorney general (if more than 500 state residents are notified) was within 45 days of discovering the breach.

SB 6187, effective June 11, 2020, amends the breach notification statute as it applies to state and local agencies by expanding the definition of "personal information" to include the last four digits of an individual's social security number. Therefore, state agencies now must notify a resident affected by a breach that compromises the resident's name, combined with a full or the last four digits of the resident's social security number.

Other States

Other states, including Illinois, South Carolina, Texas, Maine, and Washington, also amended their breach notification laws. The general trend in breach legislation proposals this year sought to establish shorter notice periods, expand the definitions of "personal information," and require reporting data breaches to the state attorney's general.

The general trend in breach legislation proposals this year sought to establish shorter notice periods, expand the definitions of "personal information," and require reporting data breaches to the state attorney's general.

Notable Litigation/Settlements in 2020

On August 5, 2020, parents accusing Disney, Viacom, Kiloo, and more than 10 other companies of violating parents' and children's privacy rights regarding information collected from children's video games sought court preliminary approval of a class settlement in three separate but coordinated actions — *McDonald et al. v. Kiloo ApS et al.*, Case No. 3:17-cv-04344; *Rushing et al. v. The Walt Disney Co. et al.*, Case No. 3:17-cv-0441; and *Rushing v. Viacom CBS Inc.*, Case No. 3:17cv-04492. All three settlements included stringent privacy protections and limitations on the use and collection of children's personal data; business practice requirements that exceed prevailing industry standards; and industrywide injunctive relief to thousands of popular children apps, including future apps aimed at children. Among other things, the settlements included requirements extending beyond the apps at issue to thousands of other apps containing certain software development kits (SDKs), as well as dozens of Disney apps. See https://www.consumerfinancialserviceslawmonitor.com/category/cyber-security-info-governance-privacy/.

In June 2020, in *Charles Brown, et al. v. Google LLC, et al.*, No. 5:20-cv-03664 (N.D. Cal. Jun. 2, 2020), a $5 billion lawsuit was filed against Google in a proposed class action, accusing the company of illegally invading the privacy of millions of users despite its use of "incognito" or private mode. The

complaint accuses the internet search company of pervasively tracking the users' internet use and collecting their web browsing information through applications and website plug-ins, including smartphone apps, regardless of whether users click on Google-supported ads. The complaint seeks at least $5,000 in damages per user for violations of federal wiretapping and California privacy laws. Very similarly, in July 2020, in *Anibal Rodriguez, et al. v. Google LLC, et al.*, No. 5:20-cv-04688, another putative class complaint was filed in the same court by the same plaintiffs' counsel against Google for violations of wiretapping, invasion of privacy, and collecting personal data of mobile device users via its Google Analytics feature and the Firebase SDK, regardless of whether users have opted out of being tracked in their devices' settings.

In July 2020, a class action and an emergency motion for a TRO was filed in *Samuel Acker, et al. v. Protech Solutions, Inc.*, No. 60CV-20-3858, in the Circuit Court of Pulaski County, Arkansas, involving an alleged failure to prevent a data breach for an unemployment website created in response to COVID-19. As a result of the pandemic, many self-employed and "gig economy" workers became unemployed. The Pandemic Unemployment Assistance (PUA) program in Arkansas was created, and a company was hired to maintain the website for those seeking aid under PUA. Instead, the plaintiffs alleged that the failure to comply with necessary cybersecurity requirements to secure claimants' personal information resulted in frozen accounts and exposure of approximately 30,000 PUA claimants.

In September 2020, the plaintiffs in a consolidated class action, in *In re: Yahoo!, Inc. Customer Data Security Breach Litigation*, No. 20-16633 (9th Cir), requested the Ninth Circuit to dispose of one person's appeal of the July 2020 approval of a $117.5 million settlement of the suit. The plaintiffs stated that the appeal was meritless and that "[o]ne serial objector should not be permitted to hold up the implementation" of the settlement for the other 194 million class members. The appeal came when the U.S. District Court for the Northern District of California, in *In re: Yahoo!, Inc. Customer Data Security Breach Litigation*, No. 5:16-md-02752, 2020 U.S. Dist. LEXIS 128727 (N.D. Cal. Jul. 20, 2020) finally approved the $117.5 million settlement of class claims of multiple data breaches experienced by Yahoo!, Inc. and included compensation to class members and business practice changes.

In September 2020, in *Darlin Gray v. Twitter, Inc.*, No. 20-1389 (W.D. Wash), a Twitter user alleged in a proposed class action that Twitter obtained telephone records by "fraudulent, deceptive[,] or false means" when phone numbers provided to Twitter were given with the belief that the users could maintain control over the company's use of their numbers via functions made available on its user-facing systems. The complaint alleged that Twitter "falsely assured Washington users that it would honor the privacy choices exercised by users" and seeks $5,000 for each instance in which it unlawfully obtained a Washington users' phone number.

In October 2020, *In re: Equifax, Inc. Customer Data Security Breach Litigation*, Case No. 17-md-2800, the Northern District of Georgia approved the $7.75 million settlement involving the 2017 data breach of Equifax. In 2017, Equifax suffered a data breach that potentially exposed the personal and financial information of about 147 million Americans, costing Equifax over $1.35 billion in losses. The breach involved consumers' information, including names, social security numbers, dates of birth, addresses, and driver's license numbers. The settlement included Equifax to spend $25 million over two years to enhance data security measures tailored to financial institutions. This settlement is separate from the $1.4 billion settlement Equifax faced in December 2019. Equifax will reserve $5.5 million to pay up to $5,000 to each financial institution for costs associated with fraud losses or the theft of customers' personal information. It will also pay as much as $4.50 for each payment card that generated an alert and $1,500 to each of 21 financial institutions listed as plaintiffs in the multidistrict litigation.

BIPA Litigation

The Illinois Biometric Information Privacy Act (BIPA) is the only biometric privacy statute with a private right of action. Since the enactment of BIPA in 2008, it has been a steady source of litigation. In the last

two years, hundreds of BIPA class action lawsuits were filed in Illinois state and federal courts, with new filings almost every week.

In March 2020, in *West Bend Mutual Insurance Company v. Krishna Schaumburg Tan, Inc.*, 2020 IL App (1st) 191834, the Illinois Court of Appeals granted a summary judgment motion in favor of an insured seeking coverage for a proposed class suit asserting technical breaches of privacy protections. The court held that a business is entitled to insurance coverage for allegations of violations of BIPA, even though the policy of insurance excluded coverage for violations of statutes. The court rejected the insurer's argument that the claim associated with violation of Section 15(d) of BIPA fell within the exclusion and found that the exclusion applied more to statutes regulating communication methods rather than the communication itself.

In May 2020, in *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617 (7th Cir. 2020), the Seventh Circuit Court of Appeals held that a plaintiff has an Article III standing to assert BIPA claims even if the plaintiff does not explicitly allege an economic loss or data breach. The Seventh Circuit acknowledged that the standard for injury-in-fact was different in Illinois state courts and federal courts. In reviewing the Supreme Court's decision under *Spokeo*, the court stated that an allegation of a failure to receive adequate disclosure or provide informed consent under BIPA is a concrete injury-in-fact and therefore meets standing requirements.

In September 2020, in *McDonald v. Symphony Bronzeville Park LLC*, 2020 IL App (1st) 192398, the Illinois Court of Appeals rejected a primary defense raised by the defendant-employer that the Illinois Workers' Compensation Act preempts BIPA. The suit involved an alleged violation of BIPA by requiring the employees to use fingerprint-based time clocks without providing notice, offering a publicly available retention policy, or obtaining the employees' written release. The employer moved to dismiss the complaint, arguing that the BIPA claims were barred by the Workers' Compensation Act, the exclusive remedy for employees to recover from employers for work-related injuries. The trial court denied the motion, and the appellate court affirmed the denial, holding that a claim under BIPA limited to statutory damages is not an injury compensable under the Compensation Act, and, therefore, the plaintiffs' claims were not preempted.

In November 2020, in *Hazlitt et al. v. Apple, Inc.*, Case No. 3:20-cv-00421, the U.S. District Court for the Southern District of Illinois remanded two of the three BIPA claims to state court, reasoning that the plaintiffs lacked standing because they did not allege that Apple's alleged violation harmed them. To have standing in federal court, the plaintiffs would have to allege that they suffered a

particularized injury-in-fact, not that Apple's software threatened generalized injury to the public. The court kept only one count for the collection of biometric information without the users' consent. The lawsuit, filed in May 2020 and the second biometric data privacy suit against Apple, alleged that the pre-installed Photos app on iPhones and other Apple devices included a facial recognition feature that collects and processes Illinois residents' biometric data, including children.

CCPA Litigation

In February 2020, the first CCPA case was filed in *Barnes v. Hanna Andersson LLC*, Case No. 20-cv-00812 (N.D. Cal. Feb. 3, 2020), now known as *In re Hanna Andersson and Salesforce.com Data Breach Litigation*. The complaint alleges that when Salesforce.com, a cloud-based software company, was infected with malware, hackers scraped customers' names, addresses, and credit card information and sold it on the dark web. While the original complaint did not allege specific CCPA claims, after the consolidation of related actions, the plaintiffs filed a consolidated amended complaint to directly allege causes of action under the CCPA on behalf of the California class seeking statutory damages. The complaint also seeks injunctive and declaratory relief, free credit monitoring, statutory and punitive damages, disgorgement and restitution, and attorneys' fees and costs. To learn more, visit https://news.bloomberglaw.com/securities-law/insight-first-ccpa-related-case-foreshadows-five-issues-5.

In March 2020, in *Robert Cullen v. Zoom Video Communications Inc.*, 5:20-cv-02155 (N.D. Cal. Mar. 30, 2020), Zoom Video Communications, Inc. was named as a defendant in its second putative class complaint in the Northern District of California for violations of privacy in Zoom's alleged sharing of users' personally identifiable information in their use of Zoom's videoconferencing platform. The class action raised claims under the CCPA and California's Unfair Competition Law and Consumer Legal Remedies Act. Then on April 24, 2020, the court granted the stipulation, which requested that seven other putative class actions be deemed related to the *Robert Cullen* action. In May, the court reviewed 15 actions, all alleging that Zoom violated privacy and consumer laws by sharing users' personal details with third parties. To read more, visit https://www.consumerfinancialserviceslawmonitor.com/2020/04/proposed-class-complaint-against-zoom-video-tests-newly-enacted-california-consumer-privacy-act/.

Other CCPA litigation actions based on data breach filed in 2020 include: *Fuentes v. Sunshine Behavioral Health Group LLC*, Case No. 8:20-cv-00487 (C.D. Cal. Mar. 10, 2020); *Albert Almeida, et al. v. Slickwraps, Inc.*, Case No. 2:20-at-00256 (E.D. Cal. March 12, 2020); *Rahman v. Marriott International, Inc.*, Case No. 8:20-cv-00654 (C.D. Cal., Apr. 3, 2020); *Gupta v. Aeries Software, Inc.*, Case No. 8:20-cv-00995-FMO-ADS (C.D. Cal., May 28, 2020); *Atkinson v. Minted, Inc.*, Case No. 3:20-cv-03869-JSC (N.D. Cal., Jun. 11, 2020); *Consolidated Ambry Genetics Cases*, Case No. 8:20-cv-00791 (C.D. Cal.).

In April 2020, in *Sweeney v. Life on Air, Inc. & Epic Games, Inc.*, Case No. 3:20-cv-00742 (S.D. Cal., Apr. 17, 2020), a putative class action was filed based on the alleged insufficient disclosures and failure to provide opt-out aspects of the CCPA. The lawsuit was filed against Life on Air and its parent company, a social networking application developer, for disseminating personally identifiable information to third parties for targeted advertising without allegedly providing the consumers any disclosures or opt-out options. Similarly, in *G.R. v. TikTok*, Case No. 2:20-cv-04537 (C.D. Cal., May 20, 2020), a class action was filed against Tiktok and its parent company ByteDance for allegedly disseminating biometric identifiers to third parties without providing users any disclosures about the application's collection of biometrics or the right to opt out. To read more, visit https://www.consumerfinancialserviceslawmonitor.com/?s=sweeney.

In May 2020, in *Shay v. Apple*, Case No. 37-2020-00017475 (San Diego Super. Ct., May 28, 2020), a California consumer alleged that Apple marketed gift cards with personal identification numbers, which are considered personal information linked with the purchasing consumer. Allegedly, the gift cards can be easily, electronically compromised by thieves. As such the plaintiff is challenging the scope of personal information under the CCPA.

In June 2020, in *Sean Burke, et al. v. Clearview AI, et al.*, Case No. 3:20-cv-00370-BAS-MSB (S.D. Cal. June 14, 2020), the plaintiff pled claims under the UCL premised on the alleged violations of the notice requirements under the CCPA. The plaintiffs claim that Clearview illegally scraped images, including images of their faces, from websites like Facebook and Instagram without providing notice or obtaining their consent. The plaintiffs claim that Clearview created a biometric template based on the information and sold the access to the database to third parties.

In June 2020, in *Bombora v. ZoomInfo*, Case No. 20-cv-365858 (Cal. Super. Ct. June 10, 2020), a competing business, engaged in market research involving the collection and sale of personal information, alleged violations of the CCPA by failing to provide notice to consumers that resulted in gaining an unfair advantage. The alleged infringement of the CCPA is intertwined with the claims of violation under the UCL.

In August 2020, in *Brekhus et al. v. Google LLC and Alphabet, Inc.*, Case No. 5:20-cv-05488 (N.D. Cal.), a class action was filed for the false advertisement that Google devices would not record conversations or process audio picked up by voice-activated hardware unless activated by the user. The complaint alleged violations under the CCPA for unauthorized access to private information when Google programmed the devices to record, retrieve, and process audio in homes when no one prompted the recording.

Regulatory

On April 23, 2020, the U.S. District Court for the District of Columbia approved Facebook's $5 billion settlement with the Federal Trade Commission (FTC), the largest penalty in history for violating consumer privacy. The settlement stemmed from alleged violations of the FTC 2012 settlement order, which prohibited Facebook from making misrepresentations about the security of consumers' personal information and deceiving users when Facebook shared the data of its users' friends with third-party app vendors. The settlement imposed new and noteworthy restrictions on Facebook's business operations and created "multiple channels of compliance." The settlement required Facebook, among others, to (1) restructure its approach to privacy from the corporate board-level down; (2) form an independent third-party privacy

committee; (3) work with a compliance assessor; (4) conduct a privacy review of every new or modified product, service, or practice; and (5) document and deliver to the FTC incidents when data of 500 or more users have been compromised. The settlement also imposed several other privacy requirements. To read more, visit https://www.consumerfinancialserviceslawmonitor.com/2020/05/court-approves-historic-ftc-facebook-settlement-giving-businesses-5-billion-reasons-to-reevaluate-privacy-programs/.

In July 2020, in *In the Matter of: First American Title Insurance Company*, Case No. 2020-003-C, the New York Department of Financial Services (DFS) filed a statement of charges against First American Title Insurance Company to initiate enforcement actions for violating cybersecurity regulation. Based on DFS's investigation, it found that since 2014, First American's document repository, containing sensitive personal information, assigned a document ID to each document and a corresponding URL, which anyone could access without login credentials. The documents were publicly accessible as long as anyone had a link and simply changed digits in the URL. The DFS found that more than 850 million records were accessible to anyone. DFS claims First American's IT department caught this vulnerability in December 2018 but did not take any meaningful action to remedy the vulnerability. This is DFS's first cybersecurity action.

On September 15, 2020, in *The People of The State of New York et al. v. Dunkin' Brands Inc.*, Case No. 451787/2019, the New York attorney general announced a settlement with Dunkin' Brands, Inc. after accusations that Dunkin' failed to take adequate measures to protect customer data from two data breach incidents in 2015 and 2018. In early 2015, hackers attempted to access Dunkin' customers' online accounts using usernames and passwords stolen through security breaches of unrelated websites. Dunkin' allegedly failed to conduct an adequate investigation into the breaches, despite being put on notice by a third-party developer. Dunkin' was alleged to violate New York's data breach notification statute, General Business Law § 899-aa, and various New York state consumer protection laws.

The $650,000 settlement agreement included that Dunkin' (1) notify customers impacted by the breaches; (2) reset the passwords for impacted customers; (3) reimburse customers for any fraudulent activity; (4) maintain safeguards to protect against future similar incidents, and (5) follow incident response procedures when an incident occurs. To read more, visit https://www.consumerfinancialserviceslawmonitor.com/2020/09/new-york-ag-announces-settlement-with-dunkin-regarding-data-breach-lawsuit/.

On November 9, 2020, the FTC announced settlement details relating to Zoom's security practices. As the pandemic made video conferencing "a daily fixture for business people conferring about trade secrets, doctors, and mental health professionals discussing sensitive patient information, kids keeping up with school work, and the rest of us sharing everything [else]," the FTC filed a complaint that Zoom allegedly engaged in deceptive and unfair practices. The settlement terms preclude Zoom from making misrepresentations on the privacy of its users and require Zoom to implement an information security program, including a security review for new software, a vulnerability management program, regular security training for employees, specialized training for developers and engineers, and independent program assessments by a third party.

DEBT COLLECTION

The most important development in the debt collection industry last year was the Consumer Financial Protection Bureau's long-awaited publication of the new debt collection rules.

CFPB Adopts New Debt Collection Rule

On October 30, 2020, the Consumer Financial Protection Bureau (CFPB) released its long-awaited final debt collection rule—also known as Regulation F (the Rule). The CFPB supplemented the rule on December 18, 2020 and both parts were adopted pursuant to the Bureau's authority under the Fair Debt Collection Practices Act (FDCPA). The Rule, in its entirety, becomes effective November 30, 2021.

The Rule is the first major update to the FDCPA since its enactment in 1977, and gives much-needed clarification on the bounds of federally regulated activities of "debt collectors," as that term is defined in the FDCPA, particularly for communication by voicemail, email, and texts. Specifically, the Rule directly addresses the following topics:

Telephone Call Frequency Limits

Under the Rule, a debt collector may not place more than seven telephone calls to a consumer within seven consecutive days in connection with the collection of debt, or within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt. *See* § 1006.14(b)(1). Further, under the rule, voicemails left for the consumer, including ringless voicemails, count as "calls" for purposes of calculating the call attempt limitation, as do limited-content messages left for consumers (see below). Calls excluded from the call attempt calculation include calls placed with prior consumer consent given directly to the debt collector, and that are returned by the collector within a period no longer than seven consecutive days after receiving that consent; calls that do not connect to the dialed number; and calls placed to certain professionals (like an attorney represented the consumer). *See* § 1006.14(b)(3).

The call frequency limits are not technically a bright-line rule, but rather establish a rebuttable presumption of violation if they are exceeded. Further, the Rule added commentary stating that even if the frequency limits are not exceeded, a debt collector could still violate the FDCPA if the natural consequence of another aspect of the debt collector's communications is to harass, oppress,

or abuse any person in connection with the collection of a debt. Specifically, Comment 14(b)(2)(i)–2 discusses how the presumption of compliance can be rebutted and includes a non-exhaustive list of factors that may rebut the presumption of compliance.

Limited-Content Messages

With regard to the Rule's definition of limited-content messages, a limited-content message must include the following information to qualify as a limited-content message: (i) a business name for the debt collector that does not indicate that the debt collector is in the debt-collection business; (ii) a request that the consumer reply to the message; (iii) the name or names of one or more natural persons whom the consumer can contact to reply to the debt collector, and (iv) a telephone number that the consumer can use to reply to the debt collector. *See* § 1006.2(j). While the final rule provides for a handful of additional, optional items that a collector can include in a limited-content message, *nothing else* can be included in the limited-content message for it to retain its status as a non-collection communication.

Unlike the proposed rule, released in 2019, the CFPB ultimately confined limited-content messages to voicemail only. *See* § 1006.2(j). Further, the final rule instructs that if a collector places a call to a consumer that results in a live connect with an unauthorized third-party, the collector should not leave any message (limited content or otherwise) and instead, simply state that they will call back another time.

Consumer's Ability to Set Restrictions

The Rule restricts the times and places during which a debt collector may communicate with a consumer, and a consumer does not need to use specific words or assert a time or place that is inconvenient for debt collection communications. Rather, these restrictions apply to any time or place that the debt collector *knows or should know* is inconvenient. Additionally, a consumer may designate certain means of communications as off-limits for debt-collection communications. The respect for the consumer's preferences is a common thread that is woven throughout the Rule.

Records Retention Requirements

The Rule includes provisions clarifying a debt collector's obligation to retain records evidencing compliance or noncompliance with the FDCPA and Regulation F. A debt collector must retain records beginning on the date it begins collection activity, and for three years after the debt collector's last collection activity on the debt. If the debt collector retains phone calls, they must be archived for three years after the date of the call. *See* § 1006.100.

Time-Barred Debt

The rule prohibits debt collectors from suing or threatening to sue consumers to collect a time-barred debt, which is defined as a debt for which the applicable statute of limitations has passed. The Bureau declined to finalize certain time-barred debt disclosures included in the proposed rule, and did not provide suggested disclosures, or a related safe-harbor provision, for notifying consumers that their debt is time-barred.

Model Validation Notice

In the proposed rule, the CFPB provided a model validation notice form which, if used, would create a safe harbor for debt collectors. The proposed validation notice is designed to protect debt collectors from a high volume of FDCPA lawsuits alleging that the validation letter violated the FDCPA in one way or another. The Rule ultimately ended up largely the same as the proposal—if a debt collector wants to take advantage of the safe harbor, it must have its collection notice mirror the model notice, subject to state law requirements.

Debt Parking/Delayed Credit Reporting

The Bureau finalized its proposal against debt parking, or the process of credit reporting the debt prior to communicating with the consumer. The final rule requires that debt collectors send a communication about the debt to the consumer. If that communication is in writing, the debt collector must wait a reasonable time (to ensure there are no deliverability issues) before it can credit report the account. The CFPB defined "reasonable time" as 14 days, regardless of delivery type.

Conclusion

In conclusion, the Rule serves as the most expansive and dramatic revision to the FDCPA in its history. Luckily for creditors, the CFPB also noted that it "declines to expand the rule to apply to first-party debt collectors who are not FDCPA debt collectors," and noted that "the Bureau did not solicit feedback on whether or how such provisions should apply to first-party debt collectors." Thus, creditors are, for now at least, unaffected by the revisions.

COVID-19 Impacts on the Debt Collection Industry

Unsurprisingly, the industry also had to adjust its business operations in 2020 due to the novel coronavirus (COVID-19) pandemic. Businesses not only had to weather the logistical difficulties COVID-19 presented, but also had to strategize and adapt to ever-changing top-down governmental regulations. The restrictions initially imposed in Massachusetts, and those still in effect in Washington D.C., illustrate challenges presented, but also a successful response from the industry.

In Massachusetts, on May 6, 2020, the U.S. District Court for the District of Massachusetts granted ACA International's (ACA) emergency motion for a temporary restraining order and preliminary injunction to enjoin enforcement of a regulation issued by the Massachusetts attorney general. This regulation prohibited, among other things, initiating debt collection lawsuits and outbound debt collection phone calls by debt collectors, except to respond to a debtor's request for the debt collector to call, and it declared all such calls an unfair or deceptive act in violation of Mass. Gen. Laws ch. 93A, § 2 (Chapter 93A).

Judge Richard Stearns entered a temporary restraining order enjoining the attorney general from enforcing the prohibitions, finding a likelihood of success on the merits. Finding the statute unconstitutional under the First Amendment, the court stated, "[w]hile I laud the Attorney General's desire to protect citizens of Massachusetts during a time of financial and emotional stress created by the COVID-19 pandemic, I do not believe that the Regulation adds anything to their protections

Businesses not only had to weather the logistical difficulties COVID-19 presented, but also had to strategize and adapt to ever-changing top-down governmental regulations.

that the existing comprehensive scheme of law and regulation already affords to debtors, other than an unconstitutional ban on one form of communication."

Likewise, in Washington, D.C., on April 7, 2020, the Council for the District of Columbia unanimously passed the COVID-19 Response Supplemental Emergency Amendment Act of 2020, an emergency relief bill for D.C.'s residents and businesses. Section 207 of the Act limited debt collection activity during a public health emergency and for 60 days after its conclusion, by, among other things, initiating or threatening to file any new collection lawsuits, initiating or acting upon the statutory remedy for garnishment, seizure, attachment or withholding of wages, repossession of vehicles. D.C. Mayor Bowser has extended the state of emergency several times, most recently extending the state of emergency through March 31, 2021. As the prohibition against initiating communication with a debtor remains in effect for 60 days after the emergency declaration ends, the communications prohibition will now last until May 31, 2021.

Standing Continues to be a Hot-Button Topic

Courts throughout the country continued to address issues related to Article III standing throughout the year. In early 2020, in *Flecha v. Medicredit, Inc.*, the Fifth Circuit decertified an FDCPA letter class, and noted that the putative class "present[ed] substantial questions of Article III standing." In doing so, the Fifth Circuit became part of a growing trend of circuit courts that are raising significant questions as to whether a class can be certified when many members lack constitutional standing.

In *Flecha*, plaintiff Nina Flecha failed to pay for medical care that she received. To assist the medical care provider with debt collection, defendant Medicredit sent Flecha several collection letters. The collection letter at issue stated that, "[a]t this time, a determination must be made with our client as to the disposition of your account." Flecha sued Medicredit, alleging a class claim that Medicredit violated the FDCPA by sending her a letter with a false threat of legal action when the medical care provider never intended to sue her.

Flecha sought class certification, arguing that everyone who received the same collection letter similarly was falsely threatened with legal action. The district court granted class certification to all Texans who had received the same letter. On appeal, the Fifth Circuit decertified the class, finding that Flecha had not met the requirements for class certification.

The Fifth Circuit reasoned that Flecha failed to show that the claims of the class could be answered with common answers. To prove her claim, Flecha needed to show that Medicredit's letter threatened legal action, and, with respect to each class member, that the medical care provider did not intend to pursue legal action against that individual. The Fifth Circuit noted that Flecha did not provide any proof of the medical care provider's intent to pursue legal action, much less class-wide proof.

Due to decertification of the class, the Fifth Circuit noted that there was no need to separately decide whether the class lacked standing. However, the Fifth Circuit acknowledged that it had not yet decided whether standing must be proven for putative class members and, instead, it indicated that other circuits have done so. The Fifth Circuit cited to *Denney v. Deutsche Bank AG*, for the proposition that "no class may be certified that contains members lacking Article III standing." This case was significant in two regards. First, the Fifth Circuit has now joined other circuits in questioning whether a class can be certified when the named plaintiff has standing, but many class members do not. Second, the Fifth Circuit recognized that a failure to read a letter precludes the recipient from having standing to bring an FDCPA claim based on that same letter.

In late 2020, the Seventh Circuit addressed standing in a series of decisions. In those cases, the Seventh Circuit clarified that for a plaintiff to meet the requirements of Article III standing, it must allege more than a mere violation of the FDCPA. There must be an actual harm or at least some type of appreciable risk of harm. These cases include *Nettles v. Midland Funding, LLC, Spuhler v. State Collection Service, Inc., Gunn v. Thrasher, Buschmann & Voelkel, P.C., Bazile v. Finance Sysm. Of Green Bay, Inc., Brunett v. Convergent Outsourcing, Inc. and Larkin v. Finance Sys. of Green Bay, Inc.*

In *Larkin*, the plaintiff alleged collection letters at issue violated the FDCPA's prohibition against false, deceptive, or misleading representations. However, the complaint did not allege any harm resulting from the alleged statutory violation. The Seventh Circuit found the district court lacked jurisdiction over the case.

In *Brunett*, a debt collector sent a letter offering to accept half of the balance to satisfy the debt. The letter also included tax-related language regarding reporting the forgiveness of more than $600. Plaintiff alleged the language regarding IRS reporting violated sections 1692e(5) and (10), because the language allegedly threatened action that could not legally be taken. The district court granted summary judgment and the plaintiff appealed. In addressing the tax-related language that allegedly confused the plaintiff, the Seventh Circuit held that "[a] debtor confused by a dunning letter may be injured if she acts, to her detriment, on that confusion—if, for example, the confusion leads her to pay something she does not owe, or to pay a debt with interest running at a low rate when the money could have been used to pay a debt with interest running at a higher rate. But the state of confusion is not itself an injury . . . if it were, then everyone would have standing to litigate about everything."

The Seventh Circuit reached a different result in *Bazile*, where the plaintiff argued that information that debt collector's letter failed to include that interest being charged on the debt. As a result, she paid other debts instead of the debt at issue to her detriment. The Seventh Circuit found this allegation sufficient for Article III standing.

Outside of the Seventh Circuit, in *Truckenbrodt v. CBE Grp., Inc.*, the Eastern District of New York dismissed an FDCPA claim after the plaintiff conceded that he had not actually read the collections letter at issue. In *Truckenbrodt*, CBE sent a letter that included two return addresses, one to which Truckenbrodt should send correspondence if he wished to dispute the debt, and one to which he could submit payment. Truckenbrodt filed suit asserting that the use of these two different addresses created confusion and rendered the collection letter misleading under § 1692e of the FDCPA. But during his deposition, Truckenbrodt conceded that he had not seen the letter before the suit was filed. Based on this testimony, the court held the letter could not have affected Truckenbrodt "in a personal and individual way." Because Truckenbrodt did not suffer any concrete and particularized harm, the court dismissed his claim for lacked standing.

All of these cases show that Article III standing continues to be an avenue that may be worth pursuing in FDCPA cases, both in the individual and class context.

Other Notable FDCPA decisions

There were also a number of other notable decisions in the FDCPA context throughout the year.

Sixth Circuit Rejects Blanket Benign Language Exception

In December 2020, the Sixth Circuit weighed in on whether a "benign language" exception exists to a flat prohibition of substantive information appearing on an envelope containing a letter from a debt collector. In *Donovan v. FirstCredit*, the Sixth Circuit took a strict reading of the FDCPA, rejected the existence of an exception to the prohibition, and cleared a class action to proceed.

In *Donovan*, the envelope at issue had two glassine windows, one on top of the other. The bottom window contained the plaintiff's name and mailing address. However, because the letter when folded was smaller than the envelope, the letter would shift in the envelope, altering the amount of text visible through the top window. Always visible in the top window were an empty checkbox and the phrase, "Payment in full is enclosed." Depending on the position of the letter, there could also appear a second empty checkbox and the phrase, "I need to discuss this further. My phone number is __________."

The plaintiff alleged that the letter violated Section 1692f(8) of the FDCPA, which prohibits the use of "any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business." The

defendant moved for judgment on the pleadings, arguing that Section 1692f(8) included an implied “benign language” exception that applied to the checkboxes and messages that appeared in the top glassine window. The district court agreed and dismissed the case.

On appeal, the Sixth Circuit acknowledged a circuit split on the existence of a “benign language” exception, yet reasoned that because “a literal reading of the unambiguous text” of Section 1692f(8) “does not lead to an absurd result, we have no cause to reach beyond the text and rely on legislative history or administrative guidance to read a ‘benign language’ exception into 1692f(8).”

Eighth Circuit Finds Actions of Debt Collector Not Necessarily Imputed to Debt Buyer

The Eighth Circuit Court of Appeals held that the actions of a debt collector are not necessarily imputed to a debt buyer in *Reygadas v. DNF Associates, LLC*. This holding reversed the District Court for the Western District of Arkansas, which held that the actions of the debt collector are necessarily imputed to the debt buyer.

DNF purchased a debt owed by the plaintiff. DNF subsequently hired an attorney and brought a claim against the plaintiff in state court. The plaintiff hired defense counsel and the state claim was ultimately dismissed in her favor. After the dismissal, DNF hired a collection agency, Radius Global Solutions, LLC (RGS), to collect the plaintiff’s debt. RGS sent an offer letter to the plaintiff, but DNF allegedly failed to inform RGS that the plaintiff was represented.

The plaintiff then filed suit claiming DNF violated the FDCPA and Arkansas FDCPA. According to the court, because the letter was sent by RGS, RGS must have had actual knowledge that the plaintiff was represented by counsel to violate Section 1692c(a)(2). Additionally, the court noted that agency law does not dictate that knowledge of the principal is imputed to the agent.

Ninth Circuit Holds that One-Time Agreement Requiring Creditor Clients to Provide Accurate Information is Not Sufficient Procedure for Bona Fide Error Purposes

There were also developments in the bona fide error context. In *Urbina v. National Business Factors Inc.*, the Ninth Circuit Court of Appeals held that a debt collector cannot use a “bona fide error” defense to shield itself from liability under FDCPA by merely: (1) requiring its creditor clients to provide accurate account information; and (2) requesting verification of account information from its creditor client, but not waiting to receive a response before trying to collect the debts.

The Ninth Circuit held that a one-time agreement requiring creditor clients to provide accurate information is not a sufficient procedure to shield a debt collector with the bona fide error defense. Rather, the procedures that have protected debt collectors in other cases “were consistently applied by collectors on a debt-by-debt basis.” Moreover, NBF could not rely on the letter sent to TFC requesting to verify the amount owed by Urbina as a sufficient procedure since it did not wait for a reply before mailing a collections letter.

Ninth Circuit Adopts Broad Interpretation of "Debt Collector" Under the FDCPA

In *McAdory v M.N.S. & Associates, LLC*, the Ninth Circuit held that "an entity that otherwise meets the 'principal purpose' definition of debt collector under [under the Fair Debt Collection Practices Act] cannot avoid liability merely by hiring a third party to perform its debt collection activities."

Under the FDCPA, a "debt collector" is defined as "any business the principal purpose of which is the collection of any debts." In 2019, the Third Circuit analyzed this provision in *Barbato v. Crown Asset Mgmt. LLC, et al.*, and concluded that "an entity that has the 'collection of any debts' as its 'important aim' is a debt collector under [the principal purpose] definition. …As long as a business's raison d'etre is obtaining payment on the debts that it acquires, it is a debt collector." The Ninth Circuit relied heavily upon *Barbato* in reaching a similar conclusion in *McAdory*.

DNF Associates purchased debt that plaintiff owed on a retail credit card and assigned the debt to a collection agency. While the complaint did not allege that plaintiff was ever contacted directly by DNF, it alleged that DNF "contracted with a network of other debt collectors that directly contacted consumers in DNF's name and at its direction[,]" including M.N.S. & Associates. The complaint alleged that DNF and M.N.S. committed eight separate violations of the FDCPA based on M.N.S.'s conduct, specifically leaving her a voicemail message referencing "asset verification" and "enforcement review," and withdrawing funds from the plaintiff's account before an authorized payment date.

DNF moved to dismiss, arguing a company like itself is merely "a debt buyer that outsources collection activities to third-party contracts," and therefore "does not meet the FDCPA's definition of a "'debt collector.'" The district court agreed.

On appeal, the Ninth Circuit reversed the district court's order granting DNF's motion to dismiss, and remanded the matter for further proceedings. The court wrote, "[McAdory's] complaint alleged that DNF's principal purpose was to buy consumer debts in order to collect on them, and that this is how DNF generated most or all of its income." As such, the complaint "sufficiently alleged that DNF's principal purpose is the collection of debts as defined by the principal purpose prong of [15 U.S.C.] § 1692a(6). … These allegations are sufficient to allege that DNF is a debt collector under the FDCPA, regardless of whether DNF outsources debt collection activities to a third party."

"These allegations are sufficient to allege that DNF is a debt collector under the FDCPA, regardless of whether DNF outsources debt collection activities to a third party."

Fourth Circuit Joins Sister Circuits to Broaden the Scope of the FDCPA's Statute of Limitations

In *Bender v. Elmore & Throop, P.C.*, the Fourth Circuit joined the Sixth, Eighth, and Tenth Circuits in interpreting the FDCPA's statute of limitations to restart after each individual violation of the Act.

Under the FDCPA, claims must be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). In *Bender*, plaintiffs sued a law firm retained by their homeowner's association (HOA) for violations of the FDCPA. The plaintiffs allegedly failed to pay HOA fees in 2016. Despite their request that the law firm cease contact, the law firm sent correspondence to the plaintiffs on several occasions from April 2016 through February 2018 in an attempt to collect this alleged debt. The plaintiffs then filed a lawsuit against the firm on April 5, 2018, more than one year after the first alleged FDCPA violation occurred in 2016. While the FDCPA clearly states that violations occurring beyond the one-year timeframe are untimely, the lower court held "that later violations of the same type do not trigger a new limitations period under the Act."

The Fourth Circuit overturned this district court decision, instead holding that the FDCPA "establishes a separate one-year limitations period for each violation." The court explained further, finding that "[t]his interpretation avoids creating a safe harbor for unlawful debt collection activity," allowing the Benders to assert some FDCPA violations rather than barring their claims entirely.

Second Circuit Affirms Dismissal of FDCPA Suit Over Failure to Use Precise Statutory Validation Language

In *Chaperon v. Sontag & Hyman, P.C.*, the Second Circuit affirmed the dismissal of a lawsuit finding that a debt collector's failure to use the FDCPA's precise language in its validation notice was not a violation of the FDCPA. The plaintiff alleged violations of 15 U.S.C. § 1692g and § 1692e related to a notice she received regarding past-due rent. Specifically, she alleged that, though the notice stated she could dispute the debt, it did not explicitly state that she could dispute a portion of the debt. The Second Circuit held that a debt collector's failure to use the FDCPA's precise language in its validation notice is not a violation. The court noted that validation language in a letter that does not track the precise language of the FDCPA is not itself a violation of the FDCPA, and that, under a "least-sophisticated consumer" standard, such letters adequately inform the reader that the debt must be disputed, and it is implicit that the claim can be wholly, or partially, challenged.

State Court Procedural Violation Cannot Be Grounds for FDCPA Violation

In *Anglin v. Merchants Credit Corporation*, the Western District of Washington held that the defendants did not violate the FDCPA by failing to follow state procedural rules in obtaining a writ of garnishment as part of a debt-collection action. This decision is significant because it adds to the litany of cases holding that violations of state procedural rules generally cannot form the basis for an FDCPA claim against the debt collector.

The court distinguished between a violation of a state court procedural rule and violation of state substantive law. According to the court, "at worst, Defendants violated a state court procedural rule — not substantive law — when they applied for the writ of garnishment based on the valid, albeit, not final judgment." The appropriate remedy? Contest garnishment in the court from which the writ was issued.

The court cited to the general consensus of courts across the country that "procedural mishaps in state court cannot be the basis for a FDCPA claim." In the court's own words, "Defendants' procedural error was innocuous and, certainly not 'unconscionable' in either the legal or lay sense, and as such, cannot be the basis for a FDCPA claim."

MORTGAGE

COVID-19 Leads to Eviction and Foreclosure Moratoria Throughout the US

The COVID-19 pandemic threw a monkey wrench into many areas of the law in 2020 and mortgage law was no exception. Many states, and even the federal government, enacted temporary eviction and foreclosure moratoria, some of which remain active into early 2021.

At the federal level, the Centers for Disease Control and Prevention (CDC) issued a "Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19," which is effective nationwide through January 31, 2021. Additionally, the Department of Housing and Urban Development (HUD) implemented a foreclosure moratorium for single family home owners with FHA-insured mortgages, which extends through February 28, 2021.

Under the CDC's order, "a landlord, owner of a residential property, or other person [including corporations, firms, partnerships, etc.] with a legal right to pursue eviction or possessory action, shall not evict any covered person from any residential property in any jurisdiction to which this [o]rder applies[.]" For the purposes of the [o]rder, a tenant, lessee, or residential property resident may be a covered person.

To receive protection under the order, individuals must provide their landlord with a declaration under penalty of perjury indicating:

(1) they have "used best efforts to obtain all available government assistance for rent or housing;"

(2) they either (a) expect to earn no more than $99,000 — $198,000 if filing jointly — in annual income in 2020, (b) were not required to report any income to the IRS in 2019, or (c) "received an Economic Impact Payment (stimulus check) pursuant to Section 2201 of the CARES Act;"

(3) they are unable to pay rent due to substantial loss of income, work or wages, a layoff, or "extraordinary out-of-pocket medical expenses;"

(4) they are "using best efforts to make timely partial payments" that are as close to full rent payments as their "circumstances may permit"; and

(5) they have no other viable housing options if evicted, meaning an eviction would likely render them homeless or living "in close quarters in a new congregate or shared living setting[.]"

Renters are not required to attach any proof of hardship, like bank statements or tax forms, to their declarations.

The CDC's order is effective throughout the U.S., but "does not apply in any [s]tate, local, territorial, or tribal area with a moratorium on residential evictions that provides the same or greater level of public-health protection than the requirements listed in this [o]rder." For example, California and New York have enacted eviction moratoria of their own that appear to provide the same or greater protection.

Additionally, the CDC makes it clear that the order "does not relieve any individual of any obligation to pay rent, make a housing payment, or comply with

any other obligation that the individual may have under a tenancy, lease, or similar contract."

At the state level, we have seen several different strategies implemented to relieve the financial stress of rent and mortgage payments on individuals. In addition to the eviction moratoria referenced above, New Jersey Governor Phil Murphy stayed residential evictions and foreclosures "for no longer than two months following the end of the Public Health Emergency or State of Emergency . . . whichever ends later, unless this [o]rder is first revoked or modified by the [g] overnor in a subsequent executive order."

Two other states that have paused foreclosures into 2021 are Kansas, which has paused residential evictions and foreclosures through at least January 26, 2021, and Maryland, which has done the same through January 30. In comparison, other states, like Michigan and Massachusetts, have opted to create eviction diversion plans instead, which aim to provide financial assistance to renters in danger of being evicted due to income lost during the pandemic.

For an up-to-date description of the actions taken regarding evictions and foreclosures in all 50 states, visit Troutman Pepper's Interactive Eviction and Foreclosure Tracker at: https://covid19.troutman.com/trackers-ef.php.

CFPB Completes Investigation into Deceptive Loan Advertisements Targeting Veterans

The Consumer Financial Protection Bureau (CFPB) recently completed an investigation into multiple mortgage companies for their alleged use of deceptive mailers to advertise mortgages guaranteed by the U.S. Department of Veterans Affairs (VA). The investigation was originally triggered by the VA over concerns with potentially unlawful advertisements sent to many of its members. The CFPB's investigation, which began in early 2020 and concluded in October, resulted in settlements of over four million dollars in civil money penalties with nine mortgage companies, spanning across the country.

CFPB's investigators concluded that each of the nine mortgage companies involved violated the Consumer Financial Protection Act's (CFPA) prohibition against deceptive acts and practices, the Mortgage Acts and Practices Advertising Rule (MAP Rule), and Regulation Z, which implements the Truth in Lending Act (TILA). Under the aforementioned laws, lenders have an obligation to accurately disclose to the borrower all material terms of the loan. The CFPB's investigation found that each of the nine mortgage companies violated Regulation Z by failing to include required disclosures. Such failures included, for example, not including the credit terms for the advertised mortgage, such as the number and time period of payments associated with the consumer's repayment obligations over the full term of the loan, and/or failing to include the true name of the lender.

In addition to the companies' failure to disclose certain terms, the CFPB also found that many of the advertisements disseminated by the mortgage companies contained false, misleading, and inaccurate statements. For example, some of the advertisements created the false impression that the mortgage company was affiliated with the VA by using words, phrases, images, or designs that are associated with the VA or the Internal Revenue Service, when that was not the case. One of the mortgage companies also misrepresented the credit terms of the advertised mortgage loan by misleadingly labeling an introductory interest rate as a "fixed" rate, when the rate was, in fact, adjustable and could increase over time.

In settling with the CFPB, the mortgage companies each entered into a consent order agreeing to enhance their compliance with the TILA by (1) designating an advertising compliance official who must review its mortgage advertisements for compliance with mortgage advertising laws prior to their use, (2) prohibiting misrepresentations similar to those identified by the bureau, (3) and requiring enhanced disclosure requirements to prevent future misrepresentations.

The CFPB's investigation serves as a reminder to the mortgage lending industry to ensure full compliance with TILA's disclosure and accuracy requirements.

The CFPB Revises Reg. Z's Qualified Mortgage Loan Criteria in Anticipation of the GSE Patch's Expiration

In anticipation of the "GSE patch" expiring, the CFPB issued several final rules in 2020 to amend Regulation Z. Concerns existed that the expiration of the GSE patch would restrict consumer mortgage credit unless the CFPB created a permanent version of the GSE patch or revised the General Qualified Mortgage (QM) definition. As outlined below, the CFPB responded by adopting the latter approach.

Since 2014, the GSE patch has allowed certain mortgage loans eligible for purchase or guarantee by Fannie Mae and Freddie Mac (GSEs) to qualify as QM loans despite not meeting all requirements of the General QM loan definition. This was important because QM loans receive certain protections from legal liabilities associated with not complying with Regulation Z's Ability to Repay/Qualified Mortgage Rule. But the GSE patch was only designed as a temporary measure, and as such was scheduled to expire on January 10, 2021, or would expire for a respective GSE upon it exiting conservatorship.

On December 10, 2020, the CFPB issued the General QM Final Rule, which replaces the 43% debt-to-income (DTI) limit in the General QM loan definition with a price-based threshold that compares a loan's annual percentage rate to the average prime offer rate for a comparable loan. It appears the CFPB adopted this approach in part because its research indicated that removing the DTI limit would help "facilitate a smooth and orderly transition" from the GSE patch. The General QM Final Rule outlines the price-based threshold approach, and makes other changes to Regulation Z.

While still requiring a lender to consider and verify borrowers' income and liabilities, the General QM Final Rule also removes the Appendix Q verification standard and makes it so a lender can receive safe harbor for compliance with the QM verification requirement if it satisfies one or more of the third-party verification standards referenced by Regulation Z.

On December 10, 2020, the CFPB also issued the Seasoned QM Final Rule, which creates a "Seasoned QM" definition. Specifically, certain first-

The General QM Final Rule outlines the price-based threshold approach, and makes other changes to Regulation Z.

lien, fixed-rate residential mortgage loans become QM loans if, during a defined seasoning period, they meet specific payment performance criteria and are held in portfolio by the originating lender. The Seasoned QM Final Rule contains some exceptions to the portfolio requirement, including a single loan transfer, where it is not securitized as part of the transfer or before the end of the seasoning period. The seasoning period is generally 36 months.

It should be noted that around the time of publication, the Acting CFPB Director Dave Uejio published a statement which indicates the CFPB will "explore options for preserving the status quo" regarding the General QM definition. A delay in implementing the above discussed rules could ultimately lead to the CFPB reopening the rulemaking process once President Joe Biden's permanent appointee is in place.

Both final rules are still scheduled to become effective on March 1, 2021. The General QM Final Rule, however, has a separate mandatory compliance date of July 1, 2021. Because the CFPB extended the GSE patch's January expiration date to coincide with the General QM Final Rule's mandatory compliance date, the GSE patch will remain available for loans, where a lender receives the application before July 1, 2021. Lenders must, however, comply with the General QM Final Rule on loans, where the application is received on or after July 1, 2021.

Despite recent developments, Lenders are still encouraged to carefully review the final rules to identify all the resulting changes and to determine how those changes will impact their current origination and compliance strategies.

PAYMENT PROCESSING AND CARDS

Regulatory developments and litigation and enforcement switched positions in 2020. Litigation and enforcement drove the payment industry in 2020, likely due to COVID-19. However, there were still regulatory developments at both the federal and state level that impacted the payment processing and cards industry.

Regulatory Developments

In 2020, the saga of the Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule (Payday Lending Rule) continued. The Payday Lending Rule, as originally drafted in 2017, addressed two discrete topics: (1) underwriting of certain covered loans and related reporting and recordkeeping requirements ("underwriting provisions"); and (2) requirements and limitations regarding withdrawing payments from consumers' accounts and recordkeeping (payment provisions). The mandatory underwriting provisions made it an abusive and unfair practice for a lender to make a covered loan without reasonably determining that the consumer has the ability to repay the loan. The payment provisions made it an unfair and abusive practice for a lender to attempt to withdraw payment from a consumer's account after two consecutive payments have failed for lack of sufficient funds, unless a new consumer authorization was obtained from the consumer allowing the lender to make withdrawals. Over the last two years, we saw delays to the compliance date for enforcement, and now, the underwriting provisions have been rescinded, but the payments provision have not. There is still no definitive timeline for compliance with the payment provisions, but we may see more movement with the changing White House administration.

There have also been regulatory developments regarding money transmission. In particular, we saw one more state, South Dakota, pass its "agent of the payee" exemption. While agent of the payee exemptions vary from state to state, the general purpose of the exemption is to exempt from money transmitter licensure a person appointed by a payee to collect and process payments on the payee's behalf. There are now roughly 25 states that recognize the agent of the payee exemption, which continues to show that states are recognizing and adapting to the changes in the payment processing industry.

We also saw the Conference of State Bank Supervisors (CSBS) continue to lead the way in "harmoniz[ing] the multistate licensing and supervisory experience for nonbank financial services providers, including fintechs" as part of its Vision 2020. Last year, we saw more states participating in the CSBS multistate licensing agreement, in which only one state regulatory department reviews common money transmission licensing requirements, growing to just under 25 states. In September 2020, the CSBS announced the launch of the "MSB Networked Supervision" program. This program allows money transmitters operating in 40 or more states to take advantage of a new, comprehensive exam designed to satisfy all state money transmitter examination requirements in 2021. It should be easier for money transmitters to undergo state examinations each year through this "integrated supervisory network." It should reduce examination frequency and disruptions to those companies in the payments industry. This is just another step that is part of the CSBS's Vision 2020, which aims to harmonize multistate practices.

During the COVID-19 pandemic, there was an increase in ransomware attacks on various governmental entities, financial institutions, health care institutions, and educational institutions. In October 2020, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) issued an advisory warning on the perils of facilitating ransomware payments involving malicious cyber-enabled activities. Persons and entities in the U.S. are "generally prohibited from engaging in transactions, directly or indirectly, with individuals or entities on OFAC's Specially Designated Nationals and Blocked Persons List, other blocked persons, and those covered by comprehensive country or region embargoes." Companies, including payment processors, that

may unintentionally, inadvertently, or unknowingly facilitate or process the victims' ransomware payments are likely encouraging future ransomware payment demands, and may also violate OFAC sanctions regulations by engaging in a transaction with a person that has been designated by OFAC. It is important to implement a risk-based compliance program to "mitigate exposure to sanctions-related violations." Payment processors should have a sanctions compliance program in place that accounts for risks involved and determine whether they have any regulatory obligations under anti-money laundering and other regulations issued by the Financial Crimes Enforcement Network (FinCEN).

In the November 2020 election, we saw multiple states include ballot measures related to marijuana policy reform, including Arizona, Mississippi, Montana, New Jersey, and South Dakota. The marijuana industry has been a highly sought-after industry for payment processors, but, since it is currently illegal at the federal level, remains a very risky industry for payment processors. More states approving some level of marijuana policy reform may help lead to a major push to end the federal prohibition, which may open the door for more payment processors to enter the industry.

In November 2020, the Office of the Comptroller of Currency (OCC) proposed a rule aimed at ensuring fair access to bank services, capital, and credit. The proposed rule endeavors to eliminate "broad-based decisions" that affect whole categories and classes of customers and instead pushes banks to decide whether to service customers based on individual risk assessments. Indeed, in its notice of proposed rulemaking, the OCC stated that "[i]n order to ensure that banks provide customers with fair access to financial services, and consistent with longstanding OCC policy, a bank's decision not to serve a particular customer must be based on an individual risk management decision about that individual customer, not on the fact that the customer operates in an industry subject to a broad categorical exclusion created by the bank." Importantly, while the proposed rule prohibits covered banks from denying services due to "broad-based decisions," a bank may still fairly deny access to its services based on "quantitative, impartial, risk-based decisions," such as creditworthiness.

Litigation and Enforcement Actions

In June, the CFPB issued a "Statement on Supervisory and Enforcement Practices Regarding Electronic Credit Card Disclosures in Light of the COVID-19 Pandemic," relaxing the requirements for some electronic disclosures given for requests by consumers made via telephone for credit card plans. The CFPB acknowledged that, due to pandemic, credit card issuers receive more calls and may have limited staffing. In light of the

pandemic, many institutions asked for relief from certain written disclosures in accordance with Regulation Z.

The Electronic Signatures in Global and National Commerce Act (E-Sign Act) allows legally required written disclosures to be given electronically provided certain conditions are met. The E-Sign Act has a variety of different requirements, which include, but are not limited to, the consumer's affirmative consent to receive electronic disclosures, specific disclosures prior to sending the documents electronically, and the consumer's consent in a manner that reasonably demonstrates the consumer can access the documents in the same manner in which the consent is provided. As noted in the CFPB's statement, credit card issuers have stated that obtaining E-Sign consent over the telephone proves difficult as calls may be dropped, the calls require more time with the limited staff available, lengthy call-wait times, or consent may require multiple calls.

Based on the these difficulties, the CFPB stated that it will not cite a violation in an examination or bring an enforcement action for disclosures typically required to be in writing for open-end, non-home secured credit plans regulated by Regulation Z that occur during the pandemic and that do not comply with the E-Sign Act. More specifically, this leniency includes only account-opening disclosures and temporary rate or fee reduction disclosures discussed via telephone. However, per the statement, issuers must obtain consent to the electronic delivery of disclosures along with affirmation from the consumer that he/she has the ability to access and review these electronic disclosures, and issuers must take reasonable steps to verify the consumers' electronic contact information.

Also in June, the U.S. District Court for the Western District of Texas permanently banned Madera Merchant Services and B&P Enterprises LLC from payment processing for their involvement in business practices that scammed consumers out of millions of dollars. The Federal Trade Commission and Ohio Attorney General Dave Yost filed their complaint in 2019.

The joint complaint filed against Madera alleged that Madera and B&P, along with their owners, operated a payment processing scheme that used remotely created payment orders or remotely created checks (RCPOs) to withdraw money from consumer accounts on behalf of third-party merchants in violation of Section 5 of the FTC Act, as well as the FTC's Telemarketing Sales Rule (TSR).

An RCPO is a check or order that a payee creates electronically using the payor's bank account information. RCPOs are not signed by the payor; rather, the RCPO usually includes a statement that the accountholder authorizes the payment. RCPOs are not subject to the heightened level of monitoring like ACH and card transactions and are ripe for committing fraud. Fraudulent merchants can use RCPOs to create unsigned checks that withdraw funds from consumers' bank accounts without their authorization.

The complaint alleged that Madera and B&P used RCPOs to withdraw funds from consumer accounts for merchants who were engaged in fraudulent and deceptive schemes, including telemarketing schemes. When the complaint was initially filed, the FTC concurrently filed a complaint against Madera and B&P's largest merchant client — Educare Center Services (Educare).

Educare operated a telemarketing scheme by which it would cold-call consumers and market credit card interest rate reduction services promising that, in exchange for a fee, Educare would substantially lower the interest rates on consumers' credit cards. Educare offered a 100% money-back guarantee if it failed to deliver on its promise. For a vast majority of consumers that enrolled in Educare's interest rate reduction program, Educare did not secure the interest rate reduction, and it would fail to honor its money-back guarantee.

Madera and B&P provided payment processing services for Educare. Madera and B&P opened business checking accounts under various names with various financial institutions, misrepresented the type of business for which they were opening the account, and failed to disclose the reason they were opening the account — to process consumer payments for third-party merchants using RCPOs. The TSR specifically prohibits the use of RCPOs in connection with telemarketing.

The U.S. Supreme Court ruled that the CFPB could carry on, despite its unconstitutional leadership structure. The ruling gives the president the freedom to replace a CFPB director at will.

Madera and B&P agreed to be permanently banned from the payment processing industry in order to settle the charges brought by the FTC and Ohio.

Also in June, the U.S. Supreme Court ruled that the CFPB could carry on, despite its unconstitutional leadership structure. The ruling gives the president the freedom to replace a CFPB director at will. In a 5-4 decision, the Court held that the CFPB's leadership by a single director removable only for cause was an unconstitutional restraint on the president's executive powers. Writing for the majority, Chief Justice John Roberts explained that the limitation on the president's authority to remove the CFPB director is out of step with historical and legal precedent and "is incompatible with our constitutional structure."

Speaking to historical precedent, the Court noted that other instances where Congress has "provided good-cause tenure to principal officers who wield power alone rather than as members of a board of commission" shed little light, describing most of the examples as "modern and contested." As to prior case law addressing limitations on the president's removal powers, the Court stressed that two of the most prominent of those cases, *Humphrey's Executor v. United States* and *Morrison v. Olson*, are factually inapposite because neither of those cases dealt with an official or agency who wielded "regulatory or enforcement authority remotely comparable to that exercised by the CFPB." Indeed, instead of extending the rationale of those decisions, the Court limited its prior decisions to their facts, thereby clarifying the boundaries of presidential removal authority and potentially raising questions about the power of removal as to other agencies.

The Court explained that, unlike the president, who wields immense authority but is subject to regular, national elections, the CFPB's single-director structure contravenes the Constitution's "carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to one." Because authority of executive officials must remain subject to supervision and control of a president and, accordingly, the electorate, the Court held the director's insulation from removal to be unconstitutional.

Despite the Court's ruling on the CFPB's leadership structure, the CFPB remains intact. The Court decided on a 7-2 vote, with only Justices Thomas and Gorsuch dissenting, that the section of the Dodd-Frank Act providing for the "for cause" removal may be severed from the rest of the act. The immediate effect of this decision is that the CFPB may carry on business as usual, with the difference now being that President Trump, and future presidents, may fire the CFPB director without cause. Essentially, the CFPB director now serves at the will of the president.

From its inception, the CFPB has been the subject of rigorous debate. While it was led by former Director Richard Cordray, supporters heralded the agency's aggressive enforcement actions and policy making, while opponents argued that the agency was upending constitutional and statutory restraints on its authority. Indeed, in late 2018, Troutman Pepper obtained a significant appellate victory against the CFPB, with the U.S. Court of Appeals for the Fifth Circuit noting that the agency had behaved as if it had "unfettered authority to cast about for potential wrongdoing" and holding that it "must comply with statutory requirements" governing its investigatory powers.

But the Supreme Court's decision may end the debate on the constitutionality of the CFPB, as its enforcement activities and policy making will now be subject to political oversight, and potentially to bipartisan political oversight. The Supreme Court's ruling could spur Congress to replace the single director model with a more traditional commission

structure akin to other agencies, such as the Federal Trade Commission and the Securities and Exchange Commission.

In October, the Eleventh Circuit Court of Appeals addressed the Fair and Accurate Credit Transaction Act (FACTA) in *Muransky v. Godiva Chocolatier, Inc*. FACTA forbids sellers who accept credit cards from including more than the last five digits of a buyer's credit card number on a purchase receipt. According to the Eleventh Circuit's decision in *Muransky*, however, including more than those five digits will not, by itself, make a seller liable under FACTA.

The controversy started when Dr. David S. Muransky traveled to a Godiva store in Florida to purchase a box of chocolates. Using his credit card, he made a purchase and was given a receipt. The receipt contained the first six and last four digits of his sixteen-digit credit card number — more than FACTA permits. Muransky then filed a FACTA class action on behalf of anyone in the United States who received a Godiva receipt displaying more than the last five digits of the buyer's credit card number. Because of the number of potential class members, Godiva faced potential liability of $342 million — $1,000 per violation.

Seeking to avoid paying such a hefty sum, Godiva eventually sought to settle the case for $6.3 million, which the lower court approved. In the interim, the U.S. Supreme Court decided the case of *Spokeo, Inc. v. Robins*, which jeopardized the lower court's ability to approve the settlement, or rule on the case in any other capacity at all, because of what the lower court said about Constitutional standing. For a federal court to hear a case, the plaintiff must show that he was, in fact, injured by the defendant's conduct. *Spokeo*, however, held that even though Congress can make certain conduct illegal through the passing of federal statutes (here, the inclusion of too many credit card digits on a receipt), a defendant's violation of the terms of a statute, by itself, does not necessarily mean that the plaintiff has in fact been injured.

Relying on *Spokeo*, the Eleventh Circuit reversed the lower court's approval of the settlement and dismissed the case without prejudice. Specifically, the court explained that a plaintiff can show a concrete harm in two ways: (1) The defendant's violation of a statute directly caused harm to the plaintiff; and (2) the defendant's violation of a statute created a real risk of harm to the plaintiff. In an extensive analysis, the court found Muransky's arguments insufficient under either theory, and held that even though Godiva had clearly violated FACTA's requirements, the suit could not proceed because Muransky failed to show that the violation caused him harm, or materially increased the risk that he could suffer identity theft.

In December 2020, the CFPB sued DMB Financial LLC (DMB) in the U.S. District Court of the District of Massachusetts for allegedly violating the TSR and the Consumer Financial Protection Act (CFPA). DMB, a company offering debt relief and debt settlement services, allegedly violated the TSR and CFPA in connection with its offers to renegotiate, settle, or otherwise alter the terms of unsecured debts owed by consumers.

The CFPB alleged that DMB engaged in abusive and deceptive acts or practices in violation of the TSR. Specifically, the CFPB alleged that DMB requested and received fees before performing promised services and before consumers began payments under any debt settlement. Additionally, the CFPB alleged that, when settling debts on behalf of its customers, DMB based the fees charged to customers not on the amount of debt at the time of enrollment, but rather the amount of debt when the debt was settled. Per the CFPB's complaint, this led to higher fees, as more interest and fees would often accrue the debt's unpaid balance before it was settled. In total, the CFPB alleged seven counts detailing violations of the TSR and/or CFPA. For the alleged violations, the CFPB is seeking an injunction, redress to consumers, disgorgement of ill-gotten gains, and civil money penalties.

Looking Ahead to 2021

In looking ahead to 2021, we anticipate that regulators will be active in bringing enforcement actions related to marketing practices during the COVID-19 pandemic. Based on the efforts spent by regulators warning consumers about bogus cures and cure-alls, this area is a clear concern and one ripe for robust enforcement activity.

We also anticipate companies to be on the lookout for regulations from FinCEN implementing the reporting requirements imposed by the Corporate Transparency Act (CTA). In a bit of an unusual journey to becoming a law, the CTA was included in the 2021 National Defense Authorization Act (NDAA), which was vetoed by President Trump in December. For the first time in his presidency, Congress overrode President Trump's veto to pass the NDAA and, by extension, the CTA on January 1, 2021.

The CTA requires FinCEN to issue regulations implementing reporting requirements for reporting companies to disclose beneficial ownership interests of certain U.S. and foreign entities by January 1, 2022. While there are some exceptions, the definition for "reporting company" is fairly broad. A reporting company is defined as a corporation, limited-liability company, or other similar entity that is (1) created by filing a document with a secretary of state or similar office under law of a state or Indian tribe; or (2) formed under the law of a foreign country and registered to do business in the United States by filing a document with a secretary of state or similar office under law of a state or Indian tribe. Companies fitting the description of a reporting company will be required to identify each beneficial owner, including each owner's (1) full legal name; (2) date of birth; (3) current residential or business street address; and (4) unique identifying number from an acceptable identification document (such as a driver's license or passport) or FinCEN identifier.

The penalties for violation are consequential — willfully failing to report or update beneficial ownership information or willfully providing false information to regulators may result in civil fines of up to $500 per day or criminal penalties of up to $10,000 and/or imprisonment for no more than two years. Given the potential penalties, companies in 2021 should be on the lookout for FinCEN regulations implementing the CTA and should begin crafting compliance programs to meet and stay in compliance with the CTA's new requirements.

Our predictions on developments in the cannabis industry are evergreen. While there have been recent pushes, such as the SAFE Banking Act, to normalize banking access to businesses in the cannabis industry, the vote in U.S. House of Representatives approving the Marijuana Opportunity Reinvestment and Expungement (MORE) Act could be a tell-tale sign that change is finally coming. While the MORE Act stalled in the Senate, it would have removed cannabis from the federal Controlled Substances Act, effectively decriminalizing marijuana at the federal level and potentially removing the red tape holding back payment processors from servicing cannabis businesses. Given the willingness of House Democrats to pass the MORE Act, similar legislation may stand a chance of becoming law if proposed in 2021, particularly with Democratic control of both the White House and Congress.

Lastly and notably, FinCEN issued a Notice of Proposed Rulemaking (NPRM) that would lower the $3,000 threshold for the applicability of the Bank Secrecy Act, Recordkeeping Rule, and Travel currently in place to $250 and would expand the definition of "money" to include virtual currencies. Comments on the NPRM were accepted until late November, and a final rule will likely be finalized in 2021. If finalized as proposed, mammoth efforts and costs would likely be necessary to comply, particularly on those financial service providers that offer cross-border funds transfer.

LITIGATION AND REGULATORY ACTIVITY: ONLINE AND NONTRADITIONAL BANKING

Lawsuits and enforcement actions involving online lending operations and nonbank entities gained significant momentum in 2020. Plaintiff's lawyers have dubbed these actions, among others, as "predatory lending," and this will be a growth area in the law during 2021. The Office of the Comptroller of the Currency (OCC) attempted to provide some clarity in this area and finalized a rule delineating which entity is the "true lender" when a bank partners with a third-party nonbank entity to provide financial services. This rule, however, remains subject to challenge, and eight state attorneys general have contested the True Lender Rule's validity. Colorado Attorney General Phil Weiser settled two landmark lawsuits against nonbanks, providing a potential roadmap for companies to use in addressing compliance with state usury laws. Finally, Virginia's General Assembly accelerated the effective date of new reforms intended to curb "predatory lending" from June 1, 2021 to January 1, 2021 at the request of Virginia Attorney General Mark Herring, who established a "first-of-its-kind" Predatory Lending Unit in 2015.

OCC Finalizes True Lender Rule, Offering Hope of Much-Needed Clarity in Partnerships Between Banks and Third Parties

On October 27, 2020, the Office of the OCC issued a rule determining when a national bank or federal savings association makes a loan and is thus the "true lender." This rule also accounted for situations where a bank and a third-party partner provides a financial service. Issuing this rule was, at least in part, an attempt to resolve uncertainty created in the wake of the Second Circuit's decision in *Madden v. Midland Funding LLC*.

Madden created two distinct legal considerations financial institutions need to take into account when making loans: whether an assignee of a national bank has the right to collect interest at the same rate as a national bank when it "steps into the shoes" of loans made by a national bank, and how to determine which entity in a partnership is actually making the loan.

The OCC attempted to resolve the first of those two considerations on June 2, 2020 when it published its final "valid when made" rule (effective August 1, 2020) that an assignee of a national bank has the right to collect interest at the same rate as a national bank on loans made and originated by the national bank. This rule codified the valid when made doctrine — that the validity of a loan is determined at the time the loan was made, not at the time the assignee purchases or is assigned the loan.

In resolving the second of those two considerations, the True Lender Rule became effective on December 29, 2020. The full, brief text of that rule is as follows:

> **§ 7.1031 National banks and Federal Savings associations as lenders.**
>
> (a) For purposes of this section, *bank* means a national bank or a Federal savings association.
>
> (b) For purposes of sections 5136 and 5197 of the Revised Statutes (12 U.S.C. 24 and 12 U.S.C. 85), section 24 of the Federal Reserve Act (12 U.S.C. 371), and sections 4(g) and 5(c) of the Home Owners' Loan Act (12 U.S.C. 1463(g) and 12 U.S.C. 1464(c)),[20] a bank makes a loan when the bank, as of the date of origination:
>
> > (1) Is named as the lender in the loan agreement; or
> >
> > (2) Funds the loan.
>
> (c) If, as of the date of origination, one bank is

[20] These are provisions that allow federal savings associations and national banks to extend credit and regulate permissible interest rates that may be loaned by federal savings associations and national banks.

named as the lender in the loan agreement for a loan and another bank funds that loan, the bank that is named as the lender in the loan agreement makes the loan.

This rule was finalized substantially as proposed and provides the prospect of much-welcomed clarity for financial institutions seeking to provide consumers with access to affordable credit. As stated by the OCC in its press release, "increasing legal uncertainty regarding [third-party] relationships may discourage banks and third parties from partnering, limiting competition, and chill the innovation that results from these partnerships."

Critics expressed concerns that such arrangements may lead to "rent-a-charter" lending schemes and argued that allowing lenders to place a national bank's name on the loan agreement would in essence allow those lenders to evade state interest rate limits and other consumer protection laws. However, as the OCC stressed, the "true lender of a loan… retains the compliance obligations associated with the origination of that loan," which would "negat[e] concern regarding harmful rent-a-charter arrangements."

National banks' and federal savings associations' partners stand to benefit greatly from clarity in this area as the *Madden* decision chilled innovation in the nonbank lending space. By increasing competition and the number of players in the lending arena, consumers will have access to more credit options and credit options tailored to meet their individual needs.

However, the vitality of the True Lender Rule remains subject to federal and state scrutiny. Since Democrats retained control of the House and gained control of the Senate, a Democratic Congress could attempt to use the Congressional Review Act — a statute that allows Congress to disapprove of recent rules by majority vote — to override the True Lender Rule. Additionally, President Joe Biden will almost certainly appoint a new comptroller of the currency who could take steps to revoke and/or replace the True Lender Rule. Finally, a multistate challenge by eight state attorneys general has been filed challenging the validity of the True Lender Rule.

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Multistate Challenge to the OCC's True Lender Rule

After the True Lender Rule went into effect, eight Democratic state attorneys general filed suit to stop the implementation of the True Lender Rule. The challenge was brought in the Southern District of New York under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq*.

Citing the OCC's supervisory authority over national banks and the National Banking Act of 1964's (NBA) regulation of interest rates — which enables national banks to charge the maximum interest rate permissible in the state in which they are located — the complaint alleges that any attempt by the national banks to pass on NBA protections to nonbank partners is improper. The complaint alleges such an attempt is an unpermitted use of a national bank as a "delivery vehicle" for a predatory lending scheme to shield nonbank partners from state usury limits.

In a press release, New York Attorney General Letitia James stated, "Rent-a-bank schemes make a mockery of federal law, and the administration's sanctioning of these schemes undermines the sovereignty of the states where legislatures and voters have told payday lenders, in no uncertain terms, that their 'services' are not welcome here." California's Attorney General and Biden-nominated Health and Human Services Secretary Xavier Becerra stated, "A bank isn't a true lender unless it has skin in the game. These illegal rent-a-bank schemes hurt borrowers as well as lenders who play by the rules."

This challenge is in its early stages. While undecided, nonbank lending operations will need

to consider the risks of partnering with banks. However, the structure of the rule should prevent predatory lending arrangements resulting from a third-party connection to the loan. National banks are subject to the OCC's oversight, and the OCC's statutes, regulations, and authorities provide robust and effective safeguards against such schemes when a bank exercises its lending authority.

Attorney General of Colorado Settles Landmark Settlement in True Lender Litigation Actions

In a case resolved as the OCC was promulgating the True Lender and Valid When Made Rules, Colorado Attorney General Phil Weiser settled lawsuits filed against Marlette Funding LLC (Marlette) and Avant of Colorado LLC (Avant), two nonbanks that partnered with out-of-state banks. Originally, suit was brought against Marlette and Avant in January 2017. In November 2018, the attorney general amended the complaint to include related entities and various securitization trusts. Crucially, on June 9, 2020, the court ruled that even if the banks were the "true lenders" of the loans, the platforms as assignees could not stand in the shoes of the banks that originated the loans.

The attorney general announced a settlement of the *Marlette* and *Avant* actions on August 18, 2020. The settlement allowed the nonbank lending platforms to work with sponsor banks without being subject to the state's challenge of federal preemption or claims that the platforms are the true lenders. The settlement also established a legal protection for future loans as long as the programs comply with the terms outlined in the settlement, which are limited to closed-end loans made to consumers through online platforms.

Additionally, the settlement focused on loans made to Colorado residents and offered by nonbank online platforms with interest rates that exceeded the maximum 21% permitted under Colorado law. Under the settlement terms, no future loan may exceed a 36% interest rate. To the extent that a program offers "supervised loans" under Colorado law and that a platform takes an assignment of such loans from a bank and directly collects payment on those loans, the online lending platform is now required to obtain a license to service the loan from the Colorado Uniform Consumer Credit Code (UCCC) administrator.

Under the settlement, the programs must follow certain requirements to receive a safe harbor from further action by the state. Specifically:

- Banks must control and oversee the programs, including approval of origination, marketing, website content, credit terms, credit models, and approval/denial of credit policies determining whether credit is extended and under what terms;
- Banks must be named as the lender, fund loans from their own funds, and approve major third-party subcontractors, consistent with federal bank regulatory guidance; and
- The online platforms must have a compliance management system, including maintaining a consumer complaint system, and must comply with regulatory guidance for third-party arrangements.

The settlement also offered four compliance options for how many loans the bank can sell. These options generally limited the percentage of such loans that a platform may purchase from the bank and made a distinction between committed and uncommitted facilities to purchase. The settlement did not limit loans that are to be securitized. The final option gave the platforms the right to negotiate an alternative purchase structure with the approval of the Colorado UCCC administrator.

This settlement represented a significant development in the bank-sponsored online lending industry and offered a blueprint for online lenders to address compliance with state usury laws. The settlement terms in this case are particular to Colorado, however, and state-specific compliance will require a jurisdiction-by-jurisdiction assessment for companies until the rules imposed by the FCC are upheld to codify usury preemption doctrines.

Virginia Attorney General Mark Herring Accelerates Effective Date of Consumer Lending

The Virginia General Assembly passed comprehensive reforms during the 2020 session of the General Assembly intended to curb "predatory lending practices" and close legal options through which lenders could offer loans in excess of the commonwealth's usury laws. After the legislation passed, and citing the current and unprecedented public health crisis that "will lead

the most vulnerable citizens of the [c]ommonwealth to seek short-term loans," Virginia Attorney General Mark Herring urged Governor Ralph Northam in a letter to accelerate the effective dates of these bills. In response, the General Assembly agreed to accelerate the effective date from June 1, 2021 to January 1, 2021. Thus, these new laws have now taken effect.

Applauding the acceleration, Attorney General Herring stated, "This is great news for the many Virginians finding themselves in a tough financial situation because of COVID-19 and who may turn to small-dollar loans in order to make ends meet . . . These consumer lending reforms will close easily abused loopholes and provide much needed protections for Virginia borrowers. I'm glad I was able to help get the effective date for these important bills moved up so that Virginians who take out these small dollar loans during this difficult time can be better protected."

This swift action embodies Attorney General Mark Herring's recent effort to vigorously enforce Virginia's lending laws. In 2015, Herring established the Predatory Lending Unit, proclaiming the unit to be the "first-of-its-kind." The unit's mission is predicated upon investigating and prosecuting "suspected violations of state and federal consumer lending statutes, including laws concerning payday loans, title loans, consumer finance loans, mortgage loans, mortgage servicing, and foreclosure rescue services." Since its creation, the Predatory Lending Unit has filed lawsuits and settled claims with a number of online lenders alleged to be offering loans in excess of Virginia's 12% interest ceiling, resulting in over $30 million in consumer relief.

In light of the Predatory Lending Unit's now even broader license to prosecute violations of Virginia's lending laws, more regulatory enforcement and litigation in matters involving consumer lending is on the horizon. As such, lenders must tread carefully and ensure their business practices comply with Virginia law.

STUDENT LENDING

Federal Regulation

CFPB

On the federal level, the Consumer Financial Protection Bureau (CFPB) had a slow year in the student lending industry.

Per the 2020 Annual Report issued by the CFPB's Private Education Loan Ombudsman, complaints related to student loans were down significantly this year — by about 33% for private loans and by about 24% for federal loans during the period from September 1, 2019 through August 31, 2020. The CFPB notes that this is the continuation of an ongoing trend, as student loan-related complaints have steadily decreased since 2017. The CFPB suggests that some of this decrease is likely due to the CARES Act, which suspended student loan payment obligations for borrowers with federal loans held by the federal government. As a result, the CFPB anticipates that complaints will likely increase again once payment obligations restart.

The CFPB's public enforcement actions — only about five filed this year — largely focused on student loan debt relief companies.

For example, in January 2020, the CFPB sued a group of defendants for obtaining consumer reports without a permissible purpose, unlawfully charging advance fees and engaging in deceptive acts and practices in marketing student loan debt relief services. The case resulted in redress judgments totaling $25 million, six-figure civil penalties, and bans related to participating in the debt-relief industry against some of the defendants.

As another example, in July 2020, the CFPB filed a complaint claiming that Texas-based student loan debt relief business GST Factoring, Inc. and its principals violated the Telemarketing Sales Rule (TSR) by collecting $11.8 million in illegal fees from over 2,500 customers. Although most of the individual defendants settled, two did not, and according to the CFPB, now face a potential default judgment for $11.5 million in restitution and $15 million in civil penalties. The case, filed in the Central District of California, remains pending.

In January 2020, the CFPB and the U.S. Department of Education, Federal Student Aid (FSA) entered into a Memorandum of Understanding, which allows them to exchange information regarding student loan complaints and borrower information. As a result, the department now has "near real-time access" to the CFPB's complaint database and other data.

The CFPB acknowledges that the FSA and CFPB, acting in concert, subjected one or more loan servicers to supervisory and oversight examinations, but maintains that the number and target of these operations are confidential.

FTC

The Federal Trade Commission (FTC) also took several enforcement actions in the student loan sphere this year, although many experts predict the number of enforcement actions to increase in 2021.

In March 2020, the FTC filed a lawsuit against related student loan debt relief companies operating out of California, contending that they were taking illegal advance fees, falsely promising to lower or eliminate student loan debt, and failing to disclose that they were paying customers for positive online reviews. The case settled with the defendants agreeing to be permanently banned from the debt relief industry.

In July, the FTC won a court victory in a case filed in the U.S. District Court for the Central District of California against a group of student loan debt relief companies. The FTC alleged that the defendants, among other things, made false claims about the debt relief available, charged illegal advance fees, and inhibited consumers' ability to communicate with their loan servicer by logging in to the servicer's website and changing consumer's contact information.

The court awarded the FTC summary judgment,

resulting in a $27.6 million monetary judgment that also bans the defendants from participating in telemarketing and debt relief businesses.

In September, the FTC settled a lawsuit filed in 2019 against another group of student loan debt relief companies alleging that the defendants misrepresented their affiliation with the Department of Education and made deceptive promises about ways to reduce or eliminate monthly payments and principal balances. The case settled for a monetary judgment of $43.3 million (partially suspended due to the defendants' inability to pay), as well as a lifetime ban on their participation in the industry going forward.

State Regulation

Legislative

In 2020, a number of states moved forward with efforts to regulate the student loan industry. The regulations continue to become more and more comprehensive, as each state enacting new laws or regulations seemingly borrows features of other states' already-enacted rules.

For example, in April 2020, Virginia passed a sweeping new law that seeks to heavily regulate student loan servicers by requiring them to be licensed, establishing various servicing standards for communications and payments, and creating a new private right of action allowing aggrieved plaintiffs to recover actual damages, punitive damages, attorneys' fees, injunctive relief, and (in some cases) treble damages. The state will begin accepting license applications in March 2021.

In July 2020, Illinois published proposed rules implementing its Student Loan Servicing Act, also inviting comments. The rules are largely geared toward facilitating communications between loan servicers and their customers, by, for example, requiring regulated student loan servicers to provide information about repayment and forgiveness options and to provide website and toll-free telephone access. The rules also seek to establish fees associated with licensure. To date, the rules have not been finalized.

In September 2020, California's student loan bill of rights was enacted into law. The bill creates a Department of Financial Protection and Innovation (DFPI) and grants it authority to regulate student loan servicing activities within the state, subject to some exceptions. The law also establishes servicing standards not unlike federal mortgage servicing regulations. It also creates a new, private right of action to enforce the law, which provides for punitive damages, attorneys' fees, and even treble damages in some instances.

New Jersey — which previously enacted a Student Loan Bill of Rights that became effective in late 2019 — announced that it would begin applications for student loan servicing licenses in September 2020.

Enforcement

Likely due to pandemic-related interference, state-level enforcement efforts in the student lending space were down this year.

However, in July 2020, no less than 23 state attorneys general joined together to sue the U.S. Department of Education in the Northern District of California, contending that the department had unlawfully replaced the Obama administration's 2016 "Borrower Defense" regulations with "Institution Accountability Regulations" in 2019. The Borrower Defense regulations were intended to provide borrowers with an efficient process to seek debt relief following the collapse of the for-profit university system. As of the date of publication, the case remains pending.

In May 2020, the attorney general of New York reached its final settlement against a group of debt relief companies and their principals. The lawsuit alleged that the defendants charged consumers a fee for debt relief services that the U.S. Department of Education offered for free. Similar to federal enforcement efforts, the settlement resulted in a $5.5 million judgment and an industry ban for the defendants.

Effects of the COVID-19 Pandemic

Federal Loans

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which was signed into law on March 27, 2020, provided significant debt relief to borrowers of federally held student

The relief for student loan borrowers in the CARES Act was not extended to borrowers of privately held loans, creating significant uncertainty for those borrowers.

loans. The cornerstone of this relief package was the suspension of all payments due, a waiver of the accumulation of all interest, a pause on the affirmative collection of student loan debt through actions (such as lawsuits or post-judgment garnishment), and an abstention on certain negative credit reporting through September 30, 2020. Further, borrowers participating in loan forgiveness and rehabilitation programs could credit the months during this time period toward the total monthly payments required under these programs, regardless of whether the borrower actually made a payment.

In addition to repayment-based relief, accommodations were made for students who otherwise would be financially affected by a qualifying emergency. A qualifying emergency was defined as a public health emergency related to the coronavirus declared by the secretary of health and human services, an event related to the coronavirus for which the president declared a major disaster or emergency, or a national emergency related to the coronavirus declared by the president under the National Emergencies Act. Students participating in federal work-study programs were eligible to receive wages even if they could not work due to a qualifying emergency. Further, in the event a qualifying emergency prevented a student from completing a full semester, any Stafford loans or Pell Grants for that semester would not count towards the total number of such loans that the student was eligible to receive.

Initially set to expire on September 30, 2020, the Department of Education extended these protections through the end of the year. This relief served to shield borrowers from the unexpected impacts of the pandemic, allowing borrowers some leeway on repayment until economic activity adapted to the virus and the job market returned to normalcy. However, it is still unclear whether Congress will extend or expand upon the relief it has already granted and what effects that could have on both borrowers and lenders.

Private Loans

The relief for student loan borrowers in the CARES Act was not extended to borrowers of privately held loans, creating significant uncertainty for those borrowers. As early as April, a coalition of education and finance groups urged politicians on both sides of the aisle to include relief from private student loans in whatever emergency bill they passed next. While such a bill never came, state level actors quickly provided some relief to private borrowers.

The protections offered to borrowers of private student loans varied from state to state but largely reflected the relief provided in the CARES Act. In early April, the New York State Department of Financial Services reached an agreement with 90% of private student loan servicers operating within the state to allow for 90 days of forbearance on payments, a waiver of any late fees during this time, and abstention from transmitting negative information to the credit reporting bureaus. This agreement also suspended all debt-collection lawsuits pertaining to student loan debt for 90 days. Further, any payments on student loan debt owed to the state of New York were suspended through December 31, 2020.

Following thereafter, leaders from California, Colorado, Connecticut, Illinois, Massachusetts, New Jersey, Vermont, and Virginia came together with private lenders to extend the protections of the CARES Act to private borrowers. Similar to New York, the majority of servicers in these states agreed to offer a minimum of 90 days of forbearance, a waiver on late payment fees, abstention from any negative credit reporting, suspension of any debt collection lawsuits, and to work with borrowers to enroll them in other borrower assistance programs when possible. It was recognized that some servicers were limited in their ability to participate in

such relief due to investor restrictions or contractual obligations, however, in these instances, servicers were encouraged to work proactively with loan holders to relax those restrictions or obligations.

Notably, borrowers were required to opt into these programs unlike the protections offered by the CARES Act, so it is unclear how many people were actually able to take advantage of these protections. Regardless, while there has not been any mention of extending these protections for private borrowers, states may still consider asking for more relief from private servicers if the pandemic surges throughout 2021.

Student Loans in Bankruptcy

Although the CARES Act generally obviated the need for borrowers to attempt a discharge of student loan debt through bankruptcy this year, significant developments have occurred in the application of the Bankruptcy Code (Code) to student loan debt nonetheless.

Section 523 of the Bankruptcy Code sets forth the types of debt excepted from a discharge in bankruptcy. Under Section 523(a)(8) as it currently stands, both federally held student loans and privately held qualified education loans are excepted from discharge absent a showing of "undue hardship." When the Code was first enacted in 1978, a debtor could not discharge federally held student loan debt unless the debtor made a showing of undue hardship or the loan came due five years before the filing for bankruptcy occurred. In 1990, Congress extended this timeframe from five to seven years. Congress amended the statute again in 1998 by removing the time period after which student loans were dischargeable, and thus it was only by showing undue hardship that federally held student loans could be discharged. In 2005, Congress included privately held student loans in this list of exceptions. All these amendments notwithstanding, the code never defined what constitutes "undue hardship," and it was left to the bankruptcy courts to interpret this phrase.

The seminal case defining "undue hardship" is *Brunner v. New York State Higher Educ. Serv. Corp. (In re Brunner)*, 831 F.2d 395 (2d. Cir. 1987). Under *Brunner*, a debtor must show that (1) they made a good-faith effort to repay the debt; (2) they cannot maintain an acceptable standard of living if forced to continue repaying it; and (3) this unacceptable standard of living is likely to persist for a significant portion of the repayment period. Showing the presence of these factors has proven increasingly difficult, with most debtors retaining their student loan debt after bankruptcy. However, a New York bankruptcy judge recognized early in the year how insurmountable the hurdle presented by *Brunner* had become when she decided to discharge more than $220,000 in student loan debt.

In *Rosenberg v. N.Y. State Higher Education Services Corp.*, U.S. Bankruptcy Judge Cecelia G. Morris found that Kevin Jared Rosenburg met the

legal test for "undue hardship" established under *Brunner*. The court found that Rosenburg met the test's elements when he demonstrated that his required loan payments caused him to have a negative monthly income, the repayment period for his student loans had ended, and he had made payments whenever he could, while requesting forbearance when he could not. However, the more notable portions of this opinion are not simply the judge's ruling but her underlying rationale.

Early in its opinion, the court noted the criticism received by *Brunner* for "creating too high of a burden for most bankruptcy petitioners to meet." This burden resulted from interpretation throughout the past that created a "quasi-standard of mythic proportions so much so that most people (bankruptcy professionals as well as lay individuals) believe it impossible to discharge student loans." The court refused to "participate in perpetuating these myths" and instead sought to apply the *Brunner* test as it was originally intended. As a result, the court decided to discharge Rosenberg's student loan debt. Compared to the Fifth Circuit's decision of the previous year in *Thomas v. Department of Education*, which stated that it was up to Congress and not the courts to change the rules for discharging student loan debt in bankruptcy, this application of the *Brunner* test is inapposite and is currently up for appeal. However, if more courts follow the lead of Judge Morris in her relatively relaxed application of the *Brunner* test, the discharge of student loan debt in bankruptcy may become a far more frequent occurrence.

Although the bankruptcy system currently favors private student lenders, *Leary v. Great Lakes Education Loan Services* demonstrates that, the high hurdle of *Brunner* notwithstanding, both creditors and servicers must actively participate in the bankruptcy process in order to protect their interests. In 2015, Sheldon Leary initiated bankruptcy proceedings in the Southern District of New York, seeking to discharge over $300,000 in student loan debt he accrued to pay for his children's college tuition. Acting *pro se*, Leary filed an adversary complaint and served the summons and complaint on Great Lakes, which serviced his loans for the Department of Education (DoE). Although Great Lakes forwarded this complaint to the DoE, which in turn referred the matter to the U.S. Attorney's Office for the Southern District of New York, the U.S. attorney's office took no action in response since Leary did not specifically name or serve the DoE. Likewise, Great Lakes took no action other than forwarding the complaint to the DoE. As a result, Leary obtained a default judgment against Great Lakes, and the Bankruptcy Court ordered to discharge his debt.

In the years that followed, neither Great Lakes nor the DoE responded to any filings or appeared at any scheduled hearings. Instead, Great Lakes waited until 2017, when Leary's case was closed and the automatic stay lifted, to attempt to collect on his debts once more. In January of 2020, Leary filed to have his adversary proceeding reopened to enforce the default judgment against Great Lakes and to sanction the DoE and Great Lakes for failing to recognize the debts as discharged. Despite this, the DoE and Great Lakes still made no responses or appearances until a second order to show cause was entered in August 2020. As a result, the court sanctioned Great Lakes for the full amount of Leary's student loan debt payable to the DoE. In addition, the court ordered compensable sanctions payable to Leary for allowing him to believe that his debt was discharged and then attempting to collect after his bankruptcy had concluded. This case demonstrates that the strong protections afforded to student debt lenders and servicers will not be applied automatically by the courts in the absence of active participation.

The Tenth Circuit also had the opportunity to consider student loans under the Bankruptcy Code this year, albeit in a more novel context. In *McDaniel v. Navient Solutions*, the McDaniel argued that loans from Navient were dischargeable because, as they were not were not made solely for the "cost of attendance," they were not "qualified education loans" under Section 523(a)(8)(B) of the Code. Navient countered by arguing that these loans were non-dischargeable under Section 523(a)(8)(A)(ii) as "an obligation to repay funds received as an educational benefit." In finding that the loans were dischargeable, the Tenth Circuit reviewed the bankruptcy court's examination of the plain language of the statute.

The bankruptcy court first noted that Section 523(a)(8)(A)(i) excepts from discharge "an educational

benefit overpayment *or* loan made, insured, or guaranteed by a governmental unit" and that this disjunctive use of "or" distinguishes an educational benefit overpayment from a loan. The court next noted that subsections (A)(i) and (B) expressly mention the word "loan" while subsection (A)(ii) does not. Last, the court determined the terms in the series of subsection (A)(ii), "educational benefit, scholarship, or stipend," all constitute conditional grants of money that generally do not require repayment, unlike money given under the terms of a traditional loan. Finding the reasoning of the bankruptcy court to be sound, the Tenth Circuit affirmed the discharge of these education loans in bankruptcy. This decision requires additional consideration of private student lenders when granting education loans, as other courts may follow suit and allow discharge of such loans moving forward.

Given the developments in bankruptcy this year in conjunction with the economic pressure of the pandemic, borrowers are increasingly likely to seek a discharge of student loan debt in the years to come. What remains to be seen is whether borrowers will succeed in their claims or if the courts will instead reaffirm the protections offered to lenders.

Preemption

State Licensing Laws

Several states have recently ramped up their regulation of the student lending industry by passing laws requiring student loan servicers to be licensed in the state in order to operate. Many of these state licensing laws are creating conflicts for servicers in an industry already dominated by federal law.

Now a U.S. District Court in Connecticut has decided in *Pennsylvania Higher Education Assistance Agency v. Perez* that federal law preempts portions of Connecticut's student loan servicer licensing statute, a decision that may limit the scope of other states' licensing laws.

In 2017, Connecticut's licensing statute placed student loan servicer Pennsylvania Higher Education Assistance Agency (PHEAA) in an impossible situation. The Connecticut Department of Banking, pursuant to Connecticut's student loan servicer licensing statute, demanded PHEAA's records and information related to the federal Public Service Loan Forgiveness Program.

However, the Department of Education, which contracted with PHEAA for the servicing of certain federal direct loans in the Public Service Loan Forgiveness Program, instructed PHEAA to not disclose any data or documentation related to the Public Service Loan Forgiveness Program. The Department of Education took the position that PHEAA was prohibited from releasing the Public Service Loan Forgiveness Program's records under the federal Privacy Act and declined to provide the records to the Connecticut Department of Banking.

Even though PHEAA informed the Connecticut Department of Banking that it could not respond to the request due to the Department of Education's directive, the Connecticut Department of Banking threatened administrative action and suspension of PHEAA's state license if it failed to comply with the records request. Ultimately, neither the Connecticut Department of Banking nor the Department of Education were willing to budge from their respective positions, leaving PHEAA's state license hanging in the balance.

The court first noted that Connecticut's "licensing requirements for student loan servicers overlap with [the Department of] Education's own criteria for selecting its servicing contractors," and accordingly interfere with the Department of Education's selection process for its own contractors. This, the court held, violated the U.S. Supreme Court's precedent set in *Leslie Miller, Inc. v. State of Ark.*, in which the Supreme Court struck down a state licensing statute that virtually gave the state power of review over a federal contractor determination.

The court also held that "impossibility preemption bars the portions of [the Connecticut Department of Banking's] demands that sought documents and information protected by the Privacy Act, since 'compliance with both federal and state regulations [wa]s a physical impossibility' for PHEAA." The court noted that the Department of Education has "substantial discretion" in whether to release documents under the Privacy Act and has ownership of the documents themselves.

PHEAA thus had no power on its own to provide the documents to the Connecticut Department of Banking, and impossibility preemption applied.

Notably, the court *did not* hold that Connecticut's general licensing requirement was preempted, but rather a limited preemption application to just those portions of Connecticut's licensing statute that covered state investigations and record-keeping requirements for federal student loan servicers. Also, the opinion appears to restrict preemption to the servicing of federal student loans rather than privately held student loans.

Last, while the court declined to reach the issue of whether field preemption applies, the court noted that there was some authority suggesting field preemption would not be appropriate as it relates to the relationship between state licensing laws and federal law.

This decision limits the reach of Connecticut's licensing statute because it strips some potent tools from the Connecticut Department of Banking — investigatory powers and informational demands. While the decision likely will not slow the growing trend of state licensing laws aimed at the student lending industry, it may take the teeth out of some of the provisions.

State Consumer Protection Laws

On April 10, 2020, the U.S. Court of Appeals for the Eleventh Circuit vacated a district court's dismissal of borrowers' state law claims against a student loan servicer, holding that the claims were not preempted by the federal Higher Education Act (HEA). The decision resulted from a lawsuit filed by two federal student loan borrowers who alleged the servicer violated the Florida Consumer Collection Practices Act (FCCPA) and other state laws by making "affirmative misrepresentations to them and to other borrowers that they were on track to have their student loans forgiven based on their public-service employment when, in fact, their loans were ineligible for the forgiveness program."

The borrowers claimed that after making years of payments, they discovered they were not eligible for the Public Service Loan Forgiveness (PSLF) Program because most of their loans were not

While the decision likely will not slow the growing trend of state licensing laws aimed at the student lending industry, it may take the teeth out of some of the provisions.

federal direct loans. Both borrowers contended that had they not been misinformed, they would have taken the necessary steps to ensure eligibility. The district court dismissed the borrowers' claims on the grounds that they were expressly preempted under section 1098g of the HEA, which prohibits the application of state law disclosure requirements to federal student loans.

On appeal, the 11th Circuit determined that the HEA had not expressly preempted the borrowers' claims, concluding that the precise language in section 1098g "preempts only state law that imposes disclosure requirements; state law causes of action arising out of affirmative misrepresentations a servicer voluntarily made that did not concern the subject matter of required disclosures imposes no 'disclosure requirements.'" Among other things, the appellate court noted that the borrowers did not allege that the servicer failed to provide information it was legally obligated to disclose, but rather that the information provided to the borrowers concerning their eligibility for the PSLF program was false. "Holding [the servicer] liable for offering false information would therefore neither impose nor equate to imposing on servicers a duty to disclose information," the appellate court wrote. In addition to dismissing the servicer's field preemption argument, the appellate court reasoned that its decision "does no harm to standardization of disclosures for federal student loan programs." The court vacated the district court's dismissal, and remanded the case for further proceedings.

Immunity Under the Eleventh Amendment

The U.S. District Court for the Western District of Texas denied a student loan servicer's motion for judgment on the pleadings, finding that it was not entitled to absolute immunity under the Eleventh Amendment of the U.S. Constitution for alleged violations of the Fair Credit Reporting Act.

In May 2018, Kanita Perkins allegedly discovered that several student loans from Missouri Higher Education Loan Authority (MOHELA) had been taken out in her name without her authorization. Perkins filed an identity theft report with the Federal Trade Commission explaining the inaccuracies on her credit reports involving the student loans. Her obligations were not discharged, and she began receiving debt collection notices.

Perkins brought suit against MOHELA for purported violations of the FCRA. In response, MOHELA filed a motion for judgment on the pleadings arguing that, as an arm of the State of Missouri, it was immune from suit under the Eleventh Amendment.

Rejecting MOHELA's argument, the court relied on six factors set forth in *Clark v. Tarrant Cty.*, 798 F.2d 736, 744-45 (5th Cir. 1986):

1. whether the state statutes and case law view the entity as an arm of the state;

2. the source of the entity's funding;

3. the entity's degree of local autonomy;

4. whether the entity is concerned primarily with local, as opposed to statewide, problems:

5. whether the entity has the authority to sue and be sued in its own name; and

6. whether the entity has the right to hold and use property.

The decision in *Perkins* comes at a time of great uncertainty for student loan servicers and borrowers alike. Amid changes brought on by the coronavirus, servicers of student loans should ensure new policies governing student loans are implemented, and employees are trained to comply with these new guidelines.

TELEPHONE CONSUMER PROTECTION ACT

The Supreme Court Resolves Challenges to the Constitutionality of the TCPA

In July 2020, the Supreme Court in *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335 (2020) answered the question of whether § 227(b)(1)(A)(iii) of the TCPA — the prohibition against using automatic telephone dialing systems (ADTS) to call cellular telephones — violates the First Amendment.

The ATDS use restrictions date from when the TCPA was first enacted in 1991. But in 2015, Congress amended the statute, creating an exception to the prohibition for calls "made solely to collect a debt owed to or guaranteed by the United States."

In 2019, the Fourth and Ninth Circuits considered challenges to constitutionality of § 227(b). The arguments raised were that: (a) the prohibition on making calls with an ATDS is an unconstitutional restriction of free speech; and (b) § 227(b)(1)(A)(iii) contains an impermissible content-based restriction on speech because it treats calls made by persons collecting debts owed to the United States differently from other types of calls. Both courts found that the government debt exception violated the First Amendment but upheld the constitutionality of the TCPA as a whole. *See Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 171-72 (4th Cir. 2019), *Gallion v. United States*, 772 F. App'x 604, 605-06 (9th Cir. 2019). In January, the Supreme Court granted certiorari to review the Fourth Circuit's decision.

In the controlling opinion in *Barr*, authored by Justice Kavanaugh, the Supreme Court found that the government debt exception is a content-based restriction on speech subject to strict scrutiny (under which a law survives only if the government can establish that it is narrowly tailored to serve compelling state interests). *Barr*, 140 S. Ct. at 2346. It then determined (and indeed, the government conceded) that the provision could not survive strict scrutiny. *Id.* at 2346. Ultimately, six members of the Court found that the TCPA "impermissibly favored debt-collection speech over political speech in violation of the First Amendment." *Id.* at 2343. However, the majority of the justices held that § 227(b)(1)(A)(iii) should not be struck down in its entirety. Rather, seven members of the Court conclude that the "2015 government-debt exception must be invalidated and severed from the remainder of the statute." *Id.*

Fallout from the Supreme Court's Decision in *Barr*

Although the Supreme Court confirmed the constitutionality of § 227(b)(1)(A)(iii) without the government debt exception, the resolution of this issue has resulted in new questions concerning whether courts have the ability to hear claims that arose during the time the unconstitutional provision was in effect.

In *Creasy v. Charter Communs., Inc.*, No. 20-1199, 2020 U.S. Dist. LEXIS 177798, at *2 (E.D. La. Sep. 28, 2020), the defendant asserted that § 227(b)(1)(A)(iii) was unconstitutional from the moment Congress enacted the government-debt exception in 2015 until the Supreme Court severed the provision in *Barr*. Based on this, it argued that claims premised on calls made before July 6, 2020 cannot be enforced in federal court. *Id.* The plaintiff took the opposite position, arguing that the government debt exception was struck to preserve the general ban on the use of ATDS and confirmed that the reminder of the statute was constitutional all along. *Id.* at *2-3. The court agreed with the defendant, finding "that the years in which § 227(b)(1)(A)(iii) permitted robocalls of one category of content (government-debt collection) while prohibiting robocalls of all other categories of content, the entirety of the provision was, indeed, unconstitutional." *Id.* at *4. It therefore held that it lacked subject matter jurisdiction over claims based on calls placed before July 6, 2020. *Id.* at *5.

Since the *Creasy* decision, the Northern District of Ohio reached a similar conclusion in *Lindenbaum v. Realgy*, No. 1:19 CV 2862, 2020 U.S. Dist. LEXIS 201572 (N.D. Ohio Oct. 29, 2020). In this case,

the court found that the decision in *Barr* did not address whether severance of the government-debt exception would apply retroactively to cases that are currently pending. *Id.* at 12. And it determined that the severance of the government-debt exception could only apply prospectively. *Id.* at *6. Consequently, because the statute was unconstitutional at the time of the violations alleged by the plaintiffs, the court held that it lacked subject matter jurisdiction and dismissed the claims. *Id.* at *19-20.

The potential implications of *Creasy* and *Lindenbaum* are tremendous — a wide application of their reasoning would bar all claims under § 227(b)(1)(A)(iii) for calls placed before July 6, 2020. We will continue to monitor how courts treat this issue and will raise lack of subject matter jurisdiction as a defense in cases where the calls at issue predate the decision in *Barr*.

Continued Circuit Splits: ATDS

2020 started off with an important decision when the Eleventh Circuit released its much-anticipated opinion in *Glasser v. Hilton Grand Vacations Company LLC*. The court held that a phone system must use randomly or sequentially generated numbers to qualify as an ATDS under the TCPA. In doing so, the Eleventh Circuit joined the Seventh and Third Circuits' interpretation of an ATDS.

This decision is of significance because of the thousands of individual and class actions brought annually under the TCPA, depending on the theory that a phone system that lacks a "random or sequential number generator" nevertheless qualifies as an ATDS, triggering the TCPA. Hence, companies of all types could take comfort that the theory has suffered another, potentially telling blow.

However, on April 7, 2020, the Second Circuit added more uncertainty to TCPA with its decision on the meaning of an ATDS in *Duran v. La Boom Disco, Inc*. Breaking from the Seventh and Eleventh Circuit decisions, which followed the statutory language in requiring random and sequential number generation, the Second Circuit held that the capacity to automatically dial from a stored list qualifies a telephone system as an ATDS (assuming the other statutory requirements are present). In its decision, the Second Circuit sided with the Ninth Circuit's decision in *Marks v. Crunch San Diego LLC* — a case that had begun to look like an outlier. The Second Circuit also found that clicking "send" to initiate a text message campaign is not "enough human intervention to turn an automatic dialing system into a non-automatic one."

The Second Circuit held that the capacity to automatically dial from a stored list qualifies a telephone system as an ATDS.

On July 29, 2020, the Sixth Circuit sided with the Second and Ninth Circuits in *Allan v. Pennsylvania Higher Education Assistance Agency*. Pennsylvania Higher Education Assistance Agency (PHEAA) used an Avaya Proactive Contact dialer, which did not randomly or sequentially generate numbers to dial, but it did create a calling list based on a stored list of accountholder numbers. The Sixth Circuit concluded the Avaya system qualified as an ATDS because it stored numbers and dialed those numbers.

The strong circuit split almost certainly factored in the Supreme Court's decision to take the case *Duguid v. Facebook*. It seems the question of precisely what constitutes an ATDS will finally be decided by the Supreme Court.

Updates Regarding a "Called Party"

On June 3, 2020, the U.S. Court of Appeals for the Ninth Circuit held in *N.L. v. Credit One Bank* that consent from the intended recipient of calls does not absolve an entity of liability under the TCPA if the entity did not have the consent of the party actually called. This decision aligns with decisions from the Third, Seventh, and Eleventh circuits holding that consent of the intended recipient is not sufficient.

While there haven't been many Court of Appeals updates in 2020 regarding the definition of a "called party," an interesting case from the Southern District of Florida was published on April 25, 2020.

In *Thompson v. Portfolio Recovery Associates LLC*, PRA, a debt collection company, called the debtor (Cousin) who then forward the calls to his cousin's (plaintiff) VoIP number. The plaintiff then brought a TCPA suit against PRA for 17 calls that were rerouted to his phone by Cousin. The court concluded, "[b]ased on a commonsense approach to the facts in this dispute, PRA did not place phone calls to [the p]laintiff. PRA called Cousin. It hardly seems to be the case that the TCPA anticipated parties like [the p]laintiff would file suit against bona fide debt collectors for having called debtors who have re-routed their phone calls to other individuals."

COVID-19 Expands the Emergency Purpose Exception to the TCPA

Unsurprisingly, COVID-19 also left its marks on the TCPA via the emergency purpose exception. Shortly after COVID-19 hit the United States in earnest, the Federal Communications Commission (FCC) confirmed via a Declaratory Ruling on March 20, 2020, that the COVID-19 pandemic constitutes an "emergency" under the TCPA. Accordingly, the FCC held that calls and texts do not require prior express consent if (i) the caller is a hospital, health care provider, state or local health official, or other government official, or a person under the express direction of such an organization and acting on its behalf; and (ii) the content of the call is solely informational, made necessary because of the COVID-19 outbreak, and directly related to the imminent health or safety risk arising out of the COVID-19 outbreak.

The FCC then issued a public notice on July 28, 2020, clarifying its prior guidance regarding the types of COVID-19-related communications that fall within the "emergency purposes" exception to the Telephone Consumer Protection Act (TCPA). In its July notice, the FCC clarified that calls and text messages (i) made by or on behalf of commercial labs, health insurers, physicians and pharmacies (health care entities) (ii) that communicate with individuals who have tested positive for COVID-19 (pursuant to guidance from federal, state, or local government officials) (iii) to provide them with information regarding donating their plasma after recovering fall within the emergency purposes exception. Therefore, such plasma donation calls and texts are exempted from the prior express consent requirements of the TCPA. In issuing its order, the FCC expressed that these calls "are critical to inform their recipients of the need for them to participate in an effort to mitigate the devastating effects of COVID-19."

Continuing its emphases of prior years, the FCC

reiterated that automated calls or texts that contain advertising or telemarketing of services, or that attempt to collect a debt (even if related to health care treatment), do not fall under the emergency purposes exception. Affirming that only those types of calls that affect the health and safety of consumers can be protected, the FCC nevertheless broadened the reach of the TCPA's emergency purpose exception.

ATDS in 2020: A Long-Asked Question, Soon Answered

The definition of an automatic telephone dialing system (ATDS) continues to be one of the most litigated aspects of the TCPA in 2020. Yet this litigation, the subject of numerous circuit splits and countless appeals over the years, may finally be primed for resolution in 2021 as the Supreme Court is scheduled to hear oral argument in *Facebook v. Duguid* on December 8, 2020. The case is set to clarify — once and for all — which dialing systems fall into the definition of "automatic telephone dialing system"?

At issue in *Duguid* is whether Congress intended to regulate equipment that has the capacity to simply store and automatically dial numbers as an ATDS when it enacted the TCPA in 1991. Duguid alleged in his putative class action that Facebook sent him numerous automatic text messages without his consent. Facebook moved to dismiss Duguid's claims and argued, among other things, that Duguid did not adequately allege that Facebook used an ATDS because he failed to allege that the equipment had a random or sequential number generator. The TCPA 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."

After the district court dismissed Duguid's claim, the Ninth Circuit Court of Appeals reversed, finding Duguid's allegation sufficient: "An ATDS need not be able to use a random or sequential generator to store numbers — it suffices to merely have *the capacity* to 'store numbers to be called' and 'to dial such numbers automatically.'" (emphasis added). The Ninth Circuit's decision conflicts with other circuit court opinions, including a decision from the Seventh Circuit, *Gadelhak v. AT&T*, which was notably authored by now Justice Amy Coney Barrett.

The main point of contention before the Supreme Court relies on whether the adverbial phrase "using a random or sequential number generator" modifies "store or produce" or just "produce." Asserting that the Ninth Circuit was correct with its broader ATDS definition, Duguid contends that a dialing system qualifies as an ATDS if it can store numbers to be dialed automatically, regardless of whether those numbers are randomly or sequentially generated.

Conversely, Facebook asserts that a system lacking the capacity to randomly or sequentially generate numbers cannot be an ATDS, even if it can store and automatically dial them. In other words, if Facebook's narrower reading applies, then companies can avoid TCPA liability if they use autodialing systems that can simply store (but not randomly or sequentially generate) potential customers' numbers and then dial them. In fact, the vast majority of dialing systems — particularly those used to send text messages — simply store and dial a list of numbers uploaded by the sender, and thus would not qualify as an ATDS. If Duguid's broader reading applies, however, then virtually any system used to send text messages or dial numbers automatically could result in TCPA liability. Interestingly, the United States has submitted a brief supporting Facebook's position, arguing that the expansive ATDS definition that Duguid advances is not what Congress intended in 1991 and will likely be broad enough to encompass ordinary smartphones.

As the definition of ATDS remains unsettled and liability frequently hinges on where a defendant is sued, significant risk exists for companies that engage in any automatic text message or telephone marketing. Regardless of how the Supreme Court rules, the decision in *Duguid* will likely provide more clarity to defendant-callers seeking to prepare appropriate compliance policies for their telephone outreach programs.

Looking Ahead: TCPA Compliance in 2021

Moving forward, companies will need to redouble their compliance efforts to keep step with the rapidly shifting landscape of TCPA regulation. The Supreme Court's decision in *Barr* suggests that robocall restrictions are here to stay and, if anything, are increasing in strength. Unless the Supreme Court reverses course in *Duguid*, companies will likely see states move toward broader restrictions on robocalls to avoid copycat First Amendment claims founded on alleged content-based restrictions. With *Barr* assuaging the plaintiffs' concerns about the long-term viability of the TCPA in the face of decisions striking down individual provisions, the plaintiffs may adopt the strategy previously employed by the defendants: attack other exceptions to TCPA restrictions, knowing that the severance doctrine, which allows courts to excise problematic provisions from a statute instead of invalidating the entire statute, will likely keep the TCPA in force. This strategy will be bolstered by the fact that attitudes toward robocalls will push courts toward increasing restrictions rather than removing them.

Other TCPA exemptions vulnerable to the plaintiffs' attacks include calls by tax-exempt nonprofit organizations, health care-related calls to a residence, non-telemarketing commercial calls, and cellular carrier calls to their own subscribers, each of which could arguably be framed as a content-based restriction. Plaintiffs will also likely continue to bring class actions alleging violations based on calls placed during the last five years. However, some courts may apply the Supreme Court's decision in *Barr* purely prospectively to provide defendants a reprieve, as in *Creasy*, potentially creating another Supreme Court-bound circuit split.

Companies should also monitor the FCC's ongoing rulemaking on pre-recorded messages. If the FCC adopts its proposed rule exempting commercial calls to a residence that use an artificial or pre-recorded voice and do not involve telemarketing, then businesses may wish to adapt their call strategy to fit more calls into the permitted informational or transactional call categories. That said, companies must still be cognizant of separate state-TCPA restrictions, which may not track the federal exemptions. Plaintiffs are also likely to litigate calls that do not clearly fit into one of the exempt categories.

Thus, there is no rest for the TCPA-weary as 2021 will likely continue to see new droves of TCPA lawsuits, especially before the *Duguid* decision comes down.

TRIBAL LENDING

Lawsuits involving tribal lending gained significant momentum in 2020. Lenders continued to enter into large settlements, though courts acted as a check on unreasonable agreements. The Fourth Circuit invalidated two more choice-of-law clauses that attempted to waive federal law, and the Seventh Circuit ruled that consumer reporting agencies could report debts owed to tribal lenders without first determining their legal validity. Finally, the U.S. Supreme Court declined to weigh in on the impact of tribal sovereign immunity in the context of criminal usury and racketeering laws.

The U.S. Supreme Court declined to weigh in on the impact of tribal sovereign immunity in the context of criminal usury and racketeering laws.

Class Action Lawsuits Against Tribal Lenders Generate Substantial Settlements, but Courts Keep Settlements in Check

In a recent class action raising tribal sovereign immunity issues, a district court judge for the Eastern District of Virginia rejected as inadequate a proposed multimillion-dollar settlement which would have disproportionately benefited certain class members, and which allocated half the cash award to attorneys' fees. Judge Morgan's November 6 decision in *Solomon v. American Web Loan, Inc.*, No. 4:17-cv-145, reversed his preliminary approval of the settlement earlier in 2020, following written objections by multiple interested parties, including the Commonwealth of Virginia. Under the terms of the class settlement submitted to the court, American Web Loan (AWL) had agreed to place $65 million in a fund for class members, and write off an additional $76 million in disputed loans. It also had agreed to pay attorneys' fees equaling up to 23 percent of the total settlement value, including both the class fund and the write-offs, or $32.43 million, roughly half of the total cash payment.

Plaintiffs alleged that AWL and its "de facto" owner operated a "predatory online lending scheme" charging unlawfully high interest rates for short-term loans. They also argued the de facto owner attempted to shield AWL using the Otoe-Missouria Indian Tribe's sovereign immunity through a "rent-a-tribe" scheme. According to the complaint, the primary investors in AWL are all entities controlled by the de facto owner, while the Tribe receives only 1 percent of AWL's revenues. Plaintiffs brought claims under the Racketeer Influenced and Corrupt Organization Act, the Electronic Funds Transfer Act, and the Truth in Lending Act, as well an unjust enrichment count. The parties pursued a settlement.

In rejecting the proposed class settlement, the court found that the particular loan cancellations and the other nonmonetary benefits to plaintiffs benefited only a minority of the class members and held little value to the class as a whole, while certain class members would be forced to give up their claims without receiving any benefit. The court also found that the requested attorneys' fees were excessive. The court directed the parties to appear for mediation in an effort to minimize future litigation costs.

Choice-of-Law Rulings Continue to Plague Lenders Whose Language Has Been Declared Invalid by Courts, Including the Fourth Circuit

In July 2020, the Fourth Circuit handed down two more decisions invalidating choice-of-law clauses that purported to waive federal law in favor of tribal law, including in *Gibbs v. Sequoia Capital Operations, LLC*, No. 19-2108 (4th Cir. 2020), where the court ruled that the arbitration agreements at issue were unenforceable because the choice-of-law provisions in the agreements operated as a prospective waiver of federal statutory law.

The court affirmed the lower court's denial of the defendant's motion to compel arbitration.

The Fourth Circuit expressly relied on its prior decisions in *Hayes v. Delbert Services Corporation*, 811 F.3d 666 (4th Cir. 2016), and *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017). In *Hayes*, decided in 2016, the court considered a contract that contained an arbitration agreement and choice-of-law clause expressly prohibiting the application of any federal law, which would effectively prevent a plaintiff from bringing federal claims. The court held that any attempt to prospectively waive a party's federal rights is "plainly forbidden," and "invalid and unenforceable." Just over a year later, in *Dillon*, the Fourth Circuit again considered another arbitration agreement's choice-of-law clause. The *Dillon* clause did not expressly disavow federal law, but provided that the arbitrator should apply tribal law and stated that "[n]either this Agreement nor the Lender is subject to the laws of any state of the United States." The court interpreted these provisions together as an "unambiguous attempt to apply tribal law to the exclusion of federal and state law." In both cases, the court declined to sever the choice-of-law provisions from the rest of the contract for public policy reasons.

The results in these cases are also consistent with the Third Circuit's decision earlier in 2020 (holding an arbitration agreement unenforceable under the prospective waiver doctrine where the plain language of the arbitration and loan agreements confirmed that the only claims available in arbitration were tribal law claims) and the Second Circuit's decision last year in *Gingras v. Think Fin., Inc.*, 922 F.3d 112 (2d Cir. 2019) (holding an arbitration clause unenforceable and unconscionable because it was designed to avoid federal and state consumer protection laws and required the application of tribal law only).

This trend is likely to continue so long as tribal lenders hold contracts that state or insinuate that tribal law trumps federal law.

Tribal Lending and the FCRA: Seventh Circuit Holds that CRAs Are Not Required to Adjudicate the Validity of an Underlying Debt

On May 11, 2020, the U.S. Court of Appeals for the Seventh Circuit – following precedent from the First, Ninth, and Tenth Circuits – affirmed a lower court's holding that the Fair Credit Reporting Act (FCRA) does not require consumer reporting agencies (CRAs) to determine the legal validity of a disputed debt, including with respect to loans from a tribe. In *Denan v. Trans Union, LLC*, 959 F.3d 290 (7th Cir. 2020), the appellate court concluded that the validity of a consumer's legal defense to a debt "is a question for a court to resolve in a suit against the [creditor,] not a job imposed upon consumer reporting agencies by the FCRA." *See also Humphrey v. Trans Union, LLC*, 759 F. App'x 484, 485 (7th Cir. 2019) (rejecting alleged inaccuracy of plaintiff because it "required a legal determination about whether his disability-discharge applications required Navient to cease collections" and, thus, did not constitute actionable inaccuracy); *Wright v. Experian Info. Sols., Inc.*, 805 F.3d 1232, 1242 (10th Cir. 2015) ("A reasonable reinvestigation, however, does not require CRAs to resolve legal disputes about the validity of the underlying debts they report.").

The two plaintiffs in *Denan* sued Trans Union, LLC in connection with its reporting of loans they had obtained through lenders owned, operated, and affiliated with Native American tribes. Both loans had interest rates in excess of 300 percent, and contained language in the terms stating that the loans were subject to tribal law, rather than the laws of the plaintiffs' respective states. When the plaintiffs each stopped paying their loans, the lenders reported outstanding balance amounts to Trans Union, which then published them on plaintiffs' credit reports.

The plaintiffs sued Trans Union, alleging violations of sections 1681e(b) and 1681i of the FCRA. The plaintiffs did not contest the factual accuracy of the debts reported by Trans Union. They instead argued that Trans Union reported debts that were "legally inaccurate" – meaning illegal under the laws of their respective states – which rendered the debts invalid. Importantly, the plaintiffs had never challenged the validity of their loans in a court. They nonetheless claimed that if Trans Union had reasonable procedures in place to ensure the maximum possible accuracy of the information, it would have determined that these debts were "void and uncollectible." Trans Union moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), and the district court found in Trans Union's favor,

stating that "[u]ntil a formal adjudication invalidates the plaintiffs' loans . . . they cannot allege factual inaccuracies in their credit reports."

The Seventh Circuit agreed. Analyzing the plaintiffs' section 1681e(b) claim, the court emphasized the distinctions between CRAs and furnishers of information under the FCRA. According to the court, "the FCRA does not require unfailing accuracy from [CRAs] but rather "requires a [CRA] to follow 'reasonable procedures to assure maximum possible accuracy' when it prepares a credit report." While furnishers must also report accurate information, the court noted that "accuracy" for furnishers "means 'correctly [r]eflects . . . liability for the account.'" Thus, the court concluded that "[n] either the FCRA nor its implementing regulations impose a comparable duty upon [CRAs], much less a duty to determine the legality of disputed debts."

The court further distinguished CRAs from tribunals. The court identified three separate legal issues bearing upon the collectability of plaintiffs' loans. It concluded "[t]he power to resolve these legal issues exceeds the competencies of [CRAs]." In agreement with the district court, the Seventh Circuit determined "[o]nly a court can fully and finally resolve the legal question of a loan's validity." The Seventh Circuit finally found that plaintiffs' section 1681i claim failed on the same basis, interpreting inaccurate information under that provision to also mean factually inaccurate information only.

Denan makes clear that courts interpret "inaccurate information" under the FCRA to mean factually inaccurate information, as CRAs "are neither qualified nor obligated to resolve legal issues" – including as overlaid with complex and entrenched issues of tribal sovereignty and self-governance. *Denan* holds that "as a threshold matter" a CRA "cannot be liable under [1681e(b) or 1681i(a)] if it did not report inaccurate information."

U.S. Supreme Court Declines to Review Extent of Sovereign Immunity in Tribal Lending Criminal Case

On April 20, 2020, the U.S. Supreme Court denied a petition for writ of certiorari from Delaware attorney Wheeler Neff, who previously was convicted for assisting American Indian tribes that offer loans with interest rates in excess of what was permitted under state law. Issues relating to immunity of individuals who partner with Indian tribes have been on the rise in recent years, as states have increased scrutiny over tribal and non-tribal partnerships.

Enforcing the delegation clause would require the arbitrator to decide the validity/enforceability of the agreement without a body of contract law to draw from.

Neff and co-defendant Charles Hallinan were charged with putting the names of three Indian tribes on high-interest loans to allegedly evade state usury laws. Defendants were convicted of conspiring to collect unlawful debts in violation of the Racketeer Influenced and Corrupt Organization Act (RICO), federal fraud, and other crimes based on defendants' efforts to skirt state usury laws by partnering with American Indian tribes to offer loans, and on defrauding consumers who sued one of the payday businesses into settling their case for a fraction of its worth. Neff was found guilty and given an eight-year prison sentence in May 2018, while Hallinan received a 14-year sentence.

Neff requested that the Supreme Court address whether jury instructions stating that tribal immunity did not extend to their criminal prosecutions constituted a reversible error. The Third Circuit previously had held that tribal immunity did not "transfigure debts that are otherwise unlawful under RICO into lawful ones." *United States v. Neff*, 787 F. App'x 81, 92 (3d Cir. 2019). The Third Circuit also had held that tribal immunity "might stymie a state civil enforcement action or consumer suit," but that does not stop the state from prosecuting offenders of the statute, thereby holding that state prosecution could go forward. *Id.* (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014)).

The Supreme Court declined to review the matter further, meaning that the Third Circuit's decision remains intact.

M.D. Fla. Declines to Enforce Delegation, Choice-of-Law, and Arbitration Clauses of Tribal Lender

On December 10, 2020, Judge William F. Jung of the Middle District of Florida found an arbitration clause that (a) made federal law applicable and (b) designated AAA or JAMS to arbitrate the dispute, was substantively unconscionable because the agreement precluded the consumer from vindicating Florida state law via arbitration. The court found Florida law applicable notwithstanding a tribal choice-of-law provision. It also acknowledged the prior precedents invalidating arbitration agreements based upon choice-of-law provisions waiving *federal* law, and recognized that the decision represented an extension of existing law invalidating tribal loan agreements. Judge Jung aggressively painted the issues in moral terms, calling the Tribe "loansharks" that "victimize the weak" and describing tribal immunity as a "circumvention scheme" to avoid usury prohibitions.

The defendants in this case were Global Trust Management, LLC (GTM) and Frank Torres, GTM's chief operations officer. GTM had purchased the plaintiff's past-due accounts from Mobiloans, Inc., an online lending company purportedly owned by the Tunica-Biloxi Tribe. Mobiloans and the tribe declined to participate in a suit asserting tribal immunity. Procedurally, the court denied the defendants' motion to compel arbitration, finding that:

- The delegation clause in the arbitration agreement was unenforceable as the arbitration agreement disclaims state contract law;
- Florida law governed the formation of the arbitration agreement, as the Tribe lacked a body of contract law; and
- The arbitration agreement was unconscionable, and thus unenforceable by violating Florida's public policy against usury.

In finding the delegation clause unenforceable, the court agreed with the plaintiffs that the arbitration agreement disclaims state contract law in favor of the law from the Indian Tribe, "whose law includes no substantive contract law." Thus, in the court's view, enforcing the delegation clause would require the arbitrator to decide the validity/enforceability

of the agreement without a body of contract law to draw from, and preclude the plaintiffs' ability to raise contract defenses to challenge the agreement - as the FAA provides. Without an enforceable delegation clause, the court found it had the ability to decide the validity and enforceability of the agreement.

The court then ruled that the Tunica-Biloxi tribe lacks a body of contract law, and that, after engaging in a conflicts-of-law analysis, Florida law governed the formation of the arbitration agreement, as "all relevant activity" took place in Florida. Under Florida law, the court held the arbitration agreement to be both procedurally and substantively unconscionable and unenforceable. The court's discussion of procedural unconscionability did not chart any new waters, essentially stating the agreement was a "contract of adhesion," and payday loan consumers lacked any meaningful bargaining power.

The court advanced substantive unconscionability, however, to find that a waiver of state law claims – combined with an arbitration process that did not provide meaningful ability to challenge or review the waiver – rendered the arbitration provision unenforceable. In finding that a waiver of state law claims violates public policy, the court pointed to the Florida Consumer Finance Act (FCFA) as an embodiment of Florida's public policy to limit interest rates on consumer loans. The court rejected defendants' cited authority that Florida allows parties to contract for another jurisdiction's laws by distinguishing those cases as being "in the commercial context as between sophisticated parties" and not the "consumer context."

The court nevertheless rejected the plaintiffs' view that the Fourth Circuit's *Hayes* decision and other cases relying on it "as establishing "the proposition that arbitration agreements applying tribal law to the exclusion of all state law are unenforceable as a matter of public policy." Instead, the court stated that *Hayes* relied on preclusion of application of federal, not state law. It still, however, relied on preclusion of state law claims "that is equally unjust."

The court then held that "all roads" of the arbitration agreement "lead to tribal law with no way out." While the arbitration would be handled by respected organizations, the arbitration provision required the arbitrator to apply tribal substantive law, and the Tribal court had sole power to review the arbitrator's decision. Hence, the court felt that the plaintiffs could not vindicate Florida state law in the arbitration, making the arbitration provision unconscionable. The court also described the opt-out provision as illusory, as it would have required the plaintiffs to litigate their claims in Tribal court under tribal law.

This opinion should be construed narrowly, as it takes a particularly hostile view towards tribal lending business models and notions of tribal self-governance. However, it spotlights the tensions found in many choice of law disputes, and raises issues businesses need to consider and address when crafting arbitration agreements and formulating a dispute resolution process.

UNIFORM COMMERCIAL CODE AND BANKING

Looking Back on 2020: A Banking Litigation Perspective

The year 2020 will go down as one of the most tumultuous years in history as the nation confronted a global pandemic and converted to a virtual work environment, engaged in social justice marches and partook in a historic election battle rife with negative rhetoric, and witnessed surprising resiliency in the stock market. For bank litigators, the year was also a bit out of the ordinary, with rulings from the U.S. Supreme Court addressing state and federal court subpoenas for President Trump's financial records, lawsuits arising out of the newly enacted Coronavirus Aid, Relief, and Economic Security (CARES) Act and implementation of the Small Business Association's Payroll Protection Program (PPP), and then more of the mundane — wire fraud and Uniform Commercial Code (UCC) cases reinforcing schemes of liability bank litigators know well.

Two cases involving subpoenas of President Trump financial records make it all the way to the Supreme Court.

In *Trump v. Vance*, 140 S. Ct. 2412 (2020), President Trump sought protection against a subpoena issued by a New York grand jury for his financial records from an accounting firm. He argued that as president, he was categorically immune from state criminal process that the subpoenas amount to harassment of the president. The Supreme Court disagreed. All nine justices ultimately rejected his claim of absolute immunity and appellate court judgment was affirmed. In *Trump v. Mazars*, 140 S. Ct. 2019 (2020), Trump sought protection against a subpoena issued by congressional committees seeking his financial records from various banks and his accounting firm. Trump argued that the separation of powers doctrine requires that Congress establish a "demonstrated, specific need" before it can issue the subpoena. The Court established a four-factor balancing test to assess Congress' significant legislative interest against the personal interests of the executive branch: (1) whether Congress can reasonably obtain the information from other sources; (2) whether the subpoena is no broader than reasonably necessary to support the legislative objective; (3) whether the subpoena advances a valid legislative purpose; and (4) whether the subpoena would impose a burden on the president. The case was remanded to the lower courts to assess the issue using these four factors.

The CARES Act and administration of the PPP spawn new litigation.

After the Small Business Administration (SBA) unveiled the PPP to ameliorate losses small businesses were facing due to COVID-19, lawsuits challenging abuses in administration of the program lit up the courts. Federal district courts have addressed several cases regarding agent fees and whether the CARES Act creates a private right of action to collect agent fees from PPP lenders. The District Court for the Northern District of Florida was one of the first courts to issue a ruling on this question in *Sport & Wheat v. Servisfirst Bank*, No. 3:20-cv-5425-TKW-HTC, 2020 U.S. Dist. LEXIS 152719 (N.D. Fla. Aug. 17, 2020). The district court found that the CARES Act and its implementing regulations do not require lenders to pay a portion of the loan processing fees they receive from the SBA to agents that assist borrowers in obtaining PPP loans. A few months later, in *Am. Video Duplicating Inc. v. Citigroup, Inc.*, No. 2:20-cv-03815, 2020 U.S. Dist. LEXIS 213898 (C.D. Cal. Nov. 16, 2020), the Central District of California, similarly held that the CARES Act does not create a private right of action to collect agent fees.

Wire fraud cases arising from business email compromise continue to proliferate the courts, with the banks prevailing.

Wire fraud cases, arising from what the FBI calls "business email compromise," continue to pose a significant risk to companies and individuals, particularly in the work-at-home environment and transactions occurring virtually. Recently, a handful

of courts have analyzed claims of negligence and Article 4A in the context of wire transfers arising from business email fraud schemes, and the banks appear to have prevailed in all of them.

In *Berry v. Regions Financial Corporation, et al.*, No. 2:20-cv-0239, 2020 U.S. Dist. LEXIS 237450 (W.D. Tenn. Dec. 17, 2020), the Western District of Tennessee granted the motions to dismiss filed by Regions Bank and Truist Bank. Significantly, the district court adopted the argument that the plaintiffs could not assert a direct cause of action against a beneficiary bank because they were not in privity with it. Thus, the lack of privity was a barrier to the Article 4A claims. In *Zeal Global Services Private Limited v. SunTrust Bank, et al.*, No. 1:20-cv-00908-AT, 2020 U.S. Dist. LEXIS 237984 (N.D. Ga. Dec. 18, 2020), the district court granted Truist's motion to dismiss, after finding that plaintiff's common law causes of action were preempted by the Georgia UCC as its claims pertained to fraudulent wire transfers. Likewise, in *Langston & Langston PLLC v. SunTrust Bank*, No. 3:18-cv-741-CWR-FKB, 2020 U.S. Dist. LEXIS 151034 (S.D. Miss. Aug. 20, 2020), the district court granted summary judgment in favor of Truist in a case involving allegations of a name and account number mismatch, determining that the bank did not have actual knowledge of the discrepancy and relying on the UCC provision absolving a bank of any liability for processing a transfer with a name and account mismatch where there was no actual knowledge. In *Valdes v. Customers Bank, Inc.*, No. 20-11951, 2020 U.S. App. LEXIS 31575 (11th Cir. Oct. 5, 2020), the Eleventh Circuit found that the district court properly dismissed a lawsuit alleging a violation of Article 4A involving an alleged name and account number mismatch. In *Valdes*, a bank customer alleged the bank violated Article 4A by accepting wire transfers made payable to the customer that the office manager directed to her personal account. The district court dismissed the complaint finding that it "made no allegation that any individual person at Customers Bank was ever aware of [a] mismatch" between the account number and account name. The Eleventh Circuit affirmed the dismissal, holding that conclusory allegations that the bank knew of the discrepancy were insufficient to "nudge" the complaint "across the line from conceivable to plausible." Because the payment orders were processed using automated means, the bank could not have known about the discrepancy from the face of the payment order.

The bank could not have known about the discrepancy from the face of the payment order.

In *Sarrouf Law LLP v. First Republic Bank*, No. 19-P-31, 87 Mass. App. Ct. 467 (2020), a law firm attempting to shift the loss in a $312,000 email scam to the bank involved lost its case and was ordered by a Massachusetts appellate court to reimburse the bank over $300,000. The law firm maintained an Interest on Lawyers Trust Account (IOLTA) with First Republic Bank. A fraudster located in the Netherlands sent an email to a lawyer at the law firm inquiring about representation of a manufacturing company in the sale of a crawler crane. The fraudster told the lawyer that the alleged buyer was located in Massachusetts and emailed the lawyer a purported term sheet for the sale agreement that included a purchase price of $1.6 million.

The lawyer agreed to represent the fraudster masquerading as a businessman from the Netherlands. Later, the buyer's broker sent two checks to the lawyer: a retainer check payable to the lawyer in the amount of $3,000 and a deposit check payable to the law firm in the amount of $337,044. The law firm's bookkeeper deposited the check. The fraudster than emailed the lawyer requesting that proceeds of the check be divided and wired to an account at a Cambodian bank and a Chinese bank. Before the law firm completed the wire transfer, the lawyer learned that the retainer check had been returned as nonpayable. Still, the lawyer directed the bookkeeper to complete the transfers and First Republic completed the wire transfers pursuant to the wire instructions. Later, the same day, First Republic received a notification that the deposit check was counterfeit, but the wire transfers to the banks in Cambodia and China were paid and could not recalled. As a result, the law firm's IOLTA was overdrawn. First Republic

charged back the amount of the counterfeit check and required the law firm to deposit the overdrawn amount to cover the bank's advance of funds on the wire transfers. The law firm filed suit against First Republic alleging common law negligence and a violation of the California UCC. The lower court granted summary judgment on behalf of First Republic and dismissed both counts. The appellate court affirmed finding that the law firm had not established any relevant duty that the bank had breached. Even if it had, the court found that the specific provisions of the UCC displaced the common law negligence claim in the circumstances alleged. As to the UCC claim, the court ruled that the law firm failed to establish any failure by the bank to perform in good faith. "On the contrary, the parties' contracts plainly disclaim any liability based on the facts asserted here." The appellate court also found that the bank had satisfied its obligation to exercise ordinary care with respect to the check and the law firm was in the best position to detect the fraudulent check.

While Article 4A governs wire transfers, it is not the exclusive body of law if the facts of the case are not contemplated by the UCC.

The Southern District of Indiana addressed the issue of whether Article 4A's provisions govern when the sending bank transmits the funds to the right beneficiary but to the beneficiary's account at the wrong bank. *See BMO Harris Bank, N.A. v. Salin Bank and Trust Company*, No. 1:18-cv03262-SEB-TAB, 2020 U.S. Dist. LEXIS 35255 (S.D. Ind. March 2, 2020). BMO Harris Bank, N.A. (BMO Harris Bank) extended a loan to North & Maple LLC (N&M). N&M retained a general contractor, Midwest Form Constructors LLC (Midwest). N&M made progress payments to Midwest from N&M's deposit account at BMO Harris Bank to Midwest's account at Salin Bank and Trust Company (Salin Bank). Salin Bank was also the lender on a credit facility to Midwest and it help a security interest in the monies in Midwest's deposit account.

Midwest was in the midst of serious financial distress. One of its creditors, Atlas Funds Control LLC (Atlas) was seeking repayment. N&M and Midwest provided BMO Harris Bank with wiring instructions to transfer all future payments to Atlas and not to Salin Bank. Subsequently, BMO Harris bank received directions from N&M to wire loan proceeds to Atlas in the amount of $1.2 million. However, BMO Harris executed the wire transfer and mistakenly wired the funds to Midwest's account at Salin Bank. Salin Bank accepted the funds and credit the funds to Midwest's deposit account at Salin Bank. Salin Bank then withdrew the $1.2 million from Midwest's account to apply it as a credit on a loan between Midwest and Salin Bank. Before Salin completed this offset, BMO Harris issued a recall request to Salin Bank notifying it of the mistake and demanding return of the improperly transferred funds to BMO Harris. Salin Bank did not return the funds.

The district court evaluated UCC § 4A-211(b) which states that a recall notice binds the receiving bank only if it is received before the receiving bank's acceptance of the transferred funds. Here, Salin Bank accepted the transfer before receiving the recall notice. The court assessed whether there was an exception to this UCC rule that the receiving bank must receive the recall notice before it has accepted the funds. If the facts in the case are contemplated by the UCC, then the UCC governs; but if not, then common law claims can proceed. Here, the district court found that the common law claims against Salin Bank for wrongful set off could proceed as the specific facts were not contemplated by the UCC.

Predictions for 2021

While the world is eager for normalcy following the tumult of 2020, from a banking litigation perspective, we can expect more of the same in 2021. Even after he leaves office, President Trump will challenge subpoenas for his personal and business financial records and the cases will wind their way through trial and appellate courts. Litigation challenging provisions of the CARES Act and PPP administration will continue to proliferate. Wire fraud losses will mount due to the virtual working world and victims will attempt unsuccessfully to obtain recompense from the deep pockets of financial institutions involved in the transactions. Bank litigators should keep their Commercial Code volumes handy!

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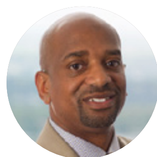

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