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Consumer Financial Services
Spring 2018 Update

District Court Takes Expansive View of *Deceptive* or *Misleading* Practices under FDCPA

January 3, 2018

The FDCPA prohibits a debt collector from using "any false, deceptive, or misleading representation" in connection with the collection of a debt. *See* 15 U.S.C. § 1692e. Recently, the Eastern District of New York took an expansive view of section 1692e, thereby making truthful statements a violation of the statute's mandates.

In *Islam v. Am. Recovery Serv.*, 2017 U.S. Dist. LEXIS 180415 (S.D.N.Y. Oct. 30, 2017), the plaintiff, Fatema Islam, failed to pay the balance due on her credit card with Bank of America, N.A., and Bank of America responded by placing Islam's account with American Recovery Service ("ARS") for collection. *Id.* at *2. ARS sent a letter to Islam on August 11, 2016 stating, in relevant part, that "[a]s of the date above, you owe $14,413.78." The letter also included a table of information which provided other details – such as identifying Bank of America as the original creditor," noting that the "total amount of the debt due as of charge-off" was $14,413.78; declaring that the "total amount of interest accrued since charge off" was $0, and further notifying Islam that the "total amount of non-interest charges or fees accrued since charge-off" was $0. After the table, the letter again advised Islam that "[t]he balance owed above reflects the total balance due *as of the date of this letter*. The itemization reflects the post charge-off activity we received from Bank of America." *Id.* (emphasis added).

Bank of America maintained a policy that any charged off account would not accrue any new interest or fees after the date of charge off. Consistent with that policy, the balance on Islam's account had not grown since it was charged off on August 4, 2016. Based solely on the language of the August 11, 2016 letter, Islam filed suit alleging that the letter was false or misleading in violation of 15 U.S.C. § 1692e.

The court agreed, and based its analysis on the Second Circuit's 2016 decision in *Avila v. Riexinger & Associates*, 817 F.3d 72 (2d Cir. 2016). In *Avila*, the Second Circuit encountered a case in which a collection letter disclosed the "current balance" of the debt, but did not disclose that after the date of the collection letter, the account was continuing to accrue interest and late fees. *Id.* at 75-76. The Second Circuit held that because the collection notice "did not disclose that the balance might increase due to interest and fees," it was a "deceptive [or] misleading representation" of the amount due under the general prohibition of 15 U.S.C. § 1692e. *Id.*

While the *Islam* court found *Avila* to be "factually distinguishable," it held that *Avila*'s analytical framework dictated the outcome. The court explained that the language of ARS' letter – that Islam's debt was $14,413.78 "as of the date of" the letter – suggested that Islam's debt was in "a dynamic state." *Islam*, at *10. "'[A]s of the date' suggests that on a different date, the amount of the debt may be different – and, of course, anyone would understand that it won't get any smaller without payment. But the undisputed fact is that, contrary to this suggestion, the amount of this debt will never be different, never get greater." *Id.* Islam, as the embodiment of the "least sophisticated consumer," was therefore

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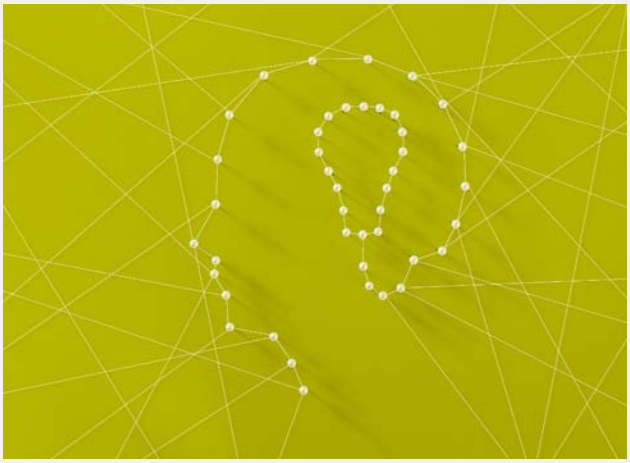
"subtly incentivized to pay now to avoid paying more later, when, in fact, there never would be 'more later.'" *Id.* This caused ARS to possibly receive money that it might not have received but for the language "as of the date of this letter," which makes that language misleading or deceiving. The court went on to hold that the misleading or deceiving communication was material, because if the least sophisticated consumer had known that the debt would never get any bigger, she might have chosen to pay another debt. *Id.*

This case serves as a troubling example of truthful statements being interpreted as misleading or deceiving. *See id.* at *9 ("The courts are to some extent simply burdening the collection industry with a continuing portfolio of litigation that potentially raises the cost of credit for all consumers."). Though all statements in ARS' letter were factually correct – including the statement that Islam's debt was $14,413.78 as of the date of the letter – the letter was nevertheless deemed to be "misleading or deceiving" because the least sophisticated consumer may be incentivized into paying a valid debt they might not have otherwise paid. To comply with the reasoning of *Islam*, creditors and debt collectors may wish to craft demand letters without the phrase "as of the date of this letter" if the debt will not increase, or to maintain a policy under which charged off debt continues to accrue interest and fees. ■



Debt Collection Letter's Inclusion of Court Costs Was Not Deceptive

January 11, 2018

Any opinion that starts out by stating "[t]his case is about $82.00" is not likely to go well for one party and in this instance, that was the case for Nestor Saroza. A New Jersey district court recently held that a debt collection letter was not false or deceptive when it included court costs in its demand for the balance. In *Saroza v. Lyons, Doughty & Veldhuis,* 2017 U.S. Dist. LEXIS 208913 (D.N.J. Dec. 19, 2017), the collection law firm filed a collection suit seeking recovery of the balance due ($9,971.55), plus court costs. Its subsequent collection letter demanded a balance of $10,053.55. The difference, $82.00, was comprised of court costs. The consumer filed suit asserting that the demand letter violated the FDCPA because the $82.00 was not part of the debt. The demand letter in question read as follows:

> LYONS, DOUGHTY & VELDHUIS, P.C. . . .
>
> Re: Capitol One Bank (USA), N.A. v. NESTOR SAROZA
>
> Docket No. DC-00065-16
>
> Amount Due: $10,053.55
>
> Dear NESTOR SAROZA:
>
> We have filed suit to recover the balance due in the above matter. However, our goal is to resolve the debt in a way that is manageable for you. We encourage you to contact us. If you would rather not call us, you can ask questions and/or make a settlement offer or payment arrangement proposal via our website: www.ldvlaw.com . . .
>
> THIS FIRM IS A DEBT COLLECTOR

In support of dismissal, the law firm presented the credit card agreement which provided for the recovery of the creditor's collection expenses, attorneys' fees and court costs and pointed to the collection suit to support its argument that the letter was accurate. The consumer meanwhile argued that the letter did not explain the filing fees were included and thus, was false, deceptive or misleading. According to the court, "[i]n essence, the line Saroza wants this Court to draw seems to be that collection notices which say 'with costs' are permissible under the FDCPA but those that add the costs into the requested sum are not." *Saroza* at *7-8. The court declined to do so. Instead, the court determined that this was a distinction without a difference - particularly where the costs are accurate and the consumer was on notice from the Customer Agreement that this could happen.

The court also rejected the consumer's argument that the omission of the court costs from the summons issued by the state court, coupled with the letter, was misleading. In doing so, the court noted that the summons was issued by the court not the defendant and placed the burden on Saroza to read the complaint

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served with the summons. In dismissing the lawsuit, the Court made clear that certain basic responsibilities fall upon a consumer – to read the documents provided to him by the creditor and debt collector. The Court further emphasized a theme that we are seeing more and more: that the FDCPA will not allow liability for bizarre or idiosyncratic interpretations of collection notices and preserves a quotient of reasonableness and presumes a basic level of understanding and willingness to read with care. *See Wilson v. Quadramed Corp.,* 225 F.3d 350, 354-55 (3rd Cir. 2000) ■

Seventh Circuit: Miller Safe Harbor Language Does Not Immunize Debt Collections from Liability for Violations of § 1692e

January 15, 2018

Eighteen years ago, the Seventh Circuit crafted "safe harbor" language which, if used, shielded debt collectors from liability under 15 U.S.C. § 1692g. A recent decision, *Boucher v. Fin. Sys. of Green Bay*, 2018 U.S. App. LEXIS 1094 (7th Cir. 2018), now calls that safe harbor language into question and subjects collectors to liability under another section of the Fair Debt Collection Practices Act ("FDCPA"), § 1692e, for use of the language the court itself drafted.

Section 1692g requires debt collectors to disclose, among other information, the "amount of the debt" a consumer owes. *See* 15 U.S.C. § 1692g(a)(1). This requirement is particularly onerous, as many debts are subject to fees, interest, and other charges which can increase the amount of the debt owed on a daily basis. To help deal with this reality, the Seventh Circuit in *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols,& Clark, LLC*, 214 F.3d 872 (7th Cir. 2000) fashioned safe harbor language which, the Court held, satisfied the debt collector's duty to state the "amount of the debt." Commonly known as the *Miller* safe harbor, the language reads as follows:

> *As of the date of this letter, you owe $ [the exact amount due]. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write the undersigned or call 1-800-[phone number].*

Miller, 214 F.3d at 876. After *Miller*, many debt collection companies began including this or similar language in communications with debt collectors. In *Boucher v. Fin. Sys. of Green Bay*, 2018 U.S. App. LEXIS 1094 (7th Cir. 2018), however, the Seventh Circuit called into question the propriety of relying on the

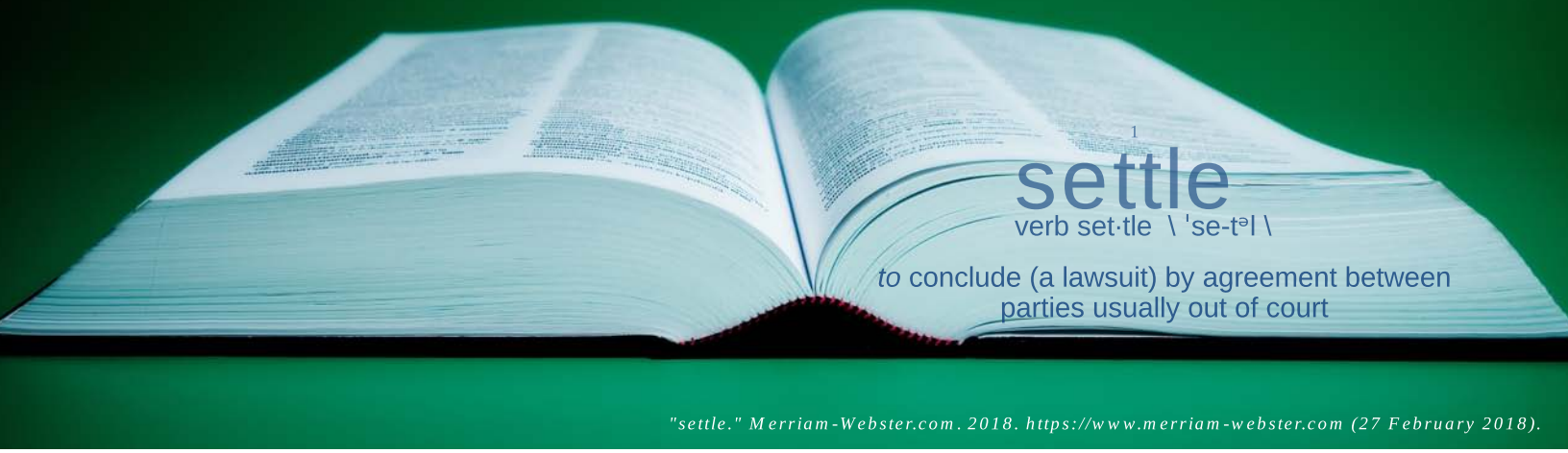
Miller safe harbor language in communications with consumers by holding that such language was misleading under § 1692e, which broadly prohibits the use of any "false, deceptive, or misleading representation or means in connection with the collection of any debt."

In *Boucher*, the debt collector, Finance System of Green Bay ("Green Bay"), was collecting upon medical debt and sent a letter to a consumer that included the *Miller* safe harbor language. The Seventh Circuit held that the safe harbor language – which was included in the letter to satisfy § 1692g and comply with *Miller* – was "false, deceptive, or misleading" within the meaning of § 1692e. According to the Court, because Wisconsin law prohibits debt collectors from imposing "late charges or other charges" (beyond interest) on medical debt, the letter "falsely implies a possible outcome—the imposition of 'late charges and other charges'—that cannot legally come to pass." *Id.* at *9. Although the *Miller* language is not misleading or deceptive on its face, the Court found it may "nevertheless be inaccurate" under certain circumstances.

In reaching this result, the Court held that debt collectors cannot "copy and paste the *Miller* safe harbor language to avoid liability under § 1692e." Troublingly, the Court held that "[a]lthough the safe harbor was offered in an attempt both to bring predictability to this area and to conserve judicial resources, it is compliance with the statute , not our suggested language, that counts." Since "judicial interpretations cannot override the statute itself," the Court implicitly suggested that debt collectors may need to ignore judicial opinions interpreting the statute, as the Court may interpret the statute differently in the future.

What does *Boucher* mean for Debt Collectors?

After *Boucher*, debt collectors cannot simply include *Miller*'s language to communications with consumers and be protected from liability under § 1692g and § 1692e. Debt collectors must consider all of the circumstances, including the requirements of state law, and determine whether the *Miller* language is accurate before including it in a communication with a consumer. This includes providing detailed information from which an unsophisticated consumer can determine whether their debt will increase. ■



Third Circuit: Settlement Offer on Time-Barred Debt States Plausible FDCPA Claim

February 27, 2018

The Third Circuit has refined its position as to whether collection of time-barred debt may violate the FDCPA where the communication involves an offer to settle. In doing so, the Court joined the Fifth, Sixth and Seventh Circuits in holding that, even absent a threat of litigation, offers to settle time-barred debts could mislead the least sophisticated consumer.

In *Tatis v. Allied Interstate, LLC,* 2018 U.S. App. LEXIS 3238 (3rd Cir. Feb. 12, 2018), the debt collector sent a letter that read:

> *[The creditor] is willing to accept payment in the amount of $128.99 in settlement of this debt. You can take advantage of this settlement offer if we receive payment of this amount or if you make another mutually acceptable payment arrangement within 40 days.*

Tatis at *1-2. Tatis filed suit asserting that the letter violated section 1692e of the FDCPA. Specifically, the consumer alleged that the word "settlement" meant she had a legal obligation to pay the debt and was a false, deceptive or misleading representation or means to collect a debt. Allied's motion to dismiss was granted by the district court which relied on prior Third Circuit precedent, *Huertas v. Galaxy Asset Management,* 641 F.3d 28 (3rd Cir. 2011). The district court held that "an attempt to collect a time-barred debt does not violate the FDCPA unless it is accompanied by the threat of legal action." *Id.* at *3.

On appeal, the issue before the Court was "whether collection letters may run afoul of the FDCPA by misleading or deceiving debtors into believing they have a legal obligation to repay time-barred debts even when the letters do not threaten legal action." *Id.* at *8. The Court held they may.

At the outset, the Court distinguished its prior opinion in *Huertas* by noting the language in that letter did not refer to a settlement. Instead, in *Huertas*, the debt collector informed Huertas that his debt had been reassigned and requested that he contact the agency "to resolve the issue." The Court concluded that *Huertas* "stands for the proposition that debt collectors do not violate 15 U.S.C. §1692e(2)(A) when they seek voluntary repayment of stale debts so long as they do not threaten or take legal action." *Id.* at *7.

The Court then rejected Allied's argument that because the letter did not threaten legal action, there was no violation of the statute. Joining the Fifth, Sixth and Seventh Circuits, the Court was persuaded by the fact that major dictionaries include within the meaning of "settle" and "settlement" a definition that refers to the conclusion and/or avoidance of a lawsuit. The Court noted that section 1692e contains three distinct categories of prohibited conduct: false, misleading and deceptive representations and noted that "misleading" representations can include more than falsehoods. Refusing to provide a narrow interpretation of the FDCPA, the Court declined to require an actual threat of litigation. Instead, the Court held that "[b]ecause the words "settlement" and "settlement offer" could connote litigation, the least-sophisticated debtor could be misled into thinking Allied could legally enforce the debt." *Id.* at *13.

For what it's worth, the Court then attempted to step back from its decision by stating the following:

- "We reiterate what we said both in *Huertas* and elsewhere: standing alone, settlement offers and attempts to obtain voluntary repayments of stale debts do not necessarily constitute deceptive or misleading practices."
- "Nor do we impose any specific mandates on the language debt collectors must use, such as requiring them to explicitly disclose that the statute of limitations has run."
- "We do not, therefore, hold that the use of the word "settlement" is misleading as a matter of federal law."

So, what are the take-aways?

- The use of words like settle and settlement are increasingly thorny in the context of time-barred debt;
- A reminder as to context (both procedural and factual)
  - *Tatis* involved reversal of a motion to dismiss. The Court's holding should be viewed in context: that the debtor plausibly stated a claim under Rule 12 – nothing more.
  - The Court also makes clear that the letter must be read in context. Plausibly, there are circumstances where the use of words 'settle' and 'settlement' might, in context, not be misleading. ■

Sixth Circuit Holds Consumer Has No Standing to Bring FDCPA Claim

March 15, 2018

The Sixth Circuit recently made clear its position that "Congress cannot override the baseline requirement[s] of Article III of the U.S. Constitution by labeling the violation of *any* requirements of a statute a cognizable injury." In *Hagy v. Demers & Adams,* 2018 U.S. App. LEXIS 3710, 882 F.3d 616 (6th Cir. 2018), a letter from a law firm advising the consumer that the creditor would not seek recovery of the deficiency balance resulted in an FDCPA claim. The alleged violation? The letter violated the 15 U.S.C. §1692e(11) because it did not disclose the communication was from a debt collector.

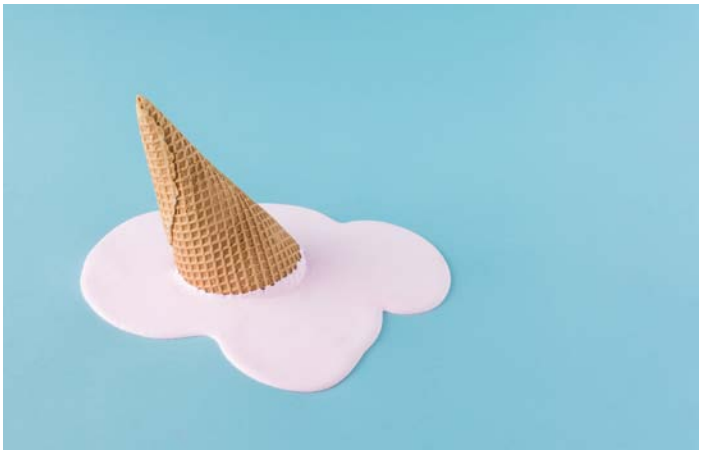
The letter read as follows:

> This letter is in follow up to our conversation of Monday, June 28, 2010 wherein we discussed the above referenced matter.
>
> Pursuant to our conversation, I informed you that we have received the executed Warranty Deed in Lieu of Foreclosure signed by the Hagy[s]. Furthermore, you inquired as to should a deficiency balance be realized after the sale of the collateral would Green Tree pursue Mr. & Mrs. Hagy for the amount of the deficiency. I have been informed by my client that in return for Mr. & Mrs. Hagy executing the Warranty Deed in Lieu of Foreclosure Green Tree will not attempt to collect any deficiency balance which may be due and owing after the sale of the collateral.
>
> I believe this letter satisfies any and all of your concerns.
>
> Should you have any questions with respect to this matter, please do not hesitate to contact me.

Hagy at *7-8.

As acknowledged by the consumers, the letter was accurate and, "[f]ar from causing the Hagys any injury, tangible or intangible, the… letter gave them peace of mind…" Importantly, there were no allegations that the consumers suffered actual injury or damages from the letter.

The issue on appeal was whether Congress' creation of a statutory injury and damages pursuant to 15 U.S.C. §1692e(11) satisfied Article III's requirement of an injury in fact. The court held that it did not. In doing so, the court refused to endorse an 'anything-hurts-so-long-as-Congress-says-it-hurts theory' of Article III and further rejected the Eleventh Circuit's rationale in *Church v. Accretive Health, Inc.*- that a bare violation of section 1692e(11) is sufficient to create standing. Looking to the legislative record and the FDCPA, the court found no finding by Congress that the failure to disclose the communication was from a debt collector *always*



creates injury. The court concluded that "[a]lthough Congress may 'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using something that is not remotely harmful into something that is." *Hagy* at *11. The court's opinion emphasizes the limitations of statutory violations and the importance for defense counsel to continue to analyze bare statutory violations against the Article III minimum standing requirements. At a minimum, the court's opinion should provide debt collectors with some solace against the absurd. ■

Focus Area

Regulatory & Legislation

Mulvaney Reins in the CFPB

January 21, 2018

On November 24, 2017, the White House appointed Mick Mulvaney as acting director of the CFPB, effective November 27, 2017. Since then, concerns have been raised that Mulvaney might 'gut" the agency. Here is a quick look at the actions of the agency since Mulvaney's appointment:

- ***December 2017***: The CFPB has changed its mission statement. Previously, the mission statement read: "The Consumer Financial Protection Bureau is a 21st century agency that helps consumer finance markets work by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers to take more control over their economic lives." The mission statement now reads: "The Consumer Financial Protection Bureau is a 21st century agency that helps consumer finance markets work by *regularly identifying and addressing outdated, unnecessary, or unduly burdensome regulations* by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers to take more control over their economic lives." (emphasis supplied).
- ***December 2017***: Various actions of the CFPB indicate debt collection rulemaking is on hold. Specifically, the CFPB withdrew its request to the OMB to conduct an online survey of consumers as part of its debt collection disclosures.
- ***January 16, 2018***: The CFPB announced its intentions to reconsider the final payday rule which took effect January 16, 2018.
- ***January 17, 2018***: Director Mulvaney informed the Fed that the CFPB will forego any funding for the Second Quarter of 2018, stating its intent to spend down the CFPB's reserve fund prior to requesting any additional funding. In his letter to Fed Chair Janet Yellen, Mulvaney states as follows:

  > "I have determined that no additional funds are necessary to carry out the authorities of the Bureau for FY 2018, Q2. Simply put, I have been assured that the funds currently in the Bureau Fund are sufficient for the Bureau to carry out the statutory mandates for the next fiscal quarter while striving to be efficient, effective, and accountable."

- ***January 17, 2018***: The CFPB stated its intent to publish in the Federal Register a series of Requests for Information seeking comment on its enforcement, supervision, rulemaking, market monitoring and education activities. The Release quotes Mulvaney as stating that "[i]n this new year, under new leadership, it is natural for the Bureau to critically examine its policies and practices to ensure they align with the Bureau's statutory mandate." The first of those RFIs will review the Bureau's Civil Investigative Demand processes and procedures.

The actions of Mulvaney thus far indicate the Trump administration, at a minimum, will significantly reign in the CFPB. The question becomes: will they go too far? ■

CFPB's Strategic Plan Reflects New Path

February 22, 2018

In February, the CFPB issued its Strategic Plan for Fiscal Years 2018-2022. The Plan reflects Acting Director Mick Mulvaney's vision for the CFPB and reflects a contrasting vision to what was reflected in the draft circulated in October prior to Cordray's resignation. Here are the key points:

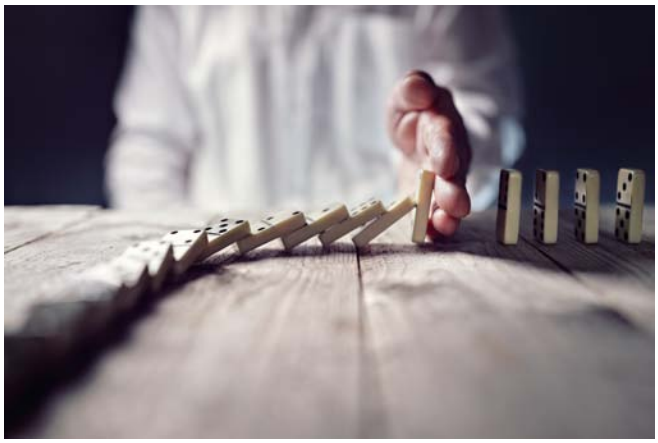
- **No More Pushing the Envelope.** In a nutshell, the CFPB's strategy is now to "fulfill the Bureau's statutory responsibilities, but go no further."
- **A New Vision.** The prior draft emphasized transparency in pricing. The new strategy emphasizes a free market economy. Specifically, "[f]ree, innovative, competitive, and transparent consumer finance markets where the rights of all parties are protected by the rule of law and where consumers are free to choose the products and services that best fit their individual needs."
- **A Departure from Paternalism.** One needs to look no further than the strategic goals listed under the draft plan and the final plan to understand that the paternalistic approach the CFPB formerly took as to consumers is gone.

The Draft Plan. Under the draft plan (Cordray's), four goals were set forth:

1. "Prevent financial harm to consumers while promoting good practices that work for consumers, responsible providers, and the economy as a whole."
2. "Empower consumers to make informed financial choices to reach their own life goals and enhance their own financial well-being."
3. "Inform the public, policy makers, and the CFPB's own policy-making with market intelligence and data-driven analysis of consumer financial markets and consumer behavior."
4. "Advance the CFPB's performance by maximizing resource productivity."

The Final Plan. Significantly, the Plan, in its final form, omits any reference to prevention of harm and the use of data driven information to inform policy. Instead, the three goals presented confirm the Bureau's new path: one that does not push the envelope and encourages access to financial products. The three goals set forth are:

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



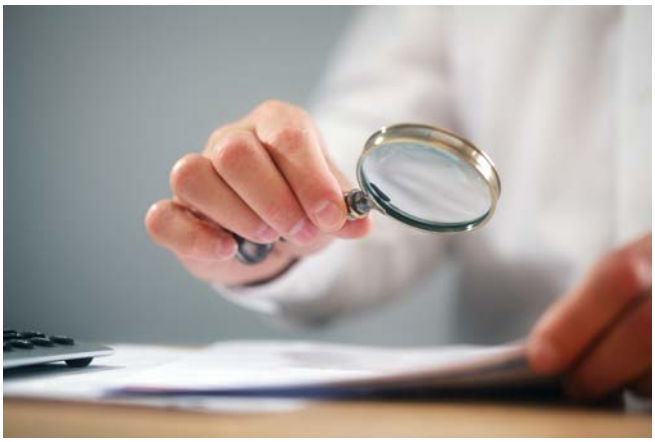
Our Takeaways:

- It's interesting to note that Mulvaney is only the *acting* director. Rather than maintaining the status quo until a permanent replacement is named, Mulvaney has chosen to change the direction of the Bureau and submit a revised Strategic Plan which makes wholesale changes to the draft plan.
- While the Final Plan de-emphasizes the CFPB's enforcement powers, it does make clear the CFPB will "[f]ocus supervision and enforcement resources on institutions and their product lines that pose the greatest risk to consumers based on the nature of the product, field and market intelligence, and the size of the institution and product line."
- The Final Plan's third goal, fostering operational excellence, appears to be a jab at Cordray's administration and a nod in favor of Cordray's critics. As explained further, to "foster accountability, the Bureau will monitor and conduct periodic evaluations of operations to ensure effective management of resources and risk" including maintaining a responsive cybersecurity program and maintaining a diverse and inclusive workforce.
- Finally, the Plan is silent as to Mulvaney's intentions as to existing enforcement actions and rules which are in progress or future rulemaking by the Bureau. ■

CFPB Report Reveals Impact Removal of Public Records Has on Credit Reporting: *Did it Make a Difference?*

March 4, 2018

The CFPB recently issued its second Quarterly Consumer Credit Trends Report which examines the impact of changes to credit reporting regarding the reporting of civil public records. In 2015, the three major credit reporting agencies ("CRAs") entered into settlements with over thirty states. The settlements required the three CRAs to implement minimum personal identifying information ("PII") standards and data collection frequency requirements for civil public records appearing on consumer reports. The settlements also resulted in the CRAs discontinuing their reporting of civil judgments.

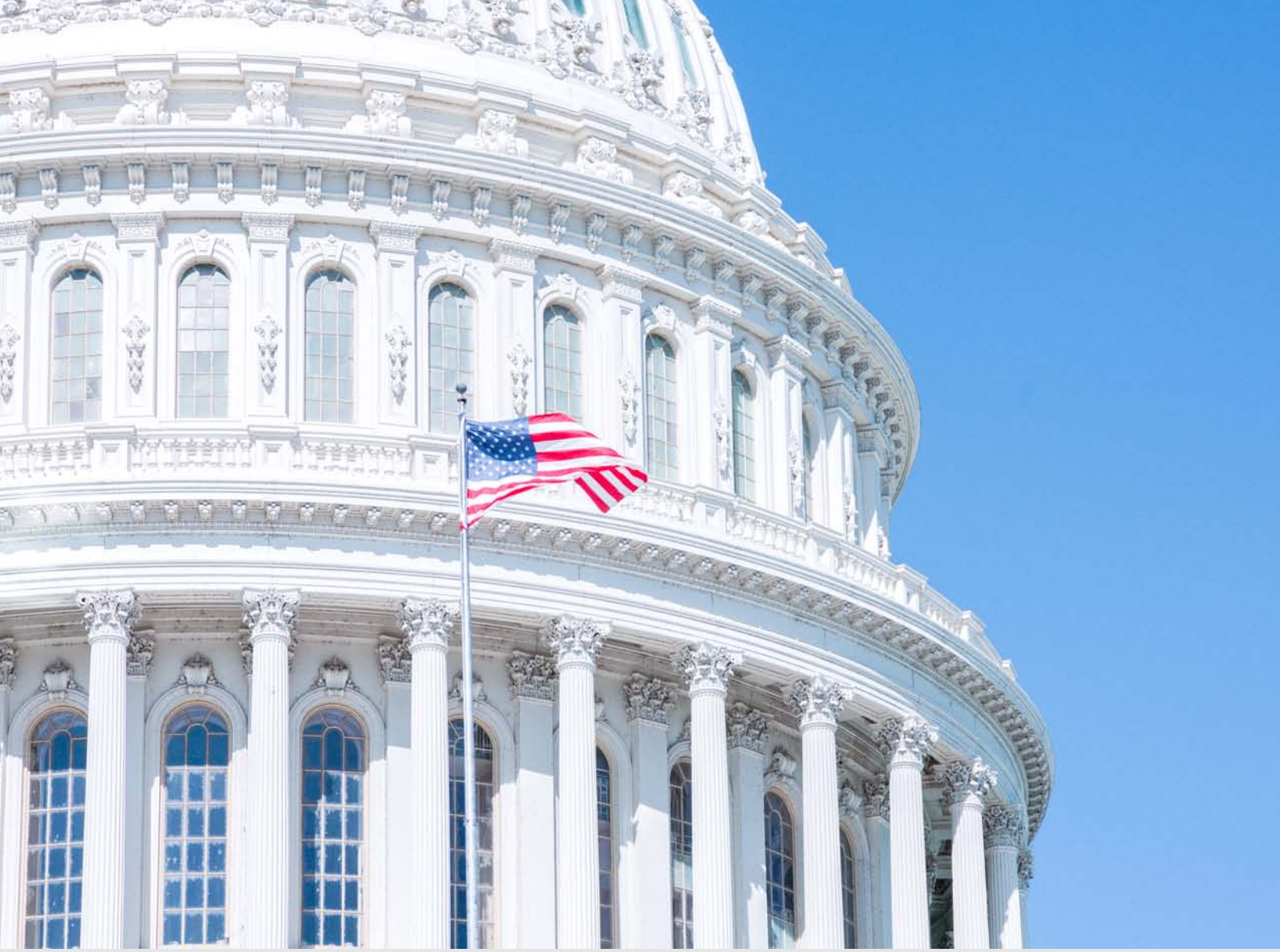


The Report breaks civil public records into three broad categories: bankruptcies, judgments and tax liens.

Bankruptcies: The Report spends little, if any, time discussing bankruptcies because the number of bankruptcies being reported remained virtually unchanged after the new standards took effect. The Report concludes this is an indication that bankruptcies were being reported with sufficient PII prior to July 1, 2017.

Tax Liens and Civil Judgments: The Report notes that the number of tax liens being reported dropped off significantly after July 1, 2017 with the reporting of state tax liens declining more than federal tax liens. The reporting of judgment liens disappeared altogether in July 2017. The Report also reviews the impact the reporting of tax liens and judgments has on credit scoring. It should come as no surprise that with the new PII standards and removal of judgment liens, affected consumers' credit scores increased. The amount of increase, however, does not appear to be significant (0-15 points) and may be attributable to the fact that many of the consumers in those categories also had other derogatory tradelines. What is interesting, however, is that the increase in scores did impact a fairly significant number of consumers (17%) and their placement into higher credit bands (for instance, movement from deep subprime to subprime).

As noted by the Report, there remains insufficient data to draw any conclusion as to whether the removal of public records will affect the predictability and accuracy of commercial credit scoring models.



Madden Fix Bill Passes House, Faces Uncertain Fate in Senate

March 5, 2018

The United States House of Representatives passed H.R. 3299, commonly known as the "*Madden* fix" bill, by a vote of 245-171 on February 14, 2018. The bill, which is officially entitled "Protecting Consumers' Access to Credit Act of 2017," is a response to the Second Circuit's decision in *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2nd Cir. 2015), *cert denied*, ___ U.S. ___, 136 S.Ct. 2505 (2016).

Under the National Bank Act, 12 U.S.C. § 85, nationally chartered banks are permitted to charge interest at the rate allowed by the laws of the State where the bank is located. In *Madden*, the Second Circuit held that a third-party debt buyer, after purchasing the loan from a national bank, is not permitted to charge the same rate of interest on the loan that the nationally chartered bank is permitted to charge. The Court ruled that allowing third-party debt buyers to charge the same amount of interest would be an "overly broad application" of the Act. This decision, and the Supreme Court's refusal to weigh in on the issue, lead to uncertainties in the secondary loan market.

Seeking to ameliorate this problem, H.R. 3299 would add the following language to 12 U.S.C. § 85:

A loan that is valid when made as to its maximum rate of interest in accordance with this section shall remain valid with respect to such rate regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party, and may be enforced by such third party notwithstanding any State law to the contrary.

If enacted, this measure would eliminate the uncertainties created by *Madden* and make clear that a third-party debt buyer may charge the same rate of interest that a nationally chartered bank may charge. The House passed H.R. 3299 mostly along partisan lines, which raises the question of whether it can reach the 60-vote threshold in the Senate. After being passed by the House, the bill was received by the Senate and referred to the Senate Banking, Housing, and Urban Affairs Committee. ■

Tenth Circuit Joins the Fray Regarding Whether Foreclosures are Debt Collection

February 1, 2018

The Tenth Circuit has weighed in on whether a non-judicial foreclosure is debt collection activity. In doing so, the Tenth Circuit has joined a split in the circuits on the issue. With the Tenth Circuit's decision, the circuits remain split with the Ninth and Tenth Circuits holding that non-judicial foreclosures are not debt collection activity and the Fourth, Fifth and Sixth Circuits holding that they are.

In *Obduskey v. Wells Fargo,* 2018 U.S. App. LEXIS 1275 (10th Cir., Jan. 19, 2018), Wells Fargo retained foreclosure counsel who sent the consumer an initial communication which stated that it "MAY BE CONSIDERED A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT" and advised Mr. Obduskey that it had been retained to initiate foreclosure proceedings. The letter referenced the amount owed and identified the current creditor as Wells Fargo. In response, the consumer requested validation of the debt. Instead of responding, the law firm initiated a non-judicial foreclosure. Mr. Obduskey then filed suit alleging the law firm violated 15 U.S.C. §1692g.

The law firm moved to dismiss the action asserting that it was not a debt collector covered by the FDCPA because a foreclosure proceeding is not debt collection activity. The district court agreed and dismissed the complaint. On appeal, the Tenth Circuit addressed the issue of whether the FDCPA applies to non-judicial foreclosure proceedings.

In doing so, the court first looked to the plain language of the statute and the nature of a non-judicial foreclosure. Adopting the rationale of the Ninth Circuit, the court took the position that the FDCPA only imposes liability when an entity is attempting to collect money. Because a non-judicial foreclosure does not preserve the right to collect a deficiency personally against the mortgagor and would require a separate action to do so, the Court was persuaded that it was not an attempt to collect money and was only the enforcement of a security interest.

The Court also found that policy considerations supported its decision. The Court took into consideration the provisions of Colorado's non-judicial foreclosure statutes and noted that they conflicted with the FDCPA. Specifically, the state provisions required notice to any party that may have acquired an interest in the property. The state statute therefore conflicted with the third-party prohibitions under the FDCPA. The state provisions also conflicted with the FDCPA by requiring direct notice to the consumer even when represented by counsel. Taking this into account, the court found that there is no 'clear and manifest' intention on the part of Congress to supplant state non-judicial foreclosure law. Indeed, many of the conflicts noted above are designed to protect the consumer and preempting them under the FDCPA would seem to undermine their purpose as well as the purpose of the FDCPA." *Obduskey* at *11-12 (internal citations omitted).

It is important to note that the Court's decision is limited in several respects. First, it is limited to non-foreclosure proceedings. Secondly, the holding is limited to the facts of this case. The court suggested that its holding might have been different had there been evidence of "aggressive collection efforts leveraging the threat of foreclosure into payment of money." *Id.* at *12. The court left that discussion for another day as there were no facts to suggest the law firm had demanded payment or used foreclosure as a threat to elicit payment. ■

Second Circuit: Flu Shot Reminder Did Not Violate the TCPA

January 15, 2018

The Second Circuit has affirmed a lower court decision that a flu shot reminder sent by text message by a medical provider did not violate the Telephone Consumer Protection Act (the "TCPA"). The decision is important because it interprets the 2012 FCC Healthcare Exemption as providing an exemption as to prior *written* consent rather than a wholesale exemption from consent. *Latner v. Mount Sinai Health System, Inc.*, 2018 U.S. App. LEXIS 114 (2nd Cir. Jan. 3, 2018).

The limited record indicates that Mr. Latner visited Mt. Sinai in 2003 for a routine health examination. At that time, he filled out new patient forms including a "New Patient Health Form" which contained his contact information, as well as an "Ambulatory Patient Notification Record" granting the hospital and its facilities consent to use his health information "for payment, treatment and hospital operations purposes." In 2011, Mr. Latner visited Mt. Sinai again and declined any immunizations. In 2014, Mt. Sinai, through a third-party vendor, sent Mr. Latner the following text message: "Its flu season again. Your PCP at WPMG is thinking of you! Please call us at 212-247-8100 to schedule an appointment for a flu shot…" *Latner* at *3. The message was sent to all active patients, including Mr. Latner, that had visited the office in the three years prior to the date of the text.

Mr. Latner filed a putative class action, alleging that the text message violated the TCPA. The hospital moved for judgment on the pleadings and asserted, as an affirmative defense, Mr. Latner's prior express consent. *Latner,* 1:16-cv-00683 (S.D.N.Y.), Dkt. No. 42.

In affirming the district court's ruling, the Second Circuit performed a two-step analysis. It first determined whether the communication was covered by the 2012 FCC Healthcare Exemption and secondly, it determined whether Mr. Latner had provided effective consent. The Second Circuit concluded that the communication was covered by the 2012 FCC Healthcare Exemption. Under the 2012 FCC Telemarketing Rule, prior *written* consent is required for autodialed or prerecorded telemarketing calls. The Rule, however, contains an exemption for covered healthcare providers in certain instances. The court determined that the Healthcare Exemption exempts from written consent "calls to wireless cell numbers if the call 'delivers a 'health care' message made by, or on behalf of, a 'covered entity' or its 'business associate' as those are defined in the HIPPA Privacy Rule." "HIPPA defines health care to include 'care, services, or supplies related to the health of an individual'… and exempts from its definition of marketing all communications made '[f]or treatment of an individual by a health care provider… or to direct or recommend alternative treatments' to the individual." *Id.* at *5. Both the district court and the Second Circuit concluded that the text message qualified for the FCC's Healthcare Exemption.

The Second Circuit then moved to the issue of prior express consent and reviewed the terms of the consent provided by Mr. Latner in his 2003 consent forms. Of particular importance to the court, the forms provided consent to use Latner's information "to recommend possible treatment alternatives or health-related benefits and services." *Id.* at *6-7. The court concluded that the language of the forms therefore provided prior express consent to receive text messages concerning a "health related benefit" such as a flu shot.

The opinion is important for a few reasons. First, it clarifies that the Healthcare Exemption only exempts covered communications from written consent and is not a wholesale exemption as to consent. Secondly, the opinion emphasizes the importance of carefully worded consent provisions. All business verticals which use automated messaging, calls or text messages should review their intake documents to ensure that consent is properly addressed as to the scope of any contemplated telecommunications and then should again review any contemplated mass communications prior to being made in light of their consent documents. Finally, the opinion notes by footnote that the text message (which was sent in 2014) was not covered by the FCC's 2015 Healthcare Treatment Exception because "there is no language in the 2015 FCC order suggesting any intent to make the Exception retroactive, much less justification for any asserted retroactivity, precluding its application in this instance." *Id.* at FN 2. ■

Focus Area

TCPA

D.C. Circuit's Ruling May Provide Some Potential Relief for the Consumer Financial Services Industry

March 26, 2018

The D.C. Circuit has issued its long-awaited decision on the FCC's 2015 TCPA Declaratory Ruling. *ACA International v. Federal Communications Commission,* No. 15-1211 (Mar. 16, 2018). The ruling invalidates the FCC's definition of an automated telephone dialing system ("ATDS") and sets aside the FCC's ruling on reassigned numbers. The ruling, however, upholds the FCC's determination that consent can be revoked through any reasonable means.

The 2015 Declaratory Ruling.

In July of 2015, the FCC issued its highly controversial ruling on 21 petitions seeking review of various aspects of the Telephone Consumer Protection Act (the "TCPA"). *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991,* Declaratory Ruling & Order, 30 FCC Rcd, 7961 (2015) ("Order"). Two commissioners issued impassioned dissents, noting that the Order "expands the TCPA's reach" and "twists the law's words…to target useful communications between legitimate businesses and their customers." *Dissenting Statement of Commissioner Ajit Pai.* Immediately following the ruling, ACA International, a major trade group for the collection industry, filed suit against the FCC in the United States Court of Appeals for the D.C. Circuit seeking a judicial review of the Order.

While the D.C. Circuit's review focused on four aspects of the FCC Ruling, this post will limit itself to an examination of the three aspects most relevant to the consumer financial services industry. Before discussing the D.C. Circuit's holding, here is a reminder of the FCC's Ruling on the relevant issues:

- ***The Definition of an ATDS.*** The FCC Ruling rejected any "present use" or current capacity test. The FCC held that capacity of an autodialer is not limited to its current configuration and includes its *potential* functionalities even if it currently lacks the requisite software. Thus, the FCC affirmed that "dialing equipment that has the capacity to store or produce, and dial random or sequential numbers… [is an autodialer] *even if it is not presently used for that purpose*." Order at ¶ 10 (emphasis supplied). The Order further confirmed the majority's focus on whether the equipment can dial without human intervention and whether it can "dial thousands of numbers in a short period of time". *Id.* at ¶ 17. The dissent was highly critical of the majority's holding, particularly as it related to capacity, its statutory interpretation of capacity, and the TCPA's potential application to smart phones. As noted by the dissent, if a system cannot store or produce telephone numbers to be called using a random or sequential number generator and if it cannot dial such numbers, it should not be included. Commissioner (and now chair of the FCC) Pai described the majority's test as being "whether there is more than a theoretical potential that the equipment could be modified to satisfy the 'autodialer' definition." *Pai Dissent.*
- ***Reassigned Numbers.*** The FCC Ruling addressed the question of where and when, a caller violates the TCPA by placing a call to a wireless number which has been reassigned from a consenting party to a third party without the caller's consent. The FCC refused to put any burden on the wrong number consumer to inform the caller that it is the wrong party or opt out of the calls. Instead, the FCC established a one-call safe harbor, stating that "where a caller believes he has consent to make a call and does not discover that a wireless number has been reassigned prior to making or initiating a call to that number for the first time after reassignment, liability should not attach for that first call, but the caller is liable for any calls thereafter." *Id.* at ¶85.

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- ***Revocation of Consent.*** The FCC Ruling also clarified the ways in which a consenting party may revoke his consent to receive auto dialed calls. Pursuant to the Ruling, consent generally may be revoked through any reasonable means and the caller may not dictate how revocation may be made. The FCC therefore held that "the consumer may revoke his or her consent in any reasonable manner that clearly expresses his or her desire not to receive further calls, and that the consumer is not limited to using only a revocation method that the caller has established as one that it will accept." *Id.* at ¶ 70. Consent must be given by either the current subscriber or the non-subscriber customary user of the phone.

The D.C. Circuit's Ruling.

The Definition of an ATDS.

Under the TCPA, an ATDS is defined as "equipment which has the capacity- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. §227(a)(1). Breaking down the definition, the Court looked at two questions. First, *when* does a device have the "capacity" to perform the two enumerated functions (to store and dial numbers) and second, *what* precisely are those functions. *ACA International,* Slip Op. at 12. The Court held that the FCC's efforts to clarify what equipment qualifies as an ATDS provided an "eyepopping sweep" and the Court set it aside. *ACA International,* Slip Op. at 16.

Regarding *when* a device has capacity to store and dial numbers, the court was highly critical of the FCC's expansive interpretation of 'capacity', noting that it was incompatible with the statute's original concern – telemarketing calls. The Court was particularly troubled by the Order's inescapable conclusion that "all smartphones, under the Commission's approach, meet the statutory definition of an autodialer." The Court concluded that the TCPA cannot be reasonably read to render every smartphone an ATDS subject to the TCPA's restrictions. *Id.* at 15-17. Applying a *Chevron* analysis, the court held that the FCC's definition was arbitrary and capricious and lay beyond the FCC's zone of delegated authority. The Court concluded that "[n]othing in the TCPA countenances concluding that Congress could have contemplated the applicability of the statute's restrictions to the most commonplace phone device used every day by the overwhelming majority of Americans." *Id.* at 19.

The Court next reviewed the FCC's treatment of what functions must be present to constitute an ATDS. Looking to the TCPA, the Court noted that to constitute an ATDS, a device must have capacity to perform two functions: (a) to store or produce numbers to be called using a random or sequential number generator; and (b) to dial such numbers. The Court determined that the FCC's efforts fell short of reasoned decision making, offering no meaningful guidance to affected parties. As examples of why the FCC Ruling failed to satisfy the requirement of reasoned decision making, the Court noted the two conflicting positions taken by the FCC as to what functionalities are necessary for a device to qualify as an ATDS. The Court noted that at certain places in the Order, the FCC took the position that a device qualifies as an ATDS only if it can generate random or sequential numbers to be dialed while in others, the FCC stated that a device qualifies as an ATDS even if it lacks that capacity. The Court also noted that the FCC Order was unclear as to whether other certain referenced capabilities (for instance, dialing without human intervention) are necessary for a dialer to qualify as an ATDS.

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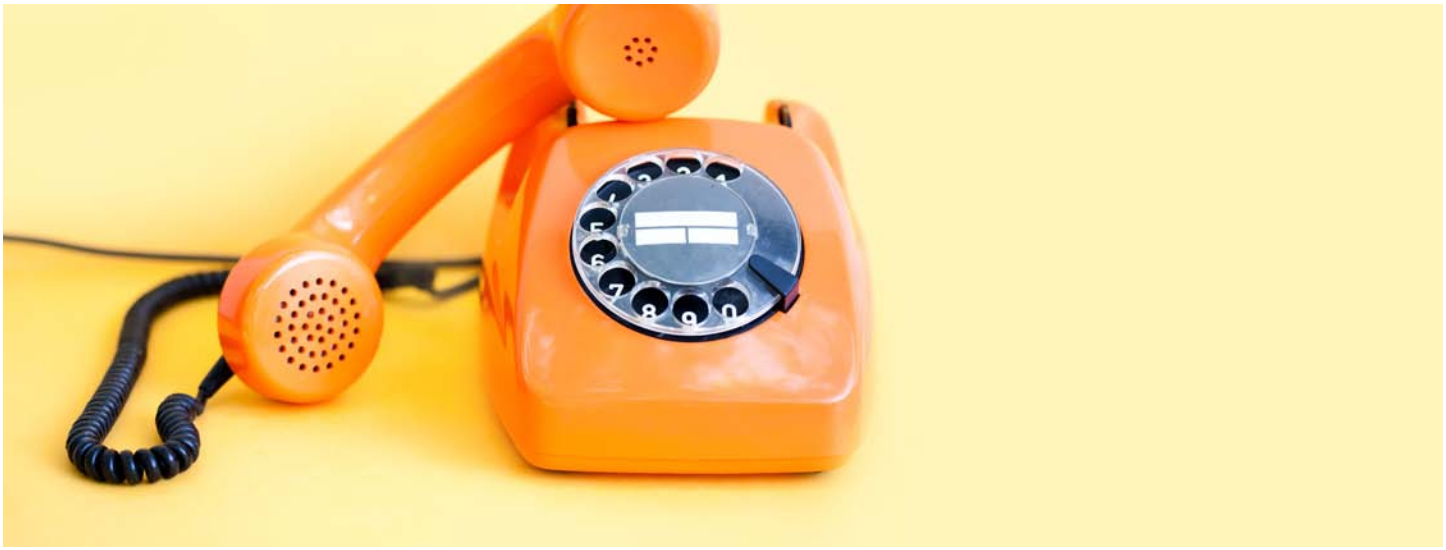

What Next? The Court's refusal to sustain the FCC Order's definition of an ATDS invalidates one of the most disturbing aspects of the 2015 Order, but what does it mean for collection agencies and others who use ATDS to make non-telemarketing calls? Absent further rulemaking from the FCC, it will leave the issue open for judicial interpretation and we are likely to see additional litigation seeking to examine equipment on a device by device basis. The Court's decision contains some language which may prove helpful to the industry on the issue of what constitutes an ATDS - particularly, its parsing of the issue as to functionality and the distinction drawn between the ability to generate random or sequential numbers and the ability to call from a database of numbers generated elsewhere. It is likely that we will see this definition delved into in litigation to a further degree than previously seen.

Reassigned Numbers. Regarding reassigned numbers, the court determined the FCC's one call safe harbor was arbitrary and set it aside. The Court's ruling was premised in large part upon the FCC's own interpretation of the TCPA as allowing a caller's reasonable reliance on prior express consent. Recognizing that a caller's reasonable reliance might not cease after one call or text message (for instance, when the recipient does not answer or provide any indication of reassignment), the Court held that there was no reasonable basis for the FCC to conclude that reasonable reliance would cease after the first call. "Having embraced an interpretation of the statutory phrase 'prior express consent' grounded in conceptions of reasonable reliance, the Commission needed to give some reasoned (and reasonable) explanation of why the safe harbor stopped at the seemingly arbitrary point of a single call or message." *Id.* at 38. Importantly, the Court further held that the FCC's failure regarding the one call safe harbor requires that the Court set aside its treatment of reassigned numbers generally. As a result, the Court also set aside the FCC's interpretation of a "called party" as referring to a new subscriber because to leave it in place would in turn "mean that a caller is strictly liable for *all* calls made to the reassigned number, even if she has no knowledge of the reassignment." *Id.* at 39.

What Next? While setting aside the FCC Ruling, the Court also signaled its agreement with other circuits (notably the Seventh and Eleventh) that the "called party" for purpose of the TCPA is intended to be the current subscriber. The Court also seemingly embraced the reasonable reliance on prior express consent position espoused by the FCC. As a result, it is likely we can anticipate a ramp up in reassigned number litigation centering around who is the "called party" and what constitutes reasonable reliance on prior express consent provided by the previous subscriber. At the same time, the FCC (under new leadership) is already seeking to address the issue of reassigned numbers by looking at mechanisms to address the issue, including a repository of reassigned numbers. *In re Advanced Methods to Target and Eliminate Unlawful Robocalls, Second Notice of Inquiry,* 32 FCC Rcd. 6007, 6010 (2017).

Revocation of Consent. As noted above, the Court sustained the FCC's ruling that consent can be revoked through any reasonable means that clearly expresses a desire not to receive further messages. Of note, the Court made clear that the FCC Ruling did not address revocation rules *mutually* adopted by contracting parties. "Nothing in the Commission's order thus should be understood to speak to parties' ability to agree upon revocation procedures." *Id.* at 43.

What Next? Based upon the court's clarification as to mutually adopted revocation rules, affected parties may wish to consider incorporating revocation procedures in their contracts with specific mechanisms for consumers to indicate their consent. Based upon the Court's ruling, affected parties should also continue to implement policies and procedures for recording revocations of consent. ■

ABOUT OUR CONSUMER FINANCE LITIGATION AND COMPLIANCE TEAM

Smith Debnam's Consumer Finance Litigation practice provides a multi-disciplinary approach to litigation, bringing together attorneys from across several of our creditors' rights practice groups to ensure our clients receive the appropriate experience as needed. Our team's depth of experience in the consumer financial services sector, both in litigation and compliance matters, is rooted in a thorough understanding of the complex regulatory environment surrounding the financial services industry.

We counsel an expansive list of clients on compliance and licensing matters to prevent future litigation and mitigate risks associated with litigation. From banks and non-bank financial services companies, mortgage servicers and originators to payday lenders, and private student lenders to auto finance companies, we advise on measures clients can take to ensure compliance with applicable statutes.

We regularly defend financial services providers in litigation matters involving the full range of laws and regulations surrounding the consumer finance industry, including federal and state consumer protection laws, fair and responsible lending claims, challenges to loan servicing involving consumers in bankruptcy, and federal and state UDAP claims, just to name a few.

Our attorneys regularly defend financial service providers and members of the collection industry in state and federal court, as well as regulatory matters.

We are heavily involved in a number of trade groups supporting the financial services industry, including the following:

- ACA International
- National Creditors Bar Association (NARCA)
- American Financial Services Association
- Mortgage Bankers of the Carolinas
- North Carolina Bankers Association
- South Carolina Bankers Association
- American Bar Association's Consumer Financial Services Committee
- North Carolina Creditors Bar Association

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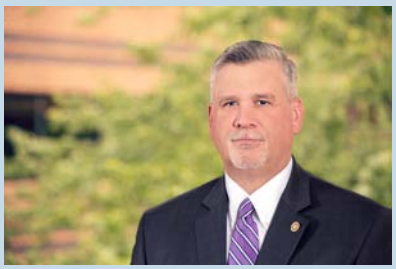

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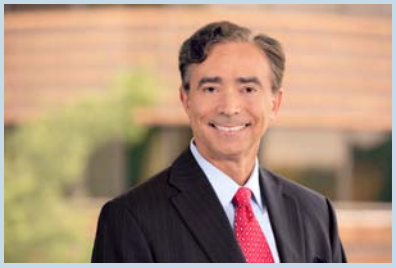

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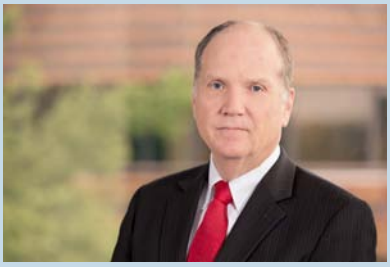

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