The Consumer Financial Protection Bureau (CFPB or Bureau) is a U.S. government agency created by the Dodd-Frank Wall Street Reform and Consumer Protection Act. The CFPB is the first federal agency tasked solely with the mission of consumer financial protection. To this end, Congress has vested it with enforcement, supervisory, and rulemaking authority. In an effort to stay apprised of significant industry changes affected by the CFPB, Burr & Forman CFPB Update will serve as a periodic briefing on recent case law, news, and developments related to the CFPB.

RECENT CASES AND ENFORCEMENT

Northern District of Georgia Finds Debt-Collection LLCs and Individuals Liable Under the FDCPA and CFPA

Consumer Financial Protection Bureau v. Universal Debt & Payment Solutions, LLC, Case No. 1:15-CV-0859-RWS, 2019 WL 1295004 (N.D. Ga. Mar. 21, 2019)

On March 21, 2019, the United States District Court for the Northern District of Georgia entered an Order granting summary judgment to the CFPB on the majority of its claims against various companies and individuals based on their "massive debt-collection scheme." The defendants included six LLCs and five individuals who were associated with the LLCs.

The defendants' debt-collection scheme involved making collection calls to consumers seeking to collect debts not owed or debts defendants were not authorized to collect. The general scheme went as follows. First, the defendants acquired consumers' contact information in two ways: they would purchase debt portfolios and payday loan leads, giving them access to names, social security numbers, and phone numbers; they also performed "skip tracing" to verify and update existing contact information for various consumers. Defendants then used this information to make automated calls to consumers. When the consumer would answer, a robo-call message told consumers that they were accused of bank fraud and that a legal claim had been filed against them. The consumer would then be connected to live individuals, who would often misrepresent themselves as a litigator or threaten arrest if the debt were not paid. As for the debts themselves, none of the payments the consumers made went toward any debt. Instead, defendants used the payments for personal gain.

The CFPB alleged various violation of the CFPA and the FDCPA, including making communications that harassed, oppressed, or abused consumers; misrepresentations that were false, deceptive, and misleading; failing to provide written notice within five days of their initial communication; and making communications that were deceptive and unfair. The Court granted summary judgment for the CFPB on a majority of its claims under the CFPA and the FDCPA, often noting that the conduct involved was a clear violation of those statutes. The Court did enter summary judgment for some claims against the individuals, noting that a question of fact remained about whether the individuals qualified as "debt collectors" based on the individuals' relationship with the defendant LLCs. The Court determined that the remaining factual issues would proceed to trial, after which the Court would also determine appropriate damages against the liable defendants.

Federal Court Finds Mortgage Assistance Relief Servicers Liable

Consumer Financial Protection Bureau v. Mortgage Law Group, LLP, Case No. 14-cv-513-wmc, 2018 WL 6002906 (W.D. Wisc. Nov. 15, 2018)

On November 15, 2018, the United States District Court for the Western District of Wisconsin entered an Opinion and Order subsequent to a bench trial between the CFPB and the defendants, a group of mortgage assistance relief service ("MARS") providers, as well as individual employees. As background, in the wake of the 2008 financial crises.

MARS providers began widely promoting their ability to assist consumers in negotiating with lenders to obtain loan modifications and prevent foreclosure. These MARS providers were known to use high pressure sales techniques and employ a number of misleading statements. MARS providers often charged consumers advance fees in the thousands of dollars and failed to perform basic promised services. To combat these practices, the FTC and then the CFPB issued regulations requiring MARS providers to make certain disclosures to consumers, barring them from making certain representations, and preventing them from collecting advance fees until the consumer signs a written agreement.

The CFPB had previously filed a Motion for Summary Judgment, which was granted by the Court in many respects. For example, the Court held that retainer fees qualified as "advance fees"; that some Defendants fails to make required disclosures; that some companies implied in their welcome letters that consumers should not communicate with their lenders; and that other Defendants represented that consumers would be receiving legal representation in seeking a loan modification. Some individual employees were also held liable for their individual actions.

By and large, the defendants used the same strategy to attract customers. They would speak with a consumer and then send a welcome packet to those consumers whose financial information qualified. Employees would follow up with the consumer regarding initial payment for these services and the loan documentation. Once payment and the documents were received, the modification packet was sent to the lender. The documentation was then forwarded to "local attorneys." Local attorneys rarely spoke with consumers about specific modification requests or about the consumer's specific file. All in all, the success rate was low. One defendant successfully obtained a loan modification 26% of the time, and another defendant obtained a loan modification only 17% of the time.

After holding a bench trial, the Court ruled in favor of the CFPB on some, but not all, of its claims. The defendants initially argued that they qualified for the "safe harbor" provision under Regulation O because they were attorneys who provided mortgage relief services as part of the practice of law, but the Court rejected this argument, noting that counsel's "legal services" involved review of pro forma documents and perfunctory, not substantive, legal services. Next, the Court addressed four alleged misrepresentations.

First, the Court found that defendants improperly represented to consumers that they shouldn't communicate with their lenders regarding the loan modification. Second, some of the defendants misrepresented that their customers would receive legal representation, yet consumers never received any legal strategy; rather, an attorney followed a checklist to double check that the consumer's file was complete. However, the Court ruled in favor of the defendants on the third and fourth alleged misrepresentations regarding the likelihood of obtaining a loan modification and the amount of time to obtain a loan modification. The Court found that the information provided to consumers was sufficiently broad as not to constitute a specific misrepresentation.

Finally, as to damages, the Court noted the three levels of damages for violations of consumer financial laws: strict liability, reckless, and knowing. A determination of reckless requires a finding that the conduct was something more than negligence but less than knowledge of the law's requirements. To constitute a knowing violation, a defendant must have known about the conduct constituting the violation and that

the conduct violated the law. Ultimately, the Court decided that, given the unclear parameters of the "safe harbor" provision of Regulation O, none of the defendants' conduct was knowing. Thus, while some Defendants were found liable for first tier strict liability violations, the Court did find that other Defendants were liable under the second tier of civil monetary penalties for recklessness based on their conduct. The Court has asked the parties to brief the specific amount of civil penalties that should be assessed.

CFPB Announces $15.5 Million Settlement with USAA Federal Savings Bank

On January 3, 2019, the CFPB filed a Consent Order and Stipulation in the Matter of USAA Federal Savings Bank relating to USAA's failure to properly honor consumer's stop payment requests and failure to complete reasonable error resolution investigations. Under the Electronic Fund Transfer Act ("EFTA"), a consumer may stop payment of a preauthorized electronic fund transfer by notifying a financial institution orally or in writing at any time up to three business days preceding the scheduled date of the transfer. According to the Consent Order, USAA did not consistently honor oral stop payments and lacked a systemic mechanism to stop payment of preauthorized EFTs processed via a debit card. Additionally, USAA failed to initiate error resolution investigations. For example, EFTA requires a financial institution to "investigate promptly" any alleged error, yet USAA's policy was to not investigate reported errors unless the consumer asserting the error submitted a completed WSUD within 10 days of USAA sending the consumer the form. Finally, USAA violated the CFPA by reopening approximately 17,000 closed accounts without obtaining consumers' prior authorization.

For its penalty, the Consent Order requires USAA to submit a comprehensive compliance plan designed to ensure that USAA's stop payment, error resolution, and deposition account re-opening practices comply with all applicable federal consumer financial laws and terms of the Consent Order. Additionally, USAA is required to pay just over $12 million to provide redress to affected customers, as well as a civil money penalty to the CFPB in the amount of $3.5 million. To read the Consent Order in full, click here.

CFPB Files Complaint and Consent Order Against Mortgage Company for Misleading Veterans

On December 4, 2018, the CFPB filed a Complaint and Proposed Consent Order against Village Capital & Investment LLC ("Village Capital"). Village Capital, a non-bank mortgage company, offers a product called an Interest Rate Reduction Refinancing Loan ("IRRRL") that allows veterans to refinance their mortgages at low interest rates with a loan guaranteed by the Department of Veterans Affairs.

According to the Complaint, Village Capital employees were trained to go over a presentation with the consumer with a laminated worksheet. The employee would fold the worksheet in half and reveal the top half of a page that stated "Here's what most banks don't want you to know . . . ." Using an excel spreadsheet, the employee would then perform an "apples to apples" comparison of the consumer's current loan and a loan provided by the Veterans Administration followed by the phrase, "Obviously, our worst case scenario is MUCH BETTER than your best case scenario." However, the excel spreadsheet formulas and the IRRRL were flawed, producing inaccurate and misleading results.

Thus, the flawed excel worksheets presented to consumers misrepresented the future amount of principal owed, underestimated the future amount of the refinanced monthly payments, and overestimated the total monthly benefit of the loan after the first month. Based on these misrepresentations, the CFPB brought one count of violation fo the Consumer Finance Protection Act ("CFPA") against Village Capital for engaging in deceptive acts and practices.

Alongside the Complaint, the parties filed a Stipulated Final Judgment and Order. According to the Stipulated Final Judgment and Order, Village Capital is prohibited from continuing to engage in deceptive practices and must submit a compliance plan containing

detailed steps for addressing the misconduct alleged against it and for proposed training to its loan officers to ensure compliance. Additionally, Village Capital is required to pay just over $250,000 to redress affected customers, as well as a civil penalty of $260,000.

To read the Complaint in full, click here.

CFPB Files Complaint against Future Income Payments, LLC for Misleading Consumers into Believing Pension-Advance Products Were Not Loans Subject to Interest Rates

On September 13, 2018, the CFPB filed a Complaint in the United States District Court for the Central District of California and against Future Income Payments, LCC and related entities that were representing to consumers that pension-advance products were loans and were not subject to interest rates. The CFPB also alleged that the entities failed to disclose the full cost of credit, in violation of the Truth in Lending Act ("TILA").

According to the CFPB's Complaint, the Defendants offered consumer lump-sum payments in exchange for the authority to debit the accounts in which consumers deposit pension payments or other future income. Defendants allegedly represented that these lump-sum payments were not "loans," that there was no interest rate, and that the cost of the lump-sum payment was less than a potential alternative source of finances, such as a credit card. Specifically, Defendants stated that their product is "a purchase and not a loan." Defendants also told consumers that there was no interest rate associated with the product and that the consumer was receiving a "discount" over time. However, these transactions ended up costing consumers interest amounts up to 183%. The CFPB suggested that this tactic preyed upon vulnerable consumers such as senior citizens and disabled military veterans in need of immediate cash. Certain contracts even included clauses binding a consumer's heirs, executors, and assigns, as well as requiring consumers to abide by the contract even after filing for bankruptcy.

According to the CFPB, these actions violate the Consumer Financial Protection Act ("CFPA") because they have engaged in deceptive acts or practices. The CFPB also alleges that the Defendants' actions violate TILA, as certain disclosures must be provided to a consumer before consummation of a closed-end credit transaction. Additionally, the CFPB allege that the TILA violations at issue constitute an additional violation of the CFPA. To read the Complaint in full, click here.

IN THE NEWS

Kathy Kraninger Takes Over as the New CFPB Director

On December 6, 2018, Kathy Kraninger became the new director of the CFPB after her nomination passed the US Senate in a 50-49 vote. Kraninger took over management of the CFPB from acting director Mick Mulvaney. More information about the CFPB and the transition to Kraninger's leadership of the agency can be found here.

CFPB Office of Innovation Proposes and Revises Disclosure Sandbox

On September 13, 2018, the CFPB's Office of Innovation proposed a revised "disclosure sandbox" to encourage trial disclosure programs for companies. The existing policy was established in 2013; however, the CFPB had not approved any trial disclosures since that time. The revised policy would allow the CFPB "to deem a covered person conducting a trial disclosure program to be in compliance with or exempt from a requirement of a [CFPB] rule or certain federal laws." The proposal put forth a number of revisions to incentivize the testing of new disclosures including:

- Streamlining the application and review process to focus on the quality and persuasiveness of the application
- Granting or denying applications within 60 days of submission

- Establishing an expected two-year time frame for the testing of disclosures
- Specifying procedures for permitting companies to continue to use disclosures that test successfully
- Coordinating with state regulators so that entities within state "regulatory sandboxes" may be able to participate in the CFPB's Disclosure Sandbox without applying separately to the CFPB

Since the revised policy's initial publication, the proposed Disclosure Sandbox has undergone its comment period, and the CFPB has offered some clarifications. On February 7, 2019, the CFPB revised its headline for this proposal that suggested the Disclosure Sandbox would only be open to "fintech companies," and stated that "any covered entity, regardless of its categorization as "FinTech, 'bank,' 'credit union' or otherwise, could apply to test a trial disclosure with the Sandbox." Unsurprisingly, as revealed during the comment period and in letters to the CFPB, there have been polarized reactions to the Disclosure Sandbox. Certain industry groups have been supportive of the measure, while a number of consumer advocacy and community groups are adamantly opposed to it.

More information can be found here.

CFPB Issues FAQ Guidance on TRID Rule

On January 25, 2019, the CFPB issued FAQ guidance on its TILA-RESPA Integrated Disclosure Rule (TRID Rule). The CFPB noted that this FAQ guidance was informal and should not be a substitute for reviewing TILA, RESPA, Regulation Z, and related commentary. The first three FAQs pertain to "corrected closing disclosures and the three business-day waiting period before consummation," while the fourth discusses whether there is a safe harbor for creditors' use of a model form that does not does not reflect a TRID Rule change finalized in 2017.

The first FAQ states that if there is a change to the disclosed terms after the creditor provides the initial Closing Disclosure, the creditor is required to ensure that a consumer receives a corrected Closing Disclosure at least three business days before consummation in three circumstances. This requirement is imposed if

(1) the change results in the APR becoming inaccurate;
(2) if the loan product information required to be disclosed under the TRID Rule has become inaccurate; or
(3) if a prepayment penalty has been added to the loan.

12 CFR §1026.19(f)(2)(ii). Otherwise, it is sufficient "if the consumer receives the corrected Closing Disclosure at or before consummation." 12 CFR § 1026.19(f)(2)(i)

The second FAQ addressed whether a creditor is "required to ensure that a consumer receives a corrected Closing Disclosure at least three business days before consummation if the APR decreases." If the overstated APR is accurate per Regulation Z, the creditor must provide a corrected Closing Disclosure. However, "the creditor is permitted to provide it at or before consummation without a new three business-day waiting period." 12 CFR § 1026.19(f)(2)(i). If such an overstated APR is inaccurate, the creditor must comply with the three business day corrected Closing Disclosure requirement before the loan's consummation.

The third FAQ provided that "Section 109(a) of the Economic Growth, Regulatory Relief, and Consumer Protection Act did not change the timing for consummating transactions if a creditor is required to provide a corrected Closing Disclosure under the TRID Rule."

Finally, the FAQ on model forms stated that "a creditor is deemed to be in compliance with the disclosure requirements associated with the Loan Estimate and Closing Disclosure if the creditor uses the appropriate model form and properly completes it with accurate content."

The TRID Rule FAQ guidance can be found here.

CFPB Releases Mortgage Complaint Snapshot

On January 29, 2019, the CFPB released a complaint snapshot of a "high-level overview of trends in consumer complaints during the last

24 months with a focus on mortgage complaint volume." Between November 1, 2016 and October 31, 2018, the CFPB received approximately 646,200 complaints pertaining to items such as prepaid cards, checking or savings accounts, debt collection, payday loans, mortgages, and student loans. The greatest increases in complaints against the rolling 24-month average occurred for prepaid cards (+51%) and consumer or credit reporting (+26%), while the greatest decreases occurred for student loans (-37%) and mortgages (-18%). The snapshot also provides complaints by state, with Washington D.C., Georgia, and Delaware having the highest proportion of complaints per 100,000 people. Finally, the snapshot highlighted mortgage complaints and discussed the trends in complaints for financial services products.

The complaint snapshot can be found here.

CFPB Proposes to Revise Payday Lending Rule and Delay Compliance Date

On February 6, 2019, the CFPB released Notices of Proposed Rulemaking on Payday Lending. The CFPB is proposing "to rescind the rule's requirements that lenders make certain underwriting determinations before issuing payday, single-payment vehicle title, and longer-term balloon payment loans. The Bureau is preliminarily finding that rescinding this requirement would increase consumer access to credit."

The mandatory underwriting provisions are part of the regulation promulgated by the CFPB in November 2017 for payday, vehicle title, and certain high-cost installment loans. The provisions that the CFPB proposes to rescind are as follows:

(1) provide that it is an unfair and abusive practice for a lender to make a covered short-term or longer-term balloon-payment loan, including payday and vehicle title loans, without reasonably determining that consumers have the ability to repay those loans according to their terms;
(2) prescribe mandatory underwriting requirements for making the ability-to-repay determination;
(3) exempt certain loans from the underwriting requirements; and
(4) establish related definitions, reporting, and recordkeeping requirements.

The CFPB also proposed to delay the August 19, 2019 compliance date for the mandatory underwriting provisions to November 19, 2020.

To read the full Notice of Proposed Rulemaking, click here.

CFPB Discusses New Protections for Veterans and Service Members

On February 7, 2019, the CFPB published an alert discussing "[f]ree credit monitoring, medical debt credit reporting restrictions, and mortgage protections for those recently back from active duty." The CFPB noted that the Economic Growth, Regulatory Relief, and Consumer Protection Act went into effect on September 21, 2018 and requires "free security freezes and one year fraud alerts at the three nationwide credit reporting agencies (CRAs)." The Act also addresses financial issues for qualifying service members including:

- Holding lenders to more stringent requirements when they participate in VA's refinance programs
- Ensuring continued foreclosure protections for service members up to one year after they leave active duty
- Prohibiting medical debt that should have been paid by the VA to be reported as part of a veteran's credit history
- Providing free credit monitoring for active duty military, including the national guard

The full alert can be found here.

CFPB Publishes Fall 2018 Semi-Annual Report

On February 12, 2019, the CFPB released its Semi-Annual Report to Congress for the period covering April 1, 2018 to September 30, 2018. In its "[s]ignificant problems faced by consumers in shopping for or obtaining consumer financial

products or services section," the CFPB highlighted credit invisibility for consumers that lack a credit record that is treated as "scorable." The CFPB also discussed mortgage shopping as a significant problem for consumers because, while rates vary widely among lenders, many homebuyers nonetheless do not comparison shop for their mortgages.

The Semi-Annual Report also discussed the CFPB's views on its significant rules and initiatives, as well as its plans for upcoming ones. The Payday Loan Rule was listed as a significant rule, while the others, such as Regulation Z under the Truth in Lending Act, were listed as less significant rules. In terms of upcoming rules, the Semi-Annual Report noted that the CFPB will work towards releasing a proposed rule on FDCPA collectors' communications practices and consumer disclosures among other plans.

The Fall 2018 Semi-Annual Report can be found here.

CFPB Releases Small Entity Compliance Guide

On February 20, 2019, the CFPB released a small entity compliance guide "summarizing the payment-related provisions of the Payday Lending Rule." The guide follows the February 6, 2019 notice of proposed rulemaking to reconsider the mandatory underwriting provisions of the Payday Lending Rule, and it notes that the proposed rulemaking "does not reconsider the payment-related requirements of the Payday Lending Rule." While the guide does not discuss the Payday Lending Rule's mandatory underwriting provisions, it does provide "information that may be helpful when implementing the payment-related requirements of the Payday Lending Rule."

The payment provisions that the guide focuses on can be found in Subpart C of the Payday Lending Rule. The guide also summarizes the Payday Lending Rule's general provisions, which can be found in Subpart A, and the record retention and compliance program aspects of the payment provisions, which can be found in Subpart D. The topics highlighted by the guide include covered loans, lenders and service providers under the Payday Lending Rule, prohibited payment transfer attempts, disclosure of payment transfer attempts, and compliance program and record retention.

A copy of the guide can be viewed here.

CFPB Releases Report on 2018 Administration of the Fair Debt Collection Practices Act

On March 20, 2019, the CFPB released to Congress its annual report on the administration of the Fair Debt Collection Practices Act ("FDCPA"). According to the Report, in 2018, the CFPB engaged in six public enforcement actions relating to alleged FDCPA violations. In the same time period, the FTC brought or resolved seven debt collection cases, obtained more than $58.9 million in judgments, and banned 32 companies and individuals engaging in repeated violations of the law from working in debt collection. The CFPB also plans to issue a Notice of Proposed Rulemaking addressing communication practices and consumer disclosures sometime in Spring 2019.

Additional highlights of the FDCPA Annual Report include two amicus curiae briefs filed in appellate cases addressing the FDCPA, identifying FDCPA violations through supervisory examinations, providing debt collection educational materials, operating the 21-day email course "Get a Handle on Debt Boot Camp," and continuing research projects and market monitoring to improve knowledge of the debt collection market. According to the Report, financial services debt continues to be the highest debt collection market by share of revenue, even higher than telecommunications and healthcare debt combined. In 2018, the highest consumer complaint related to debt collection continued to relate to an attempt to collect a debt not owed.

The full Report can be found here.

CFPB Releases 2018 Consumer Response Annual Report

On March 29, 2019, the CFPB released its 2018 Consumer Response Annual Report, highlighting challenges faced by consumers and complaints that have been submitted to the CFPB. According to the Report, the top five most frequent complaints involved the following financial product or service: (1) credit or consumer reporting, (2) debt collection, (3) mortgage, (4) credit card, and (5) checking or savings accounts. The highest percentage increase involved complaints regarding virtual currency. The CFPB states that companies responded to approximately 99% of credit reporting complaints sent to them for review and response and that companies responded to approximately 95% of debt collection complaints sent to them for review and response. The Report includes statistics related to consumers' responses in thirteen different fields, including student loan, auto loans, personal loans, prepaid card, and payday loans..

To view the full 2018 Report, click here.

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