

# Consumer Financial Services Newsletter

Spring 2014


[Homepage](#) | [Committee Roster](#) | [Join CFSC](#)

## Important Dates

### Business Law Section Spring Meeting:

April 10-12, 2014  
Los Angeles, CA

### Business Law Section Annual Meeting:

September 11-13, 2014  
Chicago, IL

## Newsletter Editors

### Managing Co-Editors:

[Amy Durant](#)  
Bodman PLC  
734/930-2492

[Grace Powers](#)  
Bank of America, N.A.  
213/345-8698

### Assistant Editor:

[Rachel Marin](#)  
Maurice & Needleman PC  
908/905-5070

## Membership Minute

**CFSC by the Numbers:** 2014 YTD through January Total Members = 1,348. An 11.59% increase over 2013. Keep up the good work in spreading the word about joining the ABA's CFSC - encourage your clients and colleagues to check it out! Now is a good time to recruit new members because the ABA is offering free memberships.

### ABA New Member Recruiting:

- The ABA recently launched a "Member-Get-A-Member" Campaign offering free ABA membership and one free Section, Division, or Forum membership. Offers expire May 31, 2014.
- The free memberships will run through August 31, 2014 and the new member will receive his or her first invoice in September 2014 for 2014-2015 ABA Membership Dues.
- Recruit new members by May 31, 2014 and you could win a "work/life balance package." Go to [www.ambar.org/ABAWorkLife](http://www.ambar.org/ABAWorkLife) for official rules and for information on how to print or email membership offers to friends and colleagues or to share offers with contacts on Facebook, LinkedIn and Twitter.
- Refer potential new members to [www.ambar.org/nextstep](http://www.ambar.org/nextstep) for sign-up and details of the campaign.

## Leadership Message



Nikki Munro  
Chair  
Consumer Financial  
Services Committee

Dear CFSC Members:

Are you working harder than you ever have? Are you struggling to keep up with the constant barrage of information coming rapid fire style in your inbox? Are you overwhelmed by the financial services cases, memos, press releases and regulations

bombarding you from all directions? Are you having trouble prioritizing what you need to read? Are you concerned about what you should focus on in your limited free time so that you can grow your practice or help your organization?

I suspect consumer financial services lawyers around the country are feeling just like you. Playing catch up is a way of life for many of us, and not knowing where to start may be a pressing problem. I invite you to start with the Consumer Financial Services Committee (CFSC).

If you need assistance on housing finance reform, listen to the monthly webinars of the Housing Finance Committee. If you've missed any, please visit our website to listen to prior programs and obtain materials. If mortgages aren't on your priority list, but you need to focus on Telephone Consumer Protection Act or disparate impact issues, look for the materials from the winter meeting, which are also accessible on the CFSC website.

[Read more...](#)

## Pro Bono Article

### The Consumer Financial Services Committee Presents A Program Of Successful Pro Bono Activities

*By Adamma Obele Muise, Nelson Mullins Riley & Scarborough, LLP*

ABA Model Rule 6.1 encourages attorneys to provide at least fifty hours of free legal services each year to those who are unable to pay. This is a serious edict, as demonstrated by Rule 6.1's Comment that pro bono is every lawyer's responsibility, "regardless of professional prominence or professional workload."

## Meeting Promos/Postcards



### Join Us in Los Angeles for Fun, Sun and CLE!

There's still time to register for the Business Law Section's Spring Meeting in Los Angeles at L.A. Live and the Los Angeles Convention Center. The Consumer Financial Services Committee (CFSC) has an exciting agenda of CLEs, substantive subcommittee panels and roundtables to get you up to speed on the latest developments in consumer financial services. The CFSC will begin its meetings on Wednesday, April 9<sup>th</sup> with the ever popular Beer and Basics program, and conclude Saturday, April 12<sup>th</sup>. For a great way to catch up with old friends and meet new members, don't miss the Welcome Reception sponsored by McGlinchey Stafford on Wednesday at 6:30pm. And of course, there are tickets available for the joint CFSC/Young Lawyers Committee Dinner on Thursday, April 10<sup>th</sup> at Cicada Restaurant sponsored this year by Morrison Foerster. For information on how to register, see [registration information](#). A [draft schedule](#) of the program is available on the CFSC website under Programs, Meetings and Events.

## Subcommittee Spotlight

### New Leaders at the Helm of CFSC Young Lawyers *By R. Scott Adams, Spilman Thomas & Battle, PLLC*

The current leadership of the Young Lawyers Subcommittee of the Consumer Financial Services Committee ("CFSC") is working to involve the next generation of lawyers in the CFSC programming, networking, and service. The leaders of the Young Lawyers Subcommittee include Daniel McKenna (Chair); Yasamine Christopherson (Vice Chair) and Marci Kawski (Vice Chair).

A major focus of the group is facilitating significant participation in the CFSC through young lawyer

**Get Involved in the CFSC:** Want to get more involved in the CFSC? Feel free to contact Margaret Stolar ([mstolar@dtlaw.com](mailto:mstolar@dtlaw.com)) or Carolyn Hann ([chann@ftc.gov](mailto:chann@ftc.gov)), CFSC Membership Chair and Vice-Chair for information.

During the 2014 Business Law Section Fall Meeting in Chicago, IL, the Consumer Financial Services Committee's Pro Bono Subcommittee will host a program where eight to twelve law firms and business legal departments will present short vignettes of their most successful pro bono activities. Pro Bono Subcommittee Chair Leonard Bernstein hopes that these vignettes will encourage and inspire business lawyers to fulfill their ethical obligation of providing legal services to those who cannot afford it, as well as demonstrate that Consumer Financial Services Committee members are particularly well positioned to provide effective services. In addition, attendants will be encouraged to replicate these programs within their own firms and institutions.

Business Law and Consumer Financial Services Committee members interested in attending the Pro Bono Subcommittee's program should look for the date, time, and location of the program in the Business Section Fall Meeting final schedule that will be released in mid-2014. Members interested in presenting during the program should contact Pro Bono Subcommittee Chair Leonard Bernstein to sign up at [lbernstein@reedsmith.com](mailto:lbernstein@reedsmith.com).

liaisons to each subcommittee. This permits the attorneys presently at the helm of the subcommittees to get to know some of the young lawyers in the field, offer mentorship, and collaborate on projects. Additionally, the CFSC Young Lawyers Subcommittee hosts the "Beer and Basics" session at each CFSC meeting, which gives the floor to young lawyers to make substantive presentations. The group works to provide social engagement at the CFSC meetings, as well. This month's constituent feature highlights these leaders in the consumer financial services bar. [Read More...](#)

## Legal Feature

### **A Closer Look at the Struggles of TCPA Compliance**

*By Michael Goodman, Hudson Cook, LLP*

Companies who contact their current and prospective customers by phone may be feeling overwhelmed by the surge in Telephone Consumer Protection Act ("TCPA") litigation, the wide range of TCPA issues being litigated, and the lack of favorable - or even consistent - rulings from courts considering similar allegations. While some companies might consider the TCPA obscure, callers ignore this law at their peril. The TCPA's private rights of action, generous statutory damages calculation, low hurdles for surviving motions to dismiss and summary judgment motions, and burden shifting for key elements of causes of action have created a minefield.

The many conflicting court decisions in private TCPA litigation leaves companies struggling to determine how they can ensure their practices are in compliance with the law. At the same time, there are currently eleven petitions pending before the Federal Communications Commission ("FCC") seeking guidance on a variety of TCPA compliance questions. In a world more perfect than ours, the unresolved issues plaguing companies would match up neatly with the issues the FCC will address in these petitions. Unfortunately, there is little overlap here. This article will explore in more detail the array of compliance challenges companies face and the largely distinct issues before the

## Member Spotlight

### **Kathleen Keest: From the Heartland to the Front Lines of Consumer Protection**

*By Rachel Marin, Maurice & Needleman, P.C.*

Admired for her work as a consumer advocate, attorney Kathleen Keest began her law career in public service by helping individuals at the local level, and over the years she has become a voice for the people on a national scale. At her current position as a Senior Policy Analyst at the Federal Deposit Insurance Corporation ("FDIC"), she has been working with the Consumer Financial Protection Bureau's new residential mortgage rules, training FDIC examiners, implementing exam procedures and manuals, and advising on other pressing issues. Over the course of her career thus far, Keest has represented individual consumers, devised policy, been involved with litigation and enforcement, taught law school classes, and authored books, treatises, manuals, studies and articles on consumer credit. Although she started her law career at a time when the consumer movement was soon to become eclipsed by deregulation initiatives, Keest has fought steadily to keep the consumer movement flame alive.

Growing up in the small town of Middletown, Illinois, Keest had no accessible attorney role model and she describes her mind as a "*tabula rasa*" in that she had no vision of what a lawyer might want to accomplish with a legal career. An advisor at her college, Eastern Illinois University in Charleston, Illinois, suggested that law school offered a versatile degree that would distinguish her from the many students who were graduating with social science degrees. Following her college graduation in 1970, she proceeded to law school at the University of Iowa in Iowa City, Iowa, and graduated with honors in 1974. Although she lacked a clear vision of the direction she wished to take, Keest was greatly influenced by the civil rights movement and

FCC. [Read More...](#)

**Housing Finance Subcommittee Update:  
Rise of Mortgage Claims Under the  
False Claims Act and FIRREA**

*By Kelly Lipinski, McGlinchey Stafford*

The United States Department of Justice ("DOJ") has placed financial fraud as one of its priorities and has done so by initiating civil actions enforcing the False Claims Act ("FCA") and the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"). At the ABA's winter meeting in Park City, Utah, the Housing Finance Subcommittee sponsored a panel with Bill Harrington from Goodwin Procter and Andrew Schilling from Buckley Sandler to discuss the recent rise of claims under the FCA and FIRREA.

**Broadening Coverage of the False Claims Act**

During the panel presentation, Mr. Schilling provided an overview of the FCA. The FCA establishes civil liability for: 1) knowingly presenting a false claim to the government; 2) knowingly making a false statement; or 3) knowingly avoiding or decreasing an obligation to pay the government. 31 U.S.C. § 3729. Mr. Schilling observed that the FCA has historically been used for fraud upon the government. However, since the passage of the Fraud Enforcement and Recovery Act of 2009, this interpretation has changed so that *direct* fraud on the government is no longer required. For example, the government may allege that a fraud upon Fannie Mae and Freddie Mac *indirectly* involves the government due to the government's infusion of funds and thus, could implicate the FCA. Additionally, the FCA requirement that the actor "knowingly" makes a false claim or statement has been broadly defined to include a deliberate ignorance or reckless disregard for truth. 31 U.S.C. § 3729(b)(1) (A). This broad language beyond "actual knowledge" is a key tool for the government to investigate fraud using a lesser standard than a criminal prosecution. Mr. Harrington added that an interesting issue to consider under the FCA is to what extent individual or department "knowledge" can be attributed to the corporation, particularly when separate departments seemingly operate in silos. Finally, the FCA's penalty provision is notable in that it provides for both a penalty and treble damages. [Read More...](#)

**Legal Considerations in Drafting Closing Instructions for Qualified Mortgages**

*By Chris Christensen, PeirsonPatterson, LLP*

***A. Qualified Mortgage Points and Fees Caps add increased importance to finality of closing fees.*** Under Dodd-Frank and its implementing regulations, "qualified mortgages" may not exceed points-and-fees caps. These points-and-fees caps place additional pressure on the interface between the lending industry and title industry at loan closing. Aside from operational vigilance, the main tool

the public interest era that had been exploding around her for the past two decades, and she closely followed the "major public policy issues playing out in the news and on television." This guided her career path by "shading values and concepts of what one could do with a law degree."

Fresh out of law school, in 1975 the young attorney joined the Black Hawk County Legal Aid Society in Waterloo, Iowa to represent clients who otherwise did not have resources to hire an attorney. She then moved to the Legal Services Corporation of Iowa in Des Moines, Iowa for six years where she worked as a Staff Attorney and then transitioned to become the office's Managing Attorney. In 1979 and 1980, Keest took sabbaticals to work in Washington, D.C. as Assistant Counsel with a subcommittee of the United States Senate that had jurisdiction over the Law Enforcement Assistance Administration and the Office of Juvenile Justice and Delinquency Prevention. In 1980 she completed a three-month fellowship with the National Consumer Law Center in Boston. A few years later she said goodbye to the Midwest and moved to Boston to work as a Staff Attorney with the National Consumer Law Center to focus on consumer credit regulation and credit practices that impacted a broad community of consumers throughout the United States.

Armed with increased knowledge about formulating public policy, Keest then returned to the Midwest in 1996 to serve as an Assistant Attorney General in Iowa and as Deputy Administrator of the Iowa Consumer Credit Code until 2004, and she helped lead the effort to change the industry standard for mortgage lending in a multi-state enforcement action against Household International. Prior to accepting her current position with the FDIC, she was a Senior Policy Counsel at the Center for Responsible Lending, in Durham, North Carolina, the research and policy affiliate of the Center for Community Self-Help, where she focused on regulatory reform issues, predatory lending, and preemption. [Read More...](#)

lenders utilize to ensure proper fee calculations for Truth-in-Lending Act purposes is lender closing instructions. Clear and consistent closing instructions are primarily helpful as an operational tool for lenders to ensure fee consistency for running applicable Qualified Mortgage ("QM") points-and-fees caps calculations. In some jurisdictions, lender closing instructions may form the basis of a legal claim. The most common issues with making those types of claims are outlined in this article.

***B. The American Land Title Association ("ALTA") Closing Protection Letter.***

Closing protection letters, issued by title underwriters, support the common industry practice of independent title agents conducting residential loan closings. Generally, closing protection letters cover (via indemnity or merger into the title policy depending on the jurisdiction) compliance of independent title agents with lender closing instructions related to title matters and fraud or theft by the settlement agent. [Read More...](#)

This message was sent to &\*TO:. Your e-mail address will only be used within the ABA.  
We do not sell or rent e-mail addresses.

[Update your profile](#) [Manage your list/email preferences](#) [Unsubscribe from other ABA email](#) [Privacy Policy](#) [Contact Us](#)

American Bar Association | 321 N Clark, Chicago, IL 60654-7598 | 800-285-2221 | 312-988-5522

Dear CFSC Members:

Are you working harder than you ever have? Are you struggling to keep up with the constant barrage of information coming rapid fire style in your inbox? Are you overwhelmed by the financial services cases, memos, press releases and regulations bombarding you from all directions? Are you having trouble prioritizing what you need to read? Are you concerned about what you should focus on in your limited free time so that you can grow your practice or help your organization?

I suspect consumer financial services lawyers around the country are feeling just like you. Playing catch up is a way of life for many of us, and not knowing where to start may be a pressing problem. I invite you to start with the Consumer Financial Services Committee (CFSC).

If you need assistance on housing finance reform, listen to the monthly webinars of the Housing Finance Committee. If you've missed any, please visit our website to listen to prior programs and obtain materials. If mortgages aren't on your priority list, but you need to focus on Telephone Consumer Protection Act or disparate impact issues, look for the materials from the winter meeting, which are also accessible on the CFSC website.

Our in-person meetings provide the best legal content, and networking opportunities, too. If you are interested in joining us for our next in person meeting, consider a trip to LA for the Business Law Section's (BLS) Spring Meeting April 9<sup>th</sup> through April 12<sup>th</sup>. At the BLS spring meeting, the CFSC is sponsoring or co-sponsoring over 12 hours of consumer financial services related continuing legal education(CLE).

At the Spring Meeting, CFSC Programming Chair Katrina Christakis and CFSC Access to Services Vice Chair Jonice Gray Tucker will present a CLE Program -*Views from the Bench: Judicial Perspectives on Consumer Finance Litigation*. Katrina and Jonice will moderate a panel of judges from across the country, including Judge Leslie Kobayashi, US District Court, District of Hawaii, Chief Judge Elizabeth Magner, US Bankruptcy Court, Eastern District of Louisiana, Judge Rebecca Pallmeyer, US District Court, Northern District of Illinois, Judge Richard Schmidt, US Bankruptcy Court, Southern District of Texas, Deanell Tacha, Dean, Pepperdine University School of Law, and Judge Lee Yeakel, US District Court, Western District of Texas. The panelists will provide perspectives on class certification, discovery, offers of judgment, arbitration motions, settlement, bankruptcy, and evidentiary issues in consumer finance litigation.

The Debt Collection Practices and Bankruptcy Subcommittee, lead by Tomio Narita, will present a CLE panel on the CFPB's ANPR on Debt Collection Rules. The panel, consisting of Robert Foehl from ACA International in Minneapolis, MN, Rich Munroe from DBA International in Suwanee, GA, Joann Needleman from Maurice & Needleman PC in Wayne, PA, Thomas Pahl from the Consumer Financial Protection Bureau (CFPB) in Washington, DC, and Dong Hong, Regulatory Counsel for the Consumer Bankers Association in Washington, DC, will discuss issues raised by the CFPB's Advance Notice of Proposed Rulemaking on Debt Collection Rules and the comments made by consumer groups and members of the credit and collection industry.

The Conference on Consumer Finance Law will present a CLE panel in honor of the late Fred Fisher. The Frederick Fisher Memorial Program is held annually in conjunction with our committee at the Spring Meeting. This year's program, *Credit for the Next Generation of Young Consumers*, is produced by Jim Swartz and moderated by John Chiles. It will cover the unique financial services issues that will confront the next generation of consumers:

- As young people enter the work force after completing education, how will they handle the mountain of student loan debt facing them in a still uncertain job market?
- What access to credit will they have as new consumers?
- How will their shopping trends and expectations about access to credit change the credit industry?
- And what are the unique challenges and issues confronting this generation and how should government and industry respond?

It is sure to be another great Fisher Memorial program.

In addition to our sponsored CLE programs, the CFSC will co-sponsor programs on third party vendor compliance management, the creation of the Restatement 3<sup>rd</sup>, Law of Consumer Contracts, and public policy enforcement through payment systems. Finally, the CFSC will also host substantive subcommittee meetings, committee roundtables, an in-house counsel lunch meeting, and a committee dinner.

At our meetings and through our webinars, the CFSC provides the up to date legal analysis given by the leaders in the industry. Rely on the CFSC to bring organization to the chaos. Let us help you find what you need to practice in today's tumultuous environment.

If you have any questions about the upcoming meetings, or would like to participate more in the CFSC, please feel free to call or email me.

Nikki Munro  
Chair  
Consumer Financial Services Committee  
410.865.5430  
nmunro@hudco.com

## **New Leaders at the Helm of CFSC Young Lawyers**

By R. Scott Adams

The current leadership of the Young Lawyers Subcommittee of the Consumer Financial Services Committee (“CFSC”) is working to involve the next generation of lawyers in the CFSC programming, networking, and service. The leaders of the Young Lawyers Subcommittee include Daniel McKenna (Chair); Yasamine Christopherson (Vice Chair) and Marci Kawski (Vice Chair).

A major focus of the group is facilitating significant participation in the CFSC through young lawyer liaisons to each subcommittee. This permits the attorneys presently at the helm of the subcommittees to get to know some of the young lawyers in the field, offer mentorship, and collaborate on projects. Additionally, the CFSC Young Lawyers Subcommittee hosts the “Beer and Basics” session at each CFSC meeting, which gives the floor to young lawyers to make substantive presentations. The group works to provide social engagement at the CFSC meetings, as well. This month’s constituent feature highlights these leaders in the consumer financial services bar.

**Daniel JT McKenna**, Chair of the Young Lawyers Subcommittee, is an attorney with Ballard Spahr, LLP, based in Philadelphia. Daniel’s practice focuses on a wide range of consumer financial services disputes, including mortgage, auto lending, credit card, and debt collection matters. He counsels his clients to avoid litigation but also has experience defending them in individual and class action lawsuits brought by individual consumers and government agencies. In addition to involvement with the CFSC, Daniel is involved with the Young Lawyers Division of the ABA, specifically as Public Service Coordinator. Through this role, he has implemented the nationwide Wills for Heroes program, and his efforts have been recognized through multiple awards with the ABA, the Pennsylvania Bar, the American Inns of Court, and his firm. Daniel attended college at Catholic University, law school at Temple University, and is admitted in New Jersey and Pennsylvania.

**Yasamine Christopherson**, Vice Chair of the Young Lawyers Subcommittee, is an attorney at Nelson Mullins Riley & Scarborough LLP in Atlanta. She has a broad-based consumer financial services and business litigation practice, with extensive litigation experience involving residential mortgage issues, debt collection, and bankruptcy. She has creditors’ rights experience including foreclosures, deficiency actions, and confirmation proceedings. In addition to her law practice, Yasamine is a Board Member for Girls on the Run Atlanta, which works with young girls to teach life skills through mentorship and running. Yasamine attended Davidson College and law school at University of South Carolina and is licensed in Georgia and South Carolina.

**Marci Kawski** (formerly VanAdestine) Vice Chair of the Young Lawyers Subcommittee, is an attorney with Whyte Hirschboeck Dudek S.C. in Wisconsin, where she is part of the Consumer Financial Services Team. Her practice involves counseling and representation of national and local providers of consumer credit in regulatory and litigation matters. She has experience with a wide variety of consumer finance laws, including the Wisconsin Consumer Act, the Truth in Lending Act, and the Fair Credit Reporting Act. Marci’s

life prior to law school involved working on several statewide campaigns, as well as official work for a member of Congress. She has experience working on public relations and grassroots campaigning on national and local levels. Marci attended college and law school at the University of Wisconsin and is admitted to all Wisconsin courts.

## A Closer Look at the Struggles of TCPA Compliance

Michael Goodman, Hudson Cook, LLP

Companies who contact their current and prospective customers by phone may be feeling overwhelmed by the surge in Telephone Consumer Protection Act (“TCPA”) litigation, the wide range of TCPA issues being litigated, and the lack of favorable – or even consistent – rulings from courts considering similar allegations. While some companies might consider the TCPA obscure, callers ignore this law at their peril. The TCPA’s private rights of action, generous statutory damages calculation, low hurdles for surviving motions to dismiss and summary judgment motions, and burden shifting for key elements of causes of action have created a minefield.

The many conflicting court decisions in private TCPA litigation leaves companies struggling to determine how they can ensure their practices are in compliance with the law. At the same time, there are currently eleven petitions pending before the Federal Communications Commission (“FCC”) seeking guidance on a variety of TCPA compliance questions. In a world more perfect than ours, the unresolved issues plaguing companies would match up neatly with the issues the FCC will address in these petitions. Unfortunately, there is little overlap here. This article will explore in more detail the array of compliance challenges companies face and the largely distinct issues before the FCC.

The first key unsettled issue in TCPA litigation concerns the willful or knowing standard triggering the availability of treble damages for violations. The TCPA establishes a fixed \$ 500 statutory damages calculation for certain violations and an “up to” \$ 500 statutory damages calculation for other violations.<sup>1</sup> Courts have discretion to award up to three times this amount based on a finding that violations were willful or knowing. Some courts have held that a plaintiff can trigger the escalated statutory damages calculation by showing that the defendant intended to engage in the conduct at issue without requiring a showing that the defendant knew the conduct violated the TCPA or that the defendant acted recklessly in this regard.<sup>2</sup> Other courts have required a heightened showing that the defendant willfully or knowingly intended to violate the TCPA in a calling campaign.<sup>3</sup> Private plaintiffs routinely allege that violations were willful or knowing, and the lack of clarity in the proper standard for this allegation adds unneeded uncertainty to an important element of TCPA litigation. The eleven petitions currently pending before the FCC do not address this issue.

The second key unsettled issue considers whether an offer of judgment made to an individual plaintiff can moot a TCPA class action. Offers of judgment would provide the plaintiff with the full recovery he or she could obtain through litigation, potentially depriving the plaintiff of standing because it eliminates any live controversy between the parties. The trickiest fact pattern involving this issue involves an unaccepted offer of judgment made before the

---

<sup>1</sup> 47 U.S.C. §§ 227(b)(3); (c)(5).

<sup>2</sup> See, e.g., *American Home Servs., Inc. v. A Fast Sign Co., Inc.*, 747 S.E.2d 205, 208-209 (Ga. App. 2013). (“AHS admitted that it hired Sunbelt to send advertising faxes on its behalf. This is sufficient to make the violation ‘willful’ within the meaning of the statute.”).

<sup>3</sup> See, e.g., *Brown v. Enter. Recovery Sys., Inc.*, 2013 Tex. App. LEXIS 10658, \*35 (Tex. App. Aug. 22, 2013) (“But to recover treble damages, the Browns had to show that ERS knew of the TCPA’s requirements and that it knew or should have known that its actions violated the Act.”).

plaintiff has filed a class certification motion. Federal district courts have resolved this issue in various ways, with no clear majority view.<sup>4</sup> Without a clear standard on this issue, defendants looking to exit a putative TCPA class action quickly and inexpensively face this additional uncertainty. The eleven petitions currently pending before the FCC do not address this issue.

The third key unsettled issue arises when courts must determine whether to certify a class in a TCPA private action. In recent years, courts have resolved the question of whether federal district courts hearing TCPA private actions should apply federal or state class certification standards. Oddities in the wording of the TCPA's private action provisions created this uncertainty.<sup>5</sup> Two United States Supreme Court opinions settled this issue in favor of the federal standard.<sup>6</sup> With this resolution, defendants lost the ability to argue that state laws prohibiting TCPA class actions mandated denial of class certification motions even in federal court. Parties continue to debate whether putative class actions can satisfy federal standards. This analysis is highly fact-specific, especially with respect to TCPA provisions requiring the called party's consent. Courts have struggled with whether the consent requirement means that individual issues predominate over issues common to the class as well as whether plaintiffs have successfully identified an ascertainable class when so little may be known about the details of a calling campaign. As discussed in more detail below, several of the FCC petitions raise issues regarding consent, but not in ways that invite the FCC to address the strengths and weaknesses of class certification in TCPA private actions.

The fourth unsettled issue concerns arbitration agreements between the parties to a call regulated by the TCPA and whether courts will order the parties to arbitration when a TCPA dispute arises. In four recent cases, courts have enforced arbitration agreements as applied to TCPA disputes, generally reasoning that the disputes, which typically arise from a creditor's collection calls, are sufficiently related to the parties' underlying relationship to be subject to an arbitration agreement.<sup>7</sup> A fifth recent case, however, declined to apply an arbitration agreement to a TCPA dispute, introducing new uncertainty on this issue. The agreement in this case applied to any claim or dispute arising from or relating to the plaintiff's account with the defendant. The

---

<sup>4</sup> See, e.g., *Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC*, 2013 U.S. Dist. LEXIS 142527, \*19 (D. Md. Oct. 2, 2013) (“[F]ederal judges both inside and outside the District of Maryland have cited approvingly the Court's prior Opinion holding that a complete settlement offer made before class certification does not moot the putative class claims.”); *Goans Acquisition, Inc. v. Merch. Solutions, LLC*, 2013 U.S. Dist. LEXIS 138228, \*\*5-6 (W.D. Mo. Sept. 26, 2013) (“Most federal circuits have found that an offer of judgment that would provide all the relief a plaintiff requests (or is entitled to) has the effect of mooting the action even if the offer is not accepted.”). In *Bais Yaakov of Spring Valley v. ACT, Inc.*, 2014 U.S. Dist. LEXIS 7793 (D. Mass. Jan. 22, 2014), the federal district court certified this question to the U.S. Court of Appeals for the First Circuit in an interlocutory appeal after rejecting the defendant's mootness argument.

<sup>5</sup> “A person or entity may, **if otherwise permitted by the laws or rules of court of a State**, bring in an appropriate court of that State: (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to recover for actual monetary loss from such a violation, or to receive \$ 500 in damages for each such violation, whichever is greater, or (C) both such actions.” 47 U.S.C. § 227(b)(3) (emphasis added).

<sup>6</sup> *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012).

<sup>7</sup> *Mendoza v. Ad Astra Recovery Services, Inc.*, 2014 U.S. Dist. LEXIS 1716 (C.D. Cal. Jan. 6, 2014); *Betancourt v. Green Tree Servicing, LLC*, 2013 U.S. Dist. LEXIS 176728 (M.D. Fla. Dec. 17, 2013); *Cyganiewicz v. Sallie Mae, Inc.*, 2013 U.S. Dist. LEXIS 153554 (D. Mass. Oct. 24, 2013); and *Brown v. DIRECTV, LLC*, 2013 U.S. Dist. LEXIS 90894 (C.D. Cal. June 26, 2013).

court acknowledged the broad scope of the agreement, but concluded nevertheless that the TCPA claim related to matters beyond that scope. The “allegations relate to the *manner* in which Discover attempted collection. Although the existence of a debt on the account and the right to collect the debt would ‘arise from’ or ‘relate to’ the Account, the legality of the manner in which collection is pursued does not. The manner of collection — whether calls were made, how frequently they were made, and what was said during them — has nothing to do with either the Account, the terms of the Cardmember Agreement, or the parties’ relationship.” *Wagner v. Discover Bank*, 2014 U.S. Dist. LEXIS 3682, \*15 (D. Colo. January 10, 2014) (emphasis in original). Given that companies rely on arbitration agreements to ward off exposure to class actions, this opinion may open a significant new front regarding TCPA risk assessment. The pending FCC petitions do not address this issue.

The fifth unsettled issue arises with respect to the ability of a party who obtains valid consent from a called party to share that consent with third-party callers. While the FCC settled the issue in favor of a creditor’s ability to share consent with a third-party collection agency, there is greater uncertainty if the sharing occurs in other contexts. In the Southern District of Florida, federal district courts have found that an emergency room physician and a radiology services provider, who were independent from the hospital at issue, could not take advantage of consent a patient provided to the hospital at the time of admission. *Hines v. CMRE Fin. Servs., Inc.*, 2014 U.S. Dist. LEXIS 3017 (S.D. Fla. Jan.10, 2014); *Mais v. Gulf Coast Collection Bureau, Inc.*, 2013 U.S. Dist. LEXIS 65603 (S.D. Fla. May 8, 2013) (interlocutory appeal subsequently certified to 11<sup>th</sup> Circuit Court of Appeals). Of the eleven petitions currently pending before the FCC, four relate to the TCPA’s consent standards for calls to cell phones using an autodialer or a prerecorded message and sales calls to residential lines using an autodialer. However, none of these petitions asks the FCC to address this specific issue. Notably, this question of the ability to share consent can arise outside the context of companies and their service providers. For example, lead generation models and indirect auto credit models anticipate that a consumer will initiate a relationship with one party (i.e., the lead generator or the motor vehicle dealer) and ultimately do business with a second party (i.e., the party receiving the lead or the assignee of the dealer’s retail installment sales contract). Companies engaged in these models are struggling to determine how to obtain and share valid consent in ways that are consistent with consumers’ expectations as well as with the text of the TCPA.

Two of the four petitions that involve the TCPA consent standard (Coalition of Mobile Engagement Providers and Direct Marketing Association) seek an FCC ruling that consent obtained prior to the October 16, 2013, effective date of the FCC’s new “prior express written consent” standard for sales calls need not be replaced with new consent satisfying the FCC’s new standard. In other words, these petitioners would like FCC permission to continue to rely on previously-obtained “prior express consent” even if it no longer satisfies the new “prior express written consent” standard for sales calls. These petitioners maintain that it would be unduly burdensome to require companies to obtain new, stricter consent to replace their older, less regulated consent. The other two petitions implicating the TCPA’s consent standard (Cargo Airline Association and Retail Industry Leaders Association) seek rulings that package delivery messages and on-demand text messages are not subject to this standard.

The sixth unsettled issue involves standing and who may bring a TCPA claim. The TCPA private right of action provision gives the right to “any person or entity.” 47 U.S.C. § 227(b)(3). The substantive TCPA provisions and related rules promulgated by the FCC refer to the rights of the “called party” without defining that term. 47 U.S.C. § 227(b)(1); 47 C.F.R. § 64.1200(a). Because the TCPA is a strict liability statute, callers face liability for accidentally calling a wrong number or calling a number that has been reassigned from a customer to an unrelated third party.<sup>8</sup> In addition, plaintiffs have sued based on the fact that they answered a call properly placed to a second person at the number called.<sup>9</sup> Defendants in these cases routinely argue that the plaintiff lacks standing to sue because the caller intended to place a legally permitted call and any violation was unavoidable and inadvertent. These arguments typically fail as applied to wrong number calls and calls to reassigned numbers. Courts explain that callers, not consumers, should bear responsibility for such calls, even if the court concedes that the caller could not have prevented the violation. However, courts have stopped short of imposing liability for calls properly placed to a customer’s phone number that happen to have been answered by someone else at the number. To support this conclusion, courts have interpreted the term “called party” to refer to the subscriber of the number. Further, courts have applied an expansive interpretation of “subscriber” to include both the person identified on the account as well as the primary user of the number, if those are separate persons.<sup>10</sup> Nevertheless, courts struggle with this issue and would benefit from FCC guidance on this standing concern.

Helpfully, two of the eleven current FCC petitions address this issue. The petition from United Healthcare Services, Inc., asks the FCC to take the position that a company that has valid consent from the person it intended to call would not violate the TCPA by calling that person at the cell phone number on file if that number has been reassigned to an unrelated third party between the time the consumer provided the consent and the time of the call. The petition would limit this position to non-sales calls subject to the TCPA’s “prior express consent” standard. The petition explains that violations in such calls are inadvertent and not easily prevented, that the TCPA’s private right of action and unforgiving statutory damages calculation creates exposure to enormous liability, and that the TCPA’s consumer protection purposes are not served when a company is sued based on these facts.

The petition from ACA International similarly requests an FCC ruling creating a TCPA safe harbor for “wrong number” non-sales calls to cell phones that are placed using an autodialer. Such calls require the called party’s “prior express consent.” The ACA petition explains that a caller may have valid consent to call the number and, unbeknownst to the caller, the number has been subsequently reassigned to an unrelated third party. As noted above, courts typically impose liability on the caller for such “wrong number” calls, notwithstanding the fact there may not be a practical way to avoid such violations. The ACA petition also argues that the consent a consumer provides by volunteering his or her cell phone to a creditor should establish consent to call any cell phone number assigned to the consumer, not just the phone number the consumer has volunteered to the creditor. This would seem to stretch too thinly the concept of “prior

---

<sup>8</sup> *Breslow v. Wells Fargo Bank, N.A.*, 2012 U.S. Dist. LEXIS 58677 (S.D. Fla. Apr. 26, 2012); *D.G. v. William W. Siegel & Assocs., Attorneys at Law, LLC*, 2011 U.S. Dist. LEXIS 63298 (N.D. Ill. June 14, 2011).

<sup>9</sup> *Leyse v. Bank of Am., National Ass’n*, 2010 U.S. Dist. LEXIS 58461 (S.D.N.Y. June 14, 2010).

<sup>10</sup> *Cellco P’ship v. Plaza Resorts, Inc.*, 2013 U.S. Dist. LEXIS 139337 (S.D. Fla. Sept. 27, 2013); *Olney v. Progressive Casualty Ins. Co.*, 2014 U.S. Dist. LEXIS 9146 (S.D. Cal. Jan. 24, 2014).

express consent.” Courts have criticized the FCC’s position that volunteering a cell phone number constitutes valid *express* consent to be called at that number. In the face of that criticism, the FCC is unlikely to extend that form of consent still further to apply to a cell phone number that the consumer has never provided to the caller.

The seventh unsettled TCPA compliance issue that companies are currently struggling with is whether or not their calling systems satisfy the TCPA’s definition of a regulated “automatic telephone dialing system.” Callers using a regulated autodialer to call a cell phone must have the called party’s “prior express consent” for non-sales calls and “prior express written consent” for sales calls. The TCPA’s definition of a regulated autodialer complicates this issue because it refers to the dialer’s *capacity* rather than its actual use in a given call. Specifically, the term “automatic telephone dialing system” means 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). As a result, even a manually dialed call may be subject to the consent standards for autodialers if they are connected through regulated dialing equipment.

The FCC has further confused this issue by effectively reading out of the definition the reference to random or sequential dialing. The FCC has stated that callers no longer engage in these practices in significant numbers, so the FCC has instead incorporated the concept of capacity to dial *without human intervention* as the key component. Not only is this shift of questionable authority, it also has not provided sufficient clarification for callers and courts. In recognition of the fact that the TCPA’s autodialer definition could be interpreted to reach every smart phone in use, courts have started trying to strike a more sensible balance by looking at the dialer’s present capacity. This distinguishes what dialers can do at the time they are used from what dialers could be, but are not, configured to do. *See, e.g., Hunt v. 21<sup>st</sup> Mortg. Corp.*, 2014 U.S. Dist. LEXIS 13469, \*\*14-15 (N.D. Ala. Feb. 4, 2014) (“[A] telephone system is only covered by the [TCPA] if, at the time the calls at issue were made, the system had the capacity, **without substantial modification**, to store or produce numbers using a random or sequential number generator.”) (Emphasis added). Not every court has been as willing to look past the FCC’s guidance on this issue. *See, e.g., Blair v. The CBE Grp., Inc.*, 2013 U.S. Dist. LEXIS 68715 (S.D. Cal. May 13, 2013); *Fields v. Mobile Messengers Am., Inc.*, 2013 U.S. Dist. LEXIS 180227 (N.D. Cal. Dec. 23, 2013).

Three of the eleven FCC petitions address the autodialer standard directly, and the FCC’s response to these petitions is likely to be the most significant of all currently pending. The petition submitted by the Professional Association for Customer Engagement (PACE) seeks a ruling that a “click-to-dial” dialing system is not necessarily regulated as a dialer unless it has the capacity to dial without human intervention. A “click-to-dial” system initiates a call by having a representative click a single button rather than enter all ten digits of a telephone number. PACE therefore argues that such a system does not involve dialing without human intervention. PACE’s petition also seeks a statement from the FCC adopting the *Hunt* court’s approach to this analysis, judging dialing systems by what they are capable of doing without further modification at the time the calls at issue were placed. Specifically, PACE asks the FCC to adopt an interpretation of “capacity” that considers “the current ability to operate or perform an action, when placing a call, without first being modified or technologically altered.”

The petition submitted by ACA International also seeks an FCC ruling that a dialing system's capacity is judged by its present ability at the time calls are made. ACA also asks the FCC to clarify that predictive dialers are not, by definition, regulated as autodialers by the TCPA. The FCC has stated several times that predictive dialers are regulated autodialers based on their capacity to store and dial numbers without human intervention. This petition asks the FCC to adopt a more nuanced approach, allowing for the possibility that a predictive dialer may lack the capacity referenced in the definition. The petition submitted by Glide Talk, Ltd. raises the smaller issue of whether an application provider offering technology that may satisfy the autodialer definition may be held liable under the TCPA for text messages sent by independent users of the application. The Glide Talk petition also asserts that the TCPA's autodialer definition should be limited to equipment that can, at the time of a call, be used to store or generate sequential or randomized telephone numbers.

The remaining three pending petitions are outside the scope of this article. The first, consolidating a series of separate submissions, seeks FCC guidance as to whether the TCPA provision requiring an opt-out notice in advertising faxes applies to faxes sent based on the recipient's prior express invitation or permission. The second, from Acurian, Inc., seeks a determination that prerecorded message calls inviting a call recipient's participation in a clinical pharmaceutical trial are not regulated by the TCPA as sales calls requiring the called party's prior express written consent. The third, from National Grid USA, Inc., seeks latitude from the FCC with respect to the business name disclosure required in prerecorded message calls.

TCPA compliance is not for the faint of heart. The easy availability of class certification and the non-discretionary statutory damages calculation have produced a recent spike in TCPA litigation. Some courts have displayed greater facility with TCPA compliance issues than others, and regardless of a court's ability to work through complicated issues of TCPA compliance, different courts are reaching different conclusions in response to similar facts and arguments. This has added further uncertainty to TCPA risk assessments. We all await the FCC's responses to the petitions currently pending. However, this article has demonstrated that these petitions will not resolve every TCPA issue currently keeping compliance attorneys up at night.

## Housing Finance Subcommittee Update: Rise of Mortgage Claims Under the False Claims Act and FIRREA

By Kelly Lipinski, Member, McGlinchey Stafford

The United States Department of Justice (“DOJ”) has placed financial fraud as one of its priorities and has done so by initiating civil actions enforcing the False Claims Act (“FCA”) and the Financial Institutions Reform, Recovery and Enforcement Act (“FIRREA”). At the ABA’s winter meeting in Park City, Utah, the Housing Finance Subcommittee sponsored a panel with Bill Harrington from Goodwin Procter and Andrew Schilling from Buckley Sandler to discuss the recent rise of claims under the FCA and FIRREA.

### Broadening Coverage of the False Claims Act

During the panel presentation, Mr. Schilling provided an overview of the FCA. The FCA establishes civil liability for: 1) knowingly presenting a false claim to the government; 2) knowingly making a false statement; or 3) knowingly avoiding or decreasing an obligation to pay the government. 31 U.S.C. § 3729. Mr. Schilling observed that the FCA has historically been used for fraud upon the government. However, since the passage of the Fraud Enforcement and Recovery Act of 2009, this interpretation has changed so that *direct* fraud on the government is no longer required. For example, the government may allege that a fraud upon Fannie Mae and Freddie Mac *indirectly* involves the government due to the government’s infusion of funds and thus, could implicate the FCA. Additionally, the FCA requirement that the actor “knowingly” makes a false claim or statement has been broadly defined to include a deliberate ignorance or reckless disregard for truth. 31 U.S.C. § 3729(b)(1)(A). This broad language beyond “actual knowledge” is a key tool for the government to investigate fraud using a lesser standard than a criminal prosecution. Mr. Harrington added that an interesting issue to consider under the FCA is to what extent individual or department “knowledge” can be attributed to the corporation, particularly when separate departments seemingly operate in silos. Finally, the FCA’s penalty provision is notable in that it provides for both a penalty and treble damages.

### Lower Standard of Proof for FIRREA Civil Claims

Mr. Harrington covered the DOJ’s use of FIRREA in mortgage lending actions. FIRREA was enacted in the 1980s after the savings and loan crisis and gives the DOJ authority to bring a civil action against a financial institution based on a violation of any of the fourteen criminal statutes expressly enumerated in 18 U.S.C. § 1833a, including mail and wire fraud. Since mail and wire fraud do not require “reliance” or “breach of contract” as essential elements of the offense, the government frequently utilizes the mail and wire statutes as its basis for prosecuting financial fraud claims.

FIRREA claims based on mail and wire fraud require the government to show the violation affected a “financial institution”, which includes a mortgage lending business. 18 U.S.C. § 20(10). This authority allows the government to prosecute banks or mortgage lenders using a lesser standard of proof than the standard required by criminal fraud statutes. In contrast with its criminal prosecutorial efforts, the DOJ need only prove a bank violated the relevant law by a preponderance of evidence. FIRREA has a ten year statute of limitations, which has allowed the

DOJ to initiate civil actions arising from the residential mortgage crisis of the 2000s. A single violation of FIRREA may result in a \$1,000,000 penalty up to \$5,000,000 for a continuing violation. If the fraud caused a gain or loss, the penalty may also include the amount of the gain or loss.

### Whistleblower Incentives

The panel also discussed the effect that whistleblower incentives have made in the rise of both FCA and FIRREA claims. A significant portion of the penalties in a FCA or FIRREA case may be awarded to a whistleblower. For example, a private person may bring, in the name of the government, a civil action for a violation of the FCA. 31 U.S.C. § 3730(b)(1). With limited exception, a private person is entitled to receive between 15% and 25% of the proceeds if the government intervenes and proceeds. Even if the government does not intervene, a private person may receive between 25% and 30% of the proceeds of the action or settlement. For example, in the recent CitiMortgage \$158 million settlement with the DOJ, the whistleblower received \$30 million for her efforts leading to the settlement. FIRREA's whistleblower provision is not as well-known and does not operate as a qui tam provision like the FCA. Instead, a private person may file a confidential declaration with the Attorney General about alleged fraud. If the government proceeds, the whistleblower may be awarded up to \$ 1.6 million. 12 U.S.C. § 4205.

### Government Investigatory Tools

The panel also discussed the government's extensive investigatory powers under these civil statutes through subpoenas or civil investigatory demands ("CID"). Historically, the U.S. Attorney General had to sign every CID. However, based on a 2010 statutory amendment, the authority to issue a FCA CID is now delegated to the United States Attorneys in each local office. An FCA CID will generally identify the basis for the investigation, but the true target or intent only becomes clear after a careful consideration of the types of documents that have been requested.

With regard to FIRREA, the authority to issue a subpoena has always been with the local United States Attorney office. A subpoena may seek documents and also compel testimony. The scope of a subpoena was recently challenged in *U.S. v. Clayton Holdings LLC* in the United States District Court of Connecticut. After receiving a subpoena that requested *all* of its data from *all* of its databases, Clayton Holdings sought to limit the scope to the data pertaining to the 15 financial institutions under investigation. Instead of limiting the scope of the subpoena, the government responded that it would simply mirror Clayton's databases and eliminate the alleged burden. Mr. Harrington observed the Clayton Holdings subpoena, and government response, further evidences how the civil investigatory process feels more like that of a criminal prosecution.

Mr. Harrington noted that the treatment of civil investigations as more like criminal prosecutions is concerning, since FCA and FIRREA lack certain discovery protections that exist for criminal prosecutions. Notable omissions include the lack of any secrecy protections similar to a grand jury process and the Fifth Amendment protection. Also missing from the civil process is the

protection of individuals that are named in the crime as a defendant, which is a key protection in a criminal prosecution. A corporate executive may be specifically identified in a civil lawsuit, even if he or she is not the direct target of the government's action. Finally, Mr. Harrington pointed out that the government has no duty to disclose exculpatory evidence in a civil fraud, which the government must do in a criminal case.

### Predictions for the Future

Both speakers predict the number of lawsuits against non-government entities will continue to increase in light of the government's prosecution of Bank of New York Mellon and Standard & Poor. Mr. Schilling noted the DOJ has placed financial fraud as a top priority only behind terrorism and other crimes against people. Evidence of this increased focus on financial fraud can also be found in the DOJ's requested budget increase that would add attorneys to investigate and prosecute such claims. The DOJ will increasingly continue to bring civil actions under FCA and/or FIRREA as the statute of limitations of claims related to the mortgage crisis begins to run out. The government is expected to continue to focus on bad business practices instead of narrowly targeted actions against fraud. Finally, the recently announced 2013 Civil Fraud Initiative is likely to produce increased activity by the Federal Housing Finance Agency and Office of Inspector General in collaboration with the Justice Department as they examine the origination practices of mortgage lenders.

# Legal Considerations in Drafting Closing Instructions for Qualified Mortgages

By Chris Christensen, Attorney, PeirsonPatterson, LLP

**A. Qualified Mortgage Points and Fees Caps add increased importance to finality of closing fees.** Under Dodd-Frank and its implementing regulations, “qualified mortgages” may not exceed points-and-fees caps.<sup>1</sup> These points-and-fees caps place additional pressure on the interface between the lending industry and title industry at loan closing. Aside from operational vigilance, the main tool lenders utilize to ensure proper fee calculations for Truth-in-Lending Act purposes is lender closing instructions. Clear and consistent closing instructions are primarily helpful as an operational tool for lenders to ensure fee consistency for running applicable Qualified Mortgage (“QM”) points-and-fees caps calculations. In some jurisdictions, lender closing instructions may form the basis of a legal claim. The most common issues with making those types of claims are outlined in this article.

**B. The American Land Title Association (“ALTA”) Closing Protection Letter.**<sup>2</sup> Closing protection letters, issued by title underwriters, support the common industry practice of independent title agents conducting residential loan closings. Generally, closing protection letters cover (via indemnity or merger into the title policy depending on the jurisdiction) compliance of independent title agents with lender closing instructions related to title matters and fraud or theft by the settlement agent. The ALTA Forms Committee recently approved a revised Closing Protection letter that covers the

“Failure of the Issuing Agent or Approved Attorney to comply with Your written closing instructions that relate to:

(a) the disbursement of Funds necessary to establish the status of the Title or the validity, enforceability, or priority of the lien of the Insured Mortgage; or

(b) the obtaining of any document, specifically required by You, but only to the extent that the failure to obtain the document affects the status of the Title or the validity, enforceability, or priority of the lien of the Insured Mortgage”<sup>3</sup>

---

<sup>1</sup> 12 C.F.R. § 1026.43(e)(3).

<sup>2</sup> While the ALTA Closing Protection Letter is not available in all states, some states publish state-specific closing protection letters, and some lenders negotiate unique closing protection letter terms, the ALTA Closing Protection Letter terms are standard for the majority of residential real estate transactions. This article takes the conservative approach and assumes that the revised ALTA Closing Protection letter will be adopted without material changes.

<sup>3</sup> See ALTA Closing Protection Letter - Single Transaction (04-02-14) accessible via <http://www.alta.org/forms/index.cfm>.

<sup>3</sup> *The article is provided only for general informational and educational purposes, and should not be construed as legal advice, legal opinion or any other advice on any specific facts or circumstances. The reader should not act or refrain from acting on the basis of this information without seeking professional advice.*

In this revised Closing Protection Letter, title underwriters are not liable for compliance with federal consumer law including QM requirements.<sup>4</sup> This express QM carve out creates a closing Catch-22 for lenders. The title underwriter approved agents who are in the best position to know any borrower or seller initiated changes to the HUD-1, and fee metadata relevant for applicable QM calculations are not liable for QM errors under the revised ALTA Closing Protection Letter.

In addition to this express carve out for QM, the ALTA Closing Protection letter also contains an arbitration provision that references arbitration rules published by the ALTA. The prudent approach is to draft lender funding and post-closing procedures on the assumption that lenders are not likely to prevail on a QM settlement error claim under the revised ALTA Closing Protection Letter.

**C. Lender Closing Instructions and Contract Law.** Some courts are willing to allow claims that lender closing instructions form a contract independent of the title policy.<sup>5</sup> These cases are highly fact specific, and they center on the language of the closing instructions. In *FDIC v. Floridian Title Group, Inc.*, the closing instructions were actually signed by the settlement agent.<sup>6</sup> Signed closing instructions are a rare occurrence in a world with title underwriter training on lender closing instructions, and, in some jurisdictions, state law prohibition of settlement agents signature blocks on lender closing instructions.<sup>7</sup> This fact specific inquiry may also result in limited damages.<sup>8</sup>

One risk associated with relying on a contractual claim based on lender closing instructions is the provision in the revised ALTA Closing Protection Letter that states “this closing protection letter supersedes and cancels any previous letter or similar agreement for closing protection that applies to the Real Estate Transaction.”<sup>9</sup>

---

<sup>4</sup> See <http://www.alta.org/forms/formsnews.cfm>.

<sup>5</sup> *New Freedom Mortg. Corp. v. Globe Mortg. Corp.*, 281 Mich. App. 63 (Mich. Ct. App. 2008); *FDIC v. Floridian Title Group, Inc.*, 2013 U.S. Dist. LEXIS 132662 (S.D. Fla. Sept. 16, 2013).

<sup>6</sup> *FDIC v. Floridian Title Group, Inc.*, 2013 U.S. Dist. LEXIS 132662 (S.D. Fla. Sept. 16, 2013) (“Floridian Title further argues that it was not in breach because the contract between itself and BankUnited did not arise until the Closing Instructions were signed, the down payments were to be made before the Closing Instructions were signed, and thus, Floridian Title cannot be in breach of a contract where the alleged breach occurred before the contract formed.”)

<sup>7</sup> See Texas Procedural Rule P-35 accessible via <http://www.tdi.texas.gov/title/titlem4f.html> (“P-35. Prohibition Against Guaranties, Affirmations, Indemnifications, and Certifications. No Title Insurance Company, Title Insurance Agent, Direct Operation, Escrow Officer, nor any employee, officer, director or agent of any such entity or person, shall issue or deliver any form of verbal or written guaranty, affirmation, indemnification, or certification of any fact, insurance coverage or conclusion of law to any insured or party to a transaction other than: (i) a statement that a transaction has closed and/or has been funded, (ii) issuance of an insured closing service letter, or any insuring form or endorsement promulgated by the State Board of Insurance, or (iii) certification of copies of documents as being true and exact copies of the original document or of the document recorded in the public records.”).

<sup>8</sup> *Herget Nat'l Bank v. USLife Title Ins. Co.*, 809 F.2d 413 (7th Cir. Ill. 1987).

<sup>9</sup> See ALTA Closing Protection Letter - Single Transaction (04-02-14) accessible via <http://www.alta.org/forms/index.cfm>.

**D. Agency Law.** Title underwriters are very adept at limiting risks posed by agency law. Settlement agent issuing contracts typically foresee and limit any possible agency claim.<sup>10</sup> As a common practice, closing, escrow services, and disbursement are expressly excluded from the scope of the agency. The revised ALTA Closing Protection Letter mirrors the industry standard language.<sup>11</sup>

Title underwriters are also very vigilant about updating approved agent lists. The prudent lender leverages this vigilance and validates the approved status of the instant settlement agent as close to the closing date as possible even in circumstances where the lender is operating under a master closing protection letter.

Most lender closing instructions are silent on the issue of agency.<sup>12</sup> Is this a missed opportunity by lender counsel? The nature of the agency relationship between the settlement agent and lender is worthy of debate in the QM context. *Hickey v. Great W. Mortgage Corp.* allowed a lender TILA liability claim for disclosure violations resulting from undisclosed fees made by the lender's settlement agent to survive summary judgment.<sup>13</sup>

**E. Negligence.** In some jurisdictions, courts allow negligence actions against title agents.<sup>14</sup> However, the revised ALTA Closing Protection letter anticipates this potential claim.<sup>15</sup>

---

<sup>10</sup> *Fifth Third Mortgage-Mi v. Hance*, 2011 Mich. App. LEXIS 1715, 16-17 (Mich. Ct. App. Sept. 29, 2011).

<sup>11</sup> See ALTA Closing Protection Letter - Single Transaction (04-02-14) accessible via <http://www.alta.org/forms/index.cfm>. ("The Issuing Agent is the Company's agent only for the limited purpose of issuing Policies. Neither the Issuing Agent nor the Approved Attorney is the Company's agent for the purpose of providing closing or settlement services.")

<sup>12</sup> See Uniform Closing Instructions accessible via <http://www.mortgagebankers.org/IndustryResources/ResourceCenters/UniformClosingInstructionsComm ents.htm>

<sup>13</sup> *Hickey v. Great W. Mortgage Corp.*, 1995 U.S. Dist. LEXIS 4495 (N.D. Ill. Apr. 4, 1995) ("The act of sending closing documents and funds to an attorney with instructions on closing a loan and disbursing the funds may be interpreted as a manifestation on the part of the lender that the closing attorney is to act as its agent. The closing attorney's consent to the relationship can be inferred from the fact that he accepts the documents and attends the closing. Finally, the principal's control can be inferred from the fact that the closing attorney purports to follow the lender's closing instructions.")

<sup>14</sup> *FDIC v. Calhoun*, 34 F.3d 1291 (5th Cir. Tex. 1994) ("Texas law recognizes the commonplace tort of negligence in the context of real estate closings. Under Texas law, a title company's duties at least run to the parties of a closing and may extend to possessors of legal rights under the contract."); *RTC Mortg. Trust 1994 N-1 v. Fidelity Nat'l Title Ins. Co.*, 58 F. Supp. 2d 503 (D.N.J. 1999) ("Notwithstanding the essentially contractual nature of the relationship between a title company and its insured, the company could be subject to a negligence action if the act complained of was the direct result of duties voluntarily assumed by the insurer in addition to the mere contract to insure title."); *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742 (Ind. 2010) ("An actor may undertake a duty when it supplies specific information in response to a specific request that makes it clear the recipient intends to attach significant importance to the information in making a decision that exposes the recipient to a risk of loss if the information is inaccurate.")

<sup>15</sup> See ALTA Closing Protection Letter - Single Transaction (04-02-14) accessible via <http://www.alta.org/forms/index.cfm>. ("Other than as expressly provided in this letter, the Company shall have no liability for loss resulting from the fraud, theft, dishonesty, misappropriation, or negligence of any party to the Real Estate Transaction, the lack of creditworthiness of any borrower connected with the Real Estate Transaction, or the failure of any collateral to adequately secure a loan connected with the Real Estate Transaction.")

**F. Conclusion.** Closing Instructions should, to the extent possible, relate to title matters as outlined specifically in the ALTA Closing Protection Letter. For fee certainty in QM calculations, the prudent approach is to align the industry standard instruction not to alter closing statement fees without lender consent with actual disbursement.

As a general rule, lenders are most successful where the closing instructions are construed by a court as an agreement. For this reason, many lenders incorporate approved settlement agent agreements into the normal course of business for all origination channels.<sup>16</sup> If the lender is planning on relying solely on closing instructions as the basis for an agreement, the ALTA Closing Protection offers model language. Specifically, the ALTA Closing Protection letter provides “[y]our transmittal of Funds or documents to the Issuing Agent or Approved Attorney constitutes Your acceptance of this letter.” Lenders, after consultation with counsel, may opt to provide that the acceptance of funds by the settlement agent constitutes acceptance of the terms in the lender closing instructions.

On a loan-by-loan basis, Lender closing instructions may be helpful in formulating the QM factual determinations where the title industry has direct knowledge.<sup>17</sup> Good closing instructions outline detailed procedures to handle last minute changes at closing that may affect QM. As with any well drafted contract, the closing instructions should expressly address the scope of damages in compliance with applicable law.

In light of the *Hickey v. Great W. Mortgage Corp.* case, lender closing instructions should address the scope of the agency with the settlement agent. The caselaw in this area demonstrates that title underwriters have successfully limited the scope of the settlement agent’s duties.

Because of the fact-specific case law in this area, the best risk mitigation tool for lenders is diligent operations to reduce the risk of loans with inaccurate QM calculations.

---

<sup>16</sup> For lenders utilizing warehouse lines, counsel for the lender should review the warehouse line closing instructions to remove any conflicting provisions.

<sup>17</sup> For example, the bona fide and reasonable nature of settlement agent fees, and the circumstances around seller paid fees.

**KATHLEEN KEEST: FROM THE HEARTLAND TO THE FRONT LINES OF**  
**CONSUMER PROTECTION**

**By Rachel Marin, Maurice & Needleman, P.C.**

Admired for her work as a consumer advocate, attorney Kathleen Keest began her law career in public service by helping individuals at the local level, and over the years she has become a voice for the people on a national scale. At her current position as a Senior Policy Analyst at the Federal Deposit Insurance Corporation (“FDIC”), she has been working with the Consumer Financial Protection Bureau’s new residential mortgage rules, training FDIC examiners, implementing exam procedures and manuals, and advising on other pressing issues. Over the course of her career thus far, Keest has represented individual consumers, devised policy, been involved with litigation and enforcement, taught law school classes, and authored books, treatises, manuals, studies and articles on consumer credit. Although she started her law career at a time when the consumer movement was soon to become eclipsed by deregulation initiatives, Keest has fought steadily to keep the consumer movement flame alive.

Growing up in the small town of Middletown, Illinois, Keest had no accessible attorney role model and she describes her mind as a “*tabula rasa*” in that she had no vision of what a lawyer might want to accomplish with a legal career. An advisor at her college, Eastern Illinois University in Charleston, Illinois, suggested that law school offered a versatile degree that would distinguish her from the many students who were graduating with social science degrees. Following her college graduation in 1970, she proceeded to law school at the University of Iowa in Iowa City, Iowa, and graduated with honors in 1974. Although she lacked a clear vision of the

direction she wished to take, Keest was greatly influenced by the civil rights movement and the public interest era that had been exploding around her for the past two decades, and she closely followed the “major public policy issues playing out in the news and on television.” This guided her career path by “shading values and concepts of what one could do with a law degree.”

Fresh out of law school, in 1975 the young attorney joined the Black Hawk County Legal Aid Society in Waterloo, Iowa to represent clients who otherwise did not have resources to hire an attorney. She then moved to the Legal Services Corporation of Iowa in Des Moines, Iowa for six years where she worked as a Staff Attorney and then transitioned to become the office’s Managing Attorney. In 1979 and 1980, Keest took sabbaticals to work in Washington, D.C. as Assistant Counsel with a subcommittee of the United States Senate that had jurisdiction over the Law Enforcement Assistance Administration and the Office of Juvenile Justice and Delinquency Prevention. In 1980 she completed a three-month fellowship with the National Consumer Law Center in Boston. A few years later she said goodbye to the Midwest and moved to Boston to work as a Staff Attorney with the National Consumer Law Center to focus on consumer credit regulation and credit practices that impacted a broad community of consumers throughout the United States.

Armed with increased knowledge about formulating public policy, Keest then returned to the Midwest in 1996 to serve as an Assistant Attorney General in Iowa and as Deputy Administrator of the Iowa Consumer Credit Code until 2004, and she helped lead the effort to change the industry standard for mortgage lending in a multi-state enforcement action against Household International. Prior to accepting her current position with the FDIC, she was a Senior Policy

Counsel at the Center for Responsible Lending, in Durham, North Carolina, the research and policy affiliate of the Center for Community Self-Help, where she focused on regulatory reform issues, predatory lending, and preemption.

Over the years Keest has generously shared her knowledge by speaking in front of a diverse group of audiences. In consulting with the South African Department of Trade and Industry to help South Africa reform its laws pertaining to the regulation of financial services, Keest attended meetings in England and Belgium, along with representatives from other countries including Canada, England and Australia. Each representative was able to share his or her own country's experience in developing consumer protection laws with the South African delegation. Additionally, both the House and Senate of the United States Congress have invited Keest to testify at hearings and she has done so on several occasions.

Recalling a fascinating experience she had at a 1993 Senate Banking Committee hearing, Keest noted that the memorable day “surprisingly had less to do with the senators than the audience.” The Senate asked her to share her expertise about the negative impact of certain mortgage lending practices, testimony that helped to enact the Home Ownership Equity Protection Act in 1994. One of her co-panelists was an official from Fleet Finance Inc., a company whose housing finance unit was being investigated by the Senate for alleged abusive home equity lending practices directed at minorities and low-income neighborhoods. The day's unique happening was when busloads of people from communities that allegedly had been targeted by the company, including Atlanta and Boston, poured into the room before the hearing started. The community members sang civil rights songs and wore gold tee-shirts with with a picture of a loan shark on

the back, in protest of the company's practices. This was an unusually lively scene for a banking hearing and it became a news story. One can imagine Keest's frustration when the housing crisis crippled the country's economy after she had been publicly voicing concern on the issue of mortgage lending practices for years.

In recognition of her commitment to financial services law, the legal community has bestowed the consumer advocate with several prestigious awards for her work, including the Senator William Proxmire Lifetime Achievement Award in 2007, the National Association of Consumer Agency Administrators' Advocate of the Year award in 2002, and the National Consumer Law Center's annual Vern Countryman Award, given to her in 1999 in recognition of service on behalf of low-income consumers. Keest has served as member of the Board of Regents of the American College of Consumer Financial Services Lawyers, a member of the Consumer Advisory Council of the Federal Reserve Board, as a Fellow, and as Co-Chair of the National Association of Consumer Advocates. She has been a part of the American Bar Association Section, Business Law Section's Consumer Financial Services Committee for more than 25 years.

While she currently stays in an apartment in D.C., Keest stays connected to the Midwest with her home in Des Moines, Iowa, and she enjoys visiting her family in Illinois and New Mexico, although the reunions are "not often enough." Many of her immediate relatives teach in the public school system, another family member owns a small business, and one works for Better Homes and Gardens magazine. Remembering her sister with great fondness and admiration, Keest considers her an early influence on her leadership style. Her sister died of cancer, "too

soon,” at age 63. Keest says that her sister approached life’s challenges in a “quiet and effective” manner. Civil rights were an important issue in her sister’s life, and she worked as a high school teacher and administrator. Even after losing her classroom job due to budget cuts, her sister never stopped teaching. Viewing her as “a model to aspire to,” Keest herself has become an extraordinary educator over the years.

In her free time, Keest likes to read biographies and history books. She also enjoys quilting and appreciates the opportunity to admire a finished product.