



CONSUMER FINANCIAL SERVICES COMMITTEE NEWSLETTER

Summer 2014

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

Important Dates

Business Law Section

Annual Meeting:
September 11-13, 2014
Chicago, IL

Consumer Financial

Services Basics 2014:
October 6-7, 2014
Baltimore, MD

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Membership Minute

CFSC by the Numbers:

2014 YTD through April Total Members = 1,217. A 7.4% 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!

Business Law Section:

- Join us for the Inaugural Business Law Section Annual Meeting - September 11-13, 2014 in Chicago! For details, click [here](#)
- The "Member-Get-A-Member" Campaign came to a successful close on May 31. BLS recruited at least 130 new members throughout the campaign.
- Don't forget about the BLS' "In The Know" program, which offers free CLE classes exclusively for BLS members, including three classes this summer. Find more info [here](#)

CFSC Website: Did you know you can find links to helpful information on the website, including past meeting materials and non-CLE Webinars?

Get Involved in the CFSC: Want to get more involved in the CFSC? Feel free to contact Margaret Stolar (mstolar@dlitlaw.com) or Carolyn Hann

Leadership Message



Nikki Munro
Chair
Consumer Financial
Services Committee

Dear CFSC Members:

I hope you are enjoying the longer days of summer. I hope you are occasionally putting down the blackberries and tablets to pick up a good book, go to a show or concert, take a swim, or play a game of tennis.

If after all of the fun you are having, you find that you have some extra time on your hands, you may want to consider how you can better serve your colleagues through leadership in the Consumer Financial Services

Committee.

Our committee has many leaders who go beyond the call of their regular jobs to commit time and energy to the success of the CFSC. We have a Committee chair and three vice chairs liaising with the Business Law Section and other Committees, planning meetings and the National Institute, and overseeing the general function of the Committee. We have chairs and vice chairs of substantive and administrative subcommittees ensuring programs educate and entertain and that the Committee operates smoothly. We have young lawyer liaisons, ambassadors and fellows who participate in the CFSC to expand their knowledge as we encourage the growth of their practices. We have consumer fellows who bring to us the consumer perspective sometimes lost in litigation and compliance work.

We have leaders who manage or routinely contribute to *The Business Lawyer*, *Business Law Today*, this newsletter, and our website. We have leaders who host webinars to educate those who are unable to attend the Committee's in-person meetings and to bring our members up to speed on the latest issues in between those meetings. We have leaders behind the scenes supporting our substantive subcommittees by providing original materials so that our programs qualify for CLE. Leaders learn process and complete forms. They navigate bureaucracy. [Read more...](#)

Pro Bono Article

Pro Bono for Consumer Financial Services Lawyers

By K. Dailey Wilson, Hudson Cook, LLP

You may be thinking that pro bono isn't for you. Maybe it's because you aren't a litigator. Maybe it's because you think you don't have time. But you'd be wrong on both counts. There are a plethora of opportunities out there, ranging from big commitments to small commitments, for non-litigators who want to give back to the community using their legal skills.

Contacting your local legal services organization is an excellent way to find non-litigation pro bono opportunities. For example, the Bay Area Volunteer Lawyers Program, part of the Florida-based Bay Area Legal Services, provides several ways for lawyers to get involved without going to court. Lawyers can volunteer to do client intake, a

Meeting Promos/Postcards



REGISTER NOW!

Consumer Financial Services Basics 2014

October 6-7, 2014

University of Maryland

Francis King Carey School of Law
Baltimore, Maryland

The recent unprecedented changes to consumer financial services (CFS) law leave even experienced consumer finance lawyers feeling that it's time to get back into the classroom. Get back to the basics with a faculty that combines decades of practical experience with law school analysis.

The classroom approach is used to review the history and background of CFS law, cover the fundamental laws that apply, and hear regulators, consumer advocates, and industry representatives discuss the current state of affairs and what's on the horizon.

Key topics covered in the program will include:

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- Truth in lending and disclosure requirements
- Fair lending and access to financial services
- Financial privacy and credit reporting
- Data security, fraud prevention, and identity protection
- Consumer communications: FDCPA, TCPA, TSR, Can-Spam, and Do-Not-Call
- Asset account regulation
- Installment credit
- Mortgage origination and servicing
- UDAAP
- Remedies

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Member Spotlight



Anne P. Fortney

Anne P. Fortney: Making her Mark on the Interpretation of the Fair Credit Reporting Act

By Rachel Marin, Bank of America

Anne P. Fortney is known within the financial services legal community for her expertise on the Fair Credit Reporting Act ("FCRA") and other consumer protection laws. She began her career as an attorney in private practice, and a few years later she joined the Federal Trade Commission ("FTC") as an Attorney-Advisor to the first woman Commissioner, Mary Gardner Jones. Then, a legal position at J.C. Penney Company marked her foray into the emerging world of credit regulation. Eventually she returned to the FTC as the Associate Director for Credit Practices, before

(chann@ftc.gov), CFSC Membership Chair and Vice-Chair for information.

program that requires no court appearances and a minimal time commitment. Participants interview and advise potential legal aid clients for two and a half hour blocks in the evenings. Legal Services organizations such as Bay Area Legal Services can also connect you to opportunities outside of the organization, such as *Wills for Heroes*, a program where volunteer lawyers and paralegals provide wills and other legal documents to first responders.

Street Law is another great way that lawyers can get involved in their communities. For example, the D.C. Street Law organization offers several different volunteer opportunities. The Street Law at Georgetown Law School program recruits volunteer lawyers to participate in a course offered at high schools in the district that teaches students about several areas of the law, including consumer law. Volunteers in this program can teach, do a presentation or assist in preparations for a mock trial. Attorneys can also volunteer through the Parents and the Law program which helps at-risk teens and parents understand legal issues concerning parental rights and responsibilities. [Read more...](#)

returning to private practice.

Ms. Fortney has worked on important FCRA matters, including litigation which culminated in the 2007 U.S. Supreme Court decision in *Safeco Ins. Co. of America v. Burr*, establishing the standard for a "willful" violation of the FCRA. She was also involved as an expert in litigation clarifying the scope of "firm offer of credit" prescreened solicitations. Today, Ms. Fortney is a partner at the law firm Hudson Cook, LLP, where she advises clients on the FCRA and related matters, and serves as an expert witness in these matters. She has testified before Congress and is a frequent speaker and author of academic articles. She has held numerous leadership positions in the American Bar Association's Consumer Financial Services Committee ("ABA CFSC") and in other ABA Sections. She is the Immediate Past Chairman of the Governing Committee of the Conference on Consumer Finance Law, and she directed the establishment of its website to enable members to access the legal publications online. Additionally, she is a Founding Member of the American College of Consumer Financial Services Lawyers and this year is the recipient of its prestigious Senator William Proxmire Lifetime Achievement Award. [Read More...](#)

Legal Feature

SCRA Interest Rate Protections and Lender Obligations: Has the Burden Shifted?

By: Tonya Esposito Oliver, León Cosgrove LLC

Introduction

On May 13, 2014, the Department of Justice and the Department of Education entered into a Consent Order with Sallie Mae and Navient Solutions regarding possible violations of the Servicemembers Civil Relief Act ("SCRA") in connection with the improper denial of SCRA benefits to student loan borrowers. The underlying Complaint alleged that the defendants failed to lower interest rates to 6% for active duty military borrowers after receiving written notice and requests; 2) did not make acceptable efforts to obtain qualifying active duty military orders from servicemembers who were requesting relief, but did not provide qualifying military documents; and 3) failed to notify servicemembers that they may be eligible for SCRA benefits when servicemembers provided their military orders or documents for other purposes.

The Consent Order, praised by the Consumer Financial Protection Bureau ("CFPB"), seemingly amends the plain language of the SCRA, placing more of the burden upon lenders to conduct due diligence in confirming active-duty status and granting SCRA protections. Pursuant to the SCRA, in order to qualify for interest rate reduction benefits, the servicemember must submit both a written request and a copy of his or her military orders to the lender. However, the Consent Order, among other things, requires the defendants to proactively consult its internal files including customer service notes, as well as the Department of Defense Manpower Data Center, to determine a borrower's active-duty status. As written, the Consent Order appears to suggest that a lender must grant interest rate reductions if it has reason to know that the borrower is servicemember, and must take steps to obtain the statutorily required documentation.

While the impact of this apparent burden shifting remains to be seen as it relates to future SCRA enforcement, it certainly muddies the waters on the compliance front for lenders and servicers. [Read More...](#)

Subcommittee Spotlight

Housing Finance Subcommittee Update: Carter v. Welles-Bowen and its Effect on Agency Guidance

By Kelly Lipinski, McGlinchey Stafford

In *Carter v. Welles-Bowen*, 736 F.3d 722 (6th Cir. 2013), the U.S. Court of Appeals for the Sixth Circuit held that a U.S. Department of Housing and Urban Development ("HUD") policy statement was not entitled to the same deference as rulemaking. At a session during the ABA Business Law Section Spring Meeting that was moderated by David Permut in April 2014, Jay Varon from Foley Lardner and Malini Mithal from the Federal Trade Commission discussed *Carter* and its effect on agency guidance.

As a matter of background for the *Carter* decision, the Real Estate Settlement Practices Act ("RESPA") generally prohibits any person from giving or accepting any fee, kickback, or thing of value for the referral of settlement service business involving a federally-related mortgage loan. 12 U.S.C. § 2607(a). Fees paid in connection with an affiliated business relationship do not violate RESPA provided: (1) the consumer receives a written disclosure of the nature of the relationship and an estimate of the affiliate's charges; (2) the consumer is not required to use the controlled entity; and (3) the only thing of value received from the arrangement, other than payments for services rendered, is a return on ownership interest. 12 U.S.C. § 2607(c)(4). In 1996, HUD issued a policy statement to "give guidance and to inform interest members of the public of the Department's interpretation" of these relevant provision. HUD Statement of Policy 1996-2 on Sham Controlled Business Arrangements set forth ten factors that HUD would use to determine whether a controlled business arrangement was a sham under the RESPA.

In *Carter*, the plaintiffs used Welles-Bowen as their real estate agent. Welles-Bowen then referred the plaintiffs to WB Title, which then contracted for some work to be performed by Chicago Title. Welles-Bowen, WB Title, and Chicago Title were all related to each other through ownership and business. The plaintiffs then sued all of the companies for a violation of RESPA and asserted that WB was a shell organization that funneled referral fees between Chicago Title and Welles-Bowen. The district court disagreed and held that the companies had satisfied RESPA's statutory safe-harbor requirements. As noted above, the Sixth Circuit affirmed and held the HUD policy is not entitled to *Chevron* deference or *Skidmore* consideration so that compliance with the three elements in the statute is all that is required to obtain the

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

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I hope you are enjoying the longer days of summer. I hope you are occasionally putting down the blackberries and tablets to pick up a good book, go to a show or concert, take a swim, or play a game of tennis.

If after all of the fun you are having, you find that you have some extra time on your hands, you may want to consider how you can better serve your colleagues through leadership in the Consumer Financial Services Committee.

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Leaders serve as Committee Directors to the Business Law Section on topics such as diversity, educational programing, pro bono, and technology. Leaders attend leadership meetings to learn how to serve and to become better leaders. Leaders mentor and guide new members.

Leaders are motivated hard workers who willingly give of themselves to serve others. Each of the leaders who serve in CFSC leadership positions is a volunteer who commits countless non-billable unpaid hours to the betterment of the legal profession in general and consumer financial services lawyers in particular.

True leaders continue to lead long after their term expires. We witness this quality in the number of past chairs who remain active leaders in our Committee: [Terry Franzen](#), [Don Lampe](#), [Jeff Langer](#), [Lynne Barr](#), [Bob Chamness](#), [Alan Kaplinsky](#), and [Roland Brandel](#). Each of these leaders continues to contribute their strong and effective leadership to our Committee and the Business Law Section.

How, you ask, can I get one of these personally fulfilling, but unpaid leadership opportunities? Volunteer, volunteer, volunteer.

The best path to leadership is to participate in an in-person meeting. The Committee meets three times a year - at the stand alone Committee meeting in January, the Business Law Section Spring Meeting in

April, and the Business Law Section Annual Meeting in September. Most of our work is done at these meetings, and we welcome you to participate on a panel, in a roundtable, or at the many social events sponsored by our members.

You also can get involved with the Committee by submitting articles to be published on the Committee's website and/or in this newsletter. You can contact [Amy Durant](#) or [Grace Powers](#), Publications Co-Chairs, or [Rachel Marin](#), Publications Vice Chair, if you are interested in submitting articles or website content. To contribute to *Business Law Today*, email [Sharmin Arefin](#). You can contact [Laurie Lucas](#) or [John Ropiequet](#) to write for the *Business Lawyer*.

The Committee has an active Young Lawyers subcommittee, which is a great way for anyone practicing in this field for less than ten years to get to know consumer financial services and other Committee members. Contact [Dan McKenna](#), Young Lawyers Chair. If you are interested in a particular substantive subcommittee, consider contacting the chair or vice chair and offer to present or prepare materials. You can find contact information for subcommittee leaders in the [leadership roster](#).

The path to leadership begins with an offer to help, followed by motivation and hard work, culminating in a time intensive but deeply rewarding experience as a CFSC leader.

If you have any questions about the upcoming meetings, or would like to participate more in the Committee, please feel free to call or email me. We welcome you on the path to leadership.

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

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Who Should Attend?

Whether you're a private practitioner, in-house lawyer, or government attorney, there's a steep learning curve to understand the basics and changes to CFS law. This program is a great way to jump up that curve for:

- Private practitioners entering the CFS arena, expanding into a new CFS area, or just wanting a refresher

- In-house counsel at financial institutions and non-bank financial services providers
- Government attorneys focused on financial practices
- Compliance officers (who may be, but need not be, attorneys)

You can register and find more information at

<http://shop.americanbar.org/eBus/Default.aspx?TabID=1444&productId=180093>.

Pro Bono for Consumer Financial Services Lawyers

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Contacting your local legal services organization is an excellent way to find non-litigation pro bono opportunities. For example, the Bay Area Volunteer Lawyers Program, part of the Florida-based Bay Area Legal Services, provides several ways for lawyers to get involved without going to court. Lawyers can volunteer to do client intake, a program that requires no court appearances and a minimal time commitment. Participants interview and advise potential legal aid clients for two and a half hour blocks in the evenings. Legal Services organizations such as Bay Area Legal Services can also connect you to opportunities outside of the organization, such as *Wills for Heroes*, a program where volunteer lawyers and paralegals provide wills and other legal documents to first responders.

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There are also pro bono opportunities designed specifically for transactional attorneys. LegalCORPS, a Minnesota-based organization, provides pro bono legal services, through its volunteers, to small businesses and nonprofits. Volunteer opportunities include full-representation assistance, brief-advice assistance, and public presentations. LegalCORPS provides attorneys with the ability to choose a volunteer opportunity that best fits their schedule – they can choose the more time-intensive full-representation or the brief-advice assistance which requires only thirty minutes of time.

The Legal Assessment Program through Lawyers Clearinghouse, a Boston-area organization, is another way for transactional attorneys to provide pro-bono. The Legal Assessment Program provides volunteer attorneys to nonprofit organizations for an intensive review of their operations. The volunteer lawyer assesses the nonprofit's legal form and corporate structure, internal policies and procedures, employment practices and tax issues, just to name a few.

These are just a few of the ways for non-litigators to give back to their communities. There are hundreds of pro bono opportunities around the country ranging from big time commitments to small time commitments. Go out there and get involved!

Anne P. Fortney: Making her Mark on the Interpretation of the Fair Credit Reporting Act

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Anne P. Fortney is known within the financial services legal community for her expertise on the Fair Credit Reporting Act (“FCRA”) and other consumer protection laws. She began her career as an attorney in private practice, and a few years later she joined the Federal Trade Commission (“FTC”) as an Attorney-Advisor to the first woman Commissioner, Mary Gardner Jones. Then, a legal position at J.C. Penney Company marked her foray into the emerging world of credit regulation. Eventually she returned to the FTC as the Associate Director for Credit Practices, before eventually returning to private practice.

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Raised as an “Army brat,” Ms. Fortney travelled extensively as a child in the United States and Europe. Ms. Fortney’s family highly valued education; her grandparents met at a university, and Ms. Fortney’s parents attended college. Her father earned two master’s degrees and a PhD, and taught at the university level, following his career in the U.S. Army Corps of Engineers. Ms. Fortney’s parents encouraged all four of their children, Ms. Fortney and her three brothers, to pursue advanced educational degrees. One brother became a medical doctor, the other a PhD clinical psychologist and the third brother pursued a business career.

Graduating with a liberal arts degree from the University of Mary Washington in 1966 (which was women-only at the time), Ms. Fortney considered her graduate school options and eliminated studies that would lead to careers in teaching or the government. She did not consider business school to be a realistic alternative for women at that time. Ms. Fortney believed that law school would open up opportunities, and she decided attend the Georgetown University Law Center. Law schools had been admitting only a limited number of women, but started to accept more females because men were being called to military duty with the escalation of the Vietnam War. Still, her entering class of 325 day students included only 21 women. The number of women law students increased significantly beginning the following year with the end of graduate school deferments from the draft. One of Ms. Fortney’s

male students accused the women in her class of causing men to die in Vietnam by usurping men's places in law school! Looking back, Ms. Fortney and the other women law students recognized that some professors discriminated against them, including making them uncomfortable. Younger women law graduates have asked why Ms. Fortney and the others did not object to the unfavorable treatment. Her answer is that these professors were reflecting much of society's view of women at the time. She did not know that the world would change. While Ms. Fortney did not consider herself "part of a vanguard," she acknowledges that her accomplishments were unusual for a woman in the 1960s.

After a successful law school career, in 1969 Ms. Fortney accepted an offer for an associate position with the law firm of Cleary, Gottlieb, Steen and Hamilton, and she was the first female lawyer in the firm's Washington D.C. office. While it was a great learning experience, the partners treated her differently than male associates, for example by limiting her client interaction and not permitting her to travel with male lawyers. At this early point in her career Ms. Fortney knew she wanted more, so in 1972 when a colleague from the firm told her about an opening at the FTC, she went for it. At the FTC she faced fewer gender-based obstacles. Her closest women friends at Georgetown Law also found more opportunities in government service. Her women classmates served with Legal Aid and in the federal government, including as general counsel of the Consumer Product Safety Commission and as Director of the SEC's Division of Investment Management. Another became a state court judge and another served on the U.S. Tax Court.

After spending a year as an Attorney-Advisor to the first female Commissioner at the FTC, Mary Gardner Jones, Ms. Fortney joined the FTC's Bureau of Consumer Protection. In the years before Ms. Fortney was at the FTC, it was criticized for failing to adequately protect consumers. "In response, the FTC hired bright, young energetic lawyers," including Ms. Fortney. Soon, however, the FTC developed an overzealous reputation and enforced the law in a manner Ms. Fortney believed Congress did not intend. After four years at the Commission Ms. Fortney considered looking for another opportunity. She was dissatisfied with the FTC's inadequate administrative support, which left her spending too much time on administrative tasks, rather than lawyering. Her French high school did not teach typing, and she had been reluctant to learn when she first began practicing for fear that she would be expected to do secretarial work that her male colleagues would not be asked to do. When she complained to one of her colleagues about the lack of clerical support, he mentioned that J.C. Penney was looking for an attorney with an FTC background for its Washington D.C. Legal Office. She contacted Charlie Lotter (who later become Penney's general counsel) and joined the company in January 1976.

Mr. Lotter offered Ms. Fortney the opportunity to focus on consumer credit laws, which the FTC enforced as to retail creditors. J.C. Penney was one of the largest credit card issuers at the time; bank-issued credit cards had not yet become as readily available. Ms. Fortney worked closely with two trade associations in drafting comments on the Federal Reserve Board's (FRB's) newly proposed Regulation B under the Equal Credit Opportunity Act. She worked closely with Anne Wallace at the FRB. The collaboration stands out to her as an example of excellence, and she is still "struck" by the successful balancing of creditors' need to predict credit risk with the legislative purpose of preventing discriminatory lending. Ms. Fortney also helped achieve a creditor exemption in the Fair Debt

Collection Practices Act, and she worked on a variety of other bank reform legislation, including the Truth and Lending Simplification Act. She entered the practice of consumer financial services law in a period of major development, and it is now her career-defining area of expertise.

In 1982, after six years at J.C. Penney, Ms. Fortney joined the FTC as Associate Director of the Bureau of Consumer Protection, for Credit Practices (now Financial Practices). After ascertaining she would have discretion to enforce the law the way she believed Congress intended, she led an effective law enforcement program that included compliance outreach to covered entities. For the next four and a half years she oversaw a staff of 35 talented lawyers, including ABA CFSC member Jean Noonan who is now her great friend and partner at Hudson Cook. Comfortable in this role, her first management position, Ms. Fortney discovered her natural leadership skills, including listening, understanding group dynamics, setting standards and expectations, and giving clear direction. Part of her success as a manager involved being consistent about the group's direction and the goals for the lawyers she supervised. Additionally, she gave praise publically, provided constructive criticism privately, and shared both positive and negative feedback immediately. And it "did not hurt that our group had good parties."

During this time Ms. Fortney met the love of her life, Dick Riddell, and the two were soon engaged to be married. Mr. Riddell was serving as a nuclear submariner in the United States Navy, and would eventually become a rear admiral. Ms. Fortney was not planning to leave the FTC, but her fiancé received orders to serve as a submarine squadron commander at Pearl Harbor, Hawaii. Mr. Riddell was concerned that the move could adversely affect her career, but Ms. Fortney saw how important this command would be to him and agreed to take the chance, assuming that, worst case scenario, she would be taking a two-year sabbatical in Hawaii after 17 years of a successful law practice. Mr. Riddell assured her he would only spend two more years in the Navy so he could retire as a Captain. However, the "just two more years" promise continued for twelve more years!

Unexpectedly, shortly before the couple moved to Hawaii in 1986, Larry Okinaga, a partner with the Hawaiian law firm Carlsmith Ball LLP (and present member of the ABA CFSC), discovered through his work on the FRB's Consumer Advisory Council that Ms. Fortney planned to move to Hawaii, and he invited Ms. Fortney to join his firm as Of Counsel. She accepted and sat for the rigorous four-day Hawaii bar exam before settling into Hawaiian life with her husband. Recalling Mr. Okinaga's mentoring style, she describes him as being "genuinely interested in others, easy going and an exceptionally good lawyer" who had an especially effective manner of communicating with his clients. She imagines the Hawaiian culture had an influence on his style, which was less direct than her own. He helped her understand how judges saw the world ("most judges try to do justice") beyond the regulatory milieu of Washington D.C., and he generously encouraged her client development. After enjoying a few years in paradise, the Navy assigned then Admiral Riddell to the Pentagon, and Ms. Fortney accepted an opportunity to open a D.C. office for Carlsmith Ball. They have remained in the D.C. area ever since, except for two years in Washington state, where Admiral Riddell commanded the Navy's Pacific Ballistic Submarine group, and earned his second star.

After ten years with Carlsmith Ball, at a client's suggestion in 1997, Ms. Fortney left to join the international law firm Lovells (now Hogan Lovells) as Of Counsel and then as Managing Partner of the Washington, D.C. office. Lovells had a larger consumer financial services practice and thus the staff necessary to navigate the client through an FTC investigation. At Lovells, she also represented Nissan Motor Acceptance Company (NMAC) as lead counsel in fair lending class action litigation based on a novel "disparate impact" theory that imputed the conduct of independent auto dealers to the third-party finance sources. Courts' initial reluctance to dispose of the litigation in summary judgment motions engendered a spate of similar lawsuits until the 6th Circuit Court of Appeals ruled that a class could not be certified for damages (which she sees as a foreshadowing of the U.S. Supreme Court's 2011 decision in *Dukes v. Walmart* where the Court held that an Equal Employment Opportunity Act class could not be certified because of the variability of the individual plaintiffs' circumstances). After some internal changes at Lovells, on April 1, 2003, Ms. Fortney left with two colleagues, Jean Noonan and Jim Chareq, for her current firm, Hudson Cook.

Hudson Cook has been a "perfect match" for Ms. Fortney and has allowed her to develop her expert witness and compliance work. She enjoys testifying and providing a balanced view and a "complete picture" of the issues to courts and jurors. Her ability to give an audience a fair representation may be due in part to her high school and college educational experiences. When Ms. Fortney was 15 years old, the Army transferred her father and family to Paris for three years. Along with her younger brothers, she attended a French-language international school. In 1964-1965 she returned to France to spend her junior year of college in Aix-en-Provence, where she enjoyed many hours in the café conversing and debating in French with her fellow students about world events, her first inkling that she might have the skills to be a lawyer. Their debates included issues involving America's expanding role in Vietnam. Her French classmates offered fresh perspectives on political and historical issues and gave her the opportunity to challenge their thoughts as well. This experience developed her ability to see and present issues from very different perspectives.

Looking back, Ms. Fortney appreciates the support of her present and past colleagues and their willingness to share opportunities with her throughout her career, and she continues to admire especially the "inclusiveness" of the ABA CFSC members, many of whom are also members of the American College of Consumer Financial Services Lawyers ("ACCFSL"). "Consumer financial services law attracts very special people because its intricate and ever-evolving nature makes it intellectually challenging." Her practice is particularly meaningful because it "really affects people's lives in the sense that providing credit can help them achieve their goals and dreams, but it can also contribute to the loss of important aspects of their lives, such as a home." At the annual dinner this year the ACCFSL presented Ms. Fortney with the prestigious Senator William Proxmire Lifetime Achievement Award at the California Club in Los Angeles. Lynne Barr, a close friend and past recipient of the Award, stood up and spoke to the audience on her behalf, and Ms. Fortney and her husband were especially touched by the personal aspect of her remarks. Ms. Noonan and Mr. Okinaga also lauded her. Ms. Fortney and her husband were especially moved by Ms. Barr's remarks because she spoke on a personal level and touched on more than professional achievements. Mr. Okinaga brought her a beautiful Hawaiian lei, which contributed to the delightful night.

Connecting with family and friends has been important and time for fun is an “essential” aspect of her life. After waiting a long time to meet the right partner, she describes her husband as an “exceptional person” who has been “enormously supportive” of her career and incredibly proud of her accomplishments. “During my litigation days, and even during my expert witness work, he was especially adept at talking me down after I returned home keyed up from the day’s excitement. He shared credit for this with our dog and joked that he would bill me at his ‘usual rate’.” While the two continue to enjoy one another’s company, 16 years ago Mr. Riddell was diagnosed with Parkinson’s disease which has constricted his mobility and made life more challenging. But they still take pleasure in having friends over for dinner, traveling, and spending time with her six nieces and nephews and her husband’s two children from a previous marriage, as well as five grandchildren. In June they made a special trip to Hawaii to show the grandchildren ages 11, 14 and 19 where they had lived and gave them an understanding of their grandfather’s work as a nuclear submariner in Pearl Harbor. Earlier in the year they traveled to Paris for a nephew’s wedding and Ms. Fortney was happy to confirm that she was still comfortable speaking French. She also enjoys mentoring her young relatives. When her older niece was 13 Ms. Fortney began bringing her along to ABA meetings, in London and around the U.S. Ms. Fortney is proud that her niece graduated from the University of Chicago Law School this year, and that her niece is excited to mentor her own young nieces.

Another treasured family member is the couple’s beautiful West Highland Terrier who is known as “the Landlord” and “the Mayor” because he is so lovingly spoiled at home and friendly with the neighbors. A typical canine, “he loves everyone except mailmen.” She has enjoyed the company of that breed for 30 years and enjoys one-to-two mile walks with him every morning. Additionally, she remains close to her female law school classmates and regularly attends performances at the Shakespeare Theater and Kennedy Center Theater with her law school roommate, Margaret Hennessey. In addition to their main home, she and her husband spend time in a cottage located in the woods in the Panhandle of West Virginia.

When asked what words of wisdom she would give to new lawyers, she recalled the “best advice she ever heard” from Patricia Wald, a prominent D.C. attorney and judge, whom Ms. Fortney greatly admires. In 1980 Ms. Fortney attended a dinner hosted by women law students at Georgetown University where Ms. Wald spoke. Her advice was to avoid trying to plan a career too far into the future because “you cannot know life’s twists and turns.” Instead focus on doing the work that is interesting and fulfilling in the present and let the future take care of itself. Judge Wald graduated from law school in 1951 and stayed home for a period while raising her children. Over time, she served on various U.S. government boards and commissions, and President Jimmy Carter appointed her to the U. S. Court of Appeals for the District of Columbia Circuit in 1979. She was President Bill Clinton’s first choice for U.S. Attorney General, but she declined in favor of staying on the court. Still following Judge Wald’s advice, Ms. Fortney looks forward to continuing to focus on the law practice she enjoys today, knowing that the future will be different but exciting in ways she cannot predict.

“Every move I made was because I thought the next opportunity would be better, without knowing where it would go.” Looking back, Judge Wald’s advice seems tailor-made for Ms. Fortney,

who could not have predicted her career path (one reason being that the Fair Credit Reporting Act came into existence only after she graduated from law school). Trusting her gut, she made many professional and personal moves that “felt right” and she never questioned her decisions.

SCRA Interest Rate Protections and Lender Obligations: Has the Burden Shifted?

By: Tonya Esposito Oliver, León Cosgrove LLC

Introduction

On May 13, 2014, the Department of Justice and the Department of Education entered into a Consent Order with Sallie Mae and Navient Solutions regarding possible violations of the Servicemembers Civil Relief Act (“SCRA”) in connection with the improper denial of SCRA benefits to student loan borrowers.¹ The underlying Complaint alleged that the defendants failed to lower interest rates to 6% for active duty military borrowers after receiving written notice and requests; 2) did not make acceptable efforts to obtain qualifying active duty military orders from servicemembers who were requesting relief, but did not provide qualifying military documents; and 3) failed to notify servicemembers that they may be eligible for SCRA benefits when servicemembers provided their military orders or documents for other purposes.

The Consent Order, praised by the Consumer Financial Protection Bureau (“CFPB”), seemingly amends the plain language of the SCRA, placing more of the burden upon lenders to conduct due diligence in confirming active-duty status and granting SCRA protections.² Pursuant to the SCRA, in order to qualify for interest rate reduction benefits, the servicemember must submit both a written request and a copy of his or her military orders to the lender. However, the Consent Order, among other things, requires the defendants to proactively consult its internal files including customer service notes, as well as the Department of Defense Manpower Data Center, to determine a borrower’s active-duty status. As written, the Consent Order appears to suggest that a lender must grant interest rate reductions if it has reason to know that the borrower is servicemember, and must take steps to obtain the statutorily required documentation.

While the impact of this apparent burden shifting remains to be seen as it relates to future SCRA enforcement, it certainly muddies the waters on the compliance front for lenders and servicers.

The SCRA and Interest Rate Protections

The Servicemembers Civil Relief Act or “SCRA” was enacted by Congress to provide certain protections to service members, including high interest rates, and foreclosure and default judgments.³ Enacted in 1940 as the “Soldiers’ and Sailors’ Civil relief Act,” the statute has been amended throughout the years to enhance the protections provided to service members.

¹ *United States v. Sallie Mae, Inc., et al.*, Case No. 1:99-mc-09999 (D.Del. May 13, 2014).

² “Today’s action should serve as warning not just to the student loan servicing industry, but to all institutions that provide or service loans to the military.” “Federal agencies will be vigilant about holding all financial institutions accountable for providing the protections that our servicemembers have earned through their selfless service to our nation.”

³ 50 U.S.C. App. §§501-597b.

Section 527 of the SCRA⁴, which prohibits creditors from charging active-duty service members an interest rate higher than 6 percent annually for debts incurred prior to military service and also forgives interest above six percent that would incur otherwise, states in pertinent part:

(a) Interest rate limitation.

(1) Limitation to 6 percent. An obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or the servicemember and the servicemember's spouse jointly, before the servicemember enters military service shall not bear interest at a rate in excess of 6 percent –

(A) during the period of military service and one year thereafter, in the case of an obligation or liability consisting of a mortgage, trust deed, or other security in the nature of a mortgage; or

(B) during the period of military service, in the case of any other obligation or liability.

(2) Forgiveness of interest in excess of 6 percent. Interest at a rate in excess of 6 percent per year that would otherwise be incurred but for the prohibition in paragraph (1) is forgiven.

Section 527 also sets for the procedures pursuant to which the above-mentioned interest rate limitation and forgiveness shall be implemented:

(1) Written notice to creditor. In order for an obligation or liability of a servicemember to be subject to the interest rate limitation in subsection (a), the servicemember shall provide to the creditor written notice and a copy of the military orders calling the servicemember to military service and any orders further extending military service, not later than 180 days after the date of the servicemember's termination or release from military service.

(2) Limitation effective as of date of order to active duty. Upon receipt of written notice and a copy of orders calling a servicemember to military service, the creditor shall treat the debt in accordance with subsection (a), effective as of the date on which the servicemember is called to military service.

The Consent Order's Burden Shifting

Notwithstanding the language of Section 527 governing implementation of SCRA interest rate protections, the Consent Order enjoins the defendants from,

⁴ See SCRA § 527. Maximum rate of interest on debts incurred before military service. [Sec. 207]

[S]eeking any default judgment with respect to any Private Loan without first checking their files, including all customer service notes and the Department of Defense Manpower Data Center database (“DMDC”) to determine whether an individual against whom Defendants intend to seek a default judgment is in the military service, and, if so, filing an accurate affidavit of military service, attaching to the most recent military status report from the DMDC and a copy of the SCRA-protected servicemember’s military orders, if available.

The Consent Order further requires that the defendants proactively take on the burden of determining the active-duty status of a borrower by, for example, establishing an on-line intake form that to accept written notices of eligibility for reduced interest rates pursuant to the SCRA and, upon receipt, checking the DMDC to confirm the servicemember’s eligibility. If confirmed by the DMDC, the defendants must “provide the interest rate reduction required by the SCRA for the dates indicated by the DMDC and shall notify the servicemember that the servicemember may submit additional documentation to establish eligibility dates if the servicemember disagrees with the dates provided by the DMDC.”

In disclosing the terms of the then proposed Consent Order in its March 31, 2014 10-Q, Navient Corporation described the shift in obligation from borrower to servicer as follows:

Previous regulatory requirements and guidance from the Department of Education regarding compliance with the SCRA statute provide that customers must provide both a copy of the military orders calling a person to active duty and a written request to receive the 6 percent interest rate cap available for active duty service members. The terms of the potential settlement with the DOJ, which remain subject to approval by the Department of Education, would provide *new guidance* on what a service member must do to receive the SCRA benefit and would apply this new approach retroactively to November 2005. The proposed settlement would assess a penalty for past non-compliance with this new approach. This new approach would reduce the documentation required, thereby easing the burden on service members. (emphasis added)⁵

All that is publicly known of this “new guidance” on what a servicemember must do to receive SCRA benefits is what can be gleaned from the text of the Consent Order which the CFPB, the Department of Education, and the Department of Justice have endorsed, but to date have really yet to explain.

⁵ Navient Corporation, Form 10-Q, March 31, 2014, available at <http://www.sec.gov/Archives/edgar/data/1593538/000119312514192760/d711908d10q.htm> (last visited on June 12, 2014).

The CFPB's Take

Prior to the execution of the Consent Order, in 2012, the CFPB released a report entitled “The Next Front? Student Loan Servicing and The Cost to Our Men and Women in Uniform” (“2012 Report”), which states:

“To qualify for the protection, a servicemember must have entered into the financial obligation prior to entry onto active duty. She must send a written request to her servicer requesting the reduction along with a copy of her orders calling her onto active duty. This request may be submitted at any time during a servicemember’s active service, and up to 180 days after completion of active duty. After receiving a valid request, the servicer must refund any interest charges in excess of the six-percent rate cap, dated from the servicemember’s receipt of orders calling her onto active duty.”

Report at 7. The footnote immediately following this text reads, “[a]lthough the law puts the initial responsibility on the servicemember to provide proof of eligibility, specifically requiring the servicemember to provide ‘a copy of the military orders calling the servicemember to military service and any orders further extending military service,’ a servicer cannot impose additional requirements.”⁶

However, in endorsing the Consent Order, the CFPB appears to be taking the position that this responsibility may have shifted, and that the lender or servicer who has any reason to believe that a borrower is protected under the SCRA is obligated to obtain the statutorily required documentation from the borrower or the DMDC.

Potential Scope and Compliance Considerations

According to Holly Petraeus, the CFPB’s Assistant Director of Servicemember Affairs, the “action should serve as a warning not just to the student loan servicing industry, but to all institutions that provide or service loans to the military.”⁷ Clearly, the CFPB intends for the scope of the Consent Order to apply not only to student loans, but also mortgages, credit cards, automotive loans, and all other forms of consumer debt incurred by servicemembers.

While the actual obligations of lenders and servicers are not entirely clear at this point based on the language of the Consent Order, and arguably not required by law (at least not at this time), lenders and servicers should take heed to the regulators’ remarks and examine their existing SCRA policies and procedures to identify areas that place the entire burden of requesting protection under the statute on servicemembers.

⁶ *Id.* at footnote 11.

⁷ May 13, 2014 Statement by CFPB’s Holly Petraeus on DOJ, FDIC Enforcement Actions Against Sallie Mae.

Housing Finance Subcommittee Update: *Carter v. Welles-Bowen* and its Effect on Agency Guidance

By Kelly Lipinski, McGlinchey Stafford

In *Carter v. Welles-Bowen*, 736 F.3d 722 (6th Cir. 2013), the U.S. Court of Appeals for the Sixth Circuit held that a U.S. Department of Housing and Urban Development (“HUD”) policy statement was not entitled to the same deference as rulemaking. At a session during the ABA Business Law Section Spring Meeting that was moderated by David Permut in April 2014, Jay Varon from Foley Lardner and Malini Mithal from the Federal Trade Commission discussed *Carter* and its effect on agency guidance.

As a matter of background for the *Carter* decision, the Real Estate Settlement Practices Act (“RESPA”) generally prohibits any person from giving or accepting any fee, kickback, or thing of value for the referral of settlement service business involving a federally-related mortgage loan. 12 U.S.C. § 2607(a). Fees paid in connection with an affiliated business relationship do not violate RESPA provided: (1) the consumer receives a written disclosure of the nature of the relationship and an estimate of the affiliate’s charges; (2) the consumer is not required to use the controlled entity; and (3) the only thing of value received from the arrangement, other than payments for services rendered, is a return on ownership interest. 12 U.S.C. § 2607(c)(4). In 1996, HUD issued a policy statement to “give guidance and to inform interest members of the public of the Department’s interpretation” of these relevant provision. HUD Statement of Policy 1996-2 on Sham Controlled Business Arrangements set forth ten factors that HUD would use to determine whether a controlled business arrangement was a sham under the RESPA.

In *Carter*, the plaintiffs used Welles-Bowen as their real estate agent. Welles-Bowen then referred the plaintiffs to WB Title, which then contracted for some work to be performed by Chicago Title. Welles-Bowen, WB Title, and Chicago Title were all related to each other through ownership and business. The plaintiffs then sued all of the companies for a violation of RESPA and asserted that WB was a shell organization that funneled referral fees between Chicago Title and Welles-Bowen. The district court disagreed and held that the companies had satisfied RESPA’s statutory safe-harbor requirements. As noted above, the Sixth Circuit affirmed and held the HUD policy is not entitled to *Chevron* deference or *Skidmore* consideration so that compliance with the three elements in the statute is all that is required to obtain the exemption.

Mr. Permut introduced the topic of agency guidance and noted that HUD issued six Statements of Policy between 1996 and 2001. Although HUD’s policy statements may not have been intended to have the weight of law, many companies relied upon the information for guidance. Mr. Permut also stated the *Carter* decision is important because it addresses what level of deference a policy statement should be afforded, particularly a policy statement that has civil and criminal penalties.

Mr. Varon stated *Carter* is important for three reasons. First, it rejected wholesale HUD’s guidance in the policy statement. Second, it explores the rule of lenity, which states that an ambiguous criminal statute should be interpreted in favor of the defendant. Third, by rejecting HUD’s guidance concerning sham relationships, the court eliminated a key challenge to

affiliated business relationships. The Sixth Circuit stated a “safe harbor is not very safe if a federal agency may add a new requirement to it through a policy statement”. Because RESPA has criminal penalties, HUD cannot add a requirement that effectively creates criminal exposure through policy statements. Instead, the agency must utilize the notice and comment period. Mr. Varon believes the *Carter* decision may preclude claims that assert a sham affiliated business relationships in the future. He also believes that the rule of lenity will need to be addressed in the future. However, he believes that *Carter* is unlikely to be the end of policy statements.

Ms. Mithal then shared her comments regarding where federal agencies may continue to provide guidance in a post-*Carter* world. The FTC has historically been governed by the Magnuson-Moss rulemaking process which required the FTC to show substantial evidence to regulate prevalent unfair and deceptive acts. As a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), the FTC has been authorized to use a new streamlined rulemaking process pursuant to the Administrative Procedure Act (“APA”). Ms. Mithal stated that auto finance and motor vehicle dealers are a priority for the agency. Ms. Mithal noted that the FTC has employed several strategies, including the use of roundtables to gather information about the motor vehicle purchase and leasing process. The FTC also increased its enforcement activity in the auto context pursuant to Section 5 of the FTC Act. Ms. Mithal stated the FTC can also be expected to issue advisory opinions when courts try to limit the agency’s authority in a manner that is different than what the statute provides. For example, some courts have disregarded the plain language of the FTC Holder Rule and barred consumers from affirmative recoveries. The FTC responded to this trend and issued an advisory letter in 2012 that reaffirmed that the Holder Rule places no limit on the consumer’s right to an affirmative recovery other than limiting recovery to a refund of money paid under the contract. FTC Letter to Jonathan Sheldon (May 3, 2012). Ms. Mithal also cited the FTC’s policy statement addressing the collection decedent’s debts as another example of agency guidance that should also indicate that debt collection is a priority for the FTC. Finally, Ms. Mithal stated the FTC will continue to utilize workshops, reports, and additional roundtables as it focuses on the MAP Rule prohibiting deceptive practices in mortgage advertisements, mobile payments and emerging technology, and payday lending.

The speakers’ insight into the importance of the *Carter* decision and how it may influence agency guidance is likely to apply not only to HUD guidance on RESPA matters, but also to other agencies that are tasked with rulemaking and enforcement authority. No court has since cited to *Carter*, but it will be import to watch how other circuits interpret the issue of how much deference to afford HUD and other agency guidance that is not developed through the rulemaking process.