AMERICAN BAR ASSOCIATION Business Law Section

CONSUMER FINANCIAL SERVICES COMMITTEE NEWSLETTER

February 2015

Committee Roster | Join CFSC

Important Dates

Business Law Section Spring Meeting
April 16-18, 2015
San Francisco, CA

Business Law Section Annual Meeting
September 17-19, 2015
Chicago, IL

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Membership Minute

CFSC by the Numbers: As of January 2015, total members = 1,405. A 4.6% increase since January 2014. Keep up the good work in spreading the word about joining the ABA's CFSC - encourage your clients and colleagues to check it out!

ABA Member Get a Member: The ABA Member Get a Member campaign has been extended through the end of February. Please let your non-member colleagues and friends know that they can join the ABA and the Section for FREE through August 31, 2015 at www.ambar.org/abagift.

Business Law Section:

- Join us for 2015 Business Law Section Spring Meeting - April 16-18, 2015 in San Francisco! For details, click here.

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

Get Involved in the CFSC: Want to get more involved in the CFSC? Feel free to contact Carolyn Hann or Grace Powers, CFSC Membership Subcommittee Chair and Vice Chair, for information.

Leadership Message

Nikki Munro
Chair
Consumer Financial Services Committee

Dear Members:

At the winter meeting, David Stein, panelist from Promontory and Vice Chair of the Privacy Subcommittee, said it best. As an industry, "we are faced with a relentless wave of change." I can only describe this wave as a Tsunami forming in Washington and making its powerful way across the country. The CFPB, the FTC, the DOJ, and state attorneys general take very seriously their charge to prevent unfair, deceptive, abusive, and illegal practices that cause consumer harm. As supervision expands and enforcement actions increase so increases the focus on compliance of those engaged in providing consumer financial services and those who advise such providers.

As attorneys, we consider the risk to our clients. As the laws change, are defined, and redefined, we hope that the uncertain becomes certain. We hope that the risks we face are diminished with the knowledge of how the law works, how the law applies to our clients, and how we can best encourage a free market place where businesses can prosper while still meeting the needs of consumers in a fair and transparent way.

The CFSC in person meetings attempt to achieve the lofty goal of educating our members about the law and bringing together lawyers with varying perspectives to engage in an open and collegial and intellectual honest discussion about how to make that law work for businesses and for consumers.

CFSC leaders presented over 12 hours of CLE to a record audience of about 300 attendees in New Orleans in January. Panels of industry lawyers, consumer advocates, and regulators spoke about topics including service provider management, mobile payments, military lending, fair lending, the prepaid card rule, and the tension between filing proofs of claim in bankruptcy and the FDCPA's requirements in connection with seeking payment on time barred debt. In Beer and Basics, Ollie Ireland, from Morrison Foerster, gave our young lawyers a history lesson while reviewing how to research CFS law.

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Meeting Promos/Postcards

CFSC lives it up in the Big Easy!

Venturing into N'awlins for the first time for its Winter Meeting in January (at least in recent history), the CFSC took the city by storm. The meeting kicked off on Saturday, January 10th at the Young Lawyers Subcommittee Beer and Basics program (sponsored by Hudson Cook LLP). The festivities continued at the Welcome Reception (sponsored by Goodwin Procter LLP) with wonderful refreshments and good company. Later, to keep the fun going, a large group of Young Lawyers headed to the Bourbon House for its delicious, local seafood (including freshly shucked oysters).

That was just the beginning. On Sunday, January 11th, the Committee hosted its dinner (sponsored by McGlinchey Stafford PLLC) at Latrobe's on Royal Street. The bars were well-stocked and the food plentiful and appetizing. As an added bonus, at least one waiter provided guests with an impromptu architectural tour of the building, pointing out in detail the beauty of the building and the historical significance of the other works of the building's architect, Benjamin Henry Latrobe. Attendees enjoyed and rocked out to the band Rockin Dopsie Jr. & the Zydeco Twisters.

Last, but certainly not least, on Monday evening attendees continued the Big Easy fun and gathered at the New Attendee Happy Hour and Bar Crawl (sponsored by Davis Wright Tremaine LLP). Starting at the Ritz Carlton bar, the group made its way to several local establishments like 21st Amendment Bar and the Carousel Piano Bar & Lounge at Hotel Monteleone, drinking Hurricanes and other New Orleanian drinks. Fun was had by all.

The CFSC experience in New Orleans may not be outdone for a while. Many thanks to the wonderful sponsors of all events!

Pro Bono Article

Member Spotlight

Lynette Hotchkiss: Lions and Mentors and Stars, Oh My!
By Grace Powers

In the wilds of Alaska, Lynette Hotchkiss didn't meet with any fierce lions. However, she started her wonderful journey into the world of consumer financial services law. It was a journey fraught with hurdles (that darn economy!), giants (the mentors that guided her safely through the thorny thicket of consumer laws and regulations), and triumphs. Today, Lynette is regarded as one of the stellar members of the ABA's

Left to right: David Lamothe (BofA Legal Department), Carl King (Culp Elliott), Wills Clinic client and Jim Dwiggins (BofA Legal Department). Photo by Kylie Akins, Legal Services of Southern Piedmont.

Bank of America Legal Department's Annual Wills-on-Wheels Clinic
By Todd Stillerman, Bank of America, N.A.

For the ninth year in a row, the Bank of America Legal Department partnered with Charlotte nonprofit Legal Services of Southern Piedmont and the Shamrock Senior Center to host Wills on Wheels on November 14, 2014. This is a program where volunteer lawyers and other legal professionals provided 36 low-income, elderly clients with free estate planning services. The annual event brought in volunteers from the Bank of America and U.S. Bank legal departments and the law firms of Culp Elliott & Carpenter and Mayer Brown to provide wills and healthcare powers of attorney for underserved elderly clients.

Of the more than 85,000 Mecklenburg County's residents aged 65 or older, nearly 6,800 are estimated to live in poverty. Without access to the simple estate planning documents that many low-income families and individuals cannot afford, older persons are at risk of losing control of end-of-life decisions and the ability to pass their assets on to family members. Each year at Wills on Wheels, pro bono attorneys and other volunteers assist older persons in completing simple wills and powers of attorney at no charge to help secure control of their assets and future decisions. In addition to the event's continued dedication to serving low-income seniors, this year's event utilized translators to assist Spanish speakers. Wills on Wheels is held each year in the winter drawing the assistance of more than 30 pro bono attorneys, paralegals and other volunteers.

The participating legal volunteers gained much from the experience. "This program gives us a wonderful opportunity to make a significant impact in the lives of our senior neighbors who may not otherwise have access to legal representation," explained Derek Dittner, an in-house attorney with Bank of America. "They are often nervous about the process, but so relieved and grateful to get this done. I am very thankful for this opportunity to make a difference." Derek's colleague Jim Dwiggins said, "This is a great opportunity for the legal profession to give back to the community."

The clinic's clients expressed gratitude too. One elderly client noted that "this has been an excellent experience. I called a lawyer and he wanted to charge me $1000. I couldn't afford that. I can't believe these attorneys are doing this for us for free." Another client added that the clinic provided relief. "Getting this done has been my first priority. I feel so relieved to have my will all taken care of now." Said another, "I finally have peace of mind. Thank you, thank you."

The clinic was coordinated by Deborah Hampton of Bank of America, with assistance from Todd Stillerman. "This was the ninth year in a row that the Legal Department has sponsored a wills clinic," noted Stillerman, "but we don't participate in the program because it's a tradition. We participate because it makes a real difference in the lives of people in our community."

Lynette Hotchkiss

Consumer Financial Services Committee ("CFSC") and a passionate practitioner of consumer finance law.

Toto, I've a feeling we're not in (Oregon) anymore

After graduating from Willamette University College of Law in 1982, no one was hiring in Oregon. So, Lynette and her husband Bari decided to move back to Hawaii where Bari grew up. Lynette passed the Hawaii Bar, but came to the quick realization that island life was not for her. So, back to Oregon, Bari and Lynette went.

After a few months as a law clerk for the State of Oregon insurance division, Lynette found herself a victim of state budgetary constraints and her position was eliminated. Lynette had a difficult time finding other opportunities since the Oregon economy as a whole was terrible at the time. So like the pioneers of old, Lynette and Bari with their son, Eric, packed up their little Honda Accord and headed northwest to Alaska to seek their fortune. She landed at a mid-size law firm in Anchorage and became a research attorney focused primarily on the business side. Eventually, she became the appellate attorney for the firm and had her first taste of consumer financial services law and was hooked. In *Rosenberg v. Smidt*, which involved a wraparound mortgage and foreclosure, Lynette briefed an appellate case that went up to the Alaska Supreme Court. The Court agreed with her argument that a foreclosure sale of the appellee owners' property was voidable since the title company failed to do its due diligence to determine the appellee owners' last known address in providing notice of the sale where the initial notice was returned unclaimed.

In 1986, the Alaskan oil economy crashed and Lynette, once again, found herself at a crossroads with no one hiring. Leaving Alaska, Lynette, Bari and their sons moved back to Hawaii. It took 3 months before Lynette remembered that humidity, coconuts, sand and oceans as far as the eye could see were not for her. So, Lynette and her family moved back to the state she loved, Oregon.

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Legal Feature

2013 OCC Guidance on Third Party Service Providers
By Joan Warrington and Judy Mok, Morrison Foerster LLP

Third party service providers are an integral part of the financial services industry, providing critical functionalities (*e.g.*, credit decisioning support, payment processing services, records retention, documents destruction) to financial institutions and other participants in the payment process. Given the complexity of services provided, financial institutions may face significant operational difficulties in transferring the services of such third party service providers that fail to meet appropriate service levels. Given the sensitive nature of information to which these third party service providers may have access, including personally identifiable information belonging to customers of financial institutions, regulators expect financial institutions to be accountable for the actions of the companies with which they contract. Financial institutions are expected to be prudent in choosing appropriate third party service providers and monitoring the performance of these providers, beginning with contract negotiations with these companies.

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Legal Feature

Lame Proofs of Claim
By John H. Bedard, Jr., Bedard Law Group, P.C.

Fundamental to American law is the notion that the passage of time erodes certainty and reliability. Memories fade over time, making eye-witness testimony less reliable. Physical evidence becomes more vulnerable to alteration, deterioration, loss, or destruction. Critical evidence may be forever lost with the disappearance or death of key witnesses. The passage of time increases the risk that the truth will become obscured by the retelling of a story with stale or incomplete evidence. Defendants are especially vulnerable to the unfairness inherent in a legal trial based on defective evidence. Laws designed to prevent this type of unfairness are called statutes of limitation. These ideas are not novel; statutes of limitation date back to the Romans and Greeks. Statutes of limitation establish the period of time after which societies will not hold its citizens liable under the law, civil or criminal. The time periods vary by state and federal law and by claim. Lawmakers make these rules by balancing two important rights: the right of defendants to be free from stale claims and the right of plaintiffs to prosecute them. Debt collectors are particularly familiar with the statute of limitations for a claim under the Fair Debt Collection Practices Act, which is 1 year.

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Winter Meeting Recap & Prelude to San Francisco

Dear Members:

At the winter meeting, David Stein, panelist from Promontory and Vice Chair of the Privacy Subcommittee, said it best. As an industry, "we are faced with a relentless wave of change." I can only describe this wave as a Tsunami forming in Washington and making its powerful way across the country. The CFPB, the FTC, the DOJ, and state attorneys general take very seriously their charge to prevent unfair, deceptive, abusive, and illegal practices that cause consumer harm. As supervision expands and enforcement actions increase so increases the focus on compliance of those engaged in providing consumer financial services and those who advise such providers.

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A personal highlight for me was the Women's Leadership Breakfast where Alana Odom Williams moderated a panel of successful woman lawyers and one honorary woman (Roland Brandel, who mentored one of our successful woman panelists) on the importance of mentoring in the growth of a woman lawyer. Roland and his mentee Veronica McGregor focused on the chemistry between mentor and mentee and the things Roland did in the background to push Veronica toward success. When considering mentor advice, panelists Peggy Twohig and Jonice Gray Tucker emphasized knowing yourself and trusting your instincts. Agnes Bundy Scanlan talked about taking risks and the importance of reaching beyond yourself to achieve your goals. The panel agreed that establishing open lines of communication is a key to success in a mentoring relationship.

Finally, although substantive panels are a key to success of any meeting, and we had many, the committee dinner will probably go down in history as one of the best parties we have ever had. Our host, McGlinchey Stafford, planned a true NOLA inspired event in the architecturally beautiful Latrobe's on Royal. Although some of our colleagues retreated to the quiet room, many committee members danced the night away to the tremendous music of Rockin' Dopsie Jr. & The Zydeco Twisters. You could complain it was too loud if I hadn't given clear and conspicuous disclosures about the decibels we may reach. At the end of the evening the house was still full. We can't promise another party like that – well not until the Spring of 2017 when we'll be back in the Big Easy. Thanks Lauren Campisi, Laura Brown and McGlinchey Stafford.

So – what's next? Join is for the spring meeting in San Francisco, April 16-18, 2015, where we will have CLE panels on Lending to Military Borrowers, UDAP, and the regulation of lawyers (ethics credit). The Fred Fisher Memorial Program will consider whether that wave of regulation I was talking about earlier is the path to consumer protection or an obstacle to innovation. The meeting is in its planning stages so please feel free to subject ideas for subcommittee meeting topics, offer to speak, and provide me any planning advice.

If you are interested in participating or your firm is interested in sponsoring a social event please drop me an email at nmunro@hudco.com.

Warm Wishes and See You in San Francisco,

Nikki Munro
Chair, Consumer Financial Services Committee

Lynette Hotchkiss: Lions and Mentors and Stars, Oh My!

By Grace Powers

In the wilds of Alaska, Lynette Hotchkiss didn't meet with any fierce lions. However, she started her wonderful journey into the world of consumer financial services law. It was a journey fraught with hurdles (that darn economy!), giants (the mentors that guided her safely through the thorny thicket of consumer laws and regulations), and triumphs. Today, Lynette is regarded as one of the stellar members of the ABA's Consumer Financial Services Committee ("CFSC") and a passionate practitioner of consumer finance law.

Toto, I've a feeling we're not in (Oregon) anymore

After graduating from Willamette University College of Law in 1982, no one was hiring in Oregon. So, Lynette and her husband Bari decided to move back to Hawaii where Bari grew up. Lynette passed the Hawaii Bar, but came to the quick realization that island life was not for her. So, back to Oregon, Bari and Lynette went.

After a few months as a law clerk for the State of Oregon insurance division, Lynette found herself a victim of state budgetary constraints and her position was eliminated. Lynette had a difficult time finding other opportunities since the Oregon economy as a whole was terrible at the time. So like the pioneers of old, Lynette and Bari with their son, Eric, packed up their little Honda Accord and headed northwest to Alaska to seek their fortune. She landed at a mid-size law firm in Anchorage and became a research attorney focused primarily on the business side. Eventually, she became the appellate attorney for the firm and had her first taste of consumer financial services law and was hooked. In *Rosenberg v. Smidt*[1], which involved a wraparound mortgage and foreclosure, Lynette briefed an appellate case that went up to the Alaska Supreme Court. The Court agreed with her argument that a foreclosure sale of the appellee owners' property was voidable since the title company failed to do its due diligence to determine the appellee owners' last known address in providing notice of the sale where the initial notice was returned unclaimed.

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There's No Place Like Oregon

This time, she reached out to Dean Sandow, CFSC member and former undergraduate and law school classmate, to see if he heard of any opportunities for her to pursue. Fortunately, it was perfect timing. One day, Dean had overheard one of his partners, Matt Chapman, walking down the hall saying that he needed a really good research attorney to help them finish their Laser Pro compliant loan document software for a startup company called CFI ProServices[2] ("CFI") that Matt was joining. Dean jumped out from his office and enthusiastically talked to Matt all about Lynette.

Being a start up and not wanting to scare Lynette during the interview, Matt and Bob Jett, another CFI executive, wined and dined Lynette at the posh MAC club in Portland and offered her the position. When Lynette reported to work at CFI, she was understandably surprised to find less than posh surroundings. Her office consisted of a basement room separated by the bookcase – Lynette, Bob Jett and Rusty Beckel on one side of the bookcase and the accountants on the other side. It was truly a bare-bones, start up experience, but she wouldn't have traded it for anything else. Most CFSC members would agree that her first project was a trial by fire, since it

[1] 727 P.2d 778 (Ala. 1986).

[2] Now D+H Financial Solutions.

consisted of her reviewing the Texas Credit Code to see if the Laser Pro loan documents were compliant. Surprisingly, Lynette, future consumer financial services law geek[3] that she is, loved it.

Follow the Yellow Brick Road

At CFI, Lynette was fortunate enough to work with Frank Andrews, who became one of her most influential mentors. Frank was her boss, but acted more like a collaborator. He was highly organized, but gave Lynette leeway to do what she needed to do and gave her the tools to succeed.

Frank created a network of attorneys, consisting of many current CFSC members and alumni throughout country to help the fledgling start-up company understand the lending laws of all 50 states. CFSC members, such as Dan Nicewander, Rick Hackett, Roland Brandel, David Willenzik, and Joe Lynyak to name a few, became her unofficial,stealth mentors and teachers as they guided her through the 50 state lending laws as well as federal law for her work with CFI. It was a fast-paced environment and gave her a solid grounding in consumer financial services law, as well as taught her that meshing technology with the law was an excellent way to help financial institutions automate their compliance. In addition to her four kids, Lynette considers CFI's Laser Pro product as her additional adopted offspring given the amount of time and love she put into bringing it to life.

It was through Frank and Bob Chamness, a past CFSC Chair and CFI executive, that she was introduced and encouraged to participate in the ABA and the CFSC.

In 1998, after seeing CFI's Laser Pro product successfully launched nationwide, Lynette decided to take a break from the practice of law and focus on the family business. However, once again, the economy intruded and Lynette needed to return to the practice of law. She worked for a bit at PSC Inc.[4] doing general corporate law at a bar code manufacturing company, but the siren song of consumer financial services law could not be silenced.

South by Southwest

In 2002, she joined Mavent Inc.[5] in Irvine, California at the urging of CFSC member, Tim Meredith, who thought Lynette's background in creating compliant lending software was perfect for the job. Mavent, like CFI, was a start-up company. As their first compliance attorney, Lynette developed and maintained the compliance rules in the Mavent Expert System, which was an automated compliance engine for mortgage lending. She hired, managed and trained the rest of the legal team and leveraged the lessons she learned early on at CFI by staying organized and maintaining strong relationships with outside counsel throughout the country.

Variety is the spice of life

In 2008, Lynette was enticed to go east and join Hudson Cook as a Partner in the Hanover, Maryland office. In hindsight, this was not the best move since this was in the middle of the financial crisis and start of the Great Recession. Work for mortgage attorneys came to a screeching halt during this tumultuous time. Fortunately, the Federal Trade Commission ("FTC") was seeking experienced mortgage attorneys at the time to write mortgage rules. Lynette became one of the FTC's subject matter experts for mortgage servicing.

After a few years, Bari started missing the sun and palm trees; he did not enjoy Maryland. Lynette agreed to move back to Southern California and join OneWest Bank as a compliance attorney.

Family is extremely important to Lynette. As a result, even though she loved her job at OneWest, she and Bari decided to make the move to Roseville, California to be closer to Lynette's mom and help her out as needed.

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[3] Geek – Term of endearment, not to be considered pejorative; defined as a person who is passionate about a subject and has the drive to learn everything about it (from Grace's internal dictionary).

l[4] Now Datalogic.

[5] Now part of Ellie Mae, Inc.

Lynette is currently Associate General Counsel at Rabobank, N.A., where she provides legal support for the bank's retail and operations business functions. In her spare time, Lynette loves to spend time with her family, especially her husband and 4 kids (Eric, Brian, Ehren and Zachary) who are now grown. When she has the time, Lynette is also an avid reader and loves to escape into all kinds of fiction.

Defying Gravity

In November 2014. Lynette was honored by the ABA with a Stellar Member award for being one of the driving forces behind the very successful Consumer Financial Services Basics National Institute for the past the two years. According to Shannon Burke of the ABA, Lynette "effectively led a team of co-chairs who did a tremendous amount of work in selecting timely program topics, bringing together superb speakers, creating effective marketing materials, and collecting course materials that served as great 'take-aways' for attendees." Of the 300 distance learning and 15-20 in-person events the ABA does every year, the ABA's Associate Directors all agreed that Lynette was only one of two members that was most deserving of the Stellar Member Award in 2014. Shannon says that Lynette "is a leader among leaders and the ABA is truly grateful for all of the time and effort she puts into her programs and making them a success."

Besides chairing the National Institute, Lynette has been actively involved in the CFSC since her days at CFI. She has served in a variety of leadership positions – former Chair of the Truth in Lending subcommittee, former Chair of the Publications/Communications subcommittee, and current Co-Chair of the Programs subcommittee.

Dreams that you dare to dream really do come true

When Lynette first started practicing in Alaska it was truly a frontier. She remembers the time she went to court and presented a motion to a judge. The judge completely overlooked Lynette and addressed his questions to Lynette's senior male partner who was only there to observe. After the motion was argued, Lynette challenged the senior partner to explain why he let the judge treat her that way. The senior partner was duly chastised and Lynette showed that she was not easily intimidated.

Since that time, Lynette believes that times have improved quite a bit for women attorneys in consumer financial services. There are a lot more women in the profession and in the CFSC in particular. When she was starting out, the majority of her unofficial mentors were the outside counsel, who happened to be mostly men. Fortunately, times have changed and there are many more CFSC members, both men and women, who are available as excellent mentors and advisors to newer CFSC members.

Her advice to young lawyers starting out in consumer financial services law is to join the CFSC (of course!) and to attend the next National Institute. One of the best pieces of advice that she follows to this day is to not be afraid to ask questions and to challenge your bosses and other people you interact act with to get what you need. She firmly believes that "there is no such thing as a stupid question." Along with being fearless in asking questions, Lynette's mad organization skills, her ability to be persistent and positive in the face of adversity and her passion for consumer financial services law, have made Lynette a truly stellar attorney and CFSC member.

<u>2013 OCC Guidance on Third Party Service Providers</u>

By Joan Warrington and Judy Mok, Morrison Foerster LLP

Third party service providers are an integral part of the financial services industry, providing critical functionalities (*e.g.*, credit decisioning support, payment processing services, records retention, documents destruction) to financial institutions and other participants in the payment process. Given the complexity of services provided, financial institutions may face significant operational difficulties in transferring the services of such third party service providers that fail to meet appropriate service levels. Given the sensitive nature of information to which these third party service providers may have access, including personally identifiable information belonging to customers of financial institutions, regulators expect financial institutions to be accountable for the actions of the companies with which they contract. Financial institutions are expected to be prudent in choosing appropriate third party service providers and monitoring the performance of these providers, beginning with contract negotiations with these companies.

On October 30, 2013, the Office of the Comptroller of the Currency ("OCC") issued a Risk Management Guidance on Third-Party Relationships[1] ("2013 OCC Guidance") which sets forth detailed expectations for national banks and federal savings associations with respect to assessing and managing risks associated with their relationships with third party service providers. The 2013 OCC Guidance calls for more comprehensive and rigorous oversight and management of third party relationships that involve "critical activities." The 2013 OCC Guidance defines "critical activities" as significant bank functions (*e.g.*, payments, clearing, settlements, custody) or significant shared services (*e.g.*, information technology), or other activities that: (i) could cause a bank to face significant risk if the third party fails to meet expectations; (ii) could have significant customer impacts; (iii) require significant investment in resources to implement the third-party relationship and manage the risk; and (iv) could have a

[1] See http://occ.gov/news-issuances/bulletins/2013/bulletin-2013-29.html. The 2013 OCC Guidance rescinds OCC Bulletin 2001-47 "Third-Party Relationships: Risk Management Principles," and OCC Advisory Letter 2000-9, "Third-Party Risk."

major impact on bank operations if the bank has to find an alternate third party or if the outsourced activity has to be brought in-house. Most notably, the 2013 OCC Guidance includes the types of contractual provisions the OCC expects to see in banks' agreements with their service providers. According to the 2013 OCC Guidance, "developing a contract that clearly defines expectations and responsibilities of the third party helps to ensure the contract's enforceability, limit the bank's liability, and mitigate disputes about performance." Specifically, the 2013 OCC Guidance provides that banks' contracts with third party service providers should address the following topics:

1. Nature and Scope of Arrangement
2. Performance Measures or Benchmarks
3. Responsibilities for Providing, Receiving, and Retaining Information
4. The Right to Audit and Require Remediation
5. Responsibility for Compliance with Applicable Laws and Regulations
6. Cost and Compensation
7. Ownership and License
8. Confidentiality and Integrity
9. Business Resumption and Contingency Plans
10. Indemnification
11. Insurance
12. Dispute Resolution
13. Limits on Liability
14. Default and Termination
15. Customer Complaints
16. Subcontracting
17. Foreign-Based Third Parties
18. OCC Supervision

The 2013 OCC Guidance provides detailed descriptions of the issues that need to be addressed with respect to each of the foregoing topics in the contracts between banks and their third party service providers. For example, the 2013 OCC Guidance states that a contract should include "a provision that enables the bank to terminate the contract, upon reasonable notice and without penalty, in the event that the OCC formally directs the bank to terminate the relationship" and also addresses limitation of liability, asking "whether the contract limits the third party's liability and whether the proposed limit is in proportion to the amount of loss the bank might experience because of the third party's failure to perform or to comply with applicable laws." It also "prohibits the third party and its subcontractors from using or disclosing the bank's information, except as necessary to provide the contracted activities or comply with legal requirement." Not surprisingly, many banks and other financial institutions use the 2013 OCC Guidance as leverage to negotiate more bank favorable provisions in their contracts with their service providers, in particular with respect to bank approval rights and oversight and control of their service providers. While some companies may feel that this gives banks unfair negotiating leverage, the key takeaway from the 2013 OCC Guidance and other regulatory guidance on this issue (as noted below) is that service providers will be held to the same standards to which the regulated entity is subject. Therefore, these standards provide flexibility depending on the risks the particular services pose to the financial institutions, their customers and operations. Even entities that are not under OCC supervision, but involved in third party service provider relationships, should consider using the 2013 OCC Guidance as a "best practices" guide. For banks and federal savings associations that are under the supervision of the OCC, it is crucial to review the 2013 OCC Guidance and make sure they manage their third party service provider relationships accordingly and meet the expectations of the 2013 OCC Guidance when negotiating contracts with their service providers.

As conveyed in the 2013 OCC Guidance, the OCC expects banks to practice effective risk management regardless of whether such banks perform the activity internally or through a third party. Similarly, other regulators have issued bulletins and guidance on their expectations with respect to how banks and other financial institutions should manage their relationships with third party service providers. For example, in April 2012, the Consumer Financial Protection Bureau ("CFPB") issued a bulletin about third party vendors[2]. In October 2012, the Federal Financial Institutions Examination Council ("FFIEC") issued a guidance on IT service providers[3]. The Federal Deposit Insurance Corporation ("FDIC") joined the regulatory bandwagon with its September 2013 Financial Institution Letter regarding payment processing relationships with high risk merchants[4]. The Board of Governors of the Federal Reserve System ("Federal Reserve Board") followed shortly thereafter with a Guidance on Managing Outsourcing Risks[5] in December 2013.

[2] See http://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf.
[3] See http://ithandbook.ffiec.gov/media/153533/10-10-12_-_administrative_guidelines_sup_of_tsps.pdf.
[4] See https://www.fdic.gov/news/news/financial/2013/fil13043.html.
[5] See http://www.federalreserve.gov/bankinforeg/srletters/sr1319.htm.

Financial institutions may not always be able to seek indemnification for non-compliance with regulatory requirements by their service providers. Recent CFPB actions raise the possibility that financial institutions could be barred from receiving indemnification under certain circumstances.[6] In another example, both a bank and service provider were sued in 2008 when the FDIC and the Federal Trade Commission ("FTC") joined forces against CompuCredit Corp. and Synovus Financial Corp. for deceptive credit card marketing practices in an unprecedented act of regulatory cooperation. So, it's clear that stakes are going up not only for financial institutions but also service providers.

[6] See http://files.consumerfinance.gov/f/201312_cfpb_consent-order_0010.pdf.

Lame Proofs of Claim

By John H. Bedard, Jr., Bedard Law Group, P.C.

Fundamental to American law is the notion that the passage of time erodes certainty and reliability. Memories fade over time, making eye-witness testimony less reliable. Physical evidence becomes more vulnerable to alteration, deterioration, loss, or destruction. Critical evidence may be forever lost with the disappearance or death of key witnesses. The passage of time increases the risk that the *truth* will become obscured by the retelling of a story with stale or incomplete evidence. Defendants are especially vulnerable to the unfairness inherent in a legal trial based on defective evidence. Laws designed to prevent this type of unfairness are called statutes of limitation. These ideas are not novel; statutes of limitation date back to the Romans and Greeks. Statutes of limitation establish the period of time after which societies will not hold its citizens liable under the law, civil or criminal. The time periods vary by state and federal law and by claim. Lawmakers make these rules by balancing two important rights: the right of defendants to be free from stale claims and the right of plaintiffs to prosecute them. Debt collectors are particularly familiar with the statute of limitations for a claim under the Fair Debt Collection Practices Act, which is 1 year.

Another concept fundamental to our American legal system is the idea that debtors should have the opportunity for a "fresh financial start" by allowing them to reduce or eliminate their debts and, in exchange, to fairly distribute their assets to creditors. In order to be eligible to participate in the distribution of a debtor's assets, a creditor must file a document called a "proof of claim." This document is the formal mechanism for notifying the bankruptcy court, the debtor, the trustee, and all other interested parties that a creditor wishes to assert its right to receive a distribution of the debtor's assets from the bankruptcy estate. The law provides ample mechanisms to allow debtors (or the trustee) to challenge claims made by creditors; however, claims by creditors are presumed to be valid and allowed as a matter of course absent a challenge. This presumption of validity begs an important question: Is it possible for a creditor to behave unfairly (ergo unlawfully) by filing a defective proof of claim? The 11th Circuit Court of Appeals recently answered this question in a case entitled *Crawford v. LVNV Funding*, LLC, 2014 U.S. App. LEXIS 13221 (11th Cir. Ala. July 10, 2014).

The *Crawford* case highlights the intersection between the FDCPA's prohibition on unfair behavior, the bankruptcy rule which automatically allows unchallenged creditor claims, and the underlying policy reasons for enforcing statutes of limitation. Despite the large body of case law rejecting debtors' attempts to bring FDCPA claims against debt collectors who file allegedly defective proofs of claim, the 11th Circuit determined that filing a proof of claim on a time-barred debt creates the misleading impression to the debtor that the debt collector can legally enforce the debt.[1] The creditor in *Crawford* was a debt collector which filed a proof of

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[1] *See, In re Simpson*, 2008 WL 4216317 (holding the claims resolution process of the bankruptcy code provides the exclusive remedy for filing a proof of claim on a time-barred debts); *In re McMillen*, 440 B.R. 907 (Bankr. N.D. Ga. 2010) (granting motion for judgment on the pleadings on debtor's FDCPA claim based on filing duplicate proofs of claim); *In re Williams*, 392 B.R. 882 (Bankr. N.D. Fla. 2008) (holding that bankruptcy law is the exclusive remedy for filing proof of claim on time-barred debt); *In re Cooper*, 253 B.R. 286 (Bankr. N.D. Fla. 2000) (holding that the filing of a proof of claim in a bankruptcy

claim in the debtor's bankruptcy proceeding. The claim; however, was for a debt on which the statute of limitations had already expired. The claim went unchallenged and under 11 U.S.C. § 502(a)-(b) and Bankruptcy Rule 3001(f) the unchallenged proof of claim was allowed. The debtor's Chapter 13 plan was confirmed and the collector actually received payments from the trustee on the claim.

Four years later the debtor hired counsel and challenged the proof of claim. The debtor argued that the collector violated the FDCPA by filing a proof of claim on a debt for which the statute of limitations expired and that such filing constitutes an unfair collection practice in violation of §1692(f) and a false representation about the character of the debt in violation of §1692(e). Both the bankruptcy court and the district court disagreed and dismissed the debtor's claims entirely. These conclusions appeared consistent with existing case and consistent with the axiomatic notation that merely filing a proof of claim cannot be "collection activity" under the FDCPA else it would be at odds with the automatic stay provisions of 11 U.S.C.S. §362(a)(6) which operate as a stay on any "act to collect" against the debtor that arose before filing of the bankruptcy petition.[2] Notwithstanding, the debtor appealed to the 11th Circuit Court of Appeals which reversed these conclusions. It is now clear in the 11th Circuit that, provided all other provisions of the FDCPA apply, filing a proof of claim to collect a stale debt in a Chapter 13 proceeding bankruptcy violates the FDCPA. This statement is worth repeating: *Debt collectors who file proofs of claim in Chapter 13 bankruptcy cases in the 11th Circuit on debts for which the statute of limitations has expired are violating the FDCPA.*

How did the court reach this conclusion? The court begins its analysis very much like the beginning of this article – with a brief tutorial of the underlying purposes of limitations statutes and the unfairness inherent in enforcing stale claims. It then highlights the "automatic allowance" rule in the bankruptcy procedure and explains the standard by which FDCPA behavior in the 11th Circuit is measured, the "least sophisticated consumer" standard. The court then focuses on §1692e (the prohibition on false representations) and concludes that filing a time-barred proof of claim creates the misleading impression to the debtor that the debt collector can legally enforce the debt. For this reason, the least sophisticated consumer would not know to challenge the claim. In addition, it is unfair, unconscionable, and deceptive in violation of §1692f to receive payment on stale debts because it reduces the amount other creditors with timely claims receive from the debtor's estate and forces parties and the court to consume "energy and resources" filing objections and dealing with stale claim issues. The court concludes its analysis stating, "Just as [the collector] would have violated the FDCPA by filing a lawsuit on stale claims in state court, [the collector] violated the FDCPA by filing a stale claim in bankruptcy court." A petition for a writ of certiorari has been filed with the U.S. Supreme Court.

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proceeding does not invoke the protections of the FDCPA). *Middlebrooks v. Interstate Credit Control, Inc.*, 2008 WL 2705496 (D. Minn. July 9, 2008) (holding the FDCPA provides no remedy to a debtor in bankruptcy where a debt collector filed a false proof of claim); *Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2010) (holding the Bankruptcy Code, and not the FDCPA, provides a remedy for wrongfully filed proofs of claim); *B-Real, LLC, v. Rogers, 405 B.R. 428* (2009) (holding that filing an invalid proof of claim in bankruptcy court cannot serve as the basis for an FDCPA action).

[2] *Jenkins v. Genesis Financial Solutions*, 456 B.R. 236, 238 (E.D.N.C. 2011)

Collecting time-barred debt is tricky business today. The issue has captured the attention of regulators and lawmakers at the state and federal levels. Courts are now weighing in. The 11th Circuit has drawn a line in the sand. Don't get caught filing a lame proof of claim.

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