



CONSUMER FINANCIAL SERVICES COMMITTEE NEWSLETTER

May 2015

Committee Roster | Join CFSC

Important Dates

[Business Law Section Annual Meeting](#)
September 17-19, 2015
Chicago, IL

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Membership Minute

CFSC by the Numbers: As of February 2015, total members = 1,430. A 12.8% increase since February 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!

CFSC at the ABA Business Law Spring Meeting: In April 2015, the CFSC had a very successful Spring Meeting in San Francisco! Once again, CFSC had three of the top 5 CLE programs based upon attendance. The most attended CLE program was "What's Unfair and Deceptive Now?", which was moderated by Eric Mogilnicki (Wilmer Cutler Pickering Hale Dorr) with speakers Kristen Donoghue (Consumer Financial Protection Bureau), Joy Feigenbaum (NY Department of Financial Services), Carolyn Hann (Federal Trade Commission) and Lucy Morris (Hudson Cook). Congratulations to all the CFSC members who made the meeting such a great success! We hope that you can join us for the next CFSC meetings in Chicago during the ABA Business Law Section Annual Meeting.

CFSC Website: Did you know you can find links to helpful information on the website, including past newsletters, meeting materials and non-CLE Webinars? To learn more, visit [CFSC website](#).

Get Involved in the CFSC: Want to get more involved in the CFSC? Feel free to contact [Carolyn Hann](#) or [Grace Powers](#), CFSC

Leadership Message



Nikki Munro
Chair
Consumer Financial Services Committee

Dear CFSC Members:

Hello and Happy Spring. For those of you who joined us at the spring meeting of the Business Law Section in San Francisco, you were treated not only to quality substantive programming, a collegial

environment, but also to great food and beautiful weather. The Business Law Section ranked three of our four CLE programs among the top five at the Spring meeting. Our CLE program hosted by Federal and State Trade Practices on "What's Unfair and Deceptive Now?" took the number one spot. The non-CLE programs were equally as good, drawing lawyers from all over the country and in many different practice areas. I can't thank our subcommittee leaders enough for the tireless commitment to the CFSC. Use the links below for all meeting materials and the recordings of the CLE programs.

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Promo/Postcard

REGISTER NOW FOR THE NATIONAL INSTITUTE

For the past several years, each fall, the Consumer Financial Services Committee hosts a National Institute on Consumer Financial Services Basics. The National Institute is an in-person meeting, designed to expose new practitioners, or more experienced practitioners who are new to consumer financial services, to key areas of consumer financial services law.

This year's Institute will take place at the Waterview Conference Center in Arlington, Virginia on October 8th and 9th. The key topics that will be covered include:

- History and development of federal and state consumer financial services laws
- Truth in lending and disclosure requirements
- Fair lending
- Financial privacy and credit reporting
- Data security, fraud prevention, and identity protection
- Consumer communications: FDCPA, TCPA, TSR, Can-Spam, and others
- Asset account regulation
- Installment lending
- Mortgage origination and servicing
- UDAAP
- Litigation and enforcement actions

You can register now at www.ShopABA.org/2015consumer. An early bird discounted rate is available through August 15, 2015 and spots can fill up quickly.

Subcommittee Spotlight

Deposit Products and Payment Systems By David W. Thompson, McGlinchey Stafford PLLC

On April 18, 2015, the Deposit and Payment Systems subcommittee of the Consumer Financial Services Committee hosted a panel to discuss the Federal Reserve's recently published *Strategies for Improving the U.S. Payment System*. Lois Woodward (Regions Bank) and Roberta Torian (Reed Smith LLP) are Co-Chairs of the subcommittee and David Thompson (McGlinchey Stafford PLLC) is a Vice Chair of the subcommittee. The panel members included Sean Rodriguez from the Federal Reserve System, Jeanne Hogarth from the Center for Financial Services Innovation, and Alaina Gimbert from The Clearing House. David Thompson acted as the moderator for this presentation during the ABA's Business Law Section meeting in San Francisco.

During the presentation, the panel provided an overview of the Federal Reserve System's strategic initiative, which was initially launched in October 2012, to improve the speed and efficiency of the U.S. payment system, while maintaining the system's safety and accessibility. In September 2013, the Federal Reserve published its *Payment System Improvement Public Consultation Paper* to solicit feedback from the public about five desired outcomes for an improved U.S. payment system (payment speed; payment security; payment efficiency; better choices for international payments; and collaboration among participants in the payment system). The Federal Reserve also completed several related studies in 2013

Member Spotlight

Richard Hackett: From New England to Washington, Decades of Significant Contributions to Consumer Financial Services Law By R. Scott Adams, Spilman Thomas & Battle, PLLC



Richard Hackett

From challenging his university's compliance with financial services law while a law student, to building a national consumer financial services practice, to working on the front lines of the Consumer Financial Protection Bureau ("CFPB"), Richard "Rick" Hackett has made significant contributions to consumer financial services law. Hackett is presently a partner at consumer financial services firm Hudson Cook LLP, based in its Portland, Maine office.

An early experience at Cornell Law School was a definite indicator that Hackett was destined for work in consumer financial services law. The first ever time Hackett asserted any type of claim as a "lawyer" was during his third year of law school when he was still a law student. After taking a full day of truth-in-lending with luminary Professor William Hogan, he got home and opened his statement from Cornell for his identification/credit card. Hackett noticed Cornell had truncated or eliminated the 30-day grace period without notice. After analyzing the dates and seeing that they violated the Truth-in-Lending Act, Hackett wrote a demand letter, seeking Cornell to give proper

Membership Subcommittee
Chair and Vice-Chair, for
information.

and 2014 to evaluate end-user demand for faster payments, payment trends, payment security, and alternatives for faster payments in the United States. This work culminated in publication of a paper by the Federal Reserve on January 26, 2015, called *Strategies for Improving the U.S. Payment System* ("Strategies Paper").

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notice, refunds, and payment of reasonable attorney fees.

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Legal Feature

The Jesinoski Decision Leaves More Questions than Answers for TILA Rescission Claims By Richard Freshwater, Thompson Hine

In *Jesinoski v. Countrywide Homes Loans, Inc.*, Case No. 13-684, 574 U. S. ____ (2015), the U.S. Supreme Court addressed whether a borrower can rescind a transaction under the Truth in Lending Act, 15 U.S.C. § 1635 ("TILA"), by either providing written notice or whether the borrower must file suit within the Act's proscribed three year period. On January 13, 2015, the Supreme Court held that a timely written notification from a borrower that the borrower elects to rescind under § 1635 is sufficient under the plain language of the statute and that the filing of a suit is not necessary. In its ruling, however, the Supreme Court may have presented financial institutions and practitioners with more questions than answers.

Under TILA, a borrower may rescind certain loans that grant a security interest within three days following the loan's closing. § 1635(a). If the lender fails to make all required disclosures under TILA, or if certain disclosures are inaccurate, the time for rescission is extended to three years. § 1635(f). The plain language of TILA states that "any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission." § 1635(b). The statute gives a lender twenty days from the "receipt of the notice of rescission to return to the obligor any money or property given as earnest money, down payment, or otherwise, and [the lender] shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." *Id.* Only after the creditor has performed its "obligations under this section" (e.g., return of funds and release of security interest) is the debtor required to tender the property or its reasonable value. *Id.* Finally, Congress noted that the order of the procedures in this section "shall apply except when otherwise ordered by a court." Thus, without court intervention, on its face, TILA provides a three step process for rescission: (1) the borrower sends the notice; (2) the lender releases the mortgage; and (3) the borrower returns the funds when they receive the notice.

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Legal Feature

Imminent Restrictions on Arbitration Provisions in Consumer Financial Contracts Foreshadowed by the CFPB's Arbitration Study By Amy Jonker, Dykema Gossett PLLC

In March, the Consumer Financial Protection Bureau (the "CFPB") released its 728-page Arbitration Study (the "Study") in which it claims to have conducted an empirical analysis of the use of arbitration agreements for consumer financial products and services. The Study concludes that arbitration agreements are detrimental to consumers and is expected to result in significant restrictions on the use of arbitration and class-action waivers in consumer contracts, especially for companies that operate retail-banking units.

Background

Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") provided the mandate for the CFPB to conduct the Study and empowers the CFPB to "prohibit or impose conditions or limitations" on the use of pre-dispute arbitration agreements for consumer financial products and services. The Act also prohibits arbitration clauses in most residential mortgage loan contracts and gives the Securities and Exchange Commission authority to prohibit or restrict the enforcement of arbitration clauses for certain disputes.

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Meeting Materials: http://www.americanbar.org/content/dam/aba/events/business_law/2015/04/spring/cfs-201504.authcheckdam.pdf.

CLE Program Materials and Recordings:

<http://apps.americanbar.org/buslaw/apps/updatedsearch/results.cfm?s=1&np=7&st=&sc=&sp=&sm=SM&sy=2015&ss=20>

Because there is no rest for the weary, immediately on the heels of the spring meeting, we are busily planning the Business Law Section Annual Meeting in Chicago. The meeting will take place September 16-19, at the Hyatt Regency on Wacker Drive. The meeting will begin Wednesday at 4:00pm with Beer and Basics, a two hour presentation introducing the substantive topics at the meeting. A joint welcome reception, with the Banking Law Committee, will follow. Our dinner will be Thursday evening.

Substantive CLE meetings will begin Thursday morning through Saturday midday. Topics will include disclosures and disclaimers, practical guidance on SCRA compliance, obligations of financial institutions that bank third party payment processors, the CFPB’s request for comment on the CARD Act, the NY AG settlement with the consumer reporting agencies, the status of mandatory arbitration in the consumer context, and much more. CFSC hopes to have about 12 hours of CLE programming.

To register for the annual meeting, click [here](#). 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.

If you have less experienced lawyers in your midst, please consider sending them to the National Institute for Consumer Financial Services Basics in Arlington, Virginia, October 8-9. As noted in this newsletter, it is a must attend event for those new to consumer financial services law.

Finally, I think this letter is my last as Chair of the Consumer Financial Services Committee. It has been extremely rewarding to lead this committee for the past three years and I have enjoyed working with each one of you. As I wind down and reflect on my time as chair and turn over the reign (I mean reins) to Andrew Smith at the annual meeting, I appreciate the time I’ve spent as committee vice chair and chair growing the CFSC, my practice, and the many friendships with colleagues on the committee and in the Business Law Section. I soon join the long list of active past chairs. I couldn’t be more humbled to be part of that group of accomplished practitioners and truly good people.

Warm Wishes and See You in Chicago,

Nikki Munro
Chair, Consumer Financial Services Committee

Subcommittee Spotlight: Deposit Products and Payment Systems

By David W. Thompson, McGlinchey Stafford PLLC

On April 18, 2015, the Deposit and Payment Systems subcommittee of the Consumer Financial Services Committee hosted a panel to discuss the Federal Reserve's recently published *Strategies for Improving the U.S. Payment System*. Lois Woodward (Regions Bank) and Roberta Torian (Reed Smith LLP) are Co-Chairs of the subcommittee and David Thompson (McGlinchey Stafford PLLC) is a Vice Chair of the subcommittee. The panel members included Sean Rodriguez from the Federal Reserve System, Jeanne Hogarth from the Center for Financial Services Innovation, and Alaina Gimbert from The Clearing House. David Thompson acted as the moderator for this presentation during the ABA's Business Law Section meeting in San Francisco.

During the presentation, the panel provided an overview of the Federal Reserve System's strategic initiative, which was initially launched in October 2012, to improve the speed and efficiency of the U.S. payment system, while maintaining the system's safety and accessibility. In September 2013, the Federal Reserve published its *Payment System Improvement Public Consultation Paper* to solicit feedback from the public about five desired outcomes for an improved U.S. payment system (payment speed; payment security; payment efficiency; better choices for international payments; and collaboration among participants in the payment system). The Federal Reserve also completed several related studies in 2013 and 2014 to evaluate end-user demand for faster payments, payment trends, payment security, and alternatives for faster payments in the United States. This work culminated in publication of a paper by the Federal Reserve on January 26, 2015, called *Strategies for Improving the U.S. Payment System* ("Strategies Paper").

In some respects, the Strategies Paper measures the progress the Federal Reserve and others have made since 2012 in the initiative to support faster payments in the United States. The Strategies Paper, however, is more important as a tool for identifying problems and opportunities in the payments system, for promoting collaboration among the stakeholders, and for encouraging those stakeholders to continue making progress toward certain key goals.

Mr. Rodriguez began his portion of the presentation by providing the context for Federal Reserve's publication of the Strategies Paper in January 2015, including a discussion of certain key problems that exist in the current payments system and potential options for resolving these problems and opportunities for change. Mr. Rodriguez explained that the Federal Reserve had published the Strategies Paper to communicate desired outcomes, establish specific multi-year strategies for the initiative, and encourage participation among a wide range of payment system participants. Mr. Rodriguez described the following five strategies for improving payment systems in the United States:

- Strategy 1: Stakeholder Engagement (actively engage with stakeholders on initiatives designed to improve the U.S. payment system);
- Strategy 2: Faster Payments (identify effective approaches for implementing safe, ubiquitous, faster payments);
- Strategy 3: Payment Security (reduce fraud risk and advance the safety, security and resiliency of the U.S. payment system);
- Strategy 4: End-to-End Payment Efficiency (achieve greater end-to-end efficiency for domestic and cross-border payments); and
- Strategy 5: Enhanced Federal Reserve Services (enhance Federal Reserve payment, settlement and risk management services to address identified gaps).

In discussing the stakeholder engagement strategy, Mr. Rodriguez explained that the Federal Reserve is helping with the establishment of two new task forces, one called the Faster Payments Task Force and the other called the Secure Payments Task Force. Mr. Rodriguez reviewed the underlying mission and objectives of each task force, the registration deadlines to participate in the initial task force meetings, and the preliminary schedules to elect steering committees and hold face-to-face meetings in 2015. Mr. Rodriguez closed by describing how audience members could find more information about the Federal Reserve's work to improve the U.S. payments system.

After Mr. Rodriguez, Jeanne Hogarth from the Center for Financial Services Innovation ("CFSI") provided an overview of the increasing number of payment options available to consumers in today's marketplace. Ms. Hogarth then explained how the CFSI measures the financial health of consumers, by focusing on the number of consumers who are considered "underbanked" and "unbanked," as well as other consumers who are struggling financially. Ms. Hogarth reviewed the potential benefits to consumers of faster payment systems, particularly for certain "just-in-time" consumers with more volatile income streams. After Ms. Hogarth reviewed trends in mobile banking and mobile payments among consumers, she focused on the specific financial services that consumers desire to access through mobile devices and other types of technology. According to the studies conducted by the CFSI, Ms. Hogarth explained that consumers want real-time and immediate availability of funds, balance information, reminders, and access to secure and easy-to-use payment services every hour and day of the year. Ms. Hogarth concluded her remarks by discussing the growing interest among consumers for person-to-person payments and the potential consumer benefits of other new payment technologies, including wages that can be paid as earned by consumers, non-recurring consumer payments to small businesses and service providers, and wearable payment devices.

Alaina Gimbert from The Clearing House ("TCH") explained TCH's own October 2014 initiative to develop a ubiquitous real-time payment system for the United States. Ms. Gimbert described how this payment system could help address several unmet consumer needs in a variety of circumstances (for example, business-to-person payments, such as temporary employee wages, emergency payroll and disaster relief payments; person-to-person payments, such as non-commerce payments, urgent account-to-account transfers, and payments for informal services; person-to-business payments, such as immediate bill payments with acknowledgement of receipt; and business-to-business payments, such as just-in-time payments to suppliers). Ms. Gimbert then reviewed several key characteristics of TCH's real-time system, including "credit-push" payments that are initiated by the consumer making the payment (instead of being initiated by the intended recipient of the payment) and immediate notification and accelerated funds availability to the recipient of the payment. Additionally, Ms. Gimbert focused on several other key characteristics of TCH's real-time system, such as the finality of payments made to the recipient, limitations on payment values to mitigate risk, robust messaging among all parties involved in completing payments, tools and methods to ensure the proper authentication of payments and strong access security standards. Ms. Gimbert then reviewed the consumer protection framework that currently exists for electronic payments under laws such as the Electronic Fund Transfer Act and under the operating rules of the payment card networks and the National Automated Clearing House Association. She discussed the extent to which these laws and rules will protect consumers in connection with TCH's real-time payment system. Ms. Gimbert covered the protections that may apply in connection with certain unauthorized, fraudulently induced or mistaken payments made in a real-time payments system, distinguishing certain unauthorized payments covered by the error resolution provisions in the Electronic Fund Transfer Act from fraudulently induced or mistaken payments that may not qualify for similar legal protections. Ms. Gimbert reminded the audience of statements made by the Consumer Financial Protection Bureau, emphasizing that the goal should be faster payments – but not at the expense of unfixable errors and unrecoverable theft from deposit accounts.

The panel members closed the presentation with a thought-provoking question and answer session with the audience. Many of the audience questions focused on how to achieve faster payments without jeopardizing the overall security and safety of the payments system for consumers, financial institutions and other participants in the payments system.

Richard Hackett: From New England to Washington, Decades of Significant Contributions to Consumer Financial Services Law

By: R. Scott Adams, Spilman Thomas & Battle, PLLC

From challenging his university's compliance with financial services law while a law student, to building a national consumer financial services practice, to working on the front lines of the Consumer Financial Protection Bureau ("CFPB"), Richard "Rick" Hackett has made significant contributions to consumer financial services law. Hackett is presently a partner at consumer financial services firm Hudson Cook LLP, based in its Portland, Maine office.

An early experience at Cornell Law School was a definite indicator that Hackett was destined for work in consumer financial services law. The first ever time Hackett asserted any type of claim as a "lawyer" was during his third year of law school when he was still a law student. After taking a full day of truth-in-lending with luminary Professor William Hogan, he got home and opened his statement from Cornell for his identification/credit card. Hackett noticed Cornell had truncated or eliminated the 30-day grace period without notice. After analyzing the dates and seeing that they violated the Truth-in-Lending Act, Hackett wrote a demand letter, seeking Cornell to give proper notice, refunds, and payment of reasonable attorney fees.

Shortly thereafter, Hackett was called to the Dean's office who asked what was going on and suggested that Hackett go talk to Professor Hogan. Hackett did just that, taking along citations to the casebook the professor himself had authored. Hackett recalls that the professor had a really hard time not smiling when he asked how a third-year law student was entitled to his attorneys' fees. Cornell subsequently provided new disclosures and refunded \$30,000, but unfortunately did not pay Hackett any attorneys' fees.

A native of the Bay Area, Hackett now lives about as far from the West Coast as one can get. Hackett moved to the East Coast to attend college at Dartmouth College, and his parents moved to western Massachusetts all in the same car trip. Hackett's wife's family is from New Hampshire, so during law school, he sought opportunities in New England. Hackett explained how during law school, he spent a summer in New York City realizing he did not want to be in New York City, but then arrived in Portland, Maine for his clerkship and had the opposite experience.

In Portland, Hackett clerked for the Honorable Frank M. Coffin, then Chief Judge of the United States Court of Appeals for the First Circuit. When the clerkship concluded, Hackett remained in Portland to work for a large New England firm and has never left. After 1994, consumer financial services became his sole focus, and he continued to build his practice in Maine. Hackett explained that one advantage of involvement with the Consumer Financial Services Committee is the ability to practice in this area of the law from anywhere in the country. That is, someone living in Portland, Maine (or elsewhere) can stay connected and tied into the practice and consumer financial services world without living in Washington or New York. Hackett commented that as a member of the CFSC if you put your shoulder to the wheel, "you can move beyond just consuming information but actually participating in the development of the law."

Once the depository laws were loosened in the early 2000s, Hackett began spending more time in Boston, as financial services companies in the Northeast moved more operations there. Hackett continued to build his consumer financial services law and retail financial services regulation practice. His practice included all aspects of state and federal regulation of retail financial products origination and marketing, e-payments, regulation of financial service entities, and lending, deposit, and insurance transactions.

In 2010, Hackett had the opportunity to get in on the ground floor of the Consumer Financial Protection Bureau ("CFPB") and assist with building a new federal agency and its regulatory function. Hackett had spent a large portion of his time focusing on the early iterations of Dodd-Frank and how it would change the consumer

financial services landscape. He said he was enough of a gambler to schedule an organized program on the CFPB at the annual meeting of the ABA. After the leadership meeting, Peggy Twohig walked into the room and said she wanted to let everyone know about her new job on the implementation team at the CFPB. Hackett, having become more heavily involved in policy and a broader view of the law through his CFSC work and teaching, walked up to her after the meeting and said, “that’s really cool, can I send you an e-mail?” Hackett reached out to Peggy, and later that year, he was in Washington and meeting Raj Date and Richard Cordray.

Hackett became an Assistant Director, leading the Office of Installment and Liquidity Lending Markets, in the Research, Markets and Rulemaking Division of the Bureau. Hackett’s responsibilities included advising all divisions of the Bureau on market information and policy issues in the installment and specialty lending areas, including vehicle finance, student lending and payday lending.

When asked why he elected to join the CFPB from a successful banking practice, he explained that he recognized that Congress had formed the most powerful consumer agency in United States history that was going to reshape the consumer financial services industry, and he figured they could use some “grownups.” Hackett said that he had two options: spend time working on matters in private practice in the face of great uncertainty after the financial meltdown, or go to Washington and create uncertainty. Despite the weekly commute from Portland and other drawbacks, Hackett spent three years in Washington working with the Bureau.

Hackett returned to Portland fulltime in 2014, joining the Maine office of Hudson Cook LLP. Hackett has continued to practice consumer financial services law, building on both his lengthy tenure in private practice and his work as a regulator with the CFPB.

With respect to involvement with the ABA Consumer Financial Services Committee, Hackett is a major proponent and supporter. His involvement began in the late 1980s when Tom Hudson called Hackett, explained that he needed a Maine lawyer, and asked if he knew anything about consumer financial services. Hackett explained that he did, and Tom’s next question was whether Hackett was a member of the CFSC. Tom told Hackett that if he wanted to work in this area of the law, he really needed to join the CFSC. Spurred by that conversation (and an upcoming CFSC winter meeting at Snowbird), Hackett got involved in the CFSC and over the years, he has held various leadership positions, including service as Vice-Chairman for several years, as well as Chair of the Subcommittee on Internet Delivery/Electronic Banking. Hackett is a member of the American College of Consumer Financial Services Lawyers.

His proudest professional contribution is assisting with the creation and development of the National Institute for Consumer Financial Services Law Basics (the “National Institute”), which is now in its sixth installment. Hackett served as an adjunct faculty member of the Morin Center for Banking Law at Boston University School of Law from 2005 to 2011, where he developed a love for teaching. The National Institute was launched from that program, with the critical involvement of the late Amy Bizar (who founded BU’s program on consumer finance regulation) and virtually the entire leadership of CFSC. Hackett has taught on the National Institute faculty each year since inception and recommends participating to young lawyers, including new associates, government attorneys, and others. Hackett explained, “It has been terrific fun and adds value to the bar and the ABA and is exactly the type of thing we should be doing.”

The *Jesinoski* Decision Leaves More Questions than Answers for TILA Rescission Claims.

By Richard Freshwater, Thompson Hine

In *Jesinoski v. Countrywide Homes Loans, Inc.*, Case No. 13–684, 574 U. S. ____ (2015), the U.S. Supreme Court addressed whether a borrower can rescind a transaction under the Truth in Lending Act, 15 U.S.C. § 1635 (“TILA”), by either providing written notice or whether the borrower must file suit within the Act’s proscribed three year period. On January 13, 2015, the Supreme Court held that a timely written notification from a borrower that the borrower elects to rescind under § 1635 is sufficient under the plain language of the statute and that the filing of a suit is not necessary. In its ruling, however, the Supreme Court may have presented financial institutions and practitioners with more questions than answers.

Under TILA, a borrower may rescind certain loans that grant a security interest within three days following the loan’s closing. § 1635(a). If the lender fails to make all required disclosures under TILA, or if certain disclosures are inaccurate, the time for rescission is extended to three years. § 1635(f). The plain language of TILA states that “any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission.” § 1635(b). The statute gives a lender twenty days from the “receipt of the notice of rescission to return to the obligor any money or property given as earnest money, down payment, or otherwise, and [the lender] shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.” *Id.* Only after the creditor has performed its “obligations under this section” (e.g., return of funds and release of security interest) is the debtor required to tender the property or its reasonable value. *Id.* Finally, Congress noted that the order of the procedures in this section “shall apply except when otherwise ordered by a court.” Thus, without court intervention, on its face, TILA provides a three step process for rescission: (1) the borrower sends the notice; (2) the lender releases the mortgage; and (3) the borrower returns the funds when they receive the notice.

Despite this plain language, many courts have held that rescission was still first conditioned upon a return of funds. *See Yamamoto v. Bank of New York*, 329 F.3d 1167, 1171 (9th Cir. 2003) (holding that rescission under TILA “should be conditioned on repayment of the amounts advanced by the lender” and explaining that, because rescission is a remedy that restores the status quo ante, a borrower seeking rescission is required to tender the loan proceeds). In practice, many courts have noted that to require a release of security before funds were returned would be inequitable, as most borrowers would not be in a position to return those funds. This follows the procedure of rescission at common law, which requires the return of funds prior to a release of any security interest.

In *Jesinoski*, the Supreme Court held that § 1635(f)’s plain language “leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind.” *Jesinoski* at Slip Op. 3. “It follows that, so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years.”

The Court could have stopped there, as it addressed the question before it. However, it went on to hold that the plain language of TILA also “disclaims the common-law condition precedent to rescission at law that the borrower [first]

tender the proceeds received under the transaction. 15 U. S. C. §1635(b).” It further explained that “the negation of rescission-at-law’s tender requirement hardly implies that the Act codifies rescission in equity.” *Jesinoski* at 4. In sticking to a textual interpretation of the Act, the Court noted that “[t]he clear import of §1635(a) is that a borrower need only provide written notice to a lender in order to exercise his right to rescind. To the extent §1635(b) alters the traditional process for unwinding such a unilaterally rescinded transaction, this is simply a case in which statutory law modifies common-law practice.” *Id.* at 5.

In light of the *Jesinoski* decision, lenders now face the question of how to handle rescission notices received more than three days after the close of a transaction that is subject to rescission. Must a lender release its lien within 20 days of receiving the notice and risk losing its lien priority, even if it has not received the funds? What if the lender disagrees with the borrower’s argument that the lender failed to provide the requisite disclosures, and thus rescission should not be available? Must a lender file a declaration suit within 20 days of receipt of such a letter to protect its interest? Should a suit be immediately filed seeking to reverse the steps outlined in § 1635(b)? Will ignoring such notices cause lenders to lose their liens? What internal policies and procedures will the Consumer Financial Protection Bureau be looking for lenders to establish in light of *Jesinoski*? Going forward, lenders will need to find internal answers to these questions, and unfortunately, the solutions will not be easy.

Imminent Restrictions on Arbitration Provisions in Consumer Financial Contracts Foreshadowed by the CFPB’s Arbitration Study

By Amy Jonker, Dykema Gossett PLLC

In March, the Consumer Financial Protection Bureau (the “CFPB”) released its 728-page Arbitration Study (the “Study”)¹ in which it claims to have conducted an empirical analysis of the use of arbitration agreements for consumer financial products and services. The Study concludes that arbitration agreements are detrimental to consumers and is expected to result in significant restrictions on the use of arbitration and class-action waivers in consumer contracts, especially for companies that operate retail-banking units.

Background

Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”) provided the mandate for the CFPB to conduct the Study and empowers the CFPB to “prohibit or impose conditions or limitations” on the use of pre-dispute arbitration agreements for consumer financial products and services. The Act also prohibits arbitration clauses in most residential mortgage loan contracts and gives the Securities and Exchange Commission authority to prohibit or restrict the enforcement of arbitration clauses for certain disputes.

This legislative push against arbitration was likely a reaction to the United States Supreme Court’s ruling in *AT&T v. Conception*, 131 S.Ct. 1740, 1747 (2011), which allowed class arbitration waivers in consumer agreements. Arbitration as an alternative dispute resolution option is intended to be an informal, efficient, streamlined proceeding that is tailored to the type of dispute and can provide faster and better dispute resolution than a lawsuit. “Judicial hostility towards arbitration prompted the creation of the [FAA]” which was “designed to promote arbitration and embodies national policy favoring arbitration.” *Conception*, 131 S.Ct. at 1747, 1749. Since the Federal Arbitration Act (the “FAA”) was enacted in 1925, courts have recognized the value in arbitration. Now, it is the CFPB that is hostile towards arbitration.

The Study

The tone of the press release² for the Study is unfavorable towards arbitration, and the Study itself seems geared towards the conclusion that arbitration is, at best, disadvantageous to consumers and is overall damaging to them. The Study presents numerous figures, but the CFPB has focused on some of the bigger numbers in an apparent attempt to justify its impending arbitration restrictions. The CFPB asserts that 53% of credit card accounts, 44% of insured deposits, and 86% of private student loans are subject to arbitration clauses. With those expansive-sounding percentages, the CFPB claims that tens of millions of consumers are covered by arbitration clauses. The CFPB further asserts that 160 million consumers were eligible for relief through class action settlements during the time period covered by the Study.

While the CFPB has focused on those vast numbers, it’s the smaller numbers in the Study that demonstrate that the current conflict resolution system for consumer financial services complaints (including arbitration) is operating effectively and fairly. The Study states that consumers filed on average 600 arbitration cases and 1,200 individual lawsuits during each of the five years of the Study and estimates that more 25% of those were actually filed by the companies. So, of the tens of millions of consumers who use consumer financial products and services each year, only about 1,350 per year have an unresolved dispute that they believe required third party resolution. This suggests that consumer financial services providers have done exceptionally well at resolving disputes with their customers and contradicts the notion that the industry requires sweeping change.

¹ Available at http://files.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf.

² *Id.*

The Study also seems to ignore the benefits of arbitration to consumers. Arbitration is typically faster than litigation (2-7 months vs. 1-2+ years for lawsuits). CITE??? Arbitration is generally more economical for consumers because the fees a consumer pays are capped or waived and often the company pays the majority of (and sometimes all of) the fees, as opposed to the \$350 lawsuit filing fee. CITE??? Arbitrations are more congenial than lawsuits because they frequently are conducted in person and by arbitrators who are committed to shepherding the parties through a less combative resolution process. According to the Study, arbitration also provided awards that likely were just as high, if not higher, than what consumers get when they file individual lawsuits. For arbitrations with ascertainable outcomes in favor of the consumer, the Study shows that the consumer received on average over \$5,000.00. Of the individual lawsuits filed, only two in the Study went to trial, one of which resulted in company liability, and nearly half resulted in settlement, presumably with a benefit to the consumers. The Study does not provide any information about those lawsuits (such as which statutes they were brought under) so it's impossible to know anything about what benefits those settlements provided to consumers.

Class Action Waivers

The CFPB claims that the Study shows that arbitration clauses are a barrier to consumer class actions. The CFPB's press release about the Study claims that credit card companies invoked arbitration clauses to block class actions in approximately two-thirds of consumer class actions. While that number may seem shocking, the CFPB fails to provide the context for that statistic: in only 17% of *all* the putative class actions (not just credit card class actions) did a consumer financial services company move to compel arbitration, and less than half of those motions were granted. So roughly 8% of consumer class actions were forced into arbitration, truly marginal amount.

While the CFPB may choose to focus on credit card arbitration clauses in an attempt to justify its inevitable prohibition on class action waivers, it cannot ignore the minimal returns class actions provide consumers. Of the class actions included in the Study, 25% were resolved through individual settlement and 35% were withdrawn or dismissed. Thus, 60% of the class actions filed provided the class consumers nothing. None went to trial. Only 12% reached class settlement.

In class settlements, consumers typically obtain little benefit. The Study claims that 160 million class members were eligible for \$2.7 billion in awards. While those enormous numbers sound impressive, 18% of that went to the plaintiff's attorneys, giving them hundreds of millions of dollars and leaving an average of \$13.83 in awards per consumer. It took on average about two years for settlements to be approved.

Those numbers are further supported by another class action study, Mayer Brown LLP's *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 11, 2013).³ In that study, of the 148 consumer and employee class actions included, none went to trial, two-thirds did not provide any class relief or award and only 20% settled.

The real class action winners are clear from the Study: plaintiff-side attorneys received \$424,495,451 in fees for class settlements. If the CFPB really wants to level the playing field, it should consider addressing the issue of out-sized plaintiff attorney's fees claims and awards in consumer class actions, as the Seventh Circuit recently has in *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014), *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014), and *Pearson v. NBTY, Inc.*, No. 12-1245, 2014 WL 6466128 (7th Cir. Nov. 19, 2014).

Overall, the Study fails to provide information about actual experiences of consumers who have gone through arbitration, does not acknowledge that plaintiff's attorneys reap unproportionally high fees in consumer class actions, fails to consider the risk of "in terrorem" settlements that class actions entail, and does not recognize

³ Available at <http://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf>.

that consumers need more financial education about the benefits of arbitration and how consumer financial services contracts work (such as opting out of arbitration clauses).

Given the likelihood that the CFPB will use its power to prohibit arbitration clauses and class action waivers in consumer financial contracts, a new wave of class action lawsuits can be expected. Companies would be well-advised to maximize customer satisfaction, understand customers' complaints and their financial impact, and resolve consumer grievances before they escalate to litigation.