Leadership Message

Dear CFSC Members:

Smooth transitions are important, not just in writing, but in life, and in leadership. After the Annual Meeting in Chicago, the leadership of the CFSC will transition from the current leadership to new leaders. Andrew Smith, a partner at Covington and Burling, will replace me as Chair of the CFSC. Let me tell you a little about Andrew and why I think he will be an exceptional leader.

Andrew has been practicing for more than 20 years, and earlier in his career served in senior supervisory and policy-making positions at the FTC and the Securities and Exchange Commission. As a partner at Covington, Andrew represents financial institutions before federal and state agencies, including the FTC and CFPB, and advises clients on privacy, credit reporting, electronic commerce, and UDAAP and related trade practices requirements.

You all may know Andrew from his long involvement in the CFSC. Over the last 10 years, Andrew has served as the Vice Chair and Chair of the Federal and State Trade Practices Subcommittee, and for the past three years has served as Vice Chair of the CFSC. As Vice Chair, Andrew has planned and moderated CLE programs and has advised on CFSC contributions to the BLS. Andrew also has chaired the National Institute for Consumer Financial Services Basics, chaired the ABA task force that successfully challenged the application of the Red Flags Rule to the legal profession, and for the last nine years has been a contributing author to the Business Lawyer’s Annual Survey of Consumer Finance Law.

Because Andrew has represented industry and consumers, he is well positioned to lead the CFSC carrying out its mission to educate our members from all perspectives and welcome members from industry, the government, the judiciary, academia, and consumer advocates. Andrew’s extensive knowledge of all aspects of consumer financial services will provide the basis for strong substantive programming. His focus on diversity will support the ABA’s commitment to inclusion. His motivation will ensure the committee’s success.

Read More...

Pro Bono Article

Everyone’s Doing It: Pro-Bono is all around
By Shahrazad Kojouri, New Penn Financial

In June 2013 I left my in-house corporate role to work pro-bono in Cambodia for a year and a half. It is one of the craziest and best decisions I ever made. As a compulsive volunteer, this move didn’t come as a shock to those close to me. But it did open my eyes to the power of my legal education and training, in areas beyond what my resume showed. Technically, I knew financial institution regulations and compliance. Within weeks of arrival in Cambodia!
Cambodia, I found myself helping with prosecution of pimps and traffickers, working on corruption cases against government officials, and helping to draft proposed law on undercover investigations. I felt like a lifelong runner deciding to do a triathlon. I started using muscles I hadn’t really used before and it felt great. One of the biggest catalysts for my work in Cambodia was hearing Chris Romjue of Arts Aftercare say, “Do what you love to undo what you hate.” I love being an attorney. I love problem solving. I love the way my legal education and work have shaped the way I can figure out almost anything tossed my way. I hate exploitation of the vulnerable. I hate the concept of any member of society being considered disposable. So off I went to offer up my services however I could.

Since returning in October 2014, the most common thing most people say about that decision is "wow, I could never do that, but I'd love to be able to help like that.” Now, I don’t think everyone should be quitting their jobs and moving to the developing world; but I do think we should all help the world around us in some way. A friend and fellow attorney (Jennifer Seme of Gibbons P.C. in Philadelphia) echoed my philosophy when she told me "I really believe that practicing law is a privilege. Along with the privilege comes the duty to give back, not only to our profession, but to the communities in which we live and work."

Legal Features

Service Providers Under the Spotlight: Is Anything Out-of-Bounds for the CFPB?
By Brett M. Kitt, Greenberg Traurig, LLP

Among the most significant doctrines that the CFPB articulates and applies is that it will not permit consumers to suffer harm as a result of decisions made by providers of consumer financial goods and services to outsource key aspects of their businesses to third party service providers. This article briefly explores this doctrine, its rationale, its application in various enforcement actions, and its continuing evolution.

The CFPB’s service provider doctrine is rooted in a concern that, all too often, businesses do not hold their service providers accountable for compliance with federal consumer financial laws to the same extent as they do their own employees. Indeed, businesses often do not vet service providers to determine their capabilities and regulations for compliance. Furthermore, businesses often do not insist that their contracts with service providers permit them to monitor service providers for compliance or impose consequences for non-compliance. To the extent that liability arises from the conduct of service providers, these contracts also tend to minimize ultimate responsibility for service providers’ misconduct, by including that service providers will indemnify businesses for liability for such misconduct. In these circumstances, the CFPB is concerned that service providers have few incentives to treat consumers properly and that businesses have few incentives to ensure that service providers do so.

The FCC Releases Its Long-Awaited TCPA Ruling: Trade Associations and Businesses File For Review
By Zachary D. Miller, Burr & Forman, LLP

The Ruling

After receiving dozens of petitions from legitimate businesses requesting clarity and a common-sense approach to interpretation of the Telephone Consumer Protection Act ("TCPA"), the FCC responded by attempting to increase consumer protection provided by the statute. Late in the day on Friday, July 10, 2015, the Federal Communications Commission ("FCC") issued a sweeping and unprecedented Declaratory Ruling and

Updates in Housing Finance: Post-Jesinoski:HUD HECM Non-Borrower Surviving Spouse: RESPA § 8; Stripping Junior Liens in Bankruptcy
By Christine Acree, Ellie Mae, Inc.

Here are the highlights from the Updates in Housing Finance presentation at the ABA Business Law Section Spring 2015 Meeting in San Francisco. Panelists included Joshua Weinberg with First Choice Bank in San Francisco, Sabrina Rose-Smith with Goodwin Procter LLP in Washington, D.C., and Nina Simon of Nina Simon Law in Washington, D.C.

Post-Jesinoski

Jesinoski v. Countrywide Home Loans, Inc. held that a borrower exercising his right to rescind under the Truth In Lending Act (TILA) need only provide written notice to his lender within the 3-year period, not file suit within that period.
Order (hereinafter, the "Order") that expanded the scope of the TCPA. See In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72 (released July 10, 2015). The FCC was sharply divided. Most of the Order's provisions were decided in a 3-2 vote, with the majority approving expansion of the FCC's prior orders and the minority seeking to only strengthen provisions governing telemarketing, and provide clarity to creditors and businesses seeking to contact customers with whom they already are servicing accounts. Each commissioner issued a separate statement. Chairman Wheeler proclaimed that "Today we help Americans hang up on nuisance calls," whereas Commissioner Pai recognized the problematic position that the FCC has taken, stating: "Rather than focus on the illegal telemarketing calls that consumers really care about, the Order twists the law's words even further to target useful communications between legitimate businesses and their customers." While the 81-page Order addresses numerous TCPA issues, following is a summary of the four major developments.
2015 Annual Meeting Chair’s Letter

Dear CFSC Members:

Smooth transitions are important, not just in writing, but in life, and in leadership. After the Annual Meeting in Chicago, the leadership of the CFSC will transition from the current leadership to new leaders. Andrew Smith, a partner at Covington and Burling, will replace me as Chair of the CFSC. Let me tell you a little about Andrew and why I think he will be an exceptional leader.

Andrew has been practicing for more than 20 years, and earlier in his career served in senior supervisory and policy-making positions at the FTC and the Securities and Exchange Commission. As a partner at Covington, Andrew represents financial institutions before federal and state agencies, including the FTC and CFPB, and advises clients on privacy, credit reporting, electronic commerce, and UDAAP and related trade practices requirements.

You all may know Andrew from his long involvement in the CFSC. Over the last 10 years, Andrew has served as the Vice Chair and Chair of the Federal and State Trade Practices Subcommittee, and for the past three years has served as Vice Chair of the CFSC. As Vice Chair, Andrew has planned and moderated CLE programs and has advised on CFSC contributions to the BLS. Andrew also has chaired the National Institute for Consumer Financial Services Basics, chaired the ABA task force that successfully challenged the application of the Red Flags Rule to the legal profession, and for the last nine years has been a contributing author to the Business Lawyer’s Annual Survey of Consumer Finance Law.

Because Andrew has represented industry and consumers, he is well positioned to lead the CFSC carrying out its mission to educate our members from all perspectives and welcome members from industry, the government, the judiciary, academia, and consumer advocates. Andrew’s extensive knowledge of all aspects of consumer financial services will provide the basis for strong substantive programming. His focus on diversity will support the ABA’s commitment to inclusion. His motivation will ensure the committee’s success.

I look forward to seeing what Andrew’s experience and enthusiasm will add to the CFSC and wish him the best of luck.

Veronica McGregor, Lynette Hotchkiss, and Tom Buiteweg will replace current Vice Chairs Jim Brown, Julie Caggiano, and Andrew Smith.

Veronica, a partner in the San Francisco Office of Hogan Lovells, brings international experience in the most cutting edge financial services areas, including payment systems, virtual and cryptocurrencies, mobile banking, mobile payments and m-commerce. Veronica has served as Vice Chair and Chair of Electronic Financial Services and Digital Currency. Her intelligence and innovation make Veronica a great lawyer. Her creativity
and compassion make Veronica a great leader. She also plans fantastic parties, so I expect our social events will be unmatched and super fun!

Lynette Hotchkiss, Associate General Counsel at Rabobank, is a strong lawyer, who, for much of her career, has used her knowledge and experience in consumer finance to build compliance tools to help financial institutions comply with the complex array of federal and state requirements. Lynette has served as the Vice Chair and Chair of the Truth in Lending Subcommittee, co-chaired the Programs Subcommittee, and has chaired the National Institute for Consumer Financial Services Basics. Lynette is one of the hardest workers I know. She is attentive to detail and thoughtful. Lynette has a way of making those in her company feel welcome and comfortable. She has mentored many young lawyers and will surely foster the inclusive atmosphere we’ve created at the CFSC.

Tom Buiteweg, a partner in the Michigan office of Hudson Cook, practices primarily in the area of auto finance. Tom is an adjunct professor at the University of Michigan Law School, where he teaches sales and secured financing. He also serves as a Michigan Uniform Law Commissioner and is a member of the executive committee of the National Conference of Commissioners of Uniform State Laws. Tom chaired the Personal Property Subcommittee and served as Vice Chair of the UCC Committee. Tom is the perfect combination of intelligence and humility. He is a teacher at his core, and his willingness to educate will strengthen CFSC programming. He’s the only person I know who can talk about the UCC over a craft beer and make it interesting.

While I say goodbye as your leader, I know that I have left the CFSC in good hands. I thank the many people who have supported me in leadership over the past three years, including the past chairs of the committee, Jim, and Julie. You have each served as my guides as we tried to make the CFSC the best committee in the Business Law Section and the American Bar Association. We are well on that path.

I hope that in some small way, through our programming, newsletters, scholarly articles, networking opportunities, and other efforts, we have been able to help you – the members – learn, grow as lawyers, and succeed in your practices. This has been an amazing journey for me, and I am grateful for the opportunity to lead such an impressive group of lawyers through what has been a seismic shift in consumer financial services law.

Hope to see you in Chicago at the Annual Meeting!

Fondly,

Nikki Munro
Chair, Consumer Financial Services Committee
Everyone’s Doing It: Pro-Bono is all around.

By: Shahrzad Kojouri, New Penn Financial

In June 2013 I left my in-house corporate role to work pro-bono in Cambodia for a year and a half. It is one of the craziest and best decisions I ever made. As a compulsive volunteer, this move didn’t come as a shock to those close to me. But it did open my eyes to the power of my legal education and training, in areas beyond what my resume showed. Technically, I knew financial institution regulations and compliance. Within weeks of arrival in Cambodia, I found myself helping with prosecution of pimps and traffickers; working on corruption cases against government officials, and helping to draft proposed law on undercover investigations. I felt like a lifelong runner deciding to do a triathlon. I started using muscles I hadn’t really pushed before and it felt great. One of the biggest catalysts for my work in Cambodia was hearing Chris Romjue of Arts Aftercare say, “Do what you love to undo what you hate.” I love being an attorney. I love problem solving. I love the way my legal education and work have shaped the way I can figure out almost anything tossed my way. I hate exploitation of the vulnerable. I hate the concept of any member of society being considered disposable. So off I went to offer up my services however I could.

Since returning in October 2014, the most common thing most people say about that decision is “wow, I could never do that, but I’d love to be able to help like that.” Now, I don’t think everyone should be quitting their jobs and moving to the developing world; but I do think we should all help the world around us in some way. A friend and fellow attorney (Jennifer Seme of Gibbons P.C. in Philadelphia) echoed my philosophy when she told me “I really believe that practicing law is a privilege. Along with the privilege comes the duty to give back, not only to our profession, but to the communities in which we live and work.”

As attorneys we have skills the world needs on so many levels, it almost makes it hard not to help. The benefit runs two ways as well. On one end pro bono work not only benefits the specific project or person in need, but our actions of ripple effects of rebuilding lives and communities that touch others. On the other hand pro bono work helps sharpen skills you might not get to use in your regular practice. It can allow you to work in an area you are passionate about, but can’t seem to get someone to pay you for. Since returning to the practice of law in the US, I’ve learned of countless ways many attorneys are serving the world around them. Below are just a few brief examples of what I’ve seen.

Jennifer Seme, mentioned above, is a products liability litigator but the work she does with the Homeless Advocacy Project and a local women’s shelter are a far cry from her daily work at her firm. She handles everything from custody issues, landlord/tenant disputes, identity theft, expungements, social security disability claims, special education issues, benefits for veterans and anything else that may pop up. Jennifer says the ability to help people, who are often “lost in the mix,” put their lives back in order is why she’s such an advocate of pro bono work.
Tracy Warga, a General Counsel in Delaware, drafts Power of Attorneys and Wills for minimum wage employees that would otherwise not be able to have these documents in place for their loved ones. She saw a need among her company’s hourly employees and approached her company President to get permission to offer her services pro bono to them. It’s a simple task, on her end, that provides a lot of peace of mind and protection for people who may not have otherwise been able to have it.

Jamie Bischoff, a partner at Ballard Spahr in Philadelphia, focuses her practice on intellectual property law. However, she’s been working pro bono with the Mural Arts Project (“MAP”) for almost 30 years after she happened to meet the woman trying to grow the project that was targeted at fighting graffiti, community deterioration, and violence throughout the city. Since then, Jamie was able to secure the support of her firm and between herself and her colleagues provide tax expertise to secure 501(c)(3) status, labor & employment advice to help overhaul the contracts MAP uses with the many artists, and real estate expertise to help with the unique real estate and land use issues that arise with each mural. Looking at the fruits of this service she has provided, Jamie says: “When I see how many other cities and nonprofits are looking to MAP for guidance on building an arts program that actually—really truly—has a measurable impact on the life of the city, and the lives lived in that city, I feel a burst of pride and happiness because I had the chance to help with various aspects of MAP's growth and its fast-moving progress.”

Erin Simmons, a corporate litigator for Skadden Arps in New York City, finds that she can serve her community by offering advice related to family law, education, and access to justice throughout the city. Some of her cases are referred to her by non-profit relationships her firm has, but she has also provided pro bono work as a result of relationships throughout the city and even just meeting someone at an event.

Jennifer Strobel, a US JAG attorney, loves that she gets paid to advise commanders in the military. However, her pro bono work serves her other passion. She represents children in need of services. She has personally built relationships with several local non-profits and receives cases from them. Her pro bono work for these non-profits ranges from domestic violence or sexual assault protection, various family law issues, to other areas of legal aid that arise on a case by case basis.

Bill Newman, a Pennsylvania general practice attorney, has a long standing relationship with the Child Advocacy Project in Montgomery County, PA. He loves being able to represent child victims and “give them a voice where they otherwise might not get their voice heard.”

Throughout the country I know attorneys working at bigger firms, running their own firms, working in-house and some not actually practicing law that offer up their legal skills to better their communities. These attorneys are involved in various justice initiatives, grassroots campaigns and community development. Each of them shares the same sentiment that it’s hard not to offer up their services pro bono to the world around them.

So what pro bono work am I up to these days? Well, I’m currently helping a group of people create a B-Corp that will be a U.S. distributor of coffee. The coffee is sourced from a plantation created as a social
enterprise creating employment and training for people coming out of various forms of exploitation and all the funds from the US distributor will go towards funding a women’s shelter in the U.S.

There’s a whole world to be involved with and it’s as close as your neighbor or as far as remote villages of Cambodia. It can be a project you work with for almost 30 years. It can be an hour of your time to a person in need. You can meet with people and work one on one, if you feel trapped in an office all day. You can draft or review documents from the comfort of your own home. The question isn’t if you can get involved, but how. How will you?
Jeremiah S. Buckley: From Participating in the Birth of Consumer Financial Services Laws to Shaping the Future of the Industry

By: Shara M. Chang, BuckleySandler LLP

Regarded as “a recognized dean of the consumer finance bar,” by Chambers USA, Jeremiah “Jerry” Buckley has long been considered a leading practitioner in consumer financial services law. While working on the staff of the U.S. Senate Banking Committee in the 1970’s, Jerry witnessed the birth of many of the key consumer financial services laws, and participated in drafting several of them. In his distinguished 45-year career, Jerry worked in public service, Congressional staff positions, and private practice in leading law firms. He is a senior founding partner of BuckleySandler LLP, a 165-lawyer firm with offices in Washington, Los Angeles, New York, Chicago and London.

Jerry’s decision to attend the University of Virginia Law School was influenced by his interest in public policy and politics. After graduating from the Law School in 1969, Jerry started his legal career as a public interest attorney with Volunteers in Service to America (VISTA), where he focused on housing issues in Detroit, Michigan. Jerry represented nonprofits providing inner-city housing and served as counsel for the Detroit Model Cities Governing Board.

In the early 1970’s, while working as counsel for the House Government Operations Committee, Jerry staffed an investigation of the FHA housing crisis and drafted a report that was the subject of an in depth program on CBS’s 60 Minutes. During his time on the House Committee staff, Jerry also assisted Subcommittee Chairman John Monagan (D, Conn.) in drafting and the successful enactment of the Federal Advisory Committee Act, which remains the principal guide for the operation of thousands of advisory committees to Federal departments and agencies.

In the mid-1970’s, serving as Republican Staff Director of the Senate Banking Committee, Jerry participated in drafting housing legislation, bank holding company and bank legislation, securities law amendments, and consumer financial services laws, including the Real Estate Settlement Procedures Act (RESPA), the Home Mortgage Disclosure Act (HMDA), the Community Reinvestment Act (CRA), the Equal Credit Opportunity Act (ECOA), the Fair Credit Reporting Act (FCRA), the Foreign Corrupt Practices Act (FCPA), and Truth in Lending Act amendments. At the Senate Banking Committee, Buckley, working under Ranking Republican Senator Edward Brooke, engaged in bipartisan efforts with Senator William Proxmire’s staff to craft consumer protection and housing legislation. The Brooke-Cranston bill, which Jerry helped to craft, was endorsed by President Ford in his State of the Union Address and was enacted into law, providing significant financing assistance for single and multifamily housing. Jerry also, on behalf of Senator Brooke, took principal Senate staff responsibility for crafting the Section 8 Housing Assistance program that has provided most of the subsidized housing assistance to low and moderate income households over the last 40 years.

Jerry’s approach to leadership was influenced by his boss on the Senate Banking Committee, the late Senator Edward W. Brooke, the first African-American elected to the US Senate since Reconstruction. Jerry praised Senator Brooke for his ability to move an audience, his insightful approach to the legislative process, and his effective, yet non-coercive, power of persuasion.
Noting Senator Brooke’s extraordinary ability to connect with people, Jerry fondly recalls one lesson in leadership he received from the Senator, “honey attracts more flies than vinegar.”

Jerry is a pioneer of the law of electronic delivery of financial services and a leading authority on electronic signatures and records. He was instrumental in urging passage of the E-SIGN Act and his book, The Law of Electronic Signatures and Records (co-authored with his partners at BuckleySandler) is one of the first legal treatises on electronic signatures. He also helped organize the Electronic Signatures and Records Association, the premier trade association for electronic signature adopters. Having spent a great deal of time promoting the use of electronic records in financial services, Jerry believes that the industry has yet to realize the full benefits of this medium, particularly as it relates to disclosures. He remains of the view that electronic interactive media holds the key to making meaningful and understandable disclosures of the kind that would have been embraced if the technology had existed at the birth of key consumer financial services laws.

Jerry is a teacher and mentor who contributes his time and talents to educating future lawyers. He teaches consumer financial services law at American University’s Washington College of Law, and in 2013, he lectured on American civil procedure at the China Foreign Affairs Institute in Beijing, China. His book, Introduction to Mortgage Lending, written with his dear friend and colleague Andrea Lee Negroni for the American Bankers Association, is used to train bank loan officers about the legal environment facing residential mortgage lenders.

I asked Jerry to share words of advice for young lawyers practicing in the consumer financial services space. Jerry opined that, while the area of consumer financial services will remain important, we will likely witness a critical transformation. For example, it remains to be seen whether consumers a few years from now will have access to as wide an array of financial services as they do now and whether they will be better protected. As this area continues to evolve, it will be important for young lawyers to develop expertise by representing clients in both advisory and enforcement matters. Additionally, young lawyers should strive to become “go-to lawyers” by choosing specific statutes or areas of the law where they are recognized as thought leaders, by publishing articles, and by participating in Bar Association committees. Buckley advised that young lawyers should seek to serve clients by providing practical, actionable and timely advice that reflects an understanding of the client’s business needs, while at the same time having the courage to caution the client not to stretch the law too far in order to achieve their business objectives. Helping clients understand risk is something that in-house counsel and their business colleagues value.

Earlier this year, in his native city of San Francisco, Jerry was presented with the Senator William Proxmire Lifetime Achievement Award from the American College of Consumer Financial Services Lawyers. Jerry’s parents were married in Old St. Mary’s Church in Chinatown. Jerry was born in San Francisco Children’s Hospital and lived in the Marina district until he was about a year old, when he moved to Connecticut.

This July, Jerry was elected Chancellor of Washington’s Exchequer Club. A longstanding member of the Club, Jerry recently served as Vice-Chancellor. The Exchequer Club was formed in 1960 for the purpose of providing an open forum for industry leaders to discuss national
economic, financial, and political matters. Jerry has chaired the Subcommittee on RESPA of the American Bar Association Consumer Financial Services Committee.

Jerry has been selected as a “Super Lawyer,” a “Best Lawyer,” and a “Who’s Who” Lawyer by various publications, and was one of only 114 attorneys nationwide named to the “2005 BTI Client Service All-Stars” team for law firms. In 2014, *Chambers USA* named Jerry a Senior Statesman in Financial Services Regulation.

His entrepreneurial drive led to the creation of new resources for financial providers and attorneys, including the State Attorneys General Enforcement (STAGE) Network and Treliant Risk Advisors, a leading consulting firm for the banking industry.

Jerry serves on the board of the Youth Leadership Foundation, a nonprofit which works with inner-city Washington youth promoting learning, character formation, and financial literacy. Jerry contributes significantly to his community through his involvement with other nonprofits and charities such as the Global Good Fund, a charity focused on developing the skills of promising young social entrepreneurs in the United States and around the world.

Jerry is admired not only professionally, but for the strength of his personal relationships, of which the most important is his 32-year marriage to Debbie. For many years, Jerry and Debbie have conducted marriage prep classes for couples to be married in the Catholic Church. The Buckleys have three adult daughters; twins Greta and Anne, and Mary, who was married in May of this year and is working as an epidemiologist in Baltimore where her husband is a pediatric resident at the Johns Hopkins University Hospital.

Jerry likes to spend time off at his family farm in Virginia’s Shenandoah Valley, where he and his wife and children have spent many weekends over the last 30 years.
Service Providers Under the Spotlight: Is Anything Out-of-Bounds for the CFPB?

By Brett M. Kitt, Greenberg Traurig, LLP

Among the most significant doctrines that the CFPB articulates and applies is that it will not permit consumers to suffer harm as a result of decisions made by providers of consumer financial goods and services to outsource key aspects of their businesses to third party service providers. This article briefly explores this doctrine, its rationale, its application in various enforcement actions, and its continuing evolution.

The CFPB’s service provider doctrine is rooted in a concern that, all too often, businesses do not hold their service providers accountable for compliance with federal consumer financial laws to the same extent as they do their own employees. Indeed, businesses often do not vet service providers to determine their capabilities and reputations for compliance. Furthermore, businesses often do not insist that their contracts with service providers permit them to monitor service providers for compliance or impose consequences for non-compliance. To the extent that liability arises from the conduct of service providers, these contracts also tend to minimize ultimate responsibility for service providers’ misconduct, including by stating that service providers will indemnify businesses for liability for such misconduct. In these circumstances, the CFPB is concerned that service providers have few incentives to treat consumers properly and that businesses have few incentives to ensure that service providers do so.

The CFPB formally articulated its doctrine regarding service provider conduct in Bulletin 2012-03 (Apr. 13, 2012). In this Bulletin, the CFPB warned businesses that it would hold them accountable for their failures to ensure that their service providers comply with federal consumer financial laws and avoid consumer harms. To avoid the prospect of such liability, the Bulletin instructed businesses to, among other things: (1) conduct thorough due diligence of service providers; (2) review service providers’ compliance policies, procedures, internal controls, and training materials; (3) include clear compliance expectations in service provider contracts as well as appropriate and enforceable consequences for non-compliance; (4) regularly monitor service providers for compliance; and (5) take prompt and appropriate action for non-compliance, up to and including termination of contracts.

In the Bulletin, the CFPB also warned service providers that, pursuant to its authority set forth in the Consumer Financial Protection Act (“CFPA”), the CFPB would hold them directly accountable for their misconduct as well.

Since the CFPB issued Bulletin 2012-03, it has amassed a substantial docket of supervisory and law enforcement actions that contain allegations of both service provider misconduct and the failure of businesses to prevent, detect, or address such misconduct appropriately. Indeed, the summaries of supervisory activities that the CFPB’s Office of Supervision publishes periodically are replete with examples of alleged failures by businesses to oversee the work of their service providers.

---

1 See Pub. L. No. 111-203, Title X, §§ 1002(26)(C), 1024(e), 1025(d), 1031(a) (Jul. 21, 2010).
Numerous law enforcement actions also apply the doctrine. In several cases, the CFPB cited depository institutions when the call centers they hired to sell add-on products to consumers, such as credit monitoring and identity theft protection products, allegedly deceived consumers about the benefits of such services and their eligibility for them. The CFPB also held firms responsible for failing to prevent, detect, or address deceptive or otherwise illegal debt collection activities that third party debt collectors conducted on their behalf. In yet another case, the CFPB held an auto finance company responsible for its failure to ensure that a software vendor took timely steps to correct a bug that resulted in the company furnishing to credit reporting agencies inaccurate credit reporting data. Moreover, in each of these enforcement actions, the CFPB imposed civil monetary penalties that it insisted be paid by the businesses themselves, regardless of any contractual indemnification provisions or insurance proceeds that were otherwise available to cover the penalties.

As a result of the Bulletin and these subsequent supervisory and enforcement actions, one would expect the industry to now have a clear appreciation for the CFPB’s concerns and expectations regarding service providers. Nevertheless, one recent CFPB enforcement action demonstrates that the CFPB continues to expand the scope of its service provider doctrine in ways that are surprising and bold.

In CFPB v. Universal Debt & Payment Solutions, LLC, et al., the CFPB cited a telemarketing firm for allegedly facilitating illegal conduct by phantom debt collectors when it “provided the debt collectors with the ability to effortlessly broadcast millions of threatening and false statements to consumers in telephone messages” – messages that the firm allegedly knew or

---


4 See Consent Order, In the Matter of ACE Cash Express, Inc., 2014-CFPB-008 (Jul. 10, 2014) (“ACE controlled its third-party debt collectors according to the terms of its third-party vendor contracts. … ACE’s compliance monitoring, vendor management, and quality assurance did not prevent, identify, or correct instances of misconduct by some third-party debt collectors.”)

should have known were “unfair or deceptive, and materially contributed to the [debt collectors’] scheme.”

*Universal Debt* represents a significant extension of the CFPB’s service provider doctrine. Rather than simply demand that service providers comply with federal consumer financial laws and that businesses actively ensure such compliance, this action suggests that the CFPB now also expects service providers to ensure that their business clients comply with federal consumer financial laws, lest the CFPB will deem such service providers to be facilitating or legitimizing the businesses’ misconduct. Although the CFPB seemingly had no qualms about extending the service provider doctrine in this manner, doing so was arguably improper and unreasonable.

It was improper because the CFPA excludes from the definition of a “service provider” a “support service of a type provided to businesses generally or a similar ministerial service.” Indeed, many service providers, such as the marketing firm at issue in *Universal Debt*, do not exclusively work for clients in the consumer finance industry. Rather, they provide general services to clients in a wide variety of industries.

It is also unreasonable for the CFPB to expect service providers to understand and evaluate the legality of all of their clients’ businesses. Service providers often perform discrete services for their clients and have only limited insight into the totality of their clients’ operations outside of these services. Moreover, many of these service providers are small and simple companies rather than large and sophisticated enterprises. As such, these service providers often lack the requisite information, expertise, and resources to evaluate the propriety of their clients’ businesses or the ultimate purposes for which their clients use their services. They also often lack the necessary leverage in their contractual negotiations with clients to insist that clients permit them to perform regulatory due diligence and conduct periodic compliance audits, as the CFPB suggests they do.

The *Universal Debt* case also raises a question of how much further, if at all, the CFPB could extend its service provider doctrine if it chose to do so. The answer is quite a bit further.

Congress granted the CFPB wide latitude in the CFPA to deem entities to be service providers. Indeed, the statute broadly defines a “service provider” to mean “any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service, including those who merely

---

7 See CFPA § 1002(26)(B).
8 Recently, a lead generation company sought to set aside a CFPB civil investigative demand (“CID”) by arguing, among other things, that it provided generic marketing services to clients and therefore did not constitute a “service provider” within the meaning of the CFPA. *See Petition to Modify or Set Aside Demand, In Re Selling Source, LLC, 2015-MSC-Selling Source, LLC-0001, at 3-9 (Jun. 10, 2015).* In the CFPB’s Decision and Order rejecting the company’s petition, the CFPB did not address the merits of this argument directly; rather, it rejected the argument as a substantive defense to allegations that the CFPB did not yet make and because the argument did not constitute a valid defense to the enforcement of the CID. *See Decision and Order on Petition By Selling Source, LLC, and Tim Madsen to Modify or Set Aside Civil Investigative Demand, In Re Selling Source, LLC, 2015-MSC-Selling Source, LLC-0001, at 3 (Aug. 6, 2015).*
“participat[e] in” the design, operation, or maintenance of consumer financial products and services. Theoretically, this definition permits the CFPB to pursue actions against virtually any company that provides even limited, albeit “material,” input, advice or assistance to businesses that arguably violate federal consumer financial laws, including the CFPA’s prohibition against unfair, deceptive, and abusive acts and practices.

Although the CFPB has yet to fully exploit its authority over mere “participants” in schemes perpetrated by clients, one could easily conceive of circumstances in which the CFPB might choose to do so. For example, the CFPB might seek to deter lawyers, consultants, and others from offering business advice or ideas to clients whom the CFPB perceives to be bad actors. It also might do so to pursue so-called “Wizards of Oz” who orchestrate allegedly illegal schemes behind the curtains but who do not themselves constitute “covered persons” subject to the CFPB’s jurisdiction.

The service provider doctrine, and the broad statutory authority that supports it, are powerful tools by which the CFPB can ensure accountability for all entities that materially contribute to the offering or provision of consumer financial products and services. Although one might not fault the CFPB for wielding this tool aggressively, the CFPB should consider whether doing so ultimately serves its own interests and those of consumers. For better or for worse, service providers play a vital role in the markets for consumer financial products and services. If the CFPB moves too forcefully in this area, it risks flushing out the good actors with the bad ones. Indeed, some service providers – and in particular, those that provide general business services, such as marketing and call support – may choose to flee the industry rather than incur the substantial compliance burdens and liability risks that arise from working with it.

Although the CFPB may be nonplussed by such an outcome, and think that consumers would benefit if more businesses perform key services using their own employees, this outcome might actually harm consumers by rendering the provision of these key services less efficient to businesses and ultimately more expensive to consumers. Consumers also may lose the benefit of innovations that service providers offer for competitive purposes but which businesses have few incentives and resources to pursue on their own. Finally, it is not a foregone conclusion that internal employees would perform services more competently and with less risk to consumers than do third parties. Indeed, it is arguable that because businesses often lack experience and expertise in performing these services themselves, they may be in an inferior position to provide services as compared to third parties that provide them routinely and for multiple clients.

---

9. Id. § 1002(26)(A). The definition of “service provider” also includes those who knowingly, and in a non-incidental fashion, process transactions relating to consumer financial products and services. See id. In addition to excluding those who provide only general business services, it also excludes those who merely provide space and time for the advertising of consumer financial products and services. See id. § 1002(26)(B).

10. It is worth noting that the CFPB need not resort to the service provider doctrine to hold such persons accountable. Section 1036(a)(3) of the CFPA provides the CFPB with parallel authority to hold persons accountable to the extent that they knowingly or recklessly provide substantial assistance to a covered person or service provider in violating the prohibition against engaging in unfair, deceptive, or abusive acts and practices.
The FCC Releases Its Long-Awaited TCPA Ruling; Trade Associations and Businesses File For Review

By Zachary D. Miller, Burr & Forman, LLP

The Ruling

After receiving dozens of petitions from legitimate businesses requesting clarity and a common-sense approach to interpretation of the Telephone Consumer Protection Act (“TCPA”), the FCC responded by attempting to increase consumer protection provided by the statute. Late in the day on Friday, July 10, 2015, the Federal Communications Commission (“FCC”) issued a sweeping and unprecedented Declaratory Ruling and Order (hereinafter, the “Order”) that expanded the scope of the TCPA. See In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72 (released July 10, 2015). The FCC was sharply divided. Most of the Order’s provisions were decided in a 3-2 vote, with the majority approving expansion of the FCC’s prior orders and the minority seeking to only strengthen provisions governing telemarketing, and provide clarity to creditors and businesses seeking to contact customers with whom they already are servicing accounts. Each commissioner issued a separate statement. Chairman Wheeler proclaimed that “Today we help Americans hang up on nuisance calls;” whereas Commissioner Pai recognized the problematic position that the FCC has taken, stating: “Rather than focus on the illegal telemarketing calls that consumers really care about, the Order twists the law’s words even further to target useful communications between legitimate businesses and their customers.” While the 81-page Order addresses numerous TCPA issues, following is a summary of the four major developments.

Automatic Telephone Dialing System

Several major provisions of the TCPA attach liability to certain calls made using an “automatic telephone dialing system” (“ATDS”). The TCPA defines an ATDS as: “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” 47 U.S.C. § 227(a)(1). Prior FCC decisions had significantly expanded the scope of the definition of ATDS, interpreting the word “capacity” to mean any system that, through modification or other means, could randomly or sequentially dial a number. See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 F.C.C. Red. 14014, 14091-14093 (2003). While the FCC declined to “address the exact contours of the ‘autodialer’ definition” in the 2015 Ruling, the FCC reaffirmed its prior rulings that “predictive dialers” satisfy the TCPA’s definition of an ATDS and that dialing equipment can have the requisite “capacity” to store or produce, and dial random or sequential numbers, even if the equipment is not presently used for that purpose, such as when calls are made from a set list of customers’ numbers. The FCC also reiterated that the “basic function” of an autodialer is “to dial numbers without human intervention.”

Revocation of Consent

The FCC also used the 2015 Ruling to address (for the first time) the means by which a called party could revoke previously given prior express consent. The FCC acknowledged that “the
TCPA does not speak directly to the issue of revocation,” but concluded that “any silence in the statute as to the right of revocation should be construed in favor of consumers.” The FCC pointed out that permitting revocation of consent was “within the consumer-protection goals of the TCPA” and was consistent with “the well-established common law right to revoke prior consent.” Therefore, the Commission held that “consumers may revoke consent through any reasonable means” and further explained that “consumers may revoke consent in any manner that clearly expresses a desire not to receive further messages, and that callers may not infringe on that ability by designating an exclusive means to revoke.”

Reassigned Telephone Numbers

Perhaps the most challenging aspect of the Commission’s Order is its treatment of reassigned numbers, a recurring problem with calls to cellular telephone numbers. In this section, the FCC “clarif[ies] that the TCPA requires the consent not of the intended recipient of a call, but of the current subscriber (or non-subscriber customary user of the phone) and that caller best practices can facilitate detection of reassignments before calls.” The 2015 Ruling purports to provide a safe harbor of sorts for callers without knowledge of reassignment of a number by providing that, if a caller (a) makes a call without knowledge that a phone number has been reassigned and (b) has a “reasonable basis” to believe that it had valid consent to make the call, then (and only then) may the caller make one call after reassignment, without incurring TCPA liability, in order to “gain actual or constructive knowledge of the reassignment and cease future calls to the new subscriber.” However, “if this one additional call does not yield actual knowledge of reassignment,” the caller is deemed “to have constructive knowledge of such.”

In other words, this safe harbor only covers one call attempt; that is, if a reassigned number is called, and no one answers, then the caller is deemed to have constructive knowledge of the reassignment, and any future calls can result in TCPA liability.

Who is the “Called Party?”

Under the TCPA, it is unlawful to “make any call” using an autodialer or an artificial or prerecorded voice, absent certain exceptions, without the “prior express consent of the called party.” However, the statute does not define the term “called party.” In the 2015 Ruling, the FCC, for the first time, declares the term “called party” to be ambiguous. The FCC therefore declares that “called party” includes “the subscriber, i.e., the consumer assigned the telephone number dialed and billed for the call, or the non-subscriber customary user of a telephone number included in a family or business calling plan.” The FCC found that defining “called party” to include the subscriber or customary user at the time the call was placed to be consistent with the text and the purpose of the TCPA.

The Petitions for Review

After the Order’s issuance, three separate organizations have filed suit against the FCC. The three lawsuits are styled as follows:

- *Professional Association for Customer Engagement, Inc. v. Federal Communications Commission*, Case No. 15-1244 (7th Cir.)
Each of the lawsuits requests judicial review of the Order, arguing that it is arbitrary and capricious, an abuse of discretion, in excess of the FCC’s statutory authority, and otherwise contrary to the Constitution and other laws. Specifically, the ACA’s petition seeks to:

- (1) set aside the FCC’s treatment of “capacity” within the definition of ATDS;
- (2) set aside the FCC’s treatment of predictive dialers and treat them in a way that does not expand the statutory definition of ATDS; and,
- (3) set aside the FCC’s treatment of prior express consent, including the FCC’s treatment of reassigned numbers, and compel the FCC to (A) establish a viable safe harbor for autodialed “wrong number” non-telemarketing calls to reassigned wireless numbers or (B) define “called party” as a call’s intended recipient.

Since filing, the three lawsuits have been consolidated. The U.S. Panel on Multidistrict Litigation randomly selected the U.S. Court of Appeals for D.C. Circuit to hear the matters. As of August 10, 2015, no briefing order had yet been entered.

It is also worth noting that on August 10, 2015, several additional parties sought leave to intervene in the lawsuit or, in the alternative, leave to participate as amici curiae. These purported interveners—Cavalry Portfolio Services, LLC, Diversified Consultants, Inc., and Mercantile Adjustment Bureau, LLC—describe themselves as debt collection agencies, state that they have each made a significant investment in call center technologies and contend that the “actions of the [FCC] in these proceedings significantly affect the ways in which calls can lawfully be made, and make anyone making outbound telephone calls subject to a claim that calls violated the [TCPA], and expose the caller to spurious class action claims that seek to impose ruinous damages invariably prompting extortionate settlements.”

The July 10, 2015 Order aimed to clarify many outstanding issues, but its issuance may have raised more questions than answers. While companies take steps to comply with the latest Ruling, the most critical question is whether the Order will withstand judicial scrutiny. An answer as to the Order’s validity may be a long time coming, but one thing is certain—the Order will only increase the number of TCPA lawsuits currently flooding federal courts.
CFSC Subcommittee Spotlight: Litigation and Arbitration Subcommittee

By R. Scott Adams, Spilman Thomas & Battle

The Litigation and Arbitration Subcommittee focuses on skills and trends that cut across many consumer financial services issues. The Subcommittee is chaired by Dave Melcer (Alliance Data; Columbus) and the Vice Chairs are David Bizar (Seyfarth Shaw; Boston) and Jonathan Ledsky (Varga, Berger, Ledsky, Hayes & Casey; Chicago). The Young Lawyer Liaisons to the committee include Katie Bell (Stites & Harbison, Louisville), Steven Burt (Ballard Spahr, Salt Lake City), and Justin Angelo (Ballard Spahr, New York).

In the last couple of years, the Subcommittee has made a purposeful change to focus on the nuts and bolts of current litigation issues that impact consumer financial services litigation. Because many of the other subcommittees within the CFSC address the specific legislative and regulatory issues and developments, the Litigation and Arbitration Subcommittee has become more focused on how to litigate those issues. Thus, the resulting seminar topics have addressed litigation trends and emerging issues that impact lawyers practicing in this area.

Most recently, at the winter meeting in January 2015, the Litigation and Arbitration Subcommittee focused on HAMP litigation and how to litigate claims that borrowers assert related to loan modification claims and issues. Carrying through this focus on litigating types of cases, the Litigation and Arbitration Subcommittee assembled a panel at the spring meeting regarding homeowner’s association liens. Dave Melcer noted that Young Lawyer Liaisons Katie Bell and Steve Burt assembled and managed this panel on their own and did an excellent job identifying panelists who addressed facets of this issue and recent developments.

At the upcoming fall meeting in September, the Litigation and Arbitration Subcommittee has assembled a presentation on electronic discovery and financial services litigation, with Vice Chair Jon Ledsky taking the lead role on orchestrating the topic and speakers. This discussion will focus on what is peculiar about electronic discovery in the context of financial services matters and how practitioners can work to address these challenges. The Seventh Circuit has a pilot electronic discovery program that may be useful to financial services litigators, and someone will be presenting on that program as part of the panel.

This Subcommittee has been working hard to assemble presentations that allow financial services litigators in the CFSC to learn from each other about developments in this area of law from around the country. The entire CFSC benefits from the excellent content and discussion of important litigation trends and developments that inform our practices.
Updates in Housing Finance: Post-Jesinoski; HUD HECM Non-Borrower Surviving Spouse; RESPA § 8; Stripping Junior Liens in Bankruptcy

By Christine Acree, Senior Product Counsel, Ellie Mae, Inc.

Here are the highlights from the Updates in Housing Finance presentation at the ABA Business Law Section Spring 2015 Meeting in San Francisco. Panelists included Joshua Weinberg with First Choice Bank in San Francisco, Sabrina Rose-Smith with Goodwin Procter LLP in Washington, D.C., and Nina Simon of Nina Simon Law in Washington, D.C.

Post-Jesinoski

Jesinoski v. Countrywide Home Loans, Inc.\(^1\) held that a borrower exercising his right to rescind under the Truth In Lending Act (TILA) need only provide written notice to his lender within the 3-year period, not file suit within that period.\(^2\)

The discussion focused on lending Post-Jesinoski. Members of the panel noted that the TILA reordered common law rescission to not require tender first. The U.S. Supreme Court made it clear that all a borrower needs to do to rescind now is send a notice.\(^3\)

This new decision brought up a lot of questions. A lender has twenty days to acknowledge rescission. The process of unwinding loans is very complicated and becomes even more so the further in time the parties get away from origination. What is the lender supposed to do? Should the lender take affirmative action to dispute the notice? What litigation might ensue? The three year rule implies actual notice was made. Does the borrower have to file suit to enforce rescission? The lender’s one year statute of limitations begins to run after the borrower gives notice. It is a business decision for the lender to make regarding how it wants to respond after it receives notice. The panel also noted that the Court didn’t address what can be done if litigation ensues.

Since the most recent regulations hold the right of rescission to be a defense to foreclosure, this could become an even bigger issue in the future. Lenders need to have systems, technology, policies, and procedures to show evidence of compliance with requirements. Servicers are likely to receive rescission notices after the original lender sold the loan so servicers need to maintain evidence of compliance with legal requirements regarding the delivery of required documentation and data as well. In the case of litigation, a lender should look at its own files to see whether the documentation it has matches that provided by borrowers because this is not always the case.

HUD HECM Non-Borrower Surviving Spouse

The U. S. Department of Housing and Urban Development (HUD)’s Home Equity Conversion Mortgage (HECM) is the most common type of reverse mortgage. Historically, a borrower might leave a spouse off the loan if the spouse was significantly younger because a borrower could get less money if the younger spouse was included on the loan. Mortgage brokers sometimes recommended that the younger spouse execute a quit claim deed to the older spouse and leave the younger spouse off of the mortgage. Then the younger spouse was often shocked to learn that they had to repay the loan shortly after the borrowing spouse’s death or face foreclosure.

---

\(^2\) See Truth in Lending Act, 15 U.S.C. § 1635(a) (2006) (Borrower “shall have the right to rescind . . . by notifying the creditor, in accordance with regulations of the Board, of his intention to do so.”).
\(^3\) Jesinoski, 135 S.Ct. at 793.
The panel mentioned that the statute that created HECM was designed to protect older homeowners and allow them to unlock the equity in their homes so that they could stay in their homes for the rest of their lives. It contained 3 protections: it was a non-recourse loan, provided the borrower with the ability to stay in the home for the lifetime of the borrower and the borrower’s spouse even if the loan balance exceeded the value of the home, and counseling.

There were a couple of key cases at the time of the presentation. Bennett et al. v. Donovan, held that HUD regulations and uniform HECM forms allowing lenders to require non-borrower surviving spouses to immediately repay reverse mortgage loans upon the death of their borrower spouses violate a statutory requirement that reverse mortgage loan obligations must be deferred until the death of the "homeowner." "Homeowner" includes spouse. The case was remanded to HUD. Plunkett v. Castro was a putative class action brought by four non-borrower surviving spouses of reverse mortgage borrowers in an attempt to expand Bennett to apply to all non-borrower surviving spouses. The case was denied class certification without prejudice and remanded to HUD.

HUD issued several mortgagee letters prior to the panel presentation. Effective for all FHA case numbers issued on or after August 4, 2014, Mortgagee Letter (ML) 2014-077 amended the HECM program regulations and requirements concerning due and payable status where there is a non-borrowing spouse at the time of loan closing. ML 2015-02 contained HECM policy guidance and certifications including, among other things, defining a new type of non-borrowing spouse. ML 2015-039 amended regulations for HECMs with a case number assigned prior to August 4, 2014, to provide an alternative option for claim payment for a HECM with an eligible surviving non-borrowing spouse.

The panel noted that foreclosing on an elderly borrower generates headlines in the press that are not favorable to lenders. It seemed like the original intent of the HECM program was lost somewhere in the execution process. The panel mentioned that the Plunkett Court found it arbitrary and capricious that the relief offered to plaintiffs was not offered to any other surviving spouses.

Since the time of the panel, HUD issued several additional MLs updating its policies in this area. ML 15-10 on HECM due and payable policies, among other things, included a requirement for mortgagees to provide HUD notice of a HECM’s "due and payable" status and notice of the initiation of foreclosure. ML 15-12 rescinded ML 2015-03. ML 15-15 on mortgagee optional election assignment for HECMs with an FHA case number assigned prior to August 4, 2014 was issued June 12, 2015. This letter provided an alternative option for claim payment for a HECM with an eligible surviving non-borrowing spouse.

---

RESPA Section 8 – Marketing Service Agreements

12 U.S.C.S. § 2607(a) states “No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding … that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.” (emphasis added)

According to a recent Consent Order issued by the Consumer Financial Protection Bureau (CFPB), *In re Lighthouse Title*,¹³ a title company allegedly violated the Real Estate Settlement Procedures Act (RESPA) § 8 by compensating referral sources/advertisers for performing certain marketing services in accord with terms of a marketing services agreement (MSA). This Consent Order provided a detailed new definition of an MSA: “an agreement … to provide any thing of value to a person in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan in exchange for marketing or advertising services. Includes agreements …: to market or promote … services to such a person or its employees or agents, that require a person or its employees or agents to endorse … services, pursuant to which such a person is to market … services to others, and to include references … in any advertising placed by such a person.” It is not “an agreement for mass advertising for consumer consumption pursuant to which [a provider] is to pay a person who does not provide real estate settlement services to place an advertisement to the public … unless the person endorses [the provider] as part of the advertisement.”¹⁶

Per the Consent Order, “Entering a contract is a ‘thing of value’ within the meaning of Section 8, even if the fees paid under that contract are fair market value for the goods or services provided.”¹⁷

According to the panelists, what was clear before is no longer clear after this Consent Order. The panel questioned how someone could stay in compliance with this new definition. One idea would be for a lender to have a check in place to make sure the services it is paying for are actually being performed, that there are bona fide goods and services being paid for, and that fees being paid for services are reasonable and customary for the service being provided. It would be helpful to have a written agreement describing what is being paid and how the value is established. Having a disinterested third party determine the market value for services may also be helpful.

RESPA Section 8 – Kickbacks

In another RESPA Section 8 action against kickbacks, the CFPB and the Maryland Attorney General went after a now-defunct title company that allegedly gave banks’ loan officers cash, marketing materials, and consumer information in exchange for business referrals.¹⁸ The Consent Orders required the banks pay millions of dollars in civil penalties and redress to consumers. Additionally, an individual loan officer owed a $30,000 penalty and was banned from the industry for 2 years for his participation in the “scheme” and receipt of cash payments paid to his wife.¹⁹

---

¹⁵ Supra note 13 at 2.
¹⁶ Id. at 3.
¹⁷ Id. at 6.
¹⁹ Id.
Chapter 7 Bankruptcy – Stripping a Junior Lien When Property is Underwater

The Bankruptcy Code § 506(d) says, “To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void.”

There were two separate bank cases where the amount owed on the senior mortgage was greater than the house’s current value making the junior lien on each of these houses totally underwater. If each of the houses were sold at the time, the junior lien holder would have received nothing. These two cases were consolidated with the following issue in front of the U.S. Supreme Court: May a Chapter 7 debtor “strip off”/void a junior mortgage lien entirely when the outstanding debt owed to a senior lienholder exceeds the current value of the property?

The lender’s argument that its junior mortgages on the houses could not be voided relied on the precedent set by Dewsnup v. Timm which held that a Chapter 7 debtor could not “strip down” a creditor’s lien on real property where the value of the property is less than what is due to be paid to the creditor. The lender did not want to void the second lien in each of these cases because each house may regain value in the future and, if a lien is voided, the lender would never have the opportunity to recover this value. The borrower could stay in the home without debt under a Chapter 7 bankruptcy and even if the home regains value eventually, the lender could not recover money due because the lien was voided. It was noted that here the lender was asking for greater rights in bankruptcy court than it would have in a foreclosure under state law where the second lien in this situation would have just been stripped off.

In both of the above cases, the borrowers wanted the Court to allow them to keep their houses and strip off the second mortgages. Doing so would have prevented the lender from recovering any of its money even if the value of the houses recovered in the future.

Note that since the panel presentation earlier this year, the U.S. Supreme Court came out with its opinion on the consolidated cases. The Court followed existing judicial precedent and held that a debtor may not void a junior mortgage under 11 U.S.C. § 506(d) when the debt owed on a senior mortgage exceeded the present value of the property.

---

24 Supra note 22.
25 Id.