AMERICAN BAR ASSOCIATION Business Law Section

CONSUMER FINANCIAL SERVICES COMMITTEE NEWSLETTER

June 2017

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Important Dates

[Business Law Section Annual Meeting](#)
September 14-16, 2017
Chicago, IL

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Membership Minute

CFSC by the Numbers: As of April 2017, total members = 1,443, which represents a small decrease compared to April 2016. Keep spreading the word about joining the ABA's CFSC - encourage your clients and colleagues to check it out!

Be Social with the CFSC: Connect with us on:

- **Facebook**: ABA Consumer Financial Services Committee
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  - Handle: @ABABusLaw_CFSC
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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 the CFSC website.

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

Leadership Message

Andrew Smith, Chair
Consumer Financial Services Committee

Chairman's Message, we will outline our plans for the Annual Meeting, as well as recap our successful Spring Meeting in New Orleans.

But, first, I would like to remind all of you to contribute to Business Law Today. Contributing to BLT can provide you and your colleagues with excellent exposure to the nearly 40,000 Business Law Section members. Moreover, our Committee members have historically been among the most prolific contributors to BLT. Let's keep the momentum rolling. Please contact Sharmin Arefin if you would like to submit an article or have an idea for a mini-theme for the BLT. Sharmin can be reached at sarefin@arefinlaw.com.

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Meeting Promo

ABA BUSINESS LAW SECTION ANNUAL MEETING 2017 CHICAGO

Join us in the Windy City for the 2017 Section Annual Meeting. Register now for the September 14-16, 2017 meeting to expand your International network of business law professionals. Experience over 90 CLE programs and attend our committee meetings and events to build relationships with colleagues in your area of interest.

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Legal Features

Consumer Financial Protection Bureau Considers the Risks and Promise of Alternative Data in the Credit Context
By Alexandra Villarreal O'Rourke and Anthony Q. Le

Earlier this year, the Consumer Financial Protection Bureau (Bureau or CFPB) joined a growing list of regulators exploring the use of non-traditional data sources in credit underwriting by issuing its Request for Information (RFI) on the Use of Alternative Data and Modeling Techniques in the Credit Process. The RFI focused on the potential promise, and the corresponding risks, of using these tools to further credit inclusion.

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Is there an Emerging Trend in Post-Foreclosure Litigation under Regulation X?
By Allison Burke, Paul Janowicz and Brian

Award

Presentation of the Consumer Financial Service Lawyers Senator William Proxmire Lifetime Achievement Award On April 8, 2017 to James L. Brown
By Lynne Barr and John Chiles

The American College of Consumer Financial Services Lawyers is pleased to present its Senator William Proxmire Lifetime Achievement Award to James L. Brown.

The Proxmire Award is given each year to "a person who has made significant contributions in the field of consumer financial services over that person's career." As a distinguished consumer advocate and a pioneer in our field of law, Jim is a highly deserving recipient of the Award.

Jim has practiced financial services law for over 40 years, and during that time, he has made a strong mark on the profession and the development of the

Laliberte; Tucker Ellis LLP

A new wave of foreclosure litigation may be gaining strength. Lawyers who previously defended foreclosures have transitioned to a plaintiffs' practice focused on holding lenders accountable in the post-foreclosure context. They are using Regulation X to do it. Regulation X contains rules concerning loss mitigation and error resolution procedures. Post-foreclosure Regulation X lawsuits allege both substantive (*e.g.*, failure to review an application) and highly technical (*e.g.*, failure to send acknowledgment of receipt of correspondence) violations of its loss mitigation rules.

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Madden v. Midland Funding: District Court Edition
By Robert Savoie, McGlinchey Stafford PLLC

The saga of *Madden v. Midland Funding, LLC* has continued after the Second Circuit's decision. The Second Circuit focused on whether a non-depository institution could rely on the interest rate contracted for between the national bank and the borrower pursuant to the bank's Congressional grant of state interest rate preemption authority. The district court's decision, in turn, focused on whether the subsequent purchaser of the loan could rely on the choice of law clause contained in the agreement creating the debt. As this article will explain, the district court determined that the subsequent purchaser could not apply the choice of law clause and instead had to look to the interest rates permitted to it under state law as if it were the original lender.

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The Current State of the Telephone Consumer Protection Act
By Leah Dempsey

With new leadership in place at the Federal Communications Commission (FCC or Commission) and ongoing litigation challenging aspects of its July 2015 Omnibus Ruling and Order (2015 Order or Order) concerning the Telephone Consumer Protection Act (TCPA), the financial services industry is *cautiously* optimistic that there could be some much-needed relief from this outdated and onerous statute. Both Chairman Ajit Pai and Commissioner Michael O'Rielly, who are now in the majority at the FCC in the new Administration, have been openly critical of past FCC interpretations of the TCPA. In fact, they each wrote strongly-worded dissents to the 2015 Order.

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law. Jim's career has been devoted to consumer issues and has been grounded in his long-time service to the University of Wisconsin-Milwaukee as Director of the Center for Consumer Affairs.

Jim is a native of Evanston, Indiana, and a graduate of Princeton University and the University of Wisconsin Law School. After graduation and admission to the bar, he began his active career in consumer financial services in the mid-70s as a lawyer for the Legal Services Corporation. That position put Jim into the action when the State of Wisconsin adopted new statutory provisions covering a variety of topics related to financial services. Over the next decade, Jim worked on various amendments to the Wisconsin Consumer Act and its implementing regulations as part of an industry/consumer working group charged with shaping Wisconsin's policy, working with a diverse group of lawyers that included the notorious Ed Heiser. The Wisconsin law was one of the first of its kind in the country and a model for much of the later federal regulatory schemes. The Wisconsin working group revamped and retooled those laws almost every two years and, as a result, Jim acquired a deep and comprehensive knowledge in this field. In addition, Jim was involved as a lead in the passage of the Wisconsin EFT law, which was one of the first in the nation.

After a four-year stint at Legal Services, Jim began his long tenure at the University of Wisconsin-Milwaukee. One of the early projects of that Center was the promotion of Wisconsin's utility disconnect rule. This was a rule adopted by the Wisconsin Utilities Commission that effectively prohibited utility shutoffs after November l until mid-April, the first such restriction in the country. Jim stayed at the Center for Consumer Affairs until his retirement in 2010, teaching and doing applied research on a variety of consumer issues, including consumer credit, auto insurance, and arbitration. He instituted, and for many years ran, the Lemon Law Mediation Program for Ford Motor Company.

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Leadership Message

It's time to register for the upcoming Annual Meeting in Chicago on September 13-16. In this Chairman's Message, we will outline our plans for the Annual Meeting, as well as recap our successful Spring Meeting in New Orleans.

But, first, I would like to remind all of you to contribute to Business Law Today. Contributing to BLT can provide you and your colleagues with excellent exposure to the nearly 40,000 Business Law Section members. Moreover, our Committee members have historically been among the most prolific contributors to BLT. Let's keep the momentum rolling. Please contact Sharmin Arefin if you would like to submit an article or have an idea for a mini-theme for the BLT. Sharmin can be reached at sarefin@arefinlaw.com.

Also, registration is now open for the Eighth Annual National Institute on Consumer Financial Services Basics, to be held October 19-20, 2017, at the Waterview Conference Center in Arlington, Virginia. This program is a perennial favorite for those who are new to consumer financial services, or those who would like a refresher. Topics will run the full spectrum of consumer financial protection laws and rules, from Regulation B to Regulation Z. (I would have said Regulation AA to Regulation Z, had Regulation AA not been repealed. Oh well.)

Business Law Section Annual Meeting

We are in the throes of planning our Committee's programming, meetings and social events at the upcoming ABA Business Law Section Annual Meeting in Chicago. Please make your hotel reservations ASAP – as you know, the room block frequently sells out early, and Chicago can be a surprisingly difficult place to find a hotel room.

- Our programming begins at 4:00 PM on **Wednesday, September 13**, with **Beer & Basics**, followed by a **Welcome Reception** with the Banking Law Committee.

- Our programs are scheduled to end on **Saturday, September 16**, at 12:00 PM, with 2 1/2 hours of CLE programs on Saturday morning.

In between Wednesday afternoon and Saturday morning, we have 18 hours of CLE programming, including presentations on:

- liability of attorneys for providing legal advice to consumer financial services providers;
- corporate social responsibility;
- online advertising and marketing – meeting acquisition goals while managing risk;
- payment network rules and how they impact financial institutions, consumers and merchants;
- understanding unconscious bias in the legal profession and financial services industry;
- sales incentive compensation strategy;

- federalism, online lending and e-commerce;
- email communication, spamming, filtering and blacklists;
- private and public remedies for violations of TILA mortgage regulations;
- state UDAAP enforcement actions and initiatives;
- housing finance: PACE liens and other regulatory and enforcement developments;
- personal property finance: state regulatory and enforcement initiatives;
- credit reporting: revisions to Metro-2 and issues relating to bankruptcy; and
- fair lending: *City of Miami* decision, alternative data, limited English proficiency.

We are also planning our **Committee Dinner** for the evening of **Thursday, September 14**. Registration information will be circulated closer to the date. We need additional sponsors for the Welcome Reception and the Committee Dinner – sponsorship benefits include your logo on the meeting website, in the meeting materials, and on event signage, as well as a complimentary ticket to the event. Please contact me for details.

Spring Meeting Recap

There were 1620 attendees in all at the meeting, with 90 CLE panels, all of which met ABA diversity requirements.

CFSC again distinguished itself, capturing all five of the top five attended programs at the conference:

Program	Sponsor	Attendance
Too Much or Too Little? Is the CFPB Exercising Its Enforcement Power Appropriately?	CFSC & BLC	149
The State of Consumer Protection Initiatives and the Bank Examination Privilege	CFSC & BLC	130
The CFPB at Six Years: Reflections on Jurisdiction, "Abusive," and the Election's Impact	CFSC	127
Blockchain Technology and Privacy	CFSC	109
Charters, Partnerships and Beyond: the Changing Landscape of Fintech Bank Licensing Strategy	BLC & CFSC	106

Although we are not the largest Committee in the ABA Business Law Section – that distinction belongs to the Mergers & Acquisitions Committee – we are among the most enthusiastic, with attendance at our stand-alone meetings and at our CLE programs at the Business Law Section Spring and Annual Meetings frequently setting new records.

Program materials and audio recordings from the Spring Meeting can be found here and on the CFSC website.

Consumer Financial Protection Bureau Considers the Risks and Promise of Alternative Data in the Credit Context

By Alexandra Villarreal O'Rourke and Anthony Q. Le**

Earlier this year, the Consumer Financial Protection Bureau (Bureau or CFPB) joined a growing list of regulators exploring the use of non-traditional data sources in credit underwriting by issuing its Request for Information (RFI) on the Use of Alternative Data and Modeling Techniques in the Credit Process. The RFI focused on the potential promise, and the corresponding risks, of using these tools to further credit inclusion.

The issue of credit inclusion has long been on the Bureau's agenda. For example, in a 2015 study, the Bureau focused on consumers who face substantially reduced access to credit as a result of having thin credit files, or no credit files at all. The Bureau estimated 26 million Americans are "credit invisible" because they lack a credit file with a major credit reporting company, while another 19 million Americans are "unscorable" because they lack sufficient credit characteristics to support a traditional credit score.[1] The report explained that these issues disproportionately affected low-income and minority consumers.

As the RFI explains, one potential way to address credit invisibility and credit unscorability may be for lenders to utilize other data sources beyond traditional factors to assess creditworthiness. For example, a number of companies are experimenting with the use of payments data, such as rental, utility, and telecom payments, to underwrite customers with thin or nonexistent credit files. Recent studies show significant promise in the predictiveness of these variables.[2] As CFPB Director Richard Cordray explained in a May 2017 speech: "The idea is that by filling in more details of a consumer's financial life, this unconventional

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**Alexandra Villarreal O'Rourke is a partner with McGuireWoods LLP and co-leads its Fintech industry group. Prior to joining the firm, she was a Senior Counsel with the CFPB's Office of Law & Policy. Anthony Q. Le is an associate with McGuireWoods LLP and member of the firm's Fintech industry group. Anthony represents financial institutions and Fintech companies in litigation and counsels clients with government investigations and regulatory compliance.

[1] CFPB, *Data Point: Credit Invisibles* (May 2015), http://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf (figures are from 2010 Census).

[2] Michael A. Turner, *Research Consensus Confirms Benefits of Alternative Data*, http://www.perc.net/wp-content/uploads/2015/03/ResearchConsensus.pdf; Experian Information Solutions, Inc., *Credit for renting: The impact of positive rent reporting on subsidized housing residents* (July 2014), http://www.experian.com/rentbureau/credit-for-renting.html?WT.srch=PR_CIS_CreditforRenting_20140729_pressrelease_Report; Experian, *Let there be light* (March 2015), http://www.experian.com/assets/consumer-information/white-papers/cis-energy-utilities-tl.pdf.

information may paint a more complete and perhaps a more accurate picture of their creditworthiness. This could make credit more readily available for millions more consumers."[3]

In recent years, a number of other regulators have explored the balance between this potential promise and the potential risks associated with the use of alternative data. For example, in January 2016, the Federal Trade Commission (FTC) issued a report on "Big Data."[4] In that report, the FTC noted that alternative data and models can be used to "provide alternative ways to score populations that were previously deemed unscorable," and to "help reveal underlying disparities in traditional credit markets and help companies serve creditworthy consumers from any background."[5] A few months later, the Department of Treasury's report on online marketplace lending struck a relatively skeptical tone on the use of alternative models, noting that "[w]hile data-driven algorithms may expedite credit assessments and reduce costs, they also carry the risk of disparate impact in credit outcomes and the potential for fair lending violations."[6] The Department of Treasury also expressed concern that "applicants do not have the opportunity to check and correct data potentially being used in underwriting decisions."[7]

By contrast, in July 2016, joint guidance from the Office of the Comptroller of the Currency (OCC), the Federal Reserve Board of Governors (FRB), and the Federal Deposit Insurance Corporation (FDIC) seemed to take a more bullish view. The guidance noted that the banks' use of alternative credit histories "to evaluate low- or moderate-income individuals who lack sufficient conventional credit histories and who would be denied credit based on the institution's traditional underwriting standards" may constitute an "innovative and flexible practice . . . to address the credit needs of low- or moderate-income individuals or geographies."[8] The guidance further acknowledged the use of alternative data could be considered as a positive factor for purposes of the banks' Community Reinvestment Act responsibilities.[9]

Congress has also begun weighing in on these issues. For example, H.R. 435, *The Credit Access and Inclusion Act,*[10] which has been introduced during the past several congressional sessions, seeks to clarify the permissibility of reporting certain positive consumer credit information, including rental, utility, and telecom payments, under the Fair Credit Reporting Act (FCRA).

Set against this backdrop, the Bureau's RFI appeared to delve more deeply into the concrete benefits of alternative data and models and the specific consumer protection issues these new tools may raise. The preamble to the RFI provides a helpful window into some of the factors that the Bureau is likely to

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[3] Richard Cordray, *Prepared Remarks of CFPB Director Richard Cordray at National Community Reinvestment Coalition Conference* (Mar. 29, 2017), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-national-community-reinvestment-coalition-conference/.
[4] FTC, *Big Data: A Tool for Inclusion or Exclusion?* (Jan. 2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.
[5] *Id.*
[6] U.S. Treasury, *Opportunities and Challenges in Online Marketplace Lending* (May 2016), https://www.treasury.gov/connect/blog/Documents/Opportunities_and_Challenges_in_Online_Marketplace_Lending_white_paper.pdf.
[7] *Id.*
[8] *See* Federal Reserve Board SR Letter 11-7 ("Guidance on Model Risk Management") (April 4, 2011); Office of the Comptroller of the Currency (OCC) Bulletin 1997-24 ("Credit Scoring Models") (May 20, 1997); OCC Bulletin 2000-16 ("Risk Modeling") (May 30, 2000); OCC Bulletin 2011-12 ("Sound Practices for Model Risk Management") (April 4, 2011); Federal Deposit Insurance Corporation (FDIC) Supervisory Insights ("Model Governance") (last updated December 5, 2005); FDIC Supervisory Insights ("Fair Lending Implications of Credit Scoring Systems") (last updated April 11, 2013).
[9] *Id.*
[10] H.R. 435, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-bill/435

consider when deciding whether to regulate the use of alternative data. These factors include, for example:

- **Benefits to consumers**: The Bureau noted that the use of alternative data and models could potentially bring about significant benefits to consumers including increased access to credit, enhanced creditworthiness predictions, lower costs, and better, more convenient customer service. The RFI sought specific, concrete evidence illustrating these benefits in practice.[11]

- **Fair lending**: While the use of alternative data may result in more predictive models, certain alternative variables may have a disparate impact on protected groups or may be used as proxies for protected characteristics.[12] The RFI requested detailed information for how companies that use alternative data and alternative models ensure compliance with the Equal Credit Opportunity Act (ECOA).

- **Transparency**: Some sources of alternative data are inherently difficult for consumers to review, change, or correct, and some complex models may not lend themselves to fulfilling the transparency-based requirements of the Fair Credit Reporting Act (FCRA) and other laws.[13] The RFI asked a number of questions on how lenders ensure the reliability of alternative data, and how they communicate with consumers about its effect on credit decisions.

The Bureau received approximately 100 responses to the RFI. Commenters included individuals, banks, Fintech companies, trade organizations, and consumer groups, among others. The range of views presented in those responses illustrates the current and healthy debate on this issue. For example, the Consumer Bankers' Association (CBA) explained that its members "have found the use of alternative approaches can improve their predictive power in the credit process, facilitate operational improvements within their institutions and reduce fraud, and can be used by consumers spanning the entire credit spectrum."[14] The CBA discouraged the Bureau from further regulating in this space, noting that "new regulatory policy on the use of alternative data and modeling techniques is not necessary, and may create barriers between CBA's members, and the credit invisible consumers they hope to serve."[15]

In contrast, the National Consumer Law Center (NCLC) stated "[i]t is very likely that most alternative data sources will have a disparate impact" and called for "significant research" to "develop new tools or to adjust the current tools to account for discrimination."[16] The NCLC also noted, because "[o]ne of the key issues with alternative data is the level of accuracy of the data," transparency and regulatory measures such as FCRA adverse action and risk-based pricing notices are particularly important.[17] Similarly, the Financial Services Roundtable opined that "[i]t may be necessary for the CFPB to provide reliable interpretations on the application of consumer financial protection laws and regulations on alternative

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[11] Consumer Financial Protection Bureau, *Request for Information Regarding Use of Alternative Data and Modeling Techniques in the Credit Process* (Feb. 16, 2017), http://files.consumerfinance.gov/f/documents/20170214_cfpb_Alt-Data-RFI.pdf.
[12] *Id.*
[13] *Id.*
[14] Stephen Congdon, *Consumer Bankers Association Comment* (May 22, 2017), https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=commentDueDate&po=0&dct=PS&D=CFPB-2017-0005
[15] *Id.*
[16] Chi Chi Wu, *National Consumers Law Center Comment* (May 22, 2017), https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=commentDueDate&po=0&dct=PS&D=CFPB-2017-0005
[17] *Id.*

data," and that "regulatory interpretations should reaffirm that the use of alternative data does not eliminate the protections afforded consumers under the existing network of consumer protection laws."[18]

Several commenters appear to agree that one of the challenges facing the Bureau is in deciding how to apply transparency-based regulations to seemingly opaque new models and data sources. Notably, some companies have already begun developing tools to address that specific challenge. For example, through its Zest Automated Machine Learning (ZAML) platform, Los Angeles-based ZestFinance offers explainability tools designed to help companies "crack open the black box" of machine learning underwriting models.[19] According to the company, the platform allows lenders to review highly complex models to obtain the data needed to satisfy regulatory requirements, such as those pertaining to adverse action notices and disparate impact. The product is an example of the growing industry of "RegTech" – technology that facilitates regulatory compliance. As RegTech tools become more widespread, they may help mitigate some of the compliance uncertainties surrounding alternative data and alternative models.

However, for now, lenders must actively grapple with those uncertainties. The RFI's preamble and the debate raised in the responses serve as powerful reminders that any lender using alternative data and alternative models is expected to fully comply with existing regulatory requirements, even in contexts in which the application of those requirements to new technologies and data sources may not be crystal clear. As many RFI respondents suggested, further guidance by the Bureau on how ECOA, FRCA, and other laws apply in this context may go a long way towards preventing unintended regulatory barriers to responsible, consumer-friendly innovation.

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[18] Rich Foster, *Financial Services Roundtable Comment*, https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=commentDueDate&po=0&dct=PS&D=CFPB-2017-0005

[19] Zest Automated Machine Learning, *Machine learning and compliance? They can coexist.*, https://www.zestfinance.com/hubfs/Site%20updates%20May%202017/ZAML%20compliance%20case%20study_2017.05.11.pdf?t=1494564520646

CONSUMER FINANCIAL SERVICES COMMITTEE NEWSLETTER

AMERICAN BAR ASSOCIATION Business Law Section

JUNE 2017

Is there an Emerging Trend in Post-Foreclosure Litigation under Regulation X?

By: Allison Burke, Paul Janowicz and Brian Laliberte
Tucker Ellis LLP**

A new wave of foreclosure litigation may be gaining strength. Lawyers who previously defended foreclosures have transitioned to a plaintiffs' practice focused on holding lenders accountable in the post-foreclosure context. They are using Regulation X to do it. Regulation X contains rules concerning loss mitigation[1] and error resolution[2] procedures. Post-foreclosure Regulation X lawsuits allege both substantive (*e.g.*, failure to review an application) and highly technical (*e.g.*, failure to send acknowledgment of receipt of correspondence) violations of its loss mitigation rules.[3]

Individuals often apply for loss mitigation programs to avoid foreclosure. These programs are offered by lenders and made available through loan servicers.[4] Regulation X provides the procedural framework for implementing such programs. Specifically, borrowers may make applications for loss mitigation either in writing or verbally. Once an application is submitted, lenders and servicers have the right to request information from a borrower in order to analyze the application,[5] but lenders and servicers must follow very detailed rules for accepting and processing the application. Despite efforts to simplify and streamline the loss mitigation process, lenders, servicers, and borrowers still face challenges. For example, borrowers may complain about poor communication, repetitive and endless requests for documents, and a lack of continuity in customer service representatives. Because Regulation X authorizes a private right of action against lenders and servicers for failure to comply with its rules, those complaints do not fall on deaf ears – attorneys are listening and have started filing lawsuits based on alleged Regulation X violations.[6]

** *Allison R. Burke and Paul L. Janowicz are business trial lawyers with Tucker Ellis LLP in its Cleveland, Ohio office. Brian J. Laliberte is a business trial lawyer and the Chair of Tucker Ellis LLP's Financial Services Litigation Practice Group.*

[1] 12 C.F.R. § 1024.41.

[2] 12 C.F.R. § 1024.35.

[3] The Mortgage Servicing Rules promulgated under the Real Estate Settlement Procedures Act (RESPA), 12 C.F.R. § 1024.1, *et. seq*., are more generally known as Regulation X.

[4] 12 C.F.R. § 1024.31.

[5] *Id.*

[6] A borrower may pursue a private cause of action pursuant to 12 C.F.R. § 1024.41(a), and RESPA, 12 U.S.C. § 2605(f)), which provides that "[w]hoever fails to comply with any provision of this section shall be liable to the borrower for each such failure" in an amount equal to "any actual damages to the borrower as a result of the failure; and any additional damages … in an amount not to exceed $2,000."

Although compliance with Regulation X is a fact-intensive analysis, complaints alleging Regulation X violations have been dismissed for failure to state a claim in certain circumstances. Others have proceeded on their merits. None of the pending complaints we have reviewed have gone past the pleading stage.

Our objective here is to identify what may be an emerging trend in post-foreclosure litigation especially in states where the 2008 recession hit homeowners the hardest.

Common Factual Allegations of Non-Compliance with Regulation X

The facts alleged in Regulation X cases are familiar. The borrower is in jeopardy of foreclosure. She applies for loss mitigation. The servicer either denies the loss mitigation application because it is incomplete or requests additional information. Some borrowers contend that no matter the number of times they submit additional information, they are denied loss mitigation because they are told their applications are incomplete.

Faced with the prospect of losing their home and a loss mitigation process they don't believe to be working, borrowers claim the servicer unlawfully refused to review their "facially complete" application. Regardless of whether the application is incomplete, complete, or facially complete, plaintiffs allege that servicers failed to review the loss mitigation application for any number of reasons that may or may not be explained or even explainable. Borrowers then send the servicer a "Notice of Error" under 12 C.F.R. § 1024.35(a). The notice identifies the servicer's alleged errors reviewing the loss mitigation application. The types of errors alleged in the notice vary.[7]

The Notice of Error then causes the borrower and servicer to engage in a seemingly interminable exchange of correspondence. The borrower claims she has provided all of the requested information. The servicer continues to request additional documentation. Locked in this cycle, foreclosure proceeds.

Claims Arising under the Loss Mitigation Procedures

The dominant, recurring general allegation in post-foreclosure Regulation X cases is that the servicer failed to exercise diligence in reviewing the loss mitigation application. As a consequence, the borrower may lose their home in foreclosure, incur allegedly unnecessary legal fees and costs, and suffer other economic damages. The most common claims arise under the following provisions:

- 12 C.F.R. § 1024.41(f), for violation of prohibition on foreclosure referral with a facially complete loss mitigation application pending review.

- 12 C.F.R. § 1024.41(c), for failure to perform a review of the borrower's eligibility for any and all loss mitigation options available to the borrower within thirty days of receipt of a complete loss mitigation application.

- 12 C.F.R. § 1024.41(b), for failure to exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application.

Claims Arising under the Error Resolution Procedures

Similarly, borrowers commonly – and very generally – allege that servicers have failed to follow Regulation X's error resolution procedures. A claim arising from such allegations falls under Regulation X's catch-all

[7] See 12 C.F.R. § 1024.35(b) for a full list of possible errors.

provision, which authorizes a private right of action for "[a]ny other error relating to the servicing of a borrower's mortgage loan."[8]

The most common claims arise from the following alleged violations of Regulation X in the error resolution process:

- 12 C.F.R. § 1024.35(d), for failure to send written acknowledgment of a Notice of Error within five business days.

- 12 C.F.R. § 1024.35(e), for failure to properly respond to or otherwise perform a reasonable investigation into an error alleged by and through the Notice of Error.

Defending the Regulation X Case

While Regulation X claims are fact-intensive, this does not mean that servicers should forego efforts to dismiss claims in an early dispositive motion.

Counsel must candidly assess the facts alleged in the complaint. In *Stallman v. U.S. Bank Nat'l Ass'n*,[9] the Cuyahoga County Court of Common Pleas granted a motion to dismiss for failure to state a claim because the complaint did not plead sufficient facts. Despite filing a 127-paragraph complaint with five different causes of action, including a cause of action for alleged RESPA violations, the plaintiffs relied almost entirely on conclusory language to describe their claims. This proved fatal. The court held that "Plaintiffs' failed to allege a single supporting fact" concerning their RESPA claims.[10]

Complaints that provide detailed fact narratives, like the ones filed in *Quade v. Nationstar Mortg. LLC*,[11] and *Bohon v. CitiMortgage, Inc.*,[12] are unlikely to suffer the same fate. In those cases, each complaint stated more than 200 specific factual allegations. The plaintiffs documented communications with loan servicers that occurred on specific dates and times, the history of their correspondence with the servicers, and the alleged violations of Regulation X. In both cases, the plaintiffs attached copies of relevant correspondence with the servicers to bolster their initial pleadings.

Pleading Regulation X claims using the templates in *Quade* and *Bohon* is highly effective. Utilizing specific allegations and attaching relevant correspondence likely eliminates any opportunity for a successful early dispositive motion for failure to state a claim. The defendants in *Quade* filed an answer, and the parties are currently set for a settlement conference in June 2017. In *Bohon*, the parties settled before Answers were filed.

In cases where defendants answer and proceed on the merits, they would be well-served to focus discovery on the timeliness of a borrower's loss mitigation application. RESPA requires a borrower to submit a completed loss mitigation application to the loan service provider at least thirty-seven (37) days before a foreclosure sale, and the time period is calculated *as of the date the application is received*.[13] In *Garmou v.*

[8] 12 C.F.R. § 1024.35(b)(11).

[9] No. CV-16-869050 (Ohio C.P. Nov. 2, 2016).

[10] *Id.*

[11] No. 1:16-cv-02669-CAB (N.D. Ohio Nov. 1, 2016) (ECF No. 1).

[12] No. 1:17-cv-0533 (N.D. Ohio Mar. 14, 2017) (ECF No. 1).

[13] 12 C.F.R. §§ 1024.41(b)(3), (c)(1).

Kondaur Capital Corp.,[14] the plaintiff submitted his application just twenty-five (25) days before the date of the announced sale. Although the sale was postponed for more than a year, the district court held that the application was not timely filed and granted the motion to dismiss.[15] It was apparent from the complaint filed in *Garmou* that the plaintiff's claims were barred. Where it is not apparent, defendants must determine whether a loss mitigation application met the timeliness requirements and then consider whether an early summary judgment motion is appropriate.

It seems that once servicers answer complaints, like those in *Quade* and *Bohon*, the choice is to seek an early resolution or to proceed with discovery. The latter option seems fraught with risk. The former, depending on the rate at which Regulation X claims are settled, may be more expedient and less costly than defending the merits.

What's Next?

Lawyers are leading the charge, in Ohio, to use federal regulations in the post-foreclosure context to pursue monetary damages on behalf of homeowners and borrowers who allegedly incurred damages because their lender or servicer did not comply with federal regulations. And they are frequently affiliated with similar firms throughout the country.

For the defense, disposing of Regulation X claims may not be a simple proposition. As the plaintiffs' representatives becomes more attentive to pleading specific factual allegations, the likelihood of winning early dispositive motions in Regulation X cases will likely diminish. Consequently, the potential for settlement before or in the early stages of discovery is worth exploring. Although, it must be remembered that early settlements in this first wave of cases, without any exploration of the merits, may encourage more Regulation X litigation. That is, enterprising lawyers may begin to accumulate Regulation X case inventories that they will file, and attempt to settle, in tranches.

Our assessment, as we watch these cases continue to appear on state and federal district court dockets, is that we are at the beginning of a litigation trend that may last for many years.

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[14] No. 15-12161, 2016 WL 3549356, at *4 (E.D. Mich. June 30, 2016).

[15] *Id.* at *4–6.

AMERICAN BAR ASSOCIATION Business Law Section CONSUMER FINANCIAL SERVICES COMMITTEE NEWSLETTER JUNE 2017

Madden v. Midland Funding: District Court Edition

By Robert Savoie, McGlinchey Stafford PLLC

The saga of *Madden v. Midland Funding, LLC* has continued after the Second Circuit's decision. The Second Circuit focused on whether a non-depository institution could rely on the interest rate contracted for between the national bank and the borrower pursuant to the bank's Congressional grant of state interest rate preemption authority.[1] The district court's decision, in turn, focused on whether the subsequent purchaser of the loan could rely on the choice of law clause contained in the agreement creating the debt.[2] As this article will explain, the district court determined that the subsequent purchaser could not apply the choice of law clause and instead had to look to the interest rates permitted to it under state law as if it were the original lender.

The Second Circuit's Decision

The Second Circuit's decision in *Madden v. Midland Funding, LLC* limited the ability of non-depository institutions to acquire debts originated by depository institutions pursuant to federal preemption of state law usury limits.[3] In *Madden*, the plaintiff obtained a credit card from a national bank, which was charged off and sold to Midland Funding, LLC, and serviced by Midland Credit Management, Inc. (referred to herein collectively as "Midland Funding" for convenience), entities that are not depository institutions.[4] The plaintiff filed suit when Midland Funding sought to collect the debt at the 27% per annum interest rate contracted for in the national bank's agreement creating the debt.[5] The plaintiff's claims asserted, among other things, that Midland Funding's attempt to collect the 27% per annum interest rate was a violation of New York's usury law, which imposed a maximum interest rate of 25%, and therefore its attempt to collect the accrued interest was a violation of the FDCPA as an attempt to collect money not actually owed.[6] While the district court held that the National Bank Act's ("NBA") preemption of state usury limits applied to the debt, the Second Circuit reversed the district court's decision and held that the NBA did not preempt Madden's state law usury claim because Midland Funding was not a national bank.[7] Accordingly, the Second Circuit remanded the case back to the district court for further proceedings consistent with its decision.[8] For a detailed overview of the Second Circuit's decision and its impact, please refer to the author's prior article on the decision.[9]

The District Court's (Second) Decision

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[1] *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015).
[2] *Madden v. Midland Funding, LLC*, 2017 U.S. Dist. LEXIS 27109 (S.D. N.Y. Feb. 27, 2017).
[3] *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015).
[4] *Id*. at 247-248.
[5] *Id*.
[6] *Id*. at 248-249.
[7] *Id*. at 249.
[8] *Id*. at 255.
[9] *See* Madden v. Midland Funding: A Sea Change in Secondary Lending Markets, American Bar Association Consumer Financial Services Committee Newsletter, available at: http://apps.americanbar.org/buslaw/committees/CL230000pub/newsletter/201512/feature_1.pdf.

On remand, the United States District Court for the Southern District of New York (the "District Court") addressed Midland Funding's renewed motion for summary judgment.[10] Midland Funding asserted that Delaware law applied to the plaintiff's claims under the agreement creating the debt, and therefore the plaintiff's claims under New York's usury law must fail.[11] Midland Funding asserted that the plaintiff's FDCPA claims must also fail because those claims were predicated on an alleged violation of New York's usury law.[12] The plaintiff, in turn, opposed those claims and moved again for class certification.[13]

The District Court began its substantive analysis by noting that while Delaware law did not provide a civil usury limit on the interest rates that may be charged to Delaware residents, New York imposes a 25% criminal usury limit on loans to New York residents.[14] Accordingly, the court's decision turned on whether to apply Delaware law, as contracted for in the agreement creating the debt, or New York law, as the plaintiff sought.[15]

The district court applied a traditional choice of law analysis to determine whether Delaware or New York law applied.[16] Accordingly, the District Court stated that it would follow the majority rule that courts should enforce the parties' choice as to the law governing their contract, so long as the jurisdiction chosen has a reasonable relationship to the transaction and the chosen law does not violate a fundamental public policy of the state of the party the contract is being enforced against.[17] In its analysis, the District Court concluded that the facts did not appear to support Midland Funding's position with respect to either element.

The court first looked to the following factors for purposes of determining whether a reasonable relationship existed: the parties' negotiation of the agreement, performance under the agreement (including where loan payments were received), the parties' places of incorporation, the parties' principal places of business, and the property that is the subject of the transaction.[18] In its review of these factors, the District Court noted that most of these traditional factors were not present between the plaintiff's transaction and Delaware.[19] However, the District Court noted that, because it ultimately concluded that the application of Delaware law would violate a public policy of the state of New York, the conclusion of whether a reasonable relationship existed was irrelevant to its decision.[20]

The court then examined whether the application of Delaware law to the plaintiff's transaction would violate a public policy of the state of New York.[21] In its review, the court first noted that New York cases instructed the court to look to New York's constitution, statutes, and judicial decisions.[22] The court was not able to identify any explicit provision of New York's constitution or statutes stating that New York's criminal usury limit reflected a public policy of New York.[23] However, when analyzing New York judicial decisions, the court took the position that the criminal usury limit reflected a public policy of New

[10] *Madden v. Midland Funding, LLC*, 2017 U.S. Dist. LEXIS 27109 (S.D. N.Y. Feb. 27, 2017).
[11] *Id*. at *6
[12] *Id*.
[13] *Id*.
[14] *Id*. at *8-9.
[15] *Id*.
[16] *Id*.
[17] *Id*. at *23-24.
[18] *Id*. at *24-25.
[19] *Id*. at *25.
[20] *Id*. at *27.
[21] *Id*.
[22] *Id*. at *28.
[23] *Id*. at *28-29.

York.[24] In support of its position, the court noted that some New York judicial decisions concluding that New York's usury limit reflected a public policy of New York.[25] However, in response to Midland Funding's citation of other judicial decisions permitting the application of other state law despite the New York usury limit, the court distinguished or dismissed these decisions.[26]

Midland Funding also noted that the judicial decisions it cited relied, in part, upon New York's "rule of validation".[27] The "rule of validation" provided that courts should assume that the parties to a contract intended to enter into a valid contract, and thus the forum state should choose to apply the law of the state with the usury statute that would sustain the contract either in full or, at a minimum, impose the lightest penalty for usury out of the states that have a substantial relationship to the contract.[28] The District Court contended that the "rule of validation" should not apply for three reasons. First, the court noted that the New York Court of Appeals has not expressly articulated a special rule for usury cases, and that the "rule of validation" has not been applied in other cases.[29] Second, the court noted that the "rule of validation" was designed to avoid the harsh remedy of forfeiture provided under the usury laws. The "rule of validation" was not relevant to the case, however, because the plaintiff's claims arose under the FDCPA and not New York's usury law, so forfeiture was not at issue.[30] Finally, the court noted that the decisions applying the "rule of validation" generally included a finding that the application of the foreign state's laws would not violate a public policy of the forum state.[31] Based upon its decision, the court also granted the plaintiff's motion for class certification, the procedural elements and analysis of which are not discussed herein.[32]

<u>The Impact of the Madden District Court Decision</u>

The District Court's decision illustrates the risks created by the Second Circuit's decision in *Madden*. Once the Second Circuit determined that the NBA did not ensure that a national bank's loan was valid when made, the district court was forced to analyze whether to enforce the contractual choice of law provision. Due to the absence of a clear constitutional or statutory imperative stating whether the usury limit was a public policy of the state, the court was able to analyze New York case law to determine whether New York courts viewed the New York usury limit as a public policy of New York.

Ultimately, this type of analysis destabilizes the ability of national banks, and F.D.I.C.-insured state-chartered banks utilizing their equivalent interest rate exportation authority, to create and sell loans on the secondary market using the rights Congress granted them. The potential end result is the creation of a patchwork of state requirements, often judicially created based upon a particular legal challenge, that dictate whether these banks are able to carry on their business. This type of ill-advised outcome illustrates why the combination of depository institution interest rate exportation and the valid when made doctrine is a critical power granted to banks. Further, the analysis is contrary to the longstanding federal court precedent holding that a transaction that is not usurious when consummated may not become usurious based upon subsequent events.[33] Rate exportation is, at its core, a federal choice of law rule that

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[24] *Id*. at *30.
[25] *Id*. at *28-29.
[26] *Id*. at *30.
[27] *Id*. at *30.
[28] *Id*.
[29] *Id*. at *31.
[30] *Id*.
[31] *Id*.
[32] *Id*. at *55.
[33] *Nicholas v. Fearson*, 32 U.S. 103, 109 (1833); *see also FDIC v. Lattimore Land Corp.*, 656 F.2d 139, 148-49 (observing that the "non-usurious character of a note should not change when the note changes hands") (citations omitted).

preempts any statutory or judicial choice of law rule, particularly with respect to usury limits. The valid-when-made doctrine is designed to allow the lender's assignee to enforce the loan according to its terms, including the choice of law for rate exportation.

Concluding Thoughts

The Second Circuit's decision raised the concern that state usury laws could apply to an extension of credit not subject to those state law requirements at the time it was consummated. The District Court decision, in turn, actually applied those laws. The result is that while the national bank that originated the plaintiff's consumer credit could lawfully ignore New York's criminal usury limit, Midland Funding, as the subsequent purchaser, was deemed to be subject to that law when it subsequently purchased the loan. While some states may pose a concern, like New York, other states have strong case law concluding that subsequent purchaser may apply the interest rate of the original creditor.[34] Accordingly, the District Court's decision confirms that the *Madden* decision will continue to impact entities other than debt purchasers. Notably, depository institutions will likely continue to see reductions in their ability to sell loans originated in the Second Circuit, which includes New York, Vermont, and Connecticut. In addition, marketplace lenders, and other bank partnership program participants, may continue to see challenges applying a *Madden* style argument. As a result, marketplace lenders and other bank partnership program participants must be mindful of the state law requirements that could potentially be deemed to apply to their credit products.

[34] For example, the California *Strike* doctrine distinguishes loan purchasers from originating lenders. *See Strike v. Trans-W. Disc. Corp.*, 92 Cal. App. 3d 735, 745 (Ct. App. 1979) (noting that "a contract, not usurious in its inception, does not become usurious by subsequent events") (citations omitted).

The Current State of the Telephone Consumer Protection Act

By: Leah Dempsey*

With new leadership in place at the Federal Communications Commission (FCC or Commission) and ongoing litigation challenging aspects of its July 2015 Omnibus Ruling and Order (2015 Order or Order) concerning the Telephone Consumer Protection Act (TCPA), the financial services industry is *cautiously* optimistic that there could be some much-needed relief from this outdated and onerous statute. Both Chairman Ajit Pai and Commissioner Michael O'Rielly, who are now in the majority at the FCC in the new Administration, have been openly critical of past FCC interpretations of the TCPA. In fact, they each wrote strongly-worded dissents to the 2015 Order.

The TCPA was enacted into law nearly 30 years ago. As such, it can be challenging to apply it to many new technologies that have developed since then and complex FCC interpretations have also made TCPA compliance difficult. Since there is no cap on statutory damages, TCPA-based class action litigation exacerbates compliance concerns. This has put many financial institutions in the difficult situation of having to choose between curtailing communications with consumers that consumers generally want, such as information about data breaches, fraud alerts, outstanding debts or fees, and other important account information, or alternatively risking liability.

Despite little success on achieving TCPA reform, that provides meaningful relief to the financial services industry, from either Congress or the FCC, there is some renewed optimism for greater reforms with the change in leadership at the FCC.

Background of TCPA Concerns for Financial Institutions

In July 2015, financial service providers were sent into a state of disarray when the FCC released its Order, which went into immediate effect and added significant complexity to how consumers can be contacted on their cell phones and via text messages. While the 2015 Order theoretically contains an exemption for financial institutions attempting to contact their customers and members, it actually adds to compliance confusion because of complex requirements to qualify for exemptions and because of an expanded definition of what is considered an autodialer.

The 2015 Order provided an exemption for calls concerning: (1) transactions and events that suggest a risk of fraud or identity theft; (2) possible breaches of the security of customers' personal information; (3) steps consumers can take to prevent or remedy harm caused by data security breaches; and (4) actions needed to arrange for receipt of pending money transfers. However, other conditions must also be met to

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qualify for this exemption. For example, a financial institution (1) must initiate no more than three messages (whether by voice call or text message) per "event" over a three-day period for an affected account; (2) must offer recipients within each message an easy means to opt out of future messages; and (3) must honor opt-out requests immediately. However, as noted, technicalities associated with each of these requirements create many unanswered questions. As a result, many important communications with consumers may still not be possible.

For example, there is considerable uncertainty and risk regarding how consumers can revoke their consent for autodialed calls, since the 2015 Order states that revocation can be done at any time and in any reasonable manner. This expansive language has been problematic since, arguably, consent could be revoked in almost any manner including through oral conversations with employees at any financial institution. Furthermore, the 2015 Order increases the risk of liability under the TCPA for calling a reassigned number that a financial institution was previously given consent to call. The Order makes clear that callers can make only one call under a safe harbor before they are considered to have actual or constructive knowledge that the number was reassigned. The one-call safe harbor does not account for the dozens of reasons it may not be possible to connect with the new holder of the number in one attempt. The 2015 Order indicates that it does not matter whether the phone call is answered; the caller is nevertheless considered to be on notice. This aspect of the Order is clearly problematic, since it is very common for consumers to switch numbers, especially cellular phone numbers, and not necessarily answer every call they receive from a potentially unknown number.

Arguably, some of the greatest confusion and risk of liability after the 2015 Order centers on what technology qualifies as an autodialer. Under the TCPA, an autodialer (i) uses a random or sequential algorithm to generate numbers without regard to whether such numbers have been assigned to subscribers, or whether such numbers are assigned to emergency services, healthcare providers or public safety agencies and (ii) 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."[1] In the 2015 Order, there is a broad interpretation of the word "capacity" meaning not only "current capacity" or "present ability" but also equipment with "potential ability" or "the potential or suitability for holding, storing, or accommodating."

In his dissent to the 2015 Order, Chairman Pai specifically addressed confusion around what can be considered an autodialer, stating, "[t]he Order's expansive reading of the term 'capacity' transforms the TCPA from a statutory rifle-shot targeting specific companies that market their services through automated, random or sequential dialing into an unpredictable shotgun blast covering virtually all communications devices. Think about it. It's trivial to download an app, update software, or write a few lines of code that would modify a phone to dial random or sequential numbers. So, under the Order's reading of the TCPA, each and every smartphone, tablet, VoIP phone, calling app, texting app—pretty much any calling device or software-enabled feature that's not a 'rotary-dial phone'—is an automatic telephone dialing system."

While the FCC previously has interpreted the definition of automatic telephone dialing system to include equipment that has the capacity to dial "without human intervention," the Order's emphasis on "potential ability" makes the inquiry into human intervention no longer a reliable test of the applicability of the TCPA. Further, the question of human intervention becomes an important issue of fact which is only minimally helpful to the disposition of these claims as consumer counsel have taken the position that an

[1] 47 U.S.C. § 227(a)(1); *see also* 47 C.F.R. § 64.1200(f)(2) ("The terms *automatic telephone dialing system* and *autodialer* mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.").

automatic telephone dialing system could include anything from a computer to a smartphone. Some courts have agreed with this very broad reading. Absent certainty that financial institutions are not using an autodialer, they need to obtain prior express consent to make informational calls. Obtaining prior express consent, and determining what qualifies as such, also creates a number of compliance uncertainties and burdens.

Recent Developments

Since the 2016 presidential election, there has been increased activity surrounding this issue at the Commission, including a petition for reconsideration of the FCC's implementation of the Bipartisan Budget Act of 2015 (the Budget Act). Section 301 of the Budget Act included an exemption from obtaining prior express consent for calls made from an autodialer specifically, "solely to collect a debt owed to or guaranteed by the United States." This was in part for the purpose of allowing the federal government to collect on student loan debt and other debts such as tax debt. However, despite the Congressional directive for an exemption for these debts, the FCC interpretation in the August 2016 TCPA Report and Order took the narrowest reading of the Budget Act possible. As a result, it did little to expand the ability to communicate with consumers about this kind of debt.

That petition for reconsideration of the August 2016 Report and Order from Great Lakes Higher Education Corp., Navient Corp., Nelnet Inc., Pennsylvania Higher Education Assistance Agency, and the Student Loan Servicing Alliance is seeking additional clarification concerning the exemption from TCPA requirements for communications related to debt owed to or guaranteed by the federal government. This petition for reconsideration and other efforts for TCPA reform may stem from the fact that Chairman Pai philosophically views this issue differently than former Chairman Tom Wheeler. In his dissent to the 2015 Order, Chairman Pai opined that the FCC's interpretation is likely to leave the "American consumer, not to mention American enterprise, worse off." He further opined that, "this is not something anyone should support."

In May, Commissioner O'Rielly noted that the change in Administration and leadership of the FCC provides the, "chance to undo the misguided and harmful TCPA decisions of the past that exposed legitimate companies to massive legal liability without actually protecting consumers." He added that, "As you are well aware, prior decisions by the Federal Communications Commission and courts throughout the country have expanded the boundaries of TCPA far beyond what I believe Congress intended, as evidenced by the actual wording of the statute."

This change in thinking from FCC leadership may bode well for the financial services industry, which continues to be plagued by TCPA-related class action litigation stemming mostly from unintentional violations. With statutory damages of $500 per call and up to $1,500 for willful violations, TCPA litigation continues to attract professional plaintiffs and those seeking sizable damages and settlements. The House Judiciary Committee Subcommittee on the Constitution and Civil Justice also held a hearing on this issue in June entitled, "Lawsuit Abuse and the TCPA". During the hearing the Subcommittee discussed litigation abuse in this area and highlighted the need for reforms.

As More Consumers Rely on Cell Phones, the Need for Clarity Intensifies

As the number of cell phone-only consumers and households continues to increase each year, the dichotomy of creating overly complex rules for companies who wish to contact consumers by way of calling the consumers' wireless devices makes less sense. According to the National Center for Health Statistics, more than two-thirds of adults ages 25 to 29 (72.1%) and ages 30-34 (69.8%) live in households with wireless telephones only. Even for those older than 35, the rate of cell phone-only households is still high: 43% for ages 35 to 44; 43.3% for ages 45 to 64; and 21.1% for ages 65 and older.

Adults living with roommates (79.1%) or in rental properties (69.7%) are also statistically much more likely to only have cell phones.

Yet, recent interpretations do not account for this rapidly growing use of new technology in all age demographics, particularly among millennials. Instead, the FCC and some court opinions continue to make it more difficult and even cost prohibitive for businesses and financial institutions to contact consumers on their cell phones. According to survey data from Credit Union National Association, smaller financial institutions have now in some instances simply stopped texting or calling consumers on their cell phones, which means consumers may not be receiving account information that they want and need.[2] This is in part because smaller financial institutions do not have the resources to wade through layers of complex TCPA requirements in addition to the many other regulatory requirements they are facing from financial regulators.

Adding an extra layer of complexity, financial regulators such as the Consumer Financial Protection Bureau (CFPB) have encouraged and in some cases required that consumers must be contacted. As just one example, the CFPB's Early Intervention Rule mandates that financial institutions must establish live contact or make a good-faith effort to establish live contact with consumers within 36 days after a mortgage loan becomes delinquent. The CFPB in other instances has urged financial institutions to utilize mobile technology such as text messaging to contact consumers.

In addition to these outstanding concerns, there are also several other areas of the TCPA that have raised compliance difficulties for financial institutions and others in the financial services industry.

Looking Ahead

In light of the many unreasonable aspects of the 2015 Order, ACA International filed a legal challenge to the FCC's interpretation in the D.C. Circuit arguing that it expanded the scope and reach of the TCPA in a way that Congress never intended.[3] More than a dozen stakeholders joined the litigation either as parties or as amici curiae. Oral arguments were held in October 2016 and a decision from the three-judge panel, which included Judge Sri Srinivasan, Judge Nina Pillard, and Senior Circuit Judge and Chief Judge Emeritus Harry Edwards, is expected this summer.

Many interested parties are waiting for the outcome of this litigation to determine what next steps should be taken in seeking relief from the onerous requirements currently surrounding the TCPA. If the litigation does not result in a favorable outcome for those challenging the 2015 Order, stakeholders may also be looking to the FCC for additional clarity. With a Commission that is arguably more favorable to providing common-sense reforms to this issue, the financial services industry will be closely following the petition process and likely looking for new opportunities for clarification relating to the TCPA.

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[2] Haller, Jon, Credit Union National Association 2017 Survey of Impact of TCPA Rules. (not yet published).

[3] ACA International et al. v. FCC et al., No. 15-1211

Presentation of the Consumer Financial Service Lawyers Senator William Proxmire Lifetime Achievement Award On April 8, 2017 to James L. Brown

By Lynne Barr and John Chiles

The American College of Consumer Financial Services Lawyers is pleased to present its Senator William Proxmire Lifetime Achievement Award to James L. Brown.

The Proxmire Award is given each year to "a person who has made significant contributions in the field of consumer financial services over that person's career." As a distinguished consumer advocate and a pioneer in our field of law, Jim is a highly deserving recipient of the Award.

Jim has practiced financial services law for over 40 years, and during that time, he has made a strong mark on the profession and the development of the law. Jim's career has been devoted to consumer issues and has been grounded in his long-time service to the University of Wisconsin—Milwaukee as Director of the Center for Consumer Affairs.

Jim is a native of Evanston, Indiana, and a graduate of Princeton University and the University of Wisconsin Law School. After graduation and admission to the bar, he began his active career in consumer financial services in the mid-70s as a lawyer for the Legal Services Corporation. That position put Jim into the action when the State of Wisconsin adopted new statutory provisions covering a variety of topics related to financial services. Over the next decade, Jim worked on various amendments to the Wisconsin Consumer Act and its implementing regulations as part of an industry/consumer working group charged with shaping Wisconsin's policy, working with a diverse group of lawyers that included the notorious Ed Heiser. The Wisconsin law was one of the first of its kind in the country and a model for much of the later federal regulatory schemes. The Wisconsin working group revamped and retooled those laws almost every two years and, as a result, Jim acquired a deep and comprehensive knowledge in this field. In addition, Jim was involved as a lead in the passage of the Wisconsin EFT law, which was one of the first in the nation.

After a four-year stint at Legal Services, Jim began his long tenure at the University of Wisconsin—Milwaukee. One of the early projects of that Center was the promotion of Wisconsin's utility disconnect rule. This was a rule adopted by the Wisconsin Utilities Commission that effectively prohibited utility shutoffs after November l until mid-April, the first such restriction in the country. Jim stayed at the Center for Consumer Affairs until his retirement in 2010, teaching and doing applied research on a variety of consumer issues, including consumer credit, auto insurance, and arbitration. He instituted, and for many years ran, the Lemon Law Mediation Program for Ford Motor Company.

Jim was an early expert in electronic banking, serving as a Consumer Board Member of the TYME Network in Wisconsin and as a consultant to the Board of Governors of the Federal Reserve System when the FRB staff was drafting Regulation E.

Jim served as a Consumer Fellow for the Consumer Financial Services Committee from 1992 to 2014, and, in keeping with tradition for Consumer Fellows (or perhaps establishing that tradition), spoke regularly as a panelist on programs presented by that Committee. His career for the CFSC culminated in a term as Vice Chair of the CFSC when Nikki Munro served as Chair.

Jim is a former President of the American College. He has been a member of the Board of Overseers for the Institute for Civil Justice, an affiliate of the Rand Corporation for many years. He also served for more than 20 years as a member of the Board of Directors of the Consumer Federation of America. He is a long-time consumer member of the Board of Directors of the Electronic Funds Transfers Association, a trade association representing a broad coalition of electronic services providers. As an EFTA director, he has taught generations of board members (all of whom - other than Jim - are industry representatives). Jim Brown's first law of consumer financial services: "No matter what change is made in the law or in your relationship with them, the consumers always pay. The only question is who is going to give them the bad news."

Jim served as a committee member on the Coalition Against Insurance Fraud, which is affiliated with the National Association of Insurance Commissioners. He also served as a member of the Partners Council of the National Consumer Law Center and served on the Consumer Advisory Council of the Federal Reserve Board.

Since his retirement from the University of Wisconsin in 2010, Jim has worked as a private consultant and expert witness on numerous CFS cases, including card network pricing and mortgage lending cases. Jim also serves as the Treasurer of the Haiti Project of the Episcopal Diocese of Milwaukee and a member of the Board of Directors of Aurora Family Services of Milwaukee. And he is a VERY proud Milwaukeean! Jim and Anne have been married for almost 37 years and have two wonderful daughters, Hannah and Emily. Jim often says that the proof that America is a great country is that a guy like him is lucky enough to be related to his beautiful and talented wife and daughters. He is also quite boastful that his wife Anne was elected to the Wisconsin Physical Therapy Hall of Fame a few years back.

Jim was an intercollegiate soccer player and prior to that, he was an all-state soccer player and co-captain of his undefeated, untied Illinois state championship team. He also professes to be a piano player of sorts.

Jim is also an accomplished pianist and has composed lyrics featuring consumer finance law issues including the TILA-related take off on the Bob Dylan classic, entitled "The Terms They Are A-Changin'," which was reportedly sung around the Federal Reserve for years after its debut.

Jim has provided colleagues with thoughtful and insightful advice in many areas. He is the paradigm of a consumer advocate: he has strongly held beliefs about the proper roles of businesses and consumers, but does not automatically assume that businesses always act in a manner designed to hurt their customers. Consequently, he is one of the most effective consumer advocates that we know, because he is able to provide rational, clear-headed and balanced advice along the entire spectrum of business relationships, all with the aim of making the system work fairly for both consumers and businesses.

Because of his very distinguished career and his exemplary work on behalf of consumers and the industry, and because he is a man who exemplifies the very best in our profession, Jim Brown is the 2017 winner of the Senator William Proxmire Lifetime Achievement Award.