CONSUMER FINANCE
YEAR IN REVIEW

MORTGAGE SERVICING & ORIGINATION | CREDIT CARDS | STUDENT LENDING | AUTO LOANS | PAYDAY LENDING | DEBT COLLECTION | TELEPHONE CONSUMER PROTECTION ACT | 2016 EMERGING ISSUES | MAJOR APPELLATE CASES TO WATCH IN 2016

GOODWIN PROCTER

OVERVIEW

In 2015, the consumer financial services industry continued to face increasing pressure, from regulators and government enforcement activity, and ever-more creative litigation tactics. In order to stay competitive—and to avoid government scrutiny and high-stakes consumer litigation—lenders must stay on top and ahead of changes in the law, new regulatory interpretations, and shifting legislative and enforcement priorities. Through our **LenderLaw Watch** and **Consumer Finance Enforcement Watch** blogs, Goodwin Procter's Consumer Financial Services Litigation and Enforcement group analyzed key industry and legal developments and provided real-time reporting on a full range of federal and state consumer finance enforcement activity, keeping our clients current and informed on key legal developments and how they could impact the industry. We also continued to grow the proprietary database of information on enforcement actions undergirding the Enforcement Watch blog, allowing us to provide detailed, quantitative enforcement trend analyses.

In this year-end review, we synthesize our prior coverage of the year's most significant developments and actions from both blogs and use our detailed industry and regulatory knowledge to offer our predictions on what the industry should expect during 2016 in several key spaces, including the mortgage, credit card, student, auto, debt collection, and payday areas. This review includes detail on litigation tactics and trends, federal and state enforcement activity, noteworthy appellate matters, and covers hot topics for online lenders and other FinTech companies.

KEY TRENDS

For all of 2015, the Consumer Financial Protection Bureau (CFPB) remained extremely active on the supervisory, enforcement and rulemaking fronts. The CFPB's view of its jurisdiction remains expansive, and in 2015, it continued an aggressive enforcement agenda involving indirect auto lenders and captive auto finance companies, telecommunications companies, and other enterprises outside the scope of the traditional bank and non-bank lenders the agency was enacted to help regulate. Likewise, the CFPB has shown continued willingness to leverage its UDAAP powers under Dodd-Frank to police conduct that would otherwise comply with enumerated consumer finance laws. Beyond these forms of "jurisdiction creep," 2015 saw the CFPB decree itself free of any statute of limitations period in administrative proceedings, and depart from prior HUD and judicial doctrine concerning RESPA in the first CFPB administrative appeal decision. In addition to the CFPB, the U.S. Department of Justice, state attorneys general and state financial services regulators all remained vigorous enforcers in the consumer finance space, at times partnering with the CFPB on significant matters.

In the courts, 2015 marked a year in which several issues with the potential to impact the adjudication of class action litigation and consumer finance laws were taken up by appellate courts. Specifically, the U.S. Supreme Court heard various challenges to a plaintiff's ability to bring or continue a class action law suit, including: standing challenges in *Spokeo Inc. v. Robins*, arguments for mootness in *Campbell-Ewald v. Gomez*, and challenges to the continuing viability of a class action when the class has members with no damages in *Tyson Foods, Inc. v. Bouaphakeo*. The D.C. Circuit, meanwhile, is set to consider, among other things, the constitutionality of the CFPB in *PHH Corp. et al., v. Consumer Financial Protection Bureau*, No. 15-1177. Finally, the explosion of Telephone Consumer Protection Act (TCPA) actions has led to several new appellate rulings, including the pending appeal of the FCC's controversial declaratory rulings construing the Act.

SOME 2015 HIGHLIGHTS

Much of the regulatory, litigation and enforcement activity remained focused on the mortgage industry in 2015, with the year seeing resolutions to much of what still remains of crisis-era claims. Similarly, 2015 saw the plaintiff's bar and government enforcement agencies continue to focus on credit card add-on products and auto finance, while the long-expected spike in activity focused on student lending and servicing practices finally materialized. The year's major developments included:

• The first-ever appeal of a CFPB administrative enforcement action, in which the CFPB Director modified the order of an administrative law judge and, among other things, increased the amount assessed against the lender by over $100 million for alleged Real Estate Settlement Procedures Act (RESPA) violations.

• Expanding its jurisdiction, the CFPB announced a new rule that it would start regulating certain large, non-bank auto finance companies. This expansion of regulatory oversight means that the CFPB may enforce federal consumer protection laws against these non-bank auto finance companies.

• The CFPB proposed to establish new rules for payday lending that would vastly change the current largely state-regulated landscape. The CFPB offered two proposals, known as "Debt Trap Prevention" and "Debt Trap Protection," that force mini-underwriting onto the payday lenders. Regulations are expected this year.

• The new TILA-RESPA Integrated Disclosure ("TRID" or "Know Before You Owe") went into effect on October 3, 2015, and the effects of the new rules continue to manifest. Initial reports determined that, despite the anxiety leading up to their implementation, the implementation might not have not hit the mortgage lending industry as hard as expected. However, as time passed, vendor implementation complications have arisen and new applications totals have fluctuated.

• The CFPB continued to heighten scrutiny of student lending and student loan servicing, coupling significant enforcement activity in the space with the release of a joint statement of general principles for student loan servicing. The CFPB issued a 152 page report that recommended servicing reforms, and announced its intent to write rules governing the student loan servicing industry in "The Joint Statement of Principles on Student Loan Servicing." 80 Fed. Reg.67389 (Nov. 11, 2015).

• The servicing of troubled loans continued to be a focus for regulators, with regulators forcing a large servicer to pay out over $60 million for alleged "abusive practices."

LOOKING AHEAD TO 2016

In 2016, we anticipate the CFPB and plaintiff's bar will significantly increase scrutiny of student lending and servicing practices, while they continue to police the mortgage, credit card and debt collection markets. We also anticipate that the CFPB will reinforce its expansive interpretation of RESPA with new enforcement activity, paying particular attention to Marketing Service Agreements.

In 2016, we also expect the CFPB to continue to scrutinize how institutions market and sell add-on products, though we expect that scrutiny to move across the consumer finance asset classes from credit cards to auto loans and other products.

On the litigation front, we expect that key rulings from the U.S. Supreme Court, decisions in certain TCPA appeals, and possibly the D.C. Circuit's decision in the *PHH* matter will bring more certainty to class action and TCPA law and practice as well as the contours of RESPA and, potentially, the authority of the CFPB itself. Finally, as the FinTech boom continues, the sector, which has thus far enjoyed a relative degree of freedom from heavy regulation and enforcement, will begin to face increased regulatory burdens and scrutiny.

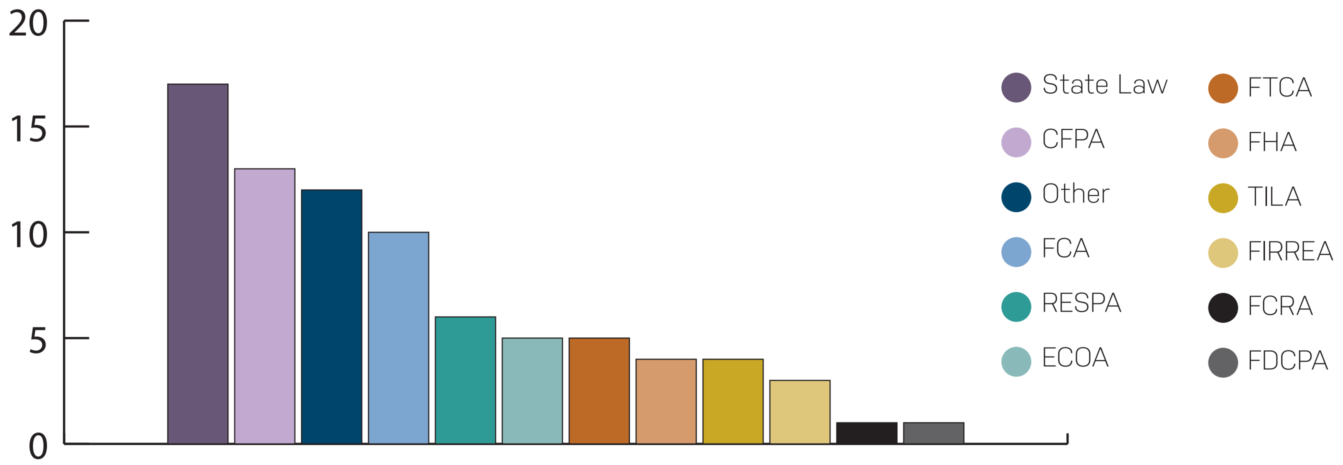
TABLE OF CONTENTS

MORTGAGE SERVICING & ORIGINATION

During 2015, Goodwin reported on several key trends in mortgage lending and servicing, including actions by federal and state agencies that resulted in settlements with large financial institutions across the country, statutory and regulatory changes to laws governing mortgage lending, and courts' evolving interpretations of key mortgage lending statutes such as the Truth in Lending Act (TILA).

Throughout the year, Goodwin tracked 68 federal and state enforcement actions related to mortgage servicing and origination. These matters involved mortgage insurance, discriminatory lending, mortgage modification and foreclosure relief services, and deceptive advertising. The CFPB and DOJ were the most active federal agencies, initiating roughly a quarter of the enforcement actions. State attorneys general combined to initiate another quarter of all mortgage-related actions. Enforcement agencies predicated actions on variety of statutes, including the False Claims Act (FCA), the Federal Trade Commission Act (FTCA), the Consumer Financial Protection Act (CFPA), RESPA, and state consumer protection and lending statutes. Enforcement agencies secured civil money penalties and consumer relief in individual actions ranging from $5,000 to over $210 million.

2015 Enforcement Actions by Statute



KEY TRENDS

The DOJ launched investigations and initiated civil fraud actions against national banks and regional mortgage lenders under the FCA, alleging that lenders failed to underwrite Fair Housing Act (FHA) insured mortgage loans in compliance with applicable Department of Housing and Urban Development (HUD) guidelines, resulting in insurance claims being paid by the government. There were at least five noteworthy U.S. Department of Justice (DOJ) settlements in 2015 ranging in amounts from $400,000 to over $210 million.

The DOJ also secured settlements with three lenders, resolving FHA discriminatory lending claims based on discretionary pricing policies.

The CFPB focused on reinsurance premiums being paid by primary mortgage insurers to lender-affiliated reinsurance companies, alleging that the premium payments were “kickbacks” that violated RESPA. In an administrative enforcement action, CFPB Director Richard Cordray issued a decision in the first ever administrative appeal of a CFPB enforcement action, and significantly altered the traditional application of RESPA to mortgage lenders in finding that a lender had violated RESPA. The lender has filed a petition for review in the D.C. Circuit on the grounds that the CFPB’s decision is arbitrary, capricious, and an abuse of discretion, is inconsistent with RESPA, and is unconstitutional. The D.C. Circuit has issued a stay of the CFPB’s disgorgement order. Meanwhile, the CFPB and the Maryland Attorney General resolved similar allegations of kickbacks involving title insurance companies rather than mortgage insurers.

The CFPB also continued to focus on deceptive advertising—entering into consent orders with a mortgage servicer and payment processor for unsubstantiated marketing claims involving consumer savings, and targeting deceptive advertising used by foreclosure relief services, especially where the service providers falsely implied an affiliation with government loan guarantors.

State attorneys general, often in conjunction with federal enforcement agencies, targeted individuals and companies allegedly running mortgage modification and foreclosure relief scams. A trend among both state and federal agencies was an increased focus on obtaining direct consumer relief, rather than merely securing civil money penalties or fines.

ENFORCEMENT ACTIONS BY STATUTE

Implementation of TRID. The TILA-RESPA Integrated Disclosure rule (TRID) took effect on October 3, 2015. Fannie Mae, Freddie Mac, and the FHA have agreed not to conduct post-purchase file reviews for technical TRID compliance in the near future, although the FHA has announced that its grace period will end on April 16, 2016.

Changes in HMDA Reporting. The CFPB issued a final rule, to be effective in January 2018, amending Regulation C, changing key portions of the Home Mortgage Disclosure Act (HMDA), including: (i) which institutions have reporting obligations, (ii) what transactions are subject to the HMDA rule, (iii) greatly expanding the information that must be collected, recorded, and reported, and (iv) the process for reporting and disclosing data.

Largest Ever Redlining Settlement Under the Fair Housing Act. HUD settled claims against Associated Bank in a redlining case under the FHA, requiring the bank to invest $200 million in increased mortgage lending and loan purchasing in heavily minority communities.

Circuit Split on TILA Resolved. The U.S. Supreme Court ruled this year that borrowers need only provide written notice to lenders within the three-year rescission period provided in TILA in order to preserve their rescission rights. The Court resolved a circuit split, as many lower courts had held that a borrower must file a lawsuit within the three-year period to preserve their rights.

Decision Issued in First Appeal of CFPB Administrative Action. On June 4, CFPB Director Cordray issued a decision in the first-ever appeal of a CFPB administrative enforcement action. He affirmed in part and reversed in part an administrative law judge's November 2014 recommendation, which held that a lender violated RESPA by accepting kickbacks (in the form of reinsurance premiums) for loans reinsured through an affiliate. Director Cordray affirmed the judge's liability determination, but significantly increased the disgorgement amount, requiring the lender to disgorge $109 million.

Financial Institutions Continue to Agree to Major Settlements to Resolve Recession-Era Allegations.

MetLife Home Loans LLC Settles FCA Claims for $123.5 Million. In February, the DOJ secured a $123.5 FCA settlement with MetLife Home Loans LLC. As is typical in these actions, the DOJ alleged that MetLife originated FHA loans with material underwriting errors, deficient quality control, and inadequate managerial oversight, resulting in insurance claims being paid by the government.

CFPB Settles with Green Tree Servicing, LLC for Over $60 Million. The CFPB and Federal Trade Commission (FTC) secured a settlement against Green Tree Servicing, LLC, stemming from allegations that Green Tree failed to recognize previous mortgage modifications, demanded payments without providing loss-mitigation alternatives, and engaged in other allegedly improper collection and loss mitigation activities.

LOOKING AHEAD TO 2016

The CFPB is likely to continue focusing on RESPA enforcement, as the agency has suggested that it believes that Marketing Service Agreements can constitute illegal "kickback" arrangements.

One new area of enforcement and litigation may be the implementation of the CFPB's new TRID rule (or the "Know Before You Owe" rule), which became effective on October 3 and makes significant changes to mortgage disclosure form requirements. There is still no formal grace period for compliance with TRID, although the CFPB announced that initial compliance examinations will focus on whether companies have made a "good-faith" effort to comply, and that certain violations can be cured even after closing. The CFPB suggested that its TRID approach would mimic its early enforcement of the 2014 mortgage servicing rules. Those rules are also likely to change in 2016 because the CFPB plans to finalize its proposed rules amending Regulation X (implementing RESPA) and Regulation Z (implementing TILA) later this year. The most significant proposed change would increase the number of times that servicers must provide certain borrowers with foreclosure protection through loss mitigation, further delaying the foreclosure process.

In addition, the FHA provided new guidance, in the form of taxonomy, to lenders on what it believes constitutes a defect in a loan. The FHA's expressed hope is that greater transparency will encourage lending to low-income borrowers, but only time will tell if the FHA's new guidance has that effect.

WHAT TO WATCH

Continued focus on RESPA | FHA encouragement of low-income borrower lending | TRID Implementation

CREDIT CARDS & CREDIT REPORTING

In 2015, Goodwin tracked over a dozen enforcement actions against credit card providers, vendors, and national banks, and against credit reporting agencies. The CFPB and state attorneys general brought nearly all of the enforcement actions, but the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC) also were active. The enforcement agencies advanced matters using the Fair Credit Reporting Act (FCRA), TILA, and the Unfair, Deceptive, Abusive Acts or Practices (UDAAP) provision of the CFPA to collect civil monetary penalties and consumer relief in excess of $764 million. The enforcement actions focused mostly on misleading and improper offering and sale of credit card add-on products, and the failure for reporting agencies to accurately report credit.

Goodwin also covered multiple litigation risks for credit card providers, including increased add-on product litigation, challenges to national bank preemption, borrower lawsuits related to excessive fees, new borrower privacy requirements for credit card issuers, and the CFPB's forthcoming final pre-paid card rules.

KEY TRENDS

As in years past, the CFPB continued to focus its 2015 enforcement efforts against credit card providers and banks on the advertisement, provision, and fees charged for add-on products. The CFPB consistently found that the add-on products provided by lenders, such as debt protection or identity theft protection, failed to comport with what lenders promised in advertising those practices, and were deceptively charged to consumers without consumer consent or knowledge. Lenders should beware of marketing additional services beyond extending credit because both the CFPB and plaintiff's lawyers have taken issue with what they claim are "misleading" add-ons. In addition, the Eleventh Circuit struck down a Florida law prohibiting merchants from imposing surcharges on customers using credit cards.

State attorneys general aggressively pursued the credit reporting agencies for inaccurate credit reporting. Responding to consumer complaints that credit reports were not accurate or were continuing to report deleted and stale information, state attorneys general obtained joint relief against credit reporting agencies. State attorneys general also pursued credit reporting agencies for improperly reselling data from credit reports to financial service providers.

SOME 2015 HIGHLIGHTS

The Eleventh Circuit Finds That Merchants Can Charge Surcharges for Credit Card Use. In Dana's Railroad Supply v. Attorney General, Florida, No. 14-14426, 2015 WL 6725138 (11th Cir. Nov. 4, 2015), the Eleventh Circuit struck down Florida's no credit-card surcharge statute as unconstitutional under the First Amendment.

Thirty-One States Settle with the Three Major Credit Reporting Agencies. On May 20, 2015, the state attorneys generals for 31 states reported a $6 million settlement with the three major credit reporting agencies over concerns regarding inaccurate consumer credit reports. The settlement arose from an investigation into consumer complaints that the reporting agencies failed to adequately (i) ensure the accuracy of consumer reports or credit reports, (ii) investigate consumer disputes, and (iii) prevent reporting of deleted or suppressed information.

CFPB Enters Consent Order with Fifth Third Bank for UDAAP Violations of Add-On Products. On September 28, 2015, the CFPB entered into a consent order with Fifth Third Bank for alleged UDAAP violations in connection with the bank's marketing and sales of its "debt protection" credit card add-on product. The CFPB alleged that the bank enrolled consumers in the debt protection program when consumers had only requested information, and failed to disclose that consumers were being charged a monthly percentage fee of their card balance. The bank agreed to pay $3 million in relief to roughly 24,500 customers and pay a $500,000 civil monetary penalty.

LOOKING AHEAD TO 2016

In 2016, we anticipate that add-on products and accurate credit reporting will continue to remain in federal and state enforcers' crosshairs. The CFPB and Director Cordray have clearly articulated their stance that add-on products are subject to unfairness and misrepresentation claims given their strong likelihood to mislead consumers. We also anticipate that credit card companies and banks will face scrutiny over their role in accurate credit reporting.

In addition, given recent trends from the CFPB consumer complaint database, we expect an uptick in litigation against banks and credit card companies concerning the assessment of late fees and inaccuracies in billing statements.

WHAT TO WATCH

Continued focus on add-on products | Increased scrutiny of lenders over accurate credit reporting | Potential increase in borrower litigation over late fees

STUDENT LENDING

During 2015, Goodwin tracked over a dozen federal and state enforcement actions related to student lending. The actions included investigations, consent orders, and litigation involving for-profit colleges, student lenders, student loan servicers, and student loan debt relief providers. The CFPB initiated over half of these enforcement actions, primarily targeting loan servicers. The CFPB estimates that over a quarter of student loan borrowers are either delinquent or in default, with the entirety of student loan debt estimated at $1.2 trillion—the second largest source of consumer debt. In the absence of a comprehensive statutory or regulatory scheme governing student lending, the CFPB and state enforcement agencies have relied heavily on generic consumer protection statutes in enforcement actions.

KEY TRENDS

The CFPB targeted student-loan servicing practices of national banks, including alleged practices such as overstating amounts due, failing to provide accurate information, and engaging in illegal debt collection activities. Although only one national bank has reached a consent order with the CFPB to date, two other national banks have disclosed ongoing CFPB investigations.

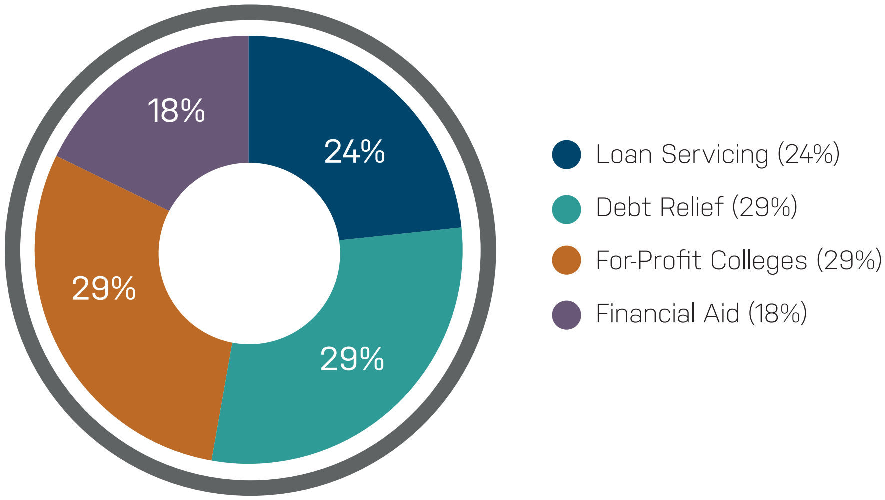
Another focus of federal and state enforcement activity has been for-profit colleges, resulting in consent orders and default judgments exceeding $1 billion. Enforcement agencies have been particularly active in targeting for-profit colleges that allegedly misrepresented job-placement statistics or career services, or pressured students into taking out federal or private student loans.

Debt relief and adjustment providers have also been subject to state enforcement actions over the past year, as states such as Washington and New York have obtained judgments against companies that overcharged students, charged up-front fees, and promised debt relief services that were never provided.

SOME 2015 HIGHLIGHTS

Joint Statement of Principles for Student Loan Servicing. In September 2015, the CFPB, Department of Education, and Department of Treasury issued a joint statement of general principles for student loan servicing, emphasizing that practices should be consistent, accurate and actionable, accountable and transparent.

2015 STUDENT LENDING ENFORCEMENT ACTIONS BY PRODUCT OR SERVICE



The CFPB simultaneously issued a 152-page student loan servicing report analyzing public input and recommending servicing reforms, including setting consistent standards across market participants, developing new disclosure requirements, and requiring periodic public reporting.

National Bank Ordered to Refund $16 Million and Pay $2.5 Million Penalty. On July 22, the CFPB issued a consent order against a national bank, requiring the bank to refund $16 million to borrowers and pay a $2.5 million civil penalty, settling allegations regarding the third-largest loan originator's student debt servicing practices.

For-Profit Colleges Ordered to Provide $480 Million in Debt Relief. On February 2, the CFPB announced that it had reached a $480 million settlement with ECMC Group and Zenith Education Group, private college consortiums that purchased the now-defunct for-profit Corinthian College, which the CFPB alleged had misrepresented job-placement statistics and the extent of career services offered, and pressured students to take out private, high-interest loans. On September 10, 2015, the Kentucky Attorney General's Office reached a $12.4 million settlement, resolving similar allegations against Daymar College, another private, for-profit institution.

LOOKING AHEAD TO 2016

The CFPB is likely to continue focusing on the servicing practices of student lenders. Although the CFPB is already investigating some prominent servicers, its most recent *Supervisory Highlights* identifies a broader array of servicing practices that the CFPB may target in the future, including allocating partial payments to maximize late fees, failing to post-date automatic payments made on weekends, and providing inaccurate information to credit reporting agencies.

Additionally, the CFPB has announced its intention to issue student loan servicing rules, the principles for which we expect the CFPB to draw from the mortgage servicing and CARD Act rules. We also expect 2016 will see the reauthorization of the Higher Education Act by Congress, which has the potential to reshape the student lending regulatory environment.

We expect the trend of enforcement against for-profit colleges and lenders of students attending for-profit colleges to continue and that scrutiny of the relationships between the two will heighten. And because general consumer protection statutes have been the favorite tool of federal and state enforcement agencies, a large factor in the number of future student lending enforcement actions will be how expansive an interpretation these enforcement agencies take regarding what is unfair, deceptive, and abusive in connection with student loans.

WHAT TO WATCH

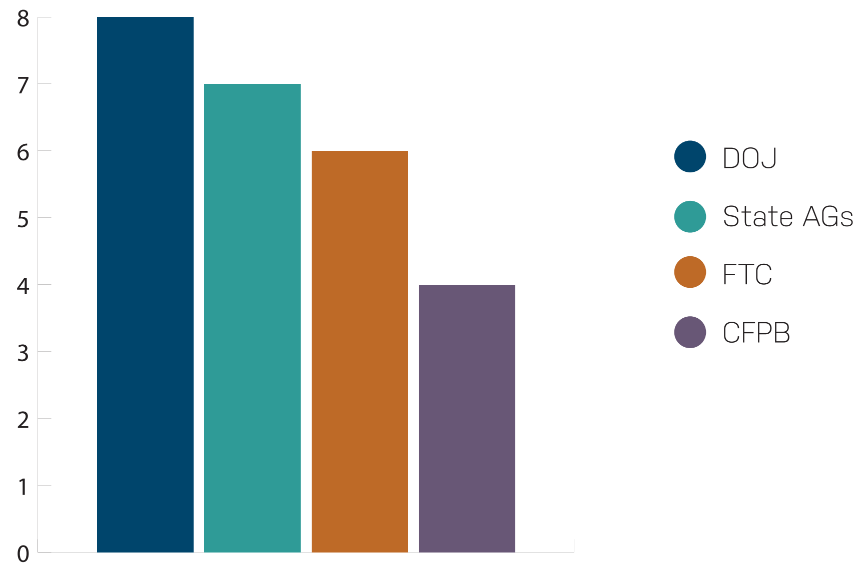
CFPB supervisory, enforcement, and rule-writing focus on servicing practices | Enforcement against for-profit colleges to continue | Reauthorization of the Higher Education Act

AUTO LOANS

During 2015, Goodwin tracked over 20 federal and state enforcement actions related to auto loans, the third largest source of household debt according to the CFPB. Goodwin also covered the CFPB's move to expand oversight of the nonbank auto finance industry, and focus on subprime auto lending, as well as the growing controversy over the CFPB's methodology for identifying discriminatory auto lending.

The 2015 enforcement actions targeted banks, direct and indirect auto lenders, auto dealers, and automobile title loan and debt collection companies, focusing primarily on allegedly deceptive advertising and discriminatory lending. Most of the enforcement activity involved consent orders and settlements, although new investigations and litigation were initiated in 2015 that could be resolved this year. Federal and state enforcement agencies secured consent judgments and settlements totaling over $110 million, ranging from under $50,000 for the smallest recovery to nearly $50 million for the largest. The DOJ was the most active agency, followed by state attorneys general and the FTC. In initiating these actions, enforcement agencies primarily relied on the Equal Credit Opportunity Act (ECOA), the FTCA, and state consumer protection laws.

2015 AUTO LENDING ENFORCEMENT ACTIONS



KEY TRENDS

About one-half of the auto lending enforcement actions involved deceptive advertising or inadequate disclosures. The FTC was particularly active in enforcing the FTCA, TILA, and state consumer protection laws against lenders that allegedly were engaged in deceptive advertising and providing inadequate disclosures to consumers.

The CFPB and DOJ continued to focus on lenders and auto dealers that permitted or encouraged discretionary auto dealer markups on interest rates offered to borrowers. The agencies alleged that such practices violated ECOA, and that lenders could be liable for permitting dealer markups where third parties utilized those markups to a discriminatory end.

The DOJ is continuing to investigate the auto loan origination and securitization practices of major financial institutions for potential violations of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). In February, Capital One Financial Corporation and Consumer Portfolio Services, Inc. each disclosed that it had received subpoenas related to these investigations. GM Financial Company, Inc. had revealed in August 2014 that it had received a similar subpoena.

State attorneys general were particularly active in initiating actions against auto lenders. About a quarter of auto lending enforcement actions were brought by state attorneys general under state consumer protection or usury laws. These actions, in states such as Massachusetts, Oregon, Vermont, Tennessee and West Virginia, involved claims that auto lenders were charging excessive interest rates, using deceptive advertising, or engaging in unfair or deceptive debt collection practices.

SOME 2015 HIGHLIGHTS

CFPB Announces Rule to Regulate Non-Bank Auto Lenders. On June 10, 2015, the CFPB announced that it would start regulating certain large non-bank auto finance companies (defined as companies with 10,000 transactions per year) that originate auto loans, refinance existing auto loans, provide certain types of automobile leases, or purchase any of these types of obligations. Before issuance of this rule, the CFPB supervised auto financing only at major banks and credit unions. This expansion of regulatory oversight means that the CFPB may enforce federal consumer protection laws against these non-bank auto finance companies.

National Bank Settles ECOA Claim for $18 Million. On September 28, 2015, Fifth Third Bank settled allegations by the DOJ and CFPB that it violated ECOA by allowing its auto dealer partners to charge minority borrowers higher interest rates through discretionary "dealer markups." The agencies alleged, based largely on questionable data analysis techniques, that these discretionary markups caused minority borrowers to pay, on average, $200 more for their auto loans.

Indirect Auto Lender Settles Advertising and Debt Collection Claims for $48 Million. On October 1, 2015, the CFPB and an indirect auto lender, Westlake Services, LLC and Wilshire Consumer Credit, LLC, settled allegations that it violated the Fair Debt Collection Practices Act (FDCPA), TILA, and the Dodd-Frank Act by deceptively advertising interest rates and using deceptive debt collection practices, such as using fake caller identification information and disclosing or threatening to disclose debts to borrowers' family, friends, and employers.

LOOKING AHEAD TO 2016

The CFPB likely will exercise its recently expanded regulatory authority over auto lending in 2016, but Congress may attempt to repeal or otherwise constrain that authority. The CFPB has further proposed rulemaking on auto lending, and rules are set to be released for notice and comment in the first quarter of 2016. Meanwhile, a bipartisan bill in the U. S. House of Representatives (H.R. 1737) is currently being considered in the U. S. Senate which, if enacted, would curtail the CFPB's authority to regulate auto finance. The CFPB and DOJ, armed with the U.S. Supreme Court's recent validation of "disparate impact" liability in mortgage discrimination cases under the FHA, will continue to advance cases against indirect auto lenders under ECOA based on dealer mark-up, dealer participation and total price. Using the play book from its credit card add-on product cases, the CFPB will further heighten scrutiny of auto add-on products, such as gap insurance and extended warranties.

WHAT TO WATCH

Congress may attempt to curtail CFPB authority over auto lenders | Continued focus on indirect auto lenders | Heightened scrutiny of add-on products

PAYDAY\SMALL DOLLAR LENDING

In 2015, Goodwin reported on the CFPB's proposed regulations of payday lending, and the different industry players that have sought to influence the coming regulations. In addition, Goodwin tracked major private actions involving payday lenders, including class actions and lawsuits brought by the government. Goodwin also monitored enforcement actions, private litigation, and regulatory developments related to the payday lending industry. Federal and state agencies initiated numerous investigations, lawsuits, and settlements regarding illegal or usurious interest rates, debt collection, and lead generation companies' marketing of payday loans to consumers. In one of these actions, the FTC secured its largest recovery ever in a payday lending enforcement action.

KEY 2015 TRENDS

Federal and state agencies focused on payday lenders who allegedly charged usurious or illegal interest rates, or misrepresented those rates to consumers. While states such as California, Missouri, and North Carolina led the charge at the state level, the CFPB also started to police similar activity where conduct spanned multiple states.

Lead-generation firms, which market payday loans to consumers and sell that information to payday lenders, have also been targeted by enforcement agencies, in particular by states where payday lending is illegal but lead-generation companies nonetheless market payday loans to state consumers. The CFPB has also shown that it is willing to take enforcement actions against lead generators despite the companies objecting that they are neither a "service provider" nor "covered person" within the meaning of the Dodd-Frank Act because they do not offer or provide a "financial product or service."

Payday lenders were also targeted by both enforcement agencies and private litigants for engaging in allegedly unlawful or unfair debt collection activities. The challenged practices include electronically withdrawing funds from consumers' bank accounts, disclosing consumers' debts to third parties, failing to disclose credit checks, and threatening consumers who fail to pay. This year, a number of banks succeeded in securing dismissals of consumer class actions alleging that banks have a duty to halt automated clearinghouse debits when they become aware that the debiting party is engaging in illegal activities.

The CFPB has moved to tighten payday lending regulations for both long- and short-term loans. The New York Department of Financial Services (DFS) has also tried to limit payday lending in the state of New York, and has supported the CFPB's more aggressive approach to regulating the industry. Both parties in Congress have criticized the proposed rules and have sought to impact the final rule's provisions.

SOME 2015 HIGHLIGHTS

Proposed Rules on Payday Lending. On March 26, 2015, CFPB Director Cordray announced a proposed outline of payday lending regulation that would vastly alter the current rules and regulations. The new rules would address both short-term and longer-term credit products such as (among others) payday loans, deposit advance products, high-cost installment loans, and certain other open-end lines of credit. Other proposals include an all-in APR cap of 36% for longer-term loans, a cooling-off period between loans, limiting the amount of the loan's principal, and notifying borrowers before accessing borrowers' bank accounts. Director Cordray stated that the purpose of the new regulations would be to return to a lending culture based on the consumer's ability to repay as opposed to the lender's ability to collect.

Payday Lenders Pay $21 Million and Waive $285 Million in Charges. On January 16, the FTC secured a settlement against two online payday lending companies, AMG Services, Inc. and MNE Services, Inc., that it alleged had misrepresented to consumers the costs of their loans and required preauthorized account-debits as a prerequisite for obtaining a loan. The $21 million payment to the FTC is the largest recovery by the FTC in a payday lending case to date.

Keeping Payday Lenders out of New York. DFS Superintendent Ben Lawsky made clear that New York regulators would have the final say over payday loans offered to New York residents by out-of-state lenders. Payday lending is illegal in New York, and Superintendent Lawsky has asked the CFPB to clarify that its proposed payday lending rules will not affect laws banning payday lending in New York.

Congress Tries to Influence the CFPB Payday Lending Rules. 12 republicans in the U. S. House of Representatives sent a letter to the CFPB, asking that the CFPB take into account the impact of its proposed payday lending rules on small businesses and rural communities.

LOOKING AHEAD TO 2016

The CFPB is likely to issue a formal notice of proposed rulemaking involving payday loans sometime in 2016 pursuant to its authority under the Dodd-Frank Act to regulate the short-term lending market. If the proposals outlined by the CFPB remain the same, the new proposed rules likely will have a dramatic effect on consumers' access to credit and on the payday lending industry generally. There is little doubt that the regulations will involve tightening available credit and forcing lenders to take into account customers' existing debt before providing them with credit, as well as potentially capping costs. Regardless of the scope of these new rules, payday lenders are likely to come under continued scrutiny from state regulators and increasing scrutiny from the CFPB, which has expressed skepticism that the industry benefits consumers.

WHAT TO WATCH

CFPB to issue notice of proposed rulemaking | Continued scrutiny from state regulators | Increasing scrutiny from CFPB | Increased borrower litigation and enforcement actions over loans offered by tribal entities

THE CFPB'S IMPENDING REGULATION OF PAYDAY AND SHORT-TERM LENDING

2015 FEBRUARY 4

NYDFS Superintendent Lawsky sends letter urging "strong national rules"

MARCH 26 2015

Director Cordray announces rulemaking proposals at Richmond Field Hearing

2015 APRIL 29

Small Business Regulatory Enforcement Fairness Act Panel meets regarding proposals

MAY 22 2015

CFPB Rulemaking Agenda notes NPR to be issued in 2015

2015 JUNE 15

Thirty-two Senate Democrats write letter urging "strongest possible rules"

SEPTEMBER 29 2015

Director Cordray testifies before House Committee on Financial Services about forthcoming new rules

2015 NOVEMBER 20

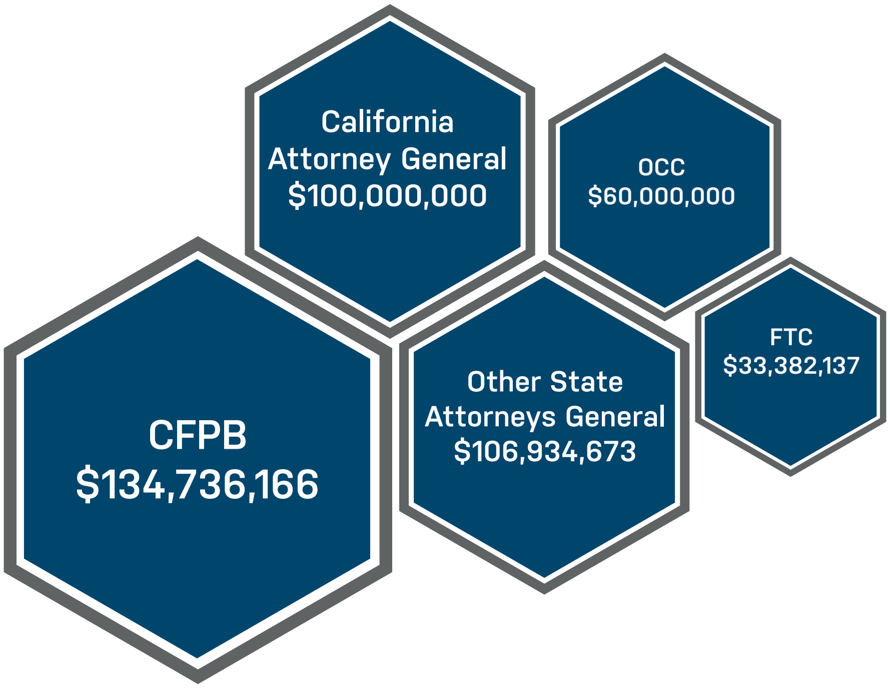
CFPB Rulemaking Agenda notes NPR to be issued in first quarter of 2016

DEBT COLLECTION

During 2015, Goodwin tracked over 30 federal and state enforcement actions related to debt collection and debt settlement, including actions targeting misleading or harassing communications, attempts to collect on or sell uncollectable debts, the charging of up-front debt settlement fees, and the failure to comply with protections extended to military servicemembers. These actions resulted in federal and state agencies securing over $375 million in consent judgments. The CFPB initiated a plurality of these actions, although the OCC, FTC, and state attorneys general also initiated numerous enforcement actions.

Goodwin monitored court rulings and the CFPB's activity as it affected collection practices across different financial sectors. Key cases covering RESPA, the FDCPA and national bank preemption affected debt collection practices this year, as did the consent requirements in the CFPB's looming pre-paid card regulations.

2015 AMOUNTS SECURED BY AGENCY IN DEBT COLLECTION & DEBT SERVICING ENFORCEMENT ACTIONS



KEY 2015 TRENDS

Courts and regulators are looking closely at collection practices of various financial services entities, from servicers to credit card companies, to ensure the companies are complying with existing consumer laws. In particular, regulatory agencies and governments are working together and pooling resources to conduct their investigations of target companies, as evidenced by various joint actions.

Specifically, the CFPB focused its enforcement energies on national banks and on practices by debt collectors and settlement agencies of providing false or unverified information to credit reporting agencies, attempting to collect unverified debts, and using unlawful collection practices like harassing phone calls and threats of legal action.

Enforcement agencies also focused on national banks trying to collect debts owed by military servicemembers. The OCC secured multiple consent judgments against national banks, which allegedly violated the Servicemembers Civil Relief Act (SCRA) by filing false affidavits stating that the consumer is not a military servicemember. The CFPB focused similarly on debt collection practices affecting the military, filing actions against a military payroll deduction processor and a national automobile finance company.

State agencies heavily policed unfair or unlawful debt settlement practices, including bringing actions where companies charged up-front fees for settlement services, misrepresented the nature of services provided, and failed to provide promised services.

SOME 2015 HIGHLIGHTS

Servicers Are Subject to the FDCPA. In Hart v. FCI Lender Services, Inc., the Second Circuit ruled that, depending on the wording of the correspondence, the transfer of servicing communication to borrowers can be considered a debt collection “initial communication” letter that triggers disclosure obligations under the FDCPA, 15 U.S.C. § 1692g.

Prior Express Consent to Collect Debts. On August 21, 2015, the Sixth Circuit issued its widely anticipated decision in Hill v. Homeward Residential, Inc., which affirmed a jury verdict finding that Homeward Residential, Inc. had the consumer’s prior express consent to call him. The court held that the consumer granted express consent when he provided his telephone number in connection with the debt.

JPMorgan Chase Bank Ordered to Pay $200 Million. On July 8, 2015, the CFPB and attorneys general from 47 states issued a consent order requiring JPMorgan Chase Bank to pay $200 million to settle claims that its debt-sale practices were unfair and that it provided substantial assistance to debt buyers' deceptive collection practices. The bank allegedly sold accounts that were inaccurate, settled, discharged in bankruptcy, not owed by the consumer, or otherwise uncollectable, and allegedly filed lawsuits and obtained judgments using affidavits and other improper documents.

California AG Secures $100 Million Settlement with JPMorgan Chase Bank. On November 2, 2015, the California Attorney General's Office agreed to a $100 million stipulated judgment with JPMorgan Chase Bank, resolving allegations that JPMorgan engaged in abusive debt collection practices related to defaulted consumer credit card accounts. The alleged practices include robo-signing affidavits in debt collection lawsuits, miscalculating amounts borrowers' owed, and reporting inaccurate amounts to credit reporting agencies.

FTC Brings "Operation Collection Protection" Actions. On November 4, 2015, the FTC announced a new joint enforcement initiative with state attorneys general targeting debt collection companies, with the goal of bringing civil and criminal enforcement actions against debt collection companies engaged in illegal collection tactics. Through this initiative the FTC brought 115 actions last year in conjunction with 70 state and federal agencies.

FTC Launches "Messaging for Money" Enforcement Initiative. The FTC secured several injunctions in federal courts against debt collectors as part of its enforcement initiative targeting practices such as the failing to provide statutorily required notices, sending misleading text messages to consumers, or threatening to arrest a consumer or contact family members.

LOOKING AHEAD TO 2016

The CFPB's 2015 rulemaking agenda notes that it is conducting research on possible additional regulations of the debt collection industry. Because debt collection is the largest source of consumer complaints received by the CFPB, debt collection is likely to remain in the CFPB's crosshairs. Future enforcement activity will likely continue to focus on banks and ensuring proper debt collection practices targeted in recent consent orders, including banning debt buyers from reselling accounts, requiring that debts be confirmed before they are sold to third parties, and providing account-level documentation to debt buyers to confirm that the debts are accurate and enforceable before the accounts can be sold. Because student debt continues to balloon, federal enforcement actions related to student debt relief service providers also may become more prominent.

WHAT TO WATCH

Additional regulations | Sale of debts to third-parties subject to enhanced scrutiny by regulators | Scrutiny of student loan debt relief providers

TELEPHONE CONSUMER PROTECTION ACT

In 2015, Goodwin monitored regulatory developments and tracked notable Telephone Consumer Protection Act (TCPA) cases throughout the year. Of note this year was the passage of FCC 15-72, which was intended to provide clarification about consumers' rights under the TCPA, and expanded the TCPA's coverage to text messages and smartphone applications. Court cases during 2015 continued to clarify the meaning of "prior express written consent," as well as the statutory terms "autodialing," and "telemarketing."

KEY 2015 TRENDS

2015 developments include the FCC's continued efforts to modernize the TCPA and expand its scope with a package of declaratory rulings addressing the TCPA's application to new technology and continued clarification of definitions under the TCPA, particularly the meaning of "prior express written consent," which the FCC recently re-defined from "prior express consent" in 2012. Also of note was the increase in consumer class action activity over TCPA violations, a trend expected to continue this year.

SOME 2015 HIGHLIGHTS

FCC Ruling Potentially Expands Scope of TCPA. The FCC continued to clarify and modernize the TCPA through passage of FCC 15-72, which altered the TCPA in several significant areas. That opinion is on appeal (ACA, Int'l v. FCC, Case No. 15-211 (D.C. Cir. 2015); Prof'l Ass'n for Customer Engagement v. FCC, No. 15-1244 (D.C. Cir. filed July 29, 2015)), and could unwind the FCC's order as to the rules and definitions governing reassigned wireless numbers, consent obtained via smartphone application downloads, inclusion of text messages in the definition of "calls" under the TCPA, and a change to the definition of an "auto-dialer."

FCC Takes a Hard Look at User Agreements. Use of services cannot be conditioned on consumers' provision of "prior express written consent" to be called. See In the Matter of F.N.B. Corporation, File No. EB-TCD-15-00019627; In the Matter of Lyft, Inc., File No. EB-TCD-15-00019865 (FCC citation and order).

Human Touch Defeats TCPA Unsolicited Text Messaging Class Action. Human direction of a prerecorded call or text does not constitute "autodialing" within the meaning of the TCPA. See Derby v. AOL, Inc., Dkt. No. 46, Case No. 15-452 (N.D. Cal. Sept. 9, 2015).

Eighth Circuit Revives Dismissed TCPA Action. Where multiple messages are involved in a telemarketing campaign, courts will look to the overall purpose of the campaign to determine whether calls were made for the purpose of telemarketing. See Golan et al. v. Veritas Entertainment, L.L.C., et al., Appeal No. 14-2484 (8th Cir. June 8, 2015).

In Well-Reasoned Decision, Sixth Circuit Joins Eleventh Circuit on TCPA Prior Express Consent. The Sixth Circuit, relying on guidance from the FCC in 2008, found that a consumer can give consent to be contacted at any time "during the transaction" that involves the debt. This case decision further cements creditors' rights to call debtors using auto-dialers prior to the FCC's 2012 rule requiring prior express consent.

Eleventh Circuit Declines to Follow the Pack on "No Piggybacking" Rule. In Ewing Industries Corp. v. Bob Wines Nursery Inc., a class action involving alleged violations of the TCPA, the court held that that the pendency of a purported class action does not toll the limitations period for a later action seeking to represent the same class, when the earlier class was denied certification on grounds of inadequate representation.

LOOKING AHEAD TO 2016

The TCPA has become a favorite with the plaintiff's bar, as shown by the recent spate of TCPA actions. We expect plaintiffs to continue to test the TCPA's application to new technology in the coming year.

The D.C. Circuit's opinion on the FCC Order 15-72 likely will come down in 2016 and could dramatically change the landscape of current TCPA actions and deter new TCPA actions. Lenders should be particularly wary of calling wireless numbers going forward, because inadvertently calling a reassigned wireless number more than once without confirming the prior express written consent of the called party is an easy way potentially to run afoul of the TCPA.

WHAT TO WATCH

Continued focus from plaintiff's bar | Impact of appellate decision on FCC 15-72

WHAT WE'RE WATCHING: 2016 EMERGING ISSUES

CYBERSECURITY

Following several high-profile data breaches in late 2014, cybersecurity remained a hot topic in 2015, and we expect the focus in this area to continue. Below are just a few cybersecurity developments over the year.

In early 2015, the NY Attorney General proposed legislation to help strengthen cybersecurity laws. The proposed legislation expands the definition of private information to include email addresses, medical information, and health insurance information. It also requires companies to notify consumers and employees in the event of a breach, and encourages companies to share information with law enforcement by granting them a safe harbor where there are data breaches.

On February 25, 2015, President Barack Obama "directed the Director of National Intelligence to establish what will be known as the Cyber Threat Intelligence Integration Center (CTIIC)." The CTIIC will be a news agency designed to combat cybersecurity threats by using information from all the different agencies currently involved in combating foreign and domestic cyber threats so that the information is more effectively communicated and used to protect U.S. interests.

In FTC v. Wyndham Worldwide Corp., the FTC sued Wyndham in the wake of three cybersecurity attacks that allegedly exposed the personal information of "hundreds of thousands of consumers [and led] to over $10.6 million in fraudulent charges." The FTC brought suit under the "unfair or deceptive acts or practices" provision of the FTCA—15 U.S.C. § 45(a)—claiming that Wyndham's failure to establish and maintain reasonable cybersecurity protocols allowed the hackers to attack Wyndham's systems. The Third Circuit decided that the FTC had the authority to regulate cybersecurity under the unfairness prong of § 45(a) and that Wyndham had notice that its cybersecurity practice could fall short of § 45(a) because it had been hacked in the past, among other reasons.

ONLINE LENDING & FINTECH

Online lending and FinTech companies are seeking to disrupt (and in some ways are disrupting) traditional banking and lending models. While they have begun to get the attention of regulators, in 2015 they largely avoided the focus of enforcers. We expect this may change in 2016 based on highlights from the past year.

On December 11, the California Department of Business Oversight (DBO) announced that it had launched an inquiry into the online lending industry, known as "marketplace lending." The DBO requested a wide array information from 14 marketplace lenders, including five-year trend data about their loan and investor funding programs, and information about their business models and online platforms. The DBO's announcement indicated that the goal of the inquiry is to better understand marketplace lending and to determine the industry's size and scope. The DBO's inquiry follows the July 16 announcement by the U.S. Treasury Department that it was requesting information from marketplace lenders regarding their business models and products, as well as requesting input into how the financial regulatory framework should evolve in light of the industry's growth.

On May 19, the CFPB entered consent orders with PayPal and Bill Me Later concerning their online-payment services. The CFPB alleged violations of the CFPA for the payment processors' failure to honor advertised promotions, misprocessing consumers' payments, and engaging in other allegedly deceptive and unfair practices relating to consumer enrollment, fees, and billing disputes. The consent order requires the companies to pay $15 million in redress to affected consumers and $10 million to the CFPB in civil money penalties.

In Madden v. Midland Funding, LLC, the Second Circuit ruled that although a national bank can charge an interest rate that exceeds state law maximums under state usury laws, the bank's assignee cannot. In reversing the lower court's ruling, the Second Circuit rejected the argument that the National Bank Act's preemption applied to assignees of a debt from a national bank. The court held that the assignee "did not act on behalf of" a national bank "in attempting to collect on [the plaintiff's] debt." The court reasoned that applying a state law interest rate limitation to the assignee of a national bank "would not significantly interfere with any national bank's ability to exercise its powers under the NBA." Midland Funding is seeking review of the Second Circuit's decision by the U.S. Supreme Court. Although Midland Funding is a secondary market purchaser of unpaid debt and the decision most directly affects that industry, it also has a significant impact on FinTech consumer finance companies. Many marketplace lenders operate on a model where they generate loans but use a national bank to originate the loans at rates higher than state usury limits, and then repurchase the loan from the bank with that interest rate. Arguably, the Second Circuit's ruling bars such lenders from this practice within that jurisdiction. If the U.S. Supreme Court accepts the appeal, it will be one of the most closely watched decisions in 2016 for disruptors in consumer finance lending.

MAJOR APPELLATE CASES TO WATCH IN 2016

In 2015, Goodwin reported on various cases that had the potential to have an impact on class action litigation or the interpretation of key consumer statutes. In 2016, the class action cases we are monitoring will be decided by the U.S. Supreme Court, which could affect defendants' ability to defend against cases that potentially create serious risk of exposure in class actions alleging technical violations of consumer protection laws; of course, uncertainty about the composition of the Court makes it difficult to predict outcomes. In addition, the U.S. Court of Appeals for the District of Columbia will take up the issue of the constitutionality of the CFPB.

SPOKEO INC. V. ROBINS

In November 2015, the U.S. Supreme Court heard *Spokeo Inc. v. Robins et al.*, No. 13-1339, in order to decide whether a plaintiff had standing based solely on an injury in law, with no injury in fact. It is unclear how the opinion, when it finally comes, will land. Questions asked during oral argument by Justices typically even as members of the conservative wing of the Court—and even Justices Breyer and Kagan—may indicate that the Court is inclined to rule that more than a bare statutory violation is required to show standing.

TYSON FOODS, INC. V. BOUAPHAKEO

In addition, the U.S. Supreme Court heard oral argument in *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146, about how class actions should be tried. Specifically, the questions in Tyson were, in cases involving collective actions under the Fair Labor Standards Act ("FLSA") or class actions under Rule 23, whether: (i) individual class members may be ignored and a class action certified where liability and damages will be determined using statistics and an average observed in a sample; and (ii) a class/collective action may be certified or maintained when the class contains hundreds of members who were not injured and have no legal right to any damages. The questioning at oral argument suggested that the Court might decide Tyson on narrow FLSA grounds, under existing Supreme Court precedent.

HAWKINS V. COMMUNITY BANK OF RAYMORE

In Hawkins v. Community Bank of Raymore, No. 14-520, the plaintiff petitioned for U.S. Supreme Court review on the questions of whether an "applicant" under ECOA includes a spousal guarantor and whether the Federal Reserve Board was authorized to include a spousal guarantor as an "applicant" in Regulation B. By accepting the petition (with both questions), the Court will likely resolve whether spousal guarantors can sue under ECOA, a decision that may also impact Regulation B's inclusion of sureties and non-spousal guarantors as applicants who can sue under ECOA.

MICROSOFT CORP. V. BAKER

On January 15, 2016, the U.S. Supreme Court granted certiorari in *Microsoft Corp. v. Baker*, 15-457, on the question of whether a federal appellate court has jurisdiction to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice. This case is in the same vein as other cases on the viability of class actions, e.g., *Campbell-Ewald Co. v. Gomez*, and *Spokeo*, where the defendants seek to limit plaintiff's attorneys from allowing a class action to continue where the named plaintiff either drops out or should otherwise be disqualified.

PHH CORP. ET AL., V. CONSUMER FINANCIAL PROTECTION BUREAU

On April 12, 2016, the U.S. Court of Appeals for the District of Columbia Circuit will hear argument in *PHH Corp. et al. v. Consumer Financial Protection Bureau*, No. 15-1177. This case is the first major challenge to the Bureau's regulatory and adjudicatory powers under the Dodd-Frank Act. The Bureau alleged that a mortgage lender and its affiliated reinsurance entity entered into a "kickback" scheme with mortgage insurers in violation of RESPA. The appeal is from the decision of the CFPB Director, after review of administrative findings. The D.C. Circuit will take up the questions of whether the CFPB may change longstanding interpretations of financial services laws without fair warning to regulated entities, whether the CFPB's interpretations of RESPA are correct, how to apply RESPA's statute of limitations, and whether the CFPB's structure is constitutional. The court will also consider whether the CFPB exceeded the scope of its powers by ordering disgorgement of $109 million and broad injunctive relief.

LenderLaw Watch Blog

LenderLaw Watch blog monitors and analyzes legal issues impacting our financial services clients and the consumer finance industry. Financial services companies face increased government investigations and enforcement actions, a shifting regulatory landscape, novel civil litigation theories and other litigation risks. LenderLaw Watch helps our clients stay on top of these legal challenges.

VISIT www.lenderlawwatch.com | FOLLOW @LenderLawWatch | SUBSCRIBE Sign Up

Consumer Finance Enforcement Watch Blog

Consumer Finance Enforcement Watch is a blog that reports on the full range of public, federal and state consumer finance enforcement activity. The blog is undergirded by a proprietary database of information on all tracked matters.

VISIT www.enforcementwatch.com | FOLLOW @GPEnforceWatch | SUBSCRIBE Sign Up

YEAR IN REVIEW AUTHORS

Sabrina Rose-Smith
Partner
202.346.4185
srosesmith@goodwinprocter.com

Ben Saul
Partner
202.346.4110
bsaul@goodwinprocter.com

Catalina Azuero
Associate
617.570.1348
cazuero@goodwinprocter.com

Kyle Tayman
Associate
202.346.4245
ktayman@goodwinprocter.com

GOODWIN PROCTER