

2018 CFPB

Update ∴ ∴ ∴

The Consumer Financial Protection Bureau (“CFPB” or “Bureau”) is a U.S. government agency created by the Dodd-Frank Wall Street Reform and Consumer Protection Act. The CFPB is the first federal agency tasked solely with the mission of consumer financial protection. To this end, Congress has vested it with enforcement, supervisory, and rulemaking authority. In an effort to stay apprised of significant industry changes affected by the CFPB, Burr & Forman’s CFPB Update will serve as a periodic briefing on recent case law, news, and developments related to the CFPB.

---- RECENT CASES ----

CFPA

CFPB Granted Statutory Fees but Denied Restitution Against Financial Services Provider

Consumer Financial Protection Bureau v. CashCall, Inc., Case No. CV 15-07522-JFW (C.D. Cal. Jan. 19, 2018).

On January 19, 2018, the United States District Court for the Central Division of California held that the CFPB was entitled to recover statutory fees, but not restitution, against financial services provider, CashCall, Inc. As background, CashCall, Inc. was founded by a co-defendant in the case, Paul Reddam, to provide unsecured consumer loans. The financial crisis of 2008 severely limited the ability of banks to engage in lending activity, which included partnerships with unsecured lenders such as CashCall. Thus, CashCall ended its unsecured consumer loan business and entered the mortgage loan business. CashCall’s mortgage business was very successful, and it was ultimately sold in 2015.

Seeking to diversify its lending, CashCall was advised to become involved in a Tribal Lending

Model in which a lender operating on an Indian reservation would make loans to borrowers and then assign the loan to a non-tribal financial services company like CashCall for servicing and collection. CashCall was advised that the loans would be made under the laws of the tribe and would not have to comply with licensing and usury laws in states where borrowers resided. CashCall went into business with Western Sky Financial LLC, whereby Western Sky would make loans to consumers, and after three days, these loans would be purchased by a subsidiary of CashCall for servicing of the loan. These entities created what would be called the Western Sky Loan Program. Borrowers’ Consumer Loan Agreement in the Western Sky Loan Program were told that their loans were governed by the Indian Commerce Clause of the Constitution of the United States and the laws of the Cheyenne River Sioux Tribe. The Consumer Loan Agreement also stated, “Neither this Agreement nor Lender is subject to the laws of any state of the United States of America.”

Although CashCall believed it was not subject to federal consumer protection law or state limiting rates due to the tribal immunity doctrine, federal and state regulators disagreed. In 2011, the state of Washington filed an enforcement action against CashCall, alleging violations of state law based on CashCall’s servicing of Western Sky loans. Other states followed, and in 2013, the CFPB filed a Complaint alleging that CashCall and others involved had engaged in unfair, deceptive, and abusive acts and practices in violation of the Consumer Financial Protection Act (“CFPA”). In 2016, the CFPB filed a Motion for Partial Summary Judgment as to liability only, which was granted.

Thus, the only issue remaining before the Court was the appropriate remedy for Defendants’ violations of the CFPA. The CFPB sought restitution in the amount of \$235,597,529.74 and statutory penalty in the amount of \$51,614,708.

While restitution is permissible under the CFPA, it is not required. Instead, the CFPB bears the burden of proving (1) that restitution is an appropriate remedy and (2) that the amount of restitution it seeks represents a defendant's unjust gains. As for the first element, the Court explained that restitution is an appropriate remedy when a defendant uses a scheme to defraud using fraudulent misrepresentations to trick consumers into believing they are purchasing something other than that which they actually receive. Because the CFPB did not show that the Defendants intended to defraud consumers or that consumers did not receive the benefit of their bargain under the Western Sky program, the court found that restitution was not an appropriate remedy. The Court held that establishing a company to avoid state licensing and usury laws is not sufficient to show fraud, as companies try to structure businesses to avoid unfavorable laws and regulations all the time. As for the second prong, even if the CFPB had satisfied the first element, the Court found that the CFPB did not present evidence that \$235,597,529.74 was the appropriate amount of restitution based on Defendants' unjust gains.

Although restitution was not permitted, statutory penalties were imposed. The Consumer Financial Protection Act ("CFPA") provides: "Any person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil penalty" 12 U.S.C. § 5565(c)(1). The Act permits penalties based on the violating party's mental state: no more than \$5,000 per day for no mental state, no more than \$25,000 per day if the defendant acted recklessly, or no more than \$1,000,000 if the defendant acted knowingly. Although the CFPB argued that CashCall acted knowingly, the Court found that CashCall did not act knowingly or recklessly. According to the Court, the evidence showed that there was no case law at the time clearly establishing that the Tribal Lending Model was not lawful. At best, the Court found, CashCall's actions were risky and nothing more. Accordingly, the court imposed a penalty in the amount of \$10,283,886.00 based on a Tier One penalty: no more than \$5,000 per day with no mental state involved.

CFPB Brings Enforcement Action Against Think Finance, LLC

On November 15, 2017, the CFPB filed a Complaint in the United States District Court for the District of Montana against Think Finance, alleging the company deceived consumers about loan payments that were not legally owed. Many states have laws that nullify loans and other types of credit if interest rates exceed state limits, and lenders may not collect on these loans that are void. According to the CFPB, Think Finance pursued customers for payments, even though the loans at issue were void under state law, representing to consumers that they owed money on loans that they did not owe.

Additionally, the CFPB also alleged that Think Finance collected on these loans that were void. According to the Complaint, Think Finance is alleged to have made electronic withdrawals or sent letters to consumers demanding payment on loans that the consumer was under no legal obligation to pay under state laws governing interest rate caps or the licensing of lenders.

To read the Complaint in full, visit https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_think-finance_complaint_112017.pdf.

CFPB Files Suit against Freedom Debt Relief, Nation's Largest Debt-Settlement Services Provider

On November 8, 2017, the CFPB filed suit against Freedom Debt Relief, LLC ("Freedom") and Andrew Houser, the co-founder and co-CEO of Freedom. Freedom works with consumers and negotiates with consumers' creditors to persuade these Creditors to accept less than what is actually owed. When a debt settles, Freedom charges the consumer between 18 and 25 percent of the amount of debt owed when Freedom's services were solicited.

According to the CFPB, Freedom misled and deceived consumers by telling them that all creditors would negotiate with Freedom, when in reality, many creditors refuse to negotiate with

debt settlement companies. In these situations, Freedom “coached” consumers instead of dealing with creditors directly, yet Freedom did not make clear that consumers may need to handle some negotiations themselves. Freedom also deceived by charging its fee to the consumer, even when a creditor simply stopped collections without a settlement, or when consumers negotiated their own settlements. Finally, Freedom also failed to clearly disclose consumers’ rights to their own account funds after they withdrew from Freedom’s program.

As for Andrew Housser, the CFPB alleges that Housser had the authority and responsibility to approve Freedom’s policies and practices, yet he allowed these illegal practices to continue. Thus, the CFPB alleges that Housser has violated the Dodd-Frank Act and the Telemarketing Sales Rule.

To read the Complaint in full, visit http://files.consumerfinance.gov/f/documents/cfpb_freedom-debt-relief-llc_complaint_112017.pdf

CFPB Files Complaint against Debt-Relief Companies for Illegally Posing as the Federal Government

On October 12, 2017, the CFPB filed a Complaint in the United States District Court for the District of Maryland against two companies operating under the name “FDAA,” along with their owners and a service provider. These companies claim to provide advice and assistance to consumers to eliminate all or a portion of their debt and improve their credit score.

According to the CFPB’s Complaint, these FDAA companies lied about having an affiliation with the federal government in an attempt to persuade financially vulnerable customers into paying thousands of dollars in illegal advance fees. Mailers from the companies stated that they were a “regulatory notification” and included a seal similar to the Great Seal of the United States. The companies maintained a “debt validation” program in which the companies told consumers that their debt would be eliminated or reduced if the creditor did not respond to the companies’ satisfaction,

even though creditors are not permitted to contact consumers after a debt has been disputed.

Additionally, the FDAA companies falsely advertised that they could reduce consumers’ debts by 60%. The FDAA companies also instructed consumers to stop making debt payments without disclosing that not making payments could result in being sued or having their debt increase. Finally, federal law prohibits the collection of certain fees by debt collection entities before certain results are achieved, yet the FDAA companies charged certain fees without achieving the promised results.

To read the Complaint in full, visit https://s3.amazonaws.com/files_consumerfinance.gov/f/documents/201710_cfpb_FDAA-complaint.pdf

---- IN THE NEWS ----

CFPB Submits Report on College Credit Card Agreements

On January 3, 2018, in compliance with the Credit Card Accountability, Responsibility and Disclosure Act (“CARD Act”), the CFPB published its annual report to Congress regarding agreements between institutions of higher education and affiliated organizations (such as fraternities, sororities, and alumni organizations). The CARD Act requires credit card issuers to annually submit to the CFPB the terms and conditions of all college credit card agreements in effect during any part of the preceding year that were entered into between the issuers and affiliated organizations.

The report identified several recent trends. First, in 2016, the number of these types of credit card agreements decreased along with the number of accounts opened pursuant to such agreements. Second, while higher education institutions have regained some market share, alumni associations continue to dominate the market for these types of agreement. Third, the largest few agreements continue to increase their market share, with the ten most lucrative agreements representing an unprecedented 43% of all payments by issuers.

To read this report visit: https://www.consumerfinance.gov/documents/5948/cfpb_college-credit-card-agreements-report_2017.pdf

State of the Consumer Credit Card Market

On December 27, 2017, the CFPB issued its biennial report on the state of the consumer credit card market. The detailed report discusses consumers' credit card use, credit card availability, the prices paid by consumers for their use, practices used by credit card companies, and recent innovations in the credit card industry. The Credit Card Accountability Responsibility and Disclosure Act ("CARD Act") requires that, every two years, the Board of Governors of the Federal Reserve System report on the state of the consumer credit card market. The CFPB assumed this responsibility in 2013. The current 2017 report revisits some of the 2015 topics in order to evaluate market developments. It also provides two new in depth "deep dives." First, it examines indicators for a range of credit card products designed for consumers lacking prime credit scores. Second, it examines the way "third-party comparison websites" have impacted the credit card market.

The report also includes analyses of the following: the total credit card market size, the data surrounding consumer credit card use and credit card debt, the effect of the CARD Act on the cost of credit to consumers, the availability of credit in the card marketplace, the manner in which consumers procure general purpose credit cards, issuer practices such as the use of digital account servicing platforms, strategies for collecting delinquent consumer credit card debt, and consumer financial product innovation such as the increased adoption of EMV "chip" card readers.

To access the report, visit: https://www.consumerfinance.gov/documents/5950/cfpb_consumer-credit-card-market-report_2017.pdf

CFPB Publishes Ombudsman's Office 2017 Annual Report

On December 6, 2017, the CFPB Published the Ombudsman's Office 2017 Annual Report ("Report"). The CFPB Ombudsman assists consumers and a variety of entities in informally resolving process issues within the CFPB. The CFPB was chosen as one of four case studies in a report by the Administrative Conference of the United States regarding the use of ombudsmen in federal agencies.

Among other items, the Report includes discussion and feedback on the accessibility of CFPB print materials and telephone entry points for non-consumers. The Report also provides updated information on the "memorializing of ex parte communications and consumers' options to identify issues with companies when submitting consumer complaints, as published in the CFPB's public Consumer Complaint Database." Finally, the Report provides strategic plan goals to guide the Ombudsman's Office over the next two years. The Report states that the Ombudsman's Office will build on its Ombudsman Forum program to help resolve issues within the CFPB. Ombudsman Forums are anticipated to be held with consumer groups in each of the four CFPB regions over the next few years.

To read the report, visit: https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_ombudsman-office-annual-report_fy2017.pdf

Growth in Longer-Term Auto Loans

The CFPB's most recent quarterly report on consumer credit trends, released on November 1, 2017, focuses on the growth of longer-term auto loans (defined as auto loans with terms of six years or more). The CFPB notes that the rapid growth of long-term auto lending has been accompanied by an increase in longer-term financing. However, the report also reveals that the rapid growth of longer-term auto loans began to subside in 2016 and 2017, and provides some analysis of this new cooling trend.

To read the report, visit: <https://www.consumerfinance.gov/documents/5744/cfpb-consumer-credit-trends-longer-term-auto-loans-2017Q2.pdf>

CFPB Issues Monthly Complaint Report Examining Servicemember Complaints

On October 31, 2017, the CFPB issued a monthly complaint report providing a 50-state review of complaints submitted by servicemembers, veterans, and their families. The report also compares these complaints to complaints submitted by non-servicemembers. The report identifies five types of products receiving the highest volume of complaints: debt collection (comprising 39% of servicemember complaints and 26% of non-servicemember complaints), mortgages (17% for servicemembers and 22% for non-servicemembers), credit or consumer reporting (15% for servicemembers and 19% for non-servicemembers), credit cards (7% for servicemembers and 10% for non-servicemembers), and checking or savings (7% for servicemembers and 10% for non-servicemembers). The report notes that 91,482 complaints have been handled since 2011, with the number of complaints handled increasing by 8% from 2015 to 2016.

To read the report, visit: <https://www.consumerfinance.gov/documents/5780/cfpb-monthly-complaint-report-50-state-snapshot-servicemembers-102017.pdf>

Statements

Call for Evidence Regarding Consumer Financial Protection Bureau Functions

On January 17, 2018, Acting CFPB Director Mick Mulvaney announced that the CFPB will publish Requests for Information (“RFIs”) in the Federal Register. The RFIs will seek public comment on CFPB “enforcement, supervision, rulemaking, market monitoring, and education activities” in order to gather feedback and suggestions from consumers and covered entities. The first RFI will

seek comment on Civil Investigative Demands issued during enforcement investigations.

To read the statement, visit: <https://www.consumerfinance.gov/about-us/newsroom/acting-director-mulvaney-announces-call-evidence-regarding-consumer-financial-protection-bureau-functions/>

Statement on the Payday Rule

On January 16, 2018, the CFPB released a statement declaring that “January 16, 2018 is the effective date of the Bureau of Consumer Financial Protection’s final rule entitled ‘Payday, Vehicle Title, and Certain High-Cost Installment Loans’ (‘Payday Rule’).” The CFPB stated that, while the Payday Rule does not require compliance until 2019, the January 16, 2018, effective dates makes April 16, 2018, the effective date to submit an application to become a registered information system under the rule. However, the CFPB noted its authority to waive the deadline, and stated that the CFPB “will entertain waiver requests from any potential applicant.”

To read the statement, visit: <https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/>

To read a copy of the rule, visit: <https://www.federalregister.gov/documents/2017/11/17/2017-21808/payday-vehicle-title-and-certain-high-cost-installment-loans>

Statement on Home Mortgage Disclosure Act Compliance

The Home Mortgage Disclosure Act (“HMDA”) requires many lenders to report information they receive from applications for certain types of mortgage loans and certain types of loans that they purchase. The Dodd-Frank Wall Street Reform and Consumer Protection Act tasked the CFPB with expanding the information collected under HMDA by including additional types of data, such

as data regarding mortgage loan underwriting. In 2015, the CFPB issued a rule requiring that financial institutions collect and report additional mortgage data effective January 1, 2018. In its final rule issued in August, 2017, the CFPB clarified reporting requirements and increased the threshold for collecting and reporting data on home equity lines of credit to two years.

On December 21, 2017, however, the CFPB publicly acknowledged the compliance challenges presented by this rule. For data collected in 2018 and reported in 2019, the CFPB stated it does not intend to require data resubmission, unless there are material errors, and does not intend to assess penalties for data errors. The CFPB hopes this will allow the collection and submission of HMDA information in 2018 to highlight any compliance gaps and provide financial institutions with the opportunity to remedy them.

The CFPB also stated that it intends to engage in rulemaking to rethink portions of the 2015 HMDA rule. For now, though, financial institutions are to submit data collected in 2017 and reported in 2018 in accordance with the current Regulation C. Starting with HMDA data collected in 2017, financial institutions are to use the CFPB's new online platform for items such as uploading loan and application registers, reviewing edits, and certifying data.

To read the statement, visit: <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-public-statement-home-mortgage-disclosure-act-compliance/>

Rules

Civil Penalty Inflation Annual Adjustments

On January 12, 2018, the CFPB issued a rule adjusting for inflation for the maximum amount of each civil penalty within the CFPB's jurisdiction.

To read the rule, visit: www.federalregister.gov/documents/2018/01/12/2018-00399/civil-penalty-inflation-adjustments

Disclosure and Exemption Threshold Adjustments

As of January 1, 2018, exemption and disclosure requirements under certain CFPB regulations have been adjusted. Some CFPB regulatory requirements received no change in their amount from the previous year. For instance, at \$12.00, the ceiling for allowable charges under section 612(f) of the Fair Credit Reporting Act (FCRA) remains the same since 2015.

The CFPB amended the asset size thresholds for exemptions under Regulation Z (Truth in Lending Act). The exemption threshold is adjusted from \$2.69 billion to \$2.112 billion. Creditors with assets of less than \$2.112 billion are exempt as of December 31, 2017, from establishing escrow accounts for higher-price home mortgage loans in 2018 if the other requirements of Regulation Z are also met.

The CFPB also issued a final rule adjusting the asset-size exemption threshold for banks, savings associations, and credit unions under the requirements of Regulation C (Home Mortgage Disclosure). The exemption threshold was increased from \$44 million to \$45 million. Beginning on December 31, 2017, banks, savings associations, and credit unions with assets under \$45 million are exempt from collecting data under this aspect of Regulation C.

To read these rules, visit the following links:

<https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/fair-credit-reporting-act-disclosures/>

<https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/truth-lending-act-regulation-z-adjustment-asset-size-exemption-threshold/>

<https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/home-mortgage-disclosure-regulation-c-adjustment-asset-size-exemption-threshold/>



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