2017 CFPB Update

FALL

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

Consumer Fin. Prot. Bureau v. Access Funding LLC, et al., 16-CV-03759-JFM, 2017 WL 4063737 (D. Md. Sept. 13, 2017).

The CFPB filed suit against Access Funding, LLC, ("Access") and attorney Charles Smith ("Smith") (collectively "Defendants") alleging violations of multiple provisions of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5481 *et. seq.* ("CFPA"). Access, a Maryland LLC, engages in "structured settlement factoring," a process in which recipients of structured settlements exchange their right to future payment streams for a discounted lump sum. Such structured settlements exist to compensate tort victims for personal injuries. Where the structured settlement recipient has suffered long-term physical or cognitive harm, 49 states, including Maryland, require companies such as Access to obtain court approval before purchasing the payment stream. Before granting such approval, courts must verify that the individual has consulted with an independent professional advisor to ensure that the transaction would be in the individual's best interest.

The CFPB's suit alleged that Access used Smith as the "independent professional advisor" for virtually all of its Maryland transactions, despite the fact that Smith had personal and professional ties to Access that compromised his independence.

Additionally, the CFPB alleged that Access violated the CFPA by providing consumers, many of whom were cognitively impaired, with advances prior to obtaining court approval of the purchase, then representing to those consumers that they would be liable for repaying those advances if they did not cooperate with obtaining court approval.

Defendants responded with motions for *Burford* abstention and a stay, or in the alternative, to dismiss. In support of their motion to dismiss, Defendants made arguments for why the CFPB failed to state a claim upon which relief could be granted. Defendants argued first that Smith was not a "covered person" under the CFPA. Defendants further claimed that Smith was exempted from the CFPA as an attorney giving legal advice under the CFPA's "practice of law exclusion." Finally, Defendants stated that the CFPB's allegations were no more than conclusory and that CFPB's count alleging that the payment advances were abusive lacked sufficient specificity.

The U.S. District Court for the District of Maryland ("Court") ultimately denied the motions for *Burford* abstention and stay, dismissed the four counts regarding Smith's conduct, and denied Defendants' motion to dismiss the count regarding Access's allegedly abusive practices.

Jurisdictional and Prudential Claims:

The Court first addressed whether there were prudential or jurisdictional bars under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the doctrine of issue preclusion, or the collateral attack doctrine. Defendants argued that, under *Burford*, the Court should abstain from issuing a decision that would interfere with Maryland state court decisions. However, the Court agreed with the CFPB in holding that *Burford* is of too limited a scope to bar the court from enforcing the CFPA despite the existence of a state administrative scheme with a similar subject matter. The Court also determined that issue preclusion did not apply, because even though the issues in this case were closely related to final judgments entered in Maryland state court cases, the CFPB was neither a party to nor in privity with any party to those cases. Therefore, the CFPB had not had an opportunity to be heard on those issues. Defendants then argued that the collateral attack doctrine barred the CFPB's claims, because the CFPB was trying to relitigate whether Maryland state courts should have approved various structured settlement transfers. The Court found that where, as here, there is an absence of proof that the party to a second case was in privity with a party to the first case, the collateral attack doctrine does not apply.

Covered Person Under the CFPA

Contrary to the CFPB's allegations, Defendants argued that Smith was not a "covered person" under the plain meaning of the CFPA and that the statute was therefore inapplicable. Applying the plain meaning of the statute, the Court found that Smith's role as the independent professional advisor required him to give legal, tax, and financial advice to consumers, which constituted "financial advisory services … to consumers on individual financial matters," and therefore made him a "covered person" under the CFPA.

Practice of Law Exclusion

Defendants claimed that even if Smith was a "covered person" under the CFPA, he would fall under the statute's "practice of law" exclusion. The CFPA provides that the CFPB "may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of the state in which the attorney is licensed to practice law." 12 U.S.C. § 5517(e)(1). The CFPB, on the other hand, argued that Smith's conversations with consumers did not constitute the practice of law and thus did not fall under the exclusion. The Court examined the definition of what it means to "practice law" in Maryland and found that it includes "the giving of legal advice." The Court then determined from the allegations in the complaint that Smith gave consumers legal advice and was therefore engaged in the practice of law. The Court further found that any financial advice Smith provided was "incidental" to his giving of legal advice. As a result, the Court dismissed all four counts raised against Smith.

Specificity of the CFPB's Complaint

Lastly, Defendants argued that the final count of the CFPB's complaint, alleging abusive acts or practices, must be dismissed because the CFPB relied only on broad, conclusory allegations in support of its claim. The CFPB alleged that Access abused consumers, as prohibited under the CFPA, by encouraging those with immediate needs for cash to take the payment advances. Those consumers would then be bound to pay back their advances or complete their transactions in the structured settlement streams. The Court found that these allegations were sufficiently specific to state a claim upon which relief could be granted. If Access misrepresented to consumers the nature of those advances or obligations, then that would violate § 5531(d)(2)(A) of the CFPA by "taking unreasonable advantage of consumers' lack of understanding of the material risks, costs, or conditions of [a] product or service." Contrary to Defendants' assertions, the Court determined that, at that stage in the litigation, the CFPB was not yet required to identify the particular consumers who were subjected to those practices. Further, the Court held that, under § 5531(d), the CFPB did not need to explain how the abusive act caused substantial injury to consumers or that the substantial injury was not outweighed by benefits to consumers.

Consumer Fin. Prot. Bureau v. Nationwide Biweekly Admin., Inc., No. 15-CV-02106-RS, 2017 WL 3948396 (N.D. Cal. Sept. 8, 2017).

The CFPB brought suit in the U.S. District Court for the Northern District of California ("Court") contending that Nationwide Biweekly

Administration, Inc. ("Nationwide"), its wholly-owned subsidiary, Loan Payment Administration ("LPA"), and Nationwide's founder, president, sole officer, and sole owner, Daniel Lipsky ("Lipsky") (collectively "Defendants") misled customers in the mailers and phone scripts they sent out for their financial service product, the Interest Minimizer Program ("IM Program"). The IM Program is a financial services product where a customer authorizes Nationwide to automatically debit from the customer's bank account one half of their monthly home mortgage payment every two weeks. This would total the equivalent of thirteen full payments, which would be applied to the principal balance and reduce it more quickly than if only twelve payments were being made each year. The CFPB alleged that, due to the amount of fees Defendants charged for the product, the IM Program would not in fact provide customers with the advertised savings opportunity.

Legal Standards

The CFPB's complaint set out four counts. First, that Defendants violated 12 U.S.C. §§ 5531, the Consumer Financial Protection Act of 2010 ("CFPA"), through "abusive" conduct, which is defined as "if, among other things, defendants have taken 'unreasonable advantage of the consumer's lack of understanding of the material risks, costs, or conditions' of, the service or product they are selling." Second, the CFPB alleged that Defendants' conduct constituted "deceptive practices" under the CFPA and its ensuing standard determined by the Ninth Circuit Court of Appeals ("Ninth Circuit") in *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1192 (9th Cir. 2016). Despite Defendants' urging of the Court to not follow the deceptiveness standard of *Gordon*, the Court relied on it and stated that the result would be the same even under Defendants' proposed alternative. Third, the CFPB's complaint alleged that Defendants violated the Telephone Sales Rule 16 C.F.R. § 310.2(d) ("TSR") regulation that implemented the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6105(d). Fourth, the CFPB claimed that Defendant's alleged violation of the TSR was, by definition, a violation of the TSR.

Alleged Misrepresentation 1: Existence and/or Amount of the "Set-up Fee"

The CFPB contended that Nationwide did not adequately disclose the existence of the fee or the amount charged for its IM Program in mailers sent to customers or in response to customer calls. In 2011, Nationwide switched from a one-time fee model to set-up the IM Program to a deferred fee model, where consumers would not have to pay an initial $245 set-up fee in exchange for Nationwide keeping the first "extra" mortgage payment the customer made. The Court discussed the language in the mailers at issue, the scripts followed over the phone by Nationwide representatives, and the deferred fee as a bi-weekly payment in the contract, to conclude that the CFPB failed to demonstrate those disclosures were inadequate. The Court found that the disclosures made in the mailers and over the phone were sufficiently clear, and that it was not too much to ask a reasonable consumer to cross-reference the bi-weekly payment to determine the fee amount.

Alleged Misrepresentation 2: Defendants' Affiliation with Consumer Lenders

Next, the CFPB contended that the mailers and phone scripts used by Nationwide and LPA created a misleading impression as to the relationship between them and the customers' existing lender. The Court found that most of the mailers and phone scripts from Nationwide and LPA contained sufficient disclaimers so that "[a]t least by the time of enrollment, no reasonable consumer could have been laboring under any misunderstanding that Nationwide was the lender, or even directly affiliated with the lender." However, the Court determined that customers would be misled by the net impression created by many of the mailers because they "contained additional language designed to instill in potential customers a sense that they had some kind of existing obligation by virtue of their loan to respond to the mailers." The Court relied on the *Gordon* decision which stated that a "later corrective written agreement does not eliminate a defendant's liability for making deceptive claims in the first instance," to come to that conclusion. Therefore, the Court held that the CFPB adequately demonstrated that some of the mailers would be likely to mislead customers and support a finding of liability.

Alleged Misrepresentation 3: Timing and Amount of Interest Savings

The CFPB next alleged based on their expert's testimony that Nationwide's representations as to the timing and amount of savings was misleading because, due to the fees involved, its typical customer would not reach a break-even point until around nine-years' worth of payments under the IM program. The CFPB argued that this was false or misleading because the average customer would stay in a specific mortgage for four and a half years, which was before the savings from the IM Program would be realized. Defendants used their own expert to dispute the CFPB's expert's approach, arguing that the savings from making an extra payment towards the loan's principal "can only be meaningfully measured by looking at the total interest amount that will have been paid by the end of the loan term, given the extra principal payments, and comparing that to what the total interest would have been absent those payments." Further, Defendants argued that the savings should be looked from the perspective of the reduction in the total interest obligation, where the interest savings would automatically carry over to a new loan if the customer refinanced it.

The Court held that even if Defendants' position was correct, parts of their marketing materials were "likely to mislead consumers acting reasonably under the circumstances," as per the decision in *Gordon*. The Court found that the context in which defendants used the "average" figure for consumer savings was such that a reasonable consumer would likely misunderstand that figure. Defendants' disclaimers in their figures as based on the lifetime of the loan were found to be insufficient when their materials made representations regarding "immediate savings." The Court determined that, while the CFPB failed to show it "to be wrongful for Nationwide to 'guarantee' savings, or to use savings figures that compare total interest on the same loan over its full term with total interest on the same loan under the IM program," Defendants were misleading in reducing that to monthly and yearly savings figures. The Court found additional misrepresentation in that some of the marketing materials used by Nationwide stated that 100% of the extra payments went to reducing the loan principal, when that was false due to the first extra payment being retained as a part of the set-up fee.

Alleged Misrepresentation 4: Consumers' Ability to Achieve Similar Savings without the IM Program

The Court held that the CFPB adequately showed that Defendants' representations that a consumer must use the IM Program or go through a similar third party was sufficiently misleading. Those misrepresentations were made during phone calls with potential customers whose loans were with lenders known to offer a similar bi-weekly payment program. The CFPB, however, failed to show how many Nationwide customers would fall into that class of consumers. The Court determined that this provided support more for injunctive rather than monetary relief.

Statute of Limitations

Defendants contended that the CFPB's action was barred by the three year statute of limitations under the CFPA. Defendants' argued that the statute began to toll on March 3, 2012, when the CFPB received a consumer complaint alleging Nationwide's misleading marketing. That was over three years before the CFPB's May 11, 2015, filing. The Court, however, held that the action was not time-barred and that the "mere receipt" of a consumer complaint would not automatically trigger the statute of limitations. At most, the Court held that such a complaint could put the CFPB on inquiry notice.

Remedies

The CFPB sought restitution under the CFPA from Nationwide and LPA for nearly $74 million, constituting the revenue from the set-up fees for 126,000 customers in the IM Program. The CFPB also sought over $33 million from Lipsky in disgorgement of his shareholder distributions from 2011 to 2015. Defendants did not contest the accuracy of the figures, and so the Court was left to determine whether restitution and/or disgorgement was appropriate. The Court ultimately concluded that the appropriate remedies would be a single penalty of $7,930,000 to be divided jointly and severally among the defendants along with an order that within thirty days that the parties negotiate injunctive relief.

The Court noted that there was little guidance in the Ninth Circuit in determining how it should exercise discretion where appropriate equitable relief would be less than the full amount available. This was an important issue, as the facts indicated that the CFPB did not prove that Defendants engaged in egregious fraud, and that Defendants did or could not show 1) that the IM Program never benefitted customers or 2) that a fully informed one would never elect to pay for that service. The Court did note that the decision in *F.T.C. v. Figgie Int'l, Inc.*, 994 F.2d 595 (9th Cir. 1993) would support the restitution refund for the set-up fees sought by the CFPB, as the opinion there held that fraud in the selling is what entitles customers to a refund despite the realization of some benefit. However, the Court found that Nationwide's misrepresentations generally did not apply to all customers, while the one that did, the timing of savings, had a basis in fact. Further, the CFPB failed to prove that the set-up fee was not adequately disclosed, so based on these circumstances the balance of equities led the Court to conclude the restitution of all of the customer's set-up fees was inappropriate.

Next, the Court addressed the disgorgement from Lipsky and the statutory penalties under the CFPA sought by the CFPB. The Court determined that if there was no restitution being made, then disgorgement was unwarranted. In regards to the statutory penalty, the CFPA provides a basic penalty of $5,000 per day, with "reckless" or "knowing" violations receiving progressively higher rates. The Court stated it could consider mitigating factors such as the "size of financial resources and good faith of the person charged," "gravity of the violation," and "the history of previous violations." The CFPB requested the maximum $5,000 per day first tier penalty from July 21, 2011, to November 23, 2015, in the amount of $7,930,000, which the Court found appropriate based on the record. The Court determined that Defendants sought to use the most effective sales tactics possible to push up to the legal limit, but also that they took mitigating training, legal, and quality control steps. As such, the Court stated that the higher tier penalties were unwarranted. The Court found that there was no sufficient basis to impose the penalty separately on each defendant for the $7,930,000 amount, so joint and several liability was appropriate. Finally, the Court dismissed Defendants' counterclaims, such as the CFPB engaging in "back-room pressure tactics," for a lack of proof and ordered the parties to confer and submit joint or separate proposals for injunctive relief.

RESPA

Consumer Fin. Prot. Bureau v. Borders & Borders, PLC, No. 3:13-CV-01047-CRS-DW, 2017 WL 2989183 (W.D. Ky. July 13, 2017).

Borders & Borders ("Borders") is a small family-owned law firm in Louisville, Kentucky that primarily performs local real estate closings. Borders is also authorized to issue title insurance policies for four title insurance companies. In 2006, Borders created joint ventures with principals of nine real estate providers ("Title LLCs") in Louisville. Title LLCs served as the title insurance agencies for real estate closings for lenders who did not maintain one internally. When Borders closed on a transaction for such a lender, it would send the title insurance underwriting to the associated Title LLC. Borders would disclose this relationship to borrowers and buyers when it referred them to Title LLCs to procure title insurance. Borders provided an Affiliated Business Arrangement Disclosure Form ("standard disclosure form") to borrowers and buyers at closing and give them thirty days to decide whether to buy title insurance from Title LLCs. David, Harry, and John Borders owned 50% in Title LLCs, with venture partners owning the remaining 50%. Each Title LLC was authorized and approved to conduct business in Kentucky.

In 2011, The U.S. Department of Housing and Urban Development ("HUD") informed Borders it was being investigated for violating the anti-kickback provision of the Real Estate Settlement

Procedures Act ("RESPA"), 12 U.S.C. § 2601, et seq. Section 8(a) of RESPA prohibits "any fee, kickback, or thing of value pursuant to any agreement or understanding ... that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred in any person." Violators of that provision face up to one year in prison, civil liability, or public enforcement actions. RESPA has a safe harbor provision to shelter "affiliated business arrangements" under 12 U.S.C. § 2607(c)(4). To qualify, that business arrangement must be disclosed to the person being referred to the affiliated business so that "such person is not required to use any particular provider of settlement services,' and 'the only thing of value that is received from the arrangements . . . is a return on the ownership interest or franchise relationship.'"

Title LLCs ceased operations and dissolved upon notice of the HUD investigation. In April 2012, the CFPB informed Borders it would be taking over and continuing the investigation of alleged RESPA violations. In 2013 in the U.S. District Court for the Western District of Kentucky ("Court"), the CFPB alleged that Borders violated RESPA's anti-kickback provision by arranging for Title LLCs to pay the joint venture partners for their participation as members. The CFPB contended that Title LLCs were not "providers of settlement services" and that the standard disclosure forms given to borrowers and buyers did not conform to 12 C.F.R. § 1024, were a threat to the purpose of disclosure, and were not provided at the time of referral. This, according to the CFPB, meant that the distributions to joint venture partners were not protected by RESPA's safe harbor provision. Both Borders and the CFPB then filed motions for summary judgment with the Court.

In its motion for summary judgment, Borders first claimed that the CFPB failed to show that their arrangement with Title LLCs violated the anti-kickback provision of RESPA. To establish such a violation, the Court relied on *Egerer v. Woodland Realty, Inc.*, 556 F.3d 415, 427 (6th Cir. 2009), and said the following elements must be met "(1) a payment or a thing of value; (2) made pursuant to an agreement to refer settlement business; and (3) an actual referral." The Court determined that the CFPB met its burden of proving those elements. First, the joint venture partners received a "thing of value" under RESPA from Borders for their roles with the Title LLCs. Second, joint venture partners testified that they would routinely refer settlement business to Borders for the closings, unless the customer indicated otherwise, which indicated an agreement to refer settlement services. Finally, the CFPB demonstrated that those referrals between Title LLCs and Borders involved federally related mortgage loans, so the elements had been met for a Section 8(a) violation of RESPA.

Borders, however, maintained that even if Section 8(a) of RESPA was violated, its arrangement with Title LLCs qualified under the safe harbor provision as an "affiliated business relationship." The Court ultimately accepted this contention and granted summary judgment in favor of Borders. The Court cited *Carter v. Welles-Bowen Realty, Inc.,* 736 F.3d 722, 725 (6th Cir. 2013) (citing 12 U.S.C. § 2607(c)(4)) and stated the following elements must be met to qualify as an affiliated business relationship under RESPA: "(1) [t]he person making the referral must disclose the arrangement to the client; (2) the client must remain free to reject the referral; and (3) the person making the referral cannot receive any 'thing of value from the arrangement' other than 'a return on the ownership interest or franchise relationship.'" The record indicated that Borders systematically gave its customers a disclosure of their arrangement with Title LLCs at the closing, when the law firm had first contact with the customers. The Court found that the standard disclosure form used by Borders was sufficient under RESPA and that it did not require customers to use one of the Title LLCs. Finally, the "thing of value" received by members of the Title LLCs was found by the Court to only be valid ownership interest and not payment for referring a customer. The CFPB failed to show that these distributions were anything other than ownership interests. Therefore, the Court concluded that Borders was entitled to judgment as a matter of law.

Though the Court stated no further ruling was necessary, its opinion addressed Borders' other arguments and the CFPB's motion for partial summary judgment. Borders alternatively argued that summary judgment should be granted because its services were performed for fair market services, which were then protected by Sections 8(c)(1) and 8(c)(2) of RESPA. The CFPB however had asserted that the payments violating RESPA were the distributions paid to joint venture partners, not that Title LLCs received a kickback from charging more than fair market value. Sections 8(c)(1) and 8(c)(2) then could not support Borders' motion.

Borders also asserted that the CFPB's claim for disgorgement and an injunction were not viable remedies. The Court however concluded that, under RESPA, disgorgement is a valid equitable remedy and that the CFPB's request for an injunction prohibiting Borders from future violations of Section 8 of RESPA was sufficiently tailored and proper. Borders also argued, relying solely on *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), that the complaint was an ultra vires act. The Court declined to address the matter, because that decision had been vacated in favor of en banc review at the U.S. Court of Appeals for the D.C. Circuit, which had not yet issued a decision. Finally, for the preceding reasons, the Court declined the CFPB's partial motion for summary judgment and found a remaining motion to strike by Borders to be moot.

Federal Rules of Civil Procedure Sanctions

Consumer Fin. Prot. Bureau v. Universal Debt Sols., LLC, No. 1:15-CV-859-RWS, 2017 WL 3887187 (N.D. Ga. Aug. 25, 2017).

Plaintiff Elaine Wendel ("Plaintiff") filed suit In 2015, the CFPB sued numerous individuals and entities ("Debt Collectors") for allegedly creating limited liability companies in Georgia and New York designed to conduct a massive debt collection scheme that targeted millions of consumers. Debt Collectors allegedly used the phone services of defendant Global Connect to send millions of false and threatening messages to consumers, as well as several payment processors, to withdraw funds from those who provided their payment information. These defendant payment processors consisted of Global Payments, Pathfinder, Frontline, and EMS (collectively "Payment Processors"), whom the CFPB accused of violating the CFPA by "providing substantial assistance to the debt collectors' unfair or deceptive conduct" and "engaging in unfair or deceptive conduct." As the case developed, Pathfinder filed a Motion for Rule 11 Sanctions ("Rule 11 Motion") under the Federal Rules of Civil Procedure.

Two months after the filing of the case, Pathfinder served the CFPB with its Rule 11 Motion, contending that the case against Pathfinder was an exercise in government overreach and lacked a basis in law and fact. Eighteen months later, once fact discovery was complete, the CFPB was still asserting its claims against Pathfinder. Pathfinder subsequently filed its Rule 11 Motion with the U.S. District Court for the Northern District of Georgia ("Court"), asserting that the CFPB's claims against it were frivolous and warranted dismissal.

The CFPB's claims against Pathfinder stated that Pathfinder "should have noticed the debt collectors' excessively high chargeback rates for particular months and should have heeded those and other ongoing warning signs of fraudulent activity." Pathfinder contended that the CFPB's pre-suit investigation did not reveal evidence supporting the CFPB's allegations and that its monitoring conduct met industry standards. The Court, however, denied Pathfinder's motion. The Court noted that the Committee Notes for Rule 11 state "Rule 11 motions . . . should not be employed . . . to test the legal sufficiency or efficacy of allegations in the pleadings" or to "emphasize the merits of a party's position." The Court found Pathfinder's motion did just that and stated "[a] Rule 11 motion filed in advance of any ruling on summary judgment is not the proper procedural mechanism for the Court to resolve such a disagreement."

More substantively, the Court discussed the defendants' Motions for Rule 30(b)(6) served on the CFPB, and later, Rule 37 Sanctions against the CFPB. In August 2016, the defendants served the CFPB with Rule 30(b)(6) deposition notices, which the CFPB felt the Court should not require it to address for multiple reasons. The Court rejected the CFPB's arguments and refused to categorically bar depositions of the CFPB. Payment Processors and Global Connect had served deposition notices, and the CFPB responded with motions for protective orders for most of the noticed topics. The CFPB contended the noticed topics should be stricken or narrowed, while relying on many of its same arguments against opposing the depositions in the first place. The CFPB was concerned about being asked to offer its evidence and link its allegations to specific facts.

In ruling on the motion for protective orders, the Court permitted some topics in full and narrowed others in discovery, while ultimately reinforcing its prior finding that the defendants were entitled to question the CFPB about the factual bases for its allegations. Depositions took place over the following weeks, and those ultimately resulted in three Motions for Rule 37 Sanctions against the CFPB. All contended that the CFPB acted in contrast to the Court's instructions and prevented the taking of meaningful depositions. They argued that the Court should sanction the CFPB by striking four of the counts against the defendants.

The Court then discussed the legal standards for those motions, which implicated Rule 37(b) and Rule 37(d). Rule 37(b) grants a court broad discretion to sanction a party for its failure to comply with a discovery order, with extreme sanction requiring a "willful or bad faith failure to obey a discovery order." Rule 37(d) provides that a court may sanction a party falling under Rule 36(b)(6) when that party fails to appear for a properly noticed deposition, which includes circumstances when the witness presented is not knowledgeable about relevant facts. The discretion granted to a court under Rule 37(d) is the same as Rule 37(b).

The defendants contended 1) that the CFPB did not produce a knowledgeable witness under Rule 36(b)(6), and 2) that the CFPB's privilege and work product objections were improper in obstructing answers to questions the Court had expressly allowed. Global Payments, Pathfinder, and Frontline sought sanctions to strike the CFPB's claims against them, while EMS and Global Connect joined them but also argued alternatively that the court should reopen the Rule 36(b)(6) depositions.

Specifically, as to the CFPB's failure to produce a knowledgeable witness, the defendants contended that the CFPB produced a witness who improperly and heavily or exclusively relied on memory aids. The Court agreed and determined that the CFPB did in fact fail to present a knowledgeable witness. In reviewing the deposition transcripts, the Court found that a CFPB witness, in response to a question from Global Payments, proceeded to read virtually entirely from a script. Further, the witness was unable to offer much testimony outside of what was contained in the memory aids. The witness was also unable to testify or reasonably identify a single exculpatory fact as to Global Payments, which the Court found particularly egregious given the volume of discovery.

As to the defendants' contention that the CFPB improperly relied on privilege and work product objections to deposition testimony, the Court found that the CFPB blatantly violated its prior instructions. The CFPB logged numerous work product objections to questions, but after the first deposition of the CFPB, the Court conducted a phone conference with the parties. The Court approved the questions Frontline used as examples of what it wanted to ask the CFPB as to the basis for its claims. Despite the Court's instruction, the next day the CFPB asserted the same objection and instructed its witness not to answer Frontline's questions, which the court had just approved.

The Court subsequently found that the CFPB willfully violated its instructions and failed to present a knowledgeable witness. As such, the Court did not believe reopening depositions would be beneficial. On August 25, 2017, the Court granted the defendants' Motions for Rule 37 Sanctions and dismissed the CFPB's claims against Frontline, Global Payments, Pathfinder, Electronic Merchant Systems, and Global Connect.

---- IN THE NEWS ----

Senate Votes to Repeal CFPB Arbitration Rule

In a late-night vote held on October 24, 2017, the Senate joined the U.S. House of Representatives in voting to repeal a controversial arbitration rule recently passed by the CFPB. On July 10, 2017, the CFPB sent ripples throughout the financial services community when it released a new Final Rule to regulate arbitration agreements in contracts for certain consumer financial products and services. The rule would have placed two sets of limitations on the use of pre-dispute arbitration agreements.

First, and most controversially, the rule would have prohibited companies from using pre-dispute arbitration agreements to block consumer class actions in court and would have required most companies to insert language into their arbitration agreements to reflect this limitation. Under this rule, a company that entered into a pre-dispute arbitration agreement on or after March 19, 2018, would have been required to include the following language in the arbitration agreement:

> "We agree that neither we nor anyone else will rely on this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else."

Second, this rule would have required companies that use pre-dispute arbitration agreements to submit certain records pertaining to arbitration and court proceedings to the CFPB. The CFPB would have then used this information to determine whether further CFPB action was needed.

The effective date for this new rule would have been March 19, 2018. Now that both the Senate and the House have approved legislation repealing the rule, which President Trump is expected to sign, the rule is no longer expected to take effect.

For more regarding the Senate's vote and its implications, visit http://bit.ly/2z7rUUD.

CFPB Issues Final Rule to Create Consumer Protections for Payday Loans, as Well as for Certain Vehicle Title and High-Cost Installment Loans

On October 5, 2017, the CFPB issued a final rule to address payday loans, vehicle title loans, and high-cost installment loans. This new rule applies to loans with terms of 45 days or less (such as payday loans or short-term vehicle loans), long-term loans with balloon payments, and long-term loans with an APR of greater than 36 percent APR.

The rule is comprised of two primary parts. First, the CFPB has determined that it is an unfair and abusive practice for a lender to make a loan with a balloon payment without reasonably determining that the consumer has the ability to repay the loan according to the loan's terms. Second, for loans with a balloon payment and for long-term loans with an APR greater than 36 percent, this new rule finds it an unfair and abusive practice to attempt to withdraw a payment from the consumer's account after two consecutive payments have failed, unless the lender obtains new, independent authorization to make additional withdrawals from the account.

To read this Final Rule, visit: s3.amazonaws.com/files.consumerfinance.gov/f/ documents/201710_cfpb_final-rule_payday-loans-rule.pdf

CFPB Issues Interim Final Rule to Help Mortgage Servicers Communicate with Certain Borrowers at Risk of Foreclosure

On October 4, the CFPB issued an Interim Final Rule and a proposed Rule clarifying uncertainty around requirements for mortgage servicers to communicate with certain borrowers under the CFPB's 2016 mortgage servicing amendments. These amendments require mortgage servicers to send early intervention notices to consumers at risk of foreclosure who have requested a cease in communication under the FDCPA. The concern was that the amendment requires servicers to provide an additional notice on the 180th day after the prior notification, regardless of whether that date is a weekend or a holiday.

The new Interim Final Rule gives servicers a 10-day window to provide this notice so that servicers have a greater ability to comply with the rule without undermining borrower protections. Additionally, a new proposed rule seeks to provide clarity to mortgage servicers regarding the timing for servicers to provide periodic statements in connection with a borrower's bankruptcy case.

To read the interim final rule, visit: s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_amendments-to-2016-Servicing-Rule_interim-final-rule.pdf

To read this proposed rule, visit: s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_amendments-to-2016-Servicing-Rule_NPRM.pdf

CFPB Releases First National Survey on Financial Well-Being

On September 26, the CFPB published the results of its first study into the financial well-being of Americans. The Report concluded that 40 percent of U.S. adults struggle to make ends meet. The Report also concluded that certain financial and demographic characteristics are associated with financial well-being.

To read the Report, visit: files.consumerfinance.gov/f/documents/201709_cfpb_ financial-well-being-in-America.pdf

CFPB Adopts Final Rule Amending the Equal Credit Opportunity Act

On September 20, the CFPB published a final rule to provide additional flexibility for mortgage lenders under the Equal Credit Opportunity Act ("ECOA"). The new rule addresses the collection of consumer ethnicity and race information and provides clarity for mortgage servicers regarding their obligations under the law, while providing clarity of rules intended to ensure consumers are treated fairly.

To read the rule, visit: files.consumerfinance.gov/f/documents/201709_cfpb_final-rule_regulation-b.pdf

CFPB Issues Final Rule to Add Several New Reporting Requirements to the Home Mortgage Disclosure Act

On August 24, the CFPB issued a Final Rule to add and clarify reporting requirements under the Home Mortgage Disclosure Act ("HMDA"). This new rule modifies the types of institutions and transactions subject to the Act, the types of data institutions are required to collect, and the processes for reporting and disclosing the required data. The rule requires institutions that originated at least 25 closed-end mortgage loans or at least 100 open-end lines of credit in each of the preceding two preceding calendar years to report HMDA data. The rule also applies to most commercial-purpose transactions, so long as they are for the purpose of home purchase, home improvement, or refinancing.

The rule also adopts four broad categories of data points: (1) information about applicants, such as age credit score, and debt-to-income ratio; (2) information about the property securing the loan, To read this Final Rule, visit: s3.amazonaws.com/files.consumerfinance.gov/f/ documents/201710_cfpb_final-rule_payday-loans-rule.pdf

CFPB Issues Interim Final Rule to Help Mortgage Servicers Communicate with Certain Borrowers at Risk of Foreclosure

On October 4, the CFPB issued an Interim Final Rule and a proposed Rule clarifying uncertainty around requirements for mortgage servicers to communicate with certain borrowers under the CFPB's 2016 mortgage servicing amendments. These amendments require mortgage servicers to send early intervention notices to consumers at risk of foreclosure who have requested a cease in communication under the FDCPA. The concern was that the amendment requires servicers to provide an additional notice on the 180th day after the prior notification, regardless of whether that date is a weekend or a holiday.

The new Interim Final Rule gives servicers a 10-day window to provide this notice so that servicers have a greater ability to comply with the rule without undermining borrower protections. Additionally, a new proposed rule seeks to provide clarity to mortgage servicers regarding the timing for servicers to provide periodic statements in connection with a borrower's bankruptcy case.

To read the interim final rule, visit:
s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_amendments-to-2016-Servicing-Rule_interim-final-rule.pdf

To read this proposed rule, visit:
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The rule also adopts four broad categories of data points: (1) information about applicants, such as age credit score, and debt-to-income ratio; (2) information about the property securing the loan, such as construction method and property value; (3) features of the loan, such as the loan term, interest rate, and introductory rate period; and (4) unique identifiers, such as property address, loan originator identifier, and legal entity identifier for the financial institution. Finally, the rule modifies disclosure and reporting requirements, including that financial institutions reporting large volumes of HMDA data for a calendar year must also submit their data for the first three quarters of the following calendar year to the appropriate Federal agency on a quarterly basis.

To read this Final Rule, visit: files.consumerfinance.gov/f/201510_cfpb_final-rule_home-mortgage-disclosure_regulation-c.pdf

CFPB Publishes Annual Report of Student Loan Ombudsman 2017

On October 16, 2017, the CFPB published the Annual Report of the CFPB Student Loan Ombudsman, which analyzes complaints submitted by consumers with student loans from September 1, 2016 through August 31, 2017. The report highlights how individual consumer complaints can shape public policy and drive industry-wide reform.

According to the Report, 71% of federal student loan issues reported by consumers involved dealing with a lender or servicer, while 28% involved struggling to repay a loan. Specific issues surrounding federal student loans include problems accessing federal student loan protections, obstacles when seeking to enroll in income-based repayment plans, and the lack of access to the benefits of affordable repayment plans.

61% of private loan issues reported by consumers involved dealing with a lender or servicer, while 35% involved struggling to repay a loan. Specific issues surrounding private student loans include limited option for payment relief during periods of financial distress, difficulties accessing advertised loan benefits and protections, and failure to allocate a payment according to the borrower's instructions.

The Report concludes that borrowers benefit from robust oversight of the student loan industry by federal and state agencies, as well as standards to strengthen servicing practices for the servicing of all student loans and to have servicers held accountable for meeting those standards.

To read further, visit: s3.amazonaws.com/files.consumerfinance.gov/f/ documents/cfpb_annual-report_student-loan-ombudsman_2017.pdf

Supervisory Highlights Summer 2017

The CFPB has released its Summer Supervisory Highlights, which provide supervisory observations in the areas of automobile loan servicing, credit card account management, debt collection, deposits, mortgage origination and servicing, remittances, service provider program, short-term small-dollar lending, and fair lending. The Highlights also discuss supervision program developments, including use of enforcement and supervisory authority, fair lending developments, examination procedures, and recent CFPB guidance.

To read the Supervisory Highlights Summer 2017, visit: s3.amazonaws.com/files.consumerfinance.gov/f/documents/201709_cfpb_Supervisory-Highlights_Issue-16.pdf

CFPB Issues First No-Action Letter

On September 14, 2017, the CFPB issued its first ever No-Action Letter to Upstart, a company that uses alternative data in financial services decision-making. Upon request from a company, the purpose of a No-Action Letter is to clarify to that company that the CFPB has no intention of bringing an enforcement action against that company with respect to a certain product or practice. The guidelines creating No-Action Letters indicate that these letters will be a rare occurrence, but they are available to reduce regulatory uncertainty for these new financial products or services.

In its September 14, 2017 letter to Upstart, the CFPB confirmed that it has no intention to recommend initiation of an enforcement or supervisory action under the Equal Credit Opportunity Act and Regulation B against Upstart for its automated model for underwriting applicants for unsecured non-revolving credit. The letter expires after three years, but Upstart may seek to renew the No-Action Letter.

To read this No-Action Letter, visit: s3.amazonaws.com/files.consumerfinance. gov/f/documents/201709_cfpb_upstart-no-action-letter.pdf

CFPB Finalizes Updates to "Know Before You Owe" Mortgage Disclosure

On July 7, 2017, the CFPB finalized amendments to its "Know Before You Owe" mortgage disclosure rule to provide guidance, clarity, and certainty. The Know Before You Owe mortgage disclosure rule took effect on October 3, 2015 and created streamlined forms that consumers receive when applying for and closing on a mortgage.

The new amendments address four topics: (1) tolerances for the total of payments that parallel tolerances for the finance charge, (2) clarifying housing assistance lending to note that recording fees and transfer taxes may be charged without losing eligibility for partial exemption from disclosure requirements to certain housing assistance loans, (3) extending this rule's coverage to include all cooperative units, and (4) privacy and sharing of information with creditors and settlement agents.

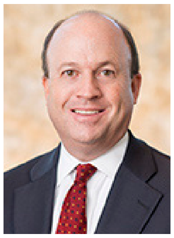
To read these final amendments, visit: files.consumerfinance.gov/f/documents/ 201707_cfpb_Final-Rule_Amendments-to-Federal-Mortgage-Disclosure-Requirements_TILA.pdf

CFPB Issues Monthly Complaint Report

On June 27, 2017, the CFPB issued a Monthly Complaint Report to address the most common complaints received by the CFPB. According to the Report, the top five consumer financial complaints reported across the United States are (1) Debt Collection: Facing a debt you don't owe—27% of Complaints; (2) Mortgages: Problems when you're unable to pay—23% of Complaints; (3) Credit Reporting: Incorrect information on your credit report—17% of Complaints; (4) Credit Card: Billing disputes with your credit card company—10% of Complaints; and (5) Bank Account or Service: Account management questions—10% of Complaints.

To read the full Report, visit: s3.amazonaws.com/files.consumerfinance.gov/ f/documents/201706_cfpb-Monthly-Complaint-Report-50-State.pdf

--- ABOUT THE AUTHORS ---



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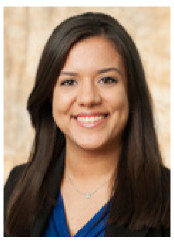
He has successfully litigated hundreds of matters on behalf of lenders in various forums across the Southeast. David is admitted to practice in Alabama, Florida, and South Carolina.



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