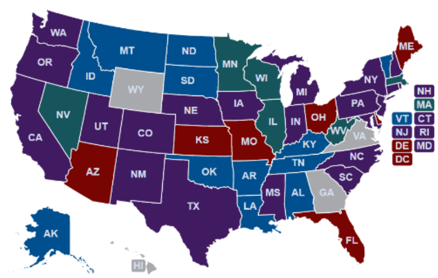
Consumer Law Hinsights

Welcome to ***Consumer Law Hinsights***—a monthly compilation of nationwide consumer protection cases of interest to financial services and accounts receivable management companies. This edition highlights our interactive COVID-19 regulatory map, two recent federal appellate rulings, and a selection of recent posts from our blog, *Consumer Crossroads*.

Tracking State Regulators' Response to COVID-19

To assist consumer financial services lenders, servicers, and investors, Hinshaw created an interactive tracker of state regulations related to the COVID-19 pandemic. The tracker documents actions by various state regulators, along with the limits imposed by states on foreclosures, evictions, and debt collections, and allows users to click on any state to view applicable provisions. We recommend adding the tracker to your browser bookmarks, as we update it on a regular basis.



Eleventh Circuit Addresses Willfulness Standard under FCRA

A consumer, Shaun Younger, resolved a small-claims debt on January 12, 2015, but as of March 30, 2015, the debt still appeared on his credit report. He sent a letter to Experian asking the company to investigate and remove the debt. On receipt of the letter, an Experian employee determined it should be diverted according to Experian's "suspicious mail policy." Experian then sent a letter on April 15, 2015, notifying him that the letter had been diverted and provided him with a phone number to call in case Younger felt there was a mistake on his credit report. Experian did not reinvestigate the matter. Shortly thereafter, the holder of the debt notified Experian that it should be removed, and Experian removed it from the consumer's file. The consumer did not call Experian as instructed by the April 15, 2015 letter, and instead sued for violations of the Fair Credit Reporting Act (FCRA).

The consumer argued that Experian was under a duty to reinvestigate his claim when they received his letter. Experian argued that they were under an additional requirement to protect the personal information of consumers from unauthorized parties. As part of their effort to do so, Experian implemented their "suspicious mail policy." At trial, Experian conceded that it misclassified Younger's letter, and explained that an investigation would require a notification to the consumer, which could result in personal information ending up in the wrong hands unless Experian could successfully verify the consumer. At trial, Experian was found to have willfully violated the FCRA, and the verdict included a $3 million punitive damage award, which was reduced to $490,000 by the trial judge after post-trial motions.

The Eleventh Circuit rejected the finding of willfulness and the punitive damage award, and clarified the standard for willful conduct. While Experian behaved negligently in regard to Younger, there was no evidence of a broad or systemic problem with Experian's suspicious mail policy—even if they could have been more diligent in their review process. Ultimately, a finding of willfulness required clear and convincing evidence that Experian ran an unjustifiably high risk of violating its duties under the FCRA.

The case is *Younger v. Experian Information Solutions Inc. LLC.*, No. 19-11487 (11th Cir. 2020).

Seventh Circuit Reiterates that Qualified Language Needs Extrinsic Evidence to Support Claims

A debt collector sent a consumer a letter stating that it "may" inform the national credit bureaus of her delinquency, and that the debt would be extinguished if she paid a specified amount by a certain date. The consumer claimed that the word "may" meant that any possible reporting to the national credit bureaus would happen in the future, and that if she paid the specified amount by the deadline, the debt collector would not report her to the national credit bureaus. Instead, the debt collector reported the delinquency to the national credit bureaus prior to the deadline, and the consumer claimed the letter therefore violated the Fair Debt Collection Practices Act (FDCPA).

The Seventh Circuit reiterated that in its jurisdiction, there are three categories of misleading statements: (1) those that are obviously not misleading; (2) those that are not misleading on their face, but that could mislead an unsophisticated consumer; and (3) those that are so plainly false so as to require no additional evidence from the consumer. The court found that this consumer's claim fell into the second category, which put the burden on the consumer to produce evidence of confusion. This evidence—usually in the form of a consumer survey—needed to show that a substantial number of recipients would face the same confusion that the consumer claims. The Seventh Circuit rejected the consumer's argument that because the language was susceptible to more than one interpretation she had met her evidentiary burden to prove confusion. The court explained that any confusion is not sufficient, instead the consumer had to show that a "significant fraction" of the population would have reached the same conclusion as she did.

The case is *Johnson v. Enhanced Recovery Co.*, LLC, No. 19-1210 (7th Cir. 2020).

Consumer Crossroads Blog | Quarterly Highlights

SCOTUS Holds CFPB's Single Director Structure Unconstitutional, Leaves Open Questions on Existing Bureau Matters

The United States Supreme Court issued a two part decision in *Seila Law LLC v. Consumer Financial Protection Bureau*. The Court first decided, in a 5-4 decision with Chief Justice Roberts authoring the Court's opinion, that the CFPB's leadership by a single Director removable only for inefficiency, neglect, or malfeasance violates the separation of powers doctrine. The Court next decided that the Director's unconstitutional removal protection is severable from the other provisions of Dodd-Frank that establish the CFPB and define its authority. The severability holding was also authored by Roberts, but drew a 7-2 split.

The Court declined to push the boundaries of the President's unrestricted removal power. In prior cases (*Humphrey's Executor v. United States* and *Morrison v. Olson*), the Court carved out two exceptions to the President's removal power: one in the context of the Federal Trade Commission's multi-member commission, and the other in the context of an inferior officer with narrowly defined duties. Here, the Court did not find a reason to hold the Bureau's structure consistent with one of those two exceptions, or to push those exceptions any further, due primarily to the following three factors:

1. The CFPB wields a tremendous amount of unique power in breadth and scope. The Court summarized this power, articulating that "[t]he Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priories, initiate prosecutions and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy

affecting millions of Americans…And the Director may do so without even having to rely on Congress for appropriations."

2. The Bureau's Director is not an inferior officer, but rather a principal officer who commands a great deal of influence and whose duties are far from limited; and
3. The Bureau bears little resemblance to the FTC because unlike the FTC which has bi-partisan commissioners who serve staggered terms, the Bureau's 5 year term limit and single director "guarantees abrupt shifts in leadership and loss of agency expertise."

In short, the Court found no historical precedent allowing a person like the CFPB Director to be unaccountable to the President's policies, and therefore to the people who elect the President.

Importantly, with respect to the severability of the unconstitutional provision, the Court decisively articulated that the provisions of Dodd-Frank bearing on the CFPB's structure and duties “remain fully operative” and that there is “nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred no CFPB to a CFPB supervised by the President.” The Court also went on not to foreclose Congress from creating a multi-member agency, but concluded it is not within the Court's power to re-write Congress's work.

Meanwhile, the issue that precipitated the case, a civil investigative demand issued by the CFPB to Seila Law while the agency was still led by former Director Richard Cordray, has been remanded to the Ninth Circuit Court of Appeals to decide whether the civil investigative demand was validly ratified when the new acting Director Mick Mulvaney came in. The remand may have implications for companies with cases pending from the Cordray or Mulvaney eras.

On July 7, 2020, in response to the Seila Law decision, the CFPB announced it had ratified "most regulatory actions the Bureau took from January 4, 2012 through June 30, 2020."

New York State Enacts New Procedures for Residential Mortgage Forbearance Plans

On June 17, 2020, New York Governor Andrew Cuomo signed Senate Bills 8243C and 8428 into law, adding Section 9-x to the Banking Law. The section creates new procedures for mortgagors and servicers in relation to forbearances of residential mortgage payments affected by the COVID-19 pandemic.

Previously, on March 30, 2020, Governor Cuomo issued Executive Order 202.8 barring the "enforcement" of eviction or foreclosures for ninety days. On May 7, 2020, Governor Cuomo followed up with Executive Order 202.28, which barred the "initiation" of certain evictions and foreclosures for 60 days from June 20, 2020. During that time, the legislature undertook efforts to codify forbearance requirements for borrowers affected by the COVID-19 pandemic, which resulted in Banking Law 9-x that became effective immediately upon signature on June 17, 2020.

Covered Period and Defining Qualified Mortgagor, Home Loan, and Financial Hardship

Section 9-x creates a new forbearance program for certain mortgagors during a "covered period," which is defined as beginning on March 7, 2020 and running until there are no restrictions applicable to non-essential gatherings of any size for the county of the mortgagor's residence. New York's 62 counties are divided among 10 regions, and restrictions are being lifted on a regional basis, with the northern regions progressing faster than New York City and Long Island. Thus, the end date for the covered period will vary across the state.

A "qualified mortgagor" is defined in Section 9-x(1)(b), which incorporates language found in RPAPL 1304, requiring the borrower be a natural person and the loan be a "home loan" as defined by RPAPL 1304(6)(a). A qualified mortgagor must also "demonstrate financial hardship as a result of COVID-19 during the covered period."

Determining whether a loan is a "home loan" is frequently the subject of litigation. The mortgaged property (including cooperative apartments) must be "used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling." Although a borrower's current residence may be different, thus exempting the loan from the forbearance requirements, a borrower's intention to occupy the subject property at some future date could be determinative, as RPAPL 1304 allows a borrower to claim the property "will be occupied" as the primary residence.

Whether a financial hardship is "a result of COVID-19" will likely be the subject of litigation. Although the statute plainly seeks to cover mortgagors affected by the COVID-19 pandemic, it is possible that borrowers who defaulted before the March 7, 2020 covered period start date will also try to claim a financial hardship as a result of COVID-19, thus bringing the loan within the statute.

Servicers' Proactive Solicitation and Approval of Forbearance Applications

Section 9-x(2)(a) requires servicers to proactively "make applications for forbearance…widely available to any qualified mortgagor who, during the covered period, is in arrears or on a trial period plan, or who has applied for loss mitigation." Although some borrowers may not be interested in the forbearance, the statute places the burden on servicers to solicit applications for forbearance. Moreover, for those loans that were in arrears long before the covered period, as long as they remain in arrears during the covered period, the servicer is required to solicit applications for forbearance. At a minimum, servicers are required to provide applications for forbearance to any mortgagor who applies for loss mitigation during the covered period.

Section 9-x(2)(b) requires servicers to grant a forbearance of "all monthly payments due" for a period of 180 days, with the option (to be exercised by the mortgagor) to extend for another 180 days, "subject to the mortgagor demonstrating continued financial hardship." Both the initial 180-day forbearance and additional 180-day extension require the mortgagor's demonstration of financial hardship. However "financial hardship" is not defined in Section 9-x(1) and, based on guidance from the Department of Financial Services, a bare attestation from the mortgagor may be sufficient to meet this requirement. Moreover, if a borrower does not demonstrate financial hardship for the initial 180-day forbearance, the additional 180-day extension is unavailable. Given the history of litigation arising out of the obligation to negotiate in good faith (*see* CPLR 3408), whether a borrower is experiencing a financial hardship could become a source of litigation going forward. Establishing financial hardship could relieve a borrower from making payments for 360 days.

Options to Resolve Forbearance Amount, Credit Reporting and GSE Exemption

Section 9-x(3)(a)-(c) outlines the options available to borrowers to pay the forborne arrears (a) extend the term of the loan for the length of the forbearance period; (b) pay the forborne arrears on a monthly basis for the remainder of the loan term; or (c) negotiate a loan modification. Section 9-x(3)(d) requires the servicer to make an offer to defer arrears as a "non-interest bearing balloon loan" payable at maturity or earlier during a refinance or sale of the property.

The original language of the 8243C bill stated that a servicer "shall waive interest on the principal for the term of the forbearance and waive any late fees…," while the enacted amendment in 8428 states that the servicer "shall not charge additional interest or late fees or penalties on the forborne payment." The original version suggested servicing in the normal course was permitted, with adjustments to be made on the back end by waiving interest and late fees assessed during the forbearance period. However, the amendment in the final version suggests that the legislature intends to prohibit those charges from the outset.

Section 9-x(3)(e) prohibits negative credit reporting if any of the options in Section 9-x(3)(a)-(d) are exercised.

Finally, Section 9-x(5) exempts government sponsored enterprise loans.

Likely Litigation Impact

Section 9-x(3) is likely susceptible to constitutional challenges based on violating the Contract Clause of the United States Constitution (*see e.g.* Wells Fargo Bank, N.A. v. Meyers, 108 A.D.3d 9 [2d Dep't 2013]). It gives the mortgagor the unilateral option to extend the term of the loan and prohibits the collection of interest which is an essential term of any loan.

Section 9-x(4) makes servicers' adherence to Section 9-x a condition precedent to commencing a foreclosure action and allows a "defendant" to raise non-compliance as a defense. The use of the word "defendant" as opposed to "borrower" or "mortgagor" will likely create unnecessary litigation. It is clear that this statute was written to protect homeowners, however, as written, it arguably allows any defendant to assert non-compliance, even those with no connection to the note, mortgage, or property.

Section 9-x(6) covers situations where a financial institution is unable to offer a forbearance because of its precarious finances. This section states that forbearances are subject to capital and liquidity requirements permitting safe and sound operations. If a servicer is unable to offer a forbearance, it must notify the Banking Department of its financial situation and explain the basis for its inability to offer a forbearance.

FCC Clarifies Autodialer Definition, Including in Bulk Text Message Context

The Federal Communications Commission (FCC) recently issued a Declaratory Ruling clarifying the definition of an autodialer. Exactly what constitutes an autodialer under the TCPA has been a burgeoning topic in consumer litigation. The TCPA prohibits any person from texting or calling a cellular telephone number using an automatic dialing system ("autodialer" or "ATDS") without prior express consent. The TCPA defines an ATDS as equipment which has the capacity to (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.

In 2018, the P2P Alliance, a coalition of providers and users of peer-to-peer text messaging, submitted a petition to the FCC asking for clarification on whether its messaging is subject to the TCPA. In response to P2P Alliance's petition, the FCC's Declaratory Ruling clarified and affirmed the following three issues:

The fact that calling equipment is used to make calls or send texts to a large volume of telephone numbers is not probative of whether the equipment is an autodialer under the TCPA.

Whether the calling equipment is an autodialer turns on whether the equipment is capable of dialing random or sequential telephone numbers without human intervention.

Even when an entity uses an autodialer to call or send text messages to a telephone number, it may still avoid TCPA liability by obtaining the recipient's prior express consent.

The FCC's June 25th ruling does not take a position on whether any particular text equipment is an autodialer, but provides clarification for entities using dialing or texting platforms that can be subject to the TCPA. The FCC's ruling aligns with the Seventh and Eleventh Circuits on the definition of an autodialer. However, it conflicts with a Ninth Circuit ruling, which held that an ATDS includes equipment that can automatically dial telephone numbers stored in a list.

The FCC ruling provides some helpful guidance to entities within the industry, given the circuit split described above.

See also "SCOTUS Decides Federal Debt Not Exempted from TCPA," July 9, 2020.