THE LATEST ON LITIGATION

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COMPLIANCE UNIVERSITY

Agenda

1. FDCPA
2. FCRA
3. Fair Lending – *Townstone* Update
4. UDAAP
5. Article III Standing Jurisprudence
6. Consumer Financial Protection Bureau v. CFSA

FDCPA

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FDCPA

- **<u>Statute of Limitations</u>**
  - *Bouye v. Bruce* (6th Cir. 2023) – FDCPA violation resulting from state court debt collection lawsuit was its own discrete FDCPA violation subject to its own SOL. No application of continuing violation doctrine.
  - *Brown v. Transworld Sys., Inc.* (9th Cir. 2023) – Each alleged violation of the FDCPA triggers its own one-year statute of limitations period. Debt collector's filing of a new affidavit to affirm ownership of the debt in a collection lawsuit was a separate alleged violation of the FDCPA.
  - *However* – in *Brown*, mailing a lawsuit or summary judgment arguments to borrower were not independent violations.
  - <u>Takeaway</u>: trend continues to be that collection on a debt without ownership or proof of ownership serves as a FDCPA violation, and each act in furthering collection activities may be subject to its own SOL.

FDCPA

- **Definition of a "Debt Collector"**
  - *Ward v. NPAS, Inc.* (6th Cir. 2023) – No FDCPA violation because collector did not qualify as a debt collector pursuant to § 1692a(6), as the debt was not in default at the time it was obtained.
  - Although bills from the medical provider stated that payment was "due on receipt," failure to pay immediately did not mean that the consumer was in default where the statements did not say that failure to pay immediately was a default and the medical provider did not treat the account as in default.
  - At-issue contract stated that the debt was not in default while held by the collector, which it designated as an "extended business office servicer" and which also did not treat the account as if it were in default.
  - Takeaway: fact-specific inquiry as to whether an entity is a debt collector at all for FDCPA purposes remains an important defense.

FDCPA

- **Communications in Connection with the Collection of a Debt**
  - *Aargon Agency, Inc. v. O'Laughlin* (9th Cir. 2023). Nevada's S.B. 248 requires collectors to provide written notification 60 days before taking action to collect a medical debt. Collectors filed suit—arguing that they could not comply with both the Nevada statute and notice requirements in the FDCPA.
  - Concluding that the notices required by S.B. 248 were not communications "in connection with the collection of any debt," Court held that the Nevada statute did not conflict with the notice requirements in §§ 1692e(11) or 1692g(a). The majority held that since S.B. 248's notice requirement provided more protection to consumers it was not preempted under § 1692n.
  - Dissent: the notices required by S.B. 248 are communications "in connection with the collection of a debt" because "there is only one reason debt collectors reach out to debtors—to collect debts" and that § 1692n should preempt S.B. 248.
  - Takeaway: state requirements remain susceptible to preemption challenges on a case-by-case basis.

FDCPA

- **Bona Fide Error Defense**
  - *Ross v. Financial Asset Mgmt. Sys., Inc.* (7th Cir. 2023) – Collector was entitled to a bona fide error defense on § 1692g(b) claim where consumer did not follow the dispute instructions provided by the collector but instead emailed his dispute to two company executives using non-public email addresses. Court concluded that the absence of procedures designed to guard against particular types of conduct does not mean that the debt collector failed to maintain "reasonably adapted" procedures.
  - The court held that the collector was also entitled to a bona fide error defense on §§ 1692d and 1692d(5) claims because the collector had a reasonably adapted procedure in place to code calls that were made to a wrong number.
  - Takeaway: Procedures "reasonably adapted" to avoid an error do not mean procedures adapted to avoid all errors for purpose of bona fide error defense.

CREDIT REPORTING

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Credit Reporting

- Furnishing has been a recent focus of the CFPB actions.
- Pennsylvania Higher Education Assistance Agency d/b/a American Education Services (May 2024)
  - Inadequate furnishing policies and procedures re: loans discharged in bankruptcy
- Commonwealth Financial Systems, Inc. (December 2023)
  - Inadequate dispute policies and procedures
    - Vague instructions, including to “glance over information populated”
    - Focus on whether SSN matches
    - Instruction to simply delete tradeline instead of conducting reasonable investigation

Credit Reporting

- Commonwealth Financial Systems, Inc. (December 2023) Cont.
  - Inadequate furnishing policies and procedures
    - No process to verify random samples of information provided to CRAs
    - Did not address repeated concerns from CRAs
  - Failed to conduct reasonable dispute investigations
  - Failed to notify CRAs that reported information was in dispute

Credit Reporting

- Toyota Motor Credit (November 2023)
  - Inaccurate furnishing after lease ended early
    - Audits identified issue years before the company changed practices
    - Failed to correct reporting in instances in which the company learned from consumer complaints that it furnished incorrect derogatory information
- Phoenix Financial Services (June 2023)
  - Inadequate dispute policies and procedures
    - Instructed employees "to only perform a circular and cursory review of limited information already in its system to resolve a dispute"
    - Did not consider prior disputes or dispute patterns
    - Use of automated dispute resolution program that considered only limited information
    - No written procedures requiring company to audit its dispute handling process

Credit Reporting

- Phoenix Financial Services (June 2023) Cont.
  - Inadequate furnishing policies and procedures
    - Failed to conduct reviews of randomly selected samples of information provided to CRAs
  - Failed to conduct reasonable dispute investigations
  - Failed to report results of direct dispute investigations to consumers

Credit Reporting

- Factual vs. legal disputes
  - Holden v. Holiday Inn Club Vacations Inc., 98 F.4th 1359 (11th Cir. 2024)
  - Sessa v. Trans Union, LLC, 74 F.4th 38 (2d Cir. 2023)
- CFPB and FTC have filed amicus briefs
- CFPB is considering revising Regulation V to state that furnishers and CRAs are required to investigate legal disputes
  - "The FCRA does not distinguish between legal and factual disputes, and accordingly it does not exempt 'legal disputes' from its requirement that consumer reporting agencies and furnishers must reasonably investigate disputes."

Credit Reporting

- FCRA preemption of state law
  - McKenna v. Dillon Transportation, LLC, 97 F.4th 471 (6th Cir. 2024)
  - Consumer Data Indus. Ass'n v. Platkin, 2024 WL 1299256 (D.N.J. Mar. 27, 2024)
  - CFPB Interpretive Rule re: FCRA preemption
    - Clarifies the Bureau's view that FCRA's express preemption provisions have a narrow and targeted scope.

FAIR LENDING

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Fair Lending

- *CFPB v. Townstone Financial, Inc.* (7th Cir.) – July 11, 2024
  - Question Raised: Does redlining violate ECOA?
    - ECOA focuses on the treatment of applicants
    - Conduct alleged here concerns prospective applicants
  - Why important to CFPB?
    - DOJ, HUD have authority to make Fair Housing Act claims
    - Not the CFPB
  - Critical Argument:
    - Reg. B provides: A creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application. 12 C.F.R. § 1002.4(b).

Fair Lending

- *CFPB v. Townstone Financial, Inc.* (7th Cir.) – July 11, 2024

  - Trial Court: N.D. Illinois – Feb. 3, 2023
    - CFPB responded by arguing that the discouragement provision in Reg. B "is authorized by and necessary to the ECOA."
    - Court applied *Chevron* two-step framework.
      - First Step: Whether Congress has spoken to the precise question at issue?
      - Here: when analyzing ECOA's language, Congress spoke directly and unambiguously in using the term "applicant" in the manner it was used.
      - **As a result: Held that ECOA only prohibits discrimination against applicants, not prospective applicants.**

Fair Lending

- *CFPB v. Townstone Financial, Inc.* (7th Cir.) – July 11, 2024
  - Reversed on appeal:
    - "When the text of the ECOA is read as a whole, it is clear that Congress authorized the imposition of liability for the discouragement of prospective applicants."
    - The ECOA's purpose is to ensure equal access to credit without discrimination. Congress granted the Federal Reserve Board—and, subsequently, the CFPB—with broad authority to prevent "circumvention or evasion" of the ECOA's purposes.
    - Notably, the ECOA's civil liability provision requires regulators responsible for enforcing the ECOA to make a referral to the DOJ whenever the agency believes a creditor "has engaged in a pattern or practice of discouraging … applications for credit in violation of section 1691(a) of this title." This provision demonstrated that Congress confirmed that discouraging an application for credit is a violation of the ECOA.
    - The court also found that Regulation B, which prohibits creditors from discouraging prospective applicants, is consistent with the ECOA's text and purpose.

Fair Lending

- *CFPB v. Townstone Financial, Inc.* (7th Cir.) – July 11, 2024
  - Procedural posture after appeal: decision reversed and remanded, awaiting future ruling on First Amendment challenge.
  - <u>Takeaways:</u>
    - Pivotal case in jurisprudence surrounding the ECOA, as protections under the ECOA now also extend to prospective applicants.
    - Statutory scope thus broadened to cover pre-application activities.
    - Despite decision in *Loper Bright Enterprises*, which the Seventh Circuit acknowledged in a footnote, the "*de novo*" review it undertook very much resembled the deferential analysis that would have occurred under *Chevron*.
    - Emboldened enforcement under Combatting Redlining Initiative?
    - Will matter be appealed to SCOTUS? Potential circuit split in future?

UDAAP / UDAP

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UDAAP / UDAP

- UDAAP / UDAP continues to be a favorite enforcement tool
- Abusiveness
  - We have seen a recent uptick in abusiveness claims
    - Toyota Motor Credit (November 2023)
      - Made it unreasonably burdensome for consumers to cancel certain add-on products and services sold with vehicles
    - BloomTech, Inc. (April 2024)
      - Earned revenue by selling ISAs to investors soon after originating them while consumers did not receive the career prospects they were promised
    - Pennsylvania Higher Education Assistance Agency d/b/a American Education Services (May 2024)
      - Collected on discharged loans and failed to maintain policies and procedures to identify discharged loans

UDAAP / UDAP

- Abusiveness Cont.
  - Solo Funds, Inc. (May 2024)
    - Represented that void and uncollectible loans were due and attempted to collect or did collect on such loans
    - Obscuring the consumer’s ability to opt out of a “donation” fee

UDAAP / UDAP

- Fees
  - Regulators have continued their aggressive campaign against "junk fees" and regularly use UDAAP / UDAP to target fees.
  - Recent actions:
    - CFPB: Toyota Motor Credit (November 2023)
      - Engaged in abusive acts or practices when the company failed to refund consumers for unearned add-on product fees after the loan term ended early
    - CFPB: Solo Funds, Inc. (May 2024)
      - Engaged in abusive acts or practices by obscuring the consumer's ability to opt out of a "donation" fee
    - FTC: Float Me (January 2024)
      - Engaged in deceptive acts or practices by imposing undisclosed fees to access funds

UDAAP / UDAP

- Recent Actions Cont.
  - FTC: Rhinelander Auto Center (October 2023)
    - Engaged in deceptive and unfair acts or practices by charging consumers for add-on products without the purchasers’ express informed consent and falsely telling consumers that they were required to purchase add-on products
  - CFPB: Atlantic Bank (December 2023)
    - Engaged in deceptive acts or practices by enrolling consumers in checking account overdraft programs and failing to clearly explain which transactions were covered by the overdraft programs and omitting key information about the costs

UDAAP / UDAP

- Other Trends in UDAAP / UDAP Actions
  - Focus on student lending
  - Failure to maintain adequate systems and processes as a UDAAP
  - Using UDAAP to enforce compliance with other laws and requirements

ARTICLE III STANDING

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Article III Standing

- ***Bassett v. Credit Bureau Servs., Inc.* (8th Cir. 2023)**
  - Consumer alleged violation of FDCPA by collector sending a collection letter to collect medical bills that demanded interest on the debt without a judgment. The consumer received the letter but did not make a payment.
  - Concluding that the consumer's alleged harm was not analogous to the type of harm recognized in common-law fraudulent misrepresentation and conversion, the Eighth Circuit held that the consumer lacked Article III standing.
  - In a footnote, the court noted that "infliction of emotional distress and intrusion upon seclusion may be close common-law analogues" but noted that the consumer did not present these analogues.

Article III Standing

- ***Huber v. Simon's Agency, Inc.*** **(3d Cir. 2023)**
  - A consumer's injury was not an "informational harm" because she did not allege the omission of information.
  - Collection letter disclosing both the "amount" and the "various other accounts total balance" was a deceptive communication in violation of § 1692e where a least sophisticated consumer could read the letter in two ways.
  - Court found that the consumer had standing for her §1692e claim for deceptive communication because it was analogous to the tort of fraudulent misrepresentation and there was detrimental action—paying to consult a financial advisor and failure to pay down other debts based on that consultation—in addition to the consumer's confusion.
- <u>Takeaway</u>: Compare *Bassett* to *Huber.* Key is often existence of common-law analogue, and/or detrimental action.

Article III Standing

- ***Bouye v. Bruce* (6th Cir. 2023)**
  - The consumer alleged violations of the FDCPA arising from an illegal state court lawsuit on a debt that allegedly was never properly transferred to the collector. Held that the consumer had standing because "[s]he alleged that she suffered an injury because she had to defend against a state lawsuit that [the collector] had no right to bring in the first place."

- ***Choice v. Kohn L. Firm, S.C.* (7th Cir. 2023)**
  - Neither lack of sleep nor the decision to retain counsel were sufficient to establish concrete injury.
  - Dissent: the expense of hiring a lawyer to defend a baseless or illegal lawsuit is a concrete injury that supports standing.

- <u>Takeaway</u>: Conflicting decisions about whether cost of defending a lawsuit provides standing. Possible ground for future SCOTUS review.

CFPB v. CFSA

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CFPB v. CFSA

- Decided May 2024, 7-2
- Supreme Court rejected a challenge to the constitutionality of the CFPB's funding structure
  - Reversed a 2022 decision by the U.S. Court of Appeals for the Fifth Circuit that held that the agency's funding violates the constitution because it comes from the Federal Reserve rather than through the congressional appropriation's process
- The case began as a challenge to the Bureau's Payday Lending rule issued in 2017

CFPB v. CFSA

- Impacts of decision:
  - could spark intensification in the CFPB’s enforcement and rulemaking activities
  - ensures that the president will have enhanced authority, at the expense of Congress, over the Bureau’s agenda
- Director Chopra statement on decision:
  - “The Court’s ruling makes clear the CFPB is here to stay”
  - The Bureau “will be firing on all cylinders” and “forge ahead with our law enforcement work”