FIRST PARTY SUMMIT
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Compliance Issues on the Horizon: A First-Party Roundtable Discussion

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Legal/Compliance Track ***Sponsored by*** ONTARIO SYSTEMS

Panelists

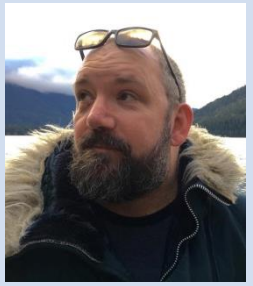
Matt Shiflett
TransUnion

Matthew Shiflett is Senior Attorney for TransUnion and Division General Counsel for Transunion Specialized Risk Group. Shiflett advises TransUnion and SRG senior executives in legal strategy, enterprise risk management, information security, litigation management, commercial contracting, intellectual property, human resources, and mergers and acquisitions. Prior to TransUnion, Matthew served as general counsel and chief compliance officer for several financial services companies in the banking, mortgage origination, mortgage securitization and mortgage servicing markets.

Kelly Knepper-Stephens
Stoneleigh Recovery

Kelly Knepper-Stephens is General Counsel and Chief Compliance Officer for Stoneleigh Recovery Associates, LLC, a debt recovery solutions company. She focuses on government regulation, compliance, and civil litigation. She is a Debt Buyer Association International Certified Receivables Compliance Professional and has earned the Credit & Collection Compliance Officer designation from the American Collectors Association. Kelly serves on the Editorial Review Board for the Compliance Professionals Forum. She also served as a Small Entity Representative (SER) for the Arbitration and Debt Collection Rulemakings. Collection Advisor Magazine named Kelly one of the Top 25 Women in Collections in 2016.

Mike Bevel
The Compliance Professionals Forum



Mike Bevel is the Director of Education for the Compliance Professionals Forum and an editor at insideARM.com. In his role at CPF, he facilitates monthly compliance conference calls across a variety of industry verticles, and is key in producing materials that help guide those working in the debt industry through the confusing sea of laws and regulations. He has worked for insideARM LLC for over 10 years.

Legal Disclaimer

The information shared in this presentation is not intended to be legal advice and may not be used as legal advice. Legal advice must be tailored to the specific circumstances of each case. Every effort has been made to assure this information is up-to-date. It is not intended to be a full and exhaustive explanation of the law in any area, however, nor should it be used to replace the advice of your own legal counsel.

Anti-Trust Statement

Discussions like this are governed by anti-trust laws. Antitrust laws are set forth in the Sherman Act, Federal Trade Commission Act, the Clayton Act, the Robinson-Patman Act, and California's Cartwright Act, among other statutes. These laws prohibit combinations of competitors in restraint of trade, attempts to monopolize, and other anti-competitive activities. Since most association activities involve groups of competitors, the opportunity to unlawfully restrain trade is always present.

Topics for Today's Discussion

- Omnichannel Communications
- First-Party Actions / Third-Party Rulemaking
- The CHOICE Act
- *Henson v. Santander Consumer USA, Inc.*
- National Consumer Assistance Plan (NCAP)

Omnichannel Communications

- Reaching consumers (particularly the up and coming consumers, aka millennials) through multiple different channels of modern communication.

- How are you maintaining your compliance and limiting your risks while at the same time communicating with more consumers in different formats?
  - ❑Emails
  - ❑Text Messages
  - ❑Live Chat
  - ❑Automated Settlement Negotiations
  - ❑Websites

First-Party Actions / Third-Party Rulemaking

- First Party proposal forthcoming (who knows when)

- Third Party Outline Indicates Where CFPB Might Be Going
  - ❑Contact Limits
  - ❑Transfer of Data

- What, if anything, have you taken from the 3rd-Party rulemaking and incorporated into your practices?

CHOICE Act

- H.R. 5983 – Introduced September 9, 2016
  - ❑ Amends Dodd-Frank Wall Street Reform and Consumer Protection Act to:
    - Repeal the "Volker Rule" (restricts banks from speculative investments)
    - Eliminates FDIC's orderly liquidation authority and establishes new provisions regarding financial institution bankruptcy
    - Eliminates the "Durbin Amendment" (limits fees that may be charged to retailers for debit card processing)
    - Certain banks may exempt themselves if they maintain certain capital ratio requirements
    - Removes "To Big To Fail" - Removes Financial Stability Oversight Council's authority to designate non-bank financial institutions and financial market utilities as "systemically important"
    - **Amends Consumer Financial Protection Act of 2010 (CFPB)**
    - Modifies SEC's managerial structure and enforcement authority
    - Eliminates Office of Financial Research within the Department of Treasury
    - Revises provisions related to capital formation, insurance regulation, civil penalties for securities laws violations and community financial institutions.
  - ❑ Sponsor: Rep. Jeb Hensalring (R-Tx)
  - ❑ Latest Action: Placed on the Union Calendar, Calendar No. 693
  - ❑ Expectation: House Financial Services expected to advance the bill to the House floor. Likely to pass in a modified form before August 2017 recess. Some Senate Republicans have identified misgivings with the current bill and Senate Democrats likely to filibuster once it moves to the Senate.

CHOICE Act

- Section Three: Empower Americans to achieve financial independence by fundamentally reforming the CFPB and protecting investors
  - ❑ Change name of the CFPB to the “Consumer Financial Opportunity Commission (CFOC)”
  - ❑ Create a bi-partisan five-member commission subject to congressional oversight and appropriations; removes current single director model
  - ❑ Establish an independent Senate-confirmed Inspector General
  - ❑ Provides the Commission with a dual mission of protecting consumers by enforcing the law and promoting market competition, with assessment of proposed rule, performed by an Office of Economic Analysis
  - ❑ Require Commission to obtain permission before collecting PII on consumers
  - ❑ Repeal authority to ban bank products or services it deems “abusive” and its authority to prohibit arbitration
  - ❑ Repeal indirect auto-lending guidance
  - ❑ Create a small business advisor board
  - ❑ Create an advisory opinion process
  - ❑ Create Chinese wall between market monitoring and enforcement functions
  - ❑ Allow motions to set aside civil investigation demands (CID) to be filed in federal court and created a timeline for CID recipients to meet and confer with investigators
  - ❑ Give defendants in administrative actions the right to remove cases to federal court and clarify that Dodd-Frank’s 3-year statute of limitations applies to such actions.
  - ❑ Require verification of the accuracy of complaint data before posting complaints publicly on its database

Henson v. Santander Consumer USA, Inc.

- *Henson v. Santander Consumer USA*, No. 16-349, 2017 WL 125669, --- S.Ct. --- (U.S. Jan. 13, 2017).
- Issue: Whether a company that purchases debt after default and attempts to collect is a "debt collector" and therefore subject to the FDCPA
- Facts:
  - ❑Auto loans were made by CitiFinancial Auto Credit, Inc. ("Citi")
  - ❑Customers defaulted on loans, Citi repossessed cars and sold them leaving a deficiency balance on the loan
  - ❑Santander Consumer USA, Inc. ("Santander") purchased $3.55 billion in receivables, including the defaulted auto loans, from Citi, and began trying to collect
  - ❑Prior to the purchased Santander had acted as a debt collector trying to collect the deficiencies on Citi's behalf
  - ❑Consumers file a class action against Santander for violation of the FDCPA for allegedly misrepresenting the amount of the debt and Santander's entitlement to collect it.
  - ❑District Court dismissed FDCPA claims, determined Santander was not a "debt collector"

Henson v. Santander Consumer USA, Inc.

- FDCPA Creditor Exemption – Who is a creditor?
  - ❑ **Fair Debt Collection Practices Act - 15 USC 1692**
    - §1692a(4) The term **"creditor"** means any person who offers or extends credit creating a debt or to whom a debt is owed, but **such term does not include** any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.
    - §1692a(6) The term **"debt collector"** means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.

Henson v. Santander Consumer USA, Inc.

- "Debt Collector" Does Not Include…
  - §1692a(6)(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) **concerns a debt which was not in default at the time it was obtained by such person**; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

Henson v. Santander Consumer USA, Inc.

- **4th Circuit Decision – Affirmed District Courts Decision**
  - ❑ Consumers appealed and argued Santander was a debt collector because they acquired the debt after default citing § 1692a(4) of the FDCPA which excludes "any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another."
  - ❑ Court rejected the argument because the consumers' argument ignored the definition of "creditor," which excludes only those who are facilitating the collection of defaulted debts "for another."
  - ❑ **4th Circuit laid out 3 definitions in context of § 1692a(6) ("debt collector") of the FDCPA**
    - (1) a person whose principal purpose is to collect debts
    - (2) a person who regularly collects debts owed to another; or
    - (3) a person who collects its own debts, using a name other than its own as if it were a debt collector
  - ❑ **4th Circuit rationale:**
    - (1) Santander's principal business was a consumer finance company, not debt collector
    - (2) Santander was using its own name
    - (3) By the time Santander became involved in the alleged illegal activity, it was the owner of the defaulted loan
    - Analysis ended regardless of status of debts.
- **Certiorari granted January 13, 2017; Argued April 18, 2017; Decision expected June 2017**

National Consumer Assistance Plan (NCAP)

NCAP

- 3 CRAs – TransUnion, Equifax and Experian – entered into an agreement with the several State Attorneys General, including New York, in an effort to collect complete and accurate consumer information and provide consumers more transparency and a better experience interacting with the credit bureaus.
- Collaborated and developed new public records data standards and service levels for the collection and timely reporting of public records.

New Reporting Requirements for Bankruptcies, Liens and Judgments to be included on a credit report

- To be included on a Consumer Report the following must occur:
  - ❑ Minimum Consumer Identifying Information ("PII")
    - Name
    - Address
    - Social Security Number and/or
    - Birthdate
  - ❑ **AND** minimum collection frequency for public records (at least every 90 days)

Effective Date:

- July 1, 2017

National Consumer Assistance Plan (NCAP)

Affect to CRA's Database and Consumers

- **CRA's will remove from their databases previously collected public record data that does not meet the new standards.**
  - ❑ Approx. 9% of the population has either a tax lien or a civil judgment report on their file, which may result in a credit score impact
  - ❑ Score shifts for TransUnion are anticipated to range between 2.5% and 6.4%, with most **scores increasing**
    - Affected population could see an average score increase between +4 and +45 points, depending on the score
  - ❑ **No loss in predictive performance** of the scores tested since they capture other derogatory-type behavior.
    - One study found that over 92% of consumers had derogatory data on file that would offset remove of public records.

- **Bankruptcy Data**
  - ❑ Already compliant, Expect No Change/No removal

- **Civil Judgment Data**
  - ❑ Significant change to CRA Database
  - ❑ 96% of this data may not meet the new standards (Approx. 26M records)
  - ❑ Very likely that this data will not be part of the CRA's core consumer credit database after July 1, 2017

- **Tax Lien Data**
  - ❑ Significant change to CRA Database
  - ❑ 60% of this data may not meet the new standards (Approx. 11.4M records)

National Consumer Assistance Plan (NCAP)

Potential Changes to the FCRA on the Horizon?

- **FCRA Liability Harmonization Act**
  - ❑ **H.R. 2359 – Introduced May 4, 2017**
    - Sponsor: Rep. Barry Loudermilk (R-Ga.); Co-Sponsors: Rep. Edward Royce (R-Cal.), Rep. Ted Budd (R-N.C.), Rep. Peter King (R-N.Y.), and Rep. Ann Wagner (R-Mo.).
    - Currently in House Judiciary and House Financial Services Committees
    - Summary: Amends civil liability requirements under FCRA to include requirements relating to class actions, and for other purposes
  - ❑ **Limits**
    - Class Action Limits for Willful Noncompliance
      - Court may not apply a minimum amount of damages for each member of the class
      - Total recovery shall not exceed the lesser of $500,000 or 1% of the net worth of such person
    - Class Acton Limits for Negligent Noncompliance
      - Total recovery shall not exceed the lesser of $500,000 or 1% of the net worth of such person
  - ❑ **According to the Sponsors**
    - Protects the right of consumers to pursue statutory damages
    - Makes FCRA consistent with other consumer protection laws (TILA, FDCPA, ECOA, and EFTA) all of which have caps on punitive damages.
  - ❑ **According to Industry Supporters**
    - The absence of a cap on class action recoveries under FCRA – which allows plaintiffs to pursue unlimited damages, including punitive damages and attorneys' fees – forces business businesses to settle suits over "technical" or "speculative" violations in order to avoid the danger of excessive damage awards.