

2017

Introduction to the 2017 Annual Survey of Consumer Financial Services Law

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Recommended Citation

Ropiequet, John L.; Smith, Andrew M.; and Rowley, Keith A., "Introduction to the 2017 Annual Survey of Consumer Financial Services Law" (2017). *Scholarly Works*. 1252.

<https://scholars.law.unlv.edu/facpub/1252>

Introduction to the 2017 Annual Survey of Consumer Financial Services Law

By John L. Ropiequet, Andrew M. Smith, and Keith A. Rowley*

The 2017 *Annual Survey* chronicles many continuing developments from the previous *Annual Survey* along with developments in several other areas. The flow of new regulations from the Consumer Financial Protection Bureau (“CFPB”) has diminished with respect to mortgage lending but encompasses many new areas as the CFPB continues to expand the scope of its regulatory and enforcement powers.

As student lending has become one of the largest sectors in consumer finance, with \$1.2 trillion in outstanding loans, the CFPB has turned its supervisory and enforcement attention to allegedly unfair, deceptive, and abusive practices by various types of student-lending businesses.¹ In addition, the U.S. Department of Education, which shares jurisdiction with the CFPB over student lending, has issued a “gainful employment” rule to regulate for-profit colleges’ access to federal financial aid programs on an ability-to-repay basis similar to current and proposed regulations issued by the CFPB for other types of lending.²

Developments under the Fair Credit Reporting Act (“FCRA”) featured the obligations of data furnishers, which became one of the CFPB’s enforcement priorities during the past year.³ The Federal Trade Commission (“FTC”) also exercised its enforcement authority under the FCRA with respect to data furnishers’ obligations.⁴ In addition, the CFPB proposed an amendment to Regulation P to relax some annual privacy notice requirements, and the FTC issued a major report on big data.⁵

The *Annual Survey* reports on two sets of developments under the Fair Debt Collection Practices Act (“FDCPA”). The first survey reports on court decisions

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1. See Laurie A. Lucas & Christopher L. Peterson, *Developments in Federal Student-Lending Law: Harbingers of Change?*, 72 *Bus. Law.* 465, 466–72 (2017) (in this *Annual Survey*).

2. See *id.* at 472–74.

3. See Andrew M. Smith & Lucille C. A. Bartholomew *Fair Credit Reporting Act and Financial Privacy Update*, 72 *Bus. Law.* 475, 475–82 (2017) (in this *Annual Survey*).

4. See *id.* at 477–78.

5. See *id.* at 482–84.

that have narrowed the key definition of “debt collector” and thereby narrowed application of the FDCPA to entities that acquire debt obligations and have gone into default.⁶ The second reports on several CFPB enforcement actions against debt buyers and debt collectors that allegedly violated the FDCPA and other statutes, as well as on an FDCPA-proposed rulemaking that would, for the first time, exercise the CFPB’s power to issue regulations under the FDCPA.⁷

The TILA-RESPA Integrated Disclosures Rule that was reported on in the previous *Annual Survey*⁸ was the subject of further proposed amendments that contain some significant changes from the final rule that was issued at the end of 2013 and became effective in 2015, along with many minor changes and technical corrections.⁹ However, many concerns that have been voiced by the mortgage lending industry remain unresolved.¹⁰

During the past year, the CFPB proposed an arbitration rule¹¹ that followed its issuance of an empirical study of consumer arbitration that was reported on in the previous *Annual Survey*.¹² The proposed rule would prohibit class action waivers in consumer arbitration agreements and require companies that use arbitration clauses for individual disputes to submit those claims to the CFPB to allow it to monitor the fairness of the arbitration process.¹³ The rule was based on the CFPB’s preliminary conclusions that class actions are needed to protect consumers from potentially harmful business practices and that pre-dispute class action waivers block class action claims and discourage the filing of other claims.¹⁴

Bank deposits and payment systems were the subject of guidance issued by the CFPB and other regulators regarding customer identification programs for prepaid cards and other prepaid access programs, preauthorized electronic fund transfers, and deposit reconciliation practices.¹⁵ FinCEN issued a final Customer Due Diligence Rule, and several consent orders were entered that dealt with banking practices.¹⁶

6. See Carmen H. Thomas, Graham R. Billings & Donna O. Tillis, *Defining “Debt Collector” Under the FDCPA: The Eleventh and Fourth Circuits Reject the Acquired-in-Default Test*, 72 *BUS. LAW.* 487 (2017) (in this *Annual Survey*).

7. See R. Scott Adams & Bruce M. Jacobs, *Developments in the Regulation of Debt Buying*, 72 *BUS. LAW.* 495 (2017) (in this *Annual Survey*).

8. See Jonathan W. Cannon, Christine Acree & Brandy Hood, *TILA-RESPA Integrated Disclosures*, 71 *BUS. LAW.* 639 (2016) (in the 2016 *Annual Survey*).

9. See Jonathan W. Cannon, Christine Acree & Brandy Hood, *TILA-RESPA Integrated Disclosures Developments*, 72 *BUS. LAW.* 503, 503–06 (2017) (in this *Annual Survey*).

10. See *id.* at 506–09.

11. See Alan S. Kaplinsky, Mark J. Levin & Martin C. Bryce, Jr., *The CFPB Publishes Its Proposed Arbitration Rule*, 72 *BUS. LAW.* 511 (2017) (in this *Annual Survey*) [hereinafter *Arbitration 2017*].

12. See Alan S. Kaplinsky, Mark J. Levin & Martin C. Bryce, Jr., *The CFPB’s Consumer Arbitration Study Takes Center Stage*, 71 *BUS. LAW.* 731 (2016) (in the 2016 *Annual Survey*).

13. See *Arbitration 2017*, *supra* note 11, at 511.

14. See *id.* at 512.

15. See Ryan S. Stinneford, *Current Developments in Bank Deposits and Payment Systems*, 72 *BUS. LAW.* 521 (2017) (in this *Annual Survey*).

16. See *id.* at 523–24, 525–28.

One subject that is new to the *Annual Survey* is marketplace lending, in which online non-bank financial companies enter into credit transactions with consumers in a way that differs from how traditional lenders make loans.¹⁷ The emergence of this business model has generated interest in regulating the industry among the Office of the Comptroller of the Currency, the U.S. Department of the Treasury, the Federal Deposit Insurance Corporation, and the CFPB.¹⁸ State enforcement officials have also dealt with the practices of marketplace lenders during the past year.¹⁹

Small-dollar lending by more traditional types of lenders has also faced scrutiny from the CFPB and state enforcement officials.²⁰ The CFPB issued a proposed rule that would impose an ability-to-repay requirement on many types of small loans that currently are regulated only by state law.²¹ The CFPB has also undertaken enforcement actions against several small-dollar lenders and online service providers for such lenders, and state enforcement officials have instituted a variety of lawsuits and enforcement actions against small-dollar lenders, including those that have entered into agreements with Indian tribal lending entities.²²

Fair lending continues to be an important litigation and enforcement area.²³ One major development was the U.S. Supreme Court's granting of certiorari on the question of whether local governments have standing to sue for alleged damages that stem from the discriminatory effects of mortgage lending on their residents, which could have an important impact on local governments' ability to prosecute such cases.²⁴ Enforcement actions based on alleged racial, national origin, and other types of discrimination continued to be brought by the U.S. Department of Justice, the CFPB, and the U.S. Department of Housing and Urban Development against mortgage lenders, although most such actions involved alleged disparate treatment rather than a disparate impact on a protected minority.²⁵ The CFPB also entered into two additional consent orders with auto finance companies based on alleged disparate impact.²⁶ State enforcement actions and developments in private litigation involving auto finance are also reported.²⁷

17. See Robert Savoie & Philip (PJ) Hoffman, *Marketplace Lending Developments: A Survey of Federal and State Issues Confronting the Marketplace Lending Model*, 72 *BUS. LAW.* 529 (2017) (in this *Annual Survey*).

18. See *id.* at 529–33.

19. See *id.* at 533–38.

20. See Catherine M. Brennan, Justin B. Hosie, K. Dailey Wilson & Erica A.N. Kramer, *2016 Small-Dollar Lending Update: An Obituary or a Re-Awakening?*, 72 *BUS. LAW.* 539 (2017) (in this *Annual Survey*).

21. See *id.* at 539–42.

22. See *id.* at 542–47.

23. See John L. Ropiequet, Christopher S. Naveja & L. Jean Noonan, *Fair Lending Developments: Standing to Sue Takes the Floor*, 72 *BUS. LAW.* 549 (2017) (in this *Annual Survey*).

24. See *id.* at 552–53.

25. See *id.* at 553–57.

26. See Kevin M. McDonald & Kenneth J. Rojc, *Accelerating Regulation of Automotive Finance*, 72 *BUS. LAW.* 559, 559–61 (2017) (in this *Annual Survey*).

27. See *id.* at 562–66.

On the litigation front, the U.S. Supreme Court issued decisions on four issues that affect consumer finance: the Article III “concrete injury” requirement for standing to sue,²⁸ whether an unaccepted offer of judgment will moot a claim,²⁹ how the preemptive effect of the Federal Arbitration Act applies to a consumer arbitration provision,³⁰ and whether representative evidence can be used to establish the cohesiveness necessary to certify a case as a class action.³¹

Other important litigation developments included the continued filing, prosecution, and settlement of residential mortgage-backed securities litigation, with several settlements in the billion-dollar range being reported.³² Although a ruling by the Federal Communications Commission in 2015 addressed many questions about interpretation of the Telephone Consumer Protection Act (“TCPA”) in response to petitions from the industry, the debt collection industry has challenged the ruling in court.³³ Other issues continue to be addressed in class action lawsuits, including whether the identities of the members of a TCPA class must be ascertainable for a class to be certified.³⁴ Finally, the *Annual Survey* reports on several putative nationwide class actions that challenge charges to borrowers for property inspections and broker price opinions made during the course of mortgage lenders’ post-default property-preservation activities.³⁵

28. See Matthew O. Stromquist, Anna-Katrina S. Christakis & Jeffrey D. Pilgrim, *The High Court Speaks on Standing, Mootness, Arbitration, and Representative Evidence*, 72 *Bus. Law.* 567, 567–69 (2017) (in this *Annual Survey*).

29. See *id.* at 569–71.

30. See *id.* at 571–73.

31. See *id.* at 573–75.

32. See Richard E. Gottlieb & Brett J. Ntarelli, *ACE in the Hole: Developments Since ACE Securities in Residential Mortgage-Backed Securities Litigation*, 72 *Bus. Law.* 585 (2017) (in this *Annual Survey*).

33. See John R. Chiles, Zachary D. Miller & Rachel R. Friedman, *TCPA Litigation Update: Enduring Questions After the FCC’s TCPA Declaratory Ruling*, 72 *Bus. Law.* 577, 577–78 (2017) (in this *Annual Survey*).

34. See *id.* at 578–80.

35. See Joseph F. Yenouskas & John C. Raffetto, *Class Actions Challenging Property Preservation Activities*, 72 *Bus. Law.* 595 (2017) (in this *Annual Survey*).