Regulatory (Non)Compliance and Class Action Litigation: Breaking the Cycle

May 24, 2017
Chicago, Illinois

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Overview

1. **Class Action Trends**
2. **Regulatory Overlap**
3. **The Cycle**
4. **Breaking the Cycle**

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CLASS ACTION TRENDS

May 24, 2017

Class Action Defense Spend & Exposure

- Up in 2015, up in 2016, and projected up in 2017
- **$2.17 billion** spent on class action defense in 2016
- **$2.22 billion** spend projected for 2017
- Number of class actions per company rising, but only slightly
- Per-case exposure up*
- "[T]he mix of cases has shifted more to bet the company and high risk."

  -The Rising Costs Of Tamping Down Class Actions (Coe, May 2, 2017)

** Data taken from the 2017 Carlton Fields Class Action Survey: "Best Practices in Reducing Cost and Managing Risk in Class Action Litigation"*

Exposure Up - Why?

- Ripple effect:
  - Tort reform
    - CAFA
    - Fairness in Class Action Litigation Act of 2017 (H.R. 985; Senate Judiciary Committee)
  - *Wal-Mart v. Dukes*
  - *AT&T v. Concepcion* & "*Arbitration Trilogy II*"
  - Ascertainability

- *See, e.g.*, "Critical Mass: How A Decade Of Upheaval Changed Class Action Firms" (Sundar, May 2, 2017).

Exposure Up - Why? *(cont'd)*

- Fewer bottom-feeders / "weeding out the weak"
  - "Bad plaintiffs lawyers brought too many bad cases."
    "Bundle Up, Defense Counsel, Winter's Coming" (Karon, May 2, 2017)
- Select plaintiffs' firms "at the top"
- More complex cases
  - *Dukes*
  - 500-page Complaints
- Higher-value cases
- "Litigating class actions is becoming tougher for plaintiffs, but it's also becoming more expensive and risky for defendants."
  -"Legislative Haymaker Could Slam Class Actions" (Lowrey, May 2, 2017)

Consumer Protection Cases

- Second most common
- 17.8% of all class actions

** Data taken from the 2017 Carlton Fields Class Action Survey: "Best Practices in Reducing Cost and Managing Risk in Class Action Litigation"*

Consumer Protection Statutes (State & Federal)

RESPA

TILA

RICO

FCRA

FACTA

FDCPA

FDCA

FTCA

CPSA

NLEA

TCPA

FHA

MMWA

TCPA

FLSA

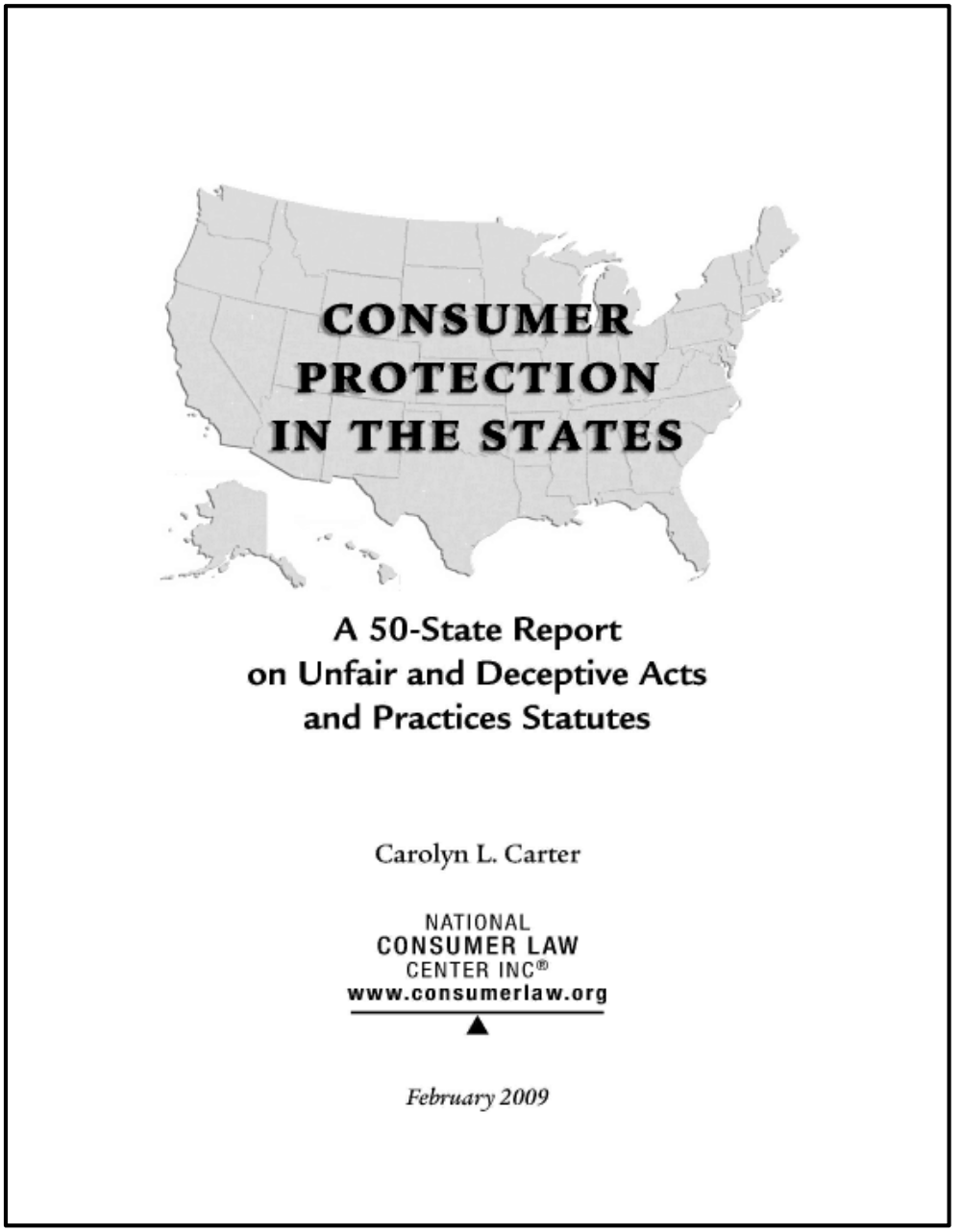
California UCL

California CLRA

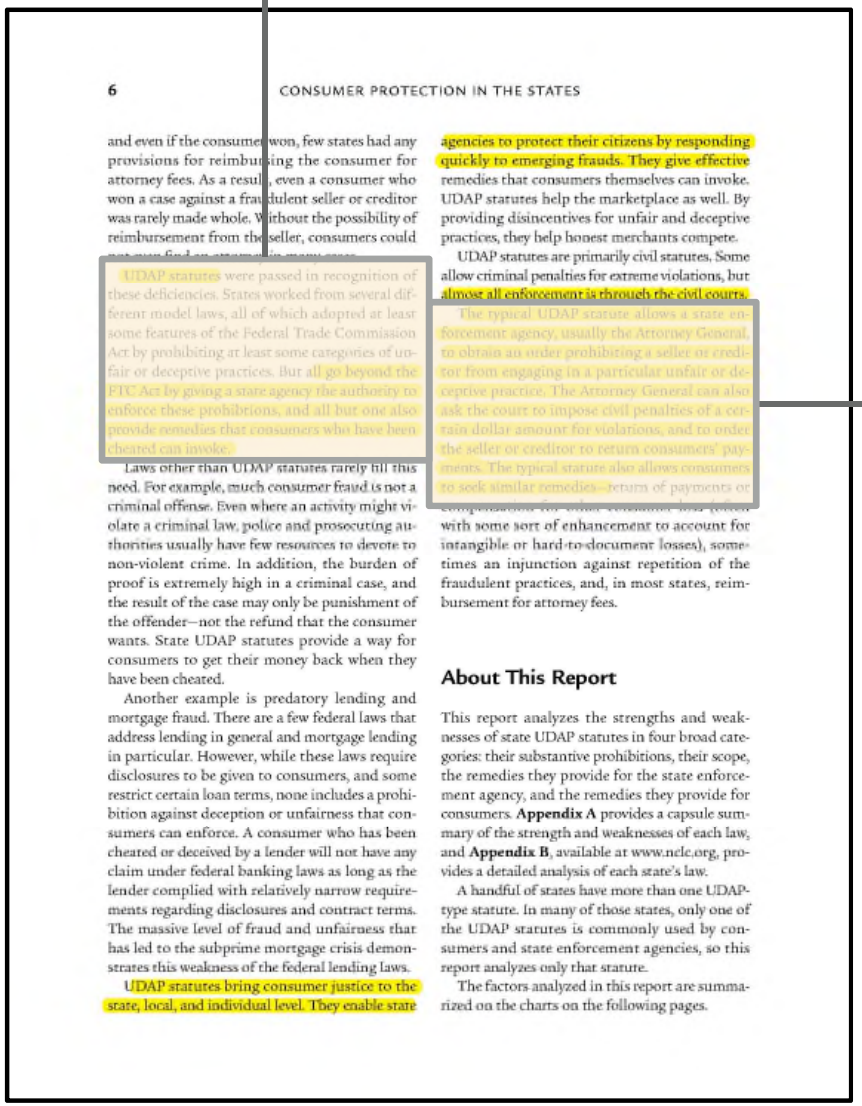
State DAPs

Common Thread

All have public and private enforcement mechanisms.



Common Thread *(cont'd)*



6 CONSUMER PROTECTION IN THE STATES

and even if the consumer won, few states had any provisions for reimbursing the consumer for attorney fees. As a result, even a consumer who won a case against a fraudulent seller or creditor was rarely made whole. Without the possibility of reimbursement from the seller, consumers could

UDAP statutes were passed in recognition of these deficiencies. States worked from several different model laws, all of which adopted at least some features of the Federal Trade Commission Act by prohibiting at least some categories of unfair or deceptive practices. But all go beyond the FTC Act by giving a state agency the authority to enforce these prohibitions, and all but one also provide remedies that consumers who have been cheated can invoke.

Laws other than UDAP statutes rarely fill this need. For example, much consumer fraud is not a criminal offense. Even where an activity might violate a criminal law, police and prosecuting authorities usually have few resources to devote to non-violent crime. In addition, the burden of proof is extremely high in a criminal case, and the result of the case may only be punishment of the offender—not the refund that the consumer wants. State UDAP statutes provide a way for consumers to get their money back when they have been cheated.

Another example is predatory lending and mortgage fraud. There are a few federal laws that address lending in general and mortgage lending in particular. However, while these laws require disclosures to be given to consumers, and some restrict certain loan terms, none includes a prohibition against deception or unfairness that consumers can enforce. A consumer who has been cheated or deceived by a lender will not have any claim under federal banking laws as long as the lender complied with relatively narrow requirements regarding disclosures and contract terms. The massive level of fraud and unfairness that has led to the subprime mortgage crisis demonstrates this weakness of the federal lending laws.

UDAP statutes bring consumer justice to the state, local, and individual level. They enable state agencies to protect their citizens by responding quickly to emerging frauds. They give effective remedies that consumers themselves can invoke. UDAP statutes help the marketplace as well. By providing disincentives for unfair and deceptive practices, they help honest merchants compete.

UDAP statutes are primarily civil statutes. Some allow criminal penalties for extreme violations, but almost all enforcement is through the civil courts.

The typical UDAP statute allows a state enforcement agency, usually the Attorney General, to obtain an order prohibiting a seller or creditor from engaging in a particular unfair or deceptive practice. The Attorney General can also ask the court to impose civil penalties of a certain dollar amount for violations, and to order the seller or creditor to return consumers' payments. The typical statute also allows consumers to seek similar remedies—return of payments or

with some sort of enhancement to account for intangible or hard-to-document losses), sometimes an injunction against repetition of the fraudulent practices, and, in most states, reimbursement for attorney fees.

About This Report

This report analyzes the strengths and weaknesses of state UDAP statutes in four broad categories: their substantive prohibitions, their scope, the remedies they provide for the state enforcement agency, and the remedies they provide for consumers. **Appendix A** provides a capsule summary of the strength and weaknesses of each law, and **Appendix B**, available at www.nclc.org, provides a detailed analysis of each state's law.

A handful of states have more than one UDAP-type statute. In many of those states, only one of the UDAP statutes is commonly used by consumers and state enforcement agencies, so this report analyzes only that statute.

The factors analyzed in this report are summarized on the charts on the following pages.

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"The Attorney General can also ask the court to impose civil penalties of a certain dollar amount for violations, and to order the seller or creditor to return consumers' payments."

"The typical statute also allows consumers to seek similar remedies."

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REGULATORY OVERLAP

May 24, 2017

Federal Agencies

- [illegible]
- [illegible]Services
- [illegible]revention
- Civil Rights Commission
- Commerce Department
- Commodity Futures Trading Commission
- Consumer Financial Protection Bureau
- Consumer Product Safety Commission
- Council on Environmental Quality
- [illegible]
- [illegible]
- [illegible]
- [illegible]
- Employment Standards Administration
- Energy Efficiency and Renewable Energy Office
- Equal Employment Opportunity Commission
- Export Administration Bureau
- Federal Aviation Administration
- Federal Bureau of Investigation
- [illegible]Commission
- [illegible]y Commission
- [illegible]ons Examination Council
- [illegible]Authority
- Federal Mediation and Conciliation Service
- Federal Pay, Advisory Committee
- Federal Trade Commission
- Financial Crimes Enforcement Network
- Food and Drug Administration
- Food Safety and Inspection Service
- Foreign Assets Control Office
- Foreign-Trade Zones Board
- Health and Human Services Department
- Industry and Security Bureau
- Inspector General Office, Health and Human Services Department
- Internal Revenue Service
- International Trade Administration
- International Trade Commission
- International Investment Office
- [illegible]mission
- [illegible]
- [illegible]
- [illegible]rds Office
- Monetary Offices
- National Labor Relations Board
- Nuclear Regulatory Commission
- Occupational Safety and Health Administration
- Occupational Safety and Health Review Commission
- Patent and Trademark Office
- Securities and Exchange Commission
- Small Business Administration
- Social Security Administration
- [illegible]
- [illegible]
- [illegible]
- Veterans Employment and Training Service
- Wage and Hour Division
- Workers Compensation Programs Office

Consumer Financial Protection Bureau*

Equal Employment Opportunity Commission

Federal Trade Commission

National Labor Relations Board

Securities and Exchange Commission

*CFPB--For How Long?

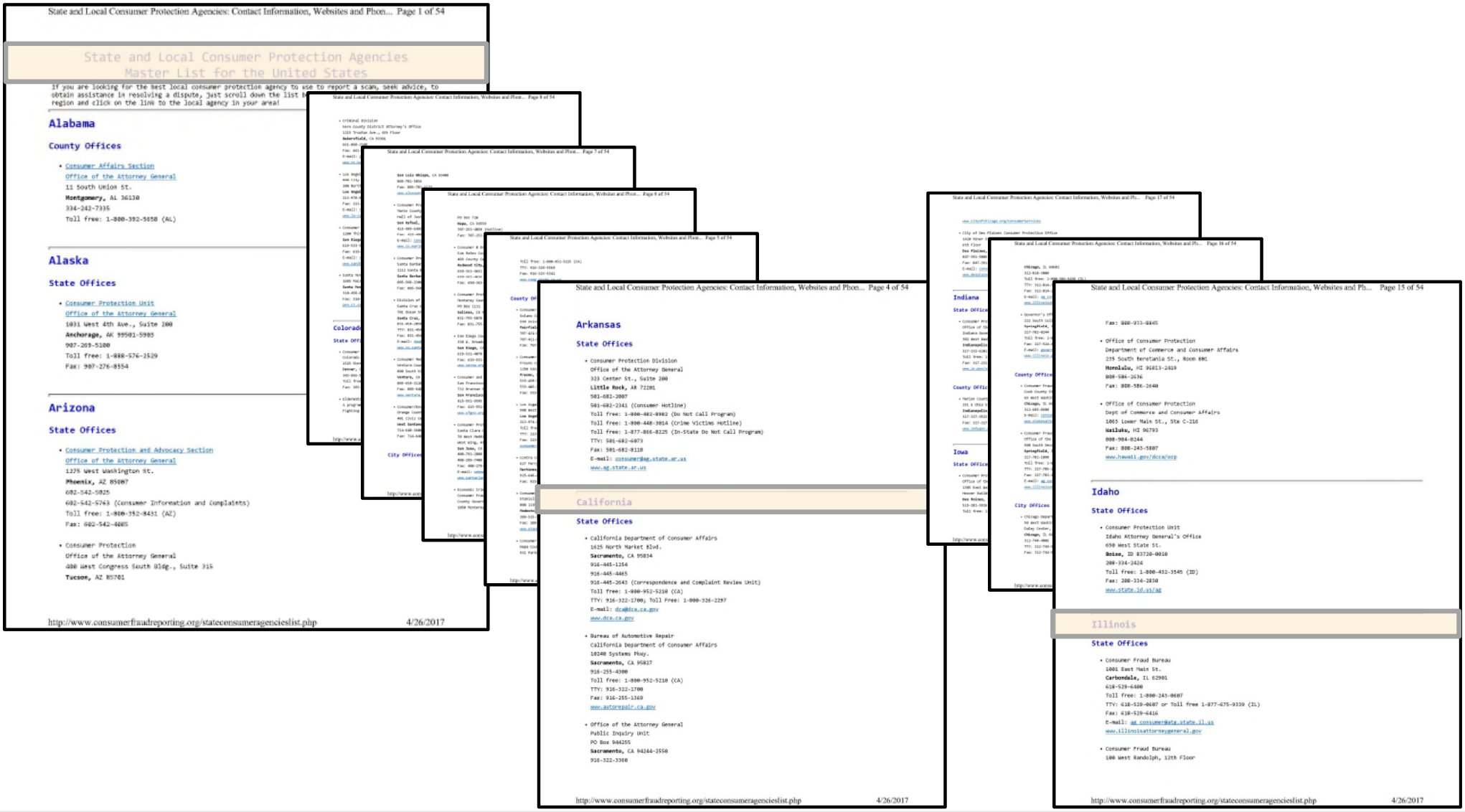
- Financial Choice Act, H.R. 10
- Designed to address "the extremely broad and unchecked authority to punish companies for whatever unspecified acts the CFPB chooses to designate"
  - Jeff Emerson, House Financial Services Committee spokesman.

Regulators - State

- NAIC / DOIs
- Attorneys General
- Consumer Affairs
- Departments of Banking

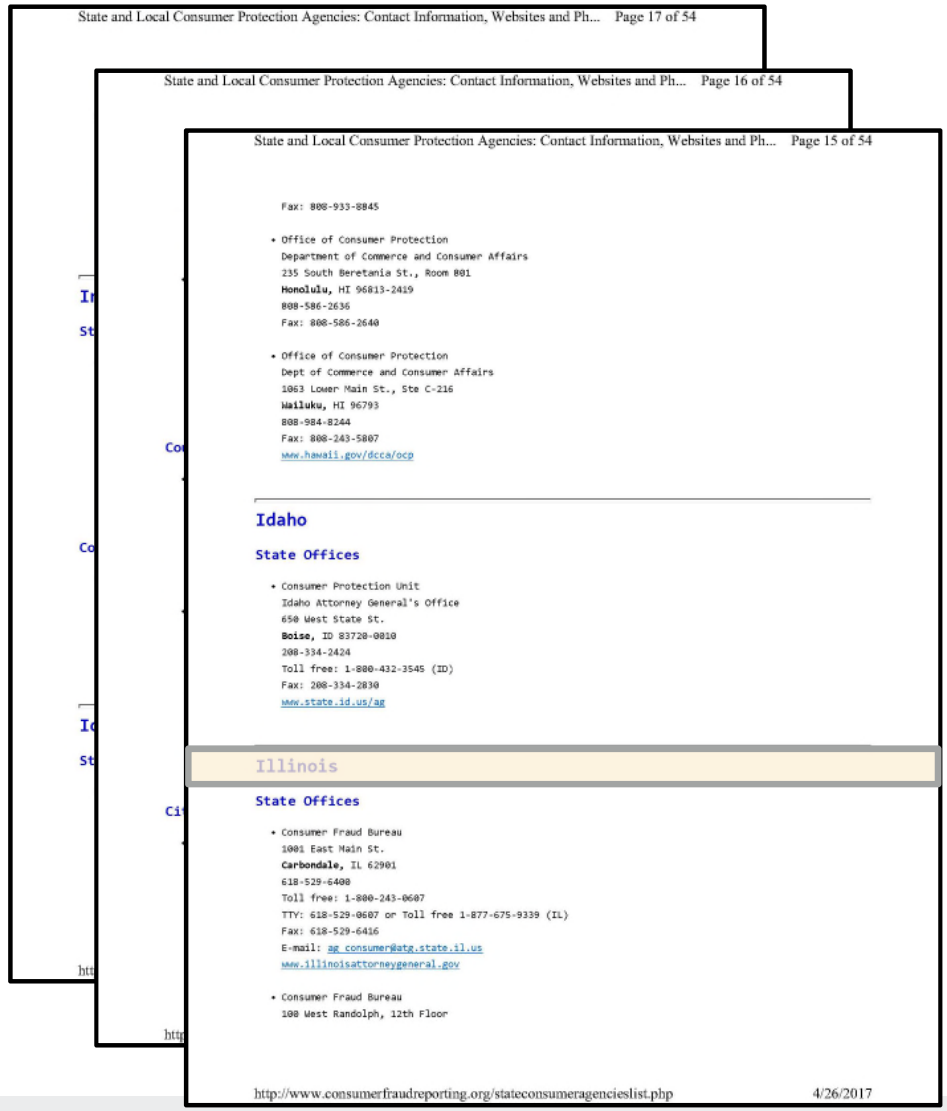
Regulators - State *(cont'd)*

State and Local Consumer Protection Agencies - Master List for the United States



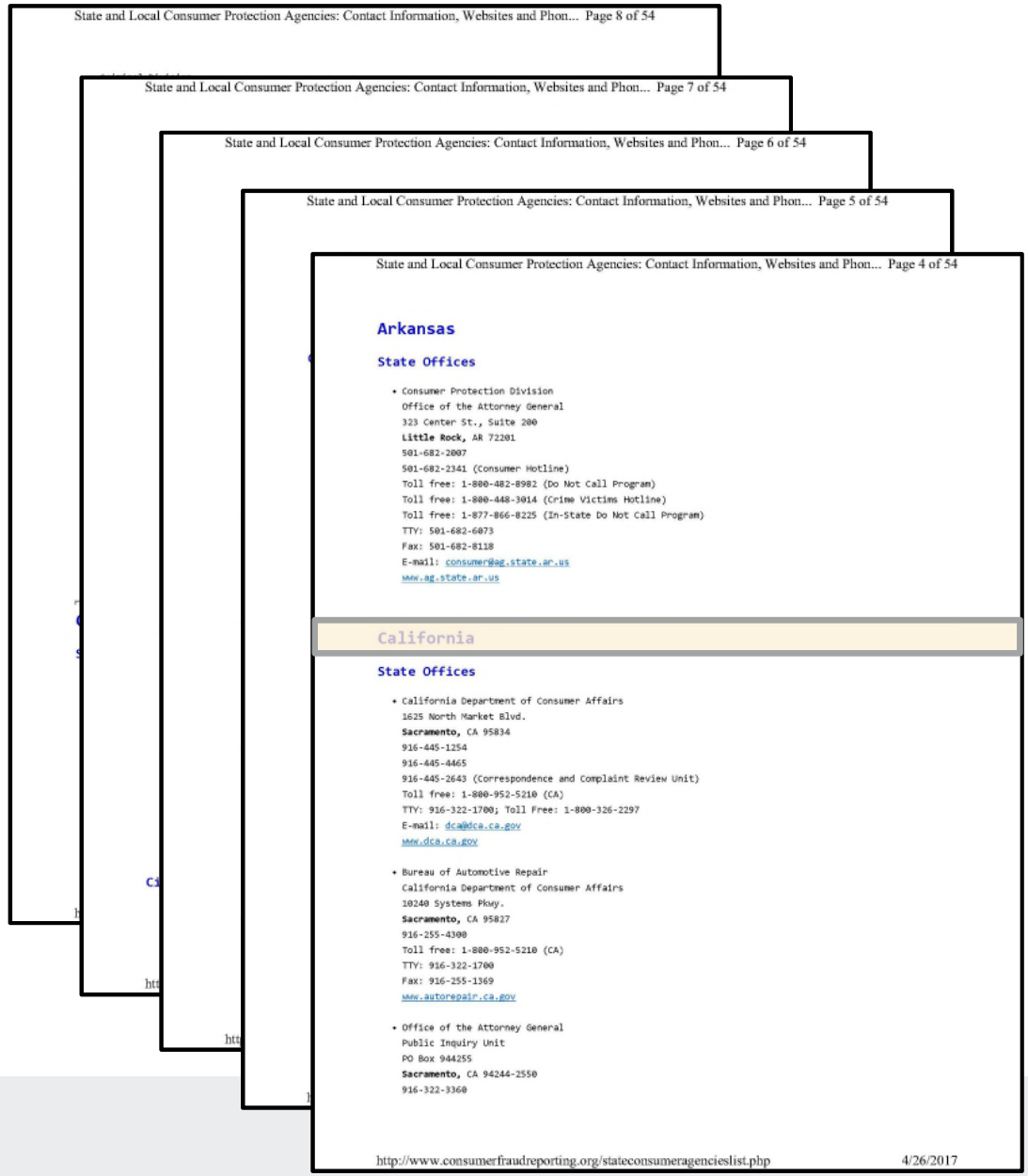
Regulators - State *(cont'd)*

State and Local Consumer Protection Agencies
Illinois



Regulators - State *(cont'd)*

State and Local Consumer Protection Agencies
California



California Agencies

- Alternative Energy and Advanced Transportation Financing Authority
- Apprenticeship Council
- Arbitration Certification Program
- Attorney General
- Building Standards Commission
- Bureau of Security and Investigative Services
- Bure[illegible]
- Busi[illegible]
- Busi[illegible]
- Business Portal
- Business, Transportation and Housing Agency
- Civil Rights Bureau
- Commission on State Mandates
- Com[illegible]
- Com[illegible]
- Cons[illegible]
- Cons[illegible]
- Cons[illegible]
- Contractors State License Board
- Debt and Investment Advisory Commission
- Department of Consumer Affairs
- Department of Corporations
- Department of Finance
- Department of Financial Institutions
- Department of Industrial Relations (DIR)
- Department of Insurance
- Department of Justice, Consumer Information, Public Inquiry Unit
- Department of Justice
- Department of Managed Health Care
- Depa[illegible]
- Depa[illegible]
- Division of Labor Standards Enforcement
- Division of Occupational Safety and Health (Cal/OSHA)
- Division of Workers Compensation Medical Unit
- Division of Workers Compensation
- Economic Assistance, Business and Community Resources
- Employment Development Department (EDD)
- Energy Commission
- Environment and Natural Resources Agency
- Environmental Protection Agency (Cal/EPA)
- Environmental Resources Evaluation System (CERES)
- Fiscal Services
- Foster Youth Help[illegible]
- Franchise Tax Bo[illegible]
- Fraud Division
- Governors Comm[illegible]
- Health and Huma[illegible]
- Housing Finance Agency
- Industrial Development Financing Advisory Commission
- Job Service
- Labor and Employment Agency
- Labor and Workforce Development Agency
- Medical Assistance Commission
- Medica[illegible]
- Occupa[illegible]
- Office [illegible]
- Office [illegible]t
- Permit [illegible]
- Procurement Division
- Real Estate Services Division
- Resources Agency
- Secretary of State
- Small Business Development Center Program
- State Mediation and Conciliation Service
- Transportation Commission
- Travel and Transportation Agency
- Water Resources Control Board
- Wildlife Conservation Board
- Workforce and Labor Development Agency
- Workforce Investment Board

Attorney General

Department of Consumer Affairs

Department of Insurance

Environmental Protection Agency

Labor and Employment Department

Double Whammy

Regulatory Enforcement
&
Class Actions

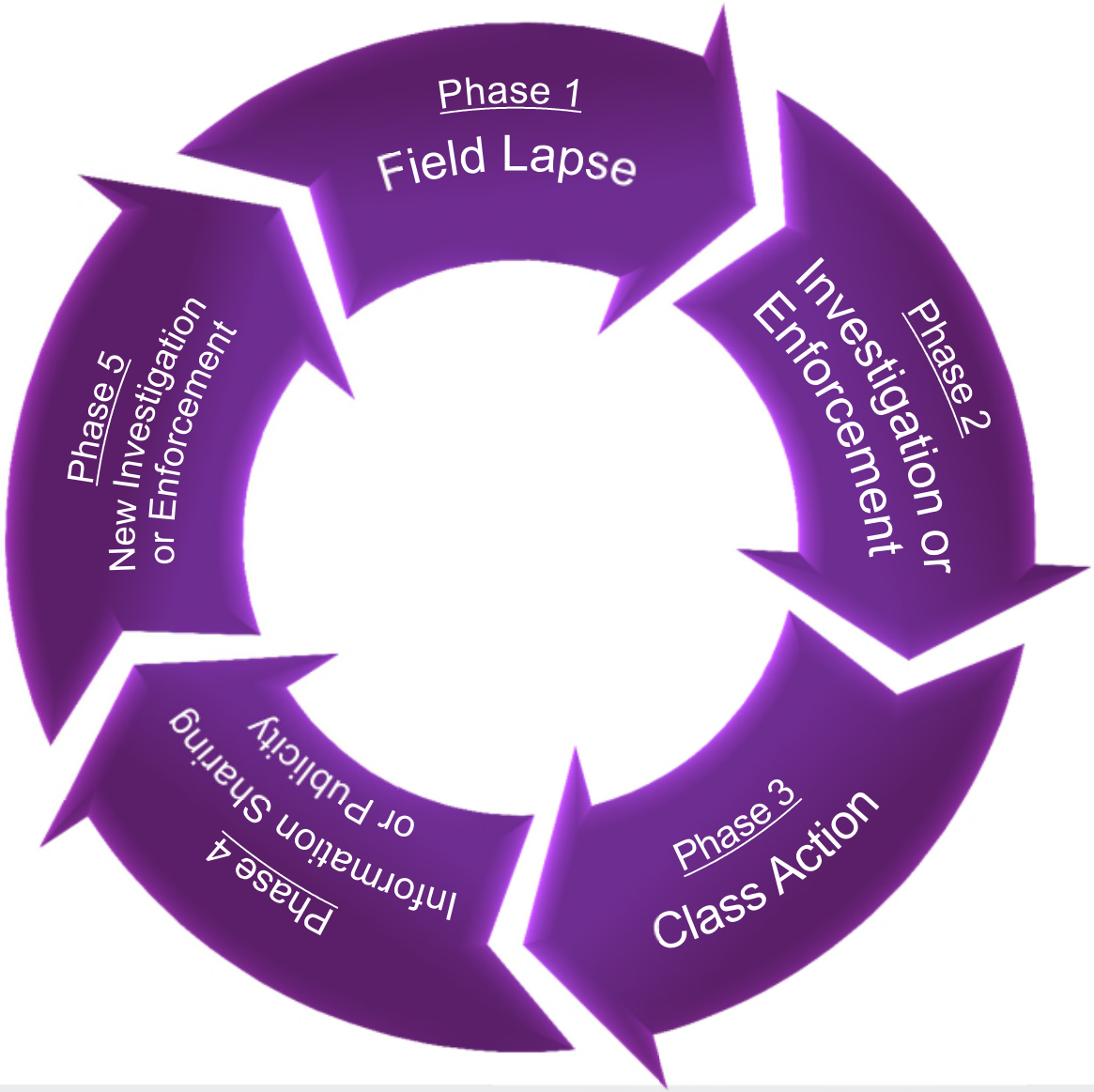
My Experience

- Defended ~ 100 class actions
  - Insurance
  - Real Estate
  - Food
  - Telecommunications
  - Automotive
- States
  - Mostly California

My Experience *(cont'd)*

- Regulatory analogue increasingly common
  - ***Subsequent*** investigation or enforcement action
  - ***Parallel*** investigation or enforcement action
  - ***Pending*** investigation or enforcement action
  - ***Already completed*** investigation or enforcement action

Class Actions & Regulatory Enforcement: The Cycle

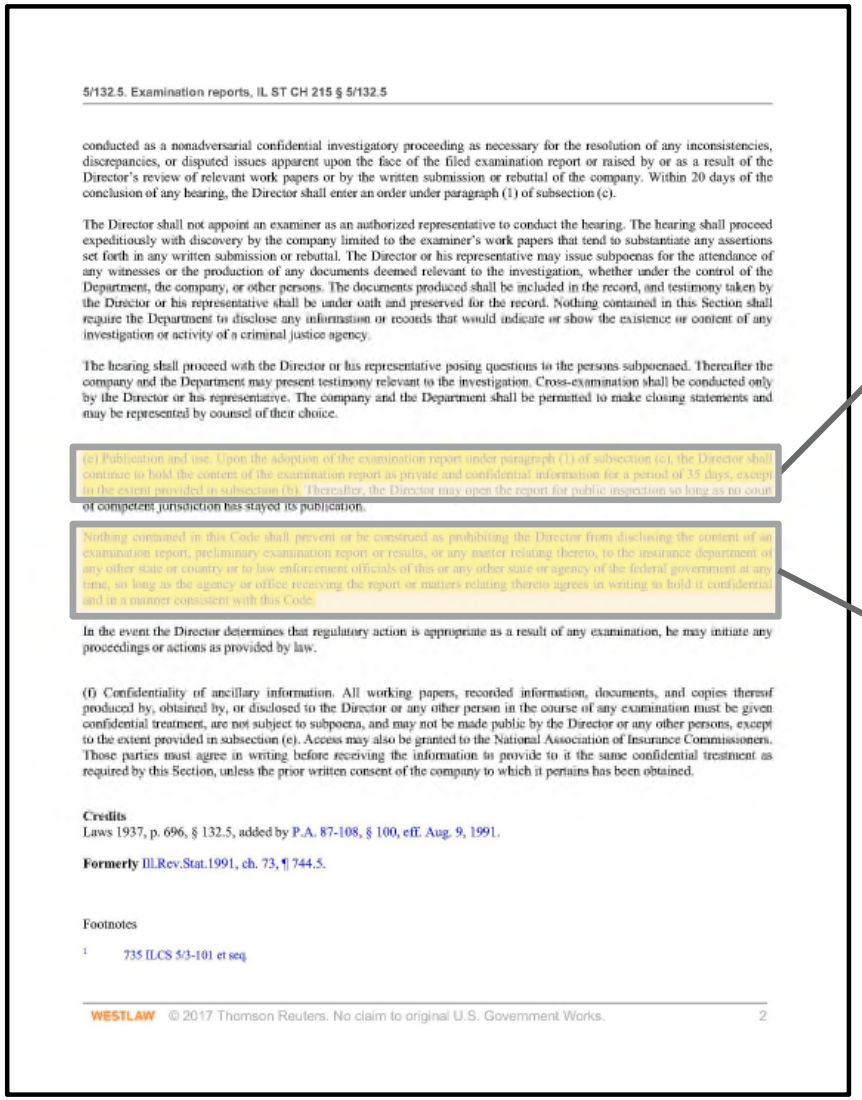


Why the Cycle Perpetuates: Reason #1

Information Sharing: Regulators and Plaintiffs' Counsel

Why the Cycle Perpetuates: Reason #1 *(cont'd)*

Information Sharing: Regulators and Plaintiffs' Counsel *(cont'd)*



5/132.5. Examination reports, IL ST CH 215 § 5/132.5

conducted as a nonadversarial confidential investigatory proceeding as necessary for the resolution of any inconsistencies, discrepancies, or disputed issues apparent upon the face of the filed examination report or raised by or as a result of the Director's review of relevant work papers or by the written submission or rebuttal of the company. Within 20 days of the conclusion of any hearing, the Director shall enter an order under paragraph (1) of subsection (c).

The Director shall not appoint an examiner as an authorized representative to conduct the hearing. The hearing shall proceed expeditiously with discovery by the company limited to the examiner's work papers that tend to substantiate any assertions set forth in any written submission or rebuttal. The Director or his representative may issue subpoenas for the attendance of any witnesses or the production of any documents deemed relevant to the investigation, whether under the control of the Department, the company, or other persons. The documents produced shall be included in the record, and testimony taken by the Director or his representative shall be under oath and preserved for the record. Nothing contained in this Section shall require the Department to disclose any information or records that would indicate or show the existence or content of any investigation or activity of a criminal justice agency.

The hearing shall proceed with the Director or his representative posing questions to the persons subpoenaed. Thereafter the company and the Department may present testimony relevant to the investigation. Cross-examination shall be conducted only by the Director or his representative. The company and the Department shall be permitted to make closing statements and may be represented by counsel of their choice.

(e) Publication and use. Upon the adoption of the examination report under paragraph (1) of subsection (c), the Director shall continue to hold the content of the examination report as private and confidential information for a period of 35 days, except to the extent provided in subsection (b). Thereafter, the Director may open the report for public inspection so long as no court of competent jurisdiction has stayed its publication.

Nothing contained in this Code shall prevent or be construed as prohibiting the Director from disclosing the content of an examination report, preliminary examination report or results, or any matter relating thereto, to the insurance department of any other state or country or to law enforcement officials of this or any other state or agency of the federal government at any time, so long as the agency or office receiving the report or matters relating thereto agrees in writing to hold it confidential and in a manner consistent with this Code.

In the event the Director determines that regulatory action is appropriate as a result of any examination, he may initiate any proceedings or actions as provided by law.

(f) Confidentiality of ancillary information. All working papers, recorded information, documents, and copies thereof produced by, obtained by, or disclosed to the Director or any other person in the course of any examination must be given confidential treatment, are not subject to subpoena, and may not be made public by the Director or any other persons, except to the extent provided in subsection (e). Access may also be granted to the National Association of Insurance Commissioners. Those parties must agree in writing before receiving the information to provide to it the same confidential treatment as required by this Section, unless the prior written consent of the company to which it pertains has been obtained.

Credits
Laws 1937, p. 696, § 132.5, added by P.A. 87-108, § 100, eff. Aug. 9, 1991.

Formerly Ill.Rev.Stat.1991, ch. 73, ¶ 744.5.

Footnotes

[1] 735 ILCS 5/3-101 et seq.

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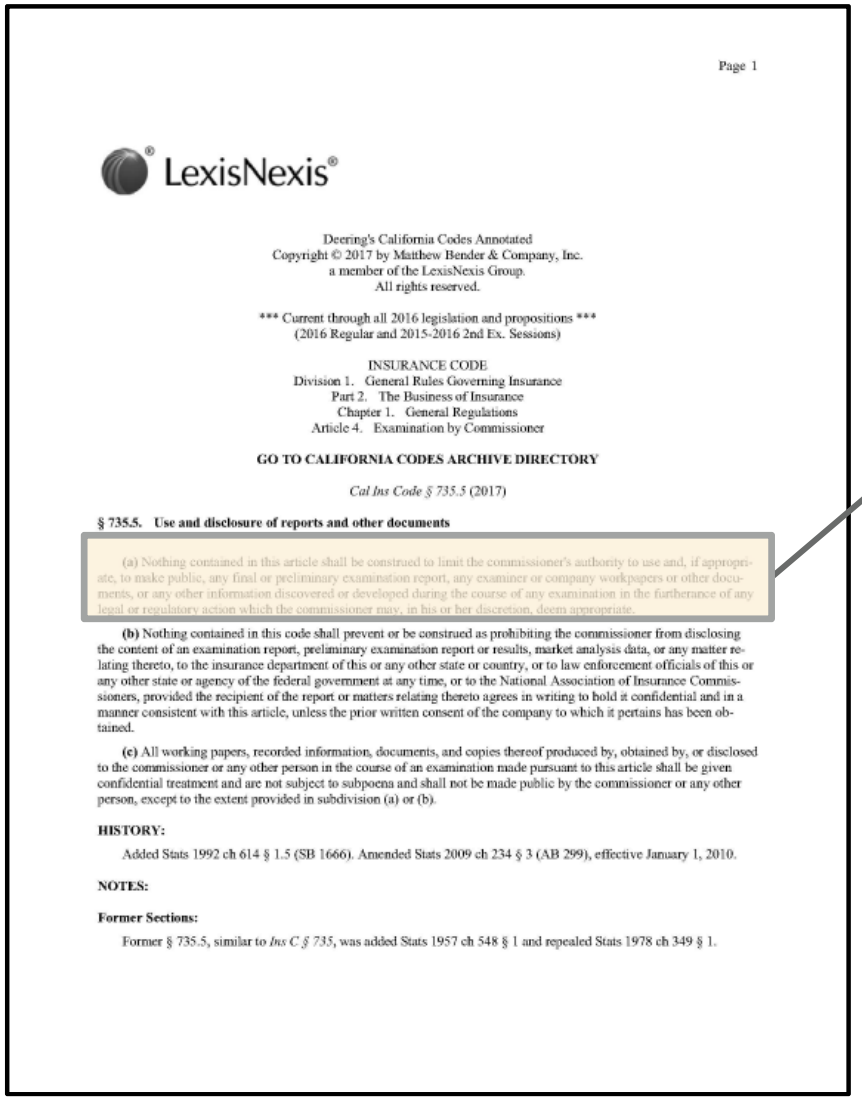
Nothing contained in this Code shall prevent or be construed as prohibiting the Director from disclosing the content of an examination report, preliminary examination report or results, or any matter relating thereto, to the insurance department of any other state or country or to law enforcement officials of this or any other state or agency of the federal government at any time, so long as the agency or office receiving the report or matters relating thereto agrees in writing to hold it confidential and in a manner consistent with this Code.

Why the Cycle Perpetuates: Reason #1 *(cont'd)*

Information Sharing: Regulators and Plaintiffs' Counsel *(cont'd)*



Page 1

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Deering's California Codes Annotated
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*** Current through all 2016 legislation and propositions ***
(2016 Regular and 2015-2016 2nd Ex. Sessions)

INSURANCE CODE
Division 1. General Rules Governing Insurance
Part 2. The Business of Insurance
Chapter 1. General Regulations
Article 4. Examination by Commissioner

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Ins Code § 735.5 (2017)

§ 735.5. Use and disclosure of reports and other documents

(a) Nothing contained in this article shall be construed to limit the commissioner's authority to use and, if appropriate, to make public, any final or preliminary examination report, any examiner or company workpapers or other documents, or any other information discovered or developed during the course of any examination in the furtherance of any legal or regulatory action which the commissioner may, in his or her discretion, deem appropriate.

(b) Nothing contained in this code shall prevent or be construed as prohibiting the commissioner from disclosing the content of an examination report, preliminary examination report or results, market analysis data, or any matter relating thereto, to the insurance department of this or any other state or country, or to law enforcement officials of this or any other state or agency of the federal government at any time, or to the National Association of Insurance Commissioners, provided the recipient of the report or matters relating thereto agrees in writing to hold it confidential and in a manner consistent with this article, unless the prior written consent of the company to which it pertains has been obtained.

(c) All working papers, recorded information, documents, and copies thereof produced by, obtained by, or disclosed to the commissioner or any other person in the course of an examination made pursuant to this article shall be given confidential treatment and are not subject to subpoena and shall not be made public by the commissioner or any other person, except to the extent provided in subdivision (a) or (b).

HISTORY:

Added Stats 1992 ch 614 § 1.5 (SB 1666). Amended Stats 2009 ch 234 § 3 (AB 299), effective January 1, 2010.

NOTES:

Former Sections:

Former § 735.5, similar to *Ins C § 735*, was added Stats 1957 ch 548 § 1 and repealed Stats 1978 ch 349 § 1.

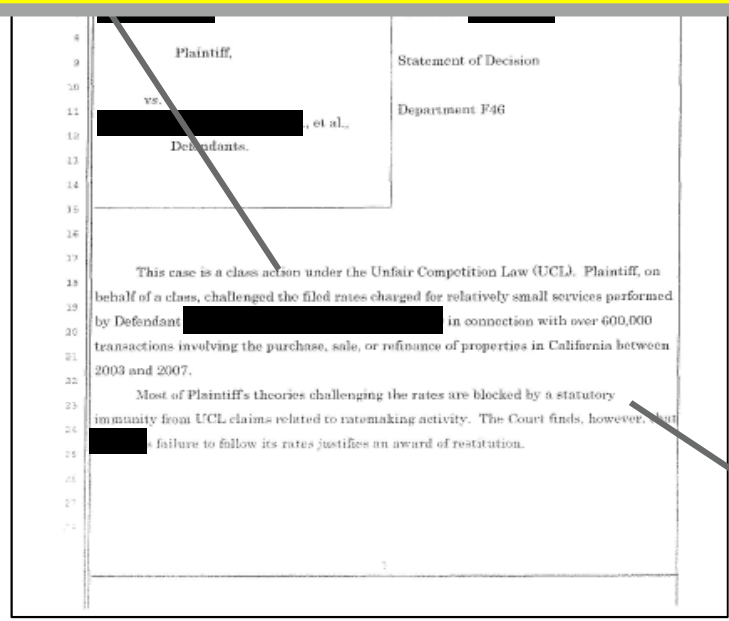
(a) Nothing contained in this article shall be construed to limit the commissioner's authority to use and, if appropriate, to make public, any final or preliminary examination report, any examiner or company workpapers or other documents, **or any other information discovered or developed during the course of any examination in the furtherance of any legal or regulatory action which the commissioner may, in his or her discretion, deem appropriate.**

Why the Cycle Perpetuates: Reason #1 *(cont'd)*

Go-Betweens

Cooperation and Information-Sharing: A Case Study

The evidence at trial also showed that the DOI cooperated with Plaintiff's counsel to suppress this historical information about its review, and approval or acceptance of [the insurer's] rates, and to minimize any notion that the DOI's actions in approving and accepting [] insurance rates could be relied upon by the insurer filing the rates.



Plaintiff,

vs.

[redacted], et al.,

Defendants.

Statement of Decision

Department F46

This case is a class action under the Unfair Competition Law (UCL). Plaintiff, on behalf of a class, challenged the filed rates charged for relatively small services performed by Defendant [redacted] in connection with over 600,000 transactions involving the purchase, sale, or refinance of properties in California between 2003 and 2007.

Most of Plaintiff's theories challenging the rates are blocked by a statutory immunity from UCL claims related to ratemaking activity. The Court finds, however, that [redacted] failure to follow its rates justifies an award of restitution.

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Attorneys for plaintiff [redacted]

CONFORMED COPY

JUN 15 2007

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

[redacted]

Plaintiffs,

vs.

[redacted]

CASE NO. [redacted]

CLASS ACTION

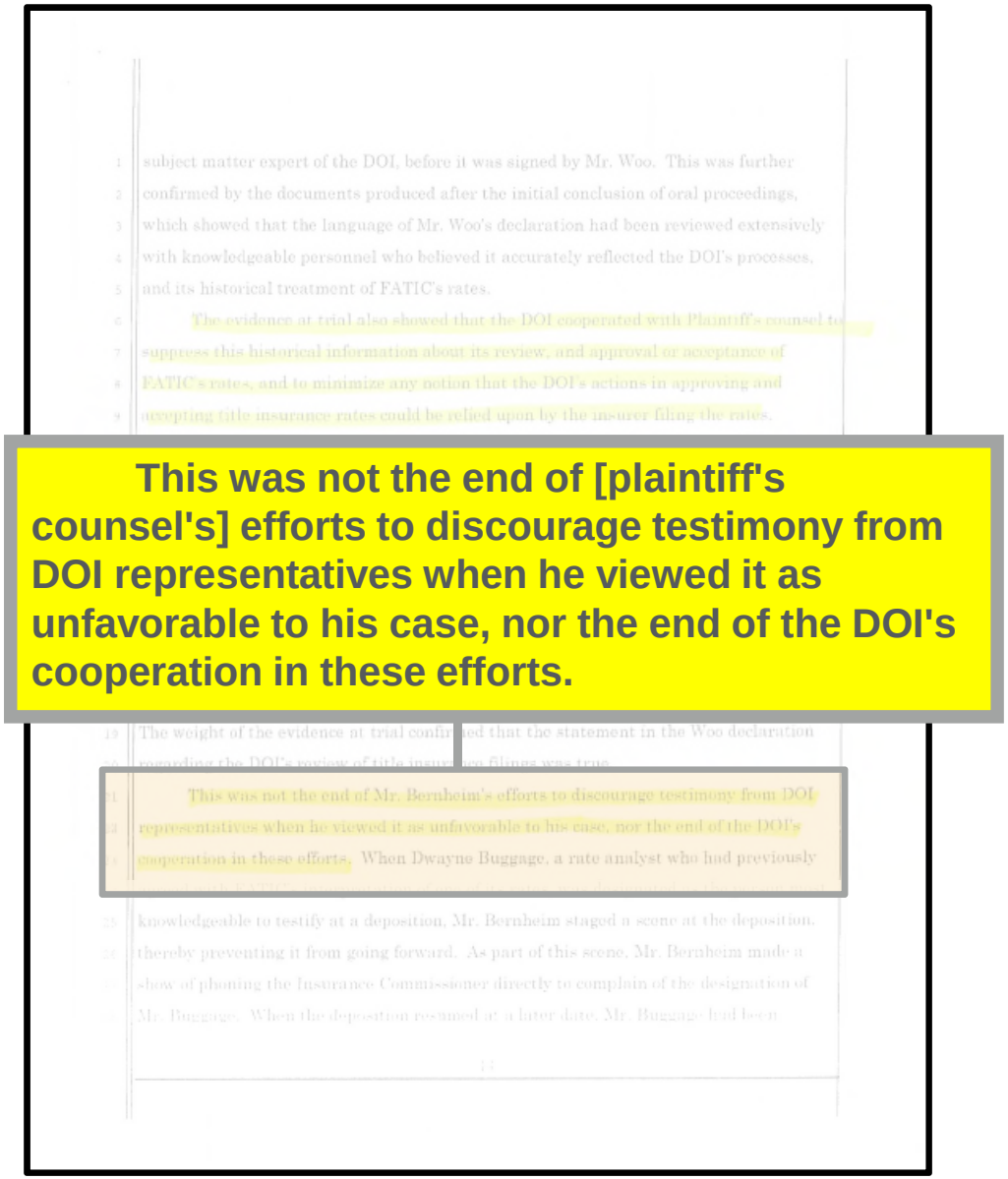
COMPLEX DESIGNATION REQUESTED

COMPLAINT FOR:

(1) Breach of Contract;
(2) Breach of Implied Covenant of Good Faith and Fair Dealing;
(3) Negligence;
(4) Fraud and Deceit;
(5) Unjust Enrichment;

Current employees of the DOI could not help but be aware of the history of [plaintiff's counsel's] contacts with the Insurance Commissioner, and were therefore aware that any testimony unfavorable to [the plaintiff's] case would be reported promptly and directly to their ultimate boss, the Insurance Commissioner, who would respond in a manner designed to assist [plaintiff's counsel].

A Case-Study *(cont'd)*



subject matter expert of the DOI, before it was signed by Mr. Woo. This was further confirmed by the documents produced after the initial conclusion of oral proceedings, which showed that the language of Mr. Woo's declaration had been reviewed extensively with knowledgeable personnel who believed it accurately reflected the DOI's processes, and its historical treatment of FATIC's rates.

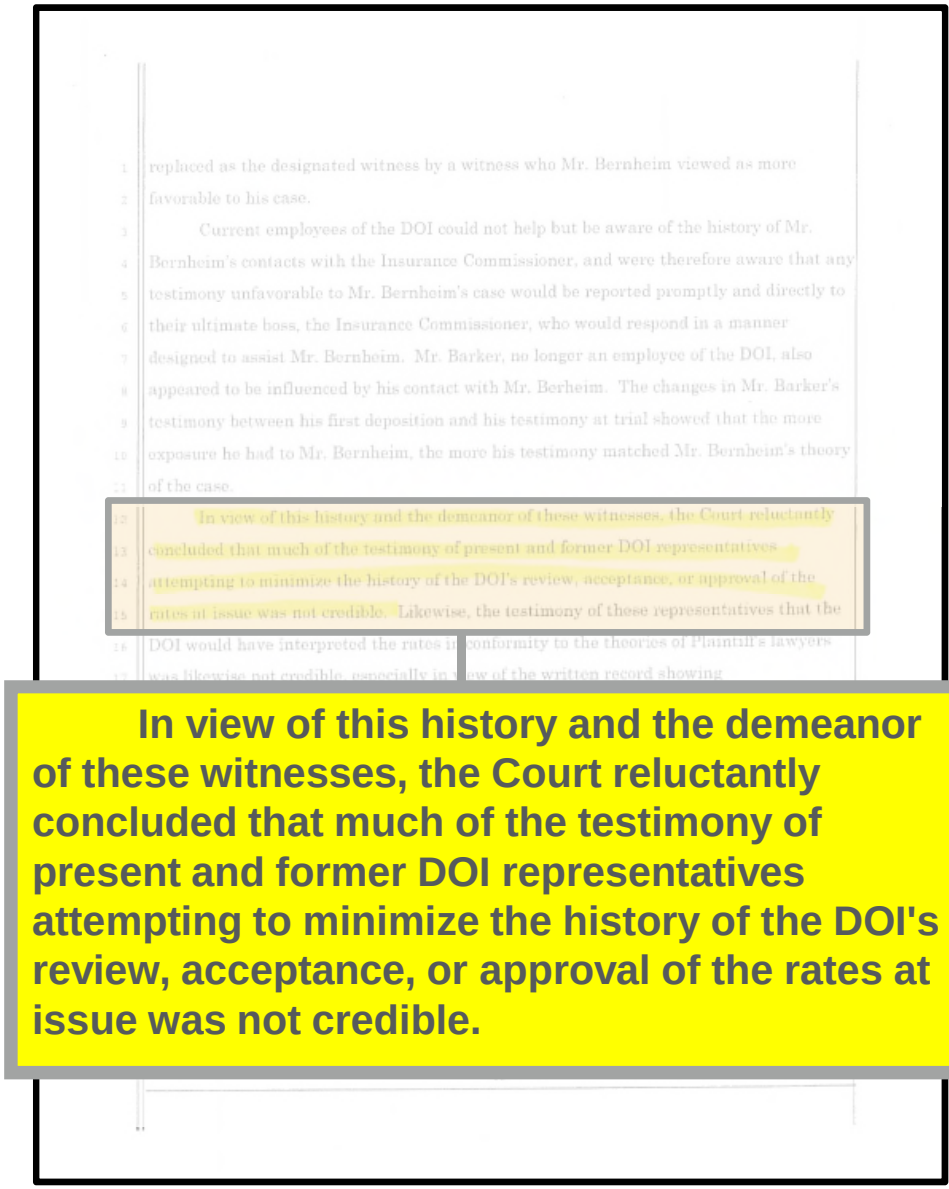
The evidence at trial also showed that the DOI cooperated with Plaintiff's counsel to suppress this historical information about its review, and approval or acceptance of FATIC's rates, and to minimize any notion that the DOI's actions in approving and accepting title insurance rates could be relied upon by the insurer filing the rates.

This was not the end of [plaintiff's counsel's] efforts to discourage testimony from DOI representatives when he viewed it as unfavorable to his case, nor the end of the DOI's cooperation in these efforts.

The weight of the evidence at trial confirmed that the statement in the Woo declaration regarding the DOI's review of title insurance filings was true.

This was not the end of Mr. Bernheim's efforts to discourage testimony from DOI representatives when he viewed it as unfavorable to his case, nor the end of the DOI's cooperation in these efforts. When Dwayne Buggage, a rate analyst who had previously

knowledgeable to testify at a deposition, Mr. Bernheim staged a scene at the deposition, thereby preventing it from going forward. As part of this scene, Mr. Bernheim made a show of phoning the Insurance Commissioner directly to complain of the designation of Mr. Buggage. When the deposition resumed at a later date, Mr. Buggage had been



replaced as the designated witness by a witness who Mr. Bernheim viewed as more favorable to his case.

Current employees of the DOI could not help but be aware of the history of Mr. Bernheim's contacts with the Insurance Commissioner, and were therefore aware that any testimony unfavorable to Mr. Bernheim's case would be reported promptly and directly to their ultimate boss, the Insurance Commissioner, who would respond in a manner designed to assist Mr. Bernheim. Mr. Barker, no longer an employee of the DOI, also appeared to be influenced by his contact with Mr. Berheim. The changes in Mr. Barker's testimony between his first deposition and his testimony at trial showed that the more exposure he had to Mr. Bernheim, the more his testimony matched Mr. Bernheim's theory of the case.

In view of this history and the demeanor of these witnesses, the Court reluctantly concluded that much of the testimony of present and former DOI representatives attempting to minimize the history of the DOI's review, acceptance, or approval of the rates at issue was not credible. Likewise, the testimony of these representatives that the DOI would have interpreted the rates in conformity to the theories of Plaintiff's lawyers was likewise not credible, especially in [illegible] of the written record showing

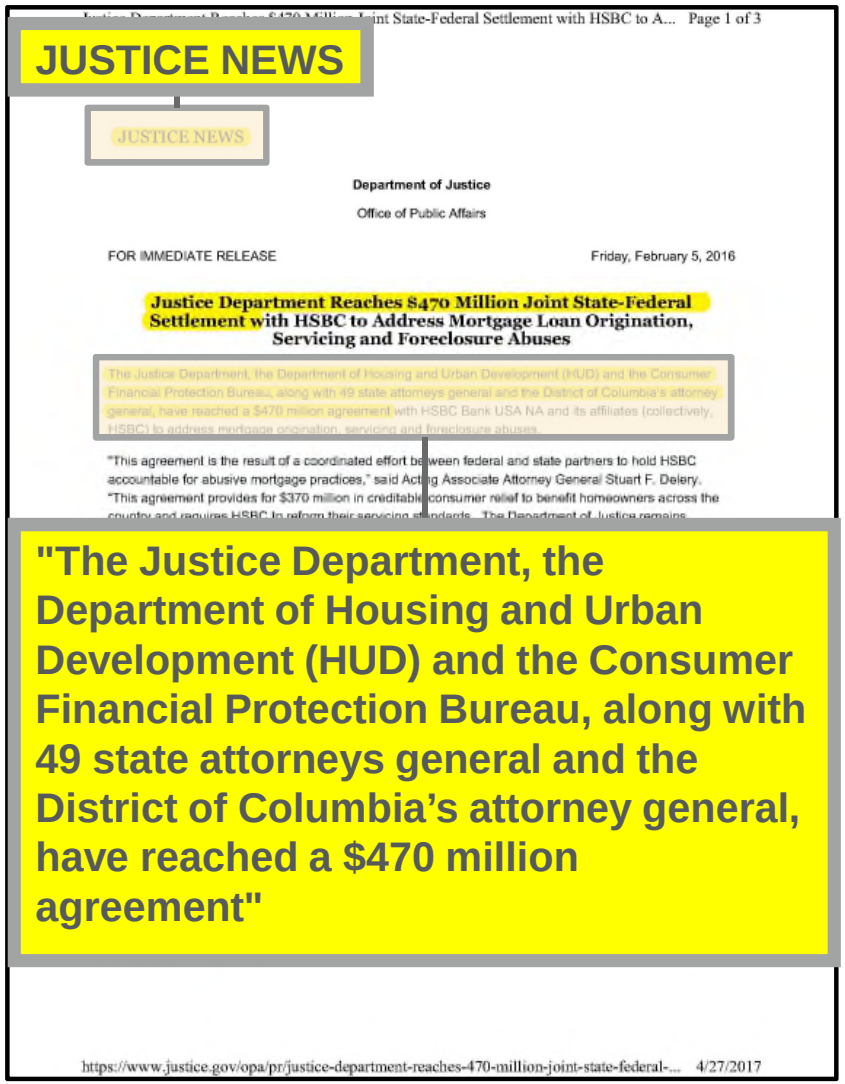
In view of this history and the demeanor of these witnesses, the Court reluctantly concluded that much of the testimony of present and former DOI representatives attempting to minimize the history of the DOI's review, acceptance, or approval of the rates at issue was not credible.

Why the Cycle Perpetuates: Reason #2

Publicity

Why the Cycle Perpetuates: Reason #2 *(cont'd)*

Publicity *(cont'd)*



Justice Department Reaches $470 Million Joint State-Federal Settlement with HSBC to A... Page 1 of 3

JUSTICE NEWS

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Friday, February 5, 2016

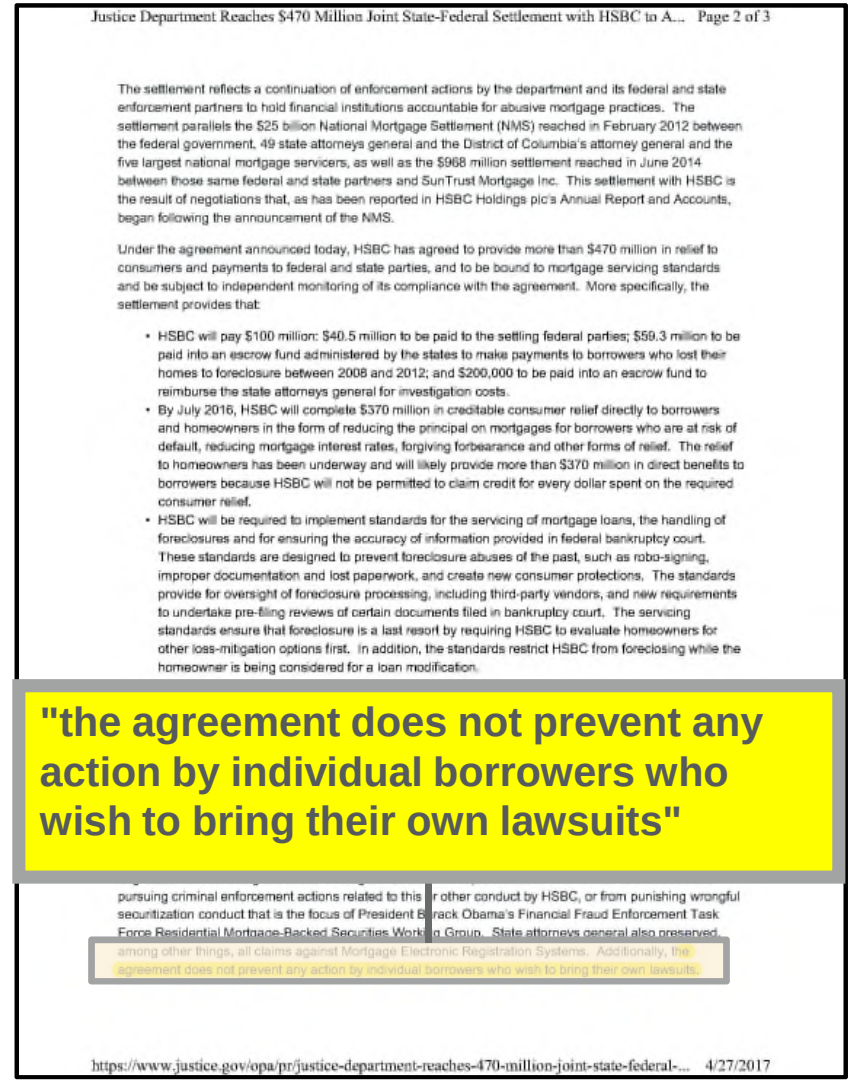
Justice Department Reaches $470 Million Joint State-Federal Settlement with HSBC to Address Mortgage Loan Origination, Servicing and Foreclosure Abuses

The Justice Department, the Department of Housing and Urban Development (HUD) and the Consumer Financial Protection Bureau, along with 49 state attorneys general and the District of Columbia's attorney general, have reached a $470 million agreement with HSBC Bank USA NA and its affiliates (collectively, HSBC) to address mortgage origination, servicing and foreclosure abuses.

"This agreement is the result of a coordinated effort between federal and state partners to hold HSBC accountable for abusive mortgage practices," said Acting Associate Attorney General Stuart F. Delery. "This agreement provides for $370 million in creditable consumer relief to benefit homeowners across the country and requires HSBC to reform their servicing standards. The Department of Justice remains

https://www.justice.gov/opa/pr/justice-department-reaches-470-million-joint-state-federal-... 4/27/2017

"The Justice Department, the Department of Housing and Urban Development (HUD) and the Consumer Financial Protection Bureau, along with 49 state attorneys general and the District of Columbia's attorney general, have reached a $470 million agreement"



Justice Department Reaches $470 Million Joint State-Federal Settlement with HSBC to A... Page 2 of 3

The settlement reflects a continuation of enforcement actions by the department and its federal and state enforcement partners to hold financial institutions accountable for abusive mortgage practices. The settlement parallels the $25 billion National Mortgage Settlement (NMS) reached in February 2012 between the federal government, 49 state attorneys general and the District of Columbia's attorney general and the five largest national mortgage servicers, as well as the $968 million settlement reached in June 2014 between those same federal and state partners and SunTrust Mortgage Inc. This settlement with HSBC is the result of negotiations that, as has been reported in HSBC Holdings plc's Annual Report and Accounts, began following the announcement of the NMS.

Under the agreement announced today, HSBC has agreed to provide more than $470 million in relief to consumers and payments to federal and state parties, and to be bound to mortgage servicing standards and be subject to independent monitoring of its compliance with the agreement. More specifically, the settlement provides that:

- HSBC will pay $100 million: $40.5 million to be paid to the settling federal parties; $59.3 million to be paid into an escrow fund administered by the states to make payments to borrowers who lost their homes to foreclosure between 2008 and 2012; and $200,000 to be paid into an escrow fund to reimburse the state attorneys general for investigation costs.
- By July 2016, HSBC will complete $370 million in creditable consumer relief directly to borrowers and homeowners in the form of reducing the principal on mortgages for borrowers who are at risk of default, reducing mortgage interest rates, forgiving forbearance and other forms of relief. The relief to homeowners has been underway and will likely provide more than $370 million in direct benefits to borrowers because HSBC will not be permitted to claim credit for every dollar spent on the required consumer relief.
- HSBC will be required to implement standards for the servicing of mortgage loans, the handling of foreclosures and for ensuring the accuracy of information provided in federal bankruptcy court. These standards are designed to prevent foreclosure abuses of the past, such as robo-signing, improper documentation and lost paperwork, and create new consumer protections. The standards provide for oversight of foreclosure processing, including third-party vendors, and new requirements to undertake pre-filing reviews of certain documents filed in bankruptcy court. The servicing standards ensure that foreclosure is a last resort by requiring HSBC to evaluate homeowners for other loss-mitigation options first. In addition, the standards restrict HSBC from foreclosing while the homeowner is being considered for a loan modification.

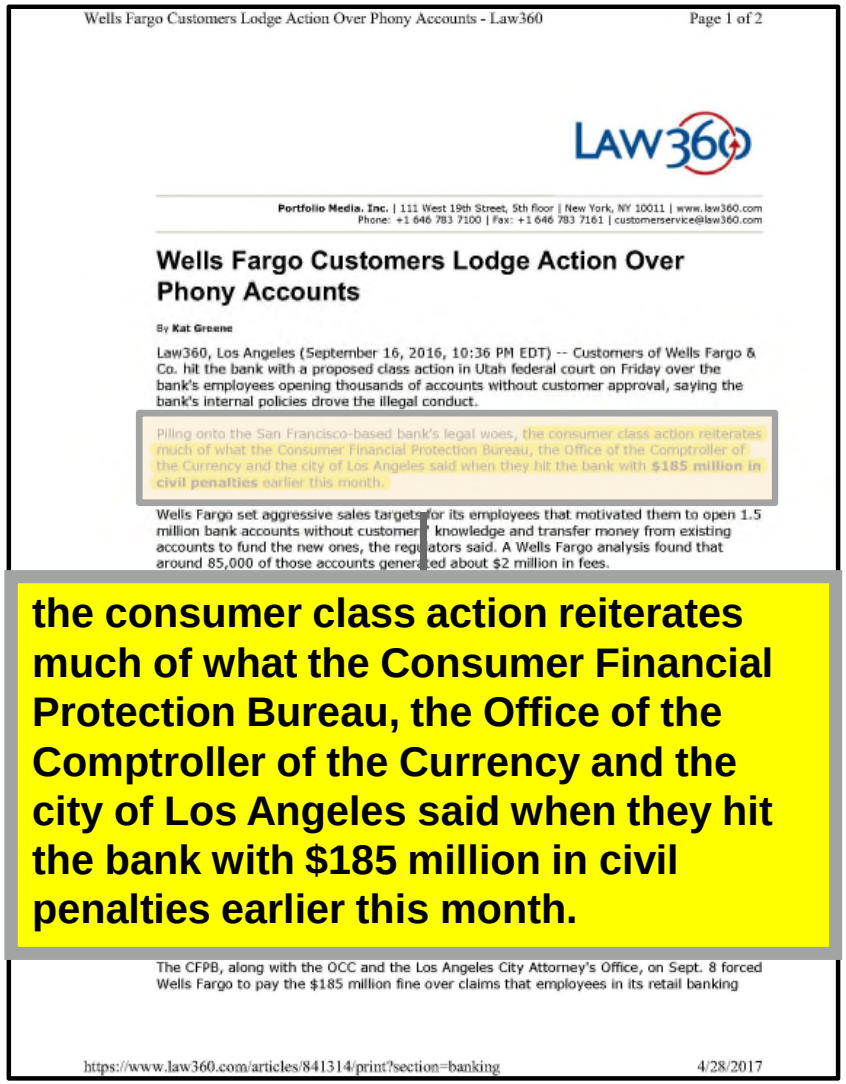
"the agreement does not prevent any action by individual borrowers who wish to bring their own lawsuits"

pursuing criminal enforcement actions related to this or other conduct by HSBC, or from punishing wrongful securitization conduct that is the focus of President Barack Obama's Financial Fraud Enforcement Task Force Residential Mortgage-Backed Securities Working Group. State attorneys general also preserved, among other things, all claims against Mortgage Electronic Registration Systems. Additionally, the agreement does not prevent any action by individual borrowers who wish to bring their own lawsuits.

https://www.justice.gov/opa/pr/justice-department-reaches-470-million-joint-state-federal-... 4/27/2017

Why the Cycle Perpetuates: Reason #2 *(cont'd)*

Publicity *(cont'd)*



Wells Fargo Customers Lodge Action Over Phony Accounts - Law360 Page 1 of 2

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Wells Fargo Customers Lodge Action Over Phony Accounts

By **Kat Greene**

Law360, Los Angeles (September 16, 2016, 10:36 PM EDT) -- Customers of Wells Fargo & Co. hit the bank with a proposed class action in Utah federal court on Friday over the bank's employees opening thousands of accounts without customer approval, saying the bank's internal policies drove the illegal conduct.

Piling onto the San Francisco-based bank's legal woes, the consumer class action reiterates much of what the Consumer Financial Protection Bureau, the Office of the Comptroller of the Currency and the city of Los Angeles said when they hit the bank with **$185 million in civil penalties** earlier this month.

Wells Fargo set aggressive sales targets for its employees that motivated them to open 1.5 million bank accounts without customers' knowledge and transfer money from existing accounts to fund the new ones, the regulators said. A Wells Fargo analysis found that around 85,000 of those accounts generated about $2 million in fees.

the consumer class action reiterates much of what the Consumer Financial Protection Bureau, the Office of the Comptroller of the Currency and the city of Los Angeles said when they hit the bank with $185 million in civil penalties earlier this month.

The CFPB, along with the OCC and the Los Angeles City Attorney's Office, on Sept. 8 forced Wells Fargo to pay the $185 million fine over claims that employees in its retail banking

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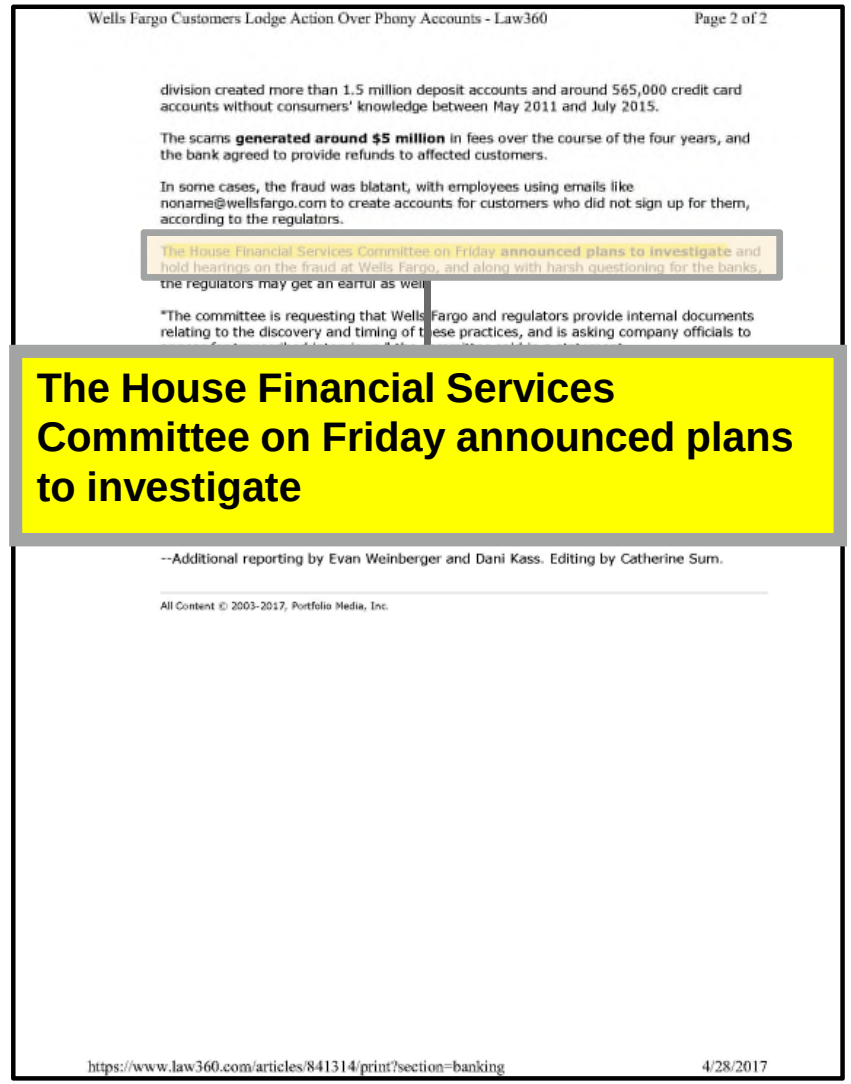


Wells Fargo Customers Lodge Action Over Phony Accounts - Law360 Page 2 of 2

division created more than 1.5 million deposit accounts and around 565,000 credit card accounts without consumers' knowledge between May 2011 and July 2015.

The scams **generated around $5 million** in fees over the course of the four years, and the bank agreed to provide refunds to affected customers.

In some cases, the fraud was blatant, with employees using emails like noname@wellsfargo.com to create accounts for customers who did not sign up for them, according to the regulators.

The House Financial Services Committee on Friday **announced plans to investigate** and hold hearings on the fraud at Wells Fargo, and along with harsh questioning for the banks, the regulators may get an earful as well.

"The committee is requesting that Wells Fargo and regulators provide internal documents relating to the discovery and timing of these practices, and is asking company officials to

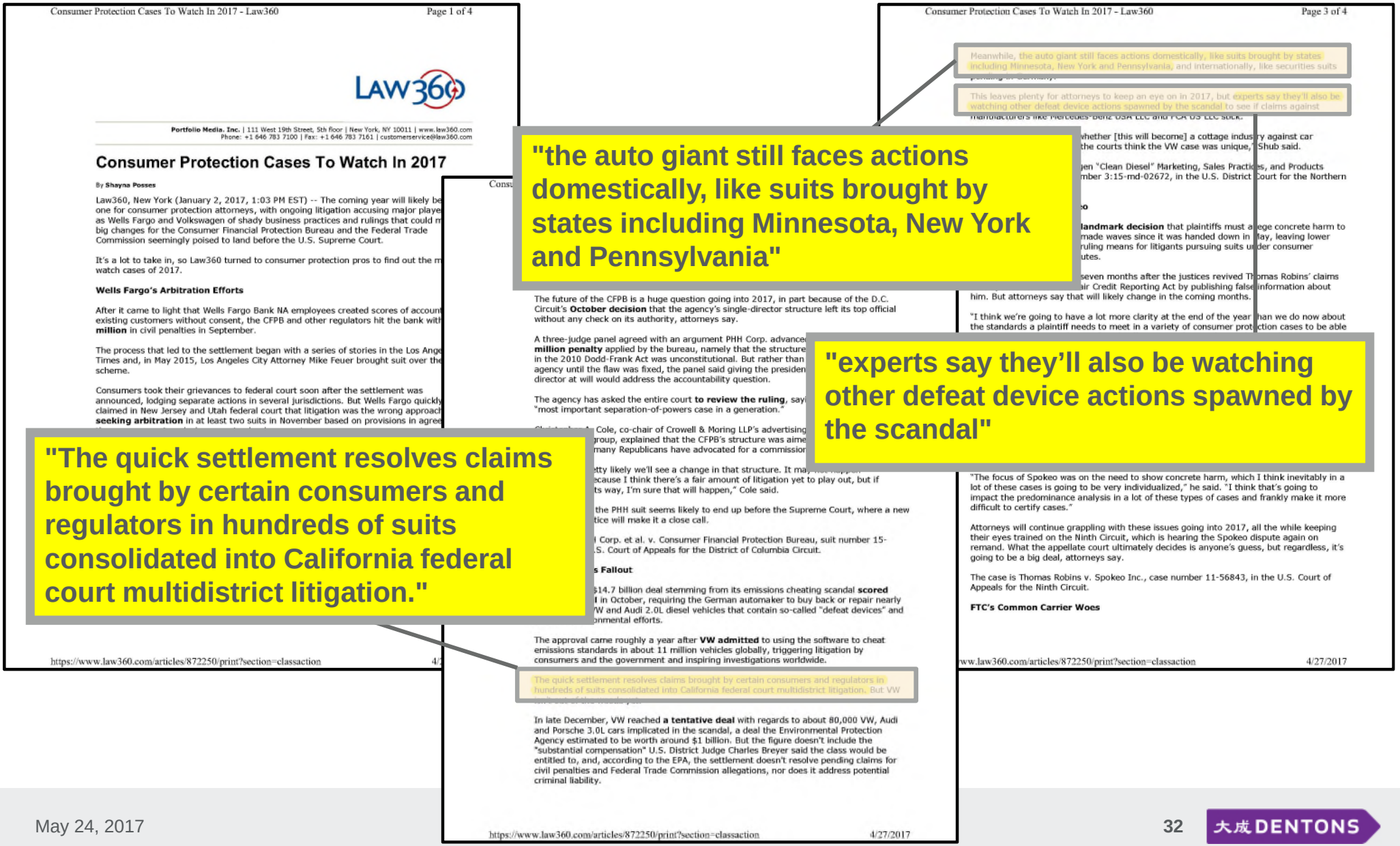
The House Financial Services Committee on Friday announced plans to investigate

--Additional reporting by Evan Weinberger and Dani Kass. Editing by Catherine Sum.

https://www.law360.com/articles/841314/print?section=banking 4/28/2017

Why the Cycle Perpetuates: Reason #2 *(cont'd)*

Publicity



Consumer Protection Cases To Watch In 2017 - Law360 Page 1 of 4

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Consumer Protection Cases To Watch In 2017

By **Shayna Posses**

Law360, New York (January 2, 2017, 1:03 PM EST) -- The coming year will likely be one for consumer protection attorneys, with ongoing litigation accusing major playe as Wells Fargo and Volkswagen of shady business practices and rulings that could m big changes for the Consumer Financial Protection Bureau and the Federal Trade Commission seemingly poised to land before the U.S. Supreme Court.

It's a lot to take in, so Law360 turned to consumer protection pros to find out the m watch cases of 2017.

Wells Fargo's Arbitration Efforts

After it came to light that Wells Fargo Bank NA employees created scores of account existing customers without consent, the CFPB and other regulators hit the bank wit **million** in civil penalties in September.

The process that led to the settlement began with a series of stories in the Los Ange Times and, in May 2015, Los Angeles City Attorney Mike Feuer brought suit over the scheme.

Consumers took their grievances to federal court soon after the settlement was announced, lodging separate actions in several jurisdictions. But Wells Fargo quickly claimed in New Jersey and Utah federal court that litigation was the wrong approach **seeking arbitration** in at least two suits in November based on provisions in agree

https://www.law360.com/articles/872250/print?section=classaction 4/

Consu

The future of the CFPB is a huge question going into 2017, in part because of the D.C. Circuit's **October decision** that the agency's single-director structure left its top official without any check on its authority, attorneys say.

A three-judge panel agreed with an argument PHH Corp. advance **million penalty** applied by the bureau, namely that the structure in the 2010 Dodd-Frank Act was unconstitutional. But rather than agency until the flaw was fixed, the panel said giving the presiden director at will would address the accountability question.

The agency has asked the entire court **to review the ruling**, say "most important separation-of-powers case in a generation."

Cole, co-chair of Crowell & Moring LLP's advertising group, explained that the CFPB's structure was aime many Republicans have advocated for a commissio

tty likely we'll see a change in that structure. It ma ecause I think there's a fair amount of litigation yet to play out, but if ts way, I'm sure that will happen," Cole said.

the PHH suit seems likely to end up before the Supreme Court, where a new tice will make it a close call.

Corp. et al. v. Consumer Financial Protection Bureau, suit number 15- .S. Court of Appeals for the District of Columbia Circuit.

s Fallout

$14.7 billion deal stemming from its emissions cheating scandal **scored** in October, requiring the German automaker to buy back or repair nearly W and Audi 2.0L diesel vehicles that contain so-called "defeat devices" and onmental efforts.

The approval came roughly a year after **VW admitted** to using the software to cheat emissions standards in about 11 million vehicles globally, triggering litigation by consumers and the government and inspiring investigations worldwide.

The quick settlement resolves claims brought by certain consumers and regulators in hundreds of suits consolidated into California federal court multidistrict litigation. But VW

In late December, VW reached **a tentative deal** with regards to about 80,000 VW, Audi and Porsche 3.0L cars implicated in the scandal, a deal the Environmental Protection Agency estimated to be worth around $1 billion. But the figure doesn't include the "substantial compensation" U.S. District Judge Charles Breyer said the class would be entitled to, and, according to the EPA, the settlement doesn't resolve pending claims for civil penalties and Federal Trade Commission allegations, nor does it address potential criminal liability.

https://www.law360.com/articles/872250/print?section=classaction 4/27/2017

Consumer Protection Cases To Watch In 2017 - Law360 Page 3 of 4

Meanwhile, the auto giant still faces actions domestically, like suits brought by states including Minnesota, New York and Pennsylvania, and internationally, like securities suits

This leaves plenty for attorneys to keep an eye on in 2017, but experts say they'll also be watching other defeat device actions spawned by the scandal to see if claims against

manufacturers like Mercedes-Benz USA LLC and FCA US LLC stick.

whether [this will become] a cottage indus ry against car the courts think the VW case was unique," Shub said.

gen "Clean Diesel" Marketing, Sales Practices, and Products mber 3:15-md-02672, in the U.S. District Court for the Northern

landmark decision that plaintiffs must a ege concrete harm to made waves since it was handed down in May, leaving lower ruling means for litigants pursuing suits under consumer utes.

seven months after the justices revived Thomas Robins' claims air Credit Reporting Act by publishing false information about him. But attorneys say that will likely change in the coming months.

"I think we're going to have a lot more clarity at the end of the year than we do now about the standards a plaintiff needs to meet in a variety of consumer protection cases to be able

"The focus of Spokeo was on the need to show concrete harm, which I think inevitably in a lot of these cases is going to be very individualized," he said. "I think that's going to impact the predominance analysis in a lot of these types of cases and frankly make it more difficult to certify cases."

Attorneys will continue grappling with these issues going into 2017, all the while keeping their eyes trained on the Ninth Circuit, which is hearing the Spokeo dispute again on remand. What the appellate court ultimately decides is anyone's guess, but regardless, it's going to be a big deal, attorneys say.

The case is Thomas Robins v. Spokeo Inc., case number 11-56843, in the U.S. Court of Appeals for the Ninth Circuit.

FTC's Common Carrier Woes

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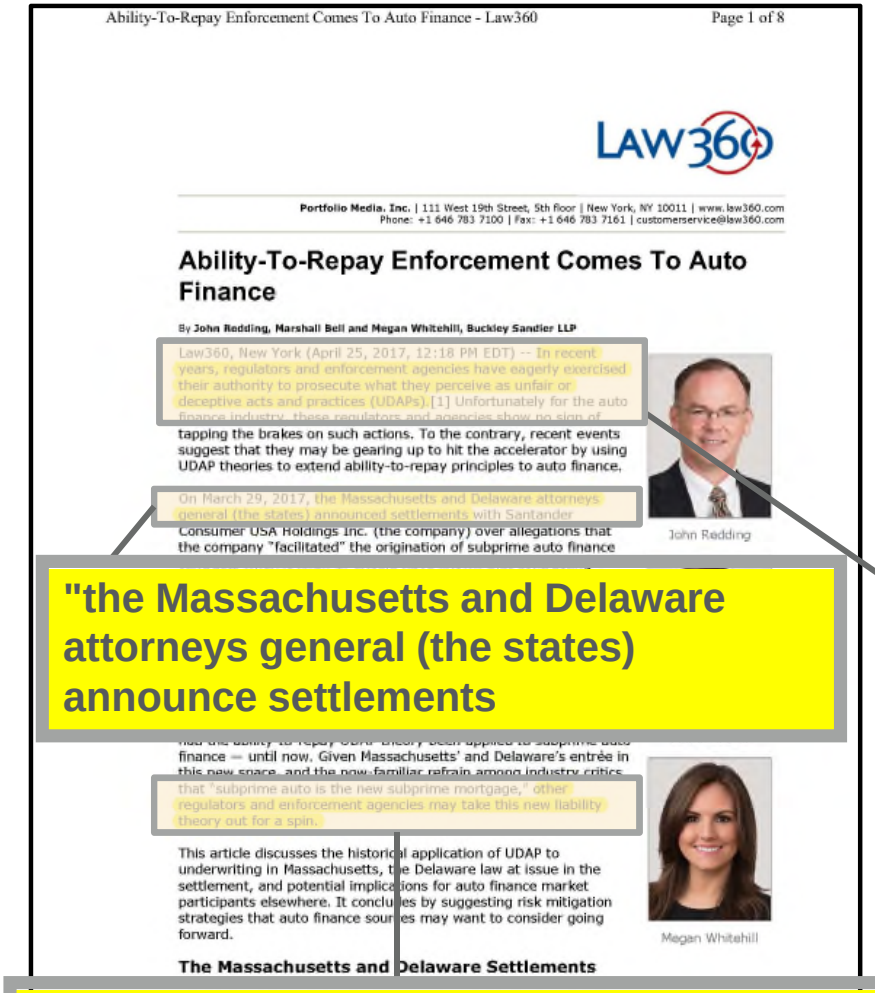
"the auto giant still faces actions domestically, like suits brought by states including Minnesota, New York and Pennsylvania"

"experts say they'll also be watching other defeat device actions spawned by the scandal"

"The quick settlement resolves claims brought by certain consumers and regulators in hundreds of suits consolidated into California federal court multidistrict litigation."

Why the Cycle Perpetuates: Reason #2 *(cont'd)*

Publicity *(cont'd)*



Ability-To-Repay Enforcement Comes To Auto Finance - Law360 Page 1 of 8

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Ability-To-Repay Enforcement Comes To Auto Finance

By John Redding, Marshall Bell and Megan Whitehill, Buckley Sandler LLP

Law360, New York (April 25, 2017, 12:18 PM EDT) -- In recent years, regulators and enforcement agencies have eagerly exercised their authority to prosecute what they perceive as unfair or deceptive acts and practices (UDAPs).[1] Unfortunately for the auto finance industry, these regulators and agencies show no sign of tapping the brakes on such actions. To the contrary, recent events suggest that they may be gearing up to hit the accelerator by using UDAP theories to extend ability-to-repay principles to auto finance.

John Redding

On March 29, 2017, the Massachusetts and Delaware attorneys general (the states) announced settlements with Santander Consumer USA Holdings Inc. (the company) over allegations that the company "facilitated" the origination of subprime auto finance

"the Massachusetts and Delaware attorneys general (the states) announce settlements

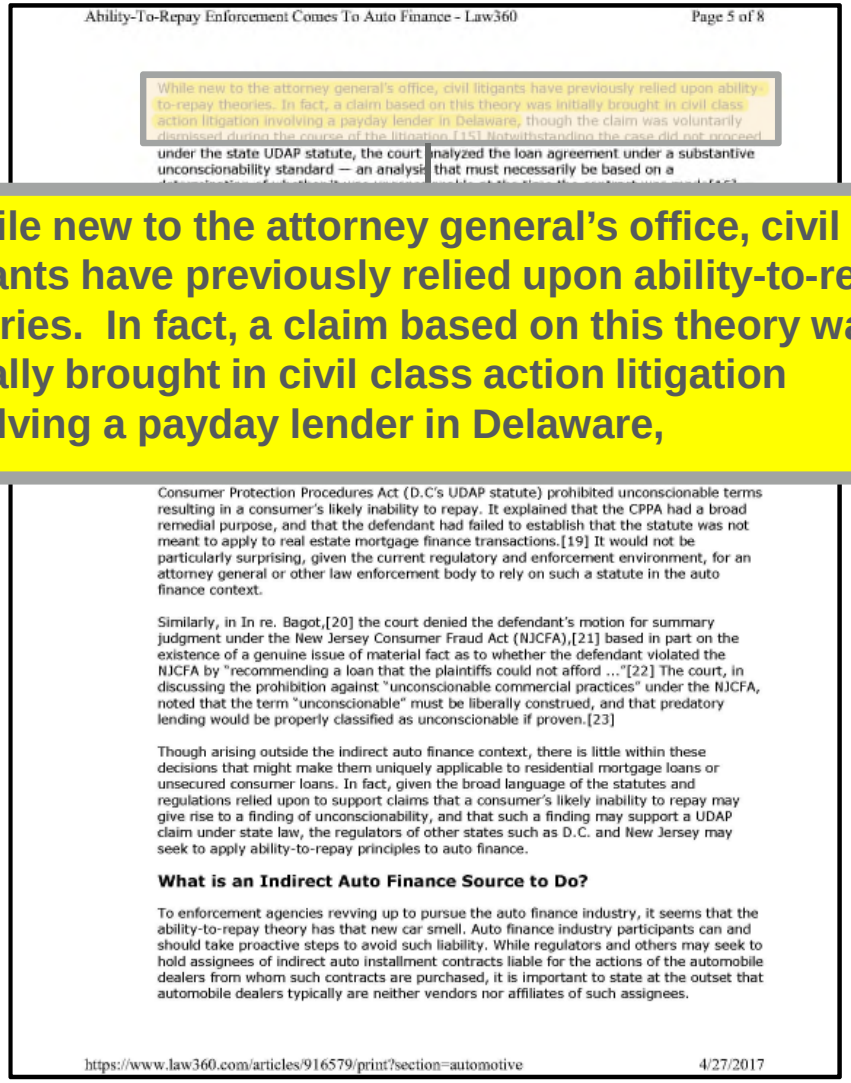
finance — until now. Given Massachusetts' and Delaware's entrée in this new space, and the now-familiar refrain among industry critics that "subprime auto is the new subprime mortgage," other regulators and enforcement agencies may take this new liability theory out for a spin.

Megan Whitehill

This article discusses the historical application of UDAP to underwriting in Massachusetts, the Delaware law at issue in the settlement, and potential implications for auto finance market participants elsewhere. It concludes by suggesting risk mitigation strategies that auto finance sources may want to consider going forward.

The Massachusetts and Delaware Settlements

"other regulators and enforcement agencies may take this new liability theory out for a spin.



Ability-To-Repay Enforcement Comes To Auto Finance - Law360 Page 5 of 8

While new to the attorney general's office, civil litigants have previously relied upon ability-to-repay theories. In fact, a claim based on this theory was initially brought in civil class action litigation involving a payday lender in Delaware, though the claim was voluntarily dismissed during the course of the litigation.[15] Notwithstanding the case did not proceed under the state UDAP statute, the court analyzed the loan agreement under a substantive unconscionability standard — an analysis that must necessarily be based on a

"While new to the attorney general's office, civil litigants have previously relied upon ability-to-repay theories. In fact, a claim based on this theory was initially brought in civil class action litigation involving a payday lender in Delaware,

Consumer Protection Procedures Act (D.C's UDAP statute) prohibited unconscionable terms resulting in a consumer's likely inability to repay. It explained that the CPPA had a broad remedial purpose, and that the defendant had failed to establish that the statute was not meant to apply to real estate mortgage finance transactions.[19] It would not be particularly surprising, given the current regulatory and enforcement environment, for an attorney general or other law enforcement body to rely on such a statute in the auto finance context.

Similarly, in In re. Bagot,[20] the court denied the defendant's motion for summary judgment under the New Jersey Consumer Fraud Act (NJCFA),[21] based in part on the existence of a genuine issue of material fact as to whether the defendant violated the NJCFA by "recommending a loan that the plaintiffs could not afford ..."[22] The court, in discussing the prohibition against "unconscionable commercial practices" under the NJCFA, noted that the term "unconscionable" must be liberally construed, and that predatory lending would be properly classified as unconscionable if proven.[23]

Though arising outside the indirect auto finance context, there is little within these decisions that might make them uniquely applicable to residential mortgage loans or unsecured consumer loans. In fact, given the broad language of the statutes and regulations relied upon to support claims that a consumer's likely inability to repay may give rise to a finding of unconscionability, and that such a finding may support a UDAP claim under state law, the regulators of other states such as D.C. and New Jersey may seek to apply ability-to-repay principles to auto finance.

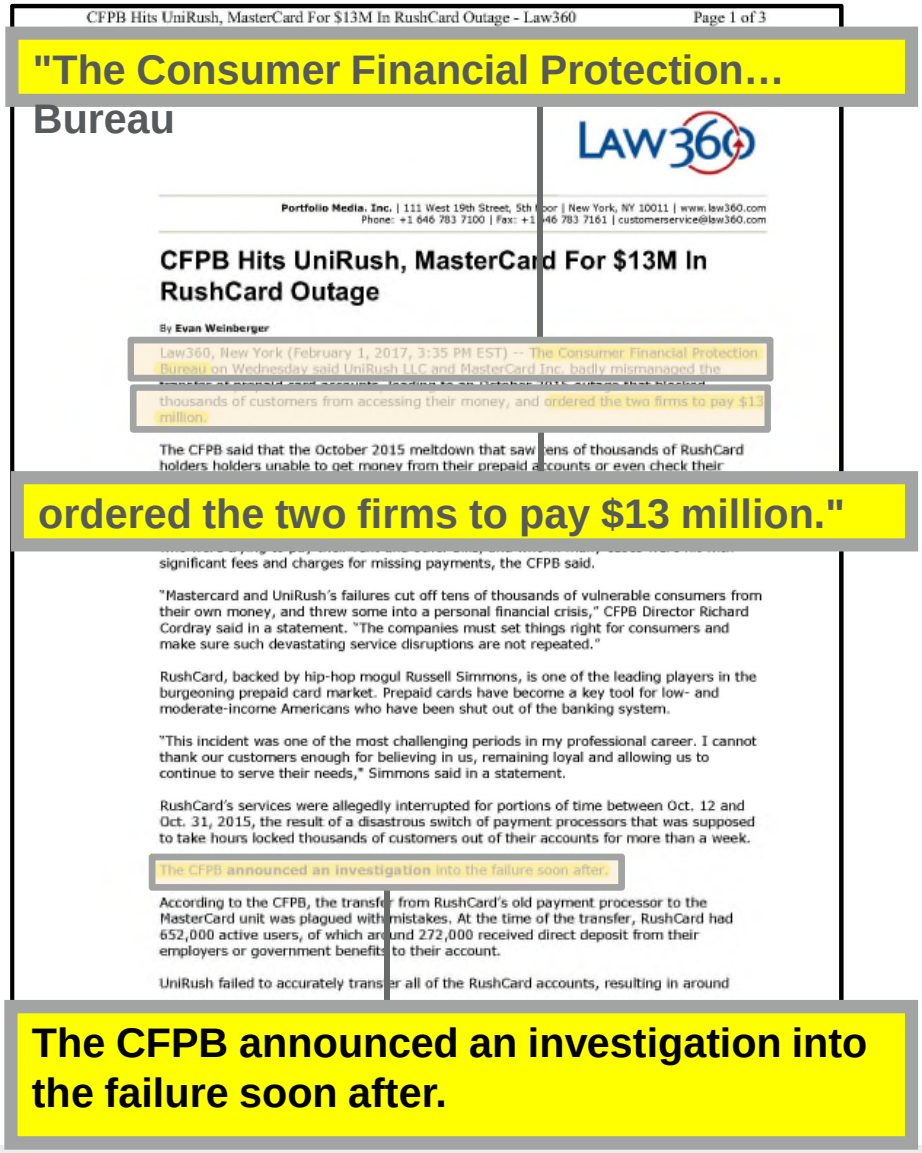
What is an Indirect Auto Finance Source to Do?

To enforcement agencies revving up to pursue the auto finance industry, it seems that the ability-to-repay theory has that new car smell. Auto finance industry participants can and should take proactive steps to avoid such liability. While regulators and others may seek to hold assignees of indirect auto installment contracts liable for the actions of the automobile dealers from whom such contracts are purchased, it is important to state at the outset that automobile dealers typically are neither vendors nor affiliates of such assignees.

https://www.law360.com/articles/916579/print?section=automotive 4/27/2017

Why the Cycle Perpetuates: Reason #2 *(cont'd)*

Publicity *(cont'd)*



CFPB Hits UniRush, MasterCard For $13M In RushCard Outage - Law360 Page 1 of 3

"The Consumer Financial Protection…

Bureau

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CFPB Hits UniRush, MasterCard For $13M In RushCard Outage

By Evan Weinberger

Law360, New York (February 1, 2017, 3:35 PM EST) -- The Consumer Financial Protection Bureau on Wednesday said UniRush LLC and MasterCard Inc. badly mismanaged the transfer of prepaid card accounts, leading to an October 2015 outage that blocked thousands of customers from accessing their money, and ordered the two firms to pay $13 million.

The CFPB said that the October 2015 meltdown that saw tens of thousands of RushCard holders holders unable to get money from their prepaid accounts or even check their

ordered the two firms to pay $13 million."

significant fees and charges for missing payments, the CFPB said.

"Mastercard and UniRush's failures cut off tens of thousands of vulnerable consumers from their own money, and threw some into a personal financial crisis," CFPB Director Richard Cordray said in a statement. "The companies must set things right for consumers and make sure such devastating service disruptions are not repeated."

RushCard, backed by hip-hop mogul Russell Simmons, is one of the leading players in the burgeoning prepaid card market. Prepaid cards have become a key tool for low- and moderate-income Americans who have been shut out of the banking system.

"This incident was one of the most challenging periods in my professional career. I cannot thank our customers enough for believing in us, remaining loyal and allowing us to continue to serve their needs," Simmons said in a statement.

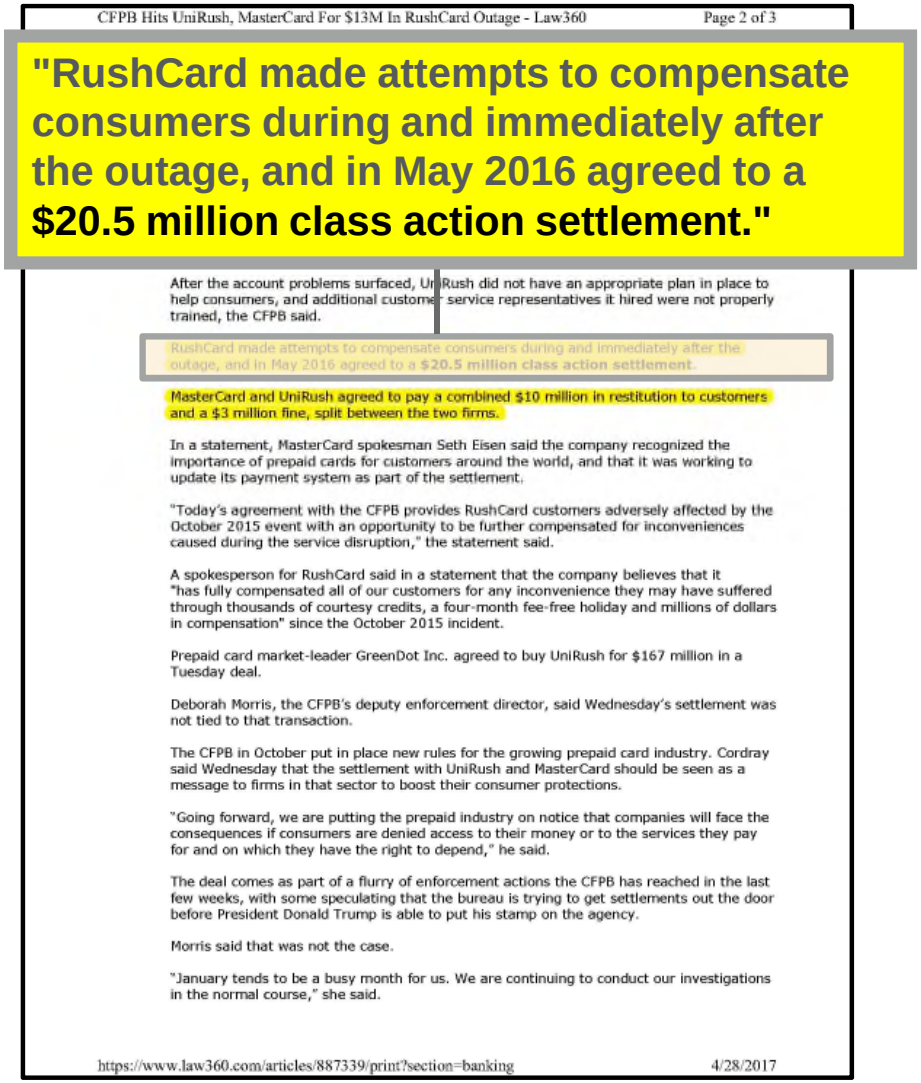
RushCard's services were allegedly interrupted for portions of time between Oct. 12 and Oct. 31, 2015, the result of a disastrous switch of payment processors that was supposed to take hours locked thousands of customers out of their accounts for more than a week.

The CFPB announced an investigation into the failure soon after.

According to the CFPB, the transfer from RushCard's old payment processor to the MasterCard unit was plagued with mistakes. At the time of the transfer, RushCard had 652,000 active users, of which around 272,000 received direct deposit from their employers or government benefits to their account.

UniRush failed to accurately transfer all of the RushCard accounts, resulting in around

The CFPB announced an investigation into the failure soon after.



CFPB Hits UniRush, MasterCard For $13M In RushCard Outage - Law360 Page 2 of 3

"RushCard made attempts to compensate consumers during and immediately after the outage, and in May 2016 agreed to a $20.5 million class action settlement."

After the account problems surfaced, UniRush did not have an appropriate plan in place to help consumers, and additional customer service representatives it hired were not properly trained, the CFPB said.

RushCard made attempts to compensate consumers during and immediately after the outage, and in May 2016 agreed to a $20.5 million class action settlement.

MasterCard and UniRush agreed to pay a combined $10 million in restitution to customers and a $3 million fine, split between the two firms.

In a statement, MasterCard spokesman Seth Eisen said the company recognized the importance of prepaid cards for customers around the world, and that it was working to update its payment system as part of the settlement.

"Today's agreement with the CFPB provides RushCard customers adversely affected by the October 2015 event with an opportunity to be further compensated for inconveniences caused during the service disruption," the statement said.

A spokesperson for RushCard said in a statement that the company believes that it "has fully compensated all of our customers for any inconvenience they may have suffered through thousands of courtesy credits, a four-month fee-free holiday and millions of dollars in compensation" since the October 2015 incident.

Prepaid card market-leader GreenDot Inc. agreed to buy UniRush for $167 million in a Tuesday deal.

Deborah Morris, the CFPB's deputy enforcement director, said Wednesday's settlement was not tied to that transaction.

The CFPB in October put in place new rules for the growing prepaid card industry. Cordray said Wednesday that the settlement with UniRush and MasterCard should be seen as a message to firms in that sector to boost their consumer protections.

"Going forward, we are putting the prepaid industry on notice that companies will face the consequences if consumers are denied access to their money or to the services they pay for and on which they have the right to depend," he said.

The deal comes as part of a flurry of enforcement actions the CFPB has reached in the last few weeks, with some speculating that the bureau is trying to get settlements out the door before President Donald Trump is able to put his stamp on the agency.

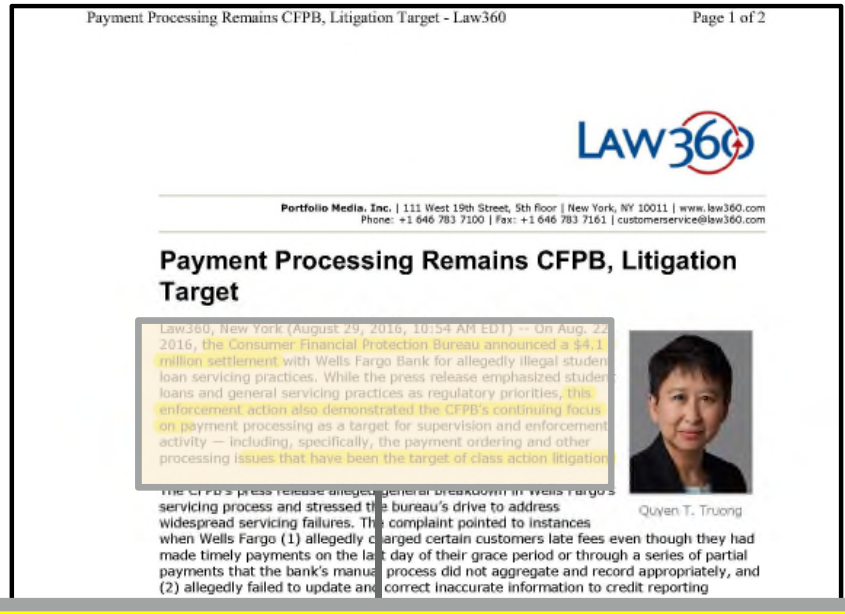
Morris said that was not the case.

"January tends to be a busy month for us. We are continuing to conduct our investigations in the normal course," she said.

https://www.law360.com/articles/887339/print?section=banking 4/28/2017

Why the Cycle Perpetuates: Reason #2 *(cont'd)*

Publicity *(cont'd)*



Payment Processing Remains CFPB, Litigation Target - Law360 Page 1 of 2

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Payment Processing Remains CFPB, Litigation Target

Law360, New York (August 29, 2016, 10:54 AM EDT) -- On Aug. 22, 2016, the Consumer Financial Protection Bureau announced a $4.1 million settlement with Wells Fargo Bank for allegedly illegal student loan servicing practices. While the press release emphasized student loans and general servicing practices as regulatory priorities, this enforcement action also demonstrated the CFPB's continuing focus on payment processing as a target for supervision and enforcement activity — including, specifically, the payment ordering and other processing issues that have been the target of class action litigation.

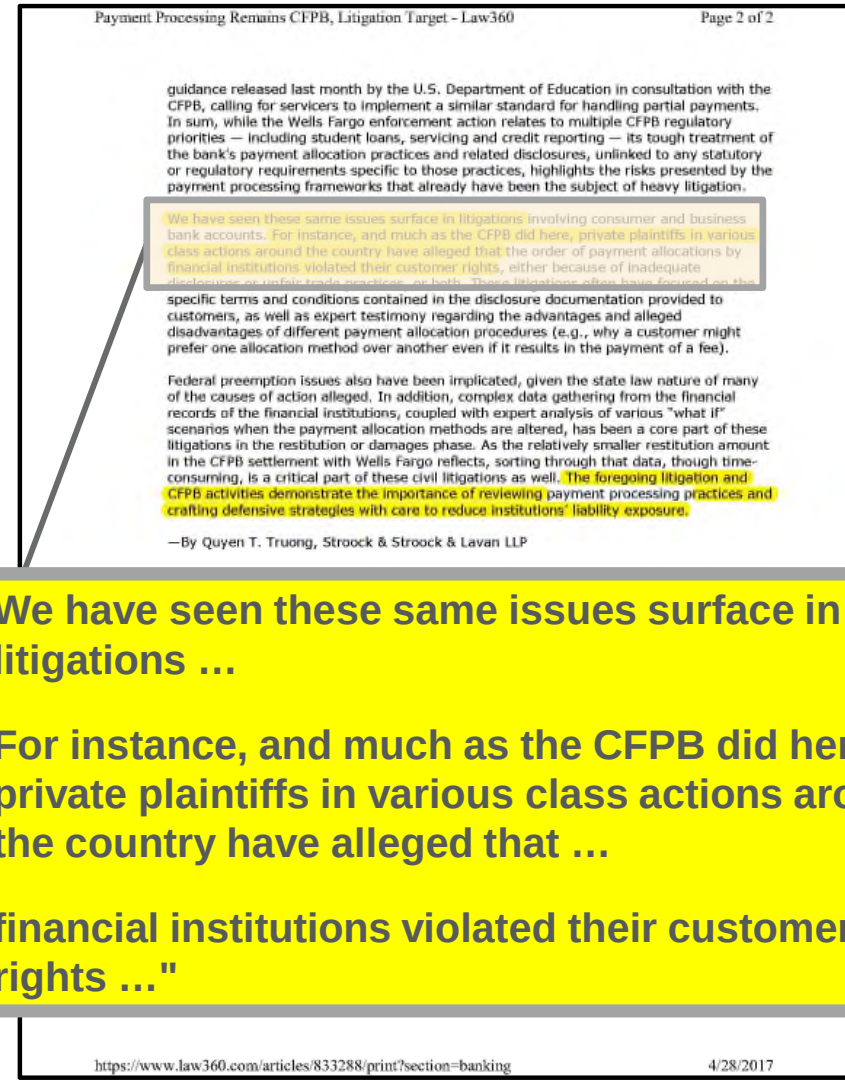
Quyen T. Truong

The CFPB's press release alleged general breakdown in Wells Fargo's servicing process and stressed the bureau's drive to address widespread servicing failures. The complaint pointed to instances when Wells Fargo (1) allegedly charged certain customers late fees even though they had made timely payments on the last day of their grace period or through a series of partial payments that the bank's manual process did not aggregate and record appropriately, and (2) allegedly failed to update and correct inaccurate information to credit reporting

"the Consumer Financial Protection Bureau announced a $4.1 million settlement …

this enforcement action also demonstrated the CFPB's continuing focus on …

issues that have been the target of class action litigation.



Payment Processing Remains CFPB, Litigation Target - Law360 Page 2 of 2

guidance released last month by the U.S. Department of Education in consultation with the CFPB, calling for servicers to implement a similar standard for handling partial payments. In sum, while the Wells Fargo enforcement action relates to multiple CFPB regulatory priorities — including student loans, servicing and credit reporting — its tough treatment of the bank's payment allocation practices and related disclosures, unlinked to any statutory or regulatory requirements specific to those practices, highlights the risks presented by the payment processing frameworks that already have been the subject of heavy litigation.

We have seen these same issues surface in litigations involving consumer and business bank accounts. For instance, and much as the CFPB did here, private plaintiffs in various class actions around the country have alleged that the order of payment allocations by financial institutions violated their customer rights, either because of inadequate disclosures or unfair trade practices, or both. These litigations often have focused on the specific terms and conditions contained in the disclosure documentation provided to customers, as well as expert testimony regarding the advantages and alleged disadvantages of different payment allocation procedures (e.g., why a customer might prefer one allocation method over another even if it results in the payment of a fee).

Federal preemption issues also have been implicated, given the state law nature of many of the causes of action alleged. In addition, complex data gathering from the financial records of the financial institutions, coupled with expert analysis of various "what if" scenarios when the payment allocation methods are altered, has been a core part of these litigations in the restitution or damages phase. As the relatively smaller restitution amount in the CFPB settlement with Wells Fargo reflects, sorting through that data, though time-consuming, is a critical part of these civil litigations as well. The foregoing litigation and CFPB activities demonstrate the importance of reviewing payment processing practices and crafting defensive strategies with care to reduce institutions' liability exposure.

—By Quyen T. Truong, Stroock & Stroock & Lavan LLP

https://www.law360.com/articles/833288/print?section=banking 4/28/2017

We have seen these same issues surface in litigations …

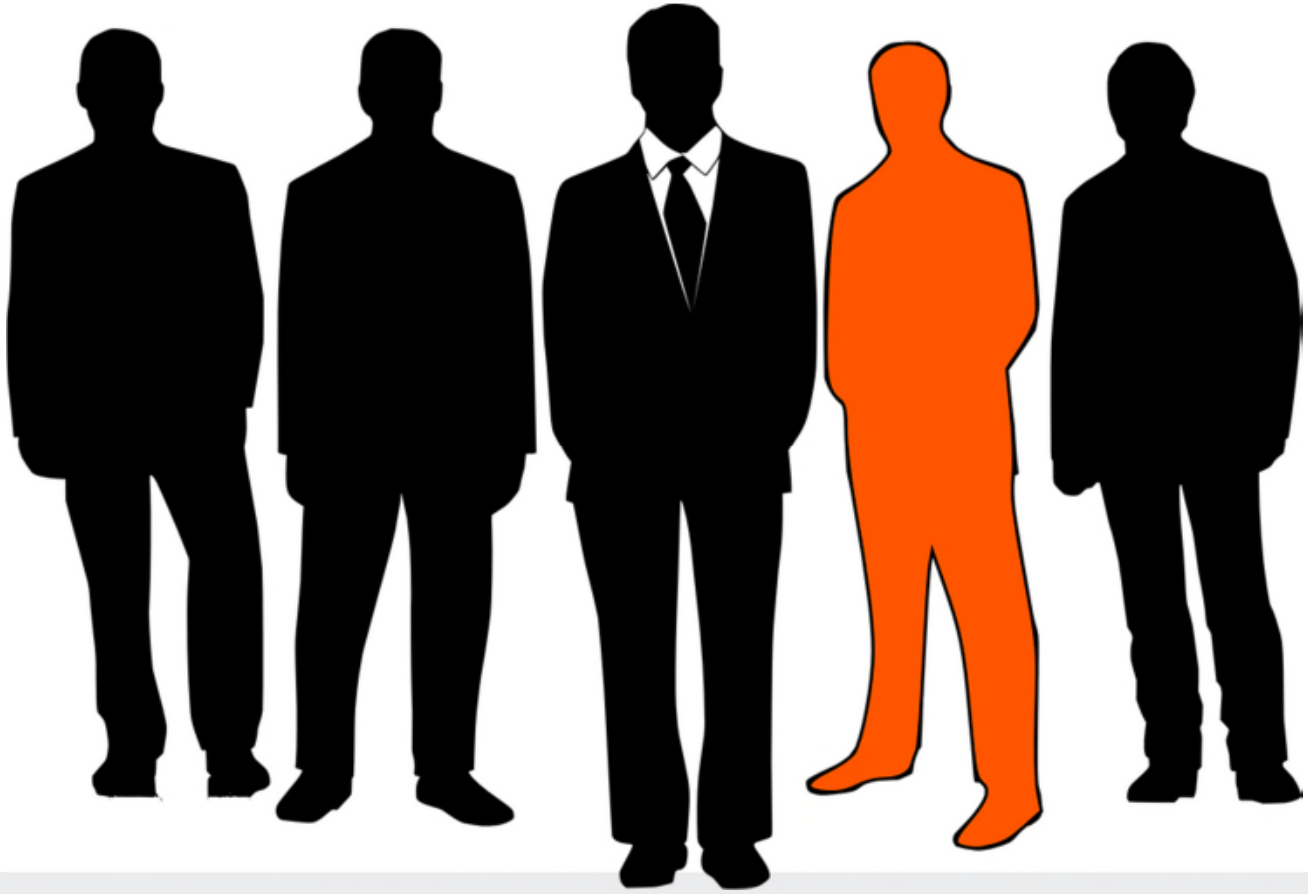
For instance, and much as the CFPB did here, private plaintiffs in various class actions around the country have alleged that …

financial institutions violated their customer rights …"

Why the Cycle Perpetuates: Reason #3

Internal Institutional Disconnects

- Turnover
- Loss of Institutional Knowledge
- "Local" Knowledge
- Imprecision by design



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BREAKING THE CYCLE

May 24, 2017

How To Break The Cycle

- Departmental Collaboration & Communication
  - Legal
  - Compliance
  - Business
  - Sales

How To Break The Cycle *(cont'd)*

- Case Studies

How To Break The Cycle *(cont'd)*

- Empowerment/Team Building
  - Common Enemies

How To Break The Cycle *(cont'd)*

Remember:

- You Are Creating Your Own Record
- Words Matter
- Be Strategic

How To Break The Cycle *(cont'd)*

- Learning from Mistakes: Issue-Specific Reviews & "Extrapolation Projects"
  - Rates
  - Forms
  - Contracts

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Questions?

Speaker Biography

Michael Duvall is a partner in Dentons' Litigation and Dispute Resolution practice, focusing on class actions, business and commercial litigation, appeals and administrative enforcement actions. He has successfully tried cases including a consumer class action, argued appeals in federal and state courts throughout the country and briefed cases to the United States Supreme Court. Michael regularly represents public and private companies in the insurance, financial services, real estate, pharmaceutical and telecommunications industries against claims of consumer fraud and unfair competition; in employment, trade secret and employee classification disputes; in shareholder and corporate governance disputes; and in cases alleging violations of federal and state consumer protection laws.

Thank You

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Office

Associate firms, offices, and special alliances

Locations in gray represent approved combinations that are not yet formalized.