VENABLE® LLP

Credit Counseling: Telemarketing Sales Rule, Credit Repair Organizations Act, and Litigation Risk Developments

Association of Credit Counseling Professionals
Spring 2011 Conference
May 23, 2011, 1:00 pm – 2:30 pm PT
Hilton Gaslamp, San Diego, California

Jeffrey S. Tenenbaum, Esq.
Jonathan L. Pompan, Esq.
Venable LLP, Washington, DC

VENABLE LLP

IMPORTANT INFORMATION ABOUT THIS PRESENTATION

This presentation is for general informational purposes only and does not represent and is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to specific fact situations.

This presentation does not represent any undertaking to keep recipients advised as to all or any relevant legal developments.

This presentation will be available at www.venable.com/ccds/publications starting on Tuesday, May 24, 2011

Agenda

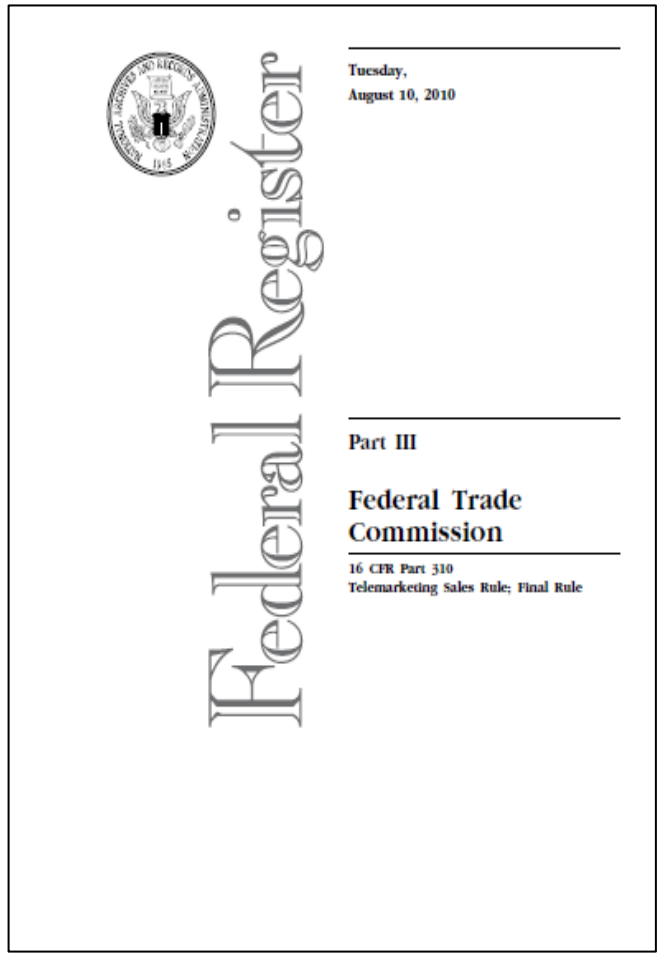
- **Introduction**
- **What does the new Telemarketing Sales Rule Mean for Credit Counseling?**
- **Consumer Financial Protection Act**
  - **Consumer Financial Protection Bureau**
- **Credit Repair Organizations Act**
    - *CompuCredit Corp. v. Greenwood*
- **Other Sources of Litigation and Enforcement**
- **State Debt Adjusting Laws**
- **How to Help Minimize Your Risk**
  - *AT&T Mobility LLC v. Concepcion*
- **Question and Answers**

Final Rule – Debt Relief Amendments to the FTC's Telemarketing Sales Rule

- 16 C.F.R. Part 310: Telemarketing Sales Rule: Amendments Addressing the Telemarketing of Debt Relief Services: Final Rule and Statement of Basis and Purpose - Released on July 29, 2010

- Four Key Features:

  1. advance fee ban for debt relief services;
  2. require debt relief companies to make specific disclosures to consumers;
  3. prohibit them from making misrepresentations; and
  4. extends the Telemarketing Sales Rule to cover calls consumers make to these firms in response to debt relief advertising.


Federal Register

Tuesday,
August 10, 2010

Part III

Federal Trade Commission

16 CFR Part 310
Telemarketing Sales Rule; Final Rule

Types of Entities Subject to the Rule

- The new rule applies to for-profit sellers of debt relief services and telemarketers for debt relief companies. The TSR defines "telemarketing" as a "plan, program, or campaign . . . to induce the purchase of goods or services" involving more than one interstate telephone call.

- In addition, under the TSR, it is illegal for a person to provide "substantial assistance" to another seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates the rule.

- Although the TSR generally exempts inbound calls placed by consumers in response to direct mail or general media advertising, there is no such exemption in the Final Rule. The Final Rule, consistent with the proposed rule, carves out inbound calls made to debt relief services from that exemption. As a result, virtually all debt relief transactions involving interstate telephone calls are now subject to the TSR.

Definition of Debt Relief Services

- **Definition of "debt relief service"** - "*any service or program represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector*."

- **Services -** The FTC's makes clear that the use of the term "service" is not intended to be limiting in any way. As a result, the Commission states that "regardless of its form, anything sold to consumers that consists [sic] of a specific group of procedures to renegotiate, settle, or in any way alter the terms of a consumer debt, is covered by the definition." Further, *"[t]he Commission believes that this definition appropriately covers all current and reasonably foreseeable forms of debt relief services, including debt settlement, debt negotiation, and debt management, as well as lead generators for these services*."

- **Products -** The Final Rule does not include "products" in the definition of "debt relief services," but the Commission notes that this limitation should not be "*used to circumvent the rule by calling a service – in which a provider undertakes certain actions to provide assistance to the purchaser – a 'product.' Nor can a provider evade the rule by including a 'product,' such as educational material on how to manage debt, as part of the service it offers*."

No Coverage of *Bona Fide* Nonprofits by the FTC…

> **I operate a non-profit organization. Does the new Rule apply to us?**
>
> Bona fide non-profit organizations aren't covered because the TSR applies only to for-profit companies. However, the Rule covers companies that falsely claim nonprofit status.

NOTE: **Dodd-Frank Act** amends the **Telemarketing and Consumer Fraud and Abuse Prevention Act** to provide for co-enforcement and rulemaking authority of the Telemarketing Sales Rule by the CFPB for providers of consumer financial products and services covered by the CFPA

Advance Fee Ban

- Effective October 27, 2010
- The Final Rule contains specific requirements for debt relief providers related to charging an advance fee before providing any services. It specifies that fees for debt relief services may not be collected until:
  1. the debt relief service successfully renegotiates, settles, reduces, or otherwise changes the terms of **at least one of the consumer's debts**;
  2. there is a **written** settlement agreement, **debt management plan**, or other agreement between the consumer and the creditor, and the consumer has agreed to it; and
  3. the **consumer has made at least one payment** to the creditor as a result of the agreement negotiated by the debt relief provider.
- **<u>What does this mean for a DMP provider?</u>**

Dedicated Accounts

- May require consumers to set aside their fees and savings payments to creditors. Providers may only require a dedicated account as long as five conditions are met:
  1. the dedicated account is maintained at an insured financial institution;
  2. the consumer owns the funds (including any interest accrued);
  3. the consumer can withdraw the funds at any time without penalty;
  4. the provider does not own or control or have any affiliation with the company administering the account; and
  5. the provider does not exchange any referral fees with the company administering the account.

How does the advance fee prohibition apply to a DMP?

"CCAs renegotiate all of the consumer's eligible debts at one time, and creditors generally grant concessions immediately upon enrolling consumers in the DMP. Thus, CCAs do not renegotiate debts individually, and Final Rule § 310.4(a)(5)(i)(C) does not apply to them. CCAs commonly charge consumers not only an initial setup fee, but also periodic (usually monthly) fees throughout the consumer's enrollment in the DMP. Laws in most states cap these fees. Final Rule § 310.4(a)(5) prohibits CCAs from charging a set-up or other fee before the consumer has enrolled in a DMP and made the first payment, but it would not prevent the CCA from collecting subsequent periodic fees for servicing the account."

- (Internal citation omitted.) TSR Amended Rule 2010, 75 Fed. Reg. 48489 n.431 (Aug. 10, 2010). Footnote 431 to the SBP of the TSR is in connection with the statement, "For a DMP, the CCA must provide a debt management plan containing the altered terms and executed by the customer that is binding on all applicable creditors. The CCA also must have evidence that the consumer has made the first payment to the CCA for distribution to creditors."

Important: Disclosures and Prohibited Misrepresentations

- Effective September 27, 2010.
- **Disclosures** - Under the Final Rule, providers will have to make several disclosures when telemarketing their services to consumers. Before the consumer signs up for any debt relief service, providers must disclose fundamental aspects of their services, including
  - how long it will take for consumers to see results,
  - how much it will cost,
  - the negative consequences that could result from using debt relief services,
  - and key information about dedicated accounts if they choose to require them.
- **Prohibition on Misrepresentations** - The Final Rule prohibits misrepresentations about any debt relief service, including success rates and whether the provider is a nonprofit entity.
  - The FTC's Statement of Basis and Purpose, which accompanies the Final Rule, provides extensive guidance about the evidence providers must have to make advertising claims commonly used in selling debt relief services.

Enforcement

- Federal Trade Commission
- State Attorneys General
- Consumer Financial Protection Bureau (covered products and services under CFPA)
- Private Persons (threshold of *$50,000 in actual damages)*
- Civil Penalties ($16,000 per violation)
- Injunction
- Damages

VENABLE LLP

Dodd-Frank Wall Street Reform and Consumer Protection Act
and the
Bureau of Consumer Financial Protection

Less than 60 days away….

Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203, July 21, 2010)

- President signed Dodd-Frank Act into law on July 21, 2010
- Over 2,000 pages long
- Enacted in wake of the worst financial crisis since the Great Depression.
- Addresses a variety of issues that arose as a result of the crisis, including the perception that consumer protection was fragmented and, in some cases inconsistent with other regulatory functions.
- Expected to generate more than 300 regulations

Consumer Financial Protection Act of 2010

- Title X of the Dodd-Frank Act, entitled the "**Consumer Financial Protection Act of 2010**" consolidates many federal consumer protection responsibilities into a new Bureau of Consumer Financial Protection (not Agency) ("CFPB" or the "Bureau").
- Strips rulemaking authority for a host of federal consumer statutes from other agencies and authorizes CFPB to prescribe uniform rules
- Strips federally-chartered institutions of a significant degree of charter preemption authority
- Consolidates and Duplicates various supervisory and program authority areas related to debt relief services

CFPB Staff will include Familiar Names

"Most members of the fledgling agency's current staff have come from other agencies. They include …**Timothy R. Burniston**, a senior associate director for the Federal Reserve's consumer affairs division; **Peggy L. Twohig**, director of the office of consumer protection at Treasury; and **Alice Hrdy** and **Lucy Morris** from the **Federal Trade Commission's consumer protection division**."

Source: Edward Wyatt, "Adviser to Consumer Agency Had Role in Lending," NY Times (Oct. 27, 2010).

Functional Units Required to be Established

- Research
- Community Affairs
- Complaint Function
- Office of Fair Lending and ECOA
- Office of Financial Education
- Office of Service Members Affairs
- Office of Financial Protection for Older Americans
- Note: **some offices are required to be established within one year of "Transfer Date" – July 21, 2011**
- Consumer Advisory Board

CFPB Coverage

- Broad authority to examine and supervise a "Covered Person" engaged in a "Financial Activity" in connection with a consumer financial product or service

- Covered persons include the following:
  - **Banks, thrifts, and credit unions**;
  - Currency exchanges;
  - **Mortgage loan originators, servicers and brokers;**
  - Real estate settlement companies, appraisers, appraisal companies, and appraisal management companies;
  - Consumer credit reporting agencies, in some cases;
  - Debt collectors;
  - Check cashing, collection, or guaranty services;
  - Lenders and brokers in certain lease-to-own arrangements;
  - Financial and investment advisors;
  - **Credit counseling agencies, debt management plan providers, debt settlement service providers, mortgage foreclosure consultants, housing counseling agencies**;
  - and more…

- A covered person includes "Related Persons"—
  - Officers and directors
  - Management employees
  - Joint venture partners
  - Independent contractors--who knowingly or recklessly participate in violations or breaches of duty, and includes—
    - Attorneys
    - Appraisers
    - Accountants
    - Vendors

Exemptions from Coverage

- Partial or full exemptions are provided for the following entities—
  - Banks and thrifts below $10 Billion
  - Investment advisor
  - CFTC-regulated party
  - SEC-regulated party
  - Farm credit-regulated party
  - Real estate broker
  - Insurance company
  - Income tax preparers
  - Merchants or retailers
  - Mobile home sales
  - Auto finance
  - Employee benefit plans

- Limited exemption for attorneys engaged in the practice of law – subject to certain preconditions – which may make it difficult for attorneys engaged in credit counseling, debt management, debt settlement, and loan modification activities to assert an exemption from regulations enacted by the Bureau under the CFPA.
- Narrow carve-out for activities relating to the solicitation or making of voluntary charitable contributions to tax-exempt organizations as recognized by the Internal Revenue Code.

Bottom Line: Coverage Includes Credit Counseling and Other Debt Relief Service Providers

- The definition of "**covered persons**" includes a broad range of organizations and activities from banks and traditional financial institutions to "financial advisory services" such as:
  - "providing **credit counseling**",
  - "providing services to assist a consumer with **debt management or debt settlement services, modifying the terms of any extension of credit, or avoiding foreclosure**," and
  - "engaging in **deposit taking, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer**."
- There is **no exemption for *bona fide* nonprofit credit counseling agencies**.

Statutes Transferred to CFPB

- Primary authority to issue regulations and interpretations of federal consumer statutes—
  - Alternative Mortgage Transaction Act
  - Consumer Leasing Act
  - Electronic Funds Transfer Act
  - Equal Credit Opportunity Act
  - Fair Credit Billing Act
  - Fair Credit Reporting Act (with exceptions)
    - Except 615(e) and 628
  - Fair Debt Collections Practices Act
  - FDI Act (Sections 43(b) through (f)
  - **Gramm-Leach-Bliley Act, Privacy Sections 502 through 509**
    - **Except 505 as it applies to Section 501(b)**
- Federal consumer statutes, continued—
  - **Home Mortgage Disclosure Act**
  - **Home Ownership and Equity Protection Act**
  - **Real Estate Settlement Procedures Act**
  - **S.A.F.E. Mortgage Licensing Act**
  - **Truth-in-Lending Act**
  - Truth-in-Savings Act
  - **Section 626 of Omnibus Appropriations Act of 2009**
  - The Interstate Land Sales Full Disclosure Act
- Transferred Authority does ***NOT*** Include Section 5 of the FTC Act or Credit Repair Organizations Act
- ***Dodd-Frank Amended the Telemarketing and Consumer Fraud and Abuse Prevention Act*** (Section 1100c)

Supervisory Authority

- Monitoring authority
- Data gathering authority
- Access to prudential regulator examination reports
- Ability for CFPB to share its own data with other state and federal regulators
- **Examination, supervision and enforcement authority over non-exempted covered persons**
  - **Ability to require that covered persons register other than—**
    - **Insured depository institutions**
    - **Insured credit unions or**
    - **Related persons**
  - Direct examination authority for large depository institutions
  - **Direct examination authority for identified non-depository entities**
    - **Subject to rulemaking**
    - **Balance with prudential and state regulators**
  - Tax scofflaw reporting requirement
  - **Negotiation with FTC required**

General Rulemaking Authority (cont'd) – Expansive Power to Declare "Unfair, Deceptive or Abusive"

- Provides the CFPB with authority to declare an act or practice by a provider of a consumer financial product or service to be an ***unfair, deceptive or abusive act or practice***
- Likely law developed interpreting Section 5 of the FTC Act will determine scope of terms "unfair and deceptive"
- Concept of "abusive" a relatively new addition
  - Used by the FTC in its recent amendment to the Telemarketing Sales Rule to prohibit charging and collecting fees in advance of providing debt relief services (effective October 27, 2010)
- ***Sec. 1100C. Amendments to the Telemarketing and Consumer Fraud and Abuse Prevention Act, e.g., the Telemarketing Sales Rule***

Enforcement and Penalties

- CFPB may investigate, issue subpoenas and civil investigative demands, and compel testimony
- CFPB may conduct hearings and adjudications to enforce compliance, including issuing cease-and-desist orders
- CFPB may initiate actions for civil penalties or an injunction
  - Penalties up to $1M per day for knowing violations
  - No exemplary or punitive damages
- Criminal referrals to DOJ
- Whistleblower protection
- State attorneys general may also enforce the CFPA with notice to the CFPB
- May enforce rules issued by the FTC to the extent such rules apply to a covered a person or service provider
  - Note: The FTC does not have enforcement jurisdiction under the FTC Act over *bona fide* nonprofit organizations (*e.g.,* tax-exempt, nonprofit credit counseling agencies).
- No express private right of action under the CFPA

General Rulemaking Authority

- **Ability to Issue rules and regulations of consumer laws**
- Primary authority—dual agency role eliminated
- CFPB granted what appears to be *Chevron* deference when interpreting transferred consumer protection laws

- Ability to prescribe rules to ensure that a consumer financial product is fully and completely described to a consumer
  - An additional layer of authority beyond specific federal consumer statutes
  - Model disclosures authorized
  - Safe harbor provided if model disclosures used
- Consider: What does this mean for credit counseling agencies?

How can a credit counseling agency or other debt relief service provider violate the law?

- CFPA prohibits **any covered person**, including a credit counseling agency, debt settlement service, loan modification or foreclosure assistance service, or a related service provider
  - (a) to offer or provide to a consumer any financial product or service **not in conformity with federal consumer financial law, or otherwise commit any act or omission in violation of a federal consumer financial law**; or
  - (b) to engage in any **unfair, deceptive, or abusive** act or practice.
- Also, any person to knowingly or recklessly **provide substantial assistance** to a covered person or service provider in violation of rules addressing unfair, deceptive, or abusive act or practice, or any rule or order issued thereunder, shall be deemed to be in violation of that section to the same extent as the person to whom such assistance is provided.

CFPB Unfair, Deceptive or Abusive Rulemaking Authority—A Backdoor Preemption

- Provides the CFPB with authority to declare an act or practice by a provider of a consumer financial product or service to be an **unfair, deceptive or abusive act or practice**
- As a federal statute, this authority may be used to negate activity otherwise authorized by a state debt adjusting law.

Specific Mandates/Limitations

- A rulemaking to limit mandatory arbitration
- CFPB prohibited from imposing usury limits
- Combine TILA and RESPA disclosures within one year (proposal released in May 2011)
- Issue regulations to enable a consumer to obtain information from a covered person

VENABLE LLP

Credit Repair Organizations Act

Credit Repair Organizations Act

The **Credit Repair Organizations Act** became effective on April 1, 1997, and is directed to the credit repair industry.

The term "**credit repair organization**"—

(A)means any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of—

(i) improving any consumer's credit record, credit history, or credit rating; or

(ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i).

(B) does not include –

(i) any nonprofit organization which is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

CROA: Disclosures

CROA requires full disclosure regarding consumer rights before any contract for credit repair services is executed. A written statement must be provided and signed by all prospective customers, and must be retained by the credit repair organization for at least two years after the statement is signed.

Consumers must be advised:

- They may dispute inaccurate information in their credit report by contacting the credit bureau directly.
- There is no right to have accurate, current, and verifiable information removed from a credit report unless it is over seven years old. Bankruptcy information can be reported for ten years.
- They have a right to sue a credit repair organization that violates the CROA.
- They have the right to cancel a contract with any credit repair organization for any reason within three business days from the date it was signed.

CROA: Written Contract

A written contract is also required and must:

1. specify the terms and conditions of payment, including the total amount of all payments to the credit repair organization or any other person

2. contain a full and detailed description of the services to be performed by the credit repair organization for the consumer, including:
   (A) all guarantees of performance; and
   (B) an estimate of the time required for the performance of the services

3. contain the credit repair organization's name and principal business address

4. contain a conspicuous statement in **bold** face type, in immediate proximity to the space reserved for the consumer's signature on the contract, which reads as follows:

"**You may cancel this contract without penalty or obligation at any time before midnight of the 3rd business day after the date on which you signed the contract.”**

CROA: Prohibitions

The statutory scheme provides further protection for consumers with a list of prohibitions. CROA prohibits any person, credit repair organizations, as well as their employees and agents, from:

- misrepresenting the organization's services
- making or enticing consumers to make untrue or misleading statements either to the credit reporting agencies or to the consumer's creditors
- advising consumers to attempt to change their credit identities
- accepting payment or other valuable consideration for their services in advance of fully performing those services

CROA: Penalties

- CROA includes civil penalties for violations and procedures for administrative enforcement by both the FTC and the states.

- CROA includes a private right of action.

CROA: Waiver of Rights

A consumer cannot waive his rights under CROA.

- Any waiver of any protection afforded by CROA is treated as void, and contracts that are not in compliance with the Act's provisions may not be enforced by any federal or state court.

CompuCredit Corp. v. Greenwood

- The Supreme Court has granted certiorari in *CompuCredit Corp. v. Greenwood* (No. 10-948), which presents the question: "Whether claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.,* are subject to arbitration pursuant to a valid arbitration agreement."

- Of particular significance, a required disclosure provision prescribes that the written statement to consumers' state:

"You have a right to sue a credit repair organization that violates the Credit Repair Organizations Act."

- The "right to sue" described in Section 1679c(a) is found in CROA's civil liability provision, which states: "Any person who fails to comply with any provision of [the CROA] with respect to any other person shall be liable to such person" in an amount determined under a framework set forth in the statute
- Resolves split between Ninth Circuit's (AK, CA, HI, ID, MT, NV, OR) conclusion in CompuCredit with decisions of the Third (DE ,NJ, PA) and Eleventh Circuits (AL, FL, GA)

CROA has been applied to…

- **Law Firm** - *Iosello v. Lexington Law Firm, 2003 U.S. Dist. LEXIS 14591 at *17-19 (N.D. Ill. Aug. 7, 2003)*
- **Car Dealership** - *Wojcik v. Courtesy Auto Sales, 2002 U.S. Dist. LEXIS 22731 at *21-26 (D. Neb. Nov. 25, 2002)*
- **Financial services company** that "regularly advertised in local news media that it ... can 'restore your credit'"; *Parker v. 1-800 Bar None, A Financial Corp., 2002 U.S. Dist. LEXIS 2139 at *8-14 (N.D. Ill. Feb. 12, 2002)*
- **Service to improve the consumer's credit record** - *Bigalke v. Creditrust Corp., 162 F. Supp. 2d 996, 997-98 (N.D. Ill. 2001)*
- **Debt Collector** - *White v. Financial Credit Corp., 2001 U.S. Dist. LEXIS 21486 at *14-18 (N.D. Ill. Dec. 27, 2001), but see Nielsen v. United Creditors Alliance Corp., 1999 U.S. Dist. LEXIS 13267 at *7-9 (N.D. Ill. Aug. 23, 1999)*
- **Bank** - *Vance v. National Benefit Ass'n, , 1999 U.S. Dist. LEXIS 13846 at *9-13 (N.D. Ill. Aug. 26, 1999)*
- **Service for Improving Credit Rating** - *In re National Credit Mgmt. Group, L.L.C., 21 F. Supp. 2d 424, 457-58 (D.N.J. 1998)*(applying the CROA to a credit repair and loan company that "represented that, for a fee, they will provide a service that will assist consumers in improving their credit ratings").

VENABLE LLP

Credit Counseling Agencies and CROA?

- In *Plattner v. Edge Solutions, Inc.,* 422 F.Supp.2d 969, 2006 WL 763651 (N.D. Ill. March 22, 2006) the court recognized, that "[w]hether [an apparent debt settlement] company is a credit repair organization under the CROA depends on the representations made [to consumers]." *Plattner*, 2006 WL 763651 at *4.

- *In re National Credit Mgt. Group, LLC*, 21 F.Supp. 2d 424 (D.N.J. 1998), wherein that court, in a case brought by the FTC, agreed with the FTC's position that certain educational and credit monitoring programs of a type offered by the credit counseling agency were governed by the CROA.

Zimmerman v. Puccio, No. 09-1416 (1st Cir. 2010).

- Held that a tax-exempt, nonprofit credit counseling agency operated as a "credit repair organization" within the meaning of CROA and that certain principals of the organization were personally liable under CROA.

- The *Zimmerman* decision adopts a sweeping interpretation of CROA that equates credit counseling agencies with credit repair organizations.

  – As the First Circuit observed, "credit counseling aimed at improving future creditworthy behavior is the quintessential credit repair service."

- As a result, we are likely to see an increase in credit repair class action lawsuits, which can be crippling to nonprofit credit counseling agencies, especially those that offer or provide services to renegotiate, settle, reduce, or otherwise alter the terms of consumer debts.

- Some courts have adopted a two-part test for the CROA exemption for *bona fide* tax-exempt nonprofit credit counseling agencies, requiring such agencies to: (1) be recognized by the IRS as being exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code; and (2) actually operate as a *bona fide* nonprofit organization.

VENABLE LLP

Notable State Law Developments

Notable State Debt Adjusting Law Developments

- **Colorado UDMSA Amendments** (effective July 1, 2011)
- **Indiana Debt Management Services Act Amendments** (effective May 16, 2011)
- **Maryland Debt Settlement Services Act** (effective October 1, 2011)
- ***North Dakota HB 1038****, an act establishing regulation for debt settlement providers (effective August 1, 2011)*
- ***Virginia SB 786,*** *an act providing an exemption from definition of mortgage loan originator for housing counseling organizations certified or approved by HUD (effective July 1, 2011)*
- ***Virginia SB 930****, an act providing exemption from regulation as credit counselors for licensed public accountants and accounting firms from charitable solicitation registration (effective July 1, 2011)*
- **Nevada Uniform-Debt Management Services Act** (effective July 1, 2010)
- **Tennessee Uniform-Debt Management Services Act** (effective July 1, 2010)
- **Illinois Debt Management Service Act / Debt Settlement Consumer Protection Act** (effective Aug. 3, 2010)
- **Kentucky Debt Adjuster Act** Amendments (HB 166, July 15, 2010)
- **California Money Transmission Act** (AB 2789, effective Jan. 1, 2011)
- Note:
  - Several additional bills pending to amend the debt adjusting law to conform to the TSR Debt Relief Services Amendments.
  - Several mortgage foreclosure assistance relief services/mortgage foreclosure consulting bills pending.
  - Several state SAFE Act amendments pending

VENABLE LLP

Steps to Help Minimize Your Legal Risk

Steps to Help Minimize Your Legal Risk

- Are you appropriately insured for the services and products that you provide? (Not all policies are the same. Consider whether CGL is adequate?).
- Align Fee Structures with Applicable Law and Regulations (e.g., TSR, CROA, 501(q), and State Debt Adjusting Laws)
- Proactively Develop Pro-Consumer Alternative Dispute Resolution Contract Provisions
- Consider Legal Compliance Implications of all products and services
  - Housing
  - Bankruptcy Counseling/Debtor Education
  - LTFB Products
- Develop Internal Processes and Procedures for such areas as:
  - Advertising and Marketing
    - Internet
      - Social Media
    - Telemarketing
    - TV and Radio
    - Mobile
  - Creditor Relations
  - Consumer Contact
  - Conflict of Interest (and Board disclosures)
  - Privacy and Data Security
  - Payments and Remittances
  - Charitable Solicitation
- Due Diligence for mergers and acquisitions

AT&T Mobility LLC v. Concepcion

- The five-to-four ruling, in the case of *AT&T Mobility LLC v. Concepcion*, stated that "[a]rbitration is poorly suited to the higher stakes of class litigation." The momentous opinion recognizes that arbitration is dependent on contractual consent and that arbitration clauses should be enforced as written, even when they include certain types of class-action waivers.

- *Concepcion* offers support to organizations with customers – in California and nationwide – that seek to use contractual arbitration clauses with class-action waiver provisions in order to provide a fast, fair and efficient way to resolve disputes on a voluntary basis and avoid class actions.

- The risk of consumer class actions may be substantially reduced or possibly eliminated with the use of an appropriately drafted and implemented arbitration provision and class-action waiver.

AT&T Mobility LLC v. Concepcion

What does *Concepcion* mean for credit counseling agencies?

- While the holding of *Concepcion* is good news for organizations that wish to quickly and inexpensively resolve customer disputes through individual arbitrations, consumer advocates and class-action plaintiffs' attorneys have called for congressional action to move forward pending legislation that would ban mandatory arbitration agreements in most consumer and employment contracts.

- In addition, the new Consumer Financial Protection Bureau that was created by the *Dodd-Frank Wall Street Reform and Consumer Protection Act* will be studying the issue and may prohibit or limit the use arbitration clauses in consumer financial product or service agreements.

- There may be additional requirements related to consumer contracts to consider when evaluating whether to use or modify an existing arbitration clause or class-action waiver.
  - UDMSA Restriction on Class Action Waiver
  - Other state debt adjusting laws
  - CROA

- Application to non-consumer agreements?
  - Employment Relationships
  - Vendor Relationships

Industry Regulatory Considerations

- How will the Bureau and FTC (and others) coordinate enforcement priorities?
- Will the Bureau enforce the FTC's rules, such as the TSR amendments regarding the sale of debt relief services, against *bona fide* nonprofit credit counseling agencies that are exempt from the FTC's reach?
  - How will the CFPB interpret the TSR (e.g., advance fee ban) to nonprofit CCAs?
- How will state Attorneys General and other state regulators take advantage of the new tools available to them to bring law enforcement actions against providers of consumer financial products and services?
- Are services you offer or provide "fair" as structured and as implemented? How will the CFPB apply its "unfair, deceptive or abusive' acts or practices authority to credit counseling agencies
- Focus and content of studies and reports to Congress and others by the CFPB, its functional units, and the GAO.
- Do policymakers adequately understand the role and value of credit counseling?
- How will regulators seek to enforce and apply the existing statute to less-than-full balance programs?

QUESTIONS AND DISCUSSION

Jeffrey S. Tenenbaum, Esq. **Jonathan L. Pompan, Esq.**

jstenenbaum@venable.com **jlpompan@Venable.com**

(202) 344-8138 **(202) 344-4383**

Venable LLP

575 7th Street, N.W.

Washington, DC 20004

www.Venable.com

1-888-Venable

To view Venable's index of articles and PowerPoint presentations on related legal topics, see www.Venable.com/ccds/publications.