



Current Issues in Receivables Management

August 1, 2023

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2023
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Today's Session

This session will focus on pressing challenges and emerging trends shaping the industry.

1. Supreme Court's Consideration of Cases
 - CFPB's Constitutionality
 - *Chevron* Deference Framework
2. Update on CFPB Proposals and Initiatives
 - Terms and Conditions Registry
 - Enforcement Action Registry
 - Open Banking
 - New Limitations on Noncompete Agreements
3. Federal and State Regulatory Approach
 - Telemarketing
 - Privacy and Data Security
 - AI, Chatbots, and Other Technologies
4. Potpourri
5. Impact and What's Next for the Receivables Management Industry
6. Wrap Up



Supreme Court's Consideration of Cases



CFPB v. Community Financial Services Association of America, Limited, et al.

- Questions Presented:
 - Whether the court of appeals erred in holding that the statute providing funding to the Consumer Financial Protection Bureau (CFPB), 12 U.S.C. 5497, violates the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, and in vacating a regulation promulgated at a time when the CFPB was receiving such funding.
- Set for Argument: Tuesday, October 3, 2023.

Case: 21-50826 Document: 00516514748 Page: 1 Date Filed: 10/19/2022

United States Court of Appeals
for the Fifth Circuit

No. 21-50826

United States Court of Appeals
Fifth Circuit
FILED
October 19, 2022
Lyle W. Cayce
Clerk

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA,
LIMITED; CONSUMER SERVICE ALLIANCE OF TEXAS,

Plaintiffs—Appellants,

versus

CONSUMER FINANCIAL PROTECTION BUREAU; ROHIT CHOPRA,
in his official capacity as Director, Consumer Financial Protection Bureau,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:18-CV-295

Before WILLETT, ENGELHARDT, and WILSON, *Circuit Judges.*
CORY T. WILSON, *Circuit Judge:*

“An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced . . . , as that no one could transcend their legal limits, without being effectually checked and restrained by the others.” THE FEDERALIST NO. 48 (J. Madison) (quoting Thomas Jefferson’s *Notes on the State of Virginia* (1781)). In particular, as George Mason put it in Philadelphia in 1787, “[t]he purse & the



Loper Bright Enterprises v. Raimondo

- In 1984, in *Chevron v. Natural Resources Defense Council*, the Supreme Court ruled that courts should defer to a federal agency's interpretation of an ambiguous statute as long as that interpretation is reasonable.
- Case brought by a group of commercial fishing companies challenging a rule issued by the National Marine Fisheries Service that requires the fishing industry to pay for the costs of observers who monitor compliance with fishery management plans.
- Relying on *Chevron*, a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit rejected the companies' challenge to the rule.

Although federal fishery law makes clear that the government can require fishing boats to carry monitors, it does not specifically address who must pay for the monitors. Because the NMFS's interpretation of federal fishery law as authorizing industry-funded monitors was a reasonable one, decision concluded, the court should defer to that interpretation.

- Court considering whether to overrule *Chevron* (or, the petition suggested, clarify that when a law does not address "controversial powers expressly but narrowly granted elsewhere in the statute," there is no ambiguity in the statute, and therefore no deference is required).



Update on CFPB Proposals and Initiatives



Terms and Conditions Registry

In January 2023, the CFPB's NPRM proposes to require nonbanks that are subject to CFPB supervision and that use form contracts to impose terms and conditions that limit or purport to limit consumer rights and legal protections to register with the CFPB.

The proposed rule, if finalized, would:

- **Identify and collect information on form contract terms and conditions that seek to waive or limit consumer rights and other legal protections**
 - Contract terms and conditions seeking to waive any constitutional, statutory, or common law legal protection, right, or defense; restrict the ability of consumers to complain; limit the time or place for consumers to bring legal actions; limit liability amounts; waive class action rights; and impose arbitration provisions.
 - Both company information and information about the use of the terms and conditions would be published.
- **Increase market transparency and improve risk-based oversight**
 - Allow risk-based government oversight.

Conformed to Federal Register version

BILLING CODE: 4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1092

[Docket No. CFPB-2023-0002]

RIN 3170-AB14

Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule with request for public comment.

SUMMARY: The Consumer Financial Protection Act of 2010 (CFPA) requires the Consumer Financial Protection Bureau (Bureau or CFPB) to monitor markets for consumer financial products and services for risks to consumers in order to support the various statutory functions of the CFPB, and to conduct a risk-based nonbank supervision program for the purpose of assessing compliance with Federal consumer financial law (among other purposes). Pursuant to these authorities, the CFPB is proposing a rule to require that nonbanks subject to its supervisory authority, with limited exceptions, register each year in a nonbank registration system established by the CFPB information about their use of certain terms and conditions in form contracts for consumer financial products and services that pose risks to consumers. In particular, these nonbanks would be required to register if they use specific terms and conditions defined in the proposed rule that attempt to waive consumers' legal protections, to limit how consumers enforce their rights, or to restrict consumers' ability to file complaints or post reviews. To facilitate public awareness and oversight by other regulators including the States, the Bureau is proposing to publish information identifying registrants and their use of these terms and conditions.

DATES: Comments should be received on or before [INSERT DATE 60 DAYS AFTER

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Enforcement Action Registry

In December 2022, the CFPB proposed:

- **Covered nonbanks would report certain agency and court orders connected to consumer financial products and services**
 - Report final agency and court orders and judgments, including consent and stipulated orders, brought under federal consumer financial protection laws or state laws regarding UDAPs.
- **Larger supervised nonbanks would designate a senior executive to attest regarding the firm's compliance with covered orders**
 - Larger nonbanks that are supervised by the CFPB would be required to designate a senior executive to submit an annual supervisory written statement attesting to the steps taken to oversee the activities subject to the order and whether the executive knows of any violations of, or other instances of noncompliance with, the covered order.

In addition to publishing information about the agency or court order, the CFPB is considering publication of certain registration information about the company via release on the CFPB's publicly available website.



Personal Financial Data Rights / Open Banking Rulemaking

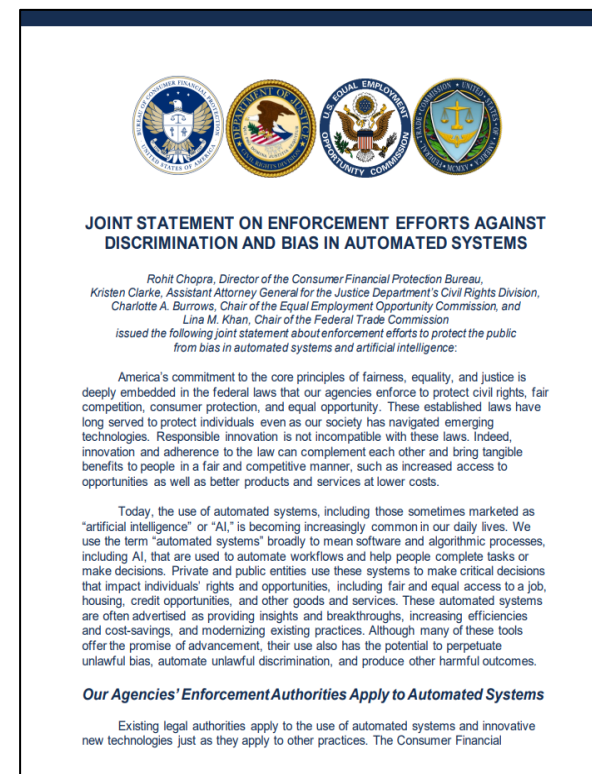
Background: Section 1033(a) of the Dodd-Frank Act authorizes the CFPB to prescribe rules requiring “a covered person [to] make available to a consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including information relating to any transaction, series of transactions, or to the account including costs, charges and usage data.” October 2022 proposals address the following topics:

- Coverage of data providers (covered person with control or possession of consumer financial data) who would be subject to the proposals under consideration:
 - Depository and non-depository financial institutions that provide consumer funds-holding accounts or that otherwise meet the Regulation E definition of financial institution, and
 - Depository and non-depository institutions that provide credit cards or otherwise meet the Regulation Z definition of card issuer.
- Recipients of information, including consumers and authorized third parties: (1) provide an “authorization disclosure” to inform the consumer of key terms of access; (2) obtain the consumer’s informed, express consent to the key terms of access contained in the authorization disclosure; and (3) certify to the consumer that it will abide by certain obligations regarding collection, use, and retention of the consumer’s information.
- The types of information that would need to be made available;
- How and when information would need to be made available, including when information made available to consumers directly and to third parties authorized to access information on their behalf;
- Third party (data recipients or data aggregator) obligations;
- Record retention obligations; and
- Implementation period.



Other Initiatives

- CFPB Pre-rulemaking re Credit Reporting
- CFPB, U.S. Department of Health and Human Services, and U.S. Department of Treasury Launch Inquiry into Credit Cards and Loans for Patients for Health Care Costs
- CFPB Issue Spotlight Analyzes “Artificial Intelligence” Chatbots in Banking
- CFPB Guidance to Address Abusive Conduct in Consumer Financial Markets
- Ongoing focus on “repeat offenders” and supervision/examination check-ins





CFPB Summer Highlights 2023

- Unlawful attempts to collect medical debt
- Deceptive representations about interest payments
- Failure to comply with Regulation E
- Unlawful charging of interest and fees
- Inadequate security for sensitive consumer information, weak password management controls, untimely software updates or failing to implement multi-factor authentication (UDAAP)
- Failure to assign contact personnel



Federal and State Regulatory Approach



Telemarketing/Consents/Online Contracts

- **New FCC Rule Effective July 20, 2023** – TCPA prohibits prerecorded calls to residential *landlines*, except in the cases of the called party’s consent or in the case of emergency.
 - As of July 20, a debt collector’s prerecorded calls to a consumer’s landline are limited to three calls within any consecutive thirty-day period. 47 C.F.R. § 64.1200(a)(3)(iii).
 - These calls remain exempt from the TCPA’s general requirement (15 U.S.C. § 227(b)(1)(B)) of prior express consent for prerecorded calls to a residential line, but a caller can exceed the three-call limit only with the prior express consent of the called party. 47 C.F.R. § 64.1200(a)(3)(iii).
 - In addition, every prerecorded debt collection call to a residential line must provide an automated, interactive voice and/or key-press-activated opt-out mechanism for the called party to make a do-not-call request, and the caller must comply with any do-not-call request. 47 C.F.R. § 64.1200(a)(3)(iii), (b)(3).
 - Private cause of action: \$500/call; up to \$1,500, if knowingly or willful
- FCC Proposal to ban the practice of obtaining a single consumer consent as grounds for delivering calls and text messages from multiple marketers on subjects beyond the scope of the original consent (April 2023, ongoing).
- Enforceability of Online Consent and Disclosures - E.g., Berman v. Freedom Financial Network LLC
- State Lending and Broker Law Developments
- New Safeguards Rule Compliance – Will the FTC come knocking?
- FTC, State AGs, Regulators – Telemarketing Enforcement Sweep (July 2023)



Artificial Intelligence (AI)



JOINT STATEMENT ON ENFORCEMENT EFFORTS AGAINST DISCRIMINATION AND BIAS IN AUTOMATED SYSTEMS

Rohit Chopra, Director of the Consumer Financial Protection Bureau, Kristen Clarke, Assistant Attorney General for the Justice Department's Civil Rights Division, Charlotte A. Burrows, Chair of the Equal Employment Opportunity Commission, and Lina M. Khan, Chair of the Federal Trade Commission issued the following joint statement about enforcement efforts to protect the public from bias in automated systems and artificial intelligence:

America's commitment to the core principles of fairness, equality, and justice is deeply embedded in the federal laws that our agencies enforce to protect civil rights, fair competition, consumer protection, and equal opportunity. These established laws have long served to protect individuals even as our society has navigated emerging technologies. Responsible innovation is not incompatible with these laws. Indeed, innovation and adherence to the law can complement each other and bring tangible benefits to people in a fair and competitive manner, such as increased access to opportunities as well as better products and services at lower costs.

Today, the use of automated systems, including those sometimes marketed as "artificial intelligence" or "AI," is becoming increasingly common in our daily lives. We use the term "automated systems" broadly to mean software and algorithmic processes, including AI, that are used to automate workflows and help people complete tasks or make decisions. Private and public entities use these systems to make critical decisions that impact individuals' rights and opportunities, including fair and equal access to a job, housing, credit opportunities, and other goods and services. These automated systems are often advertised as providing insights and breakthroughs, increasing efficiencies and cost-savings, and modernizing existing practices. Although many of these tools offer the promise of advancement, their use also has the potential to perpetuate unlawful bias, automate unlawful discrimination, and produce other harmful outcomes.

Our Agencies' Enforcement Authorities Apply to Automated Systems

Existing legal authorities apply to the use of automated systems and innovative new technologies just as they apply to other practices. The Consumer Financial



Web Chats and Chatbots

CONSUMER FINANCIAL PROTECTION BUREAU | JUNE 2023

Chatbots in consumer finance

Issue spotlight



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Potpourri

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FTC Safeguards Rule

- **New FTC Safeguards Rule Effective June 9, 2023** –
- Impacts “financial institutions” as that term is defined by law (includes debt buyers, debt sellers and collection agencies)
- Effective June 9, 2023
- Requires protection of information systems and data bases containing consumer data
- Requires Multifactor Authentication



What IS Multifactor Authentication (MFA)

Loosely and somewhat inappropriately known as “two factor authentication” or “two step authentication” (2FA)

MFA requires a layered approach to securing logins

- **Something you know** (username, password, birthdate, account number) and **one of the following:**
 - **Something you have** (authenticator app, google app, token, PIV card)
 - **Something inherent and unique about the individual** (fingerprint or face scan)

A digital certificate is a valid option for “something you have” if it is unique for a particular user. (PCI-DSS v 4.0)

- Major Area of Confusion – Who needs to protect the data?



What is NOT Multifactor Authentication (MFA)

- Not synonymous with single sign on
- Use of same process for consumer access as employee access
- User name and password or even user name and two passwords
- Relying on your clients to manage MFA for you unless operating in first party collection model



Impact on the Receivables Management Industry



Wrap Up



Thank you!

Please contact us if you have any questions:

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- **Manny Newburger**, Vice President, Barron & Newburger, P.C.
- **Jonathan Pompan**, Partner, Venable LLP