

Consumer Financial Regulatory and Litigation Fallout from the COVID-19 Crisis, with Richard Cordray and John Roddy

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Resources



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Coronavirus Disease 2019 (COVID-19) Resource Center

Ballard Spahr attorneys are closely monitoring federal and state government guidance and situation updates—and we stand ready to help clients navigate the related business concerns. [Visit here](#)



Banking and Consumer Financial Services COVID-19 Resource Center

Ballard Spahr's Consumer Financial Services, Banking & Financial Institutions, and Mortgage Banking Groups are closely monitoring regulatory developments in connection with the coronavirus (COVID-19) crisis. To provide one location where members of the banking and consumer financial services industries can access federal regulatory guidance and other information that relates to issues of particular concern. [Visit here](#)

Consumer Finance Monitor, *the podcast*

Season Three

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*to listen to more episodes and seasons one and two, [click here](#)

Upcoming Webinars

Title	Date
Nuts and Bolts of the FCRA: Hot Topics and Trends in Litigation	April 8
COVID-19 Fraud and Deposit Accounts	April 15
Credit Union and Community Banks Mortgage Regulatory Update	April 29

Register for **upcoming webinars** at www.ballardspahr.com or by e-mailing questions@ballardspahr.com.

Request materials from **past webinars** by e-mailing questions@ballardspahr.com.

Your Presenters



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**CHRISTOPHER J.
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Author of Watchdog
(2020)



JOHN RODDY

Regulatory Agency Reactions to the Current Crisis

April 6, 2020

Emergency state restrictions on:

- *debt collection*
- *foreclosure*
- *garnishment*
- *eviction moratoria*

Fraudulent Schemes Related to COVID-19

- Phone Scams
- Robo Calls
- Cybercrimes

Mass. AG –
Emergency
Debt Collection
Regulations
Stringently Limit
Debt Collection
During the
Pandemic

- UDAP Violation to file a collection suit, garnish wages, repossess a vehicle, serve a capias warrant, or threaten any such action until 30 days after the governor lifts the emergency declaration
- NB: These regulations prohibit all debt collection calls for same period

In States like
Massachusetts, What
is the Possibility of a
UDAP/UDAAP Claim
Premised on
“Normal” Pre-Crisis
Collection Activities
like Repossession,
Legal Collections,
Garnishments, etc.?
Or “Normal” Contact
Collections?

- Such a claim seems possible, but how will regulators decide which entity to pursue, if “normal” collections are pursued by a large number of entities? Is there safety in numbers?

Industry Practices
or Borrower Harms
That Will Interest
Regulators:
Fees for No Service
/ No Refunds /
Autorenewals –
UDAP Violations

- UDAP to charge while pandemic prevents providing goods or services
- UDAP to automatically charge via credit, debit, or ACH during government ordered grace period
- Probably UDAP for schools to suspend classes without adequate refund or repayment of tuition
- UDAP for companies that have cancelled trips or events to keep deposits or stop automated payments systems

For Example:
Boston Sports
Club Plans to
Charge
Members
Despite
Coronavirus
Shutdown

- Massachusetts gym members can cancel membership if gym's operation changes
- Many other health clubs have frozen members' accounts while clubs are closed
- Massachusetts AG investigation
- NY class action filed las week against parent Town Sports International ("TSI")
- TSI stock price has dropped below \$1 per share

CFPB's Bailiwick: Mortgage Lending, Debt Collection, Credit Reporting

- Foreclosure Trendlines
- Great Recession: Almost 9 million jobs lost
- Pandemic: 10 million new unemployment claims to date - Fed estimates up to 47 million job losses, with a 32% unemployment rate
- Great Recession: About 10 million homes lost
- Pandemic: CARES Act provides foreclosure moratorium and a right to forbearance for federally held loans, but 30% of mortgages not eligible for CARES Act relief – so trendline resembles Great Recession
- CFPB providing guidance to lenders/servicers to implement forbearances and work with borrowers affected by the pandemic

Debt Collection:
CFPB Should
Provide Guidance
To Debt Collectors,
Perhaps Adopting
Measures Like
Mass. AG
Emergency
Regulations

- CFPB could lead nationwide effort to encourage increased flexibility for struggling borrowers
- Like waiving bounced check and late/insufficient payment fees
- Encouraging CRAs to use “natural or declared disaster” flags to ensure the pandemic doesn’t tank credit scores

What About
Businesses that
are “Essential”
or those that
Defy Closing
Orders?

- Inevitable lawsuits alleging customers contracted the virus at their establishments claiming that those businesses were unsafe / unsanitary

Can State Laws
Require Changes
that Impact the
Terms of Credit, like
Waiving Late Fees,
Changing the Due
Dates of Payments,
or Stopping the
Accrual of Interest?

- Only if state regulated, state chartered
- Even then, dizzying array of contractual, regulatory authority, due process issues

What if the
Creditor is a
National Bank
or Federal
Savings
Association?

- Preemption, preemption and preemption
- Reputational risks

Do We Expect State Courts to be Overwhelmed with Foreclosures, and to Respond in the Same Manner We Saw in 2008 (Slow Dockets, Mandatory Mediation Programs, etc.)?

- After the crisis, yes, then comes the deluge
- Lawsuits are plummeting during the pandemics, of course, courts are closed
- But legal experts anticipate a tidal wave of court activity afterward – especially in fields like insurance and debt collection – because of the economic dislocation caused by the pandemic

Housing

- Wrongful foreclosure by lenders and servicers
- Lack of awareness or failure to comply with state moratoria or other emergency restrictions

What Role will the CFPB's Loss Mitigation Regulations (Reg X) Play in Handling of the Mortgage-Related Aspects of the Crisis?

- We would expect loss mitigation applications to increase dramatically
- Significant economic dislocation should increase CFPB interest in ensuring compliance with Reg. X, through both supervision and enforcement

Predatory
Lenders
Targeting Those
Recently Laid
Off or
Terminated

- Resuscitation/ reinvention of 2008 subprime mortgage crisis scams
- 12 years later, federal investigators are still pursuing bad actors who misused the \$475 billion federal bailout program for banks

Student Loans –
The Pandemic
Has Accelerated
The Day Of
Reckoning For
This Trillion Dollar
Plus Problem

- March 13, 2020 Executive Order and the CARES Act suspended payments and interest on certain federal loans for 180 days (primarily Family Federal Education Loans)
- FFEL loans are owned by the Department of Education

Independent of
the Government
vs. Commercial
FFEL Dichotomy
Issues, More
Confusion and
Lawsuits Will
Result from
Misinformation

- TISLA reports borrowers already being given incorrect info on these waivers on both sides of the coin
- Call Center reps not being given updated information will likely lead to class actions because of the fast-moving nature of the changes and the waterfall effect of misinformation damaging the huge number of student loan obligors
- Other Student Loan Issues Resulting from the Pandemic:
 - Charging fees for no or suspended service
 - Loan grace period abuses
 - Predatory practices, especially with Corinthian type schools

Adding to the Problem, Extreme Financial Pressures on Lenders / Servicers

- Navient's stock price dropped 75% in last week
- Possible Government Response:
 - 34 C.F.R. § 668.83 Emergency action("Under an emergency action, the Secretary may -(1) Withhold Title IV, HEA program funds from a participating institution or its students, or from a third-party servicer, as applicable."); 34 C.F.R. § 81.3 Jurisdiction of the Office of Administrative Law Judges ("The Office of Administrative Law Judges (OALJ) established under section 451(a) of GEPA has jurisdiction to conduct the following proceedings concerning an applicable program (1) Hearings for recovery of funds (2) Withholding hearings (3) Cease and desist hearings.") (emphasis added).

Around 1 AM
Friday Night the
DOE Issued
Additional
COVID
Guidance
Specifically to
the Commercial
FFEL and
Perkins Loans

- Schools holding Perkins and lenders holding non-defaulted FFEL have the option of offering the waivers and 0% rate
- Who does probably won't get sued — Who doesn't well might
- Guarantors are to cease all defaulted collections until September — but the 0% interest rate does not apply
- Issue — are defaulted FFELs federally held and eligible for all the CARES act waivers?
- There is no mention how this cessation affects rehabs

Debt Collection

- Pandemic related FDCPA/State collection law violations are inevitable
- Collectors Preparing To Garnish Stimulus Payments —NCLC warns that debt collectors are seeking to garnish bank accounts to seize stimulus payments. Some protective measures it suggests:
 - The government should code the checks like other federal benefits, such as Social Security, that are exempt from garnishment
 - State and local governments can clarify that stimulus checks are exempt under existing state law and that garnishment is UDAP
 - Consumers can withhold direct deposit information from the IRS so it issues a paper stimulus check, then withdraw stimulus funds as soon as deposited

Operational Areas that May Be Impacted by Working Remotely

- Call centers / customer service
- Collections
- Loss mitigation
- Investigation of disputes (FCRA, FCBA, FDCPA)
- Compliance monitoring / auditing
- Bank branch operations (and other in-person operations)
- Fraud investigation / ID verification

The Impact on Private and Governmental Consumer Litigation, Including Class Actions

➤ Catastrophic Impact Upon Financial Viability Of Defendants To Fund Settlements

- Deluge of defense counsel requests to delay scheduled settlement payments
- Or to reopen talks on already-signed deals
- Incipient deals ready for signature are being abandoned
- Will take up a large chunk of our time over the next year, either renegotiating settlements already reached or going to litigation on settlements that fall apart over nonpayment

Catastrophic Impact Upon Financial Viability of Defendants to Fund Settlements

- Example: NY Eatery Can't Delay Settlement Payment Due To COVID-19:
 - A New York federal judge on Tuesday rejected a Manhattan restaurant's bid to push back settlement payment in light of the business being “decimated” by pandemic
- Takeaway — mere incantation of the word ‘coronavirus’ does not justify holding settlement in abeyance without proof of inability to pay

And...

- Pandemic related Notice issues
- Proofs of Claim and Logistical / Deadline Issues Created by Pandemic
- Final Approval Hearings in Limbo:
 - Settlement agreements which cannot be met because funding from defendants' income or credit lines drying up
 - Unprecedented cash crunch for businesses
- Litigation Delays:
 - Pandemic as basis for innumerable motions to indefinitely delay discovery

What Steps the
Financial Services
Industry Should
Take to Reduce
Exposure to
Litigation and
Government
Enforcement
Initiatives?

- Data Privacy
- Cybersecurity
- Physical Security
- Social Media Risks
- Risk of Discriminatory Terminations
of Workforce Reductions

UDAAP and Fair Lending Issues

- Fair Lending Issues
- Modification/forbearance requests
- Likely spike in defaults

Forbearances, Loan Modifications and Credit Reporting

- Federal/State Moratoria on foreclosure
- Vehicle Repossessions, Both Consumer and Commercial

Quid Pro Quo and Potential UDAP Liability

— Defendants Seek
Forbearance on Settlement
Deals But Refuse to
Provide that Flexibility to
Borrowers/Consumers

Credit Reporting

- Discussion of CDIA Guidance
- Discussion of CARES Act credit reporting provisions
- Discussion of CFPB 4-1-2020 Notice regarding timing of responses to FCRA disputes – what impact will exist on private litigation, if any?
- Other potential FCRA issues related to reporting during and after crisis

THANK YOU FOR JOINING US!

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Alan S. Kaplinsky

MODERATOR

- Practice Leader of the Consumer Financial Services Group at Ballard Spahr, which was just named by *Law360* as one of five top banking law practice groups of 2017.
- Devotes his practice to counseling financial institutions with respect to bank regulatory and transactional matters and defending them in individual and class action lawsuits (including CFPB investigations and government enforcement matters)
- First President of the American College of Consumer Financial Services Lawyers and the recipient of the College's 2016 Lifetime Achievement Award
- Former Chair of the American Bar Association Committee on Consumer Financial Services of the Business Law Section
- Co-Chair of the Practising Law Institute's Annual Consumer Financial Services Institute, now on its 24th year
- Has been named as a tier one banking and consumer financial services lawyer in the 2006 through 2019 editions of *Chambers USA*
- Has been named in *The Best Lawyers in America* under financial services regulation law and banking and finance litigation from 2007 to 2019
- Recipient of the *National Law Review's* Go-To-Thought Leadership Award in Consumer Finance, 2018
- Recipient of the National Law Journal's 2015 Litigation Trailblazers Award for pioneering the use of class action waivers in consumer arbitration provisions

Christopher J. Willis

SPEAKER

- Practice Leader of the Consumer Financial Services Group at Ballard Spahr, which was just named by *Law360* as one of five top banking law practice groups of 2017.
- Also a member of the firm's Litigation, Commercial Litigation, Consumer Financial Protection Bureau (CFPB), Education, Mortgage Banking, and Fair Lending Groups
- He devotes his practice to assisting financial services institutions facing state and federal government investigations and examinations, counseling them on compliance issues including UDAP/UDAAP, credit reporting, debt collection and fair lending, and defending them in individual and class action lawsuits brought by consumers and enforcement actions brought by government agencies
- Assists clients in designing new products and processes, including product structure, advertising, online application flows, underwriting, and collection and loss mitigation strategies
- American College of Consumer Financial Services Lawyers, Fellow
- *Chambers USA: America's Leading Lawyers for Business*, financial services regulation: consumer finance (litigation), national ranking, 2014-2018

Richard Cordray

SPEAKER

- Richard Cordray is a lawyer and former public official who is the author of the recently-published book, “Watchdog” (2020)
- Previously, Cordray served as the first Director of the Consumer Financial Protection Bureau (CFPB) from 2012 to 2017
- In 2008, he received a Financial Services Champion award from the SBA and a Government Service Award from NeighborWorks America
- In 2005, he was named “County Leader of the Year” by *American City & County Magazine*
- Prior to his appointment to lead the CFPB, Cordray variously served as Ohio’s Attorney General, Solicitor General, and Treasurer
- Cordray was the Democratic nominee for Governor of Ohio in 2018

John Roddy

SPEAKER

- John represents consumers in class actions challenging unfair and deceptive business practices, and serves as relator's counsel in qui tam “whistleblower” actions
- In the last two decades the settlements in cases he has litigated have returned more than \$950 million to consumers harmed by marketplace misconduct
- John regularly writes and speaks on class action practice and consumer financial services law, and has published dozens of articles on these topics
- He has co-chaired PLI's Annual Consumer Financial Services Institute for the past 20 years
- *Super Lawyers*, Massachusetts, Class actions/Mass Torts (2011 - 2019)