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Diane Stanfield, Financial Restructuring & Reorganization

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Q&A

WITH CHRIS PYLE, SYNOVUS BANK

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The TCPA: Who Will Dictate Its Reach – the FCC or the Courts?

Frank Hirsch and Sarah Cansler, Litigation & Trial Practice

Telephone Consumer Protection Act (TCPA) litigation has hit the federal courts in a tidal wave of class action claims with almost unlimited financial exposure. More than 4,000 separate TCPA cases are filed each year.

But recent developments may stem some tides—like the D.C. Circuit's rejection of the FCC's interpretation of what devices qualify as a prohibited "autodialer" in *ACA International v. FCC*. Another wave break may come from the U.S. Supreme Court in 2019.

In general, the TCPA prohibits sending junk faxes or making autodialed telephonic calls that individuals did not consent to. Banks may not be making these TCPA-offensive communications directly (they might), but banks also face TCPA liability risk if their agents or representatives are making the calls on behalf of the creditor bank. This is the vicarious liability exposure risk. The FCC is charged with interpreting the TCPA and providing guidance to the public. But the politics of the FCC has changed over time, and the agency's TCPA rulings in 2003, 2006, 2008, 2012, and 2015 reflect a more business-friendly trend.

Judicial interpretations of the reach of the TCPA have differed significantly as the FCC has struggled with its directives on statutory intent. And the case now up for review by the Supreme Court could drastically change the way judges apply administrative orders interpreting provisions of the TCPA and other federal laws. *PDR Network LLC v. Carlton & Harris Chiropractic Inc.*, on appeal from the Fourth Circuit, will be heard some time this year, and the decision could greatly affect how much deference district courts must give to orders made by administrative agencies.

In *Carlton & Harris Chiropractic*, a chiropractic provider sued the defendant for sending the plaintiff an unsolicited fax offering a free copy of the *Physicians' Desk Reference*. The plaintiff argued that the fax violated the TCPA because it was an "unsolicited advertisement." However, the district court disagreed, dismissed the plaintiff's case, and held that the fax was not an advertisement because there was no commercial aim.

The plaintiff had pointed to a 2006 FCC ruling interpreting the TCPA that said that "facsimile messages that promote goods or services even at no cost … are unsolicited advertisements under the TCPA's definition." However, the district court declined to apply that FCC ruling, instead conducting a "*Chevron* analysis" to determine that the TCPA's definition of unsolicited advertisement was unambiguous and therefore did not need to defer to the FCC's interpretation. (Under a *Chevron* analysis, a court considers an administrative agency's interpretation of a statute only if the statute is ambiguous.)

The plaintiff appealed to the Fourth Circuit, which reversed the dismissal. The stated problem was the failure to consider the Hobbs Act (a/k/a the Administrative Procedure Act). The Hobbs Act provides that the courts of appeal, not the district courts, have exclusive jurisdiction to "enjoin, set aside, suspend … or to determine the validity of … all final orders" of various federal agencies, including the FCC. The Fourth Circuit concluded that the district court improperly determined the "validity" of the FCC ruling when it chose not to defer to the FCC and to the jurisdiction limits of the Hobbs Act.

The Hobbs Act covers appellate court review of multiple federal agency interpretations, important to banks—

(continued on next page)

including those by the Housing and Urban Development Secretary under the Fair Housing Act on issues such as disparate impact discrimination. So, the Supreme Court determination could potentially affect agency authority in many areas of banking.

The parties dispute whether there is in fact a "circuit split" over the application of Hobbs Act limits on federal district courts. In its brief, the defendant argues that the district court was not evaluating the FCC ruling validity at all—it "presumed" that the FCC ruling was valid. The appealing party argues that the court did not need to apply the FCC's interpretation under the *Chevron* analysis. The appeal further argues that the Hobbs Act should not have applied (because it only covers conventional agency review by courts of appeal, not to ordinary statutory interpretations in commercial litigation).

If the Supreme Court concludes that the Fourth Circuit was correct, then district courts will be limited in their ability to conduct *Chevron* analyses in cases involving orders from the FCC and other agencies. District courts will be required to apply the agencies' interpretations of statutes without the ability to first determine whether the statute is ambiguous. Some commentators have even considered whether the Court will use this as an opportunity to limit *Chevron* analyses altogether, given that both Justices Gorsuch and Kavanaugh as new members of the Court have opposed the doctrine. If, however, the district court's dismissal of the TCPA claim was correct, that may grant courts more leeway to determine when and if to apply administrative interpretations of statutes.

Banks, like all businesses, prefer predictable regulatory landscapes. In TCPA-land, who will be more consistent—political appointees to the agencies or judicial appointees to the bench? Time will tell. Stay tuned. ■

Secured Claims and the Automatic Stay: A Refresher

Diane Stanfield, Financial Restructuring & Reorganization

As our economy enters a time of increasing loan defaults, lenders will inevitably be confronted with a corresponding uptick in bankruptcy filings by borrowers. While there are many issues to be considered in the course of a borrower's bankruptcy proceedings, the first to arise—and a frustrating source of litigation with a debtor borrower—is the automatic stay.

Automatic Stay During Bankruptcy

As soon as a bankruptcy petition has been filed, the automatic stay kicks in to prohibit a broad range of conduct against the debtor, including any act to collect, assess, or recover a claim against the debtor or to enforce a lien against property of the estate. Applicability of the stay is instantaneous and is not dependent on the lender's knowledge of the stay or conditioned on notice to the lender. Violations can lead to sanctions, including attorneys' fees and even punitive damages—particularly in the case of repeated or egregious violations.

Although a knowing violation of the automatic stay certainly is more likely to be sanctioned, courts generally do not favor excuses based on ignorance or mistake. For that reason, it is important to be able to demonstrate that the lender has solid systems in place so that bankruptcy notices are processed immediately upon receipt, with a protocol for where and to whom such notices go. There should be internal processes to flag every system (form letters, phone calls, foreclosures, or collections that may be underway) immediately upon receipt of such a notice, as well as clear policies and procedures for all written communications.

The Discharge Injunction

A bankruptcy discharge extinguishes "the personal liability of the debtor with respect to any debt," and actions to enforce such personal liability is a violation of the "discharge injunction." However, the lien on the real property collateral survives the discharge, and the lender is permitted to pursue its remedies against the collateral—which requires communication with the debtor. The tricky part is that the lender *cannot* coerce, demand, or even invite payment, and what constitutes coercion or invitation is a bit of a moving target. Whether a communication constitutes a demand for payment is a case-by-case analysis, and a court's views can be difficult to predict; one court held that it is "largely a matter of the court knowing it when it smells it."

Although there is a statutory safe harbor for ordinary course communications associated with obtaining payments in lieu of foreclosure on a principal residence, even that provision is subject to interpretation. For example, one court held that a notice referencing the lender's right to assess a late charge was protected, while another held the lender in contempt for a statement that included the amount of the payment plus a late charge if payment was not received by a certain date.

To minimize the chance a communication violates the injunction, the lender should consider critically whether:

- The communication serves a clear purpose other than to collect a discharged debt, such as providing a debtor with information, offering opportunities to negotiate, or responding to inquiries of the debtor.
- The communication includes words of collection such as "demand" or "loan" or includes a payoff amount, payment due date, references to late charges, or payment coupons.
- Communications are frequent and relentless.
- There is a regulatory or public policy justification for the communication.
- The communication contains an adequate disclaimer that the communication is not an attempt to collect a discharged debt.

(Of course, even the best disclaimers are not bulletproof. If the overall tone of the communication is coercive or threatening, the court may find the disclaimer "underwhelming and insufficient.")

What to Do Now?

Given the likelihood of the coming wave of bankruptcies, this is a good time for every lender to conduct a review and refresh of its policies and procedures to avoid violations of the automatic stay. If not in place already, consider subscribing to a service that provides alerts of bankruptcy filings; designate and train staff to handle any files subject to bankruptcy protection. Being proactive on this issue could avoid costly litigation and increased losses on the claim—not to mention an angry judge! ■

The Future of Community and Regional Bank Compliance: Collaboration and Innovation?

Brian Frey, Litigation & Trial Practice

Community and small regional banks have long struggled to develop and implement compliance programs that adequately manage Bank Secrecy Act (BSA) and anti-money laundering (AML) risks without being cost and resource prohibitive. Federal bank regulators have finally taken notice and offered meaningful guidance to help regulated entities address this challenge. On October 3, 2018, regulators issued an interagency statement declaring their support for collaboration and resource-sharing by banks in appropriate circumstances. Regulators followed this statement with a second joint statement on December 3, 2018, broadly encouraging banks to embrace innovation in combatting money laundering and terrorism financing. Taken together, these statements suggest that collaboration and embracing technological advances may be the future of BSA/AML risk management for community and small regional banks, but banks must still proceed with caution.

Resource-Sharing and Collaboration

While the October joint statement makes it clear that regulators support resource-sharing and collaboration, it also confirms that collaboration is not appropriate for all banks. The joint statement contemplates BSA/AML compliance collaboration among smaller, community-focused banks with lower risk profiles for money laundering and terrorism financing. Key considerations in assessing whether a bank's risk profile is appropriate for collaboration will include the size of operations, the nature of the customer base, and the portfolio of services and products offered.

If resource-sharing and collaboration are appropriate for a given bank and an interested partner institution is available, regulators have provided guidance on the types of resources and tasks that are likely to be shared. These include drafting, review, and revision of BSA/AML policies and procedures, development and review of risk-based customer identification and account monitoring processes, customization of monitoring systems and reports, cross-utilization of employees for independent testing of the BSA/AML programs, and shared training.

Although collaboration will not be the right option for all smaller banks, the potential benefits of resource-sharing may be significant. For example, by pooling resources, small banks may be able to hire more capable compliance personnel and implement more sophisticated BSA/AML monitoring systems. In addition, collaborating banks stand to get more bang for their compliance buck due to increased efficiencies and economies of scale.

It is important for banks considering collaboration to be aware, however, that nothing eliminates a bank's individual obligation to implement an AML program that satisfies the requirements of the BSA. Each bank in a collaboration will still be examined based on the adequacy of its own program in light of its unique risk profile.

Innovation

The December joint statement is likewise encouraging for smaller banks, and indeed banks in general, seeking to improve BSA/AML monitoring through innovation. In a world where criminals are becoming ever more sophisticated in disguising their abuse of the U.S. financial system, bank compliance programs and practices must likewise continue to evolve. Historically, however, some banks have been wary of testing new and innovative approaches to BSA/AML compliance for fear that regulators will be swift to punish a bank if an innovation fails. The joint statement seeks to alleviate these concerns.

In the joint statement, regulators acknowledge the importance of innovation by banks in protecting the U.S. financial system from illicit activities. Regulators have committed to banks that pilot programs "will not subject banks to supervisory criticism, even if the pilot programs ultimately prove unsuccessful." Similarly, the joint statement confirms that if a pilot program exposes gaps in an existing BSA/AML compliance program, regulators will not necessarily take supervisory action as a result. Simply put, the joint statement confirms that if a pilot program works better than an existing program, regulators will not immediately presume that the existing program is therefore inadequate.

The joint statement concludes by expressing a willingness by regulators to engage in discussions with banks about proposed innovations. Although it remains to be seen whether the commitments in the joint statement will result in noticeable changes in interactions between banks and regulators on the subject of innovation, there is reason for optimism.

Conclusion

Smaller banks that decide to explore collaboration are in a unique position to simultaneously consider new and innovative means of enhancing compliance efforts while seeking to use resources more efficiently. The messages from federal banking regulators in 2018 are certainly enough to warrant smaller banks taking a fresh look at their BSA/AML compliance programs and consider whether it might be time for a change. ■

Q&A

Client Q&A with Chris Pyle, Group Executive for Consumer & Small Business Lending at Synovus Bank

Richard W. Grice

Chris leads Synovus's marketplace lending efforts. He joined the bank two years ago from another large regional bank, where he held a similar role for 10 years.

Richard focuses on representing regional banks in a variety of financing transactions and public companies as they access the debt markets. Alston & Bird and Richard have represented Synovus for many years.

- **Grice: Chris, you & I have done a number of marketplace lending deals recently. What exactly is "marketplace lending"?**
- Pyle: Richard, I am so glad you asked! While the term can mean different things to different people, marketplace lending typically refers to the use of an online platform that connects borrowers and lenders. At Synovus, we approach marketplace lending as a fresh, effective way to reach a particular customer base. Lenders used to look at a wide variety of factors, like rate environment, when deciding to get into a market. With a faster online platform, we can reach a potential customer base at a rate faster than our competitors. Speed and architecture become key advantages to reach customer segments faster.
- **Grice: Are marketplace lender deals all online?**
- Pyle: Most are. However, GreenSky, one of the biggest marketplace lenders, has a two-pronged approach—they use a contracted sales force but also utilize slick tech on their website. There is real-person interface, but the entire application process is online—the contractors swipe a customer's driver's license into a web-based application template and renders a credit decision very quickly, anywhere from 30 seconds to a few minutes. But customers can also just go online and apply for a home improvement loan independently. Both avenues are very effective and appealing to consumers.
- **Grice: Why does marketplace lending appeal to Synovus?**
- Pyle: Two things, primarily. First is the ability to scale quickly with minimal infrastructure, and sunk cost is very appealing to me.
  Second, it also allows a player like Synovus to diversify away from our traditional geographic footprint. We are the Southeast's largest mid-cap bank—but now we can go beyond the limitations of the Southeast. California and other states outside the Southeast are big areas for us—all based on the sizes of their economies.
- **Grice: What sectors are particularly well-suited for marketplace lending? Is it all retail or is there a B2B component?**
- Pyle: We are mainly in retail consumer (student loans and home improvement loans to name two areas). They are actuarial businesses—lots of observations with lots of good info—FICO, income, etc. They lend themselves to technology pretty well. While marketplace lending is 80% consumer currently, small-business lending is growing. Kabbage and OnDeck, both in Atlanta, are players in the B2B space. Regarding student loans—the arbitrage between rates applicable to prime and super-prime borrowers and the typical "straight-out-of-college" student loan creates an obvious refi opportunity. For home improvement, the online platform provides quick financing solutions between customers and contractors.
- **Grice: Why does retail consumer still dominate?**
- Pyle: Consumer will always predominate because the loans are unsecured—no collateral management is required. Tech hasn't yet gotten to the point where collateral appraisals and inventory and receivables management can be done online easily.
- **Grice: Is this a big branding exercise for Synovus?**
- Pyle: We are always looking to enhance and amplify our brand recognition, but our strategic partners are doing the majority of the branding—similar to when you buy a car at the dealership and negotiate with the sales manager. You negotiate your terms with the sales manager but the dealership doesn't typically disclose the identity of the lender. We do rate and terms on the back end.
- **Grice: Who initiates the contact with the platforms/partners?**
- Pyle: We get multiple calls a day from platform providers looking to partner up with a funding source.
- **Grice: How do you feel about Synovus's competitive position in marketplace lending?**
- Pyle: We are very well-positioned. We jumped in early—and now historical credit and loan performance metrics allow us to know exactly where we are going to go next. Return dynamics from our current experience allow us a nuanced approach—we have good sense of risk appetite and can enter markets in a meaningful way.
- **Grice: Outlook for the future?**
- Pyle: We remain bullish and expect continued opportunities. The consumer economy remains robust despite headwinds from tariffs and the shutdown. But there are many competitors, so there will likely be consolidation in the future as investor appetite or the economy changes.
- **Grice: What else are you bullish on?**
- Pyle: We are focused on the expansion of our digital channels—leveraging our marketplace lending portfolio to grow our mobile and web-based credit card business, deposit origination, and small business lending. Anywhere you want to start the application, we can be there.
- **Grice: Chris, thanks so much for taking the time to talk to me today—all good stuff! Final question, what's the last thing you bought online?**
- Pyle: Diapers. I live on Amazon Prime. ■

Bank M&A and the Regulatory Approval Process

Sandy Brown, Financial Services & Products

Banking is a highly regulated business, and it should be. Where else does the private sector have the authority to issue paper that is guaranteed by the full faith and credit of the U.S. government? With the benefit of federal deposit insurance, banks have that ability every business day of the year. But that privilege comes at a cost of significant government involvement in most aspects of the bank's business. Most of that involvement is at the discretion of the government: that is, the examiners come to the bank on a schedule that is determined by the examiners.

However, hundreds of times every year banking organizations invite the increased scrutiny by entering into transactions that require a regulatory application and (hopefully) approval. The regulators' spotlight shines brightest when a banking organization files an application to acquire all (or substantially all) of the operations of another banking organization. Whether the deal is structured as a merger or an asset acquisition, if insured deposits are involved, the government has a major role in deciding whether the proposed transaction can be consummated.

The last two years have been years of recalibration of the regulatory environment in the United States, and that certainly is true of bank supervision. When it comes to bank M&A, there are still very few easy deals, but the regulatory applications that are being filed have been approved on a more "normal" pace than we have seen at any time during the last decade. In 2014, for example, it took an average of 180 days for the Federal Reserve to approve a merger application for a proposed bank merger where the buyer had assets of more than $1 billion (the approval time was 150 days for applications where the buyer had less than $1 billion in assets). Contrast that with 2018, when regulatory approvals of larger bank deals took slightly more than 130 days (whereas deals with smaller banks took less than 120 days to obtain regulatory approval).

The regulatory approval process in 2018 was as rapid as we've seen since 2008. Granted, the U.S. economy and banking systems are much healthier now than they were in 2008, but the time it takes to obtain regulatory approval for a bank M&A deal is also a reflection of the people running the agencies with jurisdiction over the industry—the current agency heads are of the mindset that businesses are best run by business people (not government bureaucrats) and that deals that business people think are good for the businesses involved should not be delayed by government policymakers unless there are overriding concerns that affect a broader segment of society.

These are very good times in banking; the industry is experiencing record profits, and asset quality is as good as it has been in a long, long time. But the regulatory burden associated with operating an insured depository institution is still quite high. For the first time in over a decade, there were no bank failures in the U.S.; however, the number of bank charters in the country continued its steady decline of the last 20 years due to more than 250 M&A deals.

Industry observers (including this one) expect a similar pace of M&A deals in 2019; we may see a few more new charters in 2019 than we've seen in the last 10+ years, but there will be far more banks disappearing through M&A than the de novo charters created. And the process for getting those deals approved should continue to be much quicker than it was three years ago. ■

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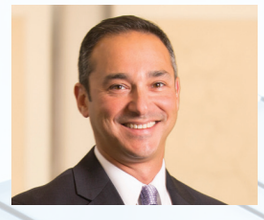

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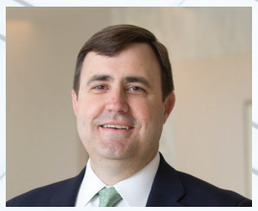

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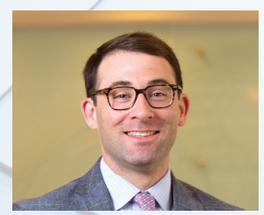

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