Small Dollar Lending Regulation in 2019

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Introduction

One year ago, small dollar lenders were operating under the specter of looming compliance dates for the Consumer Financial Protection Bureau's ("CFPB's") final rule concerning small dollar lending. One year later, through judicial stays and additional rulemaking, the compliance dates for this final rule continue to be pushed back—potentially to the point where the rule may never come to pass. However, small dollar lenders face legal challenges in their businesses outside potential CFPB regulations. This survey reviews updates in the small dollar lending space over the past year, including federal rulemaking, federal and state enforcement actions, significant state court decisions, and state legislation.

Federal Small Dollar Rulemaking

In February 2019, the CFPB issued two notices of proposed rulemaking inviting the public to comment on potential amendments to its rule governing payday, vehicle title, and certain high-cost installment loans ("Payday Lending Rule").[1] The Payday Lending Rule contained several requirements applicable to providers of "Covered Loans," which include: short-term loans payable within forty-five days; longer-term single-payment or installment loans with balloon payments; and installment loans with an annual percentage rate over 36 percent per annum.[2] Among those requirements are two key sets of provisions. The "Mandatory Underwriting Provisions" require providers of Covered Loans to make ability-to-pay determinations with respect to potential borrowers and provide guidelines for these determinations.[3] The "Payments Provisions" regulate

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1. 12 C.F.R. pt. 1041 (2019); *see* Justin B. Hosie, K. Dailey Wilson & Erica A.N. Kramer, *Stranger Things: Small-Dollar Lending Updates and the Arrival of a Final Rule*, 73 Bus. Law. 525 (2018) (in the 2018 *Annual Survey*) [hereinafter *Small Dollar 2018*].

2. 12 C.F.R. § 1041.3(b) (2019); *see Small Dollar 2018*, *supra* note 1, at 525.

3. *See* 12 C.F.R. §§ 1041.4–1041.6 (2019); *see Small Dollar 2018*, *supra* note 1, at 526.

how a provider of Covered Loans may obtain payment transfers from borrowers by prohibiting certain conduct and requiring notice in certain instances.[4]

Both the CFPB's notices of proposed rulemaking concerned the Mandatory Underwriting Provisions. The first proposed to delay their compliance date by fifteen months from August 19, 2019, to November 19, 2020.[5] The notice proposed to rescind the Mandatory Underwriting Provisions in their entirety.[6] In June 2019, the CFPB issued a final rule officially delaying the compliance date for the Mandatory Underwriting Provisions.[7] As of this writing, no final rule has been issued regarding rescission of the Mandatory Underwriting Provisions.

However, regardless of the status of the proposed rulemakings, the U.S. District Court for the Western District of Texas has stayed the compliance date for the entirety of the Payday Lending Rule in connection with a pending case between the CFPB and trade groups.[8] As of this writing, the stay is still in effect.[9]

Federal Enforcement Actions

In addition to its rulemaking activities on small dollar lending, the CFPB and the Federal Trade Commission ("FTC") have also been active in the past year on the enforcement front. In July 2018, the CFPB entered into a settlement with Triton Management Group, Inc. ("Triton"), a small dollar storefront lender operating in Alabama, Mississippi, and South Carolina.[10] The CFPB found that Triton engaged in deceptive acts and practices by failing to properly disclose the loan term and payment schedule for certain Mississippi title loans.[11] The CFPB also found that Triton violated the Truth in Lending Act by understating the finance charge in connection with its Mississippi auto title loans and failing to disclose the annual percentage rate for its loans in its advertisements.[12] The consent order entered a judgment for equitable monetary relief of approximately $1.5 million against Triton; however, full payment of the amount was suspended, subject to Triton paying $500,000 to the allegedly affected consumers.[13] A civil monetary penalty of one dollar was also imposed.[14]

4. *See* 12 C.F.R. §§ 1041.7–1041.9 (2019); *see Small Dollar 2018*, *supra* note 1, at 526–27.

5. Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date, 84 Fed. Reg. 4298, 4302 (Feb. 14, 2019).

6. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. 4252, 4296–98 (Feb. 14, 2019).

7. Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date; Correcting Amendments, 84 Fed. Reg. 27907 (June 17, 2019).

8. Order at 2–3, Cmty. Fin. Servs. Ass'n of Am. Ltd. v. Consumer Fin. Prot. Bureau, No. A-18-CV-0295-LY (W.D. Tex. Nov. 6, 2018), https://www.cfsaa.com/files/files/rulestaynov2018.pdf.

9. Order, Cmty. Fin. Servs. Ass'n of Am. Ltd. v. Consumer Fin. Prot. Bureau, No. A-18-CV-0295-LY (W.D. Tex. Aug. 6, 2019), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/08/21754519-0-32597.pdf.

10. Consent Order, Triton Mgmt. Grp., Inc., CFPB No. 2018-BCFP-0005 (July 19, 2018), https://files.consumerfinance.gov/f/documents/bcfp_triton-management-group_consent-order_2018-07.pdf.

11. *Id.* at 4–7.

12. *Id.* at 8–10.

13. *Id.* at 12–13.

14. *Id.* at 15.

In October 2018, the CFPB announced a settlement with Cash Express, LLC ("Cash Express"), a check casher, payday lender, and title lender based in Tennessee.[15] The CFPB found that Cash Express engaged in deceptive acts and practices by sending collection letters to consumers whose debts were past the applicable statute of limitations.[16] The CFPB also found that Cash Express engaged in deceptive acts or practices by misrepresenting to consumers that it may furnish information about them to consumer reporting agencies.[17] Additionally, the CFPB found that when consumers used Cash Express's check-cashing services, the company's employees were required to keep some or all of the proceeds to satisfy consumers' outstanding debts with the company.[18] Cash Express agreed to pay $32,000 in restitution to consumers and a $200,000 civil penalty to resolve the allegations.[19]

In January 2019, the CFPB entered into a consent order with Enova International, Inc. ("Enova"), a Chicago-based online payday and installment lender.[20] The CFPB found that Enova engaged in unfair acts or practices by debiting consumers' bank accounts without the required authorization and by failing to honor loan extensions it had granted to customers.[21] Enova agreed to pay a civil money penalty of $3.2 million to resolve the allegations.[22]

In February 2019, the CFPB entered into a consent order with Cash Tyme, a storefront payday lender.[23] Among other things, the CFPB found that Cash Tyme engaged in unfair acts or practices by not having adequate processes in place to prevent unauthorized charges to consumers who had paid off all or part of their loans and by failing to accurately and promptly identify and refund such overpayments when they occurred.[24] The CFPB also found that Cash Tyme's loan application required consumers to list telephone numbers for employers, supervisors, and other personal references and that when a customer became delinquent on a loan, Cash Tyme contacted the customers' personal references for purposes other than obtaining information about the customers' location.[25] The CFPB further found that Cash Tyme engaged in deceptive acts or practices by using reference information as telemarketing leads and making marketing calls to customers' personal references.[26] To resolve the allegations,

15. Consent Order, Cash Express, LLC, CFPB No. 2018-BCFP-0007 (Oct. 24, 2018), https://files.consumerfinance.gov/f/documents/bcfp_cash-express-llc_consent-order_2018-10.pdf.
16. *Id.* at 5–7.
17. *Id.* at 7–8.
18. *Id.* at 8–10.
19. *Id.* at 13, 16.
20. Consent Order, Enova Int'l, Inc., CFPB No. 2019-BCFP-0003 (Jan. 25, 2019), https://files.consumerfinance.gov/f/documents/cfpb_enova-international_consent-order_2019-01.pdf.
21. *Id.* at 4–6.
22. *Id.* at 10.
23. Consent Order, CMM, LLC, CFPB No. 2019-BCFP-0004 (Feb. 5, 2019), https://files.consumerfinance.gov/f/documents/cfpb_cash-tyme-consent-order_2019-02.pdf.
24. *Id.* at 6–8.
25. *Id.* at 8–12.
26. *Id.* at 12–14.

Cash Tyme agreed to certain recordkeeping and compliance monitoring provisions[27] and to pay a civil penalty of $100,000.[28]

In April 2019, Avant, LLC ("Avant"), an online installment loan company and bank servicer, entered into a consent order with the FTC over allegations that it engaged in deceptive and unfair loan-servicing practices in connection with loans serviced for a bank.[29] Among other things, the FTC alleged that Avant required payments by remotely created check (a paper check prepared by Avant, but drawn on the consumer's account), although it was prohibited from doing so in connection with transactions deemed to be "telemarketing" by the FTC.[30] Because repayment by remotely created check is prohibited for telemarketing transactions, the FTC alleged that, in effect, consumers were offered only one method of repayment—preauthorized recurring fund transfers—in violation of the Electronic Funds Transfer Act.[31] The company was ordered to pay a judgment of $3.85 million to resolve the matter.[32]

State Enforcement Actions

Title lenders saw increased scrutiny from state agencies in 2019. The California Department of Business Oversight filed an action in March 2019 against title lender Fast Money Loan, alleging that the company, among other things, charged interest and fees greater than those permitted by law, failed to consider borrowers' ability to repay as required, and used that failure as a marketing tool.[33] The complaint sought to revoke the company's licenses and declare its loans void.[34] In April 2019, the Maryland Attorney General filed charges against title lender Cash-N-Go, Inc., alleging that the company was not properly licensed and that it was typically charging usurious interest rates more than ten times the state's legal rate for consumer loans.[35] The complaint sought restitution and damages for injured consumers and imposition of a civil penalty.[36] Both matters remain pending as of this writing.

27. *Id.* at 24–26.

28. *Id.* at 26.

29. *See* Consent Order, FTC v. Avant, LLC, No. 1:19-cv-02517 (N.D. Ill. Apr. 15, 2019), https://www.ftc.gov/system/files/documents/cases/162_3090_avant_llc_proposed_stipulated_order_4-15-19.pdf [hereinafter Avant Consent Order].

30. Complaint at 3–4, FTC v. Avant, LLC, No. 1:19-cv-02517 (N.D. Ill. Apr. 15, 2019), https://www.ftc.gov/system/files/documents/cases/162_3090_avant_llc_complaint_4-15-19.pdf [hereinafter Avant Complaint]; *see also* 16 C.F.R. § 310.4(a)(9) (2019) (prohibiting telemarketers from using remotely created checks as payment for goods or services).

31. Avant Complaint, *supra* note 30, at 4–6, 14–15.

32. Avant Consent Order, *supra* note 29, at 6.

33. Accusation at 2–7, Comm'r of Bus. Oversight v. RLT Mgmt., Inc., CFL License No. 603-I816 (Cal. Dep't Bus. Oversight Mar. 19, 2019), https://dbo.ca.gov/wp-content/uploads/sites/296/2019/03/RLT-Management-Inc.-Accusation-03-19-19.pdf.

34. *Id.* at 13–14.

35. Statement of Charges at 13, Consumer Prot. Div. v. Cash-N-Go, Inc., No. 19-003-308458 (Md. Office Att'y Gen., Consumer Prot. Div. Apr. 1, 2019), http://www.marylandattorneygeneral.gov/News%20Documents/041019_CNG_SOC.pdf.

36. *Id.* at 25–26.

In April 2018, the Virginia attorney general filed a lawsuit against NetCredit, alleging that it had provided more than 47,000 borrowers with closed-end installment loans using annual rates from 34 percent to 155 percent, well in excess of the 12 percent interest rate cap permissible for non-licensed lenders.[37] In October 2018, the Fairfax County Circuit Court held that Virginia was the proper venue and that the matter should move forward.[38] The court found that the Utah choice-of-law provision in the contracts was unenforceable because there was no reasonable nexus to Utah and the contracts violated Virginia's public policy against usury.[39]

In the past year, the Virginia attorney general has also taken action against an entity that made illegal loans disguised as purchases of consumer pension payments. In November 2018, a Virginia court ordered Future Income Payments ("FIP") to pay over $20 million in restitution and over $31 million in civil penalties for allegedly making usurious loans in violation of the Virginia Consumer Protection Act ("CPA").[40] The ruling was the result of a lawsuit that alleged that FIP violated the CPA by misrepresenting that it was "buying" portions of borrowers' monthly pension payments, when it was actually making high-cost installment loans with interest rates that far exceeded Virginia's 12 percent annual interest rate cap.[41]

Other State Court Litigation

In the past year, state supreme courts in California and Georgia have handed down consequential small dollar lending decisions. In August 2018, upon certification of a question from the Ninth Circuit in *De La Torre v. CashCall, Inc.*,[42] the California Supreme Court ruled that a consumer loan can have an interest rate so high that the loan agreement is "unconscionable," and therefore unenforceable, despite not being subject to a usury cap.[43] Eduardo De La Torre sued CashCall, Inc. ("CashCall"), an online lender, on behalf of himself and a class of consumers, arguing that CashCall's loan agreements were unconscionable in violation of the California Finance Code[44] and the California Unfair

37. Complaint at 1, Va. *ex rel*. Herring v. NC Fin. Solutions of Utah, LLC, No. 2018-06258 (Va. Cir. Ct. Apr. 23, 2018), http://files.constantcontact.com/bfcd0cef001/85ff7242-7826-4c07-94fe-9966c7883165.pdf.

38. Opinion Letter at 2, Va. *ex rel*. Herring v. NC Fin. Solutions of Utah, LLC, No. 2018-06258 (Va. Cir. Ct. Oct. 28, 2018), https://www.fairfaxcounty.gov/circuit/sites/circuit/files/assets/documents/pdf/opinions/cl-2018-6258-cw-v-nc-financial-solutions-of-utah-llc.pdf.

39. *Id.* at 22, 25; *see also* Utah Code Ann. § 70C-2-101 (2019).

40. Permanent Injunction and Final Judgment at 4–5, Va. *ex rel*. Herring v. Future Income Payments, LLC, No. 28000527-00 (Va. Cir. Ct. Nov. 14, 2018), http://files.constantcontact.com/bfcd0cef001/c0f990c8-c024-4b92-b293-9fc1891b67d1.pdf.

41. Complaint at 2–3, Va. *ex rel*. Herring v. Future Income Payments, LLC, No. 28000527-00 (Va. Cir. Ct. Mar. 6, 2018), http://files.constantcontact.com/bfcd0cef001/9397b73a-3a92-4367-b436-0c070d9d0eae.pdf.

42. De La Torre v. CashCall, Inc., 854 F.3d 1082, 1085 (9th Cir. 2017).

43. De La Torre v. CashCall, Inc., 422 P.3d 1004, 1009 (Cal. 2018).

44. Cal. Fin. Code § 22302 (2019).

Competition Law,[45] based on their allegedly excessive interest rates.[46] CashCall only made loans greater than $2,500 in California, and loans of this size are not subject to express interest rate caps under California law.[47] CashCall argued that because the legislature chose to remove interest rate caps for loans greater than $2,500 but chose to retain them for smaller consumer loans, those larger loans could not be deemed unconscionable based on their interest rates as a matter of law.[48]

The California Supreme Court held that an interest rate could be found unconscionable for loans of $2,500 or more, reasoning that the interest rate on a consumer loan is a critical term of a loan contract.[49] The court did not issue a ruling on the merits of whether the CashCall loan agreements were in fact unconscionable, noting that the Ninth Circuit did not ask them to do so.[50] In February 2019, on remand from the Ninth Circuit, the district court declined to exercise supplemental jurisdiction over the claim regarding unconscionability and dismissed the claim without prejudice to being refiled in California state court.[51]

Ruth v. Cherokee Funding, LLC,[52] a putative class action, alleged violations of the Georgia Industrial Loan Act ("GILA") and the state's Payday Lending Act ("PLA").[53] The suit concerned "litigation funding agreements," which are agreements whereby a third party gives a party to a lawsuit a lump sum in exchange for future payment streams that may result upon the disposition of the lawsuit.[54] Cherokee Funding, LLC ("Cherokee") had entered into two separate litigation funding agreements with the plaintiffs, providing each a principal amount of less than $3,000 to be repaid upon their recovering monetary awards in their personal injury lawsuits.[55] After the underlying lawsuits were successfully resolved, Cherokee sought repayment at allegedly exorbitant rates.[56]

Cherokee moved to dismiss the complaint, arguing that it was not subject to the PLA or the GILA because the funding agreements at issue were not loans but rather investments in the plaintiffs' respective litigation efforts that created a security interest in the proceeds of the litigation.[57] The trial court granted the motion in part, finding that the GILA did not apply.[58] However, it denied the motion with respect to the PLA.[59] Both parties appealed, and the Georgia

45. *Id.* § 17200.
46. *De La Torre*, 422 P.3d at 1008.
47. *Id.*
48. *Id.* at 1009.
49. *Id.* at 1010.
50. *Id.* at 1009.
51. De La Torre v. CashCall, Inc., No. 08-CV-03174-TSH, 2019 WL 452028, at *1 (N.D. Cal. Feb. 5, 2019).
52. Ruth v. Cherokee Funding, LLC, 820 S.E.2d 704, 708 (Ga. 2018).
53. GA. CODE ANN. § 7-3-1 (West 2019); *Id.* § 16-17-1.
54. *Ruth*, 820 S.E.2d at 706–07.
55. *Id.* at 707–08.
56. *Id.* at 708.
57. *Id.*; Cherokee Funding, LLC v. Ruth, 802 S.E.2d 865 (Ga. Ct. App. 2017), *aff'd*, 820 S.E.2d 704 (Ga. 2018).
58. *Ruth*, 820 S.E.2d at 708.
59. *Id.*

Court of Appeals concluded that neither the GILA nor the PLA applied to the funding agreements.[60]

After granting the plaintiffs' petition for a writ of certiorari, the Supreme Court of Georgia affirmed the judgment of the appellate court, finding that when the obligation to repay is only contingent and limited, there generally is no "loan" for purposes of the GILA and the PLA.[61] Accordingly, the statutes do not apply to the litigation funding agreements.

Legislative Activity

Over the past year, three states have enacted legislation or adopted regulations that made significant changes to small dollar lending requirements. In November 2018, Colorado voters approved Proposition 111, amending Colorado's Deferred Deposit Loan Act to cap the annual percentage rate for deferred deposit loans (payday loans) at 36 percent.[62] Proposition 111 took effect in February 2019.[63]

In April 2019, Oklahoma Governor Kevin Stitt signed SB 720, creating the Oklahoma Small Lenders Act ("OSLA").[64] The OSLA terminates deferred-deposit lending ("DDL"),[65] effective August 2020, and allows DDL licensees to apply for an OSLA license.[66] OSLA licensees will be authorized to offer unsecured loans with a term from sixty days to twelve months, offer loan amounts up to $1,500 per borrower, and charge an interest rate up to 17 percent per month.[67] OSLA loans must be fully amortized and payable in substantially equal periodic payments and must allow prepayment in whole or part at any time without penalty.[68] OSLA licensees will be required to verify outstanding amounts by using a private database approved by the Department of Consumer Credit.[69] OSLA lenders will be prohibited from making an OSLA loan if the total scheduled payments coming due in a month exceed 20 percent of the borrower's gross monthly income.[70] In addition, OSLA lenders will be required to verify the income information used to determine the borrower's gross monthly income.[71]

On August 28, 2018, the Financial Institutions Division of New Mexico's Regulation and Licensing Department amended and repealed certain existing regulations interpreting New Mexico's Small Loan Act and adopted certain new regulations.[72] The new and amended regulations became effective in September

60. *Id.* at 709.
61. *Id.* at 709–10.
62. Initiative Petition—No. 111, 2018 Colo. Legis. Serv. Initiative Petition 111 (West).
63. Colo. Rev. Stat. Ann. § 5-3.1-101.5 (West 2019).
64. S.B. 720, 57th Leg., Reg. Sess. (Okla. 2019).
65. Okla. Stat. tit. 59, §§ 3101–3119 (2019).
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. XXIX N.M. Reg. 1155 (Aug. 28, 2018).

2018.[73] Among other things, the regulations adopt new language for licensees to include in a mandatory brochure that small-loan businesses must provide to borrowers, require licensees to prominently display disclosures of loan charges, and require certain disclosures for refund anticipation loans.[74] The new regulations also create new requirements for licensees' websites, social media pages, and mobile apps.[75]

73. *Id.*
74. *See, e.g.*, N.M. Code R. § 12.18.10.9 (2018); *id.* §§ 12.18.9.1–12.18.9.9 (2018).
75. *Id.* § 12.18.4.8 (2018); *id.* § 12.18.10.8.