Ten More Trends and Developments in Consumer Financial Services Law

Alvin C. Harrell
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By Alvin C. Harrell

1. Introduction

This is a follow-up to a previous Quarterly Report article on related issues. The ten trends and developments in the previous article, along with selected citations to some additional, more recent information on each, are as follows:

- The Demise of Private Subprime Mortgage Lending.
- Regulation of the Banking System is Being Used to Cut Off Financial Services to Selected Types of Bank Customers.
- Private Student Lending and For-Profit Education.

2. Connection (from previous column)

See, for example, Fitch Ratings, "Private Subprime Mortgage Lending," January 2006; and see, for example, "Regulation of the Banking System is Being Used to Cut Off Financial Services to Selected Types of Bank Customers," February 2006.

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Professor Harrell is Executive Director of the Conference on Consumer Finance Law and a member of its Governing Committee; a member of the American Law Institute (ALI); a member of the American College of Commercial Finance Lawyers and the American College of Consumer Financial Services Lawyers; and served as Chair of the Financial Institutions and Commercial Law Section of the Oklahoma Bar Association. With Professor Miller and others he recently completed 2015 Oklahoma Comments for Title 12A of the Oklahoma Statutes Annotated. In addition to the 2010 amendments to the uniform text of UCC Article 9, he is the editor of Title 12A. He is a graduate of Oklahoma City University (B.S., J.D., and M.B.A.) and Southern Methodist University (LL.M.), and served as Law Clerk for Judge Alfred P. Murrah of the United States Court of Appeals for the Tenth Circuit.
• Federal Regulation of Private Debt Collection.
• Regulation of the Internet.

TILA/RESPA Integrated Disclosure Rule (TRID Rule).

The Decline of Community Banking and the Impact of Increased Concentration in the Banking Industry.

Cybersecurity, Privacy, Identity Theft, Money Laundering and Electronic Money and Payments.

CFPB Regulation of Auto Insurance and Fair Lending Issues.

The Role of Contract Law and Private Litigation in the Age of the Super Administrative State - A Tale of Two Americas.
II. Plight of the Millennials

It will not be news to most readers that the 2015–2016 presidential campaign season has revealed some deep-seated frustrations, in some cases even anger, at both the ends of the political spectrum and everywhere in between, as regards the state of the American economy and its future prospects. While these emotions are apparently broad-based, the so-called "millennial generation (Millennials)" is particularly and dramatically affected, facing some hurdles and possible disappointments that are largely unprecedented in American history. As noted in the Conclusion to this article at Part XII, some of these issues affect American consumers more broadly (not just Millennials) and therefore are treated separately throughout this article. But, because of their stations in life (with many years of potentially dismal consequences to come), and thus their importance to the future, Millennials are a particularly notable cohort of consumers. Moreover, as noted below, they are impacted in some unique ways by consumer financial services laws (broadly defined), and therefore their issues deserve separate attention.

This discussion highlights a few of the resulting issues. First and most obviously, many Millennials face a "mountain of student loan debt" that may impact their ability to finance the other customary activities of American life, on top of the reduced employment and income opportunities that result from our current slow-growth economy.

This puts them in a kind of financial "squeeze" not commonly encountered in this country since the 1930s.

Second, because many Millennials are at a stage of life traditionally involving increased family size (and formations), they are disproportionately affected by the current difficulties in the housing and mortgage loan markets. These difficulties include housing price inflation in some market segments, and the restricted availability of mortgage finance in others. As a result, large numbers of Millennials (as well as many other consumers) are being limited to rental housing, at a time of significantly increasing rents. This adds to the "squeeze" noted above.

The results may include consequences not only for Millennials, but for the broader economy (and even in politics, as possibly demonstrated during the current campaign season), if Millennials fail to achieve the upward financial mobility that has characterized previous generations. Moreover, the policy responses to this problem will help determine what kind of society emerges in this country in the twenty-first century. As many other countries have experienced, counter-productive economic policies often evoke emotional public responses that result in even worse policies, sometimes creating a downward spiral of social and economic pain and suffering.

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17. See supra note 52.

18. See supra notes 18 & 11. See also Ken Sweet, Associated Press, More On Suburbs: Renting Prices, L.A. Times, Mar. 13, 2014, at C9. For example, the living space may seem inadequate, and the living situation may be "more like a dormitory," noting that living arrangements may also "bear some resemblance to those in a fraternity house." See also James R. Keck and James C. Best, "Fraternity House," Time, May 25, 2010, at 20. In other words, this is essentially a "dormitory" for adults.


In general terms, the obvious solution is increased economic growth, along with improved employment prospects and increased mainstream credit availability to allow consumers to leverage their improved prospects. The travails of the Millennials illustrate the difficulty of achieving these goals in the current political climate, as well as the dangers of failing to do so, as evidenced, e.g., in the delayed formations of new households. As others have noted, each household formation creates roughly $145,000 in economic activity, so for every 70,000 formations annually deferred there is a loss to society of $10 billion. Assuming a number of affected Millennials in the range of maybe ten times that, the adverse economic impact could be in the range of $100 billion per year. These are household formations that people want to make; they do not need policies to encourage that, they merely need the impediments removed. The question is: what can be done to reduce the current legal impediments that are hampering economic growth, restricting credit availability and discouraging the formation of new jobs and households? Addressing these impediments (which have an obvious way of creeping into our system of laws and regulations) may be essential to the future prospects of the Millennial generation.

III. Impact of Technology

This continues to be a bright spot, worldwide, in an economic environment that otherwise may seem unusually bleak.25 Even as some traditional financial services are being curtailed, technology is opening new possibilities for entrepreneurs to serve new or previously unmet needs.26 Examples abound, including such things as the internet economy,27 crowdfunding,28 virtual currencies29 and electronic payments (the latter permitting access to payment services by consumers in countries that lack the legal structure necessary for traditional banking transactions).22

To the extent that these technologies liberate private transactions from legal impediments that otherwise discourage economic growth, they may permit the emergence of new financial and employment opportunities, in the United States and elsewhere. However, this raises the usual potential for conflict between the need to protect party autonomy and the countervailing need for consumer protection. It hardly needs to be said that our society (like all societies) often does a poor job of reconciling these conflicting needs. Moreover, it should be conceded that one reason for the success of these new technologies is that no one consistently anticipated them and therefore there has not been an effort to regulate them. As this changes, there may be new risks to innovation and party autonomy.33

In addition, the potentially disruptive effects of these technologies on existing financial structures and legal systems should not be underestimated. At the same time the new technologies are expanding the scope and availability of financial services, they are also reducing the transaction costs and threatening the role of traditional intermediaries (including institutions, investors and regulators); this may unleash a backlash of anticompetitive forces and perhaps legal and regulatory restrictions that will endanger the prospects for an expanding financial services marketplace.34 If the new technologies are not able to fill the needs left unmet by a reduced system of traditional intermediaries, there could be adverse economic consequences including a continued deleveraging of the private economy.

IV. The Deleveraged Economy

A characteristic of the economic environment for subprime borrowers since 2006 has been reduced credit availability, i.e., the deleveraging of consumer households.35 Indeed, the contraction of subprime mortgage lending that began in late 2006 was a primary driver of the subsequent housing market collapse and

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25. (Continued from previous page)


27. See, e.g., supplement Part II. In particular, notes 20 & 22, supra note 17. The global economy is in a deep slump, ... a global slump. (Continued from next column)


29. See, e.g., Robert Henry, Ending the Crisis, Wall St. J., Apr. 30, 2016, at 11. (Continued from next column)

30. See, e.g., Robert Henry, Ending the Crisis, Wall St. J., Apr. 30, 2016, at 11. (Continued from next column)

31. See, e.g., Robert Henry, Ending the Crisis, Wall St. J., Apr. 30, 2016, at 11. (Continued from next column)

32. See, e.g., Robert Henry, Ending the Crisis, Wall St. J., Apr. 30, 2016, at 11. (Continued from next column)

33. See, e.g., Robert Henry, Ending the Crisis, Wall St. J., Apr. 30, 2016, at 11. (Continued from next column)

34. See, e.g., Robert Henry, Ending the Crisis, Wall St. J., Apr. 30, 2016, at 11. (Continued from next column)

35. See, e.g., Robert Henry, Ending the Crisis, Wall St. J., Apr. 30, 2016, at 11. (Continued from next column)
resulting financial crisis. To a large extent, this deleveraging was codified in the Dodd-Frank Act, and arguably the CARD Act has done some of the same for credit card debt. While this may be partly due to an alleged new preference of Millennials for the avoidance of debt, it also seems fair to say that (at least in part) this deleveraging reflects a simple reduction in credit availability.

If so, it is part of a larger problem, apparently affecting consumers and economies worldwide, to the point that central bankers in widely disparate parts of the world have resorted to multiple waves of very low and even negative interest rates as part of an aggressive effort to encourage lending and other credit transactions. It is quite extraordinary that, in the words of the Wall Street Journal, "central bankers are using taxes [on capital] and bribes [in an effort] to spur lending." It appears that the pendulum has swung from an excessive credit expansion in the period 1993–2006, to an opposite trajectory in the period since.

Public policy must bear some responsibility for this dramatic turn of events. The policy responses to perceived excesses in subprime mortgage lending, including a regulatory crackdown and the Dodd-Frank Act, are focused on measures intended to restrict the availability of credit, and include formal and informal pressures resulting from legal and regulatory uncertainties and enforcement practices. The results include a dramatic reversal of the twentieth century pattern of an expanding economy funded by increased credit availability (the so-called "democratization of credit.") It is a striking trend that affects the basic direction of modern economic society.

V. Abusive Practices and the Role of the CFPB

Obviously the Bureau of Consumer Financial Protection (CFPB) is playing a central role (as assured by the Dodd-Frank Act) in development of the twenty-first century consumer financial services marketplace. Thus, the legal approaches taken by the CFPB will be among the most important determinants of financial services law and credit availability for consumers in the foreseeable future. The enforcement authority of the CFPB enables it to create essentially a parallel legal system, significantly outside the scope of traditional legislative and judicial structures. The polarized, and therefore often gridlocked, nature of our traditional democratic institutions of government may mean that few legislative checks and balances apply. The CFPB thus has considerable ability to fashion a self-pollinated jurisprudence that is difficult to predict. Moreover, "the nature of regulation is that regulation is always going to be well behind the curve of innovation." The result is some inherent uncertainty as regards the law applicable to evolving financial practices. These factors will impact, and help to determine, the nature and structure of American consumer financial services law.

An example is the continuing development by the CFPB of standards governing "abusive" acts and practices. For the most part, the CFPB seems to have taken a deliberative, incremental approach to date. Many of the CFPB enforcement actions in this area of law illustrate definitive concepts and clear examples of apparently abusive conduct ripe for redress and reform. On the other hand, this case-by-case enforcement approach necessarily creates a risk of uncertainty as regards the future direction of these efforts, and the resulting rules of "law" may be characterized by considerable discretion and ambiguity.

For some examples, see, e.g., Repiques, supra note 13, at 85–88 & 105–106. However, some of these issues are being subjected to scrutiny in court. See infra notes 14 & 148–150.

44. 2014 Fisher Program, supra note 19, at 129 (comments of Jeff Langston) ("The pendulum swings generally very far averse to credit").

45. 2013 Fisher Program, supra note 19, at 129 (comments of Jeff Langston) ("The pendulum swings generally very far averse to credit").
Some of this is probably inevitable, given our current legal regime and the infinite variety of issues in human behavior, practices and relations. On the other hand, the resulting uncertainties may deter legitimate behavior by parties who are logically risk-averse as much as abuses (by those naturally inclined to accept legal risks in return for excessive rewards). In effect, the modest rewards available in ordinary transactions may not be sufficient to incentivize legitimate transactions in view of the new legal and regulatory risks and uncertainties, while the higher profits inherent in some abusive practices may be viewed as sufficient to compensate for the resulting risk. Thus, a high-profile enforcement regimen, in the context of evolving legal standards, may drive away legitimate transactions in favor of more dubious ones. It is an issue for policymakers and commentators to consider.

VI. Alternatives to Traditional Consumer Financial Services

Two of the trends and developments noted above (the delayering of traditional financial services, and the emergence of technology-based alternatives) suggest also a third possible wave of changes, in the form of financial services alternatives based not on technology but on more basic relationships, including early twentieth century business models that more recently fell into disuse but may now be making a comeback. Examples of many others that have cited include: increased reliance on loans from family and friends;\(^{19}\) seller financing for subprime purchasers of homes;\(^{20}\) and retail sales finance ("old traditional proprietary credit") by merchants.\(^{21}\) In some of these scenarios, the hurdles that a [seller or other creditor] has to meet in terms of making that credit available are significantly lower than the hurdles that a bank...is going to have to meet.\(^{22}\) Thus, to some extent, alternative financing sources may replace mainstream bank lending transactions that are becoming less available.

Of course, it is not clear that consumers are always better off in this legal environment; it is possible that the costs will be higher, credit availability will be reduced, and abuses will be more common.\(^{23}\) Still, when mainstream sources of financial services are constrained, as in the current legal and regulatory environment, financial needs will remain and are likely to be satisfied elsewhere, at some cost, and thus the use of alternative sources of financial services can be expected to increase; obviously, the need for credit and payment services does not go away just because traditional financial intermediaries cease to serve the market.\(^{24}\) Indeed, if the alternatives are in turn curtailed the chances are that even more costly alternatives (and reduced availability) will be the result.\(^{25}\) So long as contract law and a reasonable degree of party autonomy exist, so that consumers have some ability to conduct private transactions, this is likely to be the case, even if the resulting credit delivery system "is much closer to your grandparents' delivery system in practice[.]", as opposed to the more straightforward ("democratized") credit delivery systems of the late twentieth century.\(^{26}\)

VII. Scope of CFPB Jurisdiction

Another interesting issue, that seems likely to generate discussion and perhaps litigation in the future, concerns the statutory limitations on the jurisdiction of the CFPB. This jurisdiction is both deep and wide, but presumably not unlimited.\(^{27}\) Of course, the CFPB may be inclined to interpret its jurisdictional limits liberally, but at some point those limits may need to be more clearly defined, in ascertainable ways. So far, the CFPB mostly has been busy addressing matters clearly within its purview (and obviously there are plenty of those); however, more recently it has begun to branch out somewhat in exploring the limits of its reach.

The example referenced here is the CFPB authority over companies that

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19. Unfortunately, not a reliable source for many consumers. One may as well add, "Let them eat cake."

20. See, e.g., supra note 22 and note 2.


22. Id. Quire possibly the penalties also will be lower when things go wrong. Compare, e.g., traditional judicial remedies with those imposed on large banks in the aftermath of the housing and mortgage crises of the 2000's. See, e.g., Churches, Raymond & Emily Gliner, Where Did $110 Billion Go?, Wall St. J., Mar. 10, 2016, at A16 (tracking the recent lines put by the largest U.S. banks to Emily Gliner, Anna Viezwodnik & Joe Light, "Bank in Part $142 Billion in Mortgage Accord," Wall St. J., Feb. 4, 2016, at B3 (noting that this is only the bank's third-largest fine, after previous, related fines of $5.9 billion and $5.5 billion). All of this despite the fact that "hardly any Wall Street executives have faced criminal charges for the events that brought about the financial crisis," something that "remains a sore spot for many Americans" but many simply reflect a lack of supportive evidence. See, e.g., Anna Viezwodnik & Ryan Tracy, Crisis-Era Cases Put to Rest, Out, Wall St. J., April 5, 2016, at 1. See also Anna Viezwodnik & Christine Rezaud, Courts Treat Crisis-Era Fraud Fine, Wall St. J., May 28, 2016, at A1 (opposing, Reuters & Outlook, The Real Fine That Vanished, May 26, 2016, at A12). See also Benjamin C. L. and Anupama Desai, 7 Years, 158 Cases, 4 Convictions: The Story of the Crisis Crimes, Wall St. J., May 26, 2016, at C1. On the other hand, some major players are in jail or about to go there, e.g., Kenton Grimes, a Crisis-Era Money Launderer Convicted, Wall St. J., Feb. 6, 2016, at A1; see generally, Anna Viezwodnik, U.S. Approves $2.1 Billion Crisis-Era Fine, Wall St. J., Jan. 5, 2016, at C3; O'Keefe, Ryan & Outlook, The Litigation That Vanished, at A14 (illustrating the peril of high-profile public enforcement undertakings, supra note 14).

23. See, e.g., supra notes 2-8 and supra Part III, IV. See also, e.g., Matthew Lodwick & Melvyn Neustadt, Master for Two-Upper Tiers, Lower-Inside Buyers, N. Y. Times, Feb. 21, 2016, at 1; Stephanie Sad, In the Shadows, Stealing Homes, N. Y. Times, Nov. 5, 2015, at 1.

24. See, e.g., supra note 47.

25. Id. Suggesting the possibility of an unfortunate downward spiral in the prospects for some consumers' economic status.

26. See, e.g., supra notes 2, 18, 21, 41, 53 & 152, and infra Part VII. Carried to an extreme, the results can be severe. See, e.g., supra note 25.

27. See, e.g., supra notes 2 & 14, and supra Part III, IV. See also, e.g., Matthew Lodwick, The Dark Side of Affiliate Lending, in the Creditor Firms' Database, 64 Consumer Fin. L. Rep. 254, 285 (2016); Richard P. Baskin & Frank H. Bokerman, Jr., Summary of the Consumer Financial Protection Act of 2009, 19, at 208, 209, 303. See also CFPB/ACIC A No. 15450-01388 RBL, discussed supra note 4, supra op. cit. at 20. Although it is understandable that new agencies like the CFPB will struggle to establish the exact parameters of their authority, they must be especially prudent before choosing to pick high profile headline battles that are not clearly under their remit. Residents of the United States of America. See supra notes 2-8 and supra Part III, IV. See also, e.g., Matthew Lodwick, The Dark Side of Affiliate Lending, in the Creditor Firms' Database, 64 Consumer Fin. L. Rep. 254, 285 (2016); Richard P. Baskin & Frank H. Bokerman, Jr., Summary of the Consumer Financial Protection Act of 2009, 19, at 208, 209, 303. See also CFPB/ACIC A No. 15450-01388 RBL, discussed supra note 4, supra op. cit. at 20. Although it is understandable that new agencies like the CFPB will struggle to establish the exact parameters of their authority, they must be especially prudent before choosing to pick high profile headline battles that are not clearly under their remit. Residents of the United States of America.
recklessly provide substantial assistance" to entities covered by the Consumer Financial Protection Act (CFPA).\textsuperscript{58} In the Universal Debit case, there was an alleged fraudulent scheme by "fly-by-night" companies to collect "phantom" debt that was not owed by the consumers in question.\textsuperscript{59} Assuming the allegations are true, this is a clear case for action by the CFPB. However, the CFPB sued not only the perpetrators, but the payment processors who handled their debit and credit card payments.\textsuperscript{60} The CFPB alleged that the payment processors were "service providers" that violated CFPA section 1036(a)(3) by recklessly providing substantial assistance to the fraudulent debt collection scheme.\textsuperscript{54} This is thought to be the first such allegation by the CFPB in a court of law.\textsuperscript{62} The Universal Debit court agreed with the CFPB that the alleged facts stated a cause of action sufficient to withstand a motion to dismiss, citing authority relating to similar issues involving allegations of securities law violations in enforcement actions brought by the Securities and Exchange Commission (SEC).\textsuperscript{56} This required the CFPB to allege facts indicating "highly unreasonable omissions or misrepresentations that involve...an extreme departure from the standards of ordinary care, and...present a danger of misleading [consumers] which is either known to the defendant or is so obvious that the defendant must have been aware of it."\textsuperscript{57} This seems to impose a fairly high prosecutorial standard of proof for the SEC (and CFPB) to meet, but the Universal Debit court held that the CFPB met this burden by alleging that the high "chargeback rate" in the payment transaction being processed was a "red flag" that gave notice to the processors of possible law violations by the perpetrators.\textsuperscript{65} This is essentially the standard used in criminal aider and abetor prosecutions, and does not require a showing that the defendant "proximately caused" the violation of law.\textsuperscript{56} Instead, it requires only a knowing association and participation with the intent to help the enterprise succeed.\textsuperscript{58} Viewed in this way the prosecutorial burden is much lower, as almost any service provider will want to help its customers succeed and will work toward that end (or it will soon have no customers).

There has long been some concern in the commercial law world about the possible use of securities law concepts in ordinary contract transactions, because the quasi-fiduciary duties imposed on investment advisors\textsuperscript{60} are obviously inconsistent with an arms-length commercial transaction.\textsuperscript{69} The difficulty and expense of obtaining legal malpractice insurance for securities lawyers reflects the resulting legal uncertainties in that context, which make a securities law practice very different (and more expensive) as compared to more routine commercial and contract transactions. If this changes, obviously the cost and availability of routine contract transactions will be adversely affected, perhaps more closely resembling those in securities law transactions.\textsuperscript{60}

The Universal Debit case also is interesting as a reflection on the wide scope of CFPB jurisdiction. While the impact of fact-specific enforcement actions has only a limited immediate and direct effect on other fact patterns, the basic jurisdictional principle evidenced in Universal Debit is quite striking and reflects the importance of section 1036(a)(3).\textsuperscript{57} If CFPB jurisdiction and authority extends not only to "retail" financial services companies doing business with consumers but to the broad range of commercial enterprises that do business with those retail companies (as section 1036(a)(3) may provide), then the reach of the CFPB could extend to almost every nook and cranny of the U.S. economy. There may be very few economic enterprises that are beyond this reach. As others have noted, "payment processors and other [business-to-business] companies should expect further scrutiny from the CFPB.\textsuperscript{72}

\section{IV. State Regulation of Out-of-State Tribal Internet Lenders}

Various internet-related issues already have been noted, but this deserves separate treatment.\textsuperscript{73} Unlike many of the related issues noted elsewhere in this article,\textsuperscript{74} this is often a question of state law rather than federal law.\textsuperscript{64} Indeed, it is simply illustrated in a case like Universal Debit. But the next question is How far will this extend to other scenarios?\textsuperscript{75} Compare discussion supra notes 57 & 58.


\textsuperscript{59} See Smith, supra note 58.

\textsuperscript{60} Id. at 22. This is to be distinguished from "Operation Checkpoint," noted supra at note 58.

\textsuperscript{61} See Smith, supra note 58, at 72.

\textsuperscript{62} Id.

\textsuperscript{63} Id.

\textsuperscript{64} Id. at 73 (quoting 12 U.S.C. 5526(a)(3)).

\textsuperscript{65} Id. Other red flags also were alleged, including customer complaints and difficulties in contacting the perpetrators. Id.

\textsuperscript{66} Id.

\textsuperscript{67} The standard, or something like it, is not unknown in civil litigation, e.g., involving banks, although in this case the kind of litigation some 25 years ago was largely replaced by a realization that, in the phrase of the conundrum "special relationship" an arms-length contractual relationship does not give rise to a fiduciary duty. See, e.g., Peter G. Bice, III, & Adam G. Harrell, Private Label Creditscore, 64 Consumer Fin. L. Rep. 641 (2016). Very recently, however, the specter of aider and abet liability in contract relations may have received new impetus in Zayed v. Associated Bank, N.A., 2015-MC-372 (6th Cir. 2015). In Zayed, the Eighth Circuit ruled in order granting the bank's motion to dismiss, in a case asserting that the bank was liable for aiding and abetting a "Ponzi" scheme by opening a bank account for a fictitious entity without proper due diligence and permitting embezzled transfers from the account by the perpetrator, the more traditional analysis in Arkansas Investor Group, S.A. v. Bank of America, N.A., 2016-App. 22 (6th Cir. 2015) that the bank was not liable for the fraudulent actions of its customer against third parties.


\textsuperscript{69} See supra note 65. Compare the more limited doctrine of good faith in contract law. See, e.g., Alvin C. Harrell, Oklahoma Supreme Court Address the Use and Importance of Good Faith in Commercial Transactions, 54 Okla. Bar Rev. 1, 78 (1992).

\textsuperscript{70} Indeed, it is simply illustrated in a case like Universal Debit. But the next question is How far will this extend to other scenarios?

\textsuperscript{71} Compare discussion supra notes 57 & 58.


\textsuperscript{73} This is, of course, a topic of this article, supra Part II, at notes 56 & 57, and supra Part III.

\textsuperscript{74} Id.
The basic issue is the extent to which states can regulate out-of-state tribal financial services providers who do business with in-state residents. At first glance this may seem to be an easy case for state regulators, and some important case law seemingly would agree, even in the face of vigorous contrary arguments based, e.g., on tribal sovereignty. However, even aside from the tribal sovereignty issues, and as recognized by the Second Circuit in the *Otero-Missouria* case, the basic issue of state law jurisdiction over internet transactions remains ambiguous and significantly unresolved. When the issue of tribal sovereignty is mixed in (where, e.g., the internet financial services provider is owned or affiliated with an Indian tribe), the issues may become even more difficult and uncertain.

In *Otero-Missouria*, the United States Court of Appeals for the Second Circuit affirmed the district court's decision denying the tribal lender's motion for a preliminary injunction against the New York Department of Financial Services (New York DFS), sought by the tribe in order to prevent the New York DFS from taking various enforcement actions to prevent the tribal lender from processing transactions with New York residents. These state enforcement efforts included directed to third party payment processors that allegedly were intended to "destroy [the Tribal enterprises',] "not just with New York borrowers, but with consumers in every other state in the union."

The Second Circuit affirmed the district court's denial of a preliminary injunction, on grounds the factual record and state of the law were too uncertain (as regards the location of an internet lender and the extent of the New York DFS regulatory posture) to warrant preliminary relief. While clearly a victory for the New York DFS, this procedural ruling was not the same as a full-blown decision on the merits, and therefore did not definitively resolve the issues. In *Integrity Advance*, Minnesota state courts rendered more definitive decisions, but on more narrow issues. At issue in that case was whether the Commerce Clause of the United States Constitution would prevent Minnesota from applying its consumer protection law to lending transactions extended over the internet by an out-of-state lender to Minnesota residents. The trial court granted summary judgment to the Minnesota Attorney General, and the Supreme Court of Minnesota affirmed, holding that any resulting impact on interstate commerce was "negligible" because it did not apply to residents of other states. While Minnesota has some history of taking an expansive view of the extraterritorial reach of its state laws, it cannot be denied that this reach is firmly embraced by the courts of that state. Barring contrary holdings in other states or federal courts, the issue seems settled in Minnesota at least.

In contrast, however, two other cases, in Maryland and Connecticut, followed earlier Tenth Circuit precedent in ruling on the merits of related tribal sovereignty issues. In *Great Plains Lending, LLC, et al. v. Connecticut Department of Banking*, the Connecticut Superior Court held that the state's Department of Banking was acting as the equivalent of a state court when it issued cease and desist orders to tribal lenders, and therefore was subject to a defense based on the sovereign immunity of the tribe.

Similarly, in *Everette v. Joshua Mitchell, et al.*, the Maryland federal district court found that wholly-owned subsidiaries of a tribe engaged in internet lending transactions were "arms of the tribe" entitled to sovereign immunity from state administrative authority. The court adopted the Tenth Circuit holding in *Breakthrough Mgmt. Grp.*, as the legal standard, requiring an analysis of six factors including the extent of the tribe's ownership and management, and the resulting income for tribal sources.

These cases also followed a 2014 California Court of Appeals decision that upheld sovereign immunity as a defense for two tribal officials operating an internet lending business. Thus, on the merits, tribal lenders seem to be winning these cases to date.

On the other hand, the state law issues may become moot as the CFPB weighs in, asserting its preemptive authority under federal law. In *CFPB v. Great Plains Lending, LLC* for example, a federal district court upheld the authority of the CFPB to issue civil investigative demands (CIDs) to tribal lenders, rejecting the tribal lenders' arguments that they are entitled to sovereign immunity.
from such demands. At this writing, the case was on appeal to the Ninth Circuit.96

IX. The Madden Case

In Madden v. Midland Funding, LLC,97 the United States Court of Appeals for the Second Circuit held that the National Bank Act (NBA)98 does not preempt a state law usury claim against the non-bank assignee of a consumer credit contract originated by an assignor national bank.99 The court reasoned that allowing such preemption would go beyond the scope of the NBA and permit non-bank entities to exercise preemption authority that is statutorily limited to national banks.100 The Madden decision has caused much consternation in banking circles and some financial markets, in that large amounts of credit contracts are originated by banks and later sold (by assignment) to non-bank assignees who seek to enforce the contracts in states with usury ceilings below the contract interest rate.101 Obviously, these transactions are viable only if usury preemption is available.102

The full ramifications of Madden are not clear at this time, and several issues remain open.103 The United States Supreme Court denied the assignee’s petition for certiorari.104 However, this leaves room for various arguments and avenues of resolution. The relevant arguments are cited elsewhere in this issue, in the article by Michael Tompkins and Susan Mansfield Seaman. These arguments deserve the full explanation they receive in the Tompkins and Seaman article,105 and are noted only briefly here. Essentially one point is that the Second Circuit opinion in Madden addresses only a narrow issue, i.e., whether NBA section 85 extends directly to non-bank entities.106 On this issue, the Second Circuit rejected the assignee’s claim to complete preemption of state law under NBA section 85 (and related provisions at NBA section 86).107 However, even with the limited scope of the statutory language in the NBA, on this narrow issue the Madden decision is questionable, given the obvious adverse impact on modern banking practices and consequent conflict with section 85.108

Moreover, other related issues and arguments may offer even more promise for assignments in a Madden-like scenario, based on fundamental principles of contract law including the law of assignment. The law of assignment has been well recognized for hundreds of years (going back at least to the time of Lord Mansfield as Chief Justice of the English King’s Bench), so that, i.e., an assignee steps into the shoes of the assignor.109 A direct corollary is that a transaction valid when made (VWM) by the assignor does not lose that status by reason of assignment to an assignee (the VWM doctrine), because the assignee takes the rights of the assignor.110 The VWM doctrine was not clearly addressed by the Second Circuit in Madden, perhaps (as argued by Tompkins and Seaman) by reason of an undue focus of the parties on whether the NBA applies directly to non-bank entities.111 If subsequent courts re-focus the inquiry in these cases, to consider the law of contract assignments and the VWM doctrine, it is likely that cases like Madden will be resolved very differently as compared to the Second Circuit’s analysis.

X. The Luiz Case

In Luiz v. United States,112 the United States Supreme Court considered whether the U.S. government was entitled to a pretrial order freezing the assets of Sito Luiz after a federal grand jury charged her with paying kickbacks, conspiring to commit fraud, and other crimes relating to federal healthcare payments.113 A federal statute expressly permits the court to impose a pretrial freeze on certain assets of a criminal defendant (e.g., in a case alleging violations of federal health care or banking laws), including: (1) property “obtained as a result of” the crime, (2) property “traceable” to the crime, (3) and

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98. See supra note 88.
99. 766 F.3d 251-8 (2d Cir. 2014), see supra note 88.
100. See supra note 88.
101. See supra note 88.
102. See supra note 88.
103. See supra note 88.
104. See supra note 88.
105. See supra note 88.
106. See supra note 88.
107. See supra note 88.
108. See supra note 88.
109. See supra note 88.
110. See supra note 88.
111. See supra note 88.
112. See supra note 88.
113. See supra note 88.
other 'property of equivalent value.' In Luis, the government obtained a pre-trial freeze of assets in the third category, that is, property neither obtained by reason of nor traceable to the crime. Luis argued that this violated her right to counsel under the Sixth Amendment to the United States Constitution, because it precluded her from using untainted assets to retain and pay her legal counsel. In a five-to-three decision (a plurality opinion by Justice Thomas was joined by a separate concurring opinion of Justice Thomas), the Supreme Court agreed.

The plurality noted that the case law relied on by the government involved property tainted by the crime, i.e., property unlawfully acquired by the defendant and therefore not belonging to him or her. In contrast, the property at issue in Luis was "untainted; i.e., it belongs to the defendant, pure and simple." A majority of the Justices rejected the position of Justice Kennedy, who posited in his dissent that federal law permits the pre-trial freezing of any property — whether tainted or untainted by the crime — if it might someday be subject to forfeiture.

As the plurality noted, "[t]he distinction...is thus an important one, not a technicality. It is the difference between what is yours and what is mine." Notably, the plurality cited common law precedent dating back to the "relevant legal tradition" of "the 18th-century English legal world" in an opinion that was essentially a defense of common law private property rights and the Sixth Amendment right to counsel, as against pre-trial seizure by the government.

Justice Thomas concurred in the result, but rejected the plurality's "balancing approach," instead relying "strictly on the Sixth Amendment's text and common-law backdrop." His opinion notes that the text of the Constitutioinal language on this point is clear and paramount:

An unlimited power to freeze a defendant's potentially forfeitable assets in advance of trial would eviscerate the Sixth Amendment's original meaning and purpose...If government's mere expectancy of a total forfeiture upon conviction were sufficient to justify a complete pretrial asset freeze, then Congress could render the right to counsel a nullity in felony cases. That would have shocked the Framers.

Justice Thomas agreed with the plurality on these basic points, but rejected the willingness of the plurality to "balance" these Constitutional rights of the defendant against the needs of the government on remand. His opinion notes that these Constitutional rights are absolute, leaving "no room for balancing." Moreover, he noted that there is no basis or guidance in the Constitution or the plurality opinion for determining, as the plurality opinion mandates, whether the defendant's Constitutional rights or the government's interests "lie further from the hearth of a fair, effective criminal justice system."

The plurality and concurring opinions are notable for the reasons indicated above. The dissents essentially counter by reasoning that the defendant's property rights are protected by the subsequent trial on the merits, and that the right to counsel is preserved due to the availability of a public defender. These arguments have prevailed in cases where the frozen assets are derived from the alleged crime (and therefore are tainted by an uncertain ownership claim). But in Luis, five Supreme Court justices attempted to draw an important line that limits this reasoning, designed to protect the Sixth Amendment and fundamental property rights in cases where the government is seeking to seize essential and untainted property of a defendant without a trial.

**XI. The MetLife Case**

On March 30, 2016 United States District Judge for the District of Columbia Rosemary M. Collyer issued her opinion in Metlife, Inc. v. Financial Stability Oversight Council. The decision has caused something of a stir, not least because it imposes objective limits on the authority of a federal administrative entity to create and enforce rules pursuant to a broad legislative mandate.

Pursuant to the Dodd-Frank Act, the Financial Stability Oversight Council (FSOC) determined that "material financial distress" at Metlife (a financial holding company primarily engaged in insurance activities governed largely by state law) could "pose a threat to the financial stability of the United States.

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114. Id. (quoting 388 U.S. 143 (1967)).
115. Id.
116. Id.
117. The plurality opinion was written by Justice Breyer and joined by Justices Roberts, Ginsburg and Sotomayor. Justice Thomas filed a separate concurring opinion. Justice Alito joined a dissenting opinion filed by Justice Kennedy, and Justice Kagan filed a separate dissenting opinion. Id. at 9. Perhaps constitutional law scholars will say this lineup of opinions is predictable, but your author finds it remarkable.
118. Id. at 56.
119. Id.
120. Id. at 7-8.
121. Id. at 38. The plurality opinion noted that other federal defense statutes permit pretrial forfeiture of tainted, but not untainted, property. Id. at 7-8.
122. Id. at 91. The Founding Fathers would be proud, it would seem.
123. Id. at 114. J. Thomas, concurring.
124. Id.
125. Id. The plurality cited common law precedents and rejected the dissenters' position that such seizures are allowable because the defendant cannot rely on a public defender. See id. at 90 and note 128.
127. Id.
129. Id., reh'g granted, 911 F.3d 374 (D.C. Cir. 2018).
Under the Dodd-Frank Act, this designation permits federal supervision by the Federal Reserve Board (FRB) of the operations of the entity so designated, and the imposition of "enhanced prudential standards." Whatever the systemic benefits as envisioned in the Dodd-Frank Act, this designation and supervision carry with them significant new regulatory costs and restrictions, which many consider detrimental to the economic health of the designated entity. Metlife thus resisted this designation and objected to procedural and substantive aspects of the FSOC process and decision.

An initial issue (the first of three broad issues) was whether Metlife is a "U.S. nonbank financial company," i.e., a U.S. company "predominately engaged in financial activities." Judge Collery concluded that Metlife fits this description and is therefore eligible for designation by the FSOC. Eligible entities must then meet one of two (alternative) standards in order to qualify for the FSOC designation, i.e., (1) a "material financial distress" at the company "posed a threat to the financial stability of the United States"; or (2) the "nature, scope, size, scale, concentration interconnectedness, or mix of [company's] activities" could pose the same threat. The Metlife court noted that the FSOC relied solely on the first of these two standards in making the Metlife designation.

Ten statutory factors are provided in the Dodd-Frank Act, to guide the FSOC in making its determination (and the courts in reviewing it). The Dodd-Frank Act also authorizes the FRB "to establish such other prudential standards as [it] determines are appropriate," consistent with 12 U.S.C. section 5352(b)(1), but no such standards had been established when Metlife was designated as systemically important by the FSOC.

In 2010 and 2011, the FSOC conducted a formal rulemaking which resulted in a 2012 final rule (and an appendix to that rule), providing "Guidance for Nonbank Financial Company Determinations" (the Guidance). The Guidance sets forth both procedural and substantive standards for the FSOC to follow in determining whether a company poses a threat to the financial stability of the U.S. The Metlife court concluded that the FSOC failed to comply with the applicable standards as articulated in the Guidance; consequently, the court rescinded the FSOC's Metlife designation on two grounds.

The first ground for the court's decision was that the FSOC "made critical departures from two of the standards it adopted in its Guidance, never explaining such departures or even recognizing them as such." Secondly, the FSOC "purposely omitted any consideration of the cost of the designation to Metlife. Thus, Metlife assumed the upside benefits of designation... but not the downside costs of its decision. This is arbitrary and capricious under the latest Supreme Court precedent." Additionally, the court agreed with Metlife's criticisms of the FSOC for changing its legal position on the relevant issues, between the times of issuing the Guidance and making the Metlife designation, without public acknowledgement or explanation, and for violating its own standards as stated in the Guidance.

With Metlife on appeal, and as expected with issues of such importance, it is clear that other courts (and numerous commentators) will have opportunities to opine (and decide) further on these issues. Moreover, courts do not always have a good track record in terms of placing limits on federal administrative actions -- the inherent, direct prosecutorial power of federal agencies, the broad enabling language of most federal statutes (with their grant of expansive rule-making and enforcement authority), and the immense resources that can be brought to bear by the federal government against a private litigant, mean that such resistance is often futile. Few private parties can afford to fight what is likely, in the end, to be a long and financially ruinous battle, and even judicial victories often allow the agency to merely reconstitute its procedures to reach the desired result.

So the Metlife saga is likely not yet near an end. Still, few would deny that it marks an important milestone in the history of the Dodd-Frank Act and FSOC, with potential ramifications that may go beyond even its broad parameters.

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134. Id. at 25–4. (quoting 12 U.S.C. § 5352(b)(1)).
135. Id. at 24–25 (quoting 12 U.S.C. § 5352(b)(1)).
136. Id. at 61–63 (quoting 12 U.S.C. § 5352(b)(1)).
137. Id. at 31.
138. Id. at 8.
139. Id. at 32–33 (quoting 12 U.S.C. § 5352(b)(1)).
140. Id. at 8.
141. Id. at 75–3 (quoting 12 U.S.C. § 5352(b)(1))).
143. Id. at 1310 (cited in id. at 1310 App. D.).
144. Id. at 77 (quoting id. at 76).
145. Id. at 77–78 (quoting id. at 76).
146. Id. at 77 (quoting id. at 76).
147. Id. at 77–80.
150. See, e.g., supra text and note 114. For a slightly different example, see, e.g., Sharikt B. Umpson, Hands Off My Internet: Why the FCC Should Refuse to Regulate the Internet, 77 Consumer Fin. L. Rev. 375, 381, and oppose developments described in a referenced supra note 6. See also, e.g., Opinion, Letter of the Editor, The Miami Herald, April 23, 2016, at A10 (noting that "Judge Rosenthal's decision is, even if affirmed, likely to succeed in neither launching a new mode of political campaign, nor in reconstituting the lost, systemic, important financial institution under Dodd-Frank,") and noting that the FSOC can look back at "starcases, crises, and scandals of unprecedented scale to reach a suitable conclusion."
151. Of course, if the decision is not yet near an end. Still, few would deny that it marks an important milestone in the history of the Dodd-Frank Act and FSOC, with potential ramifications that may go beyond even its broad parameters.

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XII. Summary and Conclusion

An underlying theme in consumer financial services law is the need for a proper balance between consumer protection and party autonomy. Advocates of each of these sometimes conflicting goals may be inclined to give little credence to the other side of the equation, but it is appropriate to recognize the need for an appropriate balance.

At this point, given the legal, political and economic turmoil of this century to date, it is appropriate to pause and consider whether an appropriate public policy balance has been struck on these important issues, and, in turn, the impact on the economic prospects and well-being of consumers.\(^{131}\) Of course, it is very unlikely that a definitive conclusion can be reached, much less implemented, as little consensus exists on the underlying policy issues or even whether a problem exists in many instances.\(^{132}\) But that does not eliminate the need for a continuing discussion and inquiry, as (intellectually, at least) the issues are not yet closed.

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CFPB and FTC Data Security...

(Continued from page 147)

regulator of data security issues. The CFPB has relied on its Section 5 authority to prohibit companies from engaging in unfair and deceptive acts and practices (UDAAP). The CFPB, however, has been empowered with enhanced authority to bring enforcement actions against companies engaged in UDAAP. The Dodd-Frank Act excludes from the definition of "enumerated consumer laws" subject to the CFPB's jurisdiction the provisions of the Gramm-Leach-Bliley Act, which deal with data security. The absence of any prior enforcement action, much less any emphasis on data security on the CFPB's website, had suggested that the CFPB might defer to the federal banking agencies and the FTC when it comes to investigating and taking enforcement actions related to data security. However, although the CFPB lacks enforcement authority with respect to the data privacy provisions of Gramm-Leach-Bliley, the CFPB has apparently decided that it can use its UDAAP authority with respect to data security matters. That significantly "ups the ante" for large banks and non-banks subject to the CFPB's enforcement jurisdiction.

The CFPB's target in this action was Dwolla, Inc. (Dwolla), a company that operates an online payment system, which uses consumers' personal information to complete financial transactions. Focusing on the deception prong under UDAAP, the CFPB alleged that the company failed to maintain adequate data security practices despite representations made on the company website and in communications with consumers that the company has implemented practices that exceed industry standards, such as the Payment Card Industry Data Security Standard (PCI DSS).

More specifically, the CFPB alleged that Dwolla failed to:

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