

# Consumer Finance Law

**COVID-19** | YEAR IN REVIEW



PERKINScoie

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# STATE OF THE INDUSTRY: MORTGAGE LENDING AND SERVICING

## OVERVIEW

The year 2020 was a tumultuous one given the unexpected COVID-19 pandemic, particularly for the mortgage lending and servicing industry. In response to sudden stay-at-home orders and a sharp drop in employment rates, federal and state policymakers moved quickly to offer financial relief to consumers and borrowers. While facing their own pandemic-induced operational hardships, mortgage lenders and servicers swiftly adjusted their business plans to adopt mortgage forbearance requirements and react to foreclosure moratoriums provided under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Balancing new regulatory requirements and a significant uptick in consumer demands kept lenders and servicers on their toes.

While much of the relief provided under the CARES Act is expected to unwind over the next year, lenders and servicers should buckle up for increased regulatory enforcement under the Biden administration and the Consumer Financial Protection Bureau (CFPB). Additionally, given that foreclosure moratoriums will likely soon be lifted, litigation is expected to make a comeback in 2021 and beyond.



# FEDERAL REGULATORY OVERSIGHT

## CONSUMER FINANCIAL PROTECTION BUREAU'S ENFORCEMENT ACTIONS

Last year saw a continued increase in CFPB enforcement actions with 48—the second-highest yearly total since the bureau began operation in July 2011. This continues a trend from 2019 when enforcement actions began more than doubling year over year—from 10 in 2018 to 22 in 2019. This increase roughly coincides with the appointment of Kathy Kraninger as the second director of the CFPB in December 2018. With Acting Director David Uejio at the reins of the CFPB as of January 21, 2021, we expect this upward trend to continue.

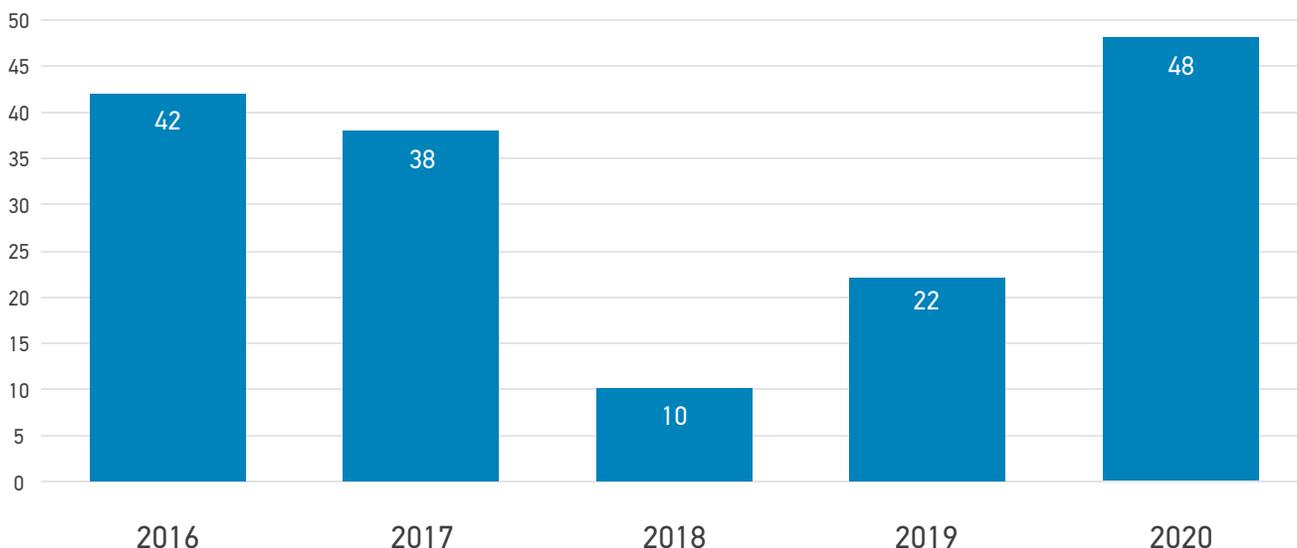
Mr. Uejio's vision for the CFPB is “to elevate and expand existing investigations and exams and add new ones to ensure we have a healthy docket intended to address racial equity.” He further explained that, while “fair lending enforcement is a top priority and will be emphasized accordingly,” the CFPB “will also look more broadly, beyond fair lending, to identify and root out unlawful conduct that disproportionately impacts communities of color and other vulnerable populations.” The CFPB brought its highest number of enforcement actions in 2015, when 57 actions were commenced, and it is foreseeable that the bureau could eclipse this mark in the next year or two.

The year 2020 also saw the commencement of an enforcement action against the largest non-bank mortgage servicer, alleging violations of Sections 1054 and 1055 of the Consumer Financial Protection Act of 2010. The CFPB asserted that Mr. Cooper failed to identify thousands of loans with existing in-flight modifications; foreclosed on borrowers to whom it had promised foreclosure holds; improperly increased payments on modified loans; failed to timely disburse tax payments from borrowers' escrow accounts; failed to properly conduct escrow analyses; and failed to timely remove private mortgage insurance from borrowers' accounts. The CFPB joined in a settlement agreement and consent order entered into between Mr. Cooper and the attorneys general of all states except Colorado and New York for total consumer relief of \$73,346,354.

The CFPB's focus on loss mitigation also produced a consent order against Seterus, Inc., for total consumer relief amounting to \$4,932,525. The CFPB found that Seterus violated the Consumer Financial Protection Act and Regulation X, which implements the Real Estate Settlement Procedures Act, by depriving borrowers of a reasonable opportunity to get their loss mitigation applications evaluated.

## CFPB ENFORCEMENT ACTIONS BY YEAR

FIGURE 1





# THE STATES' REGULATORY OVERSIGHT

# THE STATES' REGULATORY OVERSIGHT

State attorneys general continue to flex their muscle in addressing national issues, including the coronavirus pandemic and the response thereto by mortgage lenders and servicers. Notably, in March 2020, a coalition of 22 attorneys general filed a [comment letter](#) slamming a proposal by the U.S. Department of Housing and Urban Development (HUD) that would gut the current Affirmatively Furthering Fair Housing rule and replace it with a drastically scaled-back rule that lacks meaningful guidance to address segregation and promote integration within our communities.



In April 2020, a coalition of 35 attorneys general sent letters to HUD Secretary [Ben Carson](#) and Federal Housing Finance Agency Director [Mark Calabria](#) requesting action to better protect homeowners from the economic toll of the COVID-19 pandemic. Then in May, a coalition of 26 attorneys general sent a [letter](#) to Secretary Carson requesting further action to protect senior homeowners during the COVID-19 public health emergency.

## NEW YORK

In New York, a state at the forefront of the COVID-19 crisis for much of 2020, Attorney General Letitia James continued to make headlines for her consumer protection efforts. On January 10, 2020, James announced an agreement with real estate company Vision Property Management, LLC (“Vision”), for more than \$3.75 million in restitution to consumers for running an unlicensed and deceptive mortgage-lending business that targeted vulnerable households living on fixed incomes who could not otherwise qualify for conventional financing. The attorney general alleged that Vision purchased distressed properties and then marketed them for sale at a substantial markup—without making repairs and without a license—at interest rates ranging from 10% to 25%. Specifically, Vision allegedly made predatory, subprime loans in violation of the Consumer Financial Protection Act, 12 U.S.C. § 1601 et seq.; the Truth in Lending Act, 15 U.S.C. § 1601 et seq.; Regulation Z, 12 C.F.R. § 1026 et seq.; and various provisions of New York state law. The settlement agreement included transfer of ownership of 58 homes free of any future payments. Vision also agreed to wind down its business in New York and is enjoined from further real estate business in New York.

The New York State Office of the Attorney General announced a \$17 million loan forgiveness settlement with a non-bank mortgage servicer, on June 23, 2020. The settlement was in response to allegations that the company’s loss mitigation communications were unfair and deceptive under New York Executive Law § 63(12) and General Business Law Article 22-A § 349. The allegations further stated that mortgage servicer violated New York’s mortgage servicing regulations, 3 N.Y.C.R.R. Part 419, by failing to make reasonable and good faith efforts to provide borrowers appropriate loss mitigation options and by failing to structure its loss mitigation offers in a way that resulted in reasonably affordable and sustainable payments for borrowers. Specifically, it was alleged that the business prioritized interest-only and short-term modifications without clearly indicating that the payment reductions were temporary and would increase, creating an unacceptable risk of default.

## CALIFORNIA

Across the country, in California, Governor Gavin Newsom signed the California Consumer Financial Protection Law (CCFPL) on September 25, 2020. Modeled after the CFPB, the CCFPL aims to strengthen consumer protections by expanding the regulatory authority of California’s Department of Business Oversight, renaming and transforming it into the Department of Financial Protection and Innovation (DFPI). The new DFPI will have expanded examination and enforcement authority to regulate the offering and provision of consumer financial products or services under California’s consumer financial laws, and, to the extent permissible, under federal consumer financial laws. The substantive provisions of the CCFPL went into effect on January 1, 2021.



# REGULATION BY LITIGATION

## THE CARES ACT: LITIGATION OVERVIEW

In 2020, financial services litigation relating to single borrowers dropped precipitously following the enactment of the CARES Act on March 27. Several provisions of the CARES Act protected borrowers from foreclosure and eviction—likely causing a concomitant drop in single-plaintiff litigation. Specifically, the CARES Act provides up to two 180-day forbearances for borrowers of federally backed mortgage loans affected by the COVID-19 emergency. Government-sponsored enterprises extended the forbearance program by authorizing one additional three-month extension for borrowers in a forbearance plan as of February 28, 2021. And the CARES Act provided an eviction moratorium through late August 2020. Many state and local jurisdictions enacted similar, and sometimes broader, restrictions against eviction. Foreclosure moratoriums on loans backed by Fannie Mae or Freddie Mac are in effect through June 30, 2021. Loans backed by HUD/the Federal Housing Administration, the U.S. Department of Agriculture, or the U.S. Department of Veterans Affairs also cannot be foreclosed until after June 30, 2021.

The CARES Act has had its fair share of litigation in its short history. Notably, federal judges across the country exhibit a clear reluctance to expand the express requirements of the Act. Some courts barred a plaintiff's claims under the Act because the loan at issue was not federally backed and, therefore, not subject to the CARES Act. See *Wilmington Sav. Fund Soc'y, FSB as Tr. of Residential Credit Opportunities Tr. V v. Clay*, 2020 WL 6544242, at \*3 (D. N.M. Nov. 6, 2020); *Jensen-Edwards v. U.S. Bank National Association as Trustee for NRZ Pass-Through Trust VIII* (D. Idaho, July 31, 2020, No. 2:20-CV-00055-BLW) 2020 WL 4430961, at \*1.

Courts are also unwilling to extend the Act's application beyond explicit time limits. See *McRae v. Hope Properties Inc.* (D. Kan., Jan. 4, 2021, No. CV 20-1194-KHV) 2021 WL 22502, at \*3 (finding that the plaintiff was not entitled to a moratorium because that benefit expired on July 24, 2020); *Reynolds v. Wells Fargo Home Mortgage*, No. 7:19-CV-00799, 2020 WL 3977934, at \*1 (W.D. Va. July 14, 2020) (discussing the CARES Act and stating that the Act was inapplicable because the borrower's financial hardship occurred in 2019 and thus predated COVID-19). And one Texas court went so far as to further limit those persons who qualify as borrowers entitled to benefits under the Act. See *Reed v. Pigora Loan Servicing LLC*, 1:20-CV-1035-LY-SH, 2021 WL 84354, at \*3 (W.D. Tex. Jan. 11, 2021) (noting that the CARES Act does not define the term "borrower" but reasoning that "borrower" is a person who signed the promissory note or assumed the loan; therefore, the plaintiff, who did not assume the loan or sign the note and who could not prove she was the administrator of the estate of the borrower, could not seek to enforce section 9056).

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# REGULATION BY LITIGATION

## LITIGATION STEMMING FROM THE PAYCHECK PROTECTION PROGRAM

Perhaps the most notable cases concerned the authority of the Small Business Administration (SBA) to implement the Paycheck Protection Program (PPP) in a manner that excluded certain categories of persons, such as Chapter 11 debtors, sexual performers, and those with criminal histories, from PPP loans and benefits under section 9005. Some judges upheld the SBA's enforcement right, finding that the SBA did not exceed its authority in issuing its non-bankruptcy eligibility rules or other restrictions. *See, e.g., Tradeways, Ltd. v. United States Dep't of the Treasury*, CV ELH-20-1324, 2020 WL 3447767, at \*15 (D. Md. June 24, 2020); *Matter of Henry Anesthesia Associates LLC*, AP 20-06084-LRC, 2020 WL 3002124, at \*1 (Bankr. N.D. Ga. June 4, 2020); *In re Penobscot Valley Hosp.*, 2020 WL 3032939, at \*1 (Bankr. D. Me. June 3, 2020), adopted in part sub nom. *Penobscot Valley Hosp. v. Carranza*, 620 B.R. 1 (D. Me. 2020); *In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239 (11th Cir. 2020).

The SBA's PPP implementation exclusions, however, have not received widespread support. *See Alaska Urological Institute, P.C. v. U.S. Small Bus. Admin.* (D. Alaska 2020) 619 B.R. 689 (granting a motion for summary judgment filed by a Chapter 11 debtor in an adversary proceeding in part because the SBA's "bankruptcy exclusion" was arbitrary and capricious); *In re Vestavia Hills, Ltd.* (Bankr. S.D. Cal. 2020) 618 B.R. 294; *In re Springfield Hospital, Inc.* (Bankr. D. Vt. 2020) 618 B.R. 70, motion to certify appeal granted (Bankr. D. Vt. 2020) 618 B.R. 109; *DV Diamond Club of Flint, LLC v. U.S. Small Bus. Admin.*, 459 F. Supp. 3d 943 (E.D. Mich. 2020) (granting the plaintiff strip club's motion for preliminary injunction and ordering the SBA to refrain from denying PPP loans based on the "prurient sexual nature" provisions of the ineligibility rule).

Perhaps hinting at what could be a trend to release information about loans subject to the CARES Act, a court in Washington, D.C., recently ruled in favor of disclosing information such as names, addresses, and precise loan amounts of all PPP borrowers to the press. *See WP Co. LLC v. U.S. Small Bus. Admin.*, CV 20-1240 (JEB), 2020 WL 6504534 (D.D.C. Nov. 5, 2020).



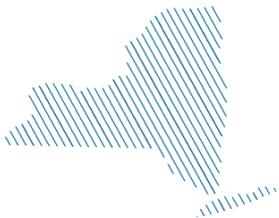
## CONVENIENCE FEE LITIGATION

Last year saw a significant increase in class action litigation about the legality of fees for online or interactive voice response payment options (“Convenience Fees”). These cases assert that Convenience Fees violate state and federal fair debt collection practices acts, breach the terms of the borrowers’ mortgage loan documents, and constitute unjust enrichment if the fee exceeds the loan servicer’s cost of providing the service. The predominant venues are federal courts in California, Texas, and Florida. Courts are generally dismissing claims sounding in breach of contract where the loan servicer is not in privity with the borrower but are willing to consider claims brought under the federal Fair Debt Collection Practices Act and state law equivalents. *See, e.g., Caldwell v. Freedom Mortgage Corp.*, 19-cv-02193 (N.D. Tex. Aug. 14, 2020). Courts have generally found that Convenience fees are incidental to the underlying debt. *See, e.g., Glover v. Ocwen Loan Servicing, LLC*, 2020 U.S. Dist. LEXIS 38701 (S.D. Fla. Mar. 2, 2020); *Williams v. Lakeview Loan Servicing, LLC*, 20-cv-01900 (S.D. Tex. Dec. 22, 2020).

### **Government agencies have taken an active role in Convenience fees.**

Government agencies have taken an active role in Convenience Fees. The CFPB has had an eye on such fees since 2017, when it issued a compliance bulletin addressing the practice. In its bulletin, the CFPB outlined the necessity for adequate disclosure to borrowers and warned that it would “closely review conduct related to phone pay fees for potential violations of Federal consumer financial laws.” The consent order between state attorneys general and Mr. Cooper in 2020, to which the CFPB joined, addressed Convenience Fees and set forth more specific standards for disclosing such fees to borrowers. However, in response to a proposed settlement in a Convenience Fees class action pending in the U.S. District Court for the Southern District of Florida, the attorneys general of 32 states and the District of Columbia (many of the same jurisdictions that entered into the Mr. Cooper consent order) filed an amicus brief opposing the motion for preliminary approval of settlement. In their brief, the attorneys general argued that the proposed settlement is not fair, reasonable, or adequate because the relief provided violates states’ laws; the one-time payment under the proposed settlement is inadequate because defendant PHH Mortgage could continue charging the fees; and prior settlements do not justify the proposed settlement. We expect further scrutiny of Convenience Fees in 2021 by private classes as well as public agencies.



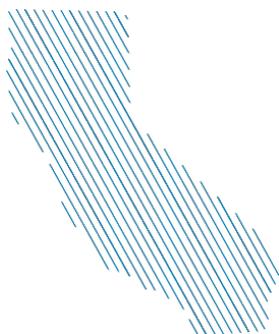


## NOTABLE LITIGATION IN NEW YORK

The Second Circuit departed from recent decisions by an Eleventh Circuit panel in *Glasser v. Hilton Grand Vacations Company, LLC*, and a Seventh Circuit panel in *Gadelhak v. AT&T Services, Inc.*, when it considered what qualified as an automatic telephone dialing system (ATDS) pursuant to the Telephone Consumer Protection Act. *Duran v. La Boom Disco, Inc.* (2nd Cir. April 7, 2020). Specifically, the Second Circuit concluded that equipment can qualify as an ATDS if it: (1) makes calls from stored lists, even lists initially generated by humans; or (2) makes calls to numbers produced using random or sequential-number generators.

## Litigation concerning COVID-19 relief is also appearing in the courts.

One example is a case filed recently in the Eastern District of New York dealing with the interplay of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 et seq., on the one hand and federal/state COVID-19 loan forbearances on the other (CARES Act, Section 4021). *Grauman v. Equifax Information Servs., LLC*, No. 20-cv-03152 (E.D.N.Y. July 15, 2020). In *Grauman*, the putative class action plaintiffs' mortgage loan payments were suspended on account of COVID-19 hardship. The allegations are that the defendants violated the FCRA by inserting derogatory remark(s) on credit reports for nonpayments.



## NOTABLE LITIGATION IN CALIFORNIA

### California saw litigation wherein mortgage borrowers sued servicers for allegedly improperly placing the borrowers' mortgages into forbearance or extending the duration of forbearances without their consent.

The borrowers allege that defendants' premature CARES Act actions caused harm to the borrowers, who have allegedly been denied opportunities to receive new credit, refinance mortgages at historically low rates, and purchase and sell homes among various other potential harms. See *Fisher v. Dovenmuehle Mortg. Inc.*, E.D. Cal. Case No. 2:20-at-00578 (filed 6/17/20, dismissed 10/14/20 before class cert.), a putative class action in which the borrower alleges that defendant failed to comply with the CARES Act by restricting the forbearance period on mortgages to 90 days instead of 180 days.

### **Under the Biden administration and given the Democrats' control of both houses of Congress, we expect to see a more aggressive approach to regulatory enforcement of the mortgage industry in 2021.**

President Biden tapped Rohit Chopra, a commissioner at the Federal Trade Commission, as his nominee to lead the CFPB. During Chopra's nomination hearing in front of the Senate Banking Committee, he testified about his potential regulatory and enforcement priorities as head of the consumer finance regulator. In his [prepared statement](#), Chopra acknowledged the widespread and lasting effects of the global pandemic and highlighted particular concerns for the housing market. During the hearing, Chopra spoke about the economic crisis from a decade ago and "how unlawful and avoidable foreclosures proved to be catastrophic in cities, small towns, and rural areas alike, contributing to deeper social divisions and inequities." He mentioned that, if confirmed, he would focus on fair lending. Chopra also answered questions about fintech, credit reporting, the housing market, and other topics. See his full testimony [here](#).

The CFPB under Rohit Chopra's leadership, and in furtherance of President Biden's fight against discrimination, will have an initial concentration on fair lending rules, including rescinding recent guidance that made it harder for the bureau to charge companies with committing abusive practices and strictly enforcing cases for unfair and deceptive acts.

Chopra is also expected to closely examine the COVID-19 response from banks, consumer reporting agencies, debt collectors, and mortgage and student loan servicers. While, under Kraninger's previous leadership, the CFPB did not necessarily turn regulatory scrutiny upon financial services companies if they showed "good-faith" efforts to provide loan forbearance and consumer relief under the CARES Act, that lenience may end when Chopra takes his position as the next CFPB director.

Lenders and servicers should be on the lookout for new investigations relating to fair lending practices and COVID-19 response. We also expect that the number of private pandemic-related lawsuits will increase as both voluntary and mandatory relief under the CARES Act comes to an end.

## CONTACT US

Consumer finance companies face regulatory compliance, consumer rights, and other operational challenges in building successful businesses. The attorneys in our Consumer Finance industry group advise these clients in litigation, compliance, enforcement, and corporate matters.

To learn more about the issues facing the consumer finance industry, please contact:

### CONSUMER FINANCE INDUSTRY GROUP CHAIR



**DAVID T. BIDERMAN** | PARTNER

+1.310.788.3220

DBiderman@perkinscoie.com

### CONTRIBUTORS



**KRISTINE KRUGER** | SENIOR COUNSEL

+1.206.359.3111

KKruger@perkinscoie.com



**OFUNNE EDOZIEM** | ASSOCIATE

+1.332.223.3977

OEdoziem@perkinscoie.com



**THOMAS ABBOTT** | SENIOR ATTORNEY

+1.503.727.2131

TAbbott@perkinscoie.com



**ROBERT YUSKO** | ASSOCIATE

+1.212.261.6838

RYusko@perkinscoie.com



**AARON GOLDSTEIN** | SENIOR ATTORNEY

+1.310.788.3285

AGoldstein@perkinscoie.com

