

New Regulations Likely to Yield New Theories

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The plaintiffs' bar, drawing inspiration from the Consumer Financial Protection Bureau (CFPB) regulations that took effect in early 2014, have begun to pursue new theories of liability under old causes of action. The new theories illustrate real conflicts between the new regulations and existing consumer protection laws, such as the Fair Credit Reporting Act (FCRA) and the Fair Debt Collection Practices Act (FDCPA). Covered entities subject to CFPB regulation thus face a Hobson's choice: Follow the new regulations and risk violating other existing laws, or face enforcement actions for failing to follow the new CFPB regulations. For example, CFPB Amendments to the RESPA Regulation X contain detailed new requirements for acknowledging and responding to notices from home mortgage borrowers alleging errors related to their mortgage loan. However, these provisions conflict with existing FCRA provisions for consumer debt dispute resolution. And while amendments to TILA Regulation Z require mortgage servicers to send regular periodic statements, the FDCPA prohibits "debt collectors" from contacting a "debtor" regarding a "debt" if they know the debtor is represented by counsel, or if they have received a "cease communication" request from the debtor regarding the debt. Once the conflict with the FDCPA became apparent in October 2013, the CFPB issued guidance that a servicer that is considered a "debt collector" does not violate the statute by sending the periodic statement notwithstanding that a "cease communication" request has been received. **This, however, did not resolve conflicts with state debt collection statutes, such as the Florida Consumer Collection Practices Act, that are broader and may be more protective than the FDCPA.** Additionally, claims now being brought under the revised RESPA Regulation X based on alleged inaccurate reporting of information concerning a home mortgage borrower's loan account to consumer reporting agencies, appear to infringe on FCRA authority, and have created uncertainty regarding whether FCRA regulations control. Given the complex regulatory and litigation landscape, some confusion was inevitable as was a series of splintered and conflicting lower court decisions. Clarity is unlikely until appellate courts start deciding the issues.

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