

Consumer Finance

Overview

Carlton Fields has extensive experience representing banks and other financial service industry clients in state, federal and bankruptcy court litigation, and arbitration. In addition to defending banks in high stakes individual and class action consumer litigation, our lawyers counsel and advise the industry on data security, cyber risk, and compliance with federal and state consumer financial protection laws and regulations, including Consumer Financial Protection Bureau (CFPB) regulations.

Litigation

Carlton Fields has developed effective, efficient, and seamless approaches to handling consumer finance litigation for its banking and servicer clients. We provide value by removing the burden of case administration from them, and imposing controls on the process and costs. Additionally, we view the big picture, continually assessing our clients' reputational and portfolio-level risks. We understand which matters are suitable for settlement or appeal, and which are not based on their broader implications. Our methods have included the following components: **Agreed-Upon Pricing and Staffing**

We offer various staffing and pricing options for clients to meet their internal budget and case management needs. We have substantial experience with alternative fee arrangements including fixed fee agreements. While alternative fee arrangements are not appropriate for every situation, we have successfully implemented various beneficial methodologies to control costs and create more certainty for our clients in their budgeting and risk assessment. **Team Approach**

To further help clients manage their matters, we have created streamlined matter intake and management processes. One key to our success is tailoring teams to meet the client's needs. Our firmwide system can create a single point of contact for case referral and intake as well as a means for the client to obtain quick and accurate information on the referred matter. For clients with a high volume of cases in a geographic area, we also make an office "team leader" responsible for oversight of all the client's matters within that office's geographical territory. **Escalation Criteria**

Whether a case is assigned to us at inception, or reaches us after prior counsel has encountered difficulties, we assess each matter and make an impartial recommendation to our clients regarding its appropriate management and assignment, based on factors such as the amount of real exposure, likelihood of trial, and the scope of reputational or portfolio-wide risk. If a matter does not rise to a level that requires our services, we say so – and offer to monitor it if needed. Our goal is to ensure that high-risk, high-exposure cases get the attention they deserve while matters

that present minimal risk and exposure do not take up a disproportionate amount of time or money. **Portfolio Level and Reputational Risk**

A key element of our services is our ongoing work with our clients to limit or eliminate portfolio level and reputational risk. We accomplish this by continually offering in-person, teleconference, and video conference training on issues such as deposition preparation and trial testimony, affidavit preparation, and verification compliance. We also offer one-on-one training for first-time witnesses including senior management. Our goal is to provide each person presented to the public as the face of the client with the tools and skills to accurately and effectively communicate our client's position, as well as the strength of their company policies and procedures. We also provide guidance on when, how, and whether to press an emerging issue. Each trial court, appellate court, and federal district court has its own idiosyncrasies and personality. We help our clients make strategic decisions based on our extensive knowledge of these courts. This ensures that the right issue is presented in the right place at the right time. Our ultimate goal is to either obtain results with positive portfolio-wide impact, or avoid decisions that may result in adverse consequences that extend beyond the single matter.

Data Security and Cyber Risk

Data Security/Cloud Computing

As regulatory bodies increasingly focus on privacy and data security concerns, information technology departments and vendors more heavily rely on cloud computing to control IT spending and simplify infrastructure management. Compliance with the regulatory requirements, however, is often hindered by the loss of control that typically occurs when using cloud computing solutions. As a result, to ensure that regulatory requirements are not inadvertently jeopardized, special care is required when attempting to realize the benefits of cloud computing. These issues are especially acute for financial institutions because of the valuable and confidential nature of the information they process, and their regulatory and statutory commitments to safeguard financial and personal identifying information. We help financial institutions to take advantage of the cost savings made possible by cloud computing, while ensuring that vendor contracts address the important compliance and data privacy issues. **Data Privacy/Data Breach**

Carlton Fields provides compliance assistance regarding the privacy and security of individually identifiable data. Our practice addresses state and federal privacy laws and regulations, including Gramm-Leach-Bliley and HIPAA, as well as the privacy and security standards used in various industries. We help clients implement policies and procedures that meet state and federal privacy and security law requirements. For example, we help clients with the implementation of company-wide privacy and security policies concerning the protection of sensitive data such as patient information. We have also facilitated programs and modules to train company employees on these policies. We assist clients that have experienced a data breach due to theft (e.g., stolen laptops and servers) or accident (e.g., natural disasters, lost backup tapes). Because most laws in this area have strict response times, an organization must promptly respond to any data breach. Our representation includes: analysis of data breach notification laws throughout the United

States; preparation of notice letters and media notices of data breach; preparation of identity theft “Frequently Asked Questions” for use in advising individuals whose information was breached; and assistance in compliance with state and federal self-reporting requirements. We also provide risk assessment and management advice in an effort to reduce the likelihood of future data breaches.

Regulatory Compliance and Response

Before the CFPB opened for business in 2011, Carlton Fields lawyers regularly represented and counseled financial service industry clients on federal and state consumer financial regulations, including the Fair Credit Billing Act, the Fair Credit Reporting Act (FCRA), the Truth in Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), the Telephone Consumer Protection Act (TCPA), and various state consumer financial protection statutes. The CFPB now supervises consumer financial services companies and depository institutions with assets exceeding \$10 billion for consumer protection purposes, and implements and enforces “federal consumer financial law,” including TILA, RESPA, and the FCRA, as well as the Consumer Financial Protection Act of 2010 (CFPA), which broadly prohibits “unfair, deceptive, or abusive acts and practices” in connection with offering consumer financial products and services, and the new CFPB regulations applicable to origination and servicing of mortgage and other consumer loans, credit reporting, fair lending, debt collection, and other consumer financial products and services. Carlton Fields lawyers have navigated the thousands of pages of new CFPB regulations and enforcement orders and counsel consumer financial industry clients on the new regulatory requirements, and the development of procedures, policies, and programs to assure compliance. We also represent clients in responding to subpoenas, civil investigative demands, and other information requests from state financial regulators, attorneys general, and the CFPB.

Featured Insights

Experience

Representative Consumer Finance Cases

Reported Decisions

- *Wachovia Mortg. Corp. v. Posti*, 166 So. 3d 944 (Fla. 4th DCA 2015) (reversing final judgment in favor of borrower).
- *Hollingsworth v. Deutsche Bank Nat'l Tr. Co.*, 170 So. 3d 810 (Fla. 1st DCA 2015) (affirming denial of relief to borrower).

- *Bloch v. Wells Fargo Home Mortg.*, 755 F.3d 886 (11th Cir. 2014), *cert. denied*, 572 U.S. 1151 (2014) (affirming district court's granting of summary judgment to Wells Fargo).
- *Tribble v. Deutsche Bank Nat'l Trust Co.*, No. 9:13-cv-80938, 2014 WL 186126 (S.D. Fla. Jan. 16, 2014) (granting motion to dismiss complaint against bank).
- *Holcomb v. Fed. Home Loan Mortg. Corp.*, No. 9:10-cv-81186, 2012 WL 718814 (S.D. Fla. Mar. 5, 2012) (granting motion for final summary judgment in favor of lender).
- *Mayor & City Council of Baltimore v. Saxon Mortg. Inc.*, No. 23651-14 (D. Md. 2015) (obtaining dismissal of action against lender alleging certain violations related to abandoned property and seeking fines/violations).
- *Grave v. Wells Fargo Bank, N.A.*, No. 0:14-cv-60975 (S.D. Fla. Sept. 9, 2015). Judgment entered in Wells Fargo's favor after trial before district court seeking punitive damages. District court concluded that borrower failed to establish that she had been advised to stop making payments to obtain a loan modification or that this claim presented a basis for awarding damages.
- *Market Tampa Invs. LLC, v. U.S. Bank, N.A.*, 177 So. 3d 31 (Fla. 2d DCA 2015). Affirming lower court ruling that investor who purchased property after recording of lis pendens did not have the right to intervene in subsequent foreclosure case.
- *Brown v. Ocwen Loan Servicing, LLC*, No. 8:14-cv-03454, 2015 WL 5008763 (D. Md. Aug. 20, 2015) (obtained dismissal for securitized trust's sponsor and depositor in action alleging fraud, violations of TILA, HOEPA and RESPA, and various other claims).
- *Vasilevskiy v. Wachovia Bank, N.A.*, 171 So. 3d 192 (Fla. 5th DCA 2015). Affirming judgment for lender. Holding that notice of intent to accelerate required by mortgage was sufficient even though it provided only 28 days to cure where claimed error was not a material breach of the mortgage.
- *Jean-Baptiste v. Saxon Mortg. Servs., Inc.*, No. CAE13-04688 (Md. Cir. Ct. July 16, 2015) (obtaining dismissal of lawsuit against servicer/lender alleging violations of TILA, Maryland's Consumer Protection Act, and RESPA and asserting claims of rescission, conversion, wrongful foreclosure, and breach of fiduciary duty).
- *Wells Fargo Bank, N.A. v. Michaels*, 166 So. 3d 226 (Fla. 5th DCA 2015). Reversing order dismissing foreclosure action where trial court failed to provide proper notice of trial. Holding order entered without notice is void.
- *Wachovia Mortg. Corp. v. Posti*, 166 So. 3d 944 (Fla. 4th DCA 2015). Reversing judgment for borrower entered after trial. Holding that trial court lacked jurisdiction to order lender/servicer to enter into a loan modification with the borrower.

- *Bank of Am. v. Asbury*, 165 So. 3d 808 (Fla. 2d DCA 2015). Reversing entry of summary judgment in favor of borrower where borrower failed to plead ground argued as basis for entry of summary judgment.
- *SMI Home Mortg. v. Hakanjin*, No. 10870/2009 (N.Y. Sup. Ct.) (obtaining discharge of erroneous satisfaction of mortgage and declaration that CEMAs are valid and subsisting liens on the subject premises, taking priority over other liens); *SMI Home Mortg. v. Sakla*, No. 005220/2009 (N.Y. Sup. Ct.); *Craig v. Saxon Mortg. Servs. Inc.*, No. 2:13-cv-04526, 2015 WL 171234 (E.D.N.Y. Jan. 13, 2015) (obtaining dismissal of complaint alleging fraud, unjust enrichment, violations of the FDCPA and TILA, and other claims against lender/mortgage servicer); *SMI Home Mortg. v. Downs*, No. 18262/2009 (N.Y. Sup. Ct. 2014); *SMI Home Mortg. v. Goodman*, No. 23786/2009 (N.Y. Sup. Ct.); *SMI Home Mortg. v. Coyne*, No. 17838/2009 (N.Y. Sup. Ct. 2014).
- *Deramo v. Laffey*, No. 15061/2011 (N.Y. Sup. Ct. 2014) (mortgage servicer not liable in action to determine adverse claims to property under New York's Real Property and Proceedings Law).
- *Whittaker v. Wells Fargo Bank, N.A.*, No. 6:12-cv-00098, 2014 WL 5426497 (M.D. Fla. Oct. 23, 2014). Entering summary judgment in favor of Wells Fargo on RESPA and TILA claims. Borrower alleged that Wells Fargo failed to timely respond to QWR and failed to properly apply a credit balance on the account.
- *Roman v. Wells Fargo Bank, N.A.*, 143 So. 3d 489 (Fla. 5th DCA 2014). Holding that notice of default was effective when mailed and there was nothing in the mortgage requiring a lender/servicer to prove receipt.
- *Bloch v. Wells Fargo Bank, N.A.*, 755 F.3d 886 (11th Cir. 2014). Affirmed summary judgment in favor of investor and servicer. Held no private right of action under HAMP, and that TPP offer letter cannot form the basis of a binding contract or create grounds for claiming promissory estoppel.
- *Suero-Sosa v. Saxon Mortg. Servs., Inc.*, 112 A.D.3d 706 (N.Y. App. Div. 2013) (mortgage servicer not liable in tort for a plaintiff's alleged injuries).
- *Wells Fargo Bank, N.A. v. Morcom*, 125 So. 3d 320 (Fla. 5th DCA 2013). Appellate court reversed lower court finding that Florida's uniform commercial code required that an entity foreclosing a mortgage must be both the owner and holder of the mortgage and note. Held that a holder may foreclose in its own right.

- *Kenechi Thomas v. Westlake Fin. Servs.*, No. 05-2012-CC-065887 (Fla. Cir. Ct.). A consumer under two retail motor vehicle installment contracts sued the indirect lender in county court for violations of the FDCPA, the TCPA, breach of contract, unfair practices, and other consumer claims. Counterclaims were filed on both contracts. After a nonjury trial, the court ruled against the consumer on all the claims, and in favor of the lender on the contracts, and awarded the lender \$60,000 in attorneys' fees against the consumer.
- *Matlock v. Medicredit, Inc. & U.S. Collections, Inc.*, No. 8:13-cv-00153 (M.D. Fla. 2013). A putative nationwide class action against a consumer debt collection company for violations of the TCPA as a result of dozens of calls to the consumer's cell phone made without her consent. A dismissal was obtained by serving an offer of judgment on the class representative before class certification, even though an initial motion to certify the class had already been filed with the first amended complaint. The plaintiff filed an amended complaint after a motion was filed asserting she had improperly sued the holding company, at which time the court denied the pending motion to certify as moot. Before a renewed motion to certify was filed, we served an offer of judgment and, after it was rejected, a motion to dismiss the claims as moot. Rather than oppose the motion to dismiss, the plaintiff voluntarily dismissed the case, and the court entered an order of dismissal. The plaintiff later attempted to join another class action in California but was unsuccessful there as well based on the Florida order.
- *U.S. Bank, N.A. v. Marion*, 122 So. 3d 398 (Fla. 2d DCA 2013). Appellate court reversed lower court finding that verification of residential foreclosure complaint cannot be done by employee of mortgage loan servicer. Held that nothing in the verification rule imposed the requirements demanded by the lower court.
- *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924 (Fla. 2013). Affirmed the lower appellate court on a certified question. Held that an ordinance enacted by the City of Palm Bay (and more than 100 other local jurisdictions) was invalid as being in conflict with state statutory law.
- *Citron v. Wachovia Mortg., FSB*, 922 F. Supp. 2d 1309 (M.D. Fla. 2013). Judgment entered in favor of Wachovia Mortgage on TILA rescission claims after trial before district court. District court rejected testimony of borrowers as not credible. District court also held that borrowers waived right of rescission under TILA.
- *Kunzelmann v. Wells Fargo Bank, N.A.*, No. 9:11-cv-81373, 2013 WL 139913 (S.D. Fla. Jan. 10, 2013). District court denied certification of nationwide class of borrowers making claims relating to lender-placed hazard insurance. Matter was ultimately dismissed by the court for lack of CAFA jurisdiction after certification was denied.

- *Foley v. Wells Fargo Bank, N.A.*, No. 0:11-cv-62314, 2012 WL 4829124 (S.D. Fla. Sept. 28, 2012). A decision of first impression on the issue of what actions trigger notice obligations under the 2009 amendments to TILA. Judgment entered in favor of Wells Fargo after trial before district court. District court held that Wells Fargo, as servicer, was not liable for claimed violation of TILA provision 15 U.S.C. § 1641(g), which requires notice of transfer of ownership of mortgage loans.
- *Holcomb v. Fed. Home Loan Mortg. Corp.*, No. 9:10-cv-81186, 2012 WL 718814 (S.D. Fla. Mar. 5, 2012). One of the few reported decisions that applies and analyzes TILA rescission rights in instances where a same lender refinance transaction occurred. Granted summary judgment in Freddie Mac's favor. Applied partial right of rescission provisions under TILA.
- *Brake v. Wells Fargo Fin. Sys. Fla., Inc.*, No. 8:10-cv-00338, 2011 WL 6412430 (M.D. Fla. Dec. 21, 2011). This decision exemplifies the "kitchen sink" approach to claims typically brought against lenders and servicers. It provides a detailed analysis and examination of these claims before adopting our argument for dismissing the fraud, negligence, promissory estoppel, and National Housing Act claims.
- *Brigliadora v. Wells Fargo Bank, N.A.*, 447 F. App'x 941 (11th Cir. 2011). Affirmed lower court dismissal of complaint. Applied TILA provisions permitting reduction in available credit for home equity lines of credit.
- *Holcomb v. Fed. Home Loan Mortg. Corp.*, No. 9:10-cv-81186, 2011 WL 5080324 (S.D. Fla. Oct. 26, 2011). A decision of first impression on whether an investor can be held vicariously liable for a servicer's failure to comply with a borrower's request for information under TILA section 15 U.S.C. § 1641(f)(2), as amended in 2009. The district court found that TILA does not provide for vicarious liability.
- *U.S. Bank, N.A. v. Paiz*, 68 So. 3d 940 (Fla. 3d DCA 2011). This decision presents a detailed analysis and review of the law's application to post-trial motions seeking to overturn foreclosure judgments. The appellate court adopted our analysis as to what facts and allegations are necessary to provide a basis to set aside a foreclosure judgment.
- *Korte v. U.S. Bank, N.A.*, 64 So. 3d 134 (Fla. 4th DCA 2011). A decision of first impression on the issue of whether prejudgment sanctions can be imposed against a borrower and her counsel for prosecuting frivolous claims and defenses for the purpose of delay. The appellate court held that where a borrower or her counsel engage in delay tactics, the trial court may order prejudgment delay damages in the form of interest, attorneys' fees, and costs, to be deposited into the registry of the court, pending the outcome of the case. This decision has had a substantial deterrent effect on borrowers engaging in delay tactics to avoid foreclosure.

National Class Actions

- *Cannon v. Wells Fargo Bank N.A.*, 917 F. Supp. 2d 1025 (N.D. Cal. 2013). Motion to dismiss granted in putative class action challenging certain lender-placed insurance practices.
- *Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601 (7th Cir. 2013). Affirming dismissal of putative national class action alleging fraud and breach of contract regarding lender-placed insurance.
- *Dobish v. M&T Bank Corp.*, No. 1:13-cv-01098 (W.D.N.Y. 2013). Putative class action alleging multiple claims and theories of liability in connection with lender-placed insurance; plaintiff voluntarily dismissed all claims after defendants filed motions to dismiss.
- *Doyle v. OneWest Bank, FSB*, No. 2:13-cv-05951 (C.D. Cal. 2013). Insurer removed, severed, and transferred to federal court putative class action alleging multiple claims and theories of liability in connection with lender-placed insurance; plaintiff voluntarily dismissed the action.
- *Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432 (1st Cir. 2013). Represented amicus curiae in case that affirmed in part the dismissal of a putative class action alleging breach of contract and breach of the implied covenant of good faith and fair dealing regarding lender-placed insurance practices.
- *Lauren v. PNC Bank, N.A.*, 296 F.R.D. 389 (W.D. Pa. 2014). Motion to dismiss granted in putative nationwide class action against hazard insurer alleging unjust enrichment and challenging certain practices related to lender-placed insurance.
- *Miller v. Wells Fargo Bank, N.A.*, 994 F. Supp. 2d 542 (S.D.N.Y. 2014). Motion to dismiss granted for insurer in putative class action alleging, *inter alia*, breach of contract and violations of RICO and state consumer protection statutes in connection with placement of lender-placed insurance.
- *Rapp v. Green Tree Servicing, LLC*, No. 0:12-cv-02496, 2013 WL 3992442 (D. Minn. Aug. 5, 2013). Motion to dismiss granted for insurer in putative class action alleging breach of contract and unjust enrichment in connection with placement of lender-placed insurance.
- *Roberts v. Wells Fargo Bank, N.A.*, No. 4:12-cv-00200, 2013 WL 1233268 (S.D. Ga. Mar. 27, 2013). Dismissal of putative class action alleging, *inter alia*, unjust enrichment and aiding and abetting breach of fiduciary duty in connection with lender-placed insurance; stay of claims pending certified question concerned filed-rate doctrine.

Other representative consumer finance matters

- Counseling national mortgage loan servicer on compliance with new CFPB servicer regulations
- Counseled national and local indirect auto lenders on compliance with FCRA, ECOA, TCPA, and CFPB regulations
- Counseling national debt collection companies on TCPA, FDCPA, and FCCPA regulations

- Defended multinational bank card issuer in several consumer cases alleging violations of FCRA and FCBA
- Defended several class actions alleging claims based on lender placed credit insurance
- Defended several class actions alleging TCPA violations
- Defended national class action alleging violations of FDCPA
- Defended national payment posting class action against international credit card bank
- Represented local and national indirect retail consumer motor vehicle finance lenders in general litigation, consumer bankruptcy litigation, and in defense of consumer claims for alleged violations of the TCPA, FCCPA, and other consumer protection laws
- Counseled indirect auto lenders on dealer agreements, guaranties, retail installment contracts, and compliance with TCPA, FCCPA, FDCPA, FCRA

Insights

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07.03.2020

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06.26.2020

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06.19.2020

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06.12.2020

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06.05.2020

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05.29.2020

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05.22.2020

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05.15.2020

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Life Insurer Permitted to Adjust Policy Proceeds Pursuant to Misstatement-of-Age Provision

04.04.2019

Individual Indexed Annuities Viewed as Installment Contracts for Statute-of-Limitations Purposes

03.23.2019

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12.21.2018

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Jump in Credit Scores Means Dip in Underwriting Predictability

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12.22.2016

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12.23.2015

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Georgia Court of Appeals Expands Lenders' Ability to Pursue Guarantor Deficiency Judgment Suits Beyond Foreclosure Confirmations

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Financial Report of the Consumer Financial Protection Bureau

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