

The Walking Dead: 2018 Small Dollar Lending Updates—Is the Small Dollar Loan Industry Mostly Dead or Slightly Alive?

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INTRODUCTION

During the past year, many small dollar lenders operated under looming rulemaking from the Bureau of Consumer Financial Protection (“CFPB”), which threatened elimination of their businesses. This survey reviews small dollar lending relative to federal rulemaking, federal actions, state actions, and state legislation during the past year.

FEDERAL RULEMAKING

In April 2018, less than three months after the CFPB announced¹ that it intended to reconsider its rule to curtail payday and title loans, as well as certain installment loan practices, two trade associations for the small dollar loan industry sued the CFPB in the Western District of Texas.² The plaintiffs asked the court to find that the CFPB’s rule governing short-term loans was issued outside the agency’s authority based on the Administrative Procedure Act and constitutional arguments.³ They also claimed that the rule was unnecessary, arbitrary, capricious, overreaching, procedurally improper, and substantially harmful to lenders and borrowers alike.⁴

In June 2018, the parties filed a joint request to stay the litigation pending CFPB rulemaking to reconsider the rule, to waive the CFPB’s obligation to file an answer, and to stay the rule’s compliance date for 445 days after any final judgment.⁵ In the middle of June 2018, the court granted the requests but re-

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1. Press Release, Consumer Fin. Prot. Bureau, CFPB Statement on Payday Rule (Jan. 16, 2018), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/>.

2. Complaint, Cmty. Fin. Servs. Ass’n v. CFPB, No. 1:18-cv-00295 (W.D. Tex. Apr. 9, 2018).

3. *Id.* at 22–24.

4. *Id.* at 2–6.

5. Joint Motion to Stay Case and to Stay Agency Action Pending Review, Cmty. Fin. Servs. Ass’n v. CFPB, No. 1:18-cv-00295 (W.D. Tex. May 31, 2018).

fused to delay the compliance date of August 19, 2019.⁶ The court also mandated joint periodic status reports from the parties, with the first report due in August 2018, and similar reports due every sixty days thereafter.⁷ At the end of June 2018, the plaintiffs filed an unopposed motion for reconsideration of the order.⁸ The next day, the CFPB filed a response to the plaintiffs' unopposed motion, indicating it expects to issue a notice of proposed rulemaking by February 2019.⁹ Then, in November 2018, the court stayed the compliance date, until further order of the court.¹⁰

FEDERAL ENFORCEMENT ACTIONS

The Federal Trade Commission ("FTC") took action against lenders in the small-dollar lending space during the past year with a focus on deceptive advertising claims, payment issues, and privacy practices. In August 2017, the FTC announced that TaxSlayer, LLC, an income tax refund advance and loan provider, agreed to settle charges that it violated the Gramm-Leach-Bliley Act's Safeguards Rule and the Privacy Rule.¹¹ The FTC alleged that TaxSlayer failed to implement any information security safeguards to prevent a cyberattack.¹² The FTC also alleged that the company violated the Privacy Rule by failing to provide its customers with a clear and conspicuous initial privacy notice and to deliver it in a way that ensured that customers received it.¹³ The FTC further alleged that malicious hackers gained access to nearly 9,000 TaxSlayer accounts and used related information to fraudulently obtain tax refunds.¹⁴ In October 2017, the FTC approved a final order settling the allegations.¹⁵ The order prohibits TaxSlayer from violating the Privacy Rule and the Safeguards Rule for twenty years.¹⁶ TaxSlayer must also obtain biennial third-party compliance assessments for ten years and create certain records for twenty years.¹⁷

6. Order Granting in Part and Denying in Part Joint Motion to Stay Case and to Stay Agency Action Pending Review, Cmty. Fin. Servs. Ass'n v. CFPB, No. 1:18-cv-00295 (W.D. Tex. June 12, 2018).

7. *Id.*

8. Unopposed Motion for Reconsideration re: Order Staying Case, Cmty. Fin. Servs. Ass'n v. CFPB, No. 1:18-cv-00295 (W.D. Tex. June 21, 2018).

9. Response in Support re: Unopposed Motion for Reconsideration re: Order Staying Case, Cmty. Fin. Servs. Ass'n v. CFPB, No. 1:18-cv-00295 (W.D. Tex. June 22, 2018).

10. Order Reversing Denial of Unopposed Motion for Reconsideration and Granting Motion to Stay, Cmty. Fin. Servs. Ass'n v. CFPB, No. 1:18-cv-00295 (W.D. Tex. Nov. 6, 2018).

11. Press Release, Fed. Trade Comm'n, Operator of Online Tax Preparation Service Agrees to Settle FTC Charges that It Violated Financial Privacy and Security Rules (Aug. 29, 2017), <https://www.ftc.gov/news-events/press-releases/2017/08/operator-online-tax-preparation-service-agrees-settle-ftc-charges>; see 16 C.F.R. pt. 314 (2018); *id.* pt. 313.

12. Complaint at *6, TaxSlayer, LLC, No. 162-3063, 2017 WL 3887821 (F.T.C. Aug. 29, 2017).

13. *Id.*

14. *Id.* at *5.

15. TaxSlayer, LLC, No. 162-3063, 2017 WL 5477619 (F.T.C. Oct. 20, 2017) (decision and order).

16. *Id.* at *5.

17. *Id.* at *2-4.

In November 2017, the CFPB sued Think Finance, LLC for its participation in the origination, servicing, and collection of online credit transactions that were allegedly void because they violated state usury laws and licensing requirements.¹⁸ The lawsuit alleged that the lender's "participation in the collection of void loans is deceptive, unfair, and abusive" under the Consumer Financial Protection Act ("CFPA").¹⁹ The CFPB sought monetary relief for consumers, civil money penalties, and injunctive relief.²⁰ Think Finance, LLC moved to dismiss the claims on multiple grounds, including that the structure of the CFPB is unconstitutional; that the CFPB's claims are not permitted by the CFPA; that the complaint fails to join indispensable parties; that the court lacks personal jurisdiction; that the complaint fails to state cognizable claims under the CFPA; and that certain claims are time-barred.²¹ The court denied the motion in its entirety on August 3, 2018.²²

In April 2018, the FTC filed a complaint against LendingClub for claiming "no hidden fees" in its advertisements for unsecured consumer loans.²³ According to the FTC's complaint, the loans were hundreds of dollars short of the amount expected by consumers because of an up-front fee the company deducted from consumers' loan proceeds.²⁴ The FTC further alleged that LendingClub falsely represented that consumer applications had been approved while knowing that many applicants would not qualify for a loan.²⁵ In addition, LendingClub allegedly withdrew double payments from consumers' bank accounts and continued to charge those who cancelled automatic payments or paid off their loans.²⁶ Finally, the FTC alleged that the company failed to provide a clear and conspicuous privacy policy.²⁷ LendingClub immediately responded to the complaint on its blog, stating that it believes the allegations in the FTC's complaint are "legally and factually unwarranted" and then filed a motion to dismiss the complaint as to all four claims brought against it.²⁸ On October 3, 2018, the court granted LendingClub's motion without prejudice on the claim related to unauthorized withdrawals from customer accounts because the FTC failed to provide sufficient facts alleging substantial injury. The court, however, denied Lending Club's motion on the remaining three claims.²⁹

18. Complaint, CFPB v. Think Fin., LLC, No. 4:17-cv-00127-BMM (D. Mont. Nov. 15, 2017), https://files.consumerfinance.gov/f/documents/cfpb_think-finance_complaint_112017.pdf.

19. *Id.* at 2.

20. *Id.* at 31.

21. CFPB v. Think Fin., LLC, No. CV-17-127-GF-BMM, 2018 WL 3707911, at *1 (D. Mont. Aug. 3, 2018) (order).

22. *Id.* at *9.

23. Complaint at 3, FTC v. LendingClub Corp., No. 3:18-cv-02454 (N.D. Cal. Apr. 25, 2018), https://www.ftc.gov/system/files/documents/cases/lendingclub_complaint.pdf.

24. *Id.*

25. *Id.* at 3-4.

26. *Id.* at 4.

27. *Id.*

28. *LendingClub Responds to Federal Trade Commission Complaint*, LENDINGCLUB BLOG (Apr. 25, 2018), <https://blog.lendingclub.com/lendingclub-responds-to-federal-trade-commission-complaint>; Motion to Dismiss, FTC v. LendingClub Corp., No. 3:18-cv-02454 (N.D. Cal. June 19, 2018).

29. FTC v. LendingClub Corp., No. 3:18-cv-02454-JSC (N.D. Cal. Oct. 3, 2018) (order).

As for the CFPB, its activities during the past year included actions related to debt collection, credit reporting, and loans violating state usury statutes. In June 2018, the CFPB announced a settlement with Security Group, Inc. and its subsidiaries.³⁰ In that case, the CFPB alleged that Security Group entities violated the Consumer Financial Protection Act by making improper in-person and telephonic collection attempts on consumer credit,³¹ all of which constituted unfair acts or practices.³² The CFPB also alleged that the Security Group entities violated the Fair Credit Reporting Act by furnishing inaccurate and incomplete information to credit reporting agencies.³³ Under the terms of the five-year consent order, Security Group and its subsidiaries must refrain from certain collection practices, amend information they furnished to credit reporting agencies, and pay a \$5 million civil money penalty.³⁴ The consent order stipulates that Security Group did not admit or deny any of the substantive findings of fact or conclusions of law.³⁵

STATE ENFORCEMENT ACTIONS

In July 2017 the Virginia Attorney General announced a settlement with Alternative Finance Company, LLC, a provider of short-term, open-end loans.³⁶ The settlement resolved allegations that the lender violated state law by imposing illegal finance charges during the required grace period, misrepresenting that it did not perform credit checks, and obtaining judgments in Virginia Beach General District Court without a legal basis for that venue.³⁷ Alternative Finance agreed to refund over \$14,000 to certain consumers and to cease collection efforts once principal amounts were recouped for other consumers.³⁸

In August 2017, the Maryland Commissioner of Financial Regulation issued an advisory notice defining “vehicle title loan” and clarifying that a vehicle title loan is not a pawn transaction subject to the state’s Pawnbrokers Act.³⁹ The Advisory Notice further clarified that “vehicle title loans” of \$6,000 or less made to Maryland

30. See Press Release, Consumer Fin. Prot. Bureau, Bureau of Consumer Financial Protection Settles with Security Group, Inc. (June 13, 2018), <https://www.consumerfinance.gov/about-us/newsroom/bureau-consumer-financial-protection-settles-security-group-inc/>.

31. Consent Order at 6–11, Sec. Grp., Inc., No. 2018-BCFP-0002 (C.F.P.B. June 6, 2018), https://files.consumerfinance.gov/f/documents/bcfp_security-group-inc_consent-order_2018-06.pdf.

32. *Id.*

33. *Id.* at 13–15.

34. *Id.* at 16, 17, 22.

35. *Id.* at 2.

36. See Press Release, Va. Attorney Gen., Attorney General Herring Reaches Settlement with Virginia Beach Open-End Credit Lender (July 25, 2017), <https://www.oag.state.va.us/consumer-protection/index.php/news/221-july-25-2017-ag-herring-reaches-settlement-with-virginia-beach-open-end-credit-lender>.

37. Assurance of Voluntary Compliance at 2–3, Commonwealth of Va. v. Alt. Fin. Co., No. CL17-3392-1 (July 20, 2017), https://www.oag.state.va.us/consumer-protection/files/Lawsuits/Alternative_Finance-OrderEnteringAVCandAVC.pdf.

38. *Id.* at 8–11.

39. Advisory Notice, Comm’r of Fin. Regulation, Vehicle Title Loan Providers in the State of Maryland Are Subject to Consumer Lending Laws (Aug. 30, 2017), <https://www.dllr.state.md.us/finance/advisories/advisory-vehicletitleloan.pdf>.

consumers are subject to the Maryland Consumer Loan Law and that non-exempt persons offering such loans are consumer lenders “subject to the licensing, investigation, and enforcement authority of the Commissioner.”⁴⁰

In November 2017, the Minnesota Department of Commerce announced that it fined the Florida-based online vehicle title loan company Autoloans, LLC \$302,000 for unlicensed lending activities; making false and misleading statements concerning loan rates, terms, and conditions; charging excessive interest rates; unlawfully repossessing vehicles; and failing to comply with the department’s subpoena for information about its lending in Minnesota.⁴¹ In addition, the agency ordered that all of the lender’s vehicle title loans with Minnesota consumers were *void ab initio*.⁴²

In December 2017, the California Department of Business Oversight entered into consent orders with Check Into Cash and Quick Cash Funding for allegedly deceiving consumers or steering them into loans greater than \$2,500.⁴³ Check Into Cash agreed to refund \$121,600 to consumers and pay \$18,000 to the Department of Business Oversight.⁴⁴ Quick Cash Funding agreed to pay \$58,200 in refunds and \$9,700 in civil penalties and costs.⁴⁵

In February 2018, the Virginia Attorney General announced a settlement with MoneyLion of Virginia, an online installment lender.⁴⁶ The attorney general alleged that the online lender falsely claimed that it was licensed by Virginia’s Bureau of Financial Institutions, charged consumers rates exceeding Virginia’s 12 percent interest cap, and charged consumers an unlawful \$15 processing fee for payments made by check. The settlement requires MoneyLion to provide approximately \$2.7 million in refunds and debt forgiveness to consumers, in addition to paying a civil penalty.⁴⁷

In March 2018, the California Department of Business Oversight entered into a \$160,000 settlement with Advance America, resolving allegations that the com-

40. *Id.*

41. See Press Release, Minn. Dep’t of Commerce, Minnesota Commerce Department Fines Online Lender Over \$300,000 for Illegal Auto Title Loans (Nov. 9, 2017), <https://mn.gov/commerce/media/news/?id=17-317656>.

42. Findings of Fact, Conclusions of Law and Order at 2–3, *In re Autoloans, LLC*, No. 8-1005-34045 (Minn. Dep’t of Commerce Oct. 11, 2017), <https://www.cards.commerce.state.mn.us/CARDS/security/search.do?documentId=%7b38E9BB4E-03A9-464E-9270-A99710BE4B99%7d>.

43. Consent Order at 3, *In re Check Into Cash of Cal., Inc.* (Cal. Dep’t of Bus. Oversight Dec. 11, 2017), http://www.dbo.ca.gov/ENF/pdf/2017/Check%20Into%20Cash%20of%20California%20Inc_.pdf [hereinafter Check Into Cash Consent Order]; Consent Order at 2, *In re Quick Cash Funding, LLC* (Cal. Dep’t of Bus. Oversight Dec. 12, 2017), <http://www.dbo.ca.gov/ENF/pdf/2017/Quick%20Cash%20Funding%20LLC.pdf> [hereinafter Quick Cash Consent Order].

44. Check Into Cash Consent Order, *supra* note 43, at 4–5.

45. Quick Cash Consent Order, *supra* note 43, at 4–5.

46. See Press Release, Va. Attorney Gen., Virginia Consumers to Receive \$2.7 Million in Relief from Settlement with Internet Lender (Feb. 7, 2018), <https://www.oag.state.va.us/consumer-protection/index.php/news/262-february-7-2018-virginia-consumers-to-receive-2-7-million-in-relief-from-settlement-with-internet-lender>.

47. Assurance of Voluntary Compliance at 2–4, *Va. v. MoneyLion of Va.*, No. CL18000586-00 (Va. Cir. Ct. Feb. 5, 2018).

pany improperly added fees to the amount of its installment loans.⁴⁸ The settlement also resolved allegations that the company paid unlicensed lead generators to acquire customers in violation of California Financing Law regulations.⁴⁹

PRIVATE LITIGATION

Several noteworthy small dollar lending decisions were handed down during the past year, the two most significant of which are discussed as follows. In *E-Z Cash Pawn Shop, Inc. v. Minor*,⁵⁰ the parties entered into a loan agreement under the Ohio Mortgage Loan Act in which the consumer agreed to pay 25 percent simple interest.⁵¹ After the borrower defaulted, the lender sued for repayment.⁵² The borrower counterclaimed, alleging that E-Z Cash charged an interest rate in excess of that permitted under Ohio law.⁵³ The court upheld the lower court's decision, finding that the Ohio Mortgage Loan Act contained an alternative rate provision allowing the parties to agree to a rate of interest not exceeding 25 percent and that, because of this, E-Z Cash was entitled to interest at the rate the parties agreed upon.⁵⁴

In *Pennachiotti v. Mansfield*,⁵⁵ the plaintiff obtained a loan from Sovereign Lending Solutions, LLC, an online title lender established under the tribal law of the Lac Vieux Desert Band of Lake Superior Chippewa Indians.⁵⁶ After defaulting on the loan, having his car repossessed, and redeeming the vehicle, the plaintiff filed a complaint against the lender's manager, alleging violations of the Racketeer Influenced and Corrupt Organizations Act and the Pennsylvania Loan Interest and Protection Law.⁵⁷ The manager moved to dismiss the complaint, arguing that he was protected by the doctrine of tribal sovereign immunity and that the court lacked personal jurisdiction over him.⁵⁸ The Pennsylvania court denied the motion and held that, because the plaintiff sought to impose personal liability on the manager alone and had not named the lender itself as a defendant, the manager was not entitled to tribal sovereign immunity.⁵⁹

LEGISLATIVE ACTIVITY

In the last year, several states enacted legislation making significant changes to small dollar lending laws. Michigan Public Act No. 171 prohibits a licensee

48. Consent Order at 2–4, *In re Advance Am.* (Cal. Dep't of Bus. Oversight Mar. 12, 2018), <http://www.dbo.ca.gov/ENF/pdf/2018/Advance%20America-Consent%20Order.pdf>.

49. *Id.* at 2.

50. 83 N.E.3d 981 (Ohio Ct. App. 2017).

51. *Id.* at 983.

52. *Id.*

53. *Id.*

54. *Id.* at 989–90.

55. No. 17-cv-02582, 2017 WL 6311646 (E.D. Pa. 2017).

56. *Id.* at *1.

57. *Id.*

58. *Id.*

59. *Id.* at *2–5.

under the Regulatory Loan Act from paying a person a fee for locating, introducing, or referring a potential borrower unless the fee is not passed, directly or indirectly, on to the potential borrower and provided the amount of the fee is \$500 or less.⁶⁰ Oklahoma and Missouri also passed legislation regarding fees, allowing lenders to assess a convenience fee on a borrower who makes his or her payment by electronic means.⁶¹

Florida Laws Chapter 2018-26 expanded Florida's Deferred Presentment Services statute by creating new requirements for installment deferred presentment transactions.⁶² The amount financed can be up to \$1,000 for a term of sixty to ninety days and bi-weekly fees may not exceed 8 percent of the outstanding balance calculated on a simple interest basis.⁶³

Indiana Public Law 69-2018 revised the Indiana Uniform Consumer Credit Code to allow a consumer loan lender to charge a fee for returned electronic funds transfers, a "skip-a-payment" service, an expedited payment service, GAP agreements, and debt cancellation agreements.⁶⁴ The bill also included changes affecting small loan lenders, including clarifying the borrower's right to rescind and prohibiting borrowers from entering into an extended payment plan until the recession period has expired.⁶⁵

Nebraska Legislative Bill 194 adopted changes to three lending statutes.⁶⁶ The bill requires Delayed Deposit Services Licensing Act licensees to provide additional disclosures to borrowers at the time of origination.⁶⁷ It also prohibits prepayment penalties, provides a right of rescission, limits licensees to two consecutive attempts to deposit or negotiate a check without a new authorization, and limits extensions.⁶⁸ Additionally, the term "check" now includes authorizations to debit an account electronically.⁶⁹ The bill also creates a six-month minimum term for loans governed by the Installment Loan Act and amends the Credit Services Organization Act to prohibit a credit services organization from charging fees in connection with a loan under the Installment Loan Act.⁷⁰

Ohio House Bill 123 requires any loan of \$1,000 or less and with a maximum duration of one year to be made under the Short-Term Loans provisions.⁷¹ The statute establishes minimum and maximum loan terms, provides borrowers with

60. MICH. COMP. LAWS § 493.12(6) (West, Westlaw through 2018 Reg. Sess. of the 99th Leg.).

61. 2018 Okla. Sess. Law Serv. ch. 109 (S.B. 1151) (West); MO. REV. STAT. § 408.140(1)(12) (2017).

62. S.B. 920, 2018 Reg. Sess. (Fla. 2018) (to be codified at FLA. STAT. § 560.404(5), (8), (6)(a), (c)). The effective date of this legislation is July 1, 2019.

63. *Id.* § 2.

64. IND. CODE ANN. § 24-4.5-3-202(1)(f), (i), (j), (l), (m), (3) (West, Westlaw through 2d. Reg. Sess. and Spec. Sess. of the 120th Gen. Assemb.).

65. *Id.* § 24-4.5-7-402(6), -404(4), -401(4).

66. Leg. B. 194, 105th Leg., 1st Reg. Sess. (Neb. 2018).

67. *Id.* § 8.

68. *Id.* §§ 11, 12, 13(1), 13(2).

69. *Id.* § 3.

70. *Id.* §§ 21, 1.

71. H.B. 123, 132d Gen. Assemb., Reg. Sess. (Ohio 2018) (with an effective date of Oct. 29, 2018).

a three-day right of recession, limits permissible interest and fees to 60 percent of the loan amount, prohibits the inclusion of certain charges in the loan balance, limits the total outstanding principal to \$2,500, and restricts licensees to two consecutive attempts to collect from a borrower's account without a new authorization.⁷² The new law also prohibits credit services organizations from arranging credit in amounts of \$5,000 or less, credit with a term of one year or less, or credit with an annual percentage rate exceeding 28 percent.⁷³

Tennessee Public Acts Chapter 600 clarifies that the permitted interest rate is based on the "amount financed," as that phrase is used in the federal Consumer Financial Protection Act.⁷⁴ The new law also clarifies that post-maturity rates are based on the original amount financed and that parties may continue to charge the original contract rate of interest after the maturity date if the contracting parties agree.⁷⁵

2018 Virginia Laws Chapter 217 amended the pawnbroking provisions to provide that a pawnbroker may charge a late fee for each item not claimed by the pledged due date, provided that the pawner is notified of the fee on the pawn ticket.⁷⁶

STATE RULEMAKING

In November 2017, the Georgia Industrial Loan Commission adopted rules establishing procedures for the use of unsolicited live checks.⁷⁷ The rules require certain disclosures and prohibit the sale or provision of ancillary products in conjunction with an unsolicited live check.⁷⁸ A "live check" is a "negotiable check or other negotiable instrument that may be used by a consumer to activate a loan."⁷⁹ Lenders also must maintain a system for preventing the furnishing of an unsolicited live check to a consumer who is not "credit-worthy," as well as for protecting the intended recipient if the unsolicited live check is fraudulently converted.⁸⁰

72. *Id.* § 1 (to be codified at OHIO REV. CODE § 1321.39(B), (E), .40(B), (C), .403, .41(R), (V)).

73. *Id.* § 2 (to be codified at OHIO REV. CODE § 417.071).

74. TENN. CODE ANN. § 45-5-102(27) (West, Westlaw through 2018 2d. Reg. Sess. of the 110th Tenn. Gen. Assemb.).

75. *Id.* § 45-5-401(c).

76. H.B. 26, Gen. Assemb., Reg. Sess. (Va. 2018); VA. CODE ANN. § 54.1-4009(C)(2) (West, Westlaw through 2018 Reg. and Sp. Sess. I, cc. 1 and 2).

77. GA. COMP. R. & REGS. r. 120-1-18-.01-.09 (2018).

78. *Id.* r. 120-1-18.06-.07(2).

79. *Id.* r. 120-1-18.03.

80. *Id.* r. 120-1-18-.05(3).