

AMERICAN FINANCIAL SERVICES ASSOCIATION
LAW COMMITTEE
PERSONAL LOAN COMMITTEE
REPORT ON RECENT DEVELOPMENTS
OCTOBER 22-23, 2018

1. Unconscionability concepts in consumer lending in California

De La Torre v. CashCall, Inc., No. S241434, 422 P.3d 1004 (Cal. 2018)

De La Torre filed a class action against CashCall claiming that CashCall's business of making unsecured personal loans to consumers at high interest rates violated, among other things, the EFTA, Reg. E, and California's Unfair Competition Law ("UCL"). The U.S. District Court for the Northern District of California ultimately granted CashCall's motion for summary judgment on the UCL claim after agreeing that courts should not intrude on matters of economic policy.

The Plaintiffs appealed the ruling to the Ninth Circuit Court of Appeals, who then submitted the following certified question to the California Supreme Court:

Can the interest rate on consumer loans of \$2500 or more governed by California Finance Code § 22303, render the loans unconscionable under California Finance Code § 22302?

The California Supreme Court ruled that an interest rate on consumer loans of \$2,500 or more **may** be deemed unconscionable under Financial Code section 22302:

Although California sets interest rate caps only on consumer loans less than \$2,500, we do not glean from the statute setting those rates—section [22303 of the Financial Code](#)—the implication that a court may never declare unconscionable an interest rate on a loan of \$2,500 or more. Nothing in our unconscionability doctrine, in [section 22303](#), its neighboring [section 22302](#), or anything else shedding light on the purpose of the relevant statutes supports such a reading.

*That responsibility is one courts must pursue with caution. Unsecured loans made to high-risk borrowers often justify high rates. Both consumers' acceptance of such rates, as well as restrictions on them, may trigger unintended consequences. (See, e.g., Bhutta et al., *Consumer Borrowing after Payday Loan Bans* (2016) 59 J. Law & Econ. 225, 247 [finding that "although payday loan regulations reduce the usage of payday loans, many consumers turn to other forms of high-interest credit"].) Wary of such consequences and cognizant of the limits of its power, a court declares unconscionable only those interest rates that—in light of the totality of a transaction's bargaining context—are so "unreasonably and unexpectedly harsh" as to be "unduly oppressive" or "shock the conscience." (E.g., [Sanchez, supra](#), 61 Cal.4th at pp. 910–911, 190*

(Cal.Rptr.3d 812, 353 P.3d 741.) But nothing in California law prohibits a court from making an inquiry into the nature of a consumer loan agreement of at least \$2,500 and the interest rate provided therein.

On October 3, 2018 the Ninth Circuit vacated the District Court decision, remanding the case back to the trial court for further proceedings consistent with the holding in the decision from the California Supreme Court.

2. OCC Fintech Charters

<https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html>

<https://www.csbs.org/csbs-pursue-litigation-against-occ>

<https://www.dfs.ny.gov/about/statements/st1809181.htm>

3. US Dept. of Treasury Report on Nonbank Financials, Fintech and Innovation

https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation_0.pdf

4. *Community Financial Services Association of America v. CFPB* , W.D. Tex., No. 18-cv-295, order 6/12/18.

5. BCFP Report on Telecommunication Related Collections

<https://www.consumerfinance.gov/about-us/blog/more-1-5-consumers-had-telecommunications-related-collections-their-consumer-report-past-5-years/>

6. Update on recent BCFP enforcement activity

<https://www.consumerfinance.gov/policy-compliance/enforcement/actions/bluestem-brands-inc/>

<https://www.consumerfinance.gov/policy-compliance/enforcement/actions/future-income-payments-llc/>

<https://www.consumerfinance.gov/policy-compliance/enforcement/actions/tcf-national-bank/>

<https://www.consumerfinance.gov/policy-compliance/enforcement/actions/triton-management-group-inc/>

<https://www.consumerfinance.gov/policy-compliance/enforcement/actions/national-credit-adjusters-llc-and-bradley-hochstein/>

<https://www.consumerfinance.gov/policy-compliance/enforcement/actions/citibank-na-2018/>

<https://www.consumerfinance.gov/policy-compliance/enforcement/actions/security-group-inc/>

7. Debt Settlement Agencies

Debt Settlement Agencies are known by a variety of names, depending on the jurisdiction: Debt Management Companies, Debt Adjusting Companies, Debt Pooling Companies, Credit Counseling Agencies, Budget Service Companies, and in some cases Prorators. Regardless of the name, all of these entities employ a fundamental business model that requires their customers to

default on their existing debts, redirect their payments to the Debt Settlement Agency (“the “Agency”), and authorize the Agency to negotiate lower payments with creditors on their behalf.

Legal and Regulatory Framework

Regulatory oversight of Debt Settlement Agencies is predominantly at the state level, with additional enforcement authorities held by the Federal Trade Commission (“FTC”) and the Bureau of Consumer Financial Protection (“BCFP”).

- State Oversight – Approximately thirty-nine states regulate Debt Settlement Agencies or their equivalent

- Prohibited in five states (Arkansas, Hawaii, New Mexico, North Carolina, and Wyoming)
 - Prohibited when conducted for profit in another two states (Louisiana and Massachusetts)
 - Unregulated in three states (Alaska, Alabama, and Oklahoma)

See National Conference of State Legislatures survey:

<http://www.ncsl.org/research/financial-services-and-commerce/credit-counseling-debt-managem983and-settlem983.aspx>

- The Uniform Debt Management Services Act promulgated by the Uniform Law Commissioners has only been adopted in one state (Utah).
http://www.uniformlaws.org/shared/docs/debt_management_services/udmsa_prestylefinal_jul11.pdf

- FTC

- The FTC Act and the Telemarketing Sales Rule apply to Debt Settlement Agencies
 - Telemarketing Sales Rule (16 CFR § 310.1 *et seq.*)
 - It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct in the sale of any debt relief service:
 - the amount of time necessary to achieve the represented results, and to the extent that the service may include a settlement offer to any of the customer's creditors or debt collectors, the time by which the debt relief service provider will make a bona fide settlement offer to each of them;
 - to the extent that the service may include a settlement offer to any of the customer's creditors or debt collectors, the amount of money or the percentage of each outstanding debt that the customer must accumulate before the debt relief service provider will make a bona fide settlement offer to each of them;
 - to the extent that any aspect of the debt relief service relies upon or results in the customer's failure to make timely payments to

- creditors or debt collectors, that the use of the debt relief service will likely adversely affect the customer's creditworthiness, may result in the customer being subject to collections or sued by creditors or debt collectors, and may increase the amount of money the customer owes due to the accrual of fees and interest; and
- to the extent that the debt relief service requests or requires the customer to place funds in an account at an insured financial institution, that the customer owns the funds held in the account, the customer may withdraw from the debt relief service at any time without penalty, and, if the customer withdraws, the customer must receive all funds in the account, other than funds earned by the debt relief service in compliance with §310.4(a)(5)(i)(A) through (C). 16 CFR § 310.3(1)(viii).
- It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to request or receive any payment or fee or consideration for any debt relief service unless:
- the seller or telemarketer has renegotiated, settled, reduced, or otherwise altered the terms of at least one debt pursuant to a settlement agreement, debt management plan, or other such valid contractual agreement executed by the customer;
 - the customer has made at least one payment pursuant to that settlement agreement, debt management plan, or other valid contractual agreement between the customer and the creditor or debt collector; and
 - to the extent that debts enrolled in a service are renegotiated, settled, reduced, or otherwise altered individually, the fee or consideration either:
 - bears the same proportional relationship to the total fee for renegotiating, settling, reducing, or altering the terms of the entire debt balance as the individual debt amount bears to the entire debt amount. The individual debt amount and the entire debt amount are those owed at the time the debt was enrolled in the service; or
 - is a percentage of the amount saved as a result of the renegotiation, settlement, reduction, or alteration. The percentage charged cannot change from one individual debt to another. The amount saved is the difference between the amount owed at the time the debt was enrolled in the service and the amount actually paid to satisfy the debt. 16 CFR § 310.4(5).
- Active on the enforcement front against the Debt Settlement industry.

<https://www.ftc.gov/news-events/press-releases/2013/01/ftc-brings-seventh-action-three-months-against-debt-relief>

<https://www.ftc.gov/news-events/press-releases/2012/10/promoters-phony-debt-reduction-schemes-settle-ftc-charges>

- BCFP

- Debt Settlement Agency services are “consumer financial services or products” under Dodd-Frank. *See* 12 U.S.C. § 5481(5)(A), (15)(A)(viii)(II).
- Active on the enforcement front against the Debt Settlement industry
 - *Consumer Financial Protection Bureau v. Freedom Debt Relief, LLC and Andrew Houser.* Case No. 3:17-cv-6484 (N.D. Cal. Nov. 8, 2017)
https://files.consumerfinance.gov/f/documents/cfpb_freedomb-debt-relief-llc_complaint_112017.pdf
 - *Consumer Financial Protection Bureau v. Federal Debt Assistance Association, LLC et al.* Case No. 3:17-cv-6484. (N.D. Cal. Nov. 8, 2017)
 - Default Judgment entered on May, 22, 2018.
https://files.consumerfinance.gov/f/documents/cfpb_freedomb-debt-relief-llc_complaint_112017.pdf