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### How to Reach Us...

2015 Delta Boulevard  
Tallahassee, Florida  
32303

Post Office Box 3637  
Tallahassee, FL 32315

850-388-0500 - Local  
866-295-8585 - Toll Free  
850-391-6800 - Facsimile

[www.svllaw.com](http://www.svllaw.com)

## An Often-Overlooked Assist in Collateral Recovery

By: Jessica Thompson

Recovering collateral, specifically motor vehicles, can be one of the most frustrating tasks for Credit Union employees who work regularly with delinquent members. The member’s realization that he or she is about to lose a vehicle to repossession can expose their stubborn and sometimes deceitful behavior. Refusal to surrender or disclose the location of vehicle, concealing the vehicle, and leaving the vehicle in the possession of an undisclosed third party are all common actions that members take to avoid the Credit Union’s recovery agents; all in hopes that he/she can delay the repossession or avoid it altogether.

What is a lender to do when it has exhausted all of its in-house resources to secure recovery of motor vehicles and to no avail? Short of filing a replevin lawsuit against the defaulted member, there is another option which many clients are not aware of: the Failure to Surrender Vehicle List. As the information regarding this list, and the corresponding paperwork is not publicly available, it is no surprise that many people are not aware that such an option exists.

The relevant section of the Florida Statutes that sets forth this procedure is Fla. Stat. § 320.1316. Upon FLHSMV’s receipt of certain documentation from the lienor under this section, FLHSMV is required to place the name of the registered owner on a list of persons who may not be issued a license plate, revalidation sticker, or replacement license plate until the name is removed from the list.

Adding your member’s name to the FLHSMV list is a two-step process. First, the lienor (Credit Union) must mail a completed HSMV Form No. 82192, Notice to Surrender Motor Vehicle/Vessel, to the member. This notice

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can be found online on FLHSMV's website in its list of available forms. It must be signed under oath; contain the name and last known address of the member; contain the Credit Union's name, address and telephone number, and contain a physical description of the vehicle, including the VIN number and, if known, the plate number. The Credit Union will also need to provide proof of mailing the notice to the member: it is suggested that the Credit Union send this notice by certified mail with a return receipt requested. The statute does not expressly set forth the amount of time that a lienor should allow to lapse before proceeding with step 2; however the Credit Union should allow a reasonable amount of time to pass before further contacting FLHSMV.

Should the member fail to surrender the vehicle within a reasonable time after receipt of the Notice, the Credit Union may submit HSMV Form No. 82191 to FLHSMV. This form is not publicly available and can only be requested by the lienholder at the office of your local tax collector. Because the form is not made available to the public and because FLHSMV does not advertise this procedure; most people, including FLHSMV employees, may not be aware that this form exists. Be prepared to ask to speak with a supervising employee to obtain a copy of the form if necessary, and to pay the proper fee. Credit Union representatives should produce a copy of FLHSMV Form 82192 along with proof of mailing at this time. FLHSMV is obligated to provide the form upon a lienholder's request, so be insistent that they furnish a copy to your representatives in the event that there is any dispute about the form.

Be advised that under this section of the Statutes, the owner of the vehicle has a right to dispute the notice to surrender the vehicle or his or her inclusion on the list of persons not to be issued a license plate, revalidation sticker, or replacement license plate. The owner of the vehicle must do this by filing a civil action in the county in which he or she resides. In this action, the Court will determine whether the lienor has a recorded lien on the vehicle and whether the lienor made a proper demand for the surrender of the vehicle. The Court will consider factors such as whether the Credit Union's lien was properly perfected, whether the previously-discussed FLHSMV forms contained all of the requisite information about the owner, the lienor, and the vehicle, and whether the notice to surrender was properly mailed to the member. If the Court determines that a lien was properly recorded, and that the demand was properly made, the member must show good cause for his or her failure to surrender the vehicle.

Good cause can include, but is not limited to: satisfaction of the debt/lien, the member is current on the loan, the vehicle was reported stolen prior to demand for surrender, or there is an ongoing dispute regarding the enforceability of the lien, etc. If the member is able to show good cause for his or her failure to surrender the vehicle, the Court will order their name removed from the FLHSMV list. The court will also award the member his court costs and reasonable attorney's fees for the proceeding. Contrary to the foregoing, should the member fail to establish good cause for his failure to surrender, the Court will award court costs and reasonable attorney fees in favor of the lienor.

The advantage of notifying FLHSMV of a repossession attempt is that this section of the law operates to deprive a defaulted member of his or her ability to use the vehicle in a practical manner. In most cases, the vehicle is the member's primary source of transportation that he or she will lose once it is repossessed. If the member can no longer revalidate the vehicle's registration, he risks citation from law enforcement should he continue to drive a vehicle with an expired registration. While FLHSMV's procedure is not a perfect one, knowledge of its existence and how to take advantage of it can be a very useful tool in the Credit Union's endeavors to recover collateral. Should you have questions or concerns on whether FLHSMV's procedure is a good recovery option for the Credit Union generally speaking or in a specific case, please contact one of our attorneys for appropriate legal advice.

## Attorney Spotlight: Blair Boyd



Born and raised in Tallahassee, Florida, Blair earned his Bachelor of Arts in History and Social Sciences from The Florida State University and obtained his Juris Doctorate from Florida Coastal School of Law in Jacksonville. After law school, Blair moved back to Tallahassee and began his career working in the public defender's office. He was employed there for 6 ½ years before he was hired on by Jim and Tyler to focus on all aspects of creditor rights, bankruptcy and foreclosure actions.

Blair is married to Elizabeth, his wife of 7 years and they have two young children. Aden Kate is 5 years old and she just started kindergarten in August. Blair states that Aden Kate "is very independent and sassy like her mother." John, their 2 year old son, "is sweet and loving like his father," but John loves the word, "no." Blair and Elizabeth have their hands full with those kiddos and their personalities, but Blair always has a fun new story to tell.

In Blair's time away from the office, he enjoys traveling with his family, working outside in the yard and watching and attending FSU sports, especially Florida State football. If you talk to Blair, be sure to ask him for an invite to their football tailgates – from what we hear, they are always a great time! Another fun fact about Blair that you may not know is that he is a huge Rolling Stones fan. This groupie has seen them live in concert a total of 4 times!! Rock on Blair!

## Sorenson Van Leuven Goes "Pink!"

Wednesday, October 4<sup>th</sup> was "Paint the Town Pink" day in Tallahassee. The Sorenson Van Leuven team wore pink to honor breast cancer awareness month, as well as to honor firm employees or members of their families who have fought the battle against breast cancer.



*Strength*  
*Courage*  
*Hope*

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# CFPB Update: Overview of Recent Guidance from the Bureau

By: Jim Sorenson



The CFPB continues to regulate financial institutions through enforcement. While the CFPB does some regulation through the rules it issues, many significant issues have been addressed through enforcement action (Navy Federal Consent Order as an example) without a specific rule in place. The Supervisory Highlights is used by the CFPB to report examination findings and to provide guidance from the Bureau on a range of issues. This guidance usually sets forth what the CFPB considers unfair practices in violation of the law and can serve as a warning before the Bureau takes enforcement action. In the Summer 2017 Supervisory Highlights issued on September 12, 2017, the CFPB addressed several issues which Credit Unions should take note. This article is a summary of that Supervisory Highlight as it applies to Credit Unions.

## **Automobile Loan Servicing and Repossessions**

The CFPB is concerned with lenders who continued repossessions or failed to stop repossessions after the consumer paid the account current, the consumer entered into a workout arrangement or the consumer made payments necessary to bring the loan current. The Report states that “Bureau examiners concluded that it was an unfair practice to repossess vehicles where borrowers had brought the account current, entered an agreement with the servicer to avoid repossession or made a payment sufficient to stop repossession.”

Unfortunately, the Report does not detail what auto loan servicers were doing. However, there are several points that one can take away from this guidance. First, it is risky to accept payments from a member once a repossession is ordered. If a payment is accepted and the repossession continues forward, the repossession might be an unfair practice under the law. Second, if you enter into any agreement with the member whose car is out for repossession, make sure that the repossession is stopped. Third, if you have discussions with the member about what they need to do to stop the repossession, put that discussion in writing to avoid any misunderstanding with the member and to avoid any allegations of unfair practices.

## **Credit Card Accounts**

The CFPB addressed four issues with regards to credit cards. First issue was the failure of some credit card issuers to provide the required tabular account-opening disclosures. The specific tabular account-opening disclosures area set forth in Appendix G-17 of the Regulation Z. The Report points out that the issuers need to make sure that disclosures are properly printed and that issuers might want to make sure controls are in place to detect errors and such controls may include an independent disclosure review to be assured of compliance.

The second issue involved deceptive misrepresentation to consumers regarding costs and availability of pay-by-phone options. In the specific situation addressed, the credit card issuer had several options for payments of a credit card account, including two pay-by-phone options. One option for pay-by-phone allowed consumers to make an expedited payment for a predetermined fee and the payment was credited the same day or the following business day. The second pay-by-phone option allowed consumers to arrange for future payments to be made free of charge, but the soonest the payment could be credited was two days after the call. The CFPB was concerned because often the free option was not disclosed to the consumer. The CFPB found this practice to be deceptive because “these customer service representatives made an implied misrepresentation to consumers paying over the phone that all of the pay-by-phone services carried a fee.” The CFPB went on to express concern for consumers paying expedited fees that could have been avoided.

This issue not only involves credit cards but any loans for which the Credit Union offers a pay-by-phone option that charges the member a fee. In these situations, the Credit Union needs to make sure that collection staff is trained to effectively and completely disclose to consumers all payment options offered, including the (Continued on page 5)

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free options. In working with collections departments, I have seen collectors try to force the payment by phone option, especially at the end of the month, to meet department delinquency goals. In these situations, Credit Unions should be careful they are not found to be engaging in deceptive practices through implied misrepresentations to the consumer about payment options.

The third issue involved deceptive misrepresentation to consumers regarding the benefits and terms of a debt cancellation credit card product. In this case, the card issuer had scripts for customer service representatives to read and it found that those scripts were not being read to the consumer or were only being read in part to the consumer. The CFPB also found that customer service representatives did not correct consumer's stated erroneous assumptions concerning the benefit and fees of this product. This Bureau stressed that a lender should have sufficient controls in place to assure employees are following procedures and to assure that employees are not committing deceptive marketing and sales practices.

Finally, with regards to credit cards, CFPB highlighted card issuers' failure to comply with Regulation Z as to billing error resolution and unauthorized transactions. In particular, the CFPB highlighted the following: (1) failure to provide consumers with a timely written acknowledgment of receipt of a billing error notice; (2) failed to timely comply with the billing error resolutions procedures; (3) failed to limit the liability of cardholders for authorized use to the lesser of \$50 or the amount of money or services obtained by the unauthorized user before the card issuer is notified; (4) before a billing error was resolved, made or threatened to make an adverse credit report, because the consumer failed to pay the disputed amount or applicable related finance charges (or other charges); (5) failed to timely correct billing errors and accounts, including any related finance charges; (6) failed to send, or failed to timely send, consumers a correction notice where the issuer concluded that the billing error occurred as asserted; (7) failed to conduct, or failed to timely conduct, a reasonable investigation before determining that no billing error occurred; or (8) failed to provide, or failed to timely provide, consumers with written explanation for its determination as to why it concluded that a billing error did not occur. The CFPB went on to discuss the need for oversight of this process including audits to assure compliance.

### **Debt Collections**

The CFPB identified several issues related to debt collection. The first issue was impermissible communication with third parties. The CFPB focused on the need to confirm that the correct party has been contacted prior to beginning collection activities. This means that if the Credit Union places a call to the member, there should be a procedure in place to be assured your employees are speaking to the member before discussing specifics regarding the delinquent loan or account. The CFPB appears to recommend that a verification process include the verification of first and last names, and confirmation of date of birth or the last four digits of the Social Security number before disclosing the debt or the nature of the call. The CFPB pointed out that an authorized user on an account (like a credit card) is still a third party if they are not personally obligated on the loan.

The second issue involved actions that implied that an authorized user is responsible for a debt. In my experience, this issue arises with credit cards or deposit accounts owned by a business. Collection staff should be sufficiently trained to understand the difference between authorized users and those who are obligated on the account.

The CFPB was also concerned with the false representations regarding the effect on a consumer's credit report of paying a debt in full rather than settling the debt for a lesser amount. The CFPB found that collection staff made false representations to consumers about the effect on their credit score if they choose to make a settlement for less than the full balance, as opposed to paying the account in full. The CFPB has previously addressed its concern regarding deceptive or false representations regarding credit scores and credit impact. This was an issue in the Consent Order with Navy Federal Credit Union and has been addressed in other publications of the CFPB.

The CFPB takes the position that a person's credit score is based on numerous factors and as such, the behavior as to one loan may not significantly impact a person's credit score either negatively or positively. As such, any representation that failure to pay or paying less than owed, will harm a person's credit is deemed to be deceptive by the CFPB.

Finally, the CFPB was concerned with debt collection communications at a time known to be inconvenient to the consumer. This issue not only addresses calls outside the hours of 8:00 a.m. to 9:00 p.m., (Continued on page 6)

(Continued from page 5) but also calls to consumers at times consumers had previously informed the creditor were inconvenient. The CFPB mentioned that these issues arose because of failure to properly document account notes about when and how to communicate with consumers and the use of auto dialers that base calls solely on the consumer's area code, rather than consider the consumer's last known address.

### **Deposit Accounts**

The CFPB states that it continues to examine financial institutions for compliance with Regulation E, as well as unfair, deceptive or abusive acts or practices involving deposit accounts. In this Report, the Bureau raised four issues.

The first issue it raised was freezes on deposit accounts related to suspicious activity. While the CFPB did not state that freezes are not allowed, it did state that consumer accounts should not be frozen if less drastic measures would have sufficiently addressed the suspicious activity concerns. The CFPB did state that when holds were appropriate, the financial institution must properly communicate with the consumer about the freeze so that the consumer can take measures to mitigate injuries from the freeze.

The second issue involved misrepresentation about monthly service fees. The CFPB was concerned with fee disclosures not accurately describing monthly service fees, including failing to sufficiently describe when such fees would be waived. The CFPB is concerned that if the consumer is lead to believe the fee would be waived, that the terms and conditions of the fee waiver be sufficiently described to avoid a misrepresentation.

The Bureau also found violations of error resolution requirements under Regulation E related to electronic fund transfers. CFPB found that institutions failed to investigate claims and provide provisional credit within 10 business days of receiving notice of the alleged error. Also found that some institutions refused a consumer's request to review material relied upon by the financial institution in denying error claims.

Finally, the CFPB addressed deceptive statements about overdraft protection products. The Report addressed deceptive acts in which representatives of the financial institution misrepresented their opt-in deposit overdraft protection products when answering inbound calls from consumers, including that: (1) the overdraft protection product applied to check, ACH and recurring bill payment transactions, when the overdraft protection product did not apply to those transactions; (2) the overdraft protection would allow consumers to withdraw more than the daily ATM cash withdrawal limit; and (3) that the overdraft protection product would take effect on the same day as enrollment, when the product would not actually take effect until the next day.

### **Mortgage Origination**

The Report addressed three issues related to mortgage origination. The first involved the "Know Before You Owe Mortgage Disclosure Rule." The Bureau stated it would be "sensitive to the progress made by supervised entities focused on making good faith efforts to come into compliance with this rule." The Report goes on to highlight common violations found by examiners.

The second issue was failure to reimburse unused portions of a specified service deposit. The concern involved consumers who withdrew their applications due to the originator's unreasonable actions or inactions. In these situations, retention of the unused portion of the required service deposit would constitute unfair acts or practices.

Finally, the Bureau addressed deceptive practice involving an arbitration notice in certain residential mortgage loans. The CFPB takes the position that a contract or other agreement for a consumer credit transaction secured by a dwelling may not include terms that require arbitration or any other non-judicial procedure to resolve a dispute.

### **Mortgage Servicing**

The CFPB addressed two issues related to mortgage servicing. The first issue applies to services other than "small services." This is the requirement that servicers help borrowers complete loss mitigation applications. The Bureau points out that Regulation X requires a servicer to exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application. The Report provides additional guidance on what is required by servicers with regards to incomplete applications.

The second issue involves waiver of rights in forbearance, loan modification and other loss mitigation options. This issue applies to all services, both large and small. The CFPB declared that any "broad" (Continued on page 7)

(Continued from page 6) waiver of rights contained in a forbearance, loan modification, or other loss mitigation option is a violation of Dodd-Frank because it is an unfair or deceptive act. This position is significant because many times a borrower will raise or allege violations of consumer protection laws, like Regulation X or Z. As a result, if you are going to offer the member a “settlement” you want to be assured that the member waives any and all claims against the Credit Union. The CFPB has just declared these broad waivers illegal and unenforceable.

What is unclear is when a waiver can be used and can be enforceable. The Bureau does state that while they cannot be included in the ordinary course of offering a loss mitigation agreement, a waiver can be offered in “the context of a resolution of a contested claim.” What constitutes a contested claim remains to be seen.

A full copy of the Supervisory Report can be found at <https://www.consumerfinance.gov/data-research/research-reports/supervisory-highlights-summer-2017/>. This Report highlights the continued need for a compliance management system, including review of processes and sufficient training of staff. Should you have questions about the issues raised by the CFPB in the Report or issues addressed in this article’s summary of the Report, please do not hesitate to contact a lawyer at our firm for further guidance and direction on specific issues facing your Credit Union.

## Staff Spotlight: Carol Garcia



Carol was born in Gainesville, Florida, but raised in Mayo, which is a small one stoplight town about 22 miles from Live Oak. Carol moved to Tallahassee and was hired on to her “first job ever” by Jim and Tyler in January of 2004. She then left the legal field to have her first child in 2009, but we are happy to report that Carol is now back employed at Sorenson Van Leuven. She has many duties at the firm, which include opening and distributing the daily mail, recording Final Judgments, preparing demand letters and working on Answer to Foreclosure files.

Carol is married to husband, Saul who is a Marine and police officer. They have been married for 11 years and have two sons, Saul, Jr. and Andy. Saul, Jr. is 8 years old, is in the 3<sup>rd</sup> grade and loves playing soccer and baseball. Carol says he also enjoys cooking and watching cooking shows-it sounds like a future chef in the making! Their second son, Andy, is four years old and is in Pre-K. He wants to be a Marine and police man just like his Daddy.

In Carol’s spare time, she enjoys reading, baking, couponing and spending time with her family. Back in Mayo, Carol and her family always attend Pioneer Day, which is the second weekend in October each year. They love that time to catch up and visit with their family who are still living in Mayo. One more interesting fact that you may not know about Carol...Believe it, or not, she is a huge zombie fan, so if you enjoy anything scary like Carol, she’s your gal to discuss gore and ooze with. Regardless, we are so excited to have you back, Carol!

### See Us At...

- ◇ **October 13, 2017**-Northeast Chapter Golf Tournament, Beverage Cart—Eagle Sponsor, St. Augustine, FL.
- ◇ **October 22-25, 2017-CUNA Attorney’s Conference**, Amelia Island, FL.
- ◇ **October 27, 2017-Northwest Chapter Golf Tournament**, Silver Tee Sign Sponsor, Pensacola, FL.
- ◇ **November 3, 2017-Tallahassee Chapter Golf Tournament**, Tallahassee, FL.

