Banking and Finance Law Daily

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U.S. Supreme Court Docket, October 2021 Term — Banking and Finance Law Cases

Granted Petitions	Docket No.	Subject	Status, Deadlines	Questions Presented
Rocket Mortgage, LLC v. Alig Granted Jan. 10, 2022	No. 21-428 (9/17/2021)	West Virginia Consumer Credit and Protection Act: financial injury, damages under Article III of Constitution	Oral argument—no date set Response due by Oct. 21, 2021 Waiver of right of respondent Phillip Alig, et al. to respond filed Sept. 28, 2021 Distributed for Oct. 29, 2021, Conference (Oct. 6, 2021) Response requested by Nov. 12, 2021 (Oct. 12, 2021) Motion to extend time to file a response by Dec. 8, 2021, is granted (Oct. 29, 2021) *Amicus curiae* brief of Washington Legal Foundation filed Nov. 12, 2021 Brief of respondents Phillip Alig, et al. in opposition filed Dec. 8, 2021 Distributed for 1/7/2022 Conference (Dec. 22, 2021)	In connection with alleged "unconscionable conduct" in violation of West Virginia Consumer Credit and Protection Act for mortgage appraisal arrangements: (i) whether basing Article III standing to seek damages on a mere risk of harm is inconsistent with the Court's holding in *TransUnion LLC v. Ramirez*; (ii) whether a purchase of a financial product or service creates a "financial injury" cognizable under Article III, even if the product or service arguably provided the consumer with the benefit of the bargain; and (iii) whether a class can be certified (or

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			Reply of petitioners Rocket Mortgage, LLC, filed Dec. 22, 2021 Petition granted, judgment vacated, and case remanded for further consideration in light of Court's 2021 decision in *TransUnion LLC v. Ramirez*, 594 U. S. ___ (Jan. 10, 2022) Judgment issued Feb. 11, 2022	remain certified) when many class members suffered no Article III injury. The U.S. Court of Appeals for the Fourth Circuit held that a mortgage lender engaged in unconscionable conduct in violation of the West Virginia Consumer Credit and Protection Act when it provided its appraisal management company with the plaintiff-borrowers' estimates of their home value. Affirming in part and reversing in part the lower court's rulings, the Fourth Circuit agreed that the mortgage lender (and others) had inappropriately shared the borrowers' estimates with the appraisers and, in some cases, pressured the appraisers to inflate the appraisal amounts. The mortgage lender contended that the practice was common in the industry and legal at the time (see *Banking and Finance Law Daily*, March 11, 2021).
Pending Petitions	**Docket No.**	**Subject**	**Status, Deadlines**	**Questions Presented**
TitleMax of Delaware, Inc. v. Weissmann	No. 21-1262 (3/15/2022)	Pennsylvania interest-usury laws and "dormant Commerce Clause"	Oral argument—no date set Response due by April 18, 2022	Whether the application of the Pennsylvania Consumer Discount Company Act and the Pennsylvania Loan Interest and Protection Law to an out-of-state lender (doing business in

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				Delaware, Virginia, and Ohio) violates the "dormant Commerce Clause" of the U.S. Constitution. The U.S. Court of Appeals for the Third Circuit ruled that The Pennsylvania Department of Banking and Securities' application of the Pennsylvania Consumer Discount Company Act and the Pennsylvania Loan Interest and Protection Law to an out-of-state lender, doing business in Delaware, Virginia, and Ohio as "TitleMax," does not violate the dormant Commerce Clause of the U.S. Constitution (see *Banking and Finance Law Daily*, Jan. 25, 2022).
Bittner v. United States	No. 21-1195 (2/28/2022)	"Report of Foreign Bank and Financial Accounts" under Bank Secrecy Act	Oral argument—no date set Response due by April 1, 2022	In connection with a required "Report of Foreign Bank and Financial Accounts" (FBAR) under the Bank Secrecy Act, whether a "violation" under the Act is the "failure to file an annual FBAR (no matter the number of foreign accounts), or whether there is a separate violation for each individual account that was not properly reported." In partly affirming the lower court, the U.S. Court of Appeals for the Fifth Circuit determined that defendant-appellant Alexandru Bittner lacked a "reasonable cause" defense and, as such, had "non-willfully" failed to report interests in foreign bank accounts; however, the Fifth Circuit reversed as to how to apply the $10,000 penalty. Although the lower

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				court had reduced the government's initial $2.72 million penalty to just $50,000, by ruling that the maximum $10,000 penalty applies to each failure to file an FBAR form, the Fifth Circuit disagreed, holding that the penalty naturally applies to each failure to disclose the existence of an account. The Fifth and Ninth Circuits now differ, respectively, on whether to tally FBAR penalties "per account" or "per form" (see *Banking and Finance Law Daily*, Dec. 1, 2021).
Denied Petitions	**Docket No.**	**Subject**	**Status, Deadlines**	**Questions Presented**
Montilla v. Federal National Mortgage Association	No. 21-688 (11/5/2021)	Federal Housing Finance Agency, Fannie Mae	Oral argument—no date set Response due by Dec. 9, 2021 Motion to extend time to file response is granted and extended to Jan. 10, 2022 (Nov. 24, 2021) *Amicus* brief of Virginia Poverty Law Center, et al. submitted Dec. 9, 2021 Motion to extend the time to file response is granted and extended to and including Feb. 9, 2022 (Dec. 27, 2021) Brief of respondents United States, et al., in opposition filed Feb. 9, 2022 Reply brief of petitioners Neris Montilla, et al., filed Feb. 22, 2022	Whether Fannie Mae, when under the conservatorship of the Federal Housing Finance Agency, is a "state actor" for purposes of constitutional claims; and whether the FHFA, when acting as the conservator for Fannie Mae, is a "state actor" for purposes of constitutional claims. The U.S. Court of Appeals for the First Circuit held that: (i) Fannie Mae, Freddie Mac, and the FHFA were *not* government actors subject to the plaintiffs' Fifth Amendment due-process claims; and (ii) the FHFA's

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			Distributed for 3/18/2022 conference (Feb. 23, 2022) Certiorari denied March 21, 2022	temporary conservatorship over Fannie Mae and Freddie Mac does not constitute "permanent authority," and the FHFA controls the Enterprises "for the limited purpose of reorganizing, rehabilitating, or winding up their affairs (12 U.S.C. § 4617(a)(2))" (see *Banking and Finance Law Daily*, June 11, 2021).
Fast Auto Loans, Inc. v. Maldonado	No. 21-31 (7/7/2021)	California's "McGill Rule" preempted by Federal Arbitration Act?	Oral argument—no date set Response due by Aug. 9, 2021 Waiver of right of respondent Joe Maldonado, others to respond filed Aug. 4, 2021 Distributed for Sept. 27, 2021 Conference (Aug. 11, 2021) Supplemental brief of petitioner Fast Auto Loans, Inc. filed Sept. 16, 2021 Motion to extend time to file a response is granted to and including Oct. 25, 2021 (Sept. 21, 2021) Motion to extend time to file response (from Oct. 25, 2021, to Nov. 8, 2021) is granted (Oct. 20, 2021) Brief of respondents Joe Maldonado, et al. in opposition filed Nov. 8, 2021 Reply of petitioner Fast Auto Loans, Inc. filed Nov. 18, 2021	Whether California's McGill rule, under which agreements for individualized arbitration are invalidated when a plaintiff seeks public injunctive relief, is preempted by the Federal Arbitration Act, given the U.S. Supreme Court's holdings that: (i) the FAA requires courts to "enforce arbitration agreements according to their terms"; (ii) arbitration agreements with terms requiring "individualized" arbitration are "protected pretty absolutely" by the FAA; (iii) state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA; (iv) states cannot carve out

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			Distributed for Dec. 10, 2021, Conference (Nov. 23, 2021) Certiorari denied Dec. 13, 2021	particular categories of disputes from the operation of the FAA; and (v) state courts must abide by the FAA and by the opinions of this Court interpreting that law. California state appellate court ruled that the arbitration clause in an auto loan agreement was unenforceable because it required consumers to waive their right to pursue public injunctive relief under California's "McGill Rule" and that the offending provision could not be severed from the rest of the agreement. Consequently, the consumers suing the auto lender could not be compelled to arbitrate any of their claims (see *Banking and Finance Law Daily*, Jan. 13, 2021).
Rum v. United States of America	No. 21-589 (10/20/2021)	"Willfulness" standard for alleged Foreign Bank Account Report violation under Bank Secrecy Act	Oral argument—no date set Response due by Nov. 22, 2021 Waiver of right of respondent United States of America to respond filed on Nov. 1, 2021 Distributed for Dec. 3, 2021, Conference (Nov. 9, 2021) Certiorari denied Dec. 6, 2021	In connection with alleged Foreign Bank Account Report (FBAR) violations under the Bank Secrecy Act: (i) whether courts are to apply *de novo* review of agency actions when purported inadequacy of factfinding procedures is due to a procedural due-process violation; (ii) how courts are to apply the "willfulness" standard in the context of specific reporting requirements; and (iii) whether 31 C.F.R. §

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				1010.820(g)(2) is superseded by 31 U.S.C. § 5321(a)(5). In connection with a taxpayer's placement of $1.1 million in a foreign bank account, the U.S. sued the taxpayer to enforce an IRS penalty against him for "willfully" failing to file a Foreign Bank Account Report (FBAR), upholding a summary judgment in favor of the Government, the U.S. Court of Appeals for the Eleventh Circuit: (i) determined that the "willfulness" standard (31 U.S.C. § 5321) includes a reckless disregard of a known or obvious risk; (ii) ruled that the plain text of section 5321(a)(5)(C) makes clear that a willful penalty may exceed $100,000; and (iii) rejected the taxpayer's argument that the IRS factfinding proceedings were so insufficient as to mandate a *de novo* review (see *Banking and Finance Law Daily*, April 26, 2021).
NC Financial Solutions of Utah, LLC v. Commonwealth	No. 21-111 (7/23/2021)	Virginia Attorney General's authority to litigate on behalf	Oral argument—no date set Response due by Aug. 26, 2021	Whether Virginia's attorney general, who is seeking individualized relief under state law on behalf of those

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of Virginia ex rel.		of loan borrowers subject to arbitration agreement	Waiver of right of respondent Commonwealth of Virginia to respond, filed Aug. 16, 2021 Distributed for Sept. 27, 2021, Conference (Aug. 18, 2021) *Amicus curiae* brief of Professor George A. Bermann filed Aug. 20, 2021 Motion to extend time to file a response is granted to and including Oct. 29, 2021 (Sept. 1, 2021) Brief of respondent Commonwealth of Virginia ex rel. Mark R. Herring (Attorney General) in opposition filed Oct. 29, 2021 Reply brief of petitioner NC Financial Solutions of Utah, LLC filed Nov. 15, 2021 Distributed for Dec. 3, 2021, Conference (Nov. 16, 2021) Certiorari denied Dec. 6, 2021	individuals who borrowed money from a lender pursuant to a loan agreement and who were signatories to the arbitration clause, may litigate those claims on the borrowers' behalf. The Virginia Supreme Court ruled that although the Virginia attorney general's claims for individualized relief would be subject to the loan agreement and arbitration clause if asserted by the borrowers themselves, the Virginia attorney general could assert those claims on the borrowers' behalf in litigation because he was not a signatory to (and not bound by) that arbitration agreement.
Alpine Securities Corporation v. SEC	No. 21-82 (7/19/2021)	Authority to enforce Bank Secrecy Act	Oral argument—no date set Response due by Aug. 20, 2021 Motion to extend time to file a response is granted to and including Sept. 20, 2021 (Aug. 17, 2021) *Amici curiae* brief of Former FinCEN Officials James H. Freis, Jr. and Charles M. Steele filed Aug. 20, 2021	Whether the Securities and Exchange Commission's assertion of independent authority to interpret and enforce the Bank Secrecy Act contravenes "Congress's decision to entrust enforcement of the BSA's comprehensive anti-money-laundering regime to the Treasury

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			Amici curiae brief of CATO Institute filed Aug. 20, 2021 Motion to extend time to file a response is granted to and including Oct. 20, 2021 (Sept. 8, 2021) *Amici curiae* brief of CATO Institute filed Aug. 20, 2021 Motion to extend time to file a response is granted to and including Oct. 20, 2021 (Sept. 8, 2021) Brief of respondent SEC in opposition filed Oct. 4, 2021 Reply of petitioner Alpine Securities Corp. filed Oct. 18, 2021 Distributed for Nov. 5, 2021, Conference (Oct. 20, 2021) Certiorari denied Nov. 8, 2021	Department, a politically accountable executive agency."
RD Legal Funding, LLC v. CFPB	No. 20-1758 (6/14/2021)	Validity of CFPB's ratification remedy after Court's *Seila Law* decision	Oral argument—no date set Response due by July 16, 2021 Waiver of right of respondent People of the State of New York, ex rel. James to respond filed July 9, 2021 Motion to extend time to file a response is granted to and including Aug. 16, 2021 (July 19, 2021) Brief of respondent United States in opposition filed Aug. 16, 2021 Distributed for Sept. 27, 2021 Conference (Sept. 1, 2021)	Whether ratification is an appropriate remedy for the separation-of-powers violation identified in the Court's *Seila Law* decision; and whether, after the Court found the CFPB's structure to be unconstitutional in its *Seila Law* decision, the CFPB could ratify an enforcement action and subsequent appeal after the time for doing so had expired.

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			Reply of petitioners RD Legal Funding, LLC, et al. filed, distributed Sept. 1, 2021 Certiorari denied Oct. 4, 2021	Second Circuit reversed a decision by the New York federal district court that the for-cause removal provision of the Dodd-Frank Act is not severable from the remainder of the CFPA, in light of the Supreme Court's ruling to the contrary in *Seila Law*; the action was remanded to the federal trial court for consideration of the validity of CFPB Director Kathleen Kraninger's ratification of the enforcement action in *CFPB v. RD Legal Funding, LLC* (see *Banking and Finance Law Daily*, Nov. 2, 2020).
Kimble v. U.S.	20-1697 (6/3/2021)	Bank Secrecy Act: Foreign Bank Account Report	Oral argument—no date set Response due by July 9, 2021 Waiver of right of respondent United States to respond filed June 21, 2021 Distributed for Sept. 27, 2021, Conference (June 23, 2021) Certiorari denied Oct. 4, 2021	Did the court err in holding that defendant Kimble acted willfully, despite the lack of proof either that she had knowledge of the requirement to file a Foreign Bank Account Report (FBAR) or of her intent to evade taxes? Did the court's finding of willfulness despite lack of proof of intent or knowledge improperly interpret the statute by rendering every failure to file willful, although the statute (31 U.S.C. §§5321) provides differing

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				penalties for willful and non-willful violations? Did the court err in finding that the U.S. Government properly assessed the maximum penalty on defendant Kimble's foreign bank account, in light of the substantial proof of the fact that Kimble relied upon erroneous findings of fact, and that the assessment of the penalty was punitive? Did the court err in holding that defendant Kimble did not preserve her argument that the 50-percent penalty imposed upon her account was an Excessive Fine under the Eighth Amendment to the U.S. Constitution? Was the penalty imposed upon defendant Kimble's account ($697,229) an Excessive Fine under the Eighth Amendment to the U.S. Constitution? Did the court err in finding that the amendments to the law [31 U.S.C. §5321(a)(5)(C)(i)] superseded IRS

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				regulation [31 CFR §1010.820] regarding the maximum penalty that can be imposed by the IRS after a finding of a willful failure to file an FBAR?
Nettles v. Midland Funding LLC	20-1673 (5/20/2021)	Fair Debt Collection Practices Act	Oral argument—no date set Response due by July 2, 2021 Motion to extend time to file a response is granted to and including Aug. 2, 2021 (June 30, 2021) Brief of respondents Midland Funding LLC, others in opposition filed Aug. 2, 2021 Distributed for Sept. 27, 2021 Conference (Aug. 18, 2021) Reply of petitioner Ashley Nettles filed Aug. 18, 2021 Certiorari denied Oct. 4, 2021	Whether, under the standard set forth in the Supreme Court's *Spokeo* decision, it is sufficient for Article III standing to allege a violation of procedural rights created by the FDCPA, or must a plaintiff allege an additional injury beyond such a violation? If some additional injury is required for establishing standing under the FDCPA, is it sufficient to allege mental distress or lost time dealing with a violation of the FDCPA or is something more than mental distress or lost time required?

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