Is the Current Department of Justice More Pro-Business on Servicemember Rights Claims? Um, No.

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The news of momentous changes in government policy, especially regarding civil rights enforcement, has been gratifying to many creditors that felt the federal government had gone too far in its interpretation of the laws and was too unreasonable in its settlement demands. The Trump administration has all but gutted the Consumer Financial Protection Bureau (although litigation is still active on this point), and the U.S. Department of Justice has not brought a single case under the Equal Credit Opportunity Act or the Fair Housing Act under this administration.

Is it time for celebration—or at least a big sigh of relief? Well, not when it comes to the DOJ's enforcement of the Servicemembers Civil Relief Act, a federal law that gives many protections to covered servicemembers related to their auto credit and lease contracts. The SCRA makes it hard to repossess servicemembers' cars when they default, lowers the finance charge (interest) rate to 6% on existing obligations after a customer enlists or is called to active duty, and allows many servicemembers to cancel their auto leases early without enduring the contractual early termination penalty.

Recent SCRA enforcement activity

In this administration's first year in office, the U.S. attorney general obtained nine SCRA settlements, a larger number than we've seen recently. It is easy to assume that, after years of active enforcement of the SCRA, all businesses would have their SCRA ducks in a row. Why are there still so many cases? Two themes emerge to explain the recent cases.

- Smaller companies are being sued, often companies other than creditors, which may have less experience with the SCRA; and
- Violations by larger companies are often not general compliance failures but rather a limited area in which the companies had a compliance "blind spot."

Let's start with small companies, including those that are not creditors. Smaller companies may have fewer resources for compliance and struggle just to stay on top of local ordinances and state laws and regulations. Indeed, four of the nine settling companies were involved in two DOJ complaints resolving claims that they were responsible for towing servicemembers' cars and disposing of them without court orders or valid written waivers of SCRA rights. One of these defendants, a local towing company, was accused of only a single violation, which makes the point that no business is too small and no business's compliance failures are too few to be safe from SCRA suits by the AG.

Once upon a time, the federal government was reluctant to spend its resources on little companies. As a government enforcement attorney at the Federal Trade Commission years ago, neither my colleagues and I nor the top agency officials would have been happy to prosecute a case against "Mom and Pop Towing Company" for an injury allegedly suffered by just one person. The towing company in the actual case had a contract with a town to tow cars at the request of the police department. In this case, it received instructions to tow a car on a public street that had an expired registration. That car turned out to belong to a deployed servicemember. The towing company sent a notice of pending lien sale to the address listed on the car's registration, but the servicemember had not kept his registered address up to date. The company sold the car for $1,200 without obtaining a court order. This was a regrettable event, and every towing company should know by now to check a federal database to see if the owner is a covered servicemember before selling a car. This company followed state law that allowed it to sell the impounded car after it attempted to notify the owner and received no response. I doubt it knew there was a federal law that required more. That knowledge gap cost the company an investigation by the DOJ, many months of litigation expense, a $7,500 check to the servicemember, and a civil penalty.

Another company that seemed unfamiliar with the SCRA was a wireless phone service provider operating only in Guam, an unincorporated U.S. territory and an island in Micronesia that is 30 miles long by up to 12 miles wide and 3,300 miles west of Hawaii. The company was charged with imposing early termination fees on servicemembers when they received relocation orders. Because Guam has a lot of servicemembers, there were more than a trivial number of improper early cancellation fees. The company suffered through a long DOJ investigation, signed an order with extensive requirements, and paid $500,000, including a $50,000 civil penalty.

Another company was a residential property manager, which was also accused of imposing early termination fees on servicemembers who received relocation orders. The company did business only in northeast Florida, and the government alleged there were SCRA violations involving six people.

A regional subprime creditor had a similar experience. Its alleged violation was repossessing the cars of four servicemembers without court orders. It was an expensive mistake. The company will pay $60,000 in restitution to the four servicemembers and a civil penalty of $60,000. In addition to the cash outlay, it must develop detailed SCRA compliance procedures, get them approved by counsel for the government, quickly develop training materials for all employees involved with SCRA compliance or repossessions, get the training materials approved by the DOJ, and get all covered employees trained within 30 days of the approval of their training materials. New employees must be trained within 30 days of their hiring, promotion, or transfer, and all covered employees must be retrained annually for the four-year term of the agreement.

When large companies are sued by the DOJ, it is seldom because they are unaware of the SCRA's requirements. Often, the company has invested considerable time and money in setting up its SCRA compliance program and following the rules. So how do these violations happen? The company may think it is doing a good job with its SCRA compliance, but it has not audited and tested its procedures to discover a compliance gap. This seems to be the case with a very large national property management firm, which the DOJ required to escrow $1.35 million to compensate affected servicemembers for assessing early lease termination fees. This firm's noncompliance appeared to stem from the use of third-party software that automatically assessed early termination fees against all tenants. No one at the company appeared to have tested the software for SCRA compliance.

A recent settlement alleged that a large auto retailer failed to check for servicemember status in a limited factual situation—when the repossession occurred after the company had already charged off the debt. It appears that repossessions occurring before charge-off were compliant. Nothing in the published settlement agreement explained why a repossession before or after charge-off mattered, and no one at the company seemed to have caught this compliance gap until the DOJ came knocking. The company paid almost $500,000 to settle the case, and even this large number is probably less than the company paid counsel to handle the investigation, which covered more than five years, to develop the new procedures, test them, and get them approved by the DOJ, to develop training materials, get them approved, and accomplish the training for all customer service employees and employees involved in repossessions, to double- and triple-check that no one missed the training, to administer the restitution payments, including compensating servicemembers for lost equity based on the retail value of their cars, to delete the tradelines of all servicemembers who experienced wrongful repos, and to file detailed compliance reports with the DOJ every six months for four years.

What do these recent cases teach us?

First, there is no such thing as a company too small to sue for an SCRA violation. Even a single violation, involving a single customer, will not deter the feds from suing.

Second, even the best companies can have compliance blind spots. When we see good companies with well-developed SCRA compliance management systems charged with violations, there is a decent chance that your company has a blind spot or two. Reviewing policies and training materials is good but not enough. It is the nature of blind spots that no one has thought to check. I advise my clients with internal audit departments to request the audit team to do transaction testing to search for system failures, glitches, and human error. For instance, a client once had a clunky software system, well past its sell-by date, which required flawless employee execution to get a repo order canceled when a client made a last-minute payment or promise to pay. Spoiler alert! Even well-trained employees occasionally make mistakes. In the hectic world of customer service calls, an employee could miss a step or become distracted from the task, which required checking and making notes on several screens to complete the repo cancellation or postponement. If a task that affects regulatory compliance is harder than it should be, putting off the fix may be more expensive than the cost of the fix. It can result in millions of dollars in restitution, civil penalties, staff overtime, counsel fees, senior management distraction, and, to top it all off, a reputation-damaging press release by the DOJ.

In addition to using auditors for transaction testing, there are even easier steps to take, such as listening to employees. You might ask at a staff meeting or training, “If a team member understood how to … (cancel a repo or check the DMDC for servicemember status) but missed something, why do you think that might happen?” Are employees afraid to ask for help? Are we asking them to do too much too quickly? Are the instructions confusing or hard to follow?

Finally, be sure you are making good use of your in-house or outside counsel with the right expertise. In a case last year, a company called its lawyer to say a customer’s JAG officer had complained that the company had not acted on its legal obligation to waive early termination fees. The lawyer (mistakenly, as it happened) told the company that its practices were fine: Virginia law did not require waiving an early termination fee if the servicemember’s new relocation was within 35 miles of his or her current residence, and the contract said that Virginia law would govern the contract. Not only do smaller companies sometimes not know about a federal law like the SCRA,

but sometimes their lawyers are also uninformed. Be sure that you have access to the legal resources you need.

In the world of consumer credit regulatory compliance, I am convinced that humility is our best friend. This stuff is complicated, and no single lawyer has mastered it all. Read alerts about government enforcement actions and class actions in our field—if someone else potentially has a problem, we might too. We must contend with incredibly complex federal, state, and even local laws. Our law firm, like many others, provides advisories for free. Subscribe to all of them, and think objectively about whether your organization could have a similar problem. Attend conferences on current compliance developments, and have your attendees share within the organization what they learned.

Train customer service reps to elevate a consumer complaint that sounds not quite right. For example, I once received a call from a client who said a customer service rep received a call from a customer that his mortgage loan closing, scheduled for that day, was on hold because the day-of check of his credit report showed a charged-off motor vehicle loan. The customer insisted he had never made a late payment, a fact the rep was able to confirm. Quick escalation to the manager got the issue before senior management, which confirmed the error. A bit more high-priority research discovered the cause: a coding error that had happened innocently over routine weekend maintenance. All early payoffs had been mistakenly recoded as charge-offs. Oops. It was only a typo in the code. I advised the client to contact all consumer reporting agencies immediately and instruct them to back out the creditor's most recent data submission, to authorize all overtime needed to fix the error, to notify its customer service department how to help the staff respond appropriately to any similar complaints, and to take a myriad of other actions needed to mitigate the risk of an unfortunate but understandable mistake. (See discussion of humility, above.) What could have been a miserable enforcement action was quickly fixed and later praised by examiners for empowering employees to speak up when something seems wrong.

Bottom-line takeaway

None of us is perfect, and no company is beyond making a mistake. But the hard truth is that a governmental agency will seldom be persuaded not to pursue a violation that affects only a few people (especially servicemembers), even if it happens in only a fraction of a percent of all transactions and (I'm sorry to say) especially if an enforcement action would make for a good press release for the agency.

A final thought

When I advise clients, I often think about what I would hope the facts would be if I had to defend them in litigation. Especially on issues without clear precedents (which is a long list), I encourage clients to make my job easy—create the facts that will mitigate compliance risk, or, barring that, show the agency or court that you were really trying. This strategy is not fail-safe, but it will take you a long way.