Nisen & Elliott, LLC

AUTO ALERT™

Auto Finance Legal Compliance Report

NOVEMBER 2020

Monthly Report and Impact Analysis:
Developments in Motor Vehicle Lease
and Retail Installment Transactions*

Auto Alert™ Table of Contents*

III. Proposed Legislation

A. Federal

No applicable developments

B. State

Appendix of Exhibits

Please contact David Gemperle at dgemperle@nisen.com if you would like to receive a copy of any legislation discussed in Auto Alert or if you have questions regarding any of the cases, regulations or legislation summarized.

1. CFPB Debt Collection Rule Executive Summary

2. Statement on Reference Rates for Loans (November 6, 2020).

3. 85 Fed. Reg. 70512 (Supervisory Guidance Rule).

4. 2020 CA Prop. 24.

5. Mass. Right to Repair Initiative, Question 1, (2020).

6. Nieran Zeto v. BMW of North America, No. 20-cv-1380, 2020 WL 6708061 (S.D. Cal. November 16, 2020).

7. Elizabeth Marchetti et al. v. Ford of Simi Valley, Inc., 2020 WL 6792858 (Cal. Ct. App. Nov. 19, 2020).

8. Ally Bank v. Bey, 2020-Ohio-5093 (Ohio Ct. App. Oct. 29, 2020).

9. 2020 N.J. A.B. 4899.

10. 2020 N.J. A.B. 5033.

* The following substantive areas are specifically excluded from **AUTO ALERT™:** Federal, state and local tax parameters, lemon laws, marketing and promotional issues, non-disclosure elements of insurance, warranty claims, motor vehicle license, title and registration requirements, direct loans, and debt collection practices.

AUTO ALERT™ is intended as a report of significant developments in motor vehicle retail installment sale and lease transactions. It is not intended as specific legal advice with respect to a particular contract form or procedure. For individualized advice related to such contract forms or procedures, Nisen & Elliott, LLC should be consulted. In addition, the matters discussed herein do not constitute opinions of federal or state law.

I. Statutory and Regulatory Developments

A. FEDERAL STATUTORY AND REGULATORY DEVELOPMENTS

1. CFPB Debt Collection Final Rule

On October 30, 2020, the Consumer Financial Protection Bureau ("CFPB") issued final regulations implementing the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq. The CFPB refers to the regulations as the "Debt Collection Rule. In promulgating the Debt Collection Rule, the CFPB stated that it "recognizes the special sensitivity of communications by FDCPA debt collectors relative to communications by creditors, and, therefore, the FDCPA provides protections for consumers receiving such communications from debt collectors but not creditors." The Debt Collection Rule explains the FDCPA meaning of "debt collector" as any person (1) who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts (i.e., the "principal purpose" prong), or (2) who regularly collects, or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another (i.e., the "regularly collects" prong). The Debt Collection Rule includes commentary it considers to be consistent with current judicial interpretations of the exclusion of creditors from the meaning of "debt collectors" under the U.S. Supreme Court decision in Henson v. Santander Consumer USA Inc. 137 S. Ct. 1718 (2017). In Henson, the Supreme Court held that Santander Consumer USA Inc. did not satisfy the "regularly collects" prong in collecting a portfolio of account it purchased. The Debt Collection Rule commentary states:

> A person who collects or attempts to collect defaulted debts that the person has purchased, but who does not collect or attempt to collect, directly or indirectly, debts owed or due, or asserted to be owed or due, to another, and who does not have a business the principal purpose of which is the collection of debts, is not a debt collector as defined in § 1006.2(i).
>
> Debt Collection Rule Official Staff Comment 2(i)-1.

The Debt Collection Rule does not foreclose the possibility that a creditor could be a "debt collector" by also having a business of debt collection or by regularly collecting on behalf of others. The preamble explains that the Court in Henson did not identify those question as being presented in the petition for certiorari. In addition, the CFPB declined to clarify whether any actions prohibited under the FDCPA are also prohibited under the general Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") Section 1031 prohibition on unfair, deceptive, or abusive practices.

Certain elements of the Debt Collection Rule likely will impact creditors because of the limitations on a debt collector's ability to use information obtained from the creditor to collect. The CFPB explains that all the following must be met for a debt collector to use an email address obtained from a creditor:

(1) the creditor obtained the email address from the consumer; (2) the creditor used the email address to communicate with the consumer about the account and the consumer did not ask the creditor to stop using it; (3) before the debt collector used the email address to communicate with the consumer about the debt, the creditor sent the consumer a written or electronic notice that clearly and conspicuously disclosed the information required under the Rule (see below); (4) the opt-out period has expired and the consumer has not opted out; and (5) the email address has a domain name that is available for use by the general public (e.g., @gmail.com), unless the debt collector knows the address is provided by the consumer's employer. The information required under the Debt Collection Rule that must be sent by the creditor in order to allow the debt collector to use an email address provided by the creditor is as follows:

(1) That the debt has been or will be transferred to the debt collector;

(2) The email address and the fact that the debt collector might use the email address to communicate with the consumer about the debt;

(3) That, if others have access to the email address, then it is possible they may see the emails;

(4) Instructions for a reasonable and simple method by which the consumer could opt out of such communications; and

(5) The date by which the debt collector or the creditor must receive the consumer's request to opt out, which must be at least 35 days after the date the notice is sent.

12 C.F.R. § 1006.6.

https://www.consumerfinance.gov/documents/9275/cfpb_debt-collection_final-rule_2020-10.pdf (omitted due to length, CFPB Executive Summary included as an Exhibit).

Impact Analysis
The Consumer Financial Protection Bureau has issued regulations implementing the federal Fair Debt Collection Practices Act ("FDCPA") which largely affirms existing law regarding the inapplicability of the FDCPA to first-party creditors collecting their own debt. However, because of rules pertaining to use of information provided by creditors to debt collectors, creditors that utilize debt collectors should consider new procedures to notify consumers of their ability to opt out of certain email communications. The regulations do not include any interpretation of the general CFPB authority regarding unfair, deceptive and abusive practices by covered persons and service providers.

2. Joint Statement on Reference Rates for Loans (LIBOR Transition)

On November 6, 2020, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency (the "agencies") issued a joint Statement on Reference Rates for Loans ("LIBOR Statement"). The Statement reiterates that agencies are not endorsing a specific replacement for the London Interbank Offer Rate ("LIBOR"). Previously, the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York convened the Alternative Reference Rates Committee ("ARRC") (which also included the U.S. Treasury Department, the Commodity Futures Trading Commission, and the Office of Financial Research) to recommend an alternative. The ARRC recommended the Secured Overnight Financing Rate ("SOFR") to replace LIBOR. 84 Fed Reg. 54068. In the LIBOR Statement, the agencies emphasize that SOFR is voluntary and recommend "robust" fallback language in case any reference rate is discontinued.

Statement on Reference Rates for Loans (November 6, 2020).

Impact Analysis
A new Joint Statement by federal regulators confirms that the Secured Overnight Financing Rate ("SOFR") is a voluntary reference rate and is not endorsed by federal regulators as a replacement for LIBOR, which will be discontinued sometime after 2021.Sometime after 2021 LIBOR will cease to be published. Wholesale finance and other loans to dealers may reflect the outgoing LIBOR. In connection with those loans, creditors and borrowers should review loan documentation to determine the reference rate and commence discussion of replacement reference rates and fallback language with their counterparties. The Alternative Reference Rates Committee ("ARRC") created recommended language for a variety of transaction types. https://www.newyorkfed.org/arrc/fallbacks-contract-language

3. Interagency Statement Clarifying the Role of Supervisory Guidance

On November 5, 2020, the Consumer Financial Protection Bureau ("CFPB"), in conjunction with the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and Office of the Comptroller of the Currency (together, the "Prudential Agencies"), published a proposed rule in the Federal Register to codify the September 2018 Interagency Statement Clarifying the Role of Supervisory Guidance (the "Clarifying Statement") explaining the role of supervisory guidance and to describing the agencies' approach to supervisory guidance. The proposed rule retains the following key passage from the Clarifying Statement:

> ***Difference between supervisory guidance and laws or regulations***
>
> The agencies issue various types of supervisory guidance, including interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions, to their respective supervised institutions. A law or regulation has the force and effect of law. Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the agencies do not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the agencies' supervisory expectations or priorities and articulates the agencies' general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the agencies generally consider consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers. Supervised institutions at times request supervisory guidance, and such guidance is important to provide insight to industry, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.

The proposed rule, like the Clarifying Statement, indicates that the Prudential Agencies will not criticize based on a "violation" or "non-compliance" with supervisory guidance. However, the proposed rule does not include language regarding the issuance of "citations" that commenters found confusing. In addition, a new parenthetical (indicated in italics below) clarifies that the agencies will not identify "violations" of Supervisory Guidance as "matters requiring attention":

> Examiners will not criticize *(including through the issuance of matters requiring attention, matters requiring immediate attention, matters requiring board attention, documents of resolution, and supervisory recommendations)* a supervised financial institution for, and agencies will not issue an enforcement action on the basis of, a "violation" of or "non-compliance" with supervisory guidance.
>
> 12 C.F.R. Part 1074, Appendix A.

The proposed rule, like the Clarifying Statement, indicates that supervisory guidance should not be used to create "bright-lines" or numerical thresholds. In addition, the Prudential Agencies will attempt to limit the issuance of multiple supervisory documents on the same topic.

85 Fed. Reg. 70512.

Impact Analysis
The Federal prudential regulators of depository institutions (the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency) have issued proposed rules codifying their previous clarifying statement regarding the role of Supervisory Guidance. The clarifying statement was never submitted to congress under the Administrative Procedure Act, 5. U.S.C. Chapter 5, and its relevance and reliability was questioned by some commenters. With this proposed rule, the agencies are attempting to affirm that Supervisory Guidance will not set forth standards or steps that regulated entities are required to follow. However, it is not clear if the appointees for the incoming administration will support the proposed rules. Comments must be received by January 4, 2021. Supervisory Guidance will remain relevant to their understanding of at least some ways that regulated entities can maintain safe and sound practices.

B. STATE STATUTORY AND REGULATORY DEVELOPMENTS

1. COVID-19: Repossession Update

The Chart below is a Summary of Guidance of laws, orders and bulletins from states related to COVID-19 that have been renewed, never expired, or are open-ended and have not been withdraw. New Mexico has restored its ban on repossession until November 30, 2020, while the existing District of Columbia prohibition remains in effect for motor vehicles. However, New Mexico is expected to move to a "phased approach" on November 30, 2020, with non-essential businesses in red counties (nearly all counties are expected to be red) limited to 25% occupational capacity, which should allow the operation of repossession businesses. Maryland's ban on repossession remains in effect for "chattel homes" only.

State	License Type	Agency/Website	Guidance
Alabama	SF	State Banking Department http://www.banking.alabama.gov/pdf/press%20release/Pandemic_Planning_3122020.pdf March 12, 2020 http://banking.alabama.gov/pdf/Covid-19/Superintendent_Mike_Hill_Statement_on_Working_with_Bank_Customers31620 20.pdf (last accessed November 29, 2020)	Sales Finance Licensees should immediately notify the Department of Banking of any circumstances that require the closure, relocation, or remote work program and any efforts taken to work with consumers. The update specifically refers to the possibility of the deferral fees or other charges, so deferral related activity should be described, if applicable. However, since that time the Department of Banking has opened and is operating with limited staff. The Department of Banking has also issued correspondence to licensees asking that licensees keep the Department of Banking "posted" on efforts to assist those customers impacted by the pandemic.

State	License Type	Agency/Website	Guidance
Arizona	SF	Department of Financial Institutions ("DFI") https://dfi.az.gov https://dfi.az.gov/sites/default/files/Statement-Coronavirus-FinancialInstitutions_20200424.pdf (last accessed November 29, 2020)	April 24, 2020, open-ended guidance from DFI encourages waiving fees such as Overdraft fees, delinquencies and negative credit bureau reporting caused by COVID-19-related disruptions and offering payment accommodations, such as allowing borrowers to defer or skip some payments or extending the payment due date, which would avoid delinquencies and negative credit bureau reporting caused by COVID-19-related disruptions. The Arizona AG separately asked on March 19, 2020 for financial and lending institutions, including those in auto lending, to "waive payments for 90 days and agree to place those payments on the back of the loan in three additional payments (no lump sum payment or balloon)."
District of Columbia	SF	Department of Insurance, Securities and Banking https://code.dccouncil.us/dc/council/laws/23-130.html (last accessed November 27, 2020)	On August 19, 2020, the District of Columbia enacted D.C. Act 23-405, the Coronavirus Support Second Congressional Review Emergency Amendment Act of 2020. The Act is effective from August 19, 2020 and *continues* a suspension of involuntary repossession. As an emergency amendment, it must be repeatedly extended. The latest extension period began on October 9, 2020 and continues the repossession prohibition. The act prohibits debt collection lawsuits, wage garnishment, and in person debt collection, or any threats to perform any of those actions, during the duration of the public health emergency and 60 days after its conclusion. The public health emergency declaration remains in effect. A separate emergency rule previously scheduled to expire after 90 days has now been codified and requires credit reporting agencies to put a "COVID alert" in the file at the consumers request and would prohibit creditors from relying on adverse information pertaining to the period in which the alert is on file. D.C. Code Ann. § 28-3871.

State	License Type	Agency/Website	Guidance
			Both rules technically expire after 225 days from October 9, 2020, but thus far they have been repeatedly extended.
Florida	SF	Office of Financial Regulation https://flofr.com/sitePages/documents/OFR-CV19-Emergency-Order-2020-03.pdf April 17, 2020 https://www.flofr.com/ (last accessed November 29, 2020)	Additionally, Commissioner Weigel on April 17, 2020 issued Emergency Order 2020-03, which allows vehicle finance companies to schedule the initial payment for 90 days after the signing of their contract. Existing law only allows companies to schedule the initial payment for 45 days after signing their contract.
Illinois	SF	Department of Financial and Professional Regulation https://www.idfpr.com/COVID-19.asp (last accessed November 29, 2020) https://www.idfpr.com/Forms/COVID19/	The repossession section of the relevant Executive Order, 2020-16, has expired. However, open-ended guidance from the Department of Financial and Professional Regulation has not been withdrawn. The guidance issued on April 14, 2020 recommending certain "best practices" for licensees. The guidance expresses the Division of Financial Institutions' expectation that consumer credit licensees will "work proactively with consumers during this crisis" and "be flexible with repayment of debt." The "best practices" described in the guidance include: - Increasing communication with consumers; - Proactively reaching out to consumers to offer payment plans or deferrals and waiving late and nonsufficient charges;

State	License Type	Agency/Website	Guidance
		2020%2004%2014%20DFI%20Best%20Practices.pdf April 14, 2020	- Using available disaster codes for credit reporting; and - Potentially suspending debt collection for consumers negatively impacted by COVID-19.
Indiana	SF	Department of Financial Institutions https://www.in.gov/dfi/ (last accessed November 29, 2020) Executive Order 20-08 guidance March 23, 2020	Sales finance companies are considered essential businesses under the Covid-19 executive order for the state which are encouraged to stay "open" despite the generally applicable order to stay at residences. Affected regulated businesses are encouraged to proactively reach out to customers to explain a customer's options and any assistance that may be available to them. https://www.in.gov/dfi/2850.htm
Kansas	SF	Office of the State Bank Commissioner https://www.osbckansas.org/cml/coronavirus_guidance.pdf https://www.osbckansas.org (last accessed November 29, 2020)	Guidance originally issued on March 16, 2020 has now been extended to December 31, 2020. A temporary policies, procedures and plan for supervision is required for remote work. The following best practices were offered: The OSBC offers the following best practices for remote workers to ensure security of information is maintained: Computers and devices that leave the office should include at-rest encryption. Paper records should not be taken off-site if they contain confidential information. Connectivity to the main office or sensitive systems should be encrypted in transit by virtual means. Private network (VPN) or similar technology.

State	License Type	Agency/Website	Guidance
			Activity should be conducted in a private home environment, avoiding public areas such as coffee shops or libraries.
Maryland	SF	Office of the Commissioner of Financial Regulation https://www.dllr.state.md.us/finance/ (last accessed November 29, 2020) https://www.dllr.state.md.us/finance/advisories/advisory-consumerdebtcovid.pdf March 27, 2020 https://www.dllr.state.md.us/finance/consumers/frfinancialreliefguidecovid.pdf May 5, 2020	The latest edition of the Commission or Financial Regulation Issued a Financial Relief Guide for Marylanders states that repossession is no longer prohibited for automobiles and light trucks: Creditors are prohibited from repossessing personal property used as a residence, including mobile homes, trailers, and live-aboard boats until further notice or the state of emergency is lifted, pursuant to Governor Hogan's executive order 20-10-16-01. The prohibition against "self-help" repossession of automobiles and trucks is no longer in effect. Consumer lenders may provide assistance by offering general loan deferral programs, modification options, certain late fee waivers, and temporarily refraining from reporting negative information to the credit bureaus related to payment deferrals." See the Maryland Department of Labor's press release on financial relief initiatives dated April 3, 2020. Contact your creditor or lender to discuss payment options specific to your situation. See your monthly statement for the contact information." The Commissioner of Financial Regulation has also issued an Industry Advisory regarding consumer borrowers impacted by the COVID-19 pandemic. The Advisory reinforces the Commissioner's expectation that licensees refrain from using the current health crisis as an opportunity to increase fees and interest rates normally charged to consumers and reminds licensees that "price gouging" is illegal in Maryland, along with other predatory conduct. Additionally, the Advisory indicates

State	License Type	Agency/Website	Guidance
			that consumer borrowers should be made aware of any delays or disruptions that may arise in their credit application process. The Commissioner also indicated that lenders should **consider** taking the following actions: • Waiving late fees as well as online and telephone payment fees; • Forgoing the reporting of payment information during the health emergency or reporting payment information to credit reporting agencies in a manner that minimizes the impact of delinquent payment on a borrowers' credit histories; • Offering modification, forbearance, or other options to allow borrowers to reduce and/or defer payments; • Taking steps to ensure that borrowers are able to timely make inquiries and manage their accounts, and, if there is a reduction in the servicer's staff, ensuring that borrowers are provided with alternatives for managing accounts, making inquiries, and making payments; • Reaching out to borrowers proactively to provide information on available assistance; and • Ensuring that all borrower-facing staff are fully informed regarding any assistance available and are proactive in informing borrowers of such.
Maryland		October 16, 2020 https://governor.maryland.gov/wp-content/uploads/2020/10/Evictions-Repossessions-Foreclosures-2d-AMENDED-10.16.20.pdf	Repossessions of automobiles and trucks may resume. The repossession ban now applies only to chattel homes. "Chattel Home" means personal property used as a person's residence, including without limitation, mobile homes, trailers, and live-aboard boats.

State	License Type	Agency/Website	Guidance
		https://www.dllr.state.md.us/finance/advisories/advisory-repossessionsupdatenewexecutiveorder.pdf (last accessed November 29, 2020)	
Minnesota	SF	Commerce Department https://Mn.gov/commerce (last accessed November 29, 2020) http://mn.gov/commerce-stat/pdfs/covid-letter-financial-institutions-reg-assist.pdf http://mn.gov/commerce/media/news/index.jsp?id=17-430899 May 4, 2020	The Department encourages loan forbearance and reduced delinquency fees and will consider such actions in its evaluation of financial condition of "financial institutions." In addition, "financial institutions" should notify the department of any facility closures. Both notices appear relevant to depositories and not contract assignees. The most recent guidance is from July 10, 2020.
Mississippi	SF	Department of Banking and Consumer Finance https://s3.amazonaws.com/dbcf-state-ms-us-content/media/Asset/Guidance_for_Finan	The Department offered COVID-19 guidance in a May 22, 2020 bulletin. The bulletin provides "prescriptive guidance" in assisting customers: "These efforts may include, but are not limited to: • Voluntarily providing payment relief such as deferrals • Waiving late payment fees • Offering payment accommodations, such as more manageable repayment plans or alternative loan products

State	License Type	Agency/Website	Guidance
		cial_Institutions_regarding_COVID-19.pdf (last accessed November 29, 2020) https://dbcf.ms.gov/covid-19-response/ (last accessed November 29, 2020)	These efforts may help avoid delinquencies and negative credit bureau reporting caused by COVID-19-related disruptions." The Department also issued its general emergency preparedness guide which does not impose new obligations.
Nevada	CL	Department of Financial Institutions http://fid.nv.gov/ (last accessed November 29, 2020) http://business.nv.gov/uploadedFiles/businessnvgov/content/News_Media/FID%20Lenders%20Working%20with%20Customers%20Affected%20by%20the%20Coronvirus.pdf March 17, 2020 http://gov.nv.gov/News/Emergency_Orders/2020/2020-04-30_-_COVID-19_Declaration_of_Emergency_Directive_017_(Attachments)/	The Nevada DFI does not require licensure for retail installment assignees or lessors. However, the DFI has published the following *open-ended* guidance for its licensees, such as installment lenders: "NFID is requesting that every licensee **have a plan in place that outlines the licensee's efforts to manage the current environment.** Such efforts, conducted with appropriate management oversight, consistent practices and compliance with applicable state and federal laws and regulation, may include, but are not limited to: • Waiving certain fees, such as late fees • Lowering the interest rates • Halting collection efforts, including repossession of a vehicle. • Offering payment accommodations, such as allowing borrowers to defer or skip some payments or extending the payment due date, which would avoid delinquencies, repossessions and negative credit bureau reporting. • Scheduling of disinfecting and cleaning of office space to limit exposure to COVID-19.

State	License Type	Agency/Website	Guidance
		April 30, 2020	Such efforts, conducted with appropriate management oversight, consistent practices and compliance with applicable state and federal laws and regulation, may include, but are not limited to: • Waiving certain fees, such as late fees • Lowering the interest rates • Halting collection efforts, including repossession of a vehicle. • Offering payment accommodations, such as allowing borrowers to defer or skip some payments or extending the payment due date, which would avoid delinquencies, repossessions and negative credit bureau reporting. • Scheduling of disinfecting and cleaning of office space to limit exposure to COVID-19." Collection agencies are specified as "non-essential."
New Hampshire	SF & LS	Banking Department https://www.nh.gov/banking/ (last accessed November 29, 2020) https://www.nh.gov/banking/documents/licensees-impacts-of-covid-19.pdf March 13, 2020	All licensees are encouraged to consider programs that might be deployed in natural disasters and to be proactive in facilitating open lines of communication. In addition, while not specifically applicable to sales finance licensees, remote working is encouraged. No demands for information were included. Financial institutions are instructed to "work constructively" with New Hampshire consumers.

State	License Type	Agency/Website	Guidance
New Mexico	SF	https://cv.nmhealth.org/2020/11/27/state-announces-tiered-red-to-green-system-for-n-m-counties-in-next-phase-of-covid-19-response/ November 27, 2020 https://cv.nmhealth.org/wp-content/uploads/2020/11/111820-PHO.pdf http://www.rld.state.nm.us/uploads/files/FID/Essential%20Business%20Guidance%203_34_2020_docx.pdf March 24, 2020	New Mexico prohibits repossession towing through November 30, 2020. Guidance is expected November 30, 2020 that will move New Mexico to a "phased" reopening, with nearly all states in the "red" phase. However, the terms of the red phase for non-essential businesses (like repossession towing) will be similar to those imposed on July 30, 2020, with such businesses limited to 25% of the maximum occupancy (with occupancy based on building structures). If the order is released as expected, that should allow repossession business operation. On April 14, 2020, the New Mexico Public Regulation Commission issued guidance reminding motor carriers that Governor Grisham's Executive Orders and mandates issued by the Department of Health restrict the operation of businesses to certain defined "essential businesses." The guidance explained that, on March 24, 2020, the New Mexico Department of Health issued an Order (attached) entitled "Public Health Emergency Order Closing All Businesses and Non-Profit Entities Except for those Deemed Essential and Providing Additional Restrictions on Mass Gatherings Due to COVID-19." Pursuant to that Order, the guidance explains, towing for repossession purposes are deemed non-essential by the Governor's office. That New Mexico Department of Health Order says it remains in effect throughout the duration of Executive Order 2020-004, wherein which the Governor initially proclaimed a statewide public health emergency. Executive Order 2020-004 was re-issued by Executive Order 2020-080 (attached), which was issued Monday, November 16, 2020, in response to the new surge in COVID-19 cases in New Mexico. An earlier Order issued on July 30, 2020 allowed non-

State	License Type	Agency/Website	Guidance
			essential business to open at 25% of the maximum occupancy. However, an Order from the NM Department of Health (attached) issued on Monday, November 16, 2020, says that all non-essential businesses must reduce their in-person workforces by 100%. That means a 0% workforce for repossession companies. Licensees are also encouraged to follow general guidance designed to reduce community spread of the COVID-19 virus and are asked to consider extending support to those customers affected by furlough and reduced hours under open-ended guidance from March. A second letter noted that financial institutions including non-depositories are considered essential and encouraged such companies to work with New Mexico consumers.
Oklahoma	SF	Department of Consumer Credit https://www.ok.gov/okdocc/ (last accessed November 29, 2020) https://www.ok.gov/okdocc/documents/FIFTH%20AMENDED%20INTERIM%20GUIDANCE%20-%20through%20December%2031.pdf	Fifth Amended Interim Guidance issued on October 22, 2020, states that the Department will look to minimize the burden of examinations by working with licensees to schedule examinations and minimize disruptions amidst the crisis. The Guidance also expresses the Department's desire that licensees consider the extraordinary circumstances facing consumers amidst the crisis and notes that licensees should work constructively with borrowers and other consumers in affected communities. The guidance is effective through December 31, 2020.

State	License Type	Agency/Website	Guidance
Rhode Island	SF	Department of Business Regulation https://dbr.ri.gov/index.php (last accessed November 29, 2020) https://dbr.ri.gov/documents/divisions/banking/notices/Banking_Bulletin_2020_-_2_Customer_Assistance_COVID_-_19.pdf https://dbr.ri.gov/documents/Financial_Institution_Pledge.pdf	Banking Bulletin 2020-2 encourages financial institutions to take steps to meet the financial services needs of affected customers. Such steps may include waiving late payment fees and offering payment accommodations such as deferment. Institutions should notify the Department and customers of any temporary closures and the availability of alternative service options as soon as practical. Institutions that anticipate difficulty meeting regulatory reporting requirements are encouraged to contact the Department to discuss their situation. The Department will, as necessary, work with Institutions to reduce the burden of examinations or inspections. The Department lists several banks and finance companies as having taken a "COVID-19 Relief Pledge". The requirements primarily relate to residential mortgages.
Texas	SF	Office of the Consumer Credit Commissioner https://occc.texas.gov/publications/coronavirus-bulletins (last accessed November 29, 2020)	The OCCC has replaced its initial guidance with specific motor vehicle sales finance and regulated lender guidance. The latest update was on November 16, 2020 which changed the guidance expiration date from November 30, 2020 to December 31, 2020, but subject to potential early withdrawal. The OCCC guidance states that it "encourages motor vehicle sales finance licensees to carefully consider the following measures during this crisis: - Increasing communication with consumers regarding COVID-19 and the recommended methods for consumers to contact the licensee, especially if the licensee has altered operations due to COVID-19. - Working out modifications with consumers to help ensure successful repayment, including deferred or

State	License Type	Agency/Website	Guidance
			partial payments, which would avoid delinquencies and negative credit reporting. - Reviewing policies for fees, late charges, delinquency practices, and repossessions, to help support successful repayment. - Accepting electronic signatures - Waiving deferment charges Texas also applies special deferment rules in the case of a natural disaster where signatures may be difficult to obtain: - send the required written deferment notice to the buyer at the time of the deferment, as required by Section 348.114(c), and - obtain a written confirmation of the deferment signed by the buyer and deliver a copy of the confirmation to the buyer, as required by Section 348.116, as soon as practicable under the circumstances. In addition, on a temporary basis, the OCCC will not take an enforcement action against licensees that service or collect motor vehicle retail installment transactions from unlicensed locations, in accordance with the following instructions: - A licensee must prepare a written plan or documentation describing what steps it is taking, as well as the locations where servicing or collection is taking place. The licensee must maintain this documentation until the OCCC's next examination of the affected licensed location. - A licensee's employees must access information in accordance with the licensee's written information security program under the federal Safeguards Rule, 16 C.F.R. pt. 314. A licensee must continue to maintain the security of each consumer's personal information. - If an employee accesses secure electronic information from the company, the employee must use a virtual private network or a similar system

State	License Type	Agency/Website	Guidance
			that requires authentication to access. Any devices must have up-to-date security updates or patches. - A licensee may not keep any physical business records at a location other than a licensed location. All records (physical or electronic) must be accessible from a licensed location. The guidance is effective through December 31, 2020.
Utah	SF	Department of Financial Institutions https://dfi.utah.gov/ https://dfi.utah.gov/general-information/publications/ (last accessed November 29, 2020)	Regulated lenders are not required to obtain the Department's approval to reduce or suspend normal operating hours, but the Department has requested that adequate notice be provided to consumers and an email be sent to astaheli@utah.gov to inform the Department of the actions taken. In open-ended guidance, The Department has also encouraged working with affected consumers including Waiving certain fees, such as late fees and NSF fees. Offering payment accommodations (within the confines of existing law), such as allowing borrowers to defer or skip some payments or extending the payment due date, which would avoid delinquencies and negative credit bureau reporting caused by COVID-19-related disruptions. The item for recommended easing restrictions on collection practices would no longer be relevant given the lack of Utah restrictions on movement.
Vermont	SF	Department of Financial Regulation https://dfr.vermont.gov/about-us/covid-19 (last accessed November 29, 2020)	The Department notes that the Office of the Comptroller of the Currency (see OCC Bulletin 2020-15), and others, recognizes the potential for the Coronavirus Disease (COVID-19) to adversely affect the customers and operations of financial institutions. The Department encourages financial institutions to take steps to meet the financial services needs of affected customers and communities. The Department will provide appropriate

State	License Type	Agency/Website	Guidance
		https://dfr.vermont.gov/memo/guidance-financial-institution-operations-under-addendum-6-executive-order-01-20	regulatory assistance to affected financial institutions subject to their supervision, as warranted.
West Virginia	LS	Department of Motor Vehicles https://transportation.wv.gov/DMV/Pages/default.aspx (last accessed November 29, 2020)	Lessors are regulated by the DMV. The DMV is reopening by appointment and drivers' licenses are extended through the end of the year. There is no special guidance on licensing except that online filing is generally encouraged.
Wisconsin	SF	Department of Financial Institutions http://www.wdfi.org/fi/lfs/ (last accessed November 29, 2020) http://wdfi.org/newsroom/press/2020/20200318_NewsRelease_COVID-19EmergencyGuidancePayday-LicensedLenders.pdf March 18, 2020	Initial guidance was directed at payday lenders and licensed lenders that increasing fees and costs may lead to suspension and revocation, while reducing such costs (as sound lending allows) is encouraged. The guidance specifically related to small loans, though it may also represent an emerging department position for other licensees. Additionally, Governor Evers on April 13 directed the Department of Financial Institutions to issue emergency guidance regarding prohibited debt collection practices for debt collectors doing business in Wisconsin. Secretary Blumenfeld issued the following statement in response: "In light of the financial distress caused by the COVID-19 pandemic, DFI cautions debt collectors that practices that may have been typical or customary under normal conditions may be deemed harassment under conditions of a global pandemic…Debt collectors who routinely rely on

State	License Type	Agency/Website	Guidance
		http://www.wdfi.org/_resources/indexed/site/corporations/EmergencyGuidanceonProhibitedDebtCollectionPractices(Combined).pdf April 13, 2020	telephone calls as a debt collection tactic should be forewarned: whether conduct can reasonably be expected to threaten or harass a consumer depends on the context, and the worldwide context just shifted dramatically." Please see the link for more information regarding the guidance, including an interpretive letter regarding impermissible pre-crisis calls to a debtor's friends and family as well as a full copy of the Wisconsin Consumer Act chapter governing debt collection practices.

See also the NMLS:https://mortgage.nationwidelicensingsystem.org/NMLS%20Document%20Library/Coronavirus%20State%20Agency%20Resource.pdf (last accessed November 29, 2020)

Note that the NMLS is recommending 30-day delays in filing obligations. (last accessed November 19, 2020) https://mortgage.nationwidelicensingsystem.org/news/Pages/NMLS%20COVID-19%20Updates.aspx

Impact Analysis
As of November 29, 2020, New Mexico and the District of Columbia have repossession suspensions in place. However, New Mexico is expected to move to a "phased approach" on November 30, 2020, with non-essential businesses in red counties (nearly all counties are expected to be red) limited to 25% occupational capacity, which should allow the operation of repossession businesses. In Maryland, the ban has ended except for "chattel homes" which would include a recreational vehicle used as a home. In Pennsylvania, which had restrictions based on red, green and yellow "phases," Governor Wolf has indicated that a return to a full shutdown or phased shutdown is "not in the cards," which likely means that an essential business rule regarding repossession services will not be reimposed. Various states have issued non-binding open-ended encouragement to work with affected consumers. The Texas Office of the Consumer Credit Commissioner has again affirmatively extended its recommendations regarding customer accommodations.

2. California: Proposition 24 Consumer Personal Information Law and Agency Initiative 2020

On November 3, 2020, California voters approved Proposition 24, the California Private Rights Act of 2020 ("CPRA"). The CPRA creates privacy rights that cannot be legislatively weakened. CPRA amends the existing non-financial privacy law, the California Consumer Privacy Act ("CCPA"), Cal Civ. Code 1798.100 et seq., effective January 1, 2023, including by providing rights to know and restrict to all *sharing* of information that only apply to the *selling* of information under the CCPA. Until 2023, the CCPA remains in effect unaltered by the CPRA. Significantly, the CPRA also creates a new regulatory agency to implement and enforce privacy in California, the California Privacy Protection Agency. The Chart below explains how the CCPA and CPRA differ.

Code Section	**CCPA - Current**	**New – CPRA Jan. 1, 2023**
Cal. Civ. Code 1798.001.	The CCPA sets forth the basic right of consumers to request that business "that collects" their "personal information" disclose the categories and pieces of information. The specific pieces of information need only be disclosed upon request.	The CPRA revises the section to impact anyone that "controls the collection". While the revision appears to be primarily targeted at ad network data collection, it also specifies that it pertains to a business's "premises…including in a vehicle." New language reads as follows: ***In addition, If such business, acting as a third party, controls the collect/on of personal information about a consumer on Its premises, Including in a vehicle, then the business shall, at or before the point of collection, Inform consumers as to the categories of personal Information to be collected and the purposes for which the categories of personal information are used, and whether such personal information Is sold, In a clear and conspicuous manner at such location.***
Cal. Civ. Code § 1798.105	CCPA sets forth the right to request deletion of personal information.	CPRA expands the parties responding to the request to delete ton include service providers of

		service providers and to third parties to whom the business has sold or shared. However, it also states that the business should instruct these third parties to delete "unless this proves impossible or involves disproportionate effort." In addition, the catch-all provision allowing retention of information "compatible with the context in which the consumer provided the information" is deleted and specific language allowing retention to "fulfill the terms of a written warranty or product recall" was added.
Cal. Civ. Code § 1798.106	The CCPA does not feature this section.	Sets forth a right to request that businesses correct inaccurate personal information.
Cal. Civ. Code § 1798.110	Right to Know - Collection. Certain disclosure (e.g. the categories of information) apply to all sharing, while others (e.g. the business purpose) apply only to collection and *selling*.	The Right to Know - Collection is expanded to do that each of the types of disclosure pertain to all sharing. Specific exceptions for one-time transactions and reidentifying data are deleted.
Cal. Civ. Code § 1798.115	Right to Know – Selling. The business must disclose the categories of personal information sold.	Right to Know -Selling *and Sharing*. The business must also disclose the categories of persons to whom the information was disclosed for a business purpose. Each of the disclosure rights will apply to sharing even in the absence of a sale of data.
Cal. Civ. Code 1798.120	Right to Opt-Out. CCPA permits consumers to opt out of the sale of personal information, with minors under 16 defaulting to opt out unless there is an opt-in by the parent or guardian, or the minor for children ages 13 to 15.	Right to Opt-Out of Sale or Sharing. The opt-out is expanded to any "sharing." The purported target of the change is the sharing of data to allow targeted advertising.
Cal. Civ. Code 1798.121.	The CCPA does not feature this section.	Right to Limit Use and Disclosure of Sensitive Information. A consumer may direct a business to limit the use of sensitive personal information to the use necessary to perform

		services and provide goods and to not use or disclose the information otherwise. However, there is a significant exclusion for "publicly available information." ***(ae) "Sensitive personal Information" means: (1) personal Information that reveals (A) a consumer's social security, driver's license, state Identification card, or passport number; (B) a consumer's account log-In, financial account, debit .card, or credit card number In combination with any required security or access code, password, or credentials allowing access to an account; (C) a consumer's precise geolocation; (D) a consumer's racial or ethnic origin, religious or philosophical beliefs, or union membership; (E) the contents of a consumer's mall, email and text messages, unless the business Is the Intended recipient of the communication; (F) a consumer's genetic data; and (2)(A) the processing of biometric Information for the purpose of uniquely identifying a consumer; (B) personal Information collected and analyzed concerning a consumer's health; or (C) personal Information collected and analyzed concerning a consumer's sex life or sexual orientation.***
Cal. Civ. Code 1798.125	Non-Retaliation. The prohibition on discrimination against consumers exercising CCPA rights is subject to an exclusion for incentives reasonably related to the value of the data. It also allows opt-in to a financial incentive program.	Non-Retaliation. Specific exclusion for loyalty, rewards, premium features, discounts or club programs. Cannot ask a customer to opt-in more than once per 12-month period if the consumer refuses.
Cal Civ. Code 1798.130	Notice, Disclosure. CCPA. The CCPA was previously revised to eliminate the need for exclusively	Notice, Disclosure, Correction and Deletion. Under the CPRA a consumer may also submit requests

	online businesses to maintain a toll-free and to specify that requests for information regarding personal information can be made online.	for deletion and correction online. The timing for correction and deletion is 45 days from a verifiable request. Service providers are not required to respond directly and a consumer's right to request information going back further than 12 months applies only to information collected on or after January 1, 2022.
Cal. Civ. Code 1798.135	Limiting Sale of Information The homepage should have a conspicuous link titled Do Not Sell My Personal Information. The same title should be used with the description of consumer's rights	Limiting Sale, Sharing and Use The homepage should have a conspicuous link titled Do Not Sell or Share My Personal Information. Additional new requirements include a conspicuous homepage link titled "Limit the Use of My Sensitive Personal Information" with the link also appearing with an explanation of the sensitive information rights.
Cal. Civ. Code § 1798.140	Definitions. Definitions in the CCPA were subject to criticism in connection with the meaning of "selling" and the "publicly available" exclusion from "personal information" that limits the exclusion to information lawfully made available from federal, state or local records. This limited exclusion apparently raised First Amendment arguments.	Definitions. The definition of selling is less significant due to the extension of rights to "sharing". However, the definition of "publicly available" is expanded to include information "that a business has a reasonable basis to believe is lawfully made available to the general public by the consumer or from widely distributed media, or by the consumer; or information made available by a person to whom the consumer has disclosed the information if the consumer has not restricted the Information to a specific audience." This exclusion would potentially allow any information that is publicly posted or obtainable by searching across the internet as outside of the "personal information" protections. New definitions pertaining to sensitive information, advertising

		networks and geolocating have been added. ***"Precise geolocation" means any data that Is derived from a device and that is used or Intended to be used to locate a consumer within a geographic area that Is equal to or less than the area of a circle with a radius of one thousand, eight hundred and fifty (1,850) feet, except as prescribed by regulations.*** Regulations will further address geolocation but as it is, the vehicle location appears to be information for which the consumer can limit its use except use for the provision of services and goods. The exemption for vehicle information is limited. An additional change was made to the definition of "biometric data" which would exclude biometric data for which there is no intent to use the data to identify the individual. Finally, the CPRA will define consent as freely given and unambiguous. Closing a window or pausing a video would not constitute consent.
Cal. Civ. Code § 1798.145	Exemptions. The primary relevant CCPA exemptions pertain to Gramm-Leach-Bliley financial information, also known as nonpublic personal information and information with consumer reporting agencies.	Exemption. A new section allows a "no delete" directive from a law enforcement agency for 90 days to allow time for a court order. With the new "sensitive information" right to limit information use, an exemption for the geolocation data deemed sensitive has been added with respect to "vehicle information." However, that exemption does not

		appear to be broad enough to exclude all telematics or GPS systems installed for collateral tracking: *(g)* *(1) Section 1798.120 shall not apply to vehicle information or ownership Information retained or shared between a new motor vehicle dealer, as defined in Section 426 of the Vehicle Code, and the vehicle's manufacturer, as defined In Section 672 of the Vehicle Code, if the vehicle or ownership information is shared for the purpose of effectuating, or In anticipation of effectuating, a vehicle repair covered by a vehicle warranty or a recall conducted pursuant to Sections 301.18 to 30120, inclusive, of Title 49 of the United States Code, provided that the new motor vehicle dealer or vehicle manufacturer with which that vehicle information or ownership Information Is shared does not sell, share, or use that information for any other purpose.* *(2)* *For purposes of this subdivision:* *(A)* *"Vehicle Information" means the vehicle Information number, make, model, year, and odometer reading.* *(B) "Ownership Information" means the name or names of the registered owner or owners and the contact information for the owner or owners.* In addition, the consumer reporting agency exclusion is limited to the furnisher, the agency and the user.

Cal. Civ. Code § 1798.150	Security Breaches. Imposes duties upon nonencrypted and nonredacted person information becoming subject to unauthorized access or extraction.	Security Breaches. Extends the meaning of breach to nonencrypted or unredacted email address in combination with a password or security question and answer that would permit access to the account. It also specifies that, after a breach, the implementation of reasonable security procedures does not "cure" the breach.
Cal. Civ. Code § 1798.155	Enforcement. Provides for civil penalties and injunctions. Enforcement by the Attorney General.	Administrative Enforcement. Replaces the civil penalty with administrative fines up to the same levels, to be imposed by the new regulatory agency, the California Privacy Protection Act ("CPPA"). The attorney general
Cal. Civ. Code § 1798.160	Consumer Privacy Fund. Created within the state General Fund and allows appropriate as necessary.	CPRA adds a provision creating a rollover amount subject to long term investing and not subject to appropriation.
Cal. Civ. Code § 1798.175, 1798.180	Conflicts and Preemption.	Unchanged.
Cal. Civ. Code § 1798.185	Regulations. Proposed Regulations have been repeatedly introduced and revised under the CFPA	CPRA instructs the Attorney General to adopt extensive new regulations, including regarding the meaning of "precise geolocation"
Cal. Civ. Code § 1798.190	Anti-Avoidance	Revised rule indicates that it cannot be avoided by accepting something of value in exchange rather than exchanging money. This would appear to impact ad sale networks.

Cal. Civ. Code §1798.190	Waiver. Provides that CCPA rights cannot be waived by contract.	The anti-waiver rule is expanded to cover a "representative action waiver" and to apply to both sale and *sharing* of personal information.
Cal. Civ. Code § 1798.199.10 et seq.	Not part of the CCPA	Creates a new California Privacy Protection Agency to implement and enforce Prop. 24.

2020 CA Prop. 24; See https://voterguide.sos.ca.gov/propositions/24/

Impact Analysis
Beginning on January 1, 2023, new rules will apply to non-financial information privacy in California. The primary intent of the rule is to allow consumers to limit sharing even where there is technically no sale of information. However, it also adds a new category of information for which a consumer can limit the "use" of information. This sensitive information includes certain personal characteristics, but also includes geolocation data. It is not yet clear if telematics systems would need to be manipulated or limited based on a request not to use sensitive information or if there will be an impact on collateral tracking once regulations are promulgated. Even "sensitive information" would still be usable as "necessary" after a request by the consumer to limit the use of the information. Creditors will need to expand on the work under the California Consumer Privacy Act to add new disclosures and to trace out all sharing of information by January 1, 2023 in order to comply when Proposition 24 goes into effect.

4. Massachusetts: Telematics Ballot Initiative – Right to Repair

On November 3, 2020, voters in Massachusetts ballot initiative Question 1 regarding manufacturer telematics systems which provides that commencing with model year 2022 vehicles must be equipped with "standardized and open access platform" capable of "securely communicating all mechanical data emanative directly from the motor vehicle via direct data connection to the platform." The platform must be accessible to the "owner of the vehicle through a mobile-based application and, upon the authorization of the vehicle owner, all mechanical data shall be directly accessible by an independent repair facility or a class 1 dealer" limited to "the time to complete the repair or for a period of time agreed to by the vehicle owner for the purposes of maintaining, diagnosing and repairing the motor vehicle." The initiative also provides that "[a]ccess shall include the ability to send commands to in-vehicle components if needed for purposes of maintenance, diagnostics and repair." The "mechanical data," definition is "any vehicle-specific data, including telematics system data, generated, stored in or transmitted by a motor vehicle used for or otherwise related to the diagnosis, repair or maintenance of the vehicle."

Mass. Right to Repair Initiative, Question 1, (2020).

Impact Analysis
Beginning with the 2022 Model Year, manufacturers will be required to adjust telematics systems to allow data access to the vehicle "owner" to telematics, and to allow such access via a mobile application and permitting the owner to authorize a repair facility to access the data. Prior to the ballot initiative, the Massachusetts Right to Repair law required the manufacturer to allow access to diagnostic data by linking directly to the vehicle using a standard computer. Although the definition of "owner" includes a lessee, the new initiative would not preclude a lessor from contractually requiring repairs to be made at franchised dealers.

II. Case Law

A. FEDERAL CASE LAW

1. District Court Grants BMW's Motion to Compel Arbitration

On November 16, 2020, the United States District Court for the Southern District of California held that BMW North America ("BMW NA"), as a third-party beneficiary of a Motor Vehicle Lease Agreement ("Lease Agreement"), may invoke the Arbitration Clause contained therein.

On October 13, 2017, Nieran Zeto ("Zeto") purchased a vehicle that was manufactured by BMW NA, who provided a written express warranty on the vehicle. Zeto alleged that during the warranty period, the vehicle had substantial defects, and that despite Zeto requesting a repurchase, BMW NA failed to successfully repair the vehicle or replace it.

On February 18, 2020, Zeto filed her complaint, which alleges seven causes of action: (1–3) violations of the Song-Beverly Consumer Warranty Act ("Song-Beverly Act"), Cal. Civ. Code § 1790-1795.8; (4) breach of express warranties under the California Commercial Code, Cal. Com. Code § 10101 et seq.; (5) breach of implied warranties; (6) violation of the Magnuson-Moss Warranty Act ("Magnuson-Moss Act"), 15 U.S.C. § 2301-2312, ; and (7) violation of the California Business and Professions Code.

BMW NA filed a Motion to Compel Arbitration and to Stay Action ("MTC"). BMW NA stated that the MTC is made pursuant to the "Arbitration Clause" that is contained in the Lease Agreement, which Zeto signed in leasing the vehicle. Zeto filed a Response opposing the MTC.

The Court concluded that arbitration is required under the Lease Agreement. Under California law, the Arbitration Clause presents a valid agreement to arbitrate. Also, the Court said Zeto failed to meet her burden of proving that the Arbitration Clause is unconscionable. In addition, Zeto's claims are all subject to the Arbitration Clause. As such, the Court enforced the broad language of the Arbitration Clause, which discusses how "any" claim, dispute, or controversy relating to the vehicle shall be subject to arbitration, which would also include claims arising from BMW NA's express warranties, the Song-Beverly Act, and the Magnuson-Moss Act. The definition of "Claims" in the Arbitration Clause is as follows:

> "Claim" broadly means any claim, dispute or controversy, whether in contract, tort, statute or otherwise, whether preexisting, present or future, between me and you or your employees, officers, directors, affiliates, successors or assigns, or between me and any third parties if I assert a Claim against such third parties in connection with a

> Claim I assert against you, which arises out of or relates to my credit application, lease, purchase or condition of this Vehicle, this Lease or any resulting transaction or relationship (including any such relationship with third parties who do not sign this Lease). Any Claim shall, at your or my election, be resolved by neutral, binding arbitration and not by a court action.

The FAA applies when arbitration agreements meet two conditions: (1) the agreement to arbitrate is in writing; and (2) the agreement is part of "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. Arbitration agreements that satisfy these two requirements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Id.

Pursuant to the FAA, a party aggrieved by the alleged failure of another to arbitrate may petition the Court to compel arbitration in the manner provided in the agreement. Id. § 4. In ruling on the motion to compel arbitration, a Court must determine two "gateway" issues: "(1) whether there is an agreement to arbitrate between the parties; and (2) whether the agreement covers the dispute." Once these two issues are satisfied, the Court must compel arbitration and stay the trial. See 9 U.S.C. §§ 3, 4.

The Court held that the Arbitration Clause in the Lease Agreement constitutes a valid agreement to arbitrate between the parties, and that the Arbitration Clause covers the lawsuit before the Court. Zeto failed to demonstrate that the Arbitration Clause is unconscionable under California law. In addition, the Arbitration Clause's broad language accounts for Zeto's current dispute over the vehicle, including Zeto's claims arising under BMW NA's Warranty Manual and the Song-Beverly Act.

To deem a contract unconscionable under California law, there must be both procedural and substantive unconscionability. Procedural unconscionability concerns the way the contract was negotiated and the circumstances of the parties at that time. The Court concluded that the Arbitration Clause was at least partially procedurally unconscionable. The Court noted that courts have generally found that contracts of adhesion, typically provided on a "take it or leave it" basis, are procedurally unconscionable. The Court held that even though there is some procedural unconscionability, that alone is insufficient. Substantive unconscionability focuses on the harshness and one-sided nature of the substantive terms of the contract. The Court said Zeto failed to demonstrate substantive unconscionability. For example, the Arbitration Clause gives Zeto the right to choose the arbitration forum, including the option to choose the American Arbitration Association or JAMS. Since Zeto could not prove substantive unconscionability of the Arbitration Clause, the Court held that a valid agreement to arbitrate exists under California law.

Finally, Zeto argued that BMW NA could not compel arbitration because it is not a

signatory to the Lease Agreement and Arbitration Clause, which BMW NA did not dispute. The Lease Agreement defines "me", "my" or "I" as Zeto and "you" and "your" as BMW Irvine or BMW Financial Services. The Court explained that California law allows non-signatories to an arbitration agreement to compel arbitration and held that BMW NA may therefore compel arbitration as a third-party beneficiary.

The Court noted that the Arbitration Clause is very specific about covered disputes that may arise between Zeto and third parties. The potential "Claim" that may arise between Zeto and third parties relating to the vehicle is expressly contemplated twice. The text of the Arbitration Clause is clear that "any third parties" is to be given broad meaning. It is more than "employees, officers, directors, affiliates, successors or assigns." In addition, the Arbitration Clause explicitly discusses a scenario where the third-party did not sign the Lease Agreement. Further, by including all claims against the third-party that are related to the "condition of this Vehicle," the Court said it is plain that the Arbitration Clause foresees and includes the dispute discussed in this case, where a consumer sues the manufacturer concerning the defects of the car. Therefore, based on the express terms of the Lease Agreement, the Court held that the parties intended BMW NA to be a third-party beneficiary that may invoke the Arbitration Clause.

The Court held that the Arbitration Clause in the Lease Agreement was a valid agreement to arbitrate the dispute in front of the Court. It further held that BMW NA has standing to enforce the Arbitration Clause because it was an intended third-party beneficiary. Thus, the Court granted BMW NA's Motion to Compel Arbitration.

Nieran Zeto v. BMW of North America, No. 20-cv-1380, 2020 WL 6708061 (S.D. Cal. November 16, 2020).

Impact Analysis
The U.S. District Court for the Southern District of California has allowed a manufacturer to enforce a lease arbitration provision against a lessee claiming violation of warranty rights. Lessors should draft arbitration provisions to cover problems with the Vehicle and claims against assigns. However, manufacturers are not always able to enforce such arbitration provisions as third-party beneficiaries since there is no expression of any intent to benefit the manufacturer set forth in the lease agreement.

B. STATE CASE LAW

1. California: Appellate Court Upholds Enforceability of Arbitration Provision

On November 19, 2020, the California Court of Appeal for the Second District affirmed an order granting a car dealership's motion to compel arbitration.

In April 2018, Elizabeth and Frank Marchetti filed a class action complaint based on their December 2017 purchase of a 2015 Ford Explorer Sport from Ford of Simi Valley ("FOSV"). The Marchettis alleged that FOSV advertised the vehicle for a specific price both on a cell phone app and on FOSV's Web site, but then refused to sell the vehicle for the advertised price. The Marchettis purchased the vehicle at the higher price.

As part of their transaction, the Marchettis signed a document entitled "RETAIL INSTALLMENT SALE CONTRACT — SIMPLE FINANCE CHARGE (WITH ARBITRATION PROVISION)." The Marchettis objected to signing the document because it "was not suitable to [the Marchettis'] non-financed cash purchase, but the retailer insisted that if Marchetti wished to purchase the vehicle, Marchetti had no option other than to do so with Ford's contract."

The Marchettis' complaint alleged violations of the Consumers Legal Remedies Act ("CLRA"), Civ. Code, § 1750 et seq., the False Advertising Law ("FAL") Bus. & Prof. Code, §§ 17500 et seq., and the Unfair Competition Law ("UCL") Bus. & Prof. Code, §§ 17200 et seq. FOSV moved the Trial Court for an order compelling arbitration and either dismissing or staying the case pending arbitration. The Trial Court granted FOSV's motion to compel arbitration.

The Marchettis argued that FOSV did not carry its burden of proving the existence of an arbitration agreement because, according to the Marchettis, "it is clear that the form contract [that the parties signed] did not express the parties' mutual consent and understanding." The Marchettis contended that the contract is essentially meaningless because it is a financing agreement and the Marchettis did not finance their vehicle. FOSV "required [the Marchettis] to sign the form contract, with all of the financing terms, even though there was no question that [the Marchettis were] not agreeing to any of the financing terms because it was agreed that [the Marchettis were] paying the full purchase price," the Marchettis argued.

The Court held that the arbitration provision applied to the Marchettis' purchase. "Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Provision, and the arbitrability of the claim or dispute) . . . which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship . . . shall . . . be resolved by neutral, binding

arbitration and not by a court action."

The Court also concluded that an agreement to arbitrate existed between the parties. In a box on the front page of the two-page agreement, the Marchettis signed under a paragraph that states: "By signing below, you agree that, pursuant to the Arbitration Provision on the reverse side of this contract, you or we may elect to resolve any dispute by neutral, binding arbitration and not by a court action. See the Arbitration Provision for additional information concerning the agreement to arbitrate."

The Marchettis contended that their claims against FOSV are not arbitrable because the arbitration agreement purports to waive claims for public injunctive relief. They argued that the arbitration agreement's failure to carve out claims for public injunctive relief renders the arbitration agreement unenforceable. FOSV contended that the arbitration agreement's delegation clause delegates questions of arbitrability, including the enforceability of the arbitration agreement based on waiver of public injunctive relief, to the arbitrator. The Court agreed with FOSV.

In Henry Schein Inc. v. Archer and White Sales, Inc., the United States Supreme Court explained, "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." 139 S. Ct. 524, 529 (2019). "[A] court, in response to a motion by an aggrieved party, must compel arbitration `in accordance with the terms of the agreement' when the court is `satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.'" Id. at 530. The Court was satisfied that the parties entered into an agreement to arbitrate and that the Marchettis had failed to comply.

The Court concluded that the Marchettis agreed to arbitrate their disputes, including questions of the interpretation and scope of their arbitration agreement and the arbitrability of specific claims. Consistent with that conclusion and the United States Supreme Court's guidance in Henry Schein, the Appellate Court affirmed the Trial Court's order granting FOSV's motion to compel arbitration.

Elizabeth Marchetti et al. v. Ford of Simi Valley, Inc., 2020 WL 6792858 (Cal. Ct. App. Nov. 19, 2020).

Impact Analysis
A California Appellate Court has upheld the enforcement of an arbitration provision in a retail installment sale contract despite the carve-out for injunctive relief and the consumers argument that both the retailer and the consumer agreed that they were not financing the transaction. The specific behavior complained of by the consumer has been the subject of increased reported litigation: refusal to honor prices advertised on the internet and through push marketing to customers. In some fact patterns the refusal to sell at the advertised price may relate to the inability of the retailer to sell the finance contract without erasing the retailer's margin due to poor credit risks. However, it is not clear whether the facts will support any retailer misbehavior in this instance.

2. Ohio: Appellate Court Grants Dismisses Appeal for Want of Jurisdiction

On October 29, 2020, the Court of Appeals of Ohio for the Tenth Appellate District dismissed an appellant's appeal for want of jurisdiction. Defendant-appellant Wayne Brown Bey appealed an order of possession of the Franklin County Court of Common Pleas ordering seizure of a vehicle upon the posting of bond by plaintiff-appellee Ally Bank. Because the Court found that the order of possession issued under Ohio Rev. Code § 2737.07(B) is not final and appealable, the Court dismissed Mr. Brown Bey's appeal for lack of jurisdiction.

On November 5, 2019, Ally Bank filed a complaint for money judgment and possession of property against Mr. Brown Bey. The complaint said that Mr. Brown Bey had executed a retail installment sales contract secured by a vehicle but had failed upon demand to "liquidate the balance due and owning." Ally Bank asked the Court for an order determining that Ally Bank has the right to possession of the vehicle. Ally Bank simultaneously moved for possession of the vehicle under Chapter 2737 of the Ohio Revised Code due to Mr. Brown Bey's alleged default on the terms of the retail installment sales contract.

A magistrate for the Franklin County Court of Common Pleas held a hearing and found that Ally Bank was entitled to an order of possession of the vehicle. Mr. Brown Bey did not file objections to the magistrate's decision. The Trial Court agreed with the magistrate and found probable cause to support the motion. The Trial Court then issued an order of possession for the sheriff to seize the vehicle upon Ally Bank's posting of bond. The order noted that Mr. Brown Bey could recover possession of the vehicle by posting his own bond with the Court. Ally Bank posted bond.

Mr. Brown Bey asked the Court of Appeals of Ohio for the Tenth Appellate District to review the merits of the Trial Court's order of possession, but the Court could not because the order of possession is not a final, appealable order. Under the Ohio Constitution, a court of appeals' jurisdiction on appeal is limited to a review of final orders of lower courts. If a lower court's order is not final, then an appellate court does not have jurisdiction to review the matter and it must be dismissed. For a judgement to be considered final and appealable, it must satisfy the requirements of Ohio Rev. Code § 2505.02.

The Court explained the only portion of Ohio Rev. Code § 2505.02 with possible application to orders of possession under Chapter 2737 would be Ohio Rev. Code § 2505.02(B)(4), which says an order is appealable if it "grants or denies a provisional remedy." The following conditions apply: (1) the order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy; and (2) the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings,

issues, claims, and parties in the action.

Under the statutory scheme for an action in replevin, any party to an action involving a claim for the recovery of specific personal property may move the court, by written motion and affidavit, for an order of possession of the property. Faced with a motion for an order of possession, the trial court must issue an order of possession if it finds, on the basis of the affidavit and any evidence presented at the hearing, that there is probable cause to support the motion considering the likelihood the movant will obtain a final judgment entitling him or her to permanent possession of the property. R.C. 2737.07(B).

The Court further explained that if the trial court issues an order of possession under Ohio Rev. Code § 2737.07(B), the respondent still has a statutory means to prevent transfer of the property by filing a bond or cash deposit. The trial court will ultimately award "permanent possession of the property" to one party or the other in a "final judgment" pursuant to Ohio Rev. Code § 2737.14. A final judgment under Ohio Rev. Code § 2737.14 includes, in addition to a decision on possession, "any damages to the party obtaining the award to the extent the damages proximately resulted from the taking, withholding, or detention of the property by the other, and the costs of the action." Ohio Rev. Code § 2737.14. The statute also sets forth a procedure for a court to return the property to the respondent and award damages caused to the respondent by deprivation of the property where the movant obtained an order of possession of property but failed to prosecute the action. Ohio Rev. Code § 2737.15.

The order of possession appealed in this case was issued under Ohio Rev. Code § 2737.07(B) based upon a finding of probable cause that Ally Bank will obtain a final judgment entitling it to permanent possession of the vehicle. The order does not resolve which party is entitled to permanent possession of the vehicle or assess any damages that may be accorded to the party who will receive permanent possession. Therefore, the Court held, even if the order constitutes a "provisional remedy," it found that the order is not appealable. The December 13, 2019 order issued under Ohio Rev. Code § 2737.07(B) does not finally determine the action even with regard to the provisional remedy and it does not prevent a meaningful judgment in favor of Mr. Brown Bey as to all issues in the case. Therefore, the Court dismissed the appeal for want of jurisdiction.

Ally Bank v. Bey, 2020-Ohio-5093 (Ohio Ct. App. Oct. 29, 2020).

Impact Analysis
An Ohio Appellate Court has held that a replevin order is not appealable because it is not the final determination of the right of possession. The holding is favorable to creditors with collateral at risk and relies on the concept that possession can be retaken by the consumer by posting a bond. Although the Court's determination that replevin is not a "provisional remedy" may not be consistent across jurisdictions, creditors should still argue that the replevin is not appealable while the Court considers the creditor's complaint for a money judgment.

III. Proposed Legislation.

The following is a summary of proposed legislation affecting motor vehicle retail installment sales and leases. The intent is to place you on notice regarding proposed legislation which could have a material impact upon your business operations and contract disclosures rather than to provide you with a detailed analysis of proposed legislation that may never become law.

A. FEDERAL PROPOSED LEGISLATION

No applicable developments.

C. STATE PROPOSED LEGISLATION

1. New Jersey: Motorcycle Electric Vehicle Incentives

On October 29, 2020, legislation was introduced in New Jersey that would extend the New Jersey plug-in electric vehicle incentives to plug-in electric motorcycles. "Plug-in electric motorcycle" means "a motorcycle that has a battery or equivalent energy storage device that can be charged from an electricity supply external to the motorcycle with an electric plug."

2020 N.J. A.B. 4899.

Impact Analysis
If the New Jersey electric vehicle incentives are enacted, electric motorcycles with a manufacturer's suggested retail price ("MSRP") of less than $55,000 will be eligible for an incentive based on $25 per mile of EPA-rated electric only range, up to $5,000. The incentive will be available on a sale or lease.

2. New Jersey: Retailer Online Sales and Electronic Signatures

On November 19, 2020, legislation was introduced in New Jersey that would allow online sales and leases by licensed New Jersey dealers. The licensees may keep records in electronic formats that allow immediate inspection and examination by the Chief Administrator of the New Jersey Motor Vehicle Commission ("Chief Administrator"). Only motor vehicles that constitute inventory of the licensee or a parent or affiliate are eligible. Specific "brick and mortar" requirements will apply to licensees other than leasing dealers.

Used Vehicle Dealers – New Physical Place of Business Requirement

Each applicant for a used motor vehicle dealer license shall at the time such license is issued maintain an established place of business consisting of a minimum office space of 72 square feet within a permanent, enclosed building located in the State of New Jersey, and where there are included or immediately contiguous, clearly identified, fixed facilities for the licensee to display at least two automobiles.

New Vehicle Dealers – New Physical Place of Business Requirement

An established place of business of a new motor vehicle dealer or a used motor vehicle dealer shall display an exterior sign permanently affixed to the land or building, which sign is consistent with local ordinances and has letters easily readable from the major avenues of traffic. The sign shall include the dealer name or trade name, provided such trade name has been previously disclosed to the chief administrator.

Transaction Documents

The legislation would affirm that any "transaction documents" may be executed in electronic form and, significantly, that the Chief Administrator cannot reject a transaction document (such as title papers) based on an electronic signature or require notarization on any transaction document. The term "Transaction documents" means any documents required to complete the sale or lease of a motor vehicle in the State, including, but not limited to, title papers, manufacturers' or importers' certificates of origin, contracts, security agreements, assignments, abstracts, or any other documents required by chapters 3 and 10 of Title 39 of the Revised Statutes. Transaction documents shall also include, but not be limited to, any powers of attorney granted by a buyer to a licensee for purposes of execution of any other transaction documents.

2020 N.J. A.B. 5033.

Impact Analysis
If the New Jersey online sales legislation is enacted, the New Jersey Motor Vehicle Commission will be required to accept electronic records for all documents associated with a sale or lease (such as title documents) and will not be able to require notarization. However, the law would impose new signage rules on new vehicle dealer licensees and new space requirements on used vehicle dealer licensees. In addition, licensees are limited to online sales and leases of existing inventory. The changes suggest that the intent of the law is to permit online sales only for licensees in New Jersey. However, it includes no express prohibitions on remote sales to New Jersey residents by dealers licensed in other states. Additional provisions appear consistent with other law regarding electronic signatures generally, such as the federal Electronic Signatures in Global and National Commerce Act ("ESIGN"), 15 U.S. Code § 7001, and the New Jersey enactment of the Uniform Electronic Transactions Act, ("NJ UETA"), N.J. Stat. 12A:12-1, et seq.

AUTO ALERT™ Appendix of Exhibits

1. CFPB Debt Collection Rule Executive Summary
2. Statement on Reference Rates for Loans (November 6, 2020).
3. 85 Fed. Reg. 70512 (Supervisory Guidance Rule).
4. 2020 CA Prop. 24.
5. Mass. Right to Repair Initiative, Question 1, (2020).
6. Nieran Zeto v. BMW of North America, No. 20-cv-1380, 2020 WL 6708061 (S.D. Cal. November 16, 2020).
7. Elizabeth Marchetti et al. v. Ford of Simi Valley, Inc., 2020 WL 6792858 (Cal. Ct. App. Nov. 19, 2020).
8. Ally Bank v. Bey, 2020-Ohio-5093 (Ohio Ct. App. Oct. 29, 2020).
9. 2020 N.J. A.B. 4899.
10. 2020 N.J. A.B. 5033.