

# BOARD BRIEFS

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## **Reporting Elder Financial Exploitation in Alabama: When is it Safe to Blow the Whistle?**

*by James L. Goyer, III and Gaines Brake*

The financial exploitation of elders is a hot topic in state legislatures, with the federal government, and in the media. In the first few months of 2017 alone, media reports from Gadsden, Fairhope and Dothan chronicle four cases of financial exploitation, with losses in each case ranging from \$20,000 to \$100,000 over short periods of time. The perpetrator in each case was a family member of the victim. One had a power of attorney which he used to gain access to the victim's accounts. Each case ended in criminal charges but, as is sadly common, prosecutions occurred only after large sums of money were taken and recovery was unlikely.

In June 2016, Corey Carlisle, executive director of the American Bankers Association Foundation noted: "Americans 50 years and older control more than 70 percent of our nation's wealth, making them prime targets for exploitation." According to the GAO, "financial fraud targeting older Americans is a growing epidemic that costs seniors an estimated \$2.9 billion annually..."

To combat this growing problem, new federal and state elder abuse prevention laws are being passed at a rapid pace. Since 2013, Alabama has passed three new elder abuse prevention acts, including the recent Elder Abuse Protection Order and Enforcement Act, enacted near the end of the 2017 regular legislative session. A principal aim of this movement has been to broaden the group of individuals and professionals who are legally required to report suspected cases of abuse. To encourage reporting, many of these laws provide qualified legal immunity for those who report suspected abuse of vulnerable elders.

The sponsor of the pending federal SeniorSafe Act bill, Senator Susan Collins (R-Maine), gave one example of the type of fraud targeted by the bill:

Last year, an attorney in the small coastal city of Belfast, Maine, was sentenced to 30 months in prison for bilking two elderly female clients out of nearly a half a million dollars over the course of several years. The lawyer's brazen theft was uncovered when a teller at a local bank noticed that he was writing large checks to himself on his clients' accounts. Meanwhile, he submitted bills for 'services,' sometimes totaling \$20,000 a month, including charging \$250 per hour for six to seven hours to check on her house, even though his office was just a one-minute drive down the road.

According to Sen. Collins, the "SeniorSafe Act encourages financial institutions to train their employees and shields them from lawsuits when they make good faith, reasonable reports of potential fraud to the proper authorities."

The Act (S.B. 223) has bipartisan support in both houses of Congress. In 2016, a prior version of the Act passed by a voice vote in the House of Representatives. It was introduced in the Senate in January 2017 with bipartisan support and approximately 21 sponsors. It currently is in the Senate Banking Committee.

As proposed, S.B. 223 would apply broadly to banks, insurance companies and agencies, broker-dealers, and investment advisers, among others. Participation by these entities in providing reports of suspected financial elder abuse, however, would be voluntary, not mandatory.

Both individuals and institutions who do make such reports would receive limited immunity under the Act in any "civil or administrative proceeding" provided: (1) the reporting individual has received specified training described by the Act; (2) serves as a "supervisor or compliance officer (including as a "Bank Secrecy Act Officer"); and (3) made the report in "good faith" and "with reasonable care...."

The Act is designed to work in tandem with state law, preempting state laws that provide less protection. Although Alabama recently enacted a comparable statute mandating reporting of elder exploitation by broker dealers and financial advisors, Alabama law currently does not mandate reporting by other financial institutions, such as banks. As of March 2016, the Consumer Financial Protection Bureau reported that approximately 26 states mandate financial institutions to report suspected financial elder abuse.

Even as questions remain about immunity, there are steps banks can take to protect their vulnerable customers. Recognizing the outward signs of abuse should be chief among them. Elders who are isolated, experiencing cognitive decline, physical disability, or recent loss of a partner and who have significant assets are attractive targets. Bankers who witness these changes in their older customers should be especially vigilant, particularly if they accompany irregular behavior or account activity. Financial institutions should consider training frontline employees in how to recognize and respond to signs of abuse and establish protocols

for internal reporting, investigations and external reporting to appropriate authorities.

Nevertheless, there remains uncertainty at this point under federal and state laws about whether banks and their employees will receive immunity for reporting possible elder abuse. Until greater clarity is provided in the law, Alabama banks should determine on a case by case basis whether they face greater risk from reporting a suspicious case or possibly allowing exploitation of an elder customer to continue. In the meantime, bankers should keep a watchful eye on pending legislation, and more importantly, they should welcome discussions with older customers and their caregivers about how they can best work together to safeguard customers' money and personal information.

*Gaines Brake is a member of the firm's Elder Law, Health Care, Estate Trust and Business Planning, and Senior Living and Long-Term Care practices. He is a graduate of University of Alabama law school and Birmingham Southern College.*



*Jim Goyer III is a shareholder and co-chair of the Elder Law and Compliance and Investigations practices at Maynard Cooper. He is also a member of the Financial Institutions, Corporate Governance and Fiduciary Litigation, and Commercial Litigation practice groups.*

## BSA/AML Enforcement: Things Are Getting Personal

by Brian J. Malcom

Compliance costs relating to the Bank Secrecy Act (BSA) Anti Money Laundering (AML) regulations have increased in recent years, and community banks are feeling the pinch more than larger banks. For some community banks, BSA/AML compliance costs can account for nearly 10 percent of expenses. Why are banks paying such careful attention to BSA/AML regulations? One reason might be potential personal liability for those charged with ensuring

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compliance with the BSA/AML regulations at financial institutions.

An amalgam of federal and state regulatory agencies enforce the BSA, and its reach extends beyond traditional banks to various types of financial institutions. The Financial Crimes Enforcement Network (“FinCEN”), a bureau of the U.S. Treasury Department, administers the BSA and issues regulations for compliance with the law. FinCEN has broad authority to bring enforcement actions and to seek civil money penalties for an individual’s “willful” violation of the BSA. A willful violation for the purposes of this rule means a “reckless disregard or willful blindness.”

Recently, the federal government ramped up its enforcement of BSA/AML regulations. Regulators are demanding personal accountability for compliance with the BSA/AML, and compliance officers are in the crosshairs. Below are some recent examples of enforcement actions imposing personal liability on compliance personnel for financial institutions:

### U.S. Dept. of the Treasury v. Haider

On Jan. 8, 2016, a federal district court in Minnesota held that compliance officers and other individuals at companies subject to the BSA could be held responsible for AML failures. MoneyGram Chief Compliance Officer Thomas Haider was hit with a \$1 million fine by the FinCEN in 2014. FinCEN’s action against Haider resulted from the money transfer company’s \$100 million settlement with the federal government in November 2012 in which MoneyGram admitted to wire fraud and money laundering violations. MoneyGram entered into a deferred prosecution agreement with the DOJ, admitting, that it had “willfully” failed to implement an effective AML program. The government alleged that Haider, as an individual, failed to ensure that MoneyGram: (a) implemented and maintained an effective AML program, and (b) filed timely Suspicious Activity Reports (SARs).

In the federal civil action against Haider, his attorneys challenged FinCEN’s ability to levy a penalty against an individual under the provisions of the BSA. A federal district court in Minnesota held that the provision of the BSA which requires institutions to

establish AML programs is governed by the BSA’s broader civil penalty provision, § 5321(a)(1), which permits a penalty to be levied against a “partner, director, officer, or employee” of a company subject to the act.

### In re Raymond James & Associates, Inc., et al.

In May 2016, the Financial Industry Regulatory Authority (FINRA) announced it fined Raymond James & Associates, Inc. (RJA) and Raymond James Financial Services, Inc. (RJFS), a total of \$17 million for widespread failures related to the firms’ AML programs. RJA was fined \$8 million and RJFS was fined \$9 million for failing to establish and implement sufficient AML procedures. As a result, the firms failed to detect and report suspicious activity over several years. FINRA also fined RJA’s AML Compliance Officer, Linda Busby, \$25,000 and suspended her for three months.

FINRA’s investigation determined that the RJA and RJFS firms failed to conduct required due diligence and periodic risk reviews for foreign financial institutions. Though there was no evidence that Busby had direct knowledge of misconduct, FINRA found that Busby failed to ensure that RJA conducted the necessary risk reviews and establish and implement appropriate AML procedures. RJFS also failed to establish and maintain an adequate Customer Identification Program, as required by the BSA.

### In re Yaffar-Pena

In October 2016, the SEC settled an action against Lia Yaffar-Pena, a former president and CEO of a Miami-based brokerage firm, E.S. Financial, for allegedly aiding, abetting, and causing violations of AML rules. Yaffar-Pena allegedly violated the BSA by allowing foreign entities to buy and sell securities without verifying the identities of the non-U.S. citizens who were beneficial owners. Yaffar-Pena agreed to a one-year supervisory suspension and payment of a \$50,000 personal penalty. The SEC had previously settled an enforcement action against Yaffar-Pena’s brokerage firm, E.S. Financial, for \$1 million for the same alleged violations.

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## Gibraltar Private Bank and Trust Co.

In an action brought by the Office of the Comptroller of the Currency in April 2016, the former CCO of Gibraltar Private Bank and Trust Company was personally fined \$2,500 for failure to “file suspicious activity reports on a set of accounts for a customer that was later convicted of crimes related to an illegal Ponzi scheme,” and was also ordered to disclose the settlement to any future employers that fall under the definition of a “depository institution.”

## Conclusion

How do you or your financial institution avoid liability under the BSA? As always, it is important to consult with counsel to ensure compliance with the BSA/AML regulations. But a good start to an effective and satisfactory AML compliance program includes the following steps:

1. develop and maintain internal policies and procedures to ensure compliance with the BSA;
2. designate a BSA officer;
3. conduct relevant and ongoing compliance training for employees;
4. conduct independent testing of the firm’s AML program; and
5. implement appropriate risk-based procedures for conducting ongoing customer due diligence.

*Brian J. Malcom is a partner at Waller in Birmingham. Top banks and financial institutions seek his counsel in all areas of litigation, including contract disputes, trust and fiduciary litigation, consumer claims, and bond and warrant claims. Birmingham Magazine recently recognized Brian Malcom as a Top Attorney in Banking in its Top Attorneys 2016 peer-reviewed survey.*



## Avoiding Lender Liability Claims on the Front End

by Gilbert C. Steindorff IV

Just as the economic downturn in recent years led to increased defaults in both consumer and business loans, Alabama banks continue to experience an appreciable number of lawsuits filed by borrowers either in direct response to the lender’s efforts to exercise its default remedies under mortgages, promissory notes, loan agreements, guaranty agreements, or other loan documents, or as counterclaims to such efforts. These lawsuits often fall into one of three categories: alleged errors or misrepresentations made by the lender, either at the time the loan was originated or in the course of negotiating a proposed forbearance or modification of loan terms; the theory that “the bank shouldn’t have loaned me this money in the first place” due to the lender’s failure to adhere to its own underwriting or loan qualification criteria; or, lastly, the alleged failure by a lender to adhere to other policies, including hiring practices, loan servicing, and deposit account administration. While these lawsuits are frequently frivolous and without any legal foundation at all, they still must be defended, which creates a financial burden to the lender (and its insurance carrier) and creates friction with federal and state regulatory agencies. Fortunately, some of the more common lender liability claims may be addressed at the time of origination to possibly reduce a lender’s exposure to claims once a loan is in default and the borrower is desperate to avoid foreclosure or a monetary judgment.

Many claims which are presently being asserted against Alabama banks arise from alleged oral representations made by the lender at the time the loan was originated or during the course of negotiations as to a proposed forbearance or modification of loan terms. Such allegations may assert representations by the lender that the loan would be renewed or additional loans would be made in the future, assurances that the lender would not foreclose or seek other remedies in the event of default, statements that the lender did not intend to enforce other provisions contained in the loan documents, including guaranties, or “oral agreements” that the bank would modify loan terms. As an initial matter, Alabama’s “Statute of Frauds” at Ala.

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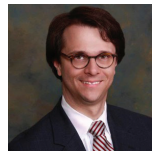
Code § 8-9-2(7) (1975) expressly provides that “[A]ny agreement or commitment to lend money, delay or forbear repayment thereof or to modify the provisions of such an agreement except for consumer loans in the principal amount financed of less than \$25,000.00 ... is void unless in writing [and signed by the lender].” We generally regard the Statute of Frauds as a complete defense to all claims of “oral agreements” or similar representations; however, lenders should exercise great caution in their correspondence with borrowers (including e-mails), and even in their own loan committee or board of directors meeting minutes, to ensure nothing is put into writing that could support a claim that the lender agreed to undertake any particular action unless the lender intends to be bound by such agreement. With respect to proposed forbearance or modification agreements, prior to engaging in any discussions, a lender should always utilize a “pre-negotiation letter” or similar document, signed by the lender, borrower, and guarantors, which provides that by agreeing to engage in discussions, the lender is neither agreeing to undertake any action nor to waive any remedies available under the loan documents until the substance of such discussions are reduced to a writing and signed by the lender.

Other claims are founded on theories that a lender failed to adhere to its own policies with respect to creditworthiness or internal procedures. For example, we have recently addressed allegations that a borrower should not be responsible for repayment of his indebtedness because the bank violated terms of its internal policy manuals by failing to obtain complete financial statements, credit reports, appraisals, or other documents to establish the creditworthiness of the borrower or establish the value of collateral property prior to loan approval or funding. We have also recently encountered a claim that a borrower’s default on a loan obligation should be set off against improperly handled deposit items. For example, a large corporate borrower asserted a defense to its default on loan obligations based on the fact that the lender bank permitted an employee of the corporate customer to cash corporate checks drawn over a DDA account maintained at the bank and allowed the employee, who held DDA accounts at the bank, to deposit third-party checks made payable to the corporation but which were endorsed to him, into his personal accounts. Even though the deposit customer at

question was well known to the lender and none of the transactions at question could be proven improper, both of these practices were still in violation of the lender’s check policy manual—a fact that the borrower’s attorney was quick to exploit. Adherence to established policies and internal procedures is essential to the underwriting, approval, and renewal of every loan, and might be overlooked in the instance of a customer with a long history of transactions at the bank or multiple loans with the same originating officer. While there are defenses available under the Alabama Uniform Commercial Code, failure to follow internal procedures presents a negative image of the bank to the court or (worse) to a jury. In litigation, the mere appearance of impropriety or loose operating practices can carry substantial weight with the finder of fact, even where the law is clearly on the lender’s side. Loan policies and other internal procedures are intended, in part, to manage risk to the institution. An officer’s disregard of any established policy can connote recklessness or a disregard for the safety of the institution and its depositors.

The realm of potential lender liability claims is far more expansive than the constraints of this brief article. Borrowers’ attorneys are growing increasingly creative in their legal theories in an effort to subvert the Statute of Frauds by alleging fraud and other torts which may be based on a lender’s “pattern or practice” of conduct. However, lenders may mitigate their exposure to such claims by maintaining vigilance throughout the loan origination and servicing process to ensure that no promises are made which the bank does not intend to honor, and by following all institutional loan policies and operating standards in a consistent manner.

*Gilbert C. Steindorff IV is a partner in the Birmingham office of Reynolds, Reynolds & Little, LLC. He represents financial institutions in the areas of lender liability litigation, participation loan resolution, loan workouts, and creditors rights. Mr. Steindorff holds an AV-Preeminent peer review rating from Martindale-Hubbell and has been recognized as a Rising Star in Banking Law by Alabama SuperLawyers annually since 2012 and since 2016 by Mid-South SuperLawyers.*



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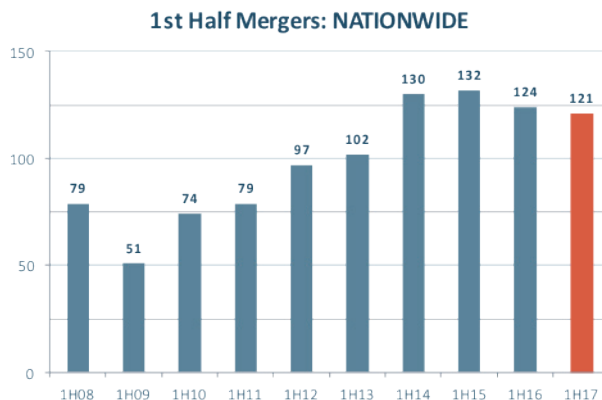
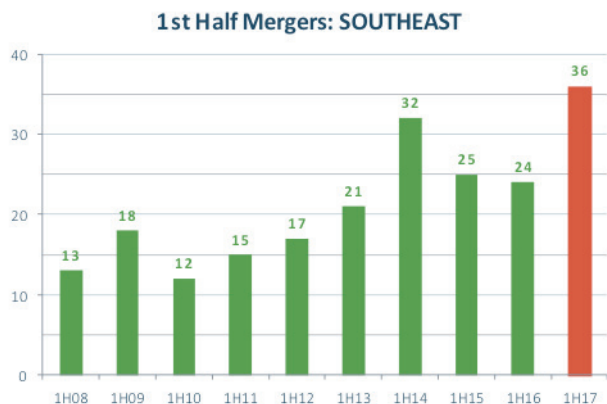
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# Bank M&A Scorecard June 30, 2017

by Michael Rediker

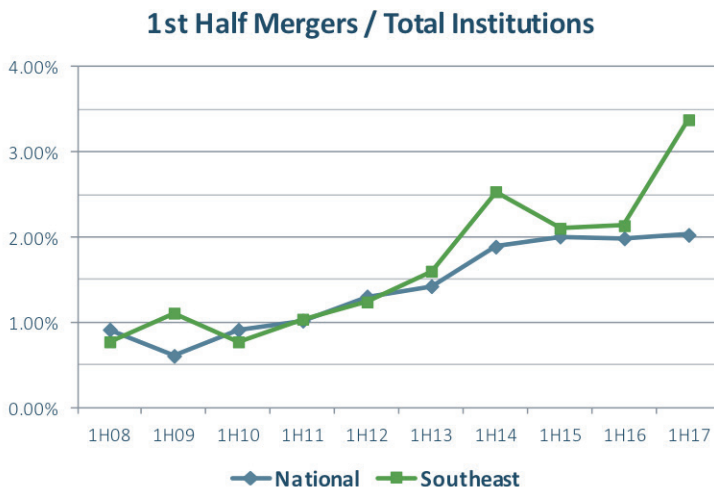
The first half of 2017 is in the books and the bank M&A world is gathering steam as both the number of deals and transaction prices are up. In the southeast 36 deals were announced in 1H 2017, which is a 50 percent jump over the 24 deals announced in 1H 2016. Looking specifically at Alabama, there were five deals announced in the first half of 2017 while the state saw four deals announced during all of 2016. The first chart shows how the first half of 2017 was the most active first half in the southeast in the last decade. Nationally, deal activity in 1H 2017 (121 deals) was essentially flat compared to 1H 2016 (124 deals).



**Note: All chart data courtesy of SNL Financial.**  
*Southeast: AL, AR, FL, GA, MS, NC, SC, TN, VA and WV.*

While deal activity nationally was flat in absolute terms compared to 2016, keep in mind the number of total banks continues to dwindle which means that in relative terms deal activity is up nationwide and especially in the southeast. The following chart shows how the number of bank mergers as a percentage of total banks is on the rise both nationally (blue line) and regionally (green line).

- Percentages were calculated by dividing mergers in a given first half by total institutions at end of the prior year.
- Southeast: AL, AR, FL, GA, MS, NC, SC, TN, VA and WV.



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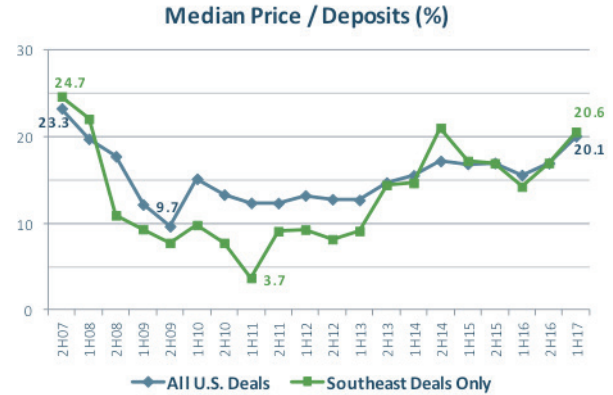
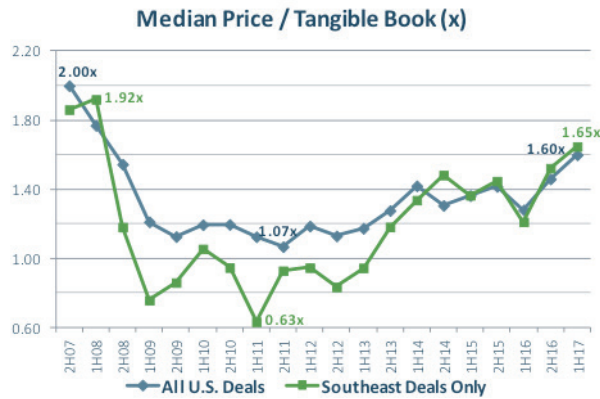
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## What About Deal Pricing?

Not only did deal activity take off in the first half, but so did deal pricing. The following two charts show pricing during the last 20 half-year periods, which encompass the Great Recession and its aftermath. While not completely rebounded to pre-recession levels, pricing in 1H 2017 was the highest both nationally and regionally since 2008 and well above the basement prices seen in 2011. For instance, the median Price/Tangible Book in the southeast in 1H 2017 was 1.65x (green line in the first chart), which is the highest we have seen since the first half of 2008 when the median was 1.92x.

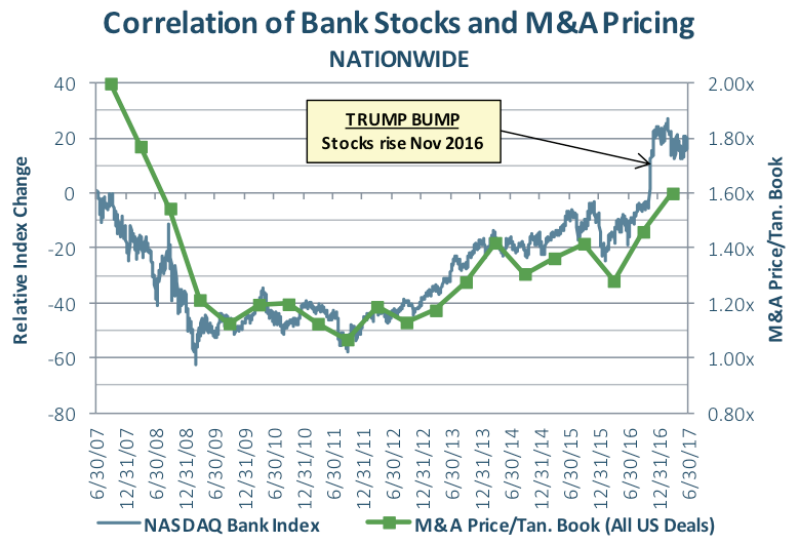


Southeast: AL, AR, FL, GA, MS, NC, SC, TN, VA and WV.

## What Explains the Surge in Deal Pricing?

What is behind this noticeable rise in bank M&A pricing through the first half of 2017? While there are a multitude of potential factors, one explanation might be found in looking at the correlation of bank stock prices and bank M&A prices, particularly in light of the phenomenon known as the “Trump Bump.”

The following chart looks at both bank stocks and M&A pricing on a national basis over the last 10 years. Bank stocks are represented by the NASDAQ Bank Index in the blue line. It is indexed at zero beginning on June 30, 2007. The green line shows the median Price/Tangible Book pricing for all U.S. bank M&A transactions during the last 10 years. The data points are medians for each half-year period.



M&A pricing are the median Price/Tangible Book values for each half-year period. NASDAQ Bank Index comprised of all NASDAQ-listed banks in the United States.

After almost 10 years of trading below pre-recession levels, the NASDAQ Bank Index was up 19.2 percent as of June 30, and most of the gains were made in November 2016 when the line turned vertical around the time of Donald Trump’s election. Bank M&A pricing (green line), which had a median Price/Tangible Book of 2.00x in 2H 2007, has largely tracked bank stock prices over the 10 year period and also had a spike following the Trump election, so that the median Price/Tangible Book in 1H 2017 was 1.60x. The data imply a fairly strong correlation between bank stock pricing and bank M&A pricing.

## The Great Unknown

In terms of deal activity as well as pricing, bank M&A in the first

half of 2017 reached heights not seen since before the Great Recession. Maybe some of this is attributable to the sector’s favorable inclination to Trump’s election, or perhaps the industry has simply shaken off any lingering effects of the recession. If your institution is a buyer or seller at some point in the future, keep in mind that the great unknown is if the upward trend in bank M&A will continue or if we are due for another downward correction.

Michael G. Rediker, CFA is an investment banker with Porter White & Company in Birmingham. He routinely provides M&A and other advisory services to community banks across Alabama.



# Supreme Court Applies “Plain-Language” Interpretation to Protect Lender from FDCPA Claims

by David Dresher, R. Aaron Chastain, and Riley Key

On June 12, the United States Supreme Court issued a long-awaited decision in *Henson v. Santander Consumer USA, Inc.*, significantly restricting the universe of companies subject to potential liability under the Fair Debt Collection Practices Act (FDCPA). In a unanimous decision of the Court, which was the first to be written by new Justice Neil Gorsuch, the Court held that companies that buy defaulted debts do not thereby become “debt collectors” under the FDCPA because they are not, by definition, “collect[ing] or attempt[ing] to collect . . . debts owed or due . . . another,” under the statute at 15 U.S.C. §1692a(6). The upshot of the decision is that banks that actually buy bad debts—as opposed to just the servicing or collection rights for loans in default—now have a solid defense to FDCPA claims.

The FDCPA was enacted in 1977 to regulate and restrict the permissible activities of persons seeking to collect a debt “owed or due another.” Over the years, courts in different parts of the country had come to differing interpretations of this phrase, which defines those parties who are deemed to be “debt collectors,” and subject to the restrictions and requirements of the FDCPA—including liability in private causes of action brought by debtors. Several courts, including the United States Court of Appeals for the 11th Circuit—which covers Alabama, Georgia, and Florida—had previously ruled that a “debt collector” would not generally include a person collecting debts owed or due to itself. In other words, the owner of the debt could take steps to collect its own loan without having to meet the strict requirements of the FDCPA. On the other hand, other federal appeal courts had viewed the issue more expansively and concluded that even for a creditor that owns the debt under collection, such creditor would be treated as a debt collector *if* it had acquired the debt in question after the debt was in default.

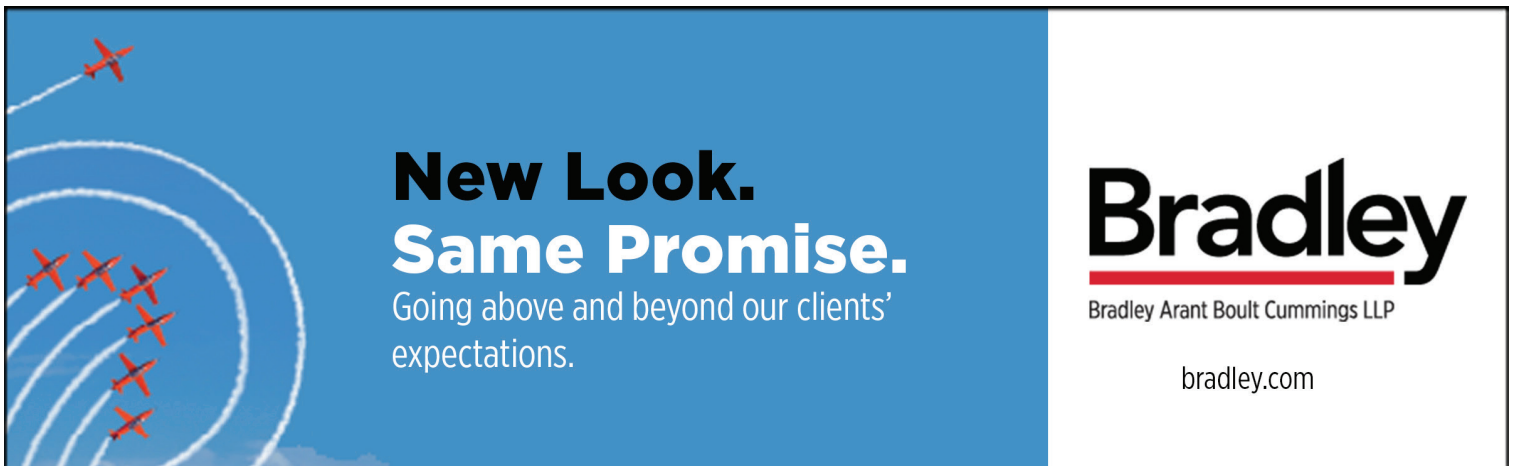
In *Henson*, the plaintiffs brought a class action lawsuit against Santander Consumer USA, Inc., claiming that Santander had acquired the plaintiffs’ automobile loans from the original lender after the

loans were in default and then subsequently violated the FDCPA through its debt collection practices. The plaintiffs did not dispute that Santander had acquired full ownership of the loans from the originator, as opposed to merely acquiring the servicing or collection rights; nonetheless, the plaintiffs claimed that Santander constituted a “debt collector” because the debt it was collecting was acquired after the debt had gone into default. The district court dismissed the claims after concluding that Santander was not a “debt collector,” and the Court of Appeals for the 4th Circuit agreed.

To address the inconsistency among the various appeal courts on this issue, the Supreme Court agreed to determine whether Santander should be treated as a “debt collector” under the FDCPA for the debts at issue, and in its ruling, the Court unanimously upheld the decision of the 4th Circuit.

In what may be a harbinger of decisions yet to come from this Court (especially those written by its newest member), Justice Gorsuch described the starting point for the Court to be “a careful examination of the statutory text.” He then noted that “by its plain terms this language [i.e., the statutory requirement that a debt collector be collecting debts “owed . . . another”] seems to focus our attention on third party collection agents working for a debt owner – not on a debt owner seeking to collect debts for itself.” Later in the opinion, in interpreting this statutory definition of “debt collector,” Justice Gorsuch referred to “The Cambridge Guide to English Usage” and also a Treatise entitled “Modern English Usage” as interpretive aids. Finally, Justice Gorsuch pointed out that “under the definition at issue before us you have to attempt to collect debts owed *another* before you can ever qualify as a debt collector. And petitioners’ argument simply does not fully confront this plain and implacable textual prerequisite.” (Italics in original).

The opinion then indicated that the “petitioners find themselves in retreat,” and asked the Court to look beyond the express language of the FDCPA and examine policy considerations. The plaintiffs claimed that the sale of defaulted debt was not a common activity at the time the FDCPA was enacted, but that “had Congress known this new industry would blossom . . . it surely would have judged defaulted debt purchasers more like (and in need of the



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same special rules as) independent debt collectors.” So, argued the plaintiffs, an expansive interpretation of the definition of “debt collector” “would be consistent with the overarching congressional goal of deterring untoward debt collection practices.”

In response, Justice Gorsuch stated that “all of this seems to us quite a lot of speculation. And while it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone’s account, it never faced.” (emphasis added).

All in all, the *Henson* case was a strong win for lenders, but it is also hopefully an indication of how the Court might view other efforts by plaintiffs or regulators to expand the original language or meaning of statutes or regulations. It is hoped that when facing other challenges of expansive interpretations under RESPA, Truth-in-Lending, Fair Lending and other regulations and requirements that courts and regulators, particularly the CFPB, have imposed on the banking industry, the Court will follow the same sort of interpretive approach as in *Henson*, and defer to the straightforward and plain language of the statute rather than expansively interpreting the underlying statutes and regulations in a way to reach supposedly-desirable policy goals.

A few caveats regarding this decision and debt-collection activities: It is worth noting that the definition of “debt collector” has two other prongs that were not raised and accordingly were not addressed in this case. First, an entity may qualify as a debt collector if it regularly acts as a third party collection agent for debts owed to others. Second, a debt collector is one engaged “in any business the principal purpose of which is the collection of any debts.” As a result, lenders or banks that fall into these additional descriptive categories could still be deemed a “debt collector,” as can servicers providing servicing activities for owners of debt. Additionally, the *Henson* case addresses issues under the federal FDCPA, and a number of states have enacted their own debt-collection restrictions that may apply even to creditors that are taking steps to collect their own debts. Finally, collection practices have been an area of heavy investment by the CFPB, and an effort by the CFPB to implement

restrictions on collection activities by banks or other creditors will likely continue unimpeded, at least for now, by the *Henson* decision.

*Dave Dresher is a partner, and Aaron Chastain and Riley Key are associates, in Bradley’s Banking and Financial*



*Services Group. They assist bank and lender clients in Alabama and across the country in navigating regulatory compliance and operational issues, in implementation of policies and procedures, and in the enforcement and defense of creditor’s rights.*

## Understanding Controlled Use of Administrative Privileges

by Mike Morris

Most of you have probably heard of the SANS/The Center for Internet Security (CIS) 20 Critical Security Controls\*. In this article, I’ll dive into the fifth control, the “Controlled Use of Administrative Privileges” and explain why boards should be strongly recommending this at their institutions.

Administrators have the proverbial “keys to the kingdom” and controlling the provision and monitoring of these privileges can be a daunting task. Over the years, we have seen several instances where administrators have abused their privileges without management’s knowledge – in these same instances management found out about it when it was just too late. Administrative privileges must provide segregation of duties and be provided only with specific job responsibilities. Additionally, administrative use should be formally and independently monitored by management. If a hacker or a malicious insider gains access to administrative-level credentials, they will have free reign to access key data and systems which is why protecting these rights is extremely important.

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## CIS recommends nine specific steps for implementing the controlled use of administrative privileges:

### STEP 1: Minimize administrative privileges

The provisioning of administrative access should follow the principle of ‘least privileged’ access, meaning that only users with specific job functions are granted administrative privileges. Also, users with administrative privileges should have two accounts: one with administrative rights and one without administrative rights. The account without administrative rights should be used for normal day-to-day activities. The account with administrative privileges should only be used when performing specific administrative activity, such as adding new users or modifying system configurations. You should never allow generic/shared administrative accounts because it does not provide proper accountability for any administrative changes. Using unique administrative credentials for each administrator helps management with monitoring what each administrator is doing on a given system. After you have made sure all of these controls are in place, you should implement focused auditing on the use of administrative privileged functions and be monitoring for any abnormal behavior.

### STEP 2: Use automated tools to inventory all administrative accounts

It’s a good idea to use automated tools to take inventory of all administrative accounts and validate that each person with administrative privileges on desktops, laptops and servers is authorized by a senior executive. If automated tools are not practical, management should implement a process to manually pull and review administrative accounts for all systems on a regular basis. A member (or members) of management should be assigned to formally review and re-certify (i.e. re-approve) administrative rights at least quarterly by reviewing user access lists from all key systems and applications as well as formally documenting their re-certification. Any anomalies identified during this process, such as terminated users or job changes that eliminate the need for access,

should be formally addressed and documented.

### Step 3: Change all default passwords


Any new device deployed in your network environment must have all default passwords changed or the accounts removed prior to implementation into production. If the default passwords are changed, they must be consistent with your institutions password requirements for administration-level accounts. The process must be formally documented in your implementation checklists and, if you have an internal audit function, ensure that these checklists are reviewed as part of your network-based audits. Additionally, it’s important to ensure that the scope of your penetration testing or network vulnerability assessment includes the search for default credentials.

### STEP 4: Configure systems to issue a log entry and alert when an account is added to or removed from a domain administrators’ group

Most applications and network devices will log administrative activity; however, management must ensure that logging is enabled on each system. Using your hardware/software listing as a guide, ensure that logging is enabled and that it will capture administrative-level account activity, including when an account is added to or removed from an administrator group. If alerts can be configured, ensure that the alerts are enabled and that they are being sent to the appropriate employees for follow up. These alert configurations must be periodically reviewed to ensure that the individuals receiving the alerts are still employees formally tasked with responding to these alerts. All logs should be sent to a central log server and backed up off site for incident reviews and forensic investigations. There are certain third-party tools that can help to aggregate logs and simplify the logging process. They can also help provide correlation between your various logs to help pin point suspicious activity that could be the result of a compromised system (or systems).

### STEP 5: Configure systems to issue an alert on any unsuccessful login

This step ties back to Step 4 mentioned above. While you are



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configuring your logs to track administrative activity, you should also configure the systems to log unsuccessful login attempts. This is especially important for any system that does not allow for account lockout.

### **STEP 6: Use multifactor authentication for all administrative access**

If a hacker obtains administrative credentials through grabbing hashes, getting keystroke loggers installed through malware, or other methods, they might be able to capture administrative level credentials, at which point they would have full access to your network environment. Multifactor authentication requires a password and one or more secondary authentication methods, such as one-time passwords delivered out of band (such as through an SMS text message), tokens that flash a different passcode at predetermined intervals, certificates, biometrics or other methods. You should require the use multifactor authentication for all points of administrative access, including domain administrative access wherever possible. As a general rule of thumb, your institution should also require multifactor authentication for any remote access to your network or web-based applications.

### **STEP 7: Require the use of long passwords**

CIS recommends that wherever multi-factor authentication is not supported, user accounts must be required to use long passwords on the system. They recommend passwords that are longer than 14 characters in length. Strong passwords are important; however, password length may not provide proper protection, such as if keystroke loggers are installed on user workstations or home computers. That's why multi-factor authentication is always your best line of defense.

### **STEP 8: Require administrators to access a system using a fully logged and non-administrative account**

We previously mentioned that administrators should have two accounts: one with administrative rights and one without. Administrators should also be required to access systems using a non-administrative account that is logged. Once they are logged onto the machine with their non-privileged account, they should transition to their administrative privileges using tools such as Sudo on Linux/UNIX, Run As on Windows, and similar resources for other systems. It's important to remember while doing so, they should still be using a unique administrative user account to provide accountability.

### **STEP 9: Require Administrators to use a dedicated machine for all administrative tasks or tasks requiring elevated access**

Administrators should be required to use a dedicated machine for all administrative tasks. The machine should be segmented from your primary network and be restricted from accessing the Internet and e-mail, which are the current attack vectors hackers are using

to infect systems. Through this type of segmentation, implement Access Control Lists ("ACLs") to restrict access and log activity to and from the machine's segment. This will help to keep malware off of the machine that could eventually be used to capture administrative-level credentials.

### **So what does this mean for you?**

It is important that management is keeping a close eye on which users in your institution have administrative rights and what activities these users are performing. This will be critical in protecting your network and resources from unauthorized access.

Strictly limiting administrative access based upon job function, and monitoring this access, can significantly help you reduce your risk of abuse relating to these critical accounts.

Further, protecting the machines that your administrators use can help to ensure administrative-level accounts are not being compromised through some of the most common ways that hackers are gaining access, such as email and web surfing.

*\*This article was based on the Top 20 Critical Security Controls identified by the SANS/Center for Internet Security(CIS).*

*For more detailed information, please visit:  
<https://www.cisecurity.org/controls>.*

*Mike Morris is a systems partner at Porter Keadle Moore, specializing in IT, cybersecurity and risk advisory services for community banks.*



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## **Banker's Bankruptcy Tool Box: The Single Asset Real Estate Designation**

*by Jeremy Retherford*

"I've filed bankruptcy." These are words no banker wants to hear from its customer. However, when a customer does file bankruptcy, the worst thing a banker can do is bury its head in the sand. Instead, the banker should go into action immediately to ensure not only its rights are preserved, but also to ensure it is using the tools made available to it under the Bankruptcy Code to enforce those rights. One such right afforded a lender under federal bankruptcy law is the ability to have some bankruptcy cases placed on an expedited track.

Though some exceptions apply, a debtor generally has the exclusive right to file a plan of reorganization in a Chapter 11 case for the first 120 days of the case. Often even this exclusivity period is extended for a longer period of time. The result is debtors do not propose a plan of reorganization until near the end of the exclusivity period. However, the rules change if the bankruptcy case is designated a single asset real estate case (or "SARE" for short). In a SARE




case, the debtor either must file a plan of reorganization with a reasonable chance of being confirmed or must begin making monthly interest payments to the secured lender at the loan's non-default interest rate on the value of the property within the later of (i) 90 days after the bankruptcy case is filed or (ii) 30 days after the bankruptcy court determines that the debtor is subject to the SARE rules. If the debtor fails to comply, the secured lender is entitled to relief from the automatic stay so that the lender can proceed with enforcing its rights and remedies. Most often, this includes foreclosure of the debtor's real property.

So what is a SARE case? The Bankruptcy Code provides that the term means real property constituting a single property or project (other than residential real property with less than four units) which generates substantially all of the debtor's gross income on which no substantial business is conducted by the debtor other than the business of operating the real property. Family farms are excluded from being a SARE. Common examples of single asset real estate include apartment complexes and strip malls. In determining whether or not property constitutes single asset real estate, courts generally look to whether the revenue received is passive or whether the debtor operates an active business on the property. There is no requirement that a debtor's real property be one contiguous parcel to constitute single asset real estate. For example, in the bankruptcy case styled *In re Holiday Isle, LLC*, the U.S. Bankruptcy Court for the Southern District of Alabama concluded that a bankruptcy case in which the debtor was the developer of a condominium complex that owned 86 unsold units in the complex was a SARE case since the units, though not comprising one piece of property, constituted a single project that generated all of the debtor's income.

The special rules for SARE debtors do not mean that reorganization in bankruptcy is impossible. However, it does mean that while a SARE debtor may obtain protection in bankruptcy from a lender's efforts to foreclose, this protection will be for only a limited time unless the debtor is capable of putting forward a confirmable Chapter 11 plan or making payments to the lender. Therefore, it is important that a bank seek a finding by the bankruptcy court that a

debtor is a SARE debtor if the debtor's initial bankruptcy filings do not designate it as such as soon as possible after the bankruptcy case is filed.

*Jeremy Retherford is a partner at Balch & Bingham. He has devoted his entire career to representing lenders and other creditors. A significant portion of Retherford's practice is focused on enforcing his clients' rights and remedies after default. However, he also counsels clients on the structure of transactions to account for the risk of default and bankruptcy.*

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