



National Collegiate Student
Loan Trust Litigation
Conspectus

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Historical Context of the NCSLT

National Collegiate Student Loan Trusts – or NCSLT – has become a household name in the world of litigation that could have a significant impact to securitization. The litigation at hand involves fifteen investment vehicles created between 2001 and 2007 (collectively, “NCSLT”).¹

NCSLT holds over 800,000 private student loans totaling \$12 billion, most of which were originated by private banks prior to 2008. The NCSLT did not act as the lender, originator, or servicer of the loans. First Marblehead Corporation established NCSLT to buy student loans and sell bonds backed by those loans to investors in securitization transactions.

Legal Battle Ensues Over Control of the Trusts

In 2009, Vantage Capital Group (VCG), a private investor, acquired the majority of the equity ownership interests in the Trusts. VCG attempted to enter into a new Servicing Agreement on behalf of the Trusts with Odyssey Education Resources, a wholly owned subsidiary of VCG, in November 2015. Trustees and certain bond investors in the Trusts asserted that the new Servicing Agreement violated provisions of the original contract including self-dealing prohibitions.

The actions by VCG resulted in multiple legal proceedings in several states, including four

lawsuits in the Delaware Chancery Court which were later consolidated by the Court. The consolidated lawsuit aimed to address the issue of whether VCG was the true “owner” of the NCSLT trusts and whether VCG had the authority to enter contracts on behalf of the trusts. A group of NCSLT bondholders--along with special servicer US Bank--alleged that VCG improperly attempted to install Odyssey as special servicer, arguing that VCG actions violated the Granting Clauses and Consent Clauses in the Trusts’ Indenture Agreements whereby required consents from the Indenture Trustee were not obtained.²

In September 2018, the District Court ruled that VCG did not violate the Granting Clauses and Consent Clauses in the Trusts’ Indentures. However, this decision was reversed by the Third Circuit in August 2020, with the Court concluding that the new Servicing Agreement with Odyssey did breach the Granting and Consent Clauses. In its ruling, the Third Circuit Court described that the actions taken by VCG to change the structure of the Trusts violated fundamental contractual rights of the Trusts’ other investors. VCG’s attempt to designate itself as the true owner and assert control over the Trusts would play a critical role in another noteworthy case impactful to the securitization industry involving legal proceedings introduced by the CFPB.

¹ *CFPB v. National Collegiate Student Loan Trusts*. Structured Finance Association, May 2019, <https://structuredfinance.org/wp-content/uploads/2019/05/SFA-Briefing-CFPB-v-NCSLT-Final.pdf>.

² American Bar Association. (2021, October 15). *A Call for Industry Awareness of Risks Relating to Residual Interests in Securitizations*. Americanbar.org. https://www.americanbar.org/groups/business_law/publications/blt/2021/10/residual-interests/

CFPB Takes Legal Action Against NCSLT

In September 2017, the CFPB filed a lawsuit (*Consumer Financial Protection Bureau vs. The National Collegiate Master Student Trust et. al.*) in the Delaware District Court against fifteen NCSLT Trusts for alleged violations of the Consumer Financial Protection Act (CFPA) and illegal collections practices. Interestingly, the CFPB named **only** the Trusts as defendants in the lawsuit, excluding other involved parties like the servicer and administrator of the loans. In fact, the CFPB entered into a separate settlement agreement with the servicer prior to filing this case against NCSLT.

In its lawsuit, the CFPB **alleges**:³

- The Trusts filed tens of thousands of collections lawsuits against borrowers with legal documentation the CFPB believes to be insufficient to prove that the Trusts actually owned the loans.
- The affidavits filed with the lawsuits were invalid and misleading because they were not signed by someone with personal knowledge of the borrower's or cosigner's account records, further alleging the Trusts

relied on sworn affidavits by employees of the servicer to prove ownership.

The Beginning: Court Denies the CFPB's Proposed Consent Judgement

In *CFPB v. NCSLT*, VCG attempted to use its status as majority equity owner of the Trusts to present itself as having the authority to take independent action on behalf of the Trusts, which the CFPB incorrectly accepted to be true. As a result, a *proposed* consent judgment was agreed to between the CFPB and counsel retained by VCG, under the CFPB's belief VCG had the authority to enter into such an agreement.⁴

The proposed consent judgment sought \$19 million in penalties and borrower refunds and included provisions such as:⁵

- A required audit of the over 800,000 private loan student loan accounts in the NCSLT's portfolio. *Many of which the CFPB asserted would be invalidated by certain courts due to NCSLT's failure to prove ownership.*⁶
- Restitution by NCSLT to roughly 2,000 borrowers in the aggregate amount of \$3.5 million.

³ Consumer Financial Protection Bureau. (2017, September 18). CFPB Takes Action Against National Collegiate Student Loan Trusts, Transworld Systems for Illegal Student Loan Debt Collection Lawsuits.

<https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-national-collegiate-student-loan-trusts-transworld-systems-illegal-student-loan-debt-collection-lawsuits/>.

⁴ Niemann, J. (2017, November 28). CFPB Deal with Servicer Raises Red Flags. *CFPB Journal*
<https://cfpbjournal.com/cfpb-deal-with-servicer-raises-red-flags/>.

⁵ Consumer Financial Protection Bureau. (2017, September 18). CFPB Takes Action Against National Collegiate Student Loan Trusts, Transworld Systems for Illegal Student Loan Debt Collection Lawsuits.

<https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-national-collegiate-student-loan-trusts-transworld-systems-illegal-student-loan-debt-collection-lawsuits/>.

⁶ Cowley, S. (2017, September 18). Student Loan Creditor, Fined for 'False' Lawsuits, Must Halt Collections. *New York Times*.
<https://www.nytimes.com/2017/09/18/business/dealbook/student-loan-national-collegiate-trusts.html>.

- A prohibition on collections for loans for which the CFPB alleged NCSLT could not sufficiently prove ownership of the debt.
- [New provisions](#) that would abrogate contractual noteholder rights, effectively rewriting the Trusts' governing contracts, without consent of all impacted parties to the transactions.⁷

Eight parties to the Trust quickly motioned to intervene in the case to challenge this proposed consent order and protect their interests, including the administrator, indenture trustee, owner trustee, primary servicer, special servicer, a sub-servicer, a bond insurer and a group of bondholders. The parties argued that VCG neither had the authority to enter into the settlement agreement nor had the authority to negotiate with the CFPB on behalf of the Trusts. [SFA submitted an amicus brief in support of the defendants and how a ruling against the defendant could severely impact the broader securitization market.](#)

Win for the Industry. In May 2020, the Honorable Maryellen Noreika sided with the opposing parties by issuing a Memorandum Opinion that granted the Motions to Intervene, and in a rare move, rejected the proposed settlement agreement between VCG and the CFPB. [Consistent with SFA's amicus brief, in](#)

[its ruling, the Court found the Owner Trustee to be the only party with authority to take such action with the CFPB on behalf of the Trusts.](#)⁸

Intervenors Argue Supreme Court Case Ruling Should Result in Dismissal of *CFPB v. NCSLT*

Since May 2020, multiple intervenors have filed numerous motions to dismiss the complaint against the Trusts. In March 2021, a group of intervenors raised a jurisdiction issue highlighting the June 2020 U.S. Supreme Court ruling in *Seila Law LLC v. Consumer Financial Protection Bureau* in which the Court found that the CFPB's structure violated the Constitution's separation of powers.⁹

Following the holding in *Seila Law*, the judge overseeing *CFPB v. NCSLT* granted the intervenor's motion to dismiss the CFPB's complaint finding that (i) the CFPB initiated its enforcement action against the Trusts at a time when its structure violated the constitutional separation of powers and (ii) a director removable by the President did not successfully and timely ratify the agency's 2017 action.

However, after initiating granting motions to dismiss the case, the Court granted the CFPB's request to file an amended complaint and ultimately allowed the case to proceed.¹⁰ On April

⁷ Structured Finance Association. (2020, February). *SFA urges CFPB to Consider Alternative Approach in National Collegiate Master Student Loan Trusts Case.* <https://structuredfinance.org/wpcontent/uploads/2020/02/SFA-Response-to-CFPB-NCSLT-Summary.pdf>

⁸ Lev, O. (2020, June 4). *CFPB Suffers Embarrassing Court Loss.* Mayer Brown. <https://www.cfsreview.com/2020/06/cfpb-suffers-embarrassing-court-loss/>

⁹ *CFPB Suit Against Student Loan Trusts Dismissed.* Cadwalader. (2021, April 1). https://www.cadwalader.com/resources/client-friends-memos/cfpb-suit-against-student-loan-trusts-dismissed#_ftnref7

¹⁰ American Bar Association. (2021, October 15). *A Call for Industry Awareness of Risks Relating to Residual Interests in Securitizations.* Americanbar.org. https://www.americanbar.org/groups/business_law/publications/blt/2021/10/residual-interests/

30, 2021, the CFPB filed [the amended complaint](#) clarifying allegations related to several issues raised in the motions to dismiss the original complaint.¹¹

The Impact of *Collins v. Yellen*

On June 23, 2021, the U.S. Supreme Court announced a [decision](#) in *Collins v. Yellen* that found the structure of the Federal Housing Finance Agency to be unconstitutional. The decision overturned the current structure and allowed the director of the FHFA to be removed at will by the President before the end of the appointed term. The Supreme Court held that “an unconstitutional removal does not invalidate agency action so long as the agency head was properly appointed.” The judge who granted the interlocutory motion for appeal in the CFPB v. NCSLT case interpreted this to mean that actions taken under a properly appointed agency head are not void and do not need to be ratified unless the plaintiff can show that, “the action would not have been taken but for the President’s inability to remove the agency head.” Applying this interpretation, the District Court found that the removal restriction did not impact the CFPB’s decision to bring about and continue litigating its case against the Trusts.

Intervenors Argue Case Should Be Dismissed on Grounds that the Trusts are Not “Covered Persons”

The Trusts and other involved parties also moved to dismiss the amended complaint, arguing that the Trusts are not “covered persons” under the CFPA because they are “passive securitization vehicles that take no action related to the servicing of student loans or collecting debt” and, therefore, are not subject to the CFPB’s authority.¹² In other words, securitization trusts serve as pass-through entities that have no employees or assets, with no mechanism to engage in providing a consumer financial product or service.

Is a Securitization Trust a “Covered Person”?

Under the Consumer Financial Protection Act (CFPA), the CFPB may bring an enforcement action “to prevent a *covered person* or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice.”¹³

A “covered person” is defined under the CFPA as:¹⁴

- A. any person that engages in offering or providing a consumer financial product or service; and
- B. any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.”

¹¹ National Collegiate Student Loan Trusts. (n.d.). *Consumer Financial Protection Bureau*. <https://www.consumerfinance.gov/enforcement/actions/national-collegiate-student-loan-trusts/>.

¹² *Federal Court Holds That Student Loan Trusts Are Subject to CFPB Enforcement Authority: What This Means for Consumer Securitizations and Other Whole Loan Buyers*. Cadwalader. (2021, December 15).

<https://structuredfinance.org/wp-content/uploads/2021/12/Cadwalader-Wickersham-Taft-LLP-Federal-Court-Holds-That-Student-Loan-Trusts-Are-Subject-to-CFPB-Enforcement-Authority-December.pdf>

¹³ PUBL203.PS (govinfo.gov)

¹⁴ <https://www.law.cornell.edu/uscode/text/12/5481>

Court Ruling on Covered Persons Deals Blow to Securitization Industry

Following the CFPB's filing of an amended complaint, the case was re-assigned to a new judge out of the U.S. District Court for the District of Delaware. **On December 13, 2021, the judge denied the Trusts' motion to dismiss the CFPB's amended complaint and the lawsuit in its entirety, ruling that securitization Trusts are "covered persons" under the CFPB, and thus subject to the CFPB's authority,** allowing the CFPB's lawsuit against NCSLT to proceed.¹⁵

This ruling fell upon the dictionary definitions of the term "engage" in its application to the CFPB. The court held that because the Trusts contracted third parties to service and collect on the securitized loans, the Trusts "engaged" in such acts as part of their business model, even if indirectly, and were thus covered persons.¹⁶

This court ruling introduced a novel risk for securitization trusts that did not previously exist: the idea that a securitization trust could be considered a covered person for purposes of the CFPB's authority under the CFPB. The CFPB authorizes the CFPB and state Attorneys General to bring lawsuits against covered persons for violating federal consumer financial laws. If upheld, the court's ruling exposes securitization trusts and noteholders to the oversight of the CFPB and introduces the idea that trusts - and by extension, investors - could potentially be held responsible for

actions by other transaction parties that run afoul of consumer protection regulations.¹⁷

District Court Grants Interlocutory Motion for Appeal

On December 23, 2021, the defendants filed a motion for interlocutory appeal of the District Court's decision to deny the motion dismiss the case, raising two issues for certification by the Court:

- (1) whether, under CFPB, the Trusts are "covered persons" subject to the CFPB enforcement authority; and
- (2) whether, after *Collins v. Yellen*, the CFPB was required to ratify the enforcement action before the three-year statute of limitations ran out.

On May 3, the Third Circuit Court of Appeals granted the appeal filed by the Trust and two intervenors – Ambac, an insurer on certain Trust securities, and Transworld Systems, Inc., a servicer to the Trust – to review the two legal findings. The Third Circuit Court's decision to hear the appeal allows the Trusts' appeal to be docketed and the issues will now be fully briefed over the coming months, effectively pausing the legal proceedings against the Trusts pending the review.

¹⁵ [17-1323_2.pdf \(uscourts.gov\)](#)

¹⁶ Lev, O. (2021, December 16). *CFPB Wins Reversal of Dismissal – and Key Ruling on Securitization Trusts*. Mayer Brown. <https://www.mayerbrown.com/en/perspectives-events/blogs/2021/12/cfpb-wins-reversal-of-dismissal--and-key-ruling-on-securitization-trusts>

¹⁷ *CFPB's Step Forward in Trust Suit Spurs Risks Across Consumer Securitizations*. Moody's Investor Service. (2022, February 28). <https://structuredfinance.org/resource-details/nclst-ruling-could-increase-trusts-vulnerability-to-financial-risks-and-legal-suits-moodys-investor-service-reports/>

SFA's Involvement:

SFA was continuously involved in the *CFPB v. National Collegiate Student Loan Trusts* case by demonstrating its commitment to inform the court on the negative implications a ruling in favor of the CFPB's enforcement action would have on the securitization market. In November 2017, SFA filed an [amicus brief](#) in support of the Trusts.

Overall, SFA fully supports the CFPB's goal of protecting consumers from illegal and deceptive business practices. However, in our involvement we urged the CFPB to consider an alternative approach that would address their consumer protection concerns while also safeguarding the contractual arrangement of market participants the case endangers. This took the form of a letter to the [CFPB in May 2019](#) where SFA raised issues with the construct of the bureau's proposed consent judgement against the Trusts.

With respect to another case involving the equity owner of the Trusts in the Delaware Chancery Court, SFA submitted an additional [amicus brief](#) in July 2020. Shortly following the amicus filing, once again the court ruled in line with SFA's position that the certain demands from the Trusts' equity owner would violate fundamental contractual rights of the Trust investors.

SFA will continue its advocacy on the matter and closely monitor any developments in the case. Additionally, SFA will seek to submit an amicus brief to inform the court on the negative impact that a finding of Trusts as "covered persons" would undoubtedly have on the securitization market.

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