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How Surveys Provide Insight For Consumer Finance Litigation

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Various indicators suggest a substantial increase in litigation and regulatory enforcement regarding consumer financial products in 2021 and the years ahead.

The new Biden administration has signaled a shift to increased regulatory enforcement of consumer protection rules with the choice of Rohit Chopra to head the Consumer Financial Protection Bureau.[1] News outlets have reported that there may be stronger enforcement of fair lending guidelines.[2]

New debt collection rules created under the Trump administration will soon come into force; these rules will require collection agencies to make additional disclosures and will limit their ability to threaten consumers with lawsuits.[3]

In addition, while the federal moratorium was recently extended until March 31, moratoria on foreclosures and other forms of forbearance during the COVID-19 pandemic will presumably also come to an end at some point.[4]

As litigation involving consumer financial products increases, tools that allow assessment of consumer behavior, such as surveys, can play an important role.

For example, when used appropriately, surveys can provide useful insights into consumer decision making regarding financial products or consumers' understanding of financial disclosures. As illustrated below, surveys can therefore be used to address issues at various stages of consumer finance litigation.

Indeed, surveys are regularly used in academic research to understand how consumers make purchase decisions, and they have also been used more broadly in litigation involving consumer products.[5] This article discusses two types of surveys that may be useful in the context of consumer financial products: Purchase reasons surveys and A/B test surveys.

Surveys should be designed according to established scientific guidelines in order to provide reliable insights.[6] While the details of survey design will necessarily be context-specific, questions and answer choices generally should be designed to avoid biases that could lead to unreliable survey data.[7]

In addition, the survey sample should be representative of the broader population of interest; in the litigation context, this population may be putative class members or respondents who are sufficiently similar to putative class members.[8] Finally, while surveys can be helpful in some aspects of litigation, they are not appropriate to address every issue.[9]

To illustrate how these surveys can be applied to assess issues in consumer finance litigation, consider the following stylized example: A named plaintiff seeks to certify a class of consumers who took out auto loans. The plaintiff claims that all consumers in the putative class would not have taken these loans had a clearer disclosure been made regarding penalties for lack of payment.

While this example is stylized, it may be particularly pertinent given current conditions in the auto loan market. For example, subprime auto loans have recently increased beyond levels seen prior to the 2008 financial crisis; as of 2019, these loans represented almost 35% of all auto loans. Then the COVID-19 pandemic hit.

Over the past year, top executives at subprime auto finance companies have indicated that they expect an increase in delinquencies.[10] Consumer complaints about auto lenders to the CFPB have also increased dramatically during the pandemic.[11]

All of these factors suggest there may be a potential increase in consumer finance litigation and enforcement with respect to auto loans in the future.

Survey Design Choices in the Context of Consumer Finance Litigation

There are several different survey designs that can potentially be used in consumer finance litigation to assess the extent of heterogeneity across putative class members and/or to evaluate whether the alleged at-issue conduct affected consumers' decision making.

A purchase reasons survey is often used to identify product features or attributes that consumers consider when making a purchasing decision. For example, survey respondents who purchased or considered purchasing the product would be asked to identify the reasons that were important to their decision.

This type of survey can assess the extent of heterogeneity among proposed class members in terms of the factors they considered when making the decision to purchase the at-issue product.[12]

In our stylized auto loan example, a purchase reasons survey could assess the extent of heterogeneity among respondents regarding which features of the auto loan were most important in their decision to take out the auto loan, including whether they cited the lack-of-payment penalty as one of the reasons for their borrowing decision.

A survey could also be designed to assess heterogeneity in how consumers interpret an at-issue disclosure. In our stylized auto loan example, the plaintiff may assert that a disclosure in the loan agreement had a particular meaning to all putative class members.

A survey could help assess whether respondents all interpreted the disclosure in the same manner, and if not, the extent of variation in interpretation across putative class members.

Another type of survey design that may be particularly helpful in consumer finance litigation is an A/B test survey. In an A/B test survey, respondents are randomly assigned to a test group and a control group.

The control group may see an advertisement, a contract, or a description of a product with the real-world disclosure, while respondents in the test group would see the same advertisement, contract, or description with the disclosure that plaintiff claims should have been provided.

Survey respondents in the test and control groups are then asked how likely they are to purchase the product that they were shown based on the advertisement, contract, or description.[13]

An expert can then assess the difference, if any, in outcomes between respondents who saw the disclosure, and respondents who did not.

A finding of no difference between the test and control groups would provide evidence that the at-issue disclosure did not affect consumer decisions in the real world.

Returning to our stylized auto loan example, an A/B test survey could provide insights into whether respondents relied on the allegedly misleading disclosure when deciding to take out the at-issue loan.

For example, an A/B test survey could be set up with auto loan contracts using two different disclosures: Respondents in the control group of the survey would see the contract with the actual disclosure about penalties for lack of payment, while respondents in the test group would see the same contract, but with the penalty disclosure language that plaintiff claims should have been provided.

Respondents would then be asked how likely they would be to sign the contract they saw and take out the at-issue loan.

If there is no statistical difference in the likelihood of taking out the auto loan between respondents in the test group and respondents in the control group, an expert could conclude that the survey provided evidence that the at-issue disclosure regarding penalties for lack of payment would not have affected consumers' decision making regarding the auto loan.

In summary, as part of future litigation and regulatory enforcement regarding consumer financial products, it will remain important to consider how surveys can be used to help address key issues regarding consumer financial decision making.

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Disclosure: Cornerstone Research was retained by defense counsel to support expert witnesses in In Re: General Motors LLC Ignition Switch, discussed in endnotes 5 and 12.

[1] "Biden Choices for CFPB, SEC Signal Pivot to Robust Enforcement," Washington Post, January 18, 2021, https://www.washingtonpost.com/business/2021/01/18/chopra-cfpb-biden-transition/.

[2] "Banks Brace for Tougher Rules under Biden on Consumer Protection, Fair Lending," Wall Street Journal, January 30, 2021, https://www.wsj.com/articles/banks-brace-for-tougher-rules-under-biden-on-consumer-protection-fair-lending-11612022400.

[3] "Consumer Financial Protection Bureau Issues Final Rule on Consumer Disclosures Related to Debt Collection," Consumer Financial Protection Bureau, December 18, 2020, https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-issues-final-rule-on-consumer-disclosures-related-to-debt-collection/.

[4] "Biden Administration Announces Foreclosure Moratorium and Mortgage Forbearance Deadline Extension That Will Bring Relief to Rural Residents," U.S. Department of Agriculture, January 20, 2021, https://www.usda.gov/media/press-releases/2021/01/20/biden-administration-announces-foreclosure-moratorium-and-mortgage.

[5] See, e.g., Annamaria Lusardi and Peter Tufano, "Debt Literacy, Financial Experiences, and Overindebtedness,"Journal of Pension Economics and Finance14, no. 4 (2015): 332–368; Annamaria Lusardi and Olivia S. Mitchell, "How Ordinary Consumers Make Complex Economic Decisions: Financial Literacy and Retirement Readiness," Quarterly Journal of Finance 7, no. 3 (2017), at p. 1750008. See also "In re General Motors LLC Ignition Switch Litigation," Cornerstone Research, https://www.cornerstone.com/Publications/Case-Studies/General-Motors-Ignition-Switch-Litigation.

[6] For example, see the recommendations in Shari S. Diamond, "Reference Guide on Survey Research," in Reference Manual on Scientific Evidence (Washington, DC: The National Academies Press, 2011), pp. 359–423.

[7] There are several common biases that can emerge in a poorly designed survey, including bias from order effects, demand effects, and leading questions or answers, all of which can lead to unreliable survey evidence. See Shari S. Diamond, "Reference Guide on Survey Research," in Reference Manual on Scientific Evidence (Washington, DC: The National Academies Press, 2011), pp. 359–423.

[8] "A survey that provides information about a wholly irrelevant population is itself irrelevant." See Shari S. Diamond, "Reference Guide on Survey Research," in Reference Manual on Scientific Evidence (Washington, DC: The National Academies Press, 2011), p. 377.

[9] For example, surveys are generally not capable of reliably quantifying economic damages.

[10] Glen Fest, "Weekly Wrap: Pessimism Mounts in Subprime Auto Outlook," Asset Securitization Report. December 18, 2020, https://asreport.americanbanker.com/list/weekly-wrap-dec-pessimism-mounts-in-subprime-auto-outlook; Joy Wiltermuth, "Auto Debt Complaints Are Soaring during Pandemic," MarketWatch, October 14, 2020, https://www.marketwatch.com/story/auto-debt-complaints-are-soaring-during-pandemic-11602636338.

[11] Joy Wiltermuth, "Auto Debt Complaints Are Soaring during Pandemic," MarketWatch, October 14, 2020, https://www.marketwatch.com/story/auto-debt-complaints-are-soaring-during-pandemic-11602636338.

[12] This type of survey is frequently utilized in class action litigation involving consumer products. For example, Professor Wayne Hoyer conducted a survey to understand whether consumers relied on an at-issue defect in litigation related to General Motors vehicles. See "In re General Motors LLC Ignition Switch Litigation," Cornerstone Research, https://www.cornerstone.com/Publications/Case-Studies/General-Motors-Ignition-Switch-Litigation.

[13] Depending on the design of the survey and the specific facts of the case, other questions may also be asked and/or respondents may see an "open-ended" follow-up question where they are asked to explain their response regarding whether they would purchase the product they were shown.