Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

April 19, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Proposes Escrow Rule Amendments, Publishes Escrow Rule Compliance Guide. On April 12, the CFPB proposed a rule to amend aspects of its January 10, 2013 final rule on escrow account requirements for first-lien higher-priced mortgage loans (HPMLs). That rule expands existing escrow requirements for such loans and creates a new exemption for small creditors that operate predominantly in rural or underserved areas. The proposal explains that the CFPB did not intend for the escrow rule to state that the CFPB will designate or determine which counties are rural or underserved. Instead, the CFPB intended to require determinations of rural or underserved status to be made by creditors, but also intended for the CFPB to apply both tests to each U.S. county and publish an annual list of counties that satisfy either test for a given calendar year, which creditors may rely upon as a safe harbor. Further, the CFPB proposes clarifications to how rural or underserved status may be determined. The proposal notes that the amended factors also will apply to three other CFPB mortgage rules that provide rural and underserved exemptions. Finally, the proposal (i) notes that the final escrow rule inadvertently removed existing language that provided certain protections related to a consumer's ability to repay and prepayment penalties for HPMLs, and (ii) seeks to establish a temporary provision to ensure the removed protections remain in effect until the expanded HPML protections take effect on January 10, 2014. The CFPB is accepting comments on the proposed amendments for 15 days following publication in the Federal Register. On April 18, the CFPB published a guide to help small entities comply with the escrow rule. More broadly, the CFPB believes the guide provides an "easy-to-use" summary of the rule for all creditors, as well as servicing market participants, software providers, and other creditor business partners. As with another compliance guide released last week, the CFPB notes that the guide is not a substitute for the rule and the Official Interpretations and does not consider other laws that may apply to the maintenance and administration of escrow accounts.

CFPB Report Urges Adoption of Standards for Marketing Financial Adviser Services to Seniors. On April 18, the CFPB issued a report that reviews the marketing of investment adviser services to older Americans. The CFPB found that financial advisers use more than 50 different

designations to market expertise in financial issues affecting seniors, which the CFPB claims creates confusion in the marketplace. The report includes detailed recommendations for the SEC and Congress related to (i) consumer education and disclosures, (ii) standards for the acquisition of senior designations, (iii) standards for senior designee conduct, and (iv) enforcement related to the misuse of senior designations. Among the recommendations, the CFPB suggests that policymakers consider requiring adviser education and standardized testing prior to obtaining a senior designation. The CFPB also suggests that the SEC and state policymakers consider increasing enforcement of misleading or other improper conduct by a holder of a senior designation and that state policymakers consider providing consumers with a private right of action to seek relief for the improper use of senior designations.

CFPB Announces Field Hearing on Student Loan Issues. On April 18, the CFPB announced a field hearing about student loan issues, to be held in Miami-Dade County on May 8, 2013. The announcement states the event will feature remarks from CFPB Director Richard Cordray, as well as testimony from consumer groups, industry representatives, and members of the public. In the past, the CFPB has made policy announcements in connection with field hearings. On April 8, the comment period closed on a CFPB notice and request for information regarding policy options to "increase the availability of affordable payment plans for borrowers with existing private student loans." The CFPB also recently proposed a rule to allow it to supervise "larger participant" nonbank student loan servicers. The comment period for that proposal does not close until May 28, 2013.

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COURTS

Minnesota Supreme Court Affirms that Foreclosing Parties Must Record Mortgage Assignments Prior to Initiating Foreclosure by Advertisement. On April 17, the Minnesota Supreme Court affirmed an intermediate appellate court ruling that held (i) a strict compliance standard applies to Minnesota's foreclosure by advertisement process, and (ii) a foreclosure by advertisement is void where the foreclosing party fails to record all mortgage assignments prior to initiating the foreclosure process. *Ruiz v. 1st Fidelity Loan Servicing, LLC*, No. A11-1081, 2013 WL 1629192 (Minn. Apr. 17, 2013). The case arose after an assignment correcting the name of the assignee was recorded on the same day that the assignee (i) published the first notice of foreclosure sale, and (ii) recorded a notice of pendency of foreclosure. After the assignee foreclosed on the property, the mortgagor brought an action in Minnesota District Court seeking to void the

foreclosure by arguing that foreclosing parties must comply strictly with Minnesota's foreclosure by advertisement process. The district court granted summary judgment in the assignee's favor, concluding, among other things, that a substantial-compliance standard, rather than a strict compliance standard, applies to Minnesota's foreclosure by advertisement process. The Minnesota Court of Appeals reversed the district court on appeal, holding instead that a strict compliance standard applies to Minnesota's foreclosure by advertisement process. On further appeal, the state supreme court analyzed the statutory language containing Minnesota's foreclosure by advertisement process and determined that the plain language of the statute unambiguously requires all mortgage assignments to be recorded before a foreclosing party has a right to engage in the process of foreclosure by advertisement. As a result, the court determined that the assignee's foreclosure was void and that the case should be remanded to the district court for further proceedings.

California Federal Court Dismisses Credit Card Interest Rate Class Action. On April 15, the U.S. District Court for the Northern District of California dismissed a putative class action in which the named plaintiff brought a breach of contract claim and other common law and statutory claims against a credit card issuer after the issuer stopped providing the cardholder an interest free grace period on new charges because the cardholder transferred a balance from another card account as part of an interest free balance transfer offer and did not immediately pay off that transferred balance. *Barton v. Capital One Bank (USA), N.A.*, No. 12-5412, slip op. (N.D. Cal. Apr. 16, 2013). Applying Virginia law, the court held that while some cardholders may have accepted the offer and transferred balances "without realizing that, because it would cause them to begin carrying a post-due balance each month, it would deprive them of the grace period they had previously enjoyed," the agreement was clear that "carrying a post-due balance -- whatever its source -- terminated cardmembers' rights to the 25-day grace period." For the same reason, the court held the cardholder's claim that the issuer violated the CARD Act's requirement that a "creditor shall not change the terms governing the repayment of any outstanding balance" similarly failed. The court also held that the cardholder failed to allege any contractual discretion to support her claim of breach of good faith and dismissed her claim under California's Unfair Competition Law.

Ninth Circuit Enforces Student Loan Arbitration Agreement. On April 11, the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, held that a national bank could compel arbitration of a dispute involving student loans. *Kilgore v. KeyBank, Nat'l Ass'n*, No. 09-16703, 2013 WL 1458876 (9th Cir. Apr. 11, 2013). Former students of a failed flight-training school filed a class action in state court seeking broad injunctive relief against the bank that originated their student loans and the loan servicer. However, each of the students had executed a promissory note containing a provision requiring arbitration and prohibiting arbitration of claims on a class action basis. The bank removed the action to federal district court and moved to compel arbitration. The district court denied the motion and subsequently granted the bank's motion to dismiss the claims. On appeal, the Ninth Circuit held that the arbitration provision was enforceable under the Federal Arbitration Act and that it was not substantively or procedurally unconscionable under state law. The court further held that the plaintiffs' claims were not exempt from the FAA under the "public injunction" exception because the bank's alleged statutory violations already ceased, the class affected by the alleged practices is small, and there is no real prospective benefit to the public at large from the relief sought. The court vacated the district court's dismissal of the students' claims, reversed the denial of the bank's motion to compel arbitration, and remanded with instructions to the district court to compel arbitration.

Michigan Court of Appeals Holds Companies Hired by Automobile Lenders to Arrange for the Repossession of Collateral Need Not Be Licensed as Collection Agencies. On April 11, the Michigan Court of Appeals affirmed a trial court's ruling that the Michigan Occupational Code did not require licensure of companies that contract with automobile lending institutions to handle collection

services on delinquent accounts ("forwarding companies") because the forwarding companies did not directly or indirectly engage in collections activities. *Badeen v. Par, Inc.*, 2013 WL 1489372 (Mich. Ct. App. Apr. 11, 2013). Plaintiffs, licensed debt collectors, filed multiple amended complaints alleging that defendants, automobile lenders and forwarding companies, violated the Michigan Occupational Code by hiring unlicensed collections agencies and indirectly engaging in collections activities. The court of appeals held that plaintiffs were not entitled to relief for their claims that defendants engaged in licensable activity without a license. The court explained that because the forwarding companies hired by the automobile lenders contract out the activities of solicitation of claims and repossession of property to properly licensed collection agencies, and do not themselves "directly or indirectly" engage in the collection of debts, the forwarding agencies are not required to be licensed.

FIRM NEWS

Complimentary Webinar - Defending SCRA Actions
Please join BuckleySandler LLP attorneys Kirk Jensen and Jeffrey Naimon on May 1, 2013 from 2:00-3:15 PM ET, to review enforcement actions by federal and state authorities based on alleged violations of the Servicemembers Civil Relief Act. The panelists will discuss how requirements in the various consent orders in many cases exceed the requirements in the statute itself and how careful factual and legal scrutiny can successfully identify meritless claims. The webinar will review what regulators expect from a compliance standpoint, while helping you prepare to defend your institution against claims that do not involve conduct prohibited by the SCRA. For registration and other information, please click here.

Thomas Sporkin and James Shreve will participate in an IAPP web conference entitled "Reporting on Cybersecurity Risk for Public Companies," on April 25, 2013, 1:00 - 2:30 PM ET. The webinar will cover the SEC's Division of Corporate Finance guidance on when and how cybersecurity risks and incidents should be reported in filings by public companies.

David Baris will speak at the American Bankers Association Risk Management Forum on April 26, 2013 at the Baltimore Marriott Waterfront Hotel in Baltimore, MD. His session is entitled "Developing Effective Board Risk Management Committees".

Benjamin Klubes and Jonice Gray Tucker will speak to the Financial Services Roundtable on May 1, 2013 on the topic of Managing Fair Lending and Jonice Gray Tucker also will speak on May 2, 2013 on the topic of Litigation Trends.

Thomas Sporkin will participate in an American Association of Bank Directors webinar entitled "SEC Whistleblower 101: How to Prevent or Mitigate Whistleblower Claims" on May 6, 2013, 2:00 - 3:00 PM ET. The webinar will be moderated by David Baris and will cover several aspects of the current whistleblower claims environment including guidance on minimizing potential whistleblower risk and strategies for ensuring that your bank's board and officers comply with their duties under the law.

James Parkinson will speak at ACI's Conference for FCPA and Anti-Corruption in the Life Sciences Industry on May 15, 2013, on a panel titled, "Managing Corruption Risks in a Transactional Setting: How to Prevent FCPA Pitfalls in Life Science Joint Ventures, Mergers & Acquisitions and Collaborations."

Andrea Mitchell will speak at an American Bankers Association Fair Lending Workshop on June 8, 2013 in Chicago, IL, offered in connection with the ABA Regulatory Compliance Conference. The

Fair Lending Workshop will review current fair lending hot topics and how institutions can manage or mitigate fair lending obstacles and demonstrate compliance with fair lending laws and regulations.

FIRM PUBLICATIONS

Jonice Gray Tucker and Kendra Kinnaird wrote "Mortgage Crisis Triggers Stronger Focus on Vendors," published by the National Notary Association on March 8, 2013.

Andrew Schilling, Ross Morrison, and Michelle Rogers published in Law360, "Finally, 8 Factors Governing FIRREA Civil Penalty Awards," on March 12, 2013, and "FCA Allows Treble Damages - 'But Treble What?'", on March 26, 2013.

About BuckleySandler LLP (www.buckleysandler.com)

With more than 150 lawyers in Washington, New York, Los Angeles, and Orange County, BuckleySandler provides best-in-class legal counsel to meet the challenges of its financial services industry and other corporate and individual clients across the full range of government enforcement actions, complex and class action litigation, and transactional, regulatory, and public policy issues. The Firm represents many of the nation's leading financial services institutions. "The best at what they do in the country." (Chambers USA).

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Los Angeles: 100 Wilshire Boulevard, Suite 1000, Santa Monica, CA 90401, (310) 424-3900
Orange County: 3121 Michelson Drive, Suite 210, Irvine, CA 92612, (949)398-1360

We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes. Email infobytes@buckleysandler.com.

In addition, please feel free to email our attorneys. A list of attorneys can be found here.

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InfoBytes is not intended as legal advice to any person or firm. It is provided as a client service and information herein is drawn from various public sources, including other publications.

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CONSUMER FINANCE

CFPB Announces Field Hearing on Student Loan Issues. On April 18, the CFPB announced a field hearing about student loan issues, to be held in Miami-Dade County on May 8, 2013. The announcement states the event will feature remarks from CFPB Director Richard Cordray, as well as testimony from consumer groups, industry representatives, and members of the public. In the past, the CFPB has made policy announcements in connection with field hearings. On April 8, the comment period closed on a CFPB notice and request for information regarding policy options to "increase the availability of affordable payment plans for borrowers with existing private student loans." The CFPB also recently proposed a rule to allow it to supervise "larger participant" nonbank student loan servicers. The comment period for that proposal does not close until May 28, 2013.

Ninth Circuit Enforces Student Loan Arbitration Agreement. On April 11, the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, held that a national bank could compel arbitration of a dispute involving student loans. *Kilgore v. KeyBank, Nat'l Ass'n*, No. 09-16703, 2013 WL 1458876 (9th Cir. Apr. 11, 2013). Former students of a failed flight-training school filed a class action in state court seeking broad injunctive relief against the bank that originated their student loans and the loan servicer. However, each of the students had executed a promissory note containing a provision requiring arbitration and prohibiting arbitration of claims on a class action basis. The bank removed the action to federal district court and moved to compel arbitration. The district court denied the motion and subsequently granted the bank's motion to dismiss the claims. On appeal, the Ninth Circuit held that the arbitration provision was enforceable under the Federal Arbitration Act and that it was not substantively or procedurally unconscionable under state law. The court further held that the plaintiffs' claims were not exempt from the FAA under the "public injunction" exception because the bank's alleged statutory violations already ceased, the class affected by the alleged practices is small, and there is no real prospective benefit to the public at large from the relief sought. The court vacated the district court's dismissal of the students' claims, reversed the denial of the bank's motion to compel arbitration, and remanded with instructions to the district court to compel arbitration.

Michigan Court of Appeals Holds Companies Hired by Automobile Lenders to Arrange for the Repossession of Collateral Need Not Be Licensed as Collection Agencies. On April 11, the Michigan Court of Appeals affirmed a trial court's ruling that the Michigan Occupational Code did not require licensure of companies that contract with automobile lending institutions to handle collection services on delinquent accounts ("forwarding companies") because the forwarding companies did not directly or indirectly engage in collections activities. *Badeen v. Par, Inc.*, 2013 WL 1489372 (Mich. Ct. App. Apr. 11, 2013). Plaintiffs, licensed debt collectors, filed multiple amended complaints alleging that defendants, automobile lenders and forwarding companies, violated the Michigan Occupational Code by hiring unlicensed collections agencies and indirectly engaging in collections activities. The court of appeals held that plaintiffs were not entitled to relief for their claims that defendants engaged in licensable activity without a license. The court explained that because the forwarding companies hired by the automobile lenders contract out the activities of solicitation of claims and repossession of property to properly licensed collection agencies, and do not themselves "directly or indirectly" engage in the collection of debts, the forwarding agencies are not required to be licensed.

SECURITIES

CFPB Report Urges Adoption of Standards for Marketing Financial Adviser Services to Seniors. On April 18, the CFPB issued a report that reviews the marketing of investment adviser services to older Americans. The CFPB found that financial advisers use more than 50 different designations to market expertise in financial issues affecting seniors, which the CFPB claims creates confusion in the marketplace. The report includes detailed recommendations for the SEC and Congress related to (i) consumer education and disclosures, (ii) standards for the acquisition of senior designations, (iii) standards for senior designee conduct, and (iv) enforcement related to the misuse of senior designations. Among the recommendations, the CFPB suggests that policymakers consider requiring adviser education and standardized testing prior to obtaining a senior designation. The CFPB also suggests that the SEC and state policymakers consider increasing enforcement of misleading or other improper conduct by a holder of a senior designation and that state policymakers consider providing consumers with a private right of action to seek relief for the improper use of senior designations.

CREDIT CARDS

California Federal Court Dismisses Credit Card Interest Rate Class Action. On April 15, the U.S. District Court for the Northern District of California dismissed a putative class action in which the named plaintiff brought a breach of contract claim and other common law and statutory claims against a credit card issuer after the issuer stopped providing the cardholder an interest free grace period on new charges because the cardholder transferred a balance from another card account as part of an interest free balance transfer offer and did not immediately pay off that transferred balance. *Barton v. Capital One Bank (USA), N.A.*, No. 12-5412, slip op. (N.D. Cal. Apr. 16, 2013). Applying Virginia law, the court held that while some cardholders may have accepted the offer and transferred balances "without realizing that, because it would cause them to begin carrying a post-due balance each month, it would deprive them of the grace period they had previously enjoyed," the agreement was clear that "carrying a post-due balance -- whatever its source -- terminated cardmembers' rights to the 25-day grace period." For the same reason, the court held the cardholder's claim that the issuer violated the CARD Act's requirement that a "creditor shall not change the terms governing the repayment of any outstanding balance" similarly failed. The court also held that the cardholder failed to allege any contractual discretion to support her claim of breach of good faith and dismissed her claim under California's Unfair Competition Law.