Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

January 21, 2011

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Federal Issues

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FSOC Holds Third Meeting, Approves Volcker Rule Study. On January 18, the Financial Stability Oversight Council (FSOC), established under the Dodd-Frank Act (Dodd Frank), convened its third meeting and approved several studies and proposed rules mandated by Dodd-Frank. FSOC approved a study of future implementation of the Volcker Rule (Section 619 of Dodd-Frank), which would prohibit proprietary trading activities and certain private fund investments, and recommendations regarding implementation. FSOC also approved a report and study of Dodd-Frank's financial sector concentration limit (Section 622). The report and study detailed how the concentration limit would affect financial stability, moral hazard, efficiency and competitiveness of financial firms and markets, and the availability of credit and other financial services. FSOC's recommendations regarding modifying the concentration limit will be issued for public comment. Lastly, FSOC approved a proposed rule specifying the criteria used by the FSOC in its designation of

nonbank financial companies. The Notice of Proposed Rulemaking (NPR) will be open for public comment for 30 days following publication in the *Federal Register*. For a copy of the FSOC press release, please see http://www.treasury.gov/press-center/press-releases/Pages/tg1028.aspx. For a copy of the studies and the NPR, please see http://www.treasury.gov/FSOC.

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Department of Veterans Affairs Provides Notice of Relocation Assistance for VA Borrowers. On January 6, the Department of Veterans Affairs (VA) issued Circular 26-11-1, "Relocation Assistance for VA Borrowers," in which the VA provided instructions for mortgage servicers to advance $1,500 in relocation assistance to a borrower occupant who completes a short sale with a VA compromise claim or who executes a deed-in-lieu of foreclosure (DIL). This provision is effective immediately. Servicers are expected to provide notice to eligible homeowners of the availability of such foreclosure alternatives and to encourage completion of a short sale or DIL. Related procedures are outlined in the Circular, which can be found at http://www.benefits.va.gov/HOMELOANS/circulars/26_11_1.pdf.

FDIC Announces Rule to Include IOLTA Accounts in Definition of "Noninterest-Bearing Transaction Accounts." On January 18, the Federal Deposit Insurance Corporation (FDIC) announced that it approved a final rule to include Interest on Lawyer Trust Accounts (IOLTAs) in the definition of "noninterest-bearing transaction accounts" for purposes of extending the temporary unlimited deposit coverage as provided by the Dodd-Frank Act (as reported in *InfoBytes*, Nov. 12, 2010). Funds held in IOLTA accounts, as well as funds held in any other noninterest-bearing transaction accounts, are insured without limit, through December 31, 2012. For a copy of the FDIC Announcement, please click here.

Fannie Mae Announces Increase in Attorney's Fees for Maryland Foreclosures. On January 18, Fannie Mae announced an increase in allowable attorney's fees for non-judicial foreclosures for properties located in Maryland. Beginning with loans referred to an attorney on or after February 1, 2011, the maximum allowable attorney's fees for legal work related to non-judicial foreclosures will increase from $950 to $1,300 (which includes the combined attorney's fees, notary's fees, and the trustee's commission (or statutory fee)). Click here for a copy of the announcement.

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FDIC Approves Interim Final Rule on Treatment of Certain Creditor Claims Under New Orderly Liquidation Authority. On January 18, the Board of Directors of the Federal Deposit Insurance Corporation (FDIC) approved an interim final rule intended to clarify key components of its new orderly liquidation authority for financial companies whose failure could adversely affect the financial stability of the Untied States. Pursuant to Title II of the Dodd-Frank Act, the FDIC may be appointed as receiver for certain financial companies if the failure of such company poses a significant risk to the United States' financial stability. Most importantly, the interim final rule clarifies that creditors bear the losses of any failure and that "[i]n no event may taxpayer money be used to cover losses associated with the failure of a large financial firm." The interim rule also (i) addresses the FDIC's authority to continue operations, including by establishing a bridge financial company, (ii) clarifies the measure of damages for creditors' contingent claims and the priority of payment to creditors, and (iii) provides that upon liquidation of subsidiaries, remaining shareholder value is paid to the shareholders of the subsidiary. Public comments on the rule are due 60 days after publication in the Federal Register. For a copy of the press release announcing the interim rule, please see http://www.fdic.gov/news/news/press/2011/pr11007.html. For a copy of the interim final rule, please see http://www.fdic.gov/news/board/2011Janno6.pdf.

Fed Announces Establishment of Diversity and Inclusion Offices. On January 18, pursuant to a Dodd-Frank Act requirement that diversity and inclusion offices be established at certain federal agencies, the Federal Reserve Board (FRB) announced the establishment of diversity and inclusion offices at the FRB and all 12 of the Federal Reserve Banks. The heads of these offices are: Sheila Clark, FRB; Marques Benton, Federal Reserve Bank of Boston; Diane Ashley, Federal Reserve Bank of New York; Mary Ann Hood, Federal Reserve Bank of Philadelphia; Peggy Velimesis, Federal

Reserve Bank of Cleveland; Tammy Cummings, Federal Reserve Bank of Richmond; Joan Buchanan, Federal Reserve Bank of Atlanta; Valerie Van Meter, Federal Reserve Bank of Chicago; James Price, Federal Reserve Bank of St. Louis; Duane Carter, Federal Reserve Bank of Minneapolis; Donna Ward, Federal Reserve Bank of Kansas City; Tyrone Gholson, Federal Reserve Bank of Dallas; and Susan Sutherland, Federal Reserve Bank of San Francisco. Click here for a copy of the press release.

State Issues

State of Maine's Department of Professional and Financial Regulation and Bureau of Consumer Credit Protection Issue Joint Advisory Ruling Regarding the Federal Reserve's Interim Truth In Lending Rule. On January 6, Maine's Department of Professional and Financial Regulation and Bureau of Consumer Credit Protection (Bureaus) issued a Joint Advisory Ruling regarding closed-end credit disclosures in light of the Federal Reserve's Interim Truth-in-Lending Rule (Interim Rule), which was published on September 24, 2010. The Bureaus confirmed that lenders must continue to follow Maine's current version of 12 C.F.R. 226.18 when providing disclosures to Maine consumers. However, the Bureaus announced that they would use their regulatory discretion to not take action to enforce Maine's inconsistent disclosure provisions against lenders that act in conformity with the Interim Rule. The Bureaus issued the no-action declaration because the Interim Rule provide more complete disclosures and better protection for Maine consumers. Click here for a copy of the Joint Advisory Ruling.

Courts

California Appellate Court Permits Extrinsic Evidence Regarding the Terms of a Loan Forbearance Agreement Under Fraud Exception to Parol Evidence Rule. The Fifth Appellate District of the California Court of Appeal recently reversed a decision of the trial court barring evidence of prior oral misrepresentations about the terms of a loan forbearance agreement, finding that the oral misrepresentations came within the fraud exception of the parol evidence rule and were therefore admissible. *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n*, No. F058434, 2011 WL 6577 (Cal. Ct. App. Jan. 3, 2011). In Riverisland, borrowers sued their lender for fraud, negligent misrepresentation, rescission and reformation, alleging that they were induced to sign a written forbearance agreement with the defendant by defendant's oral misrepresentations of the terms contained in the contract. The trial court refused to allow extrinsic evidence of prior oral misrepresentations, finding that it was inadmissible parol evidence. The Court of Appeal, however, reversed, holding that evidence of defendant's oral statements fell within the fraud exception of the parol evidence rule. The appellate court found that the statements at issue were a prior promise made without any intention of performing it that directly contradicted the provisions of the written contract. In this regard, the court distinguished these promises-admissible under the fraud exception to the parol evidence rule-from inadmissible parol evidence of a contemporaneous factual misrepresentation of the terms contained in a written agreement. For a copy of the opinion, please see http://www.courtinfo.ca.gov/opinions/documents/F058434.PDF.

New Jersey Court Permits Foreclosure Despite Loss of Promissory Note and Subsequent Assignment of Rights. Plaintiff Bank of America (BofA) sought foreclosure against Defendant homeowner who had defaulted on her mortgage. *Bank of America, NA v. Alvarado*, No. BER-F-47941-08 (N.J. Super. Ct. Jan. 7, 2011). Defendant counterclaimed that Plaintiff lacked the right to foreclose because it was not in possession of the subject promissory note, which had been lost some time earlier when the rights were pooled, securitized, and transferred. The court addressed whether the right to enforce a lost note or instrument can be transferred or assigned (*i.e.*, whether any person other than the person who lost the Note can enforce a lost Note). Finding that the Uniform Commercial Code as interpreted by New Jersey case law was silent on this point, the court turned to common law principles of law and equity to settle the issue. The court held that denying BofA's right to foreclose would result in unjust enrichment for Defendant and therefore granted summary judgment for Plaintiff. Click here for a copy of the opinion.

Seventh Circuit Affirms District Court Holdings Remanding to State Court Purported CAFA "Mass Action." On January 4, the U.S. Court of Appeals for the Seventh Circuit affirmed several district court decisions to remand to Illinois state court a purported Class Action Fairness Act (CAFA) "mass action" on grounds that the defendant's removal of 29 separate suits, involving more than 100 plaintiffs, from an Illinois state court was premature and that a proposal for joint trial cannot be made by a defendant. *Koral v. Boeing Company*, No. 10-8035 et al. (7th Cir. Jan. 4, 2011). Under CAFA, a "mass action" is a suit in which monetary relief claims of 100 or more persons are proposed to be tried jointly. In this case, the defendant aircraft manufacturer initially filed a motion to dismiss under the doctrine of *forum non conveniens*. In opposing the motion, the plaintiffs stated that in aviation disaster cases similar to the one at issue, several exemplar cases are routinely tried on one occasion at which time the issue of liability is determined for the remainder of the cases, making travel arrangements for defendant's witnesses less burdensome than if each case was tried separately. On the basis of this response, the defendant removed the state court cases to federal district court, arguing that the plaintiffs' statement in opposition to its motion to dismiss was a proposal for a joint trial, and thus made the 29 separate suits a mass action removable under the CAFA. Several of the district judges disagreed, and remanded the actions back to state court. On appeal, the Seventh Circuit affirmed the decisions of the district court judges, holding that the defendant's removal of the cases was premature and that, under CAFA, the initial proposal for joint trial cannot be made by a defendant. Moreover, the court held that a state court's decision on its own initiative to conduct a joint trial also would not enable removal, as that would not be a proposal. Lastly, the court noted that a proposal can be implicit, as where a single complaint joins more than 100 plaintiffs' claims without proposing a joint trial. Here, however, the court found that the plaintiffs' statement fell short of a proposal, instead classifying it as a prediction of what might happen if the judge decided to hold a mass trial. Click here for a copy of the opinion.

Firm News

Donna Wilson will be speaking at the ACI Privacy & Security of Consumer & Employee Information Conference on January 25-26, in Washington, DC. The topic will be "Responding to the Latest Cyber Threats: Mobile Workforces, Technology, Data Thefts, and Cloud Computing."

Benjamin Klubes will be speaking at the American Conference Institute's 10th Annual Advanced Forum on Consumer Finance Class Actions & Litigation on January 27 at 11am. The conference is taking place at The Helmsley Park Lane Hotel, 36 Central Park South, New York City. The topic will be Emerging Federal and State Regulatory and Enforcement Initiatives: FTC, DOJ, SEC, FRB, and State AGs Perspectives. Also on the panel with Mr. Klubes will be Attorney General William Sorrell, AG, State of Vermont and Attorney General Greg Zoeller, AG, State of Indiana.

Andrew Sandler will be speaking at Compliance Summit '11 hosted by FIS on Friday, January 28 in San Diego. Mr. Sandler's session is: Fair Lending: How Do Good Banks Get Into Bad Trouble, What You Must Avoid; How to Perform a Fair Lending Risk Assessment & Implement a Highly Effective Fair & Responsible Lending Compliance Program.

Andrew Sandler will be speaking at the 2011 ABA National Conference for Community Bankers on Tuesday, February 22 in San Diego. Mr. Sandler's session is: The Federal Bank Regulatory and Enforcement Environment Post-Dodd-Frank. Speaking with Mr. Sandler is Mark W. Olson, Co-Chairman, Treliant Risk Advisors LLC.

Margo Tank will be speaking at the E-Signature Summit for Banking Executives on April 8 in New York.

James Parkinson will be speaking at the ACI's "FCPA Compliance in Emerging Markets" program in Washington, D.C., on June 15-16.

Mortgages

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

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