Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

September 3, 2010

Topics In This Issue

Federal Issues

Fannie Mae Requires Pre-Filing Mediation for Florida Mortgage Loans. On August 31, Fannie Mae issued Announcement SVC-2010-13, which requires servicers to participate in pre-filing mediation for certain Florida mortgage loans, using an attorney from Fannie Mae's Retained Attorney Network. Among other provisions, the new policy: (i) accelerates the timeline for referral to retained attorneys following delinquency, (ii) requires servicers to refer delinquent mortgages to retained attorneys for mediation before initiation of foreclosure proceedings, (iii) requires servicers to cooperate in and attend mediation proceedings, (iv) caps mediation and attorneys' fees, (v) provides for $3,000 incentive payments to borrowers who complete short sales or deeds-in-lieu of foreclosure as a result of mediation, and (vi) reserves Fannie Mae's right to assess compensatory fees on servicers for delays or failure to comply with the policy. The new policy will be implemented by January 1, 2011, but servicers must designate and send liaison team information, and retained attorneys must begin newly referred screening loans for mediation by September 15, 2010. For a copy of Announcement SVC-2010-13, please click here.

FinCEN Fines Broker-Dealer for Violating the Bank Secrecy Act. On September 1, the Financial Crimes Enforcement Network (FinCEN) of the Department of the Treasury announced that it has assessed a $50,000 civil penalty against a broker-dealer for violating the Bank Secrecy Act. FinCEN determined that, among other things, the broker-dealer had failed to establish and implement an adequate anti-money laundering program, establish an adequate due diligence program for foreign correspondent accounts, obtain and verify required customer identification program information for account holders, and establish and implement adequate procedures for monitoring suspicious transactions that led to the failure to file suspicious activity reports. The FinCEN investigation was conducted in cooperation with the Securities and Exchange Commission and the Financial Industry Regulatory Authority. The broker-dealer consented to payment without admitting or denying the allegations. For a copy of the FinCEN news release, please see http://www.fincen.gov/news_room/nr/pdf/20100831.pdf.

Freddie Mac Issues Bulletin Regarding the Purchase of Mortgages with PACE Obligations. On August 31, the Federal Home Loan Mortgage Corporation (Freddie Mac) published Bulletin 2010-20, which provides guidance to approved Sellers/Servicers on purchase restrictions that Freddie Mac places on mortgages secured by properties subject to Property Assessed Clean Energy (PACE) obligations. The Bulletin states that, as a general matter, Freddie Mac will not purchase mortgages secured by properties subject to PACE obligations with first lien priority. However, Freddie Mac has waived this requirement for all mortgages with Freddie Mac settlement dates before July 6, 2010 that were secured by properties subject to PACE obligations with first lien priority originated before July 6, 2010. Nevertheless, if a borrower who has received a waiver wishes to refinance his or her mortgage with Freddie Mac, that borrower must payoff the existing PACE obligation as a condition to obtaining a new mortgage, unless the refinancing is conducted under Freddie Mac's Relief Refinance *Mortgages*SM offering. For a copy of Bulletin 2010-20, please see http://www.freddiemac.com/sell/guide/bulletins/pdf/bll1020.pdf.

FTC Obtains Settlement Order Prohibiting Florida Credit Repair Company's Fraudulent Activities. On September 1, the Federal Trade Commission (FTC) announced that it settled claims against a Florida credit repair operation, Clean Credit Report Services, Inc. (Clean Credit). The FTC filed the action in "Operation Clean Sweep" in October 2008. According to the FTC, Clean Credit told consumers they would help remove all the negative remarks from their credit reports, as well as current debt, but often debited funds from the consumers' bank accounts and then did little, if anything, that it promised. Pursuant to the settlement, Clean Credit agreed to stop making false claims and stop charging their customers up-front fees. The settlement agreement also: (i) requires that Clean Credit and its owners give up cars, houses and commercial property in Florida and in Bogota, Colombia, (ii) bars Clean Credit and its owners from making misrepresentations about any good or service, charging money up-front for credit repair services, and from collecting payments from consumers who purchased its services before October 22, 2008,(iii) bars the defendants from disclosing, benefitting from, or failing to properly dispose of customer information, and (iv) imposes a $14.4 million judgment that will be suspended, contingent upon the defendants surrendering their assets and any proceeds received from selling their commercial and residential, and personal property. For more information, please click here.

FDIC Extends Application Period for Safe Account Pilot Program. On September 2, the Federal Deposit Insurance Corporation (FDIC) announced that it was extending the application period for its Safe Account Pilot Program by 30 days; a program that will evaluate the feasibility of offering safe, low-cost transactional and savings accounts to underserved consumers. The FDIC chose to offer the extension because several institutions indicated that they needed more time to: (i) evaluate whether current product offerings were responsive to program parameters, (ii) make adjustments to current product offerings as necessary, (iii) design a responsive product offering, (iv) or obtain management review and approval of applications. The applications are now due by October 15, 2010, and should be submitted through SafeAcctPilot@fdic.gov. The FDIC will announce its selections for the program by October 29. For a copy of the FDIC's press release, please see http://fdic.gov/news/news/press/2010/pr10203.html.

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Courts

California Appeals Court Rejects Statute of Limitations and HOLA Preemption Arguments. On August 19, the Court of Appeals of California reversed the dismissal of loan fraud claims based on statutes of limitations, and rejected a bank's argument that the claims were preempted by the Home Owner's Loan Act (HOLA). *Vannix-Serina v. Pacific Life Ins. Co.*, 2010 WL 3260413, No. B214458, (Cal. App. 2 Dist., Aug. 19, 2010). In *Vannix-Serina*, plaintiff sued her mortgage lender - a federally-chartered savings association (Bank) - alleging that the Bank knew or should have known that her loan was based on false income, expenses and assets inserted without her knowledge by a loan broker, and that the broker had a history of making predatory loans to elderly persons like plaintiff. Plaintiff brought causes of action for fraud and intentional deceit, negligent misrepresentation, constructive fraud, conversion, civil conspiracy, unfair business practices (Cal. Bus. & Prof., § 17200), breach of the implied covenant of good faith and fair dealing, money had and received, and financial abuse of elderly person. The Bank demurred, arguing that the claims were barred by each applicable statute of limitations, and by HOLA preemption. The trial court sustained the demurrer based on the running of the statutes of limitation. Plaintiff appealed, and the appellate court reversed. First, the appellate court rejected the Bank's statute of limitation argument, holding that plaintiff did not discover - and had no reason to discover - the alleged conduct until a time during the limitations period because that conduct had been concealed from her. Second, the appellate court rejected the Bank's preemption argument, holding that "actions for fraud are governed almost exclusively by state law, and do not raise issues of great federal interest." (quoting *Fenning v. Glenfed, Inc.*, 40 Cal.App.4th 1285, 1298-1299 (1995)). Although the Bank argued that plaintiff's fraud and unfair trade practices claims effectively regulated its conduct, the court found that "[p]laintiff's ability to sue the Bank for fraud does not interfere with what the Bank may do, that is, how it may conduct its operations; it simply insists that the Bank cannot misrepresent how it operates, or employ fraudulent methods in its operations." The court affirmed the trial court's judgment of dismissal in favor of the Bank with respect to plaintiff's causes of action for conversion, civil conspiracy, and breach of the implied covenant of good faith and fair dealing. For a copy of the opinion, please see here.

Illinois Court Holds That EFT Authorization is a Security Interest. On July 30, the Illinois Appellate Court held that an Electronic Funds Transfer (EFT) authorization form completed by a borrower gave rise to a security interest, thus requiring a disclosure pursuant to the Truth in Lending Act (TILA). *Randle v. AmeriCash Loans, LLC*, 2010 WL 3001366, No. 1-09-2318 (Ill. App. Ct. July 30, 2010). The plaintiff took out a consumer installment loan, which she agreed to repay using voluntary payroll deductions. She also completed an optional EFT authorization form, which authorized the lender to debit plaintiff's checking account if she was in default of her repayment obligation. The EFT authorization also provided that the plaintiff could only revoke the authorization after giving the lender notice sufficient to enable it to act, and allowed for the lender to collect the full amount due under the loan agreement, including late charges and returned check fees. The plaintiff's suit alleged that the lender violated TILA because the "federal disclosure box" on the loan agreement did not indicate that the EFT authorization constituted a security interest. The trial court dismissed the complaint, finding that the EFT authorization was merely a method of payment, not a security interest. The Appellate Court reversed. Relying on *Pinkett v. First Citizens Bank*, 2010 U.S. Dist. Lexis 46200, No. 09 C 2365 (N.D. Ill. May 10, 2010), and rejecting the analysis in *Cobb v. Monarch Financial Corp.*, 913 F. Supp. 1164 (N.D. Ill. 1995), the court held that the EFT authorization was a security interest because it granted the lender rights beyond those created by the loan agreement. Specifically, it authorized the lender to initiate debit entries into the plaintiff's checking account, restricted the plaintiff's ability to terminate the authorization and provided that any debits that were returned unpaid could be collected upon in the same manner as an unpaid paper check. For a copy of the opinion, please see http://bit.ly/oczMXt.

Oregon Federal Court Finds That The Fair Debt Collection Practices Act Does Not Exempt Mistakes Of Law. On August 19, the United States District Court of Oregon held that the Fair Debt Collection Practices Act's (FDCPA's) strict liability provisions did not exempt technical violations resulting from mistaken interpretations of the law. The issue in *McNall v. Credit Bureau of Josephine County, Inc.*, 2010 WL 3306899, No. CV 07-3075-CL (D. Or. Aug. 19, 2010) was whether the defendant's failure to report that a challenged debt was disputed to a third-party credit bureau violated the FDCPA. The defendant acknowledged that its failure to report was a violation, but argued that the error was unintended and made in good faith, and thus exempted under the FDCPA's bona fide error rule. Applying the Supreme Court's recent decision in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 130 S. Ct. 1605 (2010), the District Court explained that although the FDCPA is a strict liability statute, it allows a carve-out for unintended factual errors or clerical mistakes. Here, however, the defendant knew that it had not reported the disputed debt, and chose not to do so based on a misunderstanding of the rule; specifically, their mistaken belief that they were not required to report because the plaintiff had already done so. This, the court explained, was a misinterpretation of the statute's requirements and not an exempted factual or clerical error. Because the FDCPA's bona fide error rule does not exempt from liability mistakes of law, the court found that the defendant's failure to report the dispute violated the FDCPA, and that plaintiffs were entitled to judgment on the pleadings. For a copy of the opinion, please see http://bit.ly/nDLHQl.

Federal Court Holds Arbitration Provision Unenforceable by Third-Party Debt Collector Against Cardholders. On August 25, the U.S. District Court for the Northern District of Illinois (Eastern Division) denied defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(3) and to compel arbitration pursuant to the Federal Arbitration Act in a class action concerning alleged violations of the Fair Debt Collection Practices Act (FDCPA) and the Illinois Collection Agency Act (ICAA). *Fox v. Nationwide Credit, Inc.*, 2010 WL 3420172, No. 09-cv-7111 (N.D. Ill. August 25, 2010). Plaintiff alleged that the defendant, a third-party debt collector for creditor, violated the FDCPA by leaving several telephone messages without identifying itself and without indicating that the calls were being made in an effort to collect a debt. Plaintiff brought the action on behalf of herself and a class of similarly situated individuals in the same area code. Defendant argued that plaintiff's claims must be arbitrated pursuant to a provision in a cardholder agreement between plaintiff and the creditor. The court held that the definition of the parties to the cardholder agreement did not expressly include the defendant or third-party debt collectors generally, so therefore defendant could not exercise or enforce the rights created by the arbitration provision against the plaintiff. For a copy of the opinion, please click here.

Ninth Circuit Holds that a Consumer's Statutory Right to Sue Under the CROA Cannot be Waived. On August 17, the U.S. Court of Appeals for the Ninth Circuit held that a mandatory arbitration clause in a credit card agreement is void under the Credit Repair Organization Act ("CROA") because the CROA gives consumers the "right to sue" and prevents any waiver of "any right" under the statute. *Greenwood v. CompuCredit Corporation*, 2010 WL 3222415, No. 09-15906 (9th Cir. Aug. 17, 2010). In*Greenwood*, the consumer plaintiffs brought suit against creditor defendants alleging that the defendants' actions in connection with certain credit cards marketed and provided to consumers with low or weak credit scores violated the CROA and California's Unfair Competition Law. The creditor defendants moved to compel arbitration of the consumer plaintiffs' CROA claims pursuant to an arbitration clause the consumer plaintiffs signed before obtaining the subject credit cards. The district court held the arbitration clause to be invalid and void under the CROA's prohibition of the waiver of a consumer's right to sue in court, and denied the motion to compel arbitration. The creditor defendants then filed an interlocutory appeal challenging the denial of the motion to compel arbitration. The Ninth Circuit, affirming the decision of the district court, looked directly to the plain meaning of the CROA, noting that the statute does not provide a right to "some form of dispute resolution," but instead specifies the "right to sue." The court further noted that the act of suing in a court of law is distinctly different from arbitration, and the right to sue protected by the CROA cannot be satisfied by replacing it with an opportunity to submit a dispute to arbitration. Moreover, the court noted that the statute provides that "[a]ny attempt by any person to obtain a waiver from any consumer of any protection provided or any right of the consumer . . . shall be treated as a violation" of the CROA. The court interpreted "any right of the consumer" to apply to all the rights in the statute, including the "right to sue." The court justified its departure from the position held by the Third and Eleventh Circuits on this topic by noting that those Circuits ignore the plain meaning of the word "sue," and ignore the anti-waiver clause of the statute. For a copy of the opinion, please click here.

Court Holds Servicer Must Conduct Due Diligence Prior to Filing Motion. On July 29, the United States Bankruptcy Court for the District of Arizona held that a purported holder of a note allegedly transferred into a securitized mortgage pool failed to satisfy its burden of demonstrating that it had standing to obtain relief from the automatic stay under the U.S. Bankruptcy Code. *In re Tarantola*, 2010 WL 3022038, No. 4:09-bk-09703 (D. Az. Jul. 29, 2010) involved a motion by Deutsche Bank, National Trust Company (Deutsche), the trustee of a securitized mortgage pool, for relief from the automatic stay in the debtor's Chapter 13 bankruptcy proceeding. Tracing a complex series of purported transfers and assignments of the debtor's mortgage note and transfer documents which were: (i) not submitted in evidence or submitted late in the proceedings; (ii) executed without proper authority; and (ii) executed after the filing of the motion, the Court determined that Deutsche did not have standing to seek relief from the stay. Deutsche's initial motion included a copy of the mortgage note, without endorsement or allonge, the deed of trust and an assignment of the note and deed of trust as exhibits. A month later it filed an undated allonge purporting to assign the note to Deutsche. The allonge had been executed by an officer of the servicer, purportedly in reliance on a limited power of attorney which granted the power to authorize assignments only in certain circumstances, such as repurchase, pay off or refinancing of a note. The court determined that the limited power of attorney did not authorize the allonge, citing two prior cases, involving the same original lender, trustee and servicers, and a substantially identical power of attorney, and therefore the transfer of the note to Deutsche was not proven by the allonge. The court noted that post filing creation of evidence to support a motion for relief from the stay had been found to violate bankruptcy procedural rules, and that Deutsche had falsely represented that the allonge had been attached to the original note. Six months after filing of the motion, a copy of the original note was filed, containing two undated endorsements, including one in blank. In the end, as the allonge was deemed ineffective, Deutsche relied exclusively on the endorsements to establish its standing. However, in the absence of testimony as to the reasons why, based on the original lender's practices, the endorsements did not appear on the copies of the note filed in evidence and in light of evidence that the allonge was "fabricated," the court refused to presume that the endorsements were valid. Deutsche's witnesses were unable to establish who endorsed the note, the authority under which it was endorsed, or when it was endorsed. Further, the court determined that the endorsements did not meet the requirements of the Pooling and Servicing Agreement, and although the Mortgage Loan Purchase Agreement endorsement requirements would have been met, Deutsche did not offer into evidence the schedule establishing that the debtor's loan was sold to Deutsche under that Agreement. The court criticized Deutsche for: (i) its failure to provide any evidence of standing; (ii) creating the allonge after filing the motion; (iii) falsely representing that it was attached to the original note; (iv) for the delay in obtaining the original note, and (v) for disclosing the original note through witness testimony, rather than bringing it to the court's attention at the start of the hearing. The court permitted Deutsche to file an amended motion to address the defects, but warned that it, its servicer and counsel must conduct adequate due diligence before filing any further pleadings. The court noted that it did not impose sanctions on its own motion, or issue an order to show cause why sanctions should not be imposed, and stated that it would consider sanctions in future cases with such "deficient and incorrect filings." For a copy of the opinion, please see http://bit.ly/mWoDPp.

Firm News

John Kromer was quoted in an American Banker article titled "Will CFPB Find Way Out of the Mortgage Disclosure Quagmire?" on August 25th.

Jamie Parkinson spoke at the Georgia Institute of Continuing Legal Education Conference, The Foreign Corrupt Practices Act (FCPA)—International Business and Crime: An Overview," in Atlanta on September 2. Mr. Parkinson's session is titled "FCPA Compliance Tools and Techniques" and will focus on detection and compliance.

David Krakoff will be speaking at the ALI-ABA Environmental Crimes Conference on September 23.

Jeff Naimon will be speaking at the Mortgage Bankers Association's Regulatory Compliance Conference on September 27 on the Servicing Issues panel.

Andrew Sandler will be co-chairing the PLI program Financial Crisis Fallout 2010: Emerging Enforcement Trends in New York City on November 4. David Krakoff and Sam Buffone will also be presenting at the seminar.

Andrew Sandler will be speaking at the American Conference Institute's 10th Annual Advanced Forum on Consumer Finance Class Actions & Litigation on January 27, 2011. The Conference is taking place at The Helmsley Park Lane Hotel, New York,. 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. Sandler will be Attorney General William Sorrell, State of Vermont and Attorney General Greg Zoeller, State of Indiana.

Mortgages

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Litigation

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Illinois Court Holds That EFT Authorization is a Security Interest. On July 30, the Illinois Appellate Court held that an Electronic Funds Transfer (EFT) authorization form completed by a borrower gave rise to a security interest, thus requiring a disclosure pursuant to the Truth in Lending Act (TILA). *Randle v. AmeriCash Loans, LLC*, 2010 WL 3001366, No. 1-09-2318 (Ill. App. Ct. July 30, 2010). The plaintiff took out a consumer installment loan, which she agreed to repay using voluntary payroll deductions. She also completed an optional EFT authorization form, which authorized the lender to debit plaintiff's checking account if she was in default of her repayment obligation. The EFT authorization also provided that the plaintiff could only revoke the authorization after giving the lender notice sufficient to enable it to act, and allowed for the lender to collect the full amount due under the loan agreement, including late charges and returned check fees. The plaintiff's suit alleged that the lender violated TILA because the "federal disclosure box" on the loan agreement did not indicate that the EFT authorization constituted a security interest. The trial court dismissed the complaint, finding that the EFT authorization was merely a method of payment, not a security interest. The Appellate Court reversed. Relying on *Pinkett v. First Citizens Bank*, 2010 U.S. Dist. Lexis 46200, No. 09 C 2365 (N.D. Ill. May 10, 2010), and rejecting the analysis in *Cobb v. Monarch Financial Corp.*, 913 F. Supp. 1164 (N.D. Ill. 1995), the court held that the EFT authorization was a security interest because it granted the lender rights beyond those created by the loan agreement. Specifically, it authorized the lender to initiate debit entries into the plaintiff's checking account, restricted the plaintiff's ability to terminate the authorization and provided that any debits that were returned unpaid could be collected upon in the same manner as an unpaid paper check. For a copy of the opinion, please see http://bit.ly/oczMXt.

Oregon Federal Court Finds That The Fair Debt Collection Practices Act Does Not Exempt Mistakes Of Law. On August 19, the United States District Court of Oregon held that the Fair Debt Collection Practices Act's (FDCPA's) strict liability provisions did not exempt technical violations resulting from mistaken interpretations of the law. The issue in *McNall v. Credit Bureau of Josephine County, Inc.*, 2010 WL 3306899, No. CV 07-3075-CL (D. Or. Aug. 19, 2010) was whether the defendant's failure to report that a challenged debt was disputed to a third-party credit bureau violated the FDCPA. The defendant acknowledged that its failure to report was a violation, but argued that the error was unintended and made in good faith, and thus exempted under the FDCPA's bona fide error rule. Applying the Supreme Court's recent decision in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 130 S. Ct. 1605 (2010), the District Court explained that although the FDCPA is a strict liability statute, it allows a carve-out for unintended factual errors or clerical mistakes. Here, however, the defendant knew that it had not reported the disputed debt, and chose not to do so based on a misunderstanding of the rule; specifically, their mistaken belief that they were not required to report because the plaintiff had already done so. This, the court explained, was a misinterpretation of the statute's requirements and not an exempted factual or clerical error. Because the FDCPA's bona fide error rule does not exempt from liability mistakes of law, the court found that the defendant's failure to report the dispute violated the FDCPA, and that plaintiffs were entitled to judgment on the pleadings. For a copy of the opinion, please see http://bit.ly/nDLHQl.

Federal Court Holds Arbitration Provision Unenforceable by Third-Party Debt Collector Against Cardholders. On August 25, the U.S. District Court for the Northern District of Illinois (Eastern Division) denied defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(3) and to compel arbitration pursuant to the Federal Arbitration Act in a class action concerning alleged violations of the Fair Debt Collection Practices Act (FDCPA) and the Illinois Collection Agency Act (ICAA). *Fox v. Nationwide Credit, Inc.*, 2010 WL 3420172, No. 09-cv-7111 (N.D. Ill. August 25, 2010). Plaintiff alleged that the defendant, a third-party debt collector for creditor, violated the FDCPA by leaving several telephone messages without identifying itself and without indicating that the calls were being made in an effort to collect a debt. Plaintiff brought the action on behalf of herself and a class of similarly situated individuals in the same area code. Defendant argued that plaintiff's claims must be arbitrated pursuant to a provision in a cardholder agreement between plaintiff and the creditor. The court held that the definition of the parties to the cardholder agreement did not expressly include the defendant or third-party debt collectors generally, so therefore defendant could not exercise or enforce the rights created by the arbitration provision against the plaintiff. For a copy of the opinion, please click here.

Ninth Circuit Holds that a Consumer's Statutory Right to Sue Under the CROA Cannot be Waived. On August 17, the U.S. Court of Appeals for the Ninth Circuit held that a mandatory arbitration clause in a credit card agreement is void under the Credit Repair Organization Act ("CROA") because the CROA gives consumers the "right to sue" and prevents any waiver of "any right" under the statute. *Greenwood v. CompuCredit Corporation*, 2010 WL 3222415, No. 09-15906 (9th Cir. Aug. 17, 2010). In*Greenwood*, the consumer plaintiffs brought suit against creditor defendants alleging that the defendants' actions in connection with certain credit cards marketed and provided to consumers with low or weak credit scores violated the CROA and California's Unfair Competition Law. The creditor defendants moved to compel arbitration of the consumer plaintiffs' CROA claims pursuant to an arbitration clause the consumer plaintiffs signed before obtaining the subject credit cards. The district court held the arbitration clause to be invalid and void under the CROA's prohibition of the waiver of a consumer's right to sue in court, and denied the motion to compel arbitration. The creditor defendants then filed an interlocutory appeal challenging the denial of the motion to compel arbitration. The Ninth Circuit, affirming the decision of the district court, looked directly to the plain meaning of the CROA, noting that the statute does not provide a right to "some form of dispute resolution," but instead specifies the "right to sue." The court further noted that the act of suing in a court of law is distinctly different from arbitration, and the right to sue protected by the CROA cannot be satisfied by replacing it with an opportunity to submit a dispute to arbitration. Moreover, the court noted that the statute provides that "[a]ny attempt by any person to obtain a waiver from any consumer of any protection provided or any right of the consumer . . . shall be treated as a violation" of the CROA. The court interpreted "any right of the consumer" to apply to all the rights in the statute, including the "right to sue." The court justified its departure from the position held by the Third and Eleventh Circuits on this topic by noting that those Circuits ignore the plain meaning of the word "sue," and ignore the anti-waiver clause of the statute. For a copy of the opinion, please click here.

Court Holds Servicer Must Conduct Due Diligence Prior to Filing Motion. On July 29, the United States Bankruptcy Court for the District of Arizona held that a purported holder of a note allegedly transferred into a securitized mortgage pool failed to satisfy its burden of demonstrating that it had standing to obtain relief from the automatic stay under the U.S. Bankruptcy Code. *In re Tarantola*, 2010 WL 3022038, No. 4:09-bk-09703 (D. Az. Jul. 29, 2010) involved a motion by Deutsche Bank, National Trust Company (Deutsche), the trustee of a securitized mortgage pool, for relief from the automatic stay in the debtor's Chapter 13 bankruptcy proceeding. Tracing a complex series of purported transfers and assignments of the debtor's mortgage note and transfer documents which were: (i) not submitted in evidence or submitted late in the proceedings; (ii) executed without proper authority; and (ii) executed after the filing of the motion, the Court determined that Deutsche did not have standing to seek relief from the stay. Deutsche's initial motion included a copy of the mortgage note, without endorsement or allonge, the deed of trust and an assignment of the note and deed of trust as exhibits. A month later it filed an undated allonge purporting to assign the note to Deutsche. The allonge had been executed by an officer of the servicer, purportedly in reliance on a limited power of attorney which granted the power to authorize assignments only in certain circumstances, such as repurchase, pay off or refinancing of a note. The court determined that the limited power of attorney did not authorize the allonge, citing two prior cases, involving the same original lender, trustee and servicers, and a substantially identical power of attorney, and therefore the transfer of the note to Deutsche was not proven by the allonge. The court noted that post filing creation of evidence to support a motion for relief from the stay had been found to violate bankruptcy procedural rules, and that Deutsche had falsely represented that the allonge had been attached to the original note. Six months after filing of the motion, a copy of the original note was filed, containing two undated endorsements, including one in blank. In the end, as the allonge was deemed ineffective, Deutsche relied exclusively on the endorsements to establish its standing. However, in the absence of testimony as to the reasons why, based on the original lender's practices, the endorsements did not appear on the copies of the note filed in evidence and in light of evidence that the allonge was "fabricated," the court refused to presume that the endorsements were valid. Deutsche's witnesses were unable to establish who endorsed the note, the authority under which it was endorsed, or when it was endorsed. Further, the court determined that the endorsements did not meet the requirements of the Pooling and Servicing Agreement, and although the Mortgage Loan Purchase Agreement endorsement requirements would have been met, Deutsche did not offer into evidence the schedule establishing that the debtor's loan was sold to Deutsche under that Agreement. The court criticized Deutsche for: (i) its failure to provide any evidence of standing; (ii) creating the allonge after filing the motion; (iii) falsely representing that it was attached to the original note; (iv) for the delay in obtaining the original note, and (v) for disclosing the original note through witness testimony, rather than bringing it to the court's attention at the start of the hearing. The court permitted Deutsche to file an amended motion to address the defects, but warned that it, its servicer and counsel must conduct adequate due diligence before filing any further pleadings. The court noted that it did not impose sanctions on its own motion, or issue an order to show cause why sanctions should not be imposed, and stated that it would consider sanctions in future cases with such "deficient and incorrect filings." For a copy of the opinion, please see http://bit.ly/mWoDPp.

Privacy/Data Security

FinCEN Fines Broker-Dealer for Violating the Bank Secrecy Act. On September 1, the Financial Crimes Enforcement Network (FinCEN) of the Department of the Treasury announced that it has assessed a $50,000 civil penalty against a broker-dealer for violating the Bank Secrecy Act. FinCEN determined that, among other things, the broker-dealer had failed to establish and implement an adequate anti-money laundering program, establish an adequate due diligence program for foreign correspondent accounts, obtain and verify required customer identification program information for account holders, and establish and implement adequate procedures for monitoring suspicious transactions that led to the failure to file suspicious activity reports. The FinCEN investigation was conducted in cooperation with the Securities and Exchange Commission and the Financial Industry Regulatory Authority. The broker-dealer consented to payment without admitting or denying the allegations. For a copy of the FinCEN news release, please see http://www.fincen.gov/news_room/nr/pdf/20100831.pdf.

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