InfoBytes

August 12, 2011

Topics In This Issue

Federal Issues

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Agencies Seek Input on Options for Reducing REO Inventory. On August 10, the Federal Housing Finance Agency, in consultation with the U.S. Department of Housing and Urban Development and the U.S. Department of Treasury, issued a Request for Information seeking input on approaches to reduce the current and future REO inventories held by Fannie Mae, Freddie Mac and the Federal Housing Administration. The issuing agencies are seeking information to (i) assist in the disposition of REO properties, (ii) improve loss recoveries compared to individual retail REO sales, (iii) stabilize neighborhoods and local home values, and (iv) where possible, improve the supply of rental housing. Two suggestions under consideration are to use vacant homes to meet affordable housing needs and to lease the properties back to the foreclosed owners. Click here for a copy of the press release.

OCC Names Deputy Comptroller for Capital and Regulatory Policy. On August 9, the OCC named Charles Taylor as its Deputy Comptroller for Capital and Regulatory Policy. Mr. Taylor will

oversee the formulation of policy on bank capital issues. In addition, he will advise OCC executive management on (i) Dodd-Frank Wall Street Reform and Consumer Protection Act implementation, (ii) the Financial Stability Oversight Council, and (iii) other international initiatives. Click here for a copy of the announcement.

State Issues

Massachusetts Settles Unfair and Discriminatory Lending Claims Against Lender. On August 9, the Massachusetts Attorney General announced a settlement, valued at approximately $125 million, of unfair and discriminatory lending claims against Option One (now known as Sand Canyon), a subsidiary of H&R Block, Inc., based on subprime loans originated between 2004 and 2007. The lawsuit alleged that Option One's loans carried an excessive risk of default and foreclosure, and that its discretionary pricing policies resulted in higher fees, on average, for African-American and Latino borrowers. The settlement requires Option One to direct the service of these loans to institute a loan modification program that will provide an estimated $115 million in relief to borrowers in the form of principal balance write-downs and reduced interest rates. The settlement also requires Option One to pay $9.8 million to the Commonwealth of Massachusetts to cover $8 million in consumer relief, $1 million in fees and costs, and $800,000 in exchange for a release of civil penalties. Click here for a copy of the press release.

Courts

NJ Appellate Court Bars Foreclosure Action. On August 9, a New Jersey appellate court reversed a trial court decision, holding that non-possession of the Note and the lack of a right to enforce it at the time the original foreclosure complaint was filed constituted a fatal defect in standing that could not be cured by the bank's subsequent amendment of the complaint after the it took possession of the Note. The court, accordingly, vacated the sheriff's sale of the property. *Deutsche Bank National Trust Company v. Mitchell et. al.*, No. A-4925-09T3 (N.J. Super. Ct. App. Div. Aug. 9, 2011). Defendant homeowner fell victim to a buy-leaseback mortgage rescue scam at the hands of a third party and, upon defaulting, faced a foreclosure action by Plaintiff Deutsche Bank, which had subsequently acquired an interest in the property. Defendant responded by arguing that the bank did not have possession of the Note upon commencing the foreclosure action and, alternatively, that it was not a holder in due course because the underlying fraud tainted the chain of title. The trial court had held that the bank's amendment of the complaint after coming into possession of the Note cured any initial defect with respect to standing and that it was a holder in due course because it was not privy to the fraudulent mortgage rescue scam. The appellate court, reversing the lower court as to the first point, found that because the threshold question of standing was dispositive, there was no need to reach the secondary dispute as to whether the bank was privy to the underlying fraud so as to negate its status as a holder in due course. Click here for a copy of the opinion.

Ninth Circuit Finds California Debt Collection Law Is Not Preempted. Recently, the U.S. Court of Appeals for the Ninth Circuit held that the National Bank Act and regulations promulgated thereunder do not preempt the California Rees-Levering Act's (Act) provision that the lender may not collect a deficiency unless certain notices are given to the borrower before the lender sells a repossessed

vehicle. *Aguayo v. U.S. Bank*, Case No. 09-56679 (9th Cir. Aug. 1, 2011). The borrower sued its lender, a national bank, alleging that the bank sold his vehicle without giving him the required notices. The District Court found that the Act's requirements were preempted and granted the bank's motion to dismiss. On appeal, the Ninth Circuit reversed and remanded for further proceedings. The Ninth Circuit noted that 12 C.F.R. § 7.4008 - a regulation promulgated by the OCC preempting certain state laws related to non-real estate loans - contains a savings clause providing that it does not preempt state laws related to rights to collect debts. The Ninth Circuit determined that the savings clause applied to the Act because debt collection, including the right to repossess property, is a fixture of state law, not federal law. The Ninth Circuit added that the bank chose to use its right to self-help repossession under state law, but now claims that it no longer needs to comply with state law to collect any remaining debt. The Ninth Circuit found that this inconsistency demonstrates that the bank's debt collection efforts fall within the savings clause and thus are not preempted. The bank argued that recovering a deficiency falls within the bank's lending power, and thus more than incidentally affects lending powers and therefore does not fall within the reach of the savings clause. The Ninth Circuit, however, found that there is no loan at this point, but only an outstanding debt for which the bank seeks to recover by using a state law remedy. After finding that the savings clause applies to the Act's notice requirements, the Ninth Circuit then addressed whether express preemption is still available under the provision in § 7.4008 preempting state laws related to disclosures in credit-related documents. The Ninth Circuit held that the notice requirements in the Act operate differently from disclosure requirements, and that a debt collection notice is not a credit-related document because the lending relationship has ended. Therefore, the notice requirements do not fall within the scope of the express preemption provision in § 7.4008. As a result, the bank lost the right to obtain a deficiency after selling the repossessed car because it did not give the required notice. Click here for a copy of the opinion.

Firm News

James Parkinson will speak on the Foreign Corrupt Practices Act as a Visiting Lecturer at Universidad Panamericana, Mexico on August 25.

Jonice Gray Tucker will be moderating a panel focusing on Regulatory and Litigation Developments in Servicing at the California Mortgage Bankers' Servicing Conference on August 29 in Las Vegas.

Jeff Naimon will be participating in a panel titled "The Future of Lending" at the National Mortgage News Mortgage Regulatory Forum which will be held at the Washington Marriott in Washington, DC from September 19-20. Mr. Naimon will be discussing the effect of recent regulatory and enforcement developments on the direction of the mortgage market, including QM/QRM, Loan Officer Compensation rules, and Federal Housing Administration and fair lending enforcement efforts.

Benjamin Klubes will be moderating a panel focusing on Preparing for and Responding to New and Emerging Federal and State Enforcement Actions at the ACI's Residential Mortgage Litigation and Regulatory Enforcement Conference on Tuesday, September 20 in Dallas, Texas.

Andrew Sandler, **Benjamin Klubes**, and **Jonice Gray Tucker** will be speaking at the Mortgage Bankers Association's Regulatory Compliance Conference which will be held in Washington, D.C. from September 25 through September 27. Mr. Sandler will be addressing enforcement priorities. Mr. Klubes will address litigation and enforcement trends relating to loan originations and Ms. Tucker will speak on developments in mortgage servicing.

James Parkinson will be speaking at two International Bar Association training sessions as part of the IBA's Anti-Corruption Strategy for the Legal Profession (http://www.anticorruptionstrategy.org/) on September 27 (Sao Paulo, Brazil), and on September 29 (Caracas, Venezuela).

David Krakoff will be participating in a panel at the International Association of Defense Counsel program on worldwide anti-corruption laws in Palm Springs in February 2012.

Mortgages

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Banking

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