

May 13, 2011

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Federal Issues

VA Announces Relief Measures for Tornado Victims. On May 4, the Department of Veterans Affairs (VA) issued a circular encouraging holders of mortgage loans guaranteed by the VA to offer relief to borrowers affected by the tornado outbreaks in April. Circular 26-11-6 requests that loan holders (i) establish a 90-day moratorium from the date of the storms on initiating new foreclosures on affected loans, (ii) offer forbearance to borrowers in distress because of the storms, (iii) waive late charges on loans in the disaster areas, (iv) suspend credit reporting on affected borrowers, (v) extend special forbearance to National Guard members who are assisting in the recovery efforts. The VA indicated that it will not penalize servicers for any late default reporting to the VA because of the tornados. For a copy of Circular 26-11-6, please see http://www.benefits.va.gov/HOMELOANS/circulars/26_11_6.pdf.

State Issues

Montana Adopts Revisions to the Montana Broker, Mortgage Lender, and Mortgage Loan Originator Licensing Act. On May 5, Montana adopted House Bill No. 90, which made numerous revisions to the Montana Mortgage Broker, Mortgage Lender, and Mortgage Loan Originator Licensing Act (Act) and changed its title to the Montana Mortgage Act. The revisions include provisions for the licensing and regulation of mortgage servicers, updated application and licensing requirements for brokers, lenders and originators, a reduction in the number of hours required for continuing education, changes to recordkeeping, reporting, bonding and disclosure requirements, and prohibitions against certain acts by mortgage lenders and mortgage servicers. In addition, the Act was revised to conform to federal law and expand the Department of Administration's rulemaking authority. For a copy of the adopted 2011 Montana House Bill No. 90, please see <http://data.opi.mt.gov/bills/2011/billpdf/HB0090.pdf>.

Tennessee Amends Consumer Protection Provision of the Uniform Debt-Management Services Act. The state of Tennessee recently amended the Uniform Debt-Management Services Act regarding registration applicants for entities providing debt-management services in the state. The new provision requires applications for registration to include (at their own expense) the results of fingerprint-based criminal history records, both state and national, covering every officer of the applicant and every employee or agent of the applicant who is authorized to have access to the trust account used to hold money for disbursement to creditors. This amendment is effective immediately. For a copy of the amendment, please see <http://www.capitol.tn.gov/Bills/107/Bill/SB1446.pdf>.

Hawaii Amends State Code Concerning Mortgage Foreclosure Process. On May 5, Hawaii Governor Neil Abercrombie signed into law several amendments to the state's mortgage foreclosure statutes. The changes were encompassed within Senate Bill (S.B.) No. 651, "Relating to Mortgage Foreclosures". The bill places numerous procedural requirements in the way of foreclosure completion. Section 667-D, entitled "Availability of dispute resolution required before foreclosure," mandates that a foreclosing mortgagee participate in a dispute resolution program at the election of the owner-occupant in order to "attempt to negotiate an agreement that avoids foreclosure or mitigates damages in cases where foreclosure is unavoidable." The amendments also require (at § 667-E) that foreclosure notices advise of that obligation. The program requires the owner-occupant to pay a \$300 participation fee. (§ 667-H). Both the mortgagor and the owner-occupant may be represented by counsel in a dispute resolution; the owner-occupant may also be assisted by "an approved housing counselor or approved budget and credit counselor." (§ 667-J). Within ten days of conclusion of a dispute resolution, the neutral participant examining the parties' claims is required to file a "closing report" with Hawaii's Department of Commerce and Consumer Affairs, advising (among other things) whether the parties were able to resolve the dispute. The foreclosure process may resume (§ 667-K) after the report is recorded with Hawaii's Bureau of Conveyances or Land Court (as appropriate). [Click here for a copy of S.B. No. 651.](#)

Arizona Amends Statutes Relating to Notarization. The state of Arizona recently amended provisions of its statute regarding the duties of notaries public. Senate Bill 1230 imposed several new requirements on notaries aimed at ensuring that they understand the documents they sign, including a requirement that they are able to read and write in English and requirements that documents and signatures be in a language that they understand. The amendments also contain revisions related to advertising, fees, self-interest in transactions, and training for suspended notaries. [Click here for a copy of the bill.](#)

State of Washington Revises the Consumer Loan Act. The state of Washington recently revised its Consumer Loan Act (Act) to exclude loans that are secured by a lien on the borrower's primary residence from the exemption for loans made primarily for business, commercial, or agricultural purposes. In addition, the Act provides an exemption for non-profit housing organizations making loans under housing programs that are funded by federal or state programs if their primary purpose is to assist low-income borrowers with purchasing or repairing housing or the development of housing for low-income residents. The Act also prohibits lenders from (i) accepting any ownership interest in the borrower's primary residence that is the security for the borrower's loan (excepting a mortgage or deed of trust), and (ii) obtaining a release in connection with future damages for usury or other damages or penalties provided by law or a waiver of the provisions of the Act. The amendments will be effective July 22, 2011. [Click here for a copy of the bill.](#)

Iowa Amends Banking Division Provisions. On May 5, the Division of Banking of the Iowa Department of Commerce approved a bill to amend provisions the Iowa Banking Act. The amendments, which became effective on May 5, govern the security of information technology systems, authorize state banks to grant loans and credit extensions to a borrowing group, and prohibit the establishment of branch locations outside of the United States. The act also adds new provisions, including requirements that an applicant incorporated in another state be authorized to do business in Iowa and that each mortgage loan originator submit reports to the nationwide mortgage licensing system. [Click here for a copy of the bill.](#)

Courts

Eleventh Circuit Applies Dodd-Frank Preemption Standard To Find That State Law Is Preempted. On May 11, the U.S. Court of Appeals for the 11th Circuit held that a Florida law significantly interfered with federally-authorized bank powers and thus was preempted under the Dodd-Frank Act. *Baptista v. JP Morgan*

Chase Bank, No. 6:10-cv-139 (11th Cir. May 11, 2011). The defendant national bank charged the plaintiff, who did not hold an account at the bank, a \$6 fee for cashing a check. The plaintiff brought a class action lawsuit in federal district court, alleging that the bank's check-cashing fee violated a Florida statutory provision that prohibited the fee and that it unjustly enriched the bank. The district court dismissed both claims as preempted under 12 U.S.C. § 24 (Seventh), which accords national bank powers incidental to the business of banking, and 12 C.F.R. § 7.4002, which is a regulation promulgated by the Office of the Comptroller of the Currency (OCC) authorizing national banks to charge customers non-interest charges and fees. In dismissing the plaintiff's claims, the district court noted that the OCC interpreted "customer" to include not just accountholders, but any person who presents a check for payment. The plaintiff appealed, and the 11th Circuit affirmed. The court noted that the Dodd-Frank Act provides that "State consumer financial laws are preempted . . . if . . . in accordance with *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by [a] national bank of its powers." The court concluded that under this standard, "the proper preemption test asks whether there is a significant conflict between the state and federal statutes-that is, the test for conflict preemption." The court concluded that the OCC was authorized by Congress to regulate banking, that the OCC's definition of "customer" to include a non-acountholder presenting a check for payment was not unreasonable, and that the Florida law substantially conflicted with the authorization of national banks to charge non-acountholders with check-cashing fees. [Click here for a copy of the opinion.](#)

Mortgage Lender Sanctioned for Email Evidence Spoliation. The U.S. District Court for the Eastern District of Virginia sanctioned SunTrust Mortgage, Inc. for what it characterized as an employee's willful spoliation of e-mail evidence and in-house counsel and senior management's "ensuing willful blindness to the truth" in relying on affected facts. *SunTrust Mortgage, Inc. v. AIG United Guaranty Corp.*, No. 3:09cv529 (E.D. Va. Mar. 29, 2011). The issue arose in the course of a lawsuit brought by SunTrust Mortgage, which alleges that United Guaranty refused improperly to provide coverage for insured mortgage loans that had gone into default. The court awarded attorney's fees and expenses in connection with the defendant's motion for sanctions, but denied motions to dismiss the action, to sanction outside counsel, and to provide an adverse inference instruction to the jury. The court reasoned that the subject actions did not constitute willful abuse of the judicial process. The court concluded that "[t]he record shows that some of the documents on which the employee relied for her story were fraudulent, but it does not show that her story itself is a false one that cannot be independently proved by untainted means." For a copy of the opinion, please see <http://bit.ly/qxlek2>.

Class Action alleging TCPA violations filed against Twitter for Sending Unsolicited Text Messages. On April 28, two California residents filed a class action lawsuit under the Telephone Consumer Protection Act (TCPA) in the District Court for the Southern District of California against Twitter, alleging that unsolicited confirmatory text messages to users' phones constitute an invasion of privacy. The plaintiffs are Twitter users who activated options in their online Twitter accounts to receive account notifications via text message. The plaintiffs subsequently decided that they no longer wanted to receive text message notifications, and replied "stop", as instructed, to Twitter's last text message. In response to the "stop" text messages, Twitter sent confirmatory text messages, which resulted in charges or reduced cellular telephone account minutes. The plaintiffs claim that they suffered irreparable harm as a result of receiving these confirmatory text messages. They further allege that because the confirmatory messages were sent via an "automatic telephone dialing system" after Plaintiffs had revoked consent to receive such messages, Twitter violated the TCPA restrictions on the use of automated telephone equipment. Plaintiffs are seeking \$500.00 for each violation of the TCPA suffered by each member of the putative class. [Click here for the entire complaint.](#)

Firm News

[Andrew Sandler](#), [Jerry Buckley](#), [Ben Klubes](#), [Jeff Naimon](#), [Margo Tank](#) and [Jonice Gray Tucker](#) will be speaking at the Mortgage Bankers Association's Legal Issues and Regulatory Compliance Conference taking place May 15 - 18 in Boca Raton, Florida. Mr. Sandler will be a panelist on Session #4: Enforcement, as well as on the Fair Lending panel during the State Regulation and Enforcement Initiatives Forum. Mr. Buckley will speak on a panel addressing the CFPB rollout. Mr. Klubes' program is titled "Litigation Challenges Involving the Mortgage Origination Process." Mr. Naimon will speak on the mortgage servicing panel. Ms. Tucker's remarks will focus on litigation involving servicing and foreclosure. Margo Tank will be speaking about legal and regulatory updates on mortgage implementation issues.

[Warren Traiger](#) will be speaking about potential changes to the CRA regulations and the current regulatory environment during a webinar hosted by the CRA Qualified Investment Fund, on Thursday, May 19 at 2pm.

[Donna Wilson](#) will be presenting at a CLE webinar on "Emerging Class Action Threat: Consumer Personal Identification Data Strategies to Minimize Litigation Risks and Maximize Insurance Coverage" on Tuesday, May 24. This seminar will analyze the Song-Beverly Act and its impact of ruling on class action litigation under other state privacy statutes. The webinar is sponsored by the Legal Publishing Group of Strafford Publications.

[Kirk Jensen](#) will be the featured speaker on SCRA Developments at the Women in Housing and Finance luncheon on June 8.

[Andrew Sandler](#) will be speaking at CBA Live 2011 and presenting an Annual Fair Lending Report on Tuesday, June 14 at 3:30 pm in Orlando, Florida. Mr. Sandler will be giving an overview of current regulatory and enforcement developments and discussing the most significant fair lending risks confronting consumer lenders in the next twelve months.

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

[Kirk Jensen](#) will be speaking on Litigation Developments at the AFSA State Government Affairs & Legal Issues Forum on June 22.

[Andrew Sandler](#) will be participating on a panel at the Florida Bar Annual Convention on Friday, June 24 as part of the "Presidential Showcase". On the panel with Mr. Sandler is Paul Bland, Public Justice. The Moderator is Justice R. Fred Lewis, a Justice of the Florida Supreme Court, a former Chief Justice and founder of Justice Teaching.

[Andrew Sandler](#) will be teaching the Litigation Strategy Session: Developing Strong Protocols, Admissible Documentation & Comprehensive Strategies in Order to Survive Regulatory Enforcement Actions & Litigation Workshop on Tuesday, July 26 in Chicago. This workshop precedes ACI's Consumer Finance Class Actions & Litigation Conference taking place July 27-28 at the Sutton Place Hotel, Chicago, IL.

[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.

Mortgages

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