InfoBytes

November 18, 2011

Topics In This Issue

Federal Issues

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Fannie Mae Updates Flood Insurance Policy. On November 16, Fannie Mae advised servicers that, effective immediately, they must provide evidence of flood insurance coverage within ten days of receiving a request from Fannie Mae as part of Fannie Mae's flood insurance compliance testing process. Details about appropriate documentation and instructions for responding to such a request will be provided by Fannie with the request. In the announcement, Fannie reminded servicers that mortgage loans secured by property located within a Special Flood Hazard Area (SFHA) must have sufficient flood insurance from origination through the full term of the loan, or as long as the property continues to fall within an SFHA. Properties not within an SFHA at origination, but that subsequently fall within such an area due to remapping, also must have adequate coverage. As a result, servicers are required to monitor such changes and ensure that proper coverage is obtained as needed. Click here for a copy of the Fannie Mae announcement.

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Agencies Clarify Supervisory and Enforcement Responsibilities for Federal Consumer Financial Laws. On November 17, the Office of Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation, National Credit Union Administration, and Consumer Financial Protection Bureau (CFPB) (collectively, the Agencies) released a joint statement seeking to clarify their roles and responsibilities with regard to supervision and enforcement of federal consumer financial laws. As background, section 1025 of the Dodd-Frank Act provides the CFPB with exclusive supervisory and primary enforcement authority over "Large Institutions," defined as institutions with total assets exceeding $10 billion. The prudential regulators retain supervisory and enforcement authority over their respective institutions falling under that threshold.

As the statement points out, the Dodd-Frank Act does not specify how or when to calculate total assets for purposes of applying the threshold. Therefore, the Agencies have announced a consensus decision to use quarterly Call Report data to classify institutions. Initially, any institution with over $10 billion in total assets as of the June 30, 2011 Call Report (and any of its affiliates) will be considered a Large Institution subject to the exclusive supervision and enforcement authority of the CFPB. Institutions with total assets of $10 billion or less as of that report (and not affiliated with a Large Institution) will not be so subject to CFPB supervision. After this initial classification, the Agencies will rely on an existing FDIC method that considers reporting of assets (again, using Call Report data) and reclassify only those institutions that are either always above or always below the $10 billion threshold for four consecutive quarters. As a result, the earliest an institution can be reclassified is after the June 2012 report, *i.e.*, July 1, 2012. The statement also addresses issues raised by mergers and acquisitions of supervised financial institutions. Click here for a copy of the joint statement.

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State Issues

New York Obtains Agreements on New Mortgage Servicing Standards. On November 10, the New York Department of Financial Services (DFS) announced that it had obtained from several mortgage servicers an agreement to follow a set of new servicing practices, which it described as consistent with a previous agreement the DFS obtained from other servicers. This agreement does not require the DFS to release any claims based on past practices, nor does it prohibit investigations of any past practices. The new standards seek to, among other things: (i) end "robo-signing"; (ii) require servicers to ensure that the equity in a property is returned to a borrower found to have been wrongly foreclosed upon, or to compensate the borrower if the property was sold; (iii) prevent layering of fees; (iv) end "dual tracking" of foreclosure and loss mitigation efforts; and (v) require that servicers provide a single point of contact for all borrowers seeking loss mitigation or borrowers in foreclosure. The servicers subject to the agreement also must withdraw any pending foreclosure action involving inaccurate or "robo-signed" affidavits. Click here for a press release describing the recent agreement; click here for a copy of the prior servicing agreement.

Michigan Toughens Mortgage Fraud Laws. Recently, Michigan enacted several new laws aimed at enhancing the state's ability to pursue mortgage fraud and related criminal activity. The centerpiece of the legislative package (SB 43) amends state law, effective January 1, 2012, to create the felony crime of mortgage fraud. The new crime involves knowingly and intentionally engaging in any one of the several acts listed in the law, or conspiring to violate those provisions, including: (i) making a false statement or misrepresentation concerning a material fact or deliberately concealing or failing to disclose a material fact during the mortgage lending process; (ii) filing or causing to be filed with the register of deeds of any state county any document involved in the mortgage lending process that the filer knows to contain deliberate material misstatement, misrepresentation, or omission; or (iii) failing to disburse funds in accordance with the settlement or closing statement for a mortgage loan. In addition, Michigan enacted legislation (HB 4462) to criminalize forgery of a mortgage document, as well as a bill (SB 252) to increase penalties applicable to notaries public who violate the Notary Public Act while notarizing a document used in a mortgage transaction or otherwise involving an interest in real property. Finally, the state increased, from six to ten years, the statute of limitations for false pretenses involving real property, mortgage fraud, or forgery or uttering and publishing of an instrument affecting interest in real property (SB 251). To review the various pieces of enacted legislation, please access the following links: SB 43; SB 251; SB 252; HB 4462.

Nevada AG Announces Indictment in Alleged Massive Robo-Signing Scheme. On November 16, the Nevada Attorney General announced that a Clark County grand jury returned a 606 count indictment against two employees of Lender Processing Services, Inc., who allegedly directed and supervised a robo-signing scheme. According to the indictment, the scheme resulted in tens of thousands of fraudulent documents being filed with the county recorder's office between 2005 and 2008. Specifically, the indictment alleges that the defendants directed employees under their supervision to sign, fraudulently notarize, and file Notices of Default with the recorder to initiate foreclosures on local homeowners. The indictment charges both defendants with numerous counts of (i) offering false statements for recording (a felony); (ii) false certification on certain instruments (a felony); and (iii) notarization of the signature of a person not in the presence of a notary public (a gross misdemeanor). Click here for a copy of the press release.

Courts

Justice Department Files Fair Housing Suit Alleging Discrimination Against Families With Children. On November 17, the U.S. Department of Justice (DOJ) filed suit in the U.S. District Court for the Southern District of Mississippi against the owners and managers of twenty three rental homes in that state, alleging discrimination against families with children in violation of the Fair Housing Act. The complaint follows an investigation and referral by the U.S. Department of Housing and Urban Development that revealed, according to DOJ, a "pattern and practice of violating the Fair Housing Act . . . by implementing occupancy standards limiting the number of children in the rental homes owned and/or leased by the defendants." DOJ is seeking monetary damages for those allegedly harmed, a civil penalty, and an order prohibiting similar future conduct by the defendants. Click here for a copy of the complaint; click here for the related DOJ press release.

MERS' Foreclosures in Michigan Validated. On November 16, the Michigan Supreme Court upheld foreclosures by advertisement by the Mortgage Electronic Registration System, Inc. (MERS) in Michigan. *Residential Funding Co. LLC v. Saurman*, No. 143178-9, 2011 WL 5588929 (Mich. Nov. 16, 2011). In the cases underlying the appeal, the borrowers' mortgages named MERS as nominee for the lender with the right to foreclose under the power of sale. The borrowers defaulted on their loans and MERS foreclosed. Facing eviction, the borrowers argued that MERS was not entitled to foreclose because it lacked an interest in the debt, *i.e.*, the note. The district courts rejected this argument, and the circuit courts affirmed. The Court of Appeals granted borrowers leave to appeal and, in a two-to-one decision, held that MERS did not have authority to foreclose and that MERS' foreclosures in Michigan were void. The Court of Appeals held that an interest in the mortgage alone did not confer an interest in the note because "the indebtedness, *i.e.*, the note, and the mortgage are two different legal transactions providing two different sets of rights." This purported separation of the mortgage and note meant that MERS lacked an ownership interest in the debt, and therefore did not have authority to foreclose. The entities initiating eviction sought leave to appeal to the Michigan Supreme Court, which, in lieu of granting leave, reversed the judgment of the Court of Appeals. In its two-page ruling, the Michigan Supreme Court clarified that,

MERS' status as an "owner of an interest in the indebtedness" does not equate to an ownership interest in the note. Rather, as recordholder of the mortgage, MERS owned a security lien on the properties, the continued existence of which was contingent upon the satisfaction of the indebtedness. This interest in the indebtedness - i.e.*, the ownership of legal title to a security lien whose existence is wholly contingent on the satisfaction of the indebtedness - authorized MERS to foreclose by advertisement . . . .*

The Michigan Supreme Court also held that the Court of Appeals' conclusion was "inconsistent with established legal principles governing Michigan's real property law," including that "the mortgage and the note are to be construed together."

The Court of Appeals decision had been the basis for several lawsuits-including class actions and at least one lawsuit by a county register of deeds-in Michigan courts seeking to prevent or void foreclosures. Certain class action suits pending in federal court were stayed pending the decision of the Michigan Supreme Court.

Click here for a copy of the Michigan Supreme Court Decision.

New Jersey Federal Court Allows Putative Foreclosure Class Action to Proceed. Recently, in *Beals v. Bank of America, N.A.*, No. 10-5427, 2011 WL 5415174 (D.N.J. Nov. 4, 2011), the U.S. District Court for the District of New Jersey rejected the defendants' motion to dismiss, which argued that the court should abstain from considering plaintiffs' claims in the putative class action lawsuit because of the case's potential conflict with pending state proceedings. The plaintiffs' claims arose out of the defendants' alleged practices resulting in unreliable and unfair foreclosure proceedings. The District Court held that the state foreclosure proceedings and the federal action do not involve substantially identical claims because the federal case includes claims not present in the state litigation. Additionally, the court noted, the federal case is principally an action for damages against the defendants for their alleged conduct, whereas the state action will focus primarily on whether the defendants are entitled to foreclose on plaintiffs' property. Therefore, the court held that considerations involving the parallel state proceeding under *Colorado River Water Conservation District v. United States* did not weigh in favor of abstention. Similarly, it held that abstention was not necessary under the Anti-Injunction Act or *Younger v. Harris*, both of which prevent federal courts from enjoining pending state proceedings except in very limited circumstances, because the plaintiffs' desired relief would not interfere with the state foreclosure proceedings. Given the finding that abstention was not appropriate under any one of these three theories, the court decided not to apply *Brillhart/Wilton* abstention, which would have had the effect of the court surrendering jurisdiction over plaintiffs' claim for declaratory relief while deciding the merits of plaintiffs' claims for monetary and injunctive relief. However, the court granted defendants' motion to dismiss on plaintiffs' claims for negligent processing of a load modification, all claims under the Fair Debt Collections Practice Act, and one plaintiff's state law claims. However, all common law and statutory claims of fraud and negligent misrepresentation were allowed to proceed, along with another plaintiff's claims for breach of contract and duty. Click here for a copy of the complaint.

Firm News

Please Join Us for a Complimentary Webinar: The CFPB in Focus: Where Are We Now and What Lies Ahead?

In this webinar, we will review the current status of the CFPB and its progress to date, including an overview of the scope of its powers, stated priorities, key staff, and the issuance of the CFPB's new Supervision and Examination Manual. We also will discuss the CFPB's enforcement powers: how it intends to enforce consumer protection laws, its plans to collaborate with other federal and state regulators, and concerns regarding how the CFPB will protect confidential data provided by industry in examination, enforcement, and other contexts. We will conclude by projecting what lies ahead for the CFPB, including enforcement of new UDAAP standards and powers in the absence of a confirmed Director. We'll share these valuable insights and more, so please be sure to join us.

Date: Thursday, December 8, 2011

Time: 2:00 - 3:15 PM ET

Click here to register: https://www1.gotomeeting.com/register/335580144

Presenters: Jeff Naimon, Jonice Gray Tucker, Lori Sommerfield.

Donna Wilson will be speaking in the Strafford Privacy Data Breach Class Action Webinar on Wednesday, December 7, from 1:00 to 2:30 PM EST/10:00 to 11:30 AM PST. Ms. Wilson's session is entitled: "Class Actions on Data Breach and Privacy on the Rise; Litigating Class Claims, Alleging and Challenging Damages, and Evaluating Insurance."

David Baris, **Sam Buffone**, and **Donna Wilson** will be hosting and presenting in an AABD complimentary webinar entitled "Legal Actions by the FDIC to Recover Losses of Failed Banks: The Potential Liability of Officers and Directors" on December 7, from 3:00 to 4:30 PM EST/12:00 to 1:30 PM PST. Joining Mr. Baris, Mr. Buffone, and Ms. Wilson will be Richard Osterman, head of the FDIC's Professional Liability Program.

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.

James Parkinson will be speaking on a panel at the ACI Latin America Summit on Anti-Corruption held in Sao Paulo, Brazil on February 8, 2012. The panel is entitled: "Assessing the Risk of Personal Liability in Bribery Investigations."

Donna Wilson will be speaking at the ABA Section of Litigation Insurance Coverage CLE Seminar held at the Loews Ventana Canyon Resort in Tucson, Arizona from March 1-3, 2012. Ms. Wilson will be representing the defense counsel perspective in a plenary session panel entitled "The Credit Crisis and D&O Insurance Coverage: Challenges facing Insureds, Insurers, and Regulators" on March 1 from 1:00 PM to 2:10 PM.

James Parkinson will be chairing a panel at the International Bar Association's 10th Annual Anti-Corruption Conference in Paris, France on March 13 and 14, 2012. The panel is entitled: "The Privileged Profession: Risks faced by legal professionals advising in international transactions."

Donna Wilson was recently appointed by the ABA as Co-Chair of the Practice and Business Development Subcommittee of the Litigation Insurance Coverage Litigation Committee for a two year term.

John McGuinness was recently appointed by the ABA as Co-Chair of the CGL Subcommittee of the Litigation Insurance Coverage Litigation Committee for a two year term.

Firm Publications

Donna Wilson and **John McGuinness** published an article entitled "Case Study: *Anderson v Hannaford Brothers*" in Law360 on November 7, 2011. The article discusses a decision by the First Circuit Court of Appeals which may improve the ability of the plaintiffs' bar to proceed past the motion to dismiss stage in litigation arising out of data security breaches, even absent actual theft or misuse of customers' data by a third party. Click here for the full article.

Mortgages

Fannie Mae and Freddie Mac Announce Modifications to HARP-related Refinance Programs. On November 15, Fannie Mae and Freddie Mac published program changes and guidelines designed to expand Home Affordable Refinance Program (HARP) coverage to additional borrowers, pursuant to an October 24 announcement by the Federal Housing Finance Agency (FHFA) (as reported in *InfoBytes*, October 28, 2011). The modifications and additions to existing guidelines include extending the HARP program to December 31, 2013, removing the maximum loan-to-value (LTV) ratio of 105% for Refi Plus fixed-rate mortgage loans with terms of up to thirty years. In addition, borrowers seeking to refinance will be permitted to have had one thirty-day delinquency in the past year on their current mortgage, provided that such delinquency was not in the last six months. Other underwriting changes include specific requalification requirements if a borrower's payment is to increase by more than twenty percent, and expanded borrower benefit criteria to include reductions in interest rate or amortization term as permissible reasons for a refinance under the program. The modifications by Fannie and Freddie also indicate that in connection with DU Refi Plus modifications, lenders are not responsible for any representations or warranties associated with the original loan, and lenders are relieved from standard underwriting representations and warranties if the casefile is complete and the lender followed all other underwriting instructions and guidelines set forth by the GSEs. Most of the changes, including those described above, are slated to take effect December 1, 2011. Click here to review the program changes outlined in the Fannie Mae Bulletin; click here for the Freddie Mac Bulletin.

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The Court of Appeals decision had been the basis for several lawsuits-including class actions and at least one lawsuit by a county register of deeds-in Michigan courts seeking to prevent or void foreclosures. Certain class action suits pending in federal court were stayed pending the decision of the Michigan Supreme Court.

Click here for a copy of the Michigan Supreme Court Decision.

New Jersey Federal Court Allows Putative Foreclosure Class Action to Proceed. Recently, in *Beals v. Bank of America, N.A.*, No. 10-5427, 2011 WL 5415174 (D.N.J. Nov. 4, 2011), the U.S. District Court for the District of New Jersey rejected the defendants' motion to dismiss, which argued that the court should abstain from considering plaintiffs' claims in the putative class action lawsuit because of the case's potential conflict with pending state proceedings. The plaintiffs' claims arose out of the defendants' alleged practices resulting in unreliable and unfair foreclosure proceedings. The District Court held that the state foreclosure proceedings and the federal action do not involve substantially identical claims because the federal case includes claims not present in the state litigation. Additionally, the court noted, the federal case is principally an action for damages against the defendants for their alleged conduct, whereas the state action will focus primarily on whether the defendants are entitled to foreclose on plaintiffs' property. Therefore, the court held that considerations involving the parallel state proceeding under *Colorado River Water Conservation District v. United States* did not weigh in favor of abstention. Similarly, it held that abstention was not necessary under the Anti-Injunction Act or *Younger v. Harris*, both of which prevent federal courts from enjoining pending state proceedings except in very limited circumstances, because the plaintiffs' desired relief would not interfere with the state foreclosure proceedings. Given the finding that abstention was not appropriate under any one of these three theories, the court decided not to apply *Brillhart/Wilton* abstention, which would have had the effect of the court surrendering jurisdiction over plaintiffs' claim for declaratory relief while deciding the merits of plaintiffs' claims for monetary and injunctive relief. However, the court granted defendants' motion to dismiss on plaintiffs' claims for negligent processing of a load modification, all claims under the Fair Debt Collections Practice Act, and one plaintiff's state law claims. However, all common law and statutory claims of fraud and negligent misrepresentation were allowed to proceed, along with another plaintiff's claims for breach of contract and duty. Click here for a copy of the complaint.

Criminal Enforcement Action

Michigan Toughens Mortgage Fraud Laws. Recently, Michigan enacted several new laws aimed at enhancing the state's ability to pursue mortgage fraud and related criminal activity. The centerpiece of the legislative package (SB 43) amends state law, effective January 1, 2012, to create the felony crime of mortgage fraud. The new crime involves knowingly and intentionally engaging in any one of the several acts listed in the law, or conspiring to violate those provisions, including: (i) making a false statement or misrepresentation concerning a material fact or deliberately concealing or failing to disclose a material fact during the mortgage lending process; (ii) filing or causing to be filed with the register of deeds of any state county any document involved in the mortgage lending process that the filer knows to contain deliberate material misstatement, misrepresentation, or omission; or (iii) failing to disburse funds in accordance with the settlement or closing statement for a mortgage loan. In addition, Michigan enacted legislation (HB 4462) to criminalize forgery of a mortgage document, as well as a bill (SB 252) to increase penalties applicable to notaries public who violate the Notary Public Act while notarizing a document used in a mortgage transaction or otherwise involving an interest in real property. Finally, the state increased, from six to ten years, the statute of limitations for false pretenses involving real property, mortgage fraud, or forgery or uttering and publishing of an instrument affecting interest in real property (SB 251). To review the various pieces of enacted legislation, please access the following links: SB 43; SB 251; SB 252; HB 4462.

Nevada AG Announces Indictment in Alleged Massive Robo-Signing Scheme. On November 16, the Nevada Attorney General announced that a Clark County grand jury returned a 606 count indictment against two employees of Lender Processing Services, Inc., who allegedly directed and supervised a robo-signing scheme. According to the indictment, the scheme resulted in tens of thousands of fraudulent documents being filed with the county recorder's office between 2005 and 2008. Specifically, the indictment alleges that the defendants directed employees under their supervision to sign, fraudulently notarize, and file Notices of Default with the recorder to initiate foreclosures on local homeowners. The indictment charges both defendants with numerous counts of (i) offering false statements for recording (a felony); (ii) false certification on certain instruments (a felony); and (iii) notarization of the signature of a person not in the presence of a notary public (a gross misdemeanor). Click here for a copy of the press release.