Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

June 4, 2010

Topics In This Issue

Federal Issues

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Holder Orders Prosecutorial Discretion in Federal Charging, Sentencing. On May 19, U.S. Attorney General Eric Holder sent a memorandum to all federal prosecutors requiring them to make charging and sentencing decisions based on an "individualized assessment" of each case. The memorandum, which was subsequently submitted to the U.S. Sentencing Commission at a public hearing on May 27, supersedes the prior policy that prosecutors must charge the most serious crimes available and seek the highest possible sentences. The new approach applies to (i) charging decisions, which must now include a memorandum explaining the decision and be approved by a supervising attorney, (ii) plea agreements, and (iii) advocacy at sentencing, where prosecutors must back demands for variances with "specific and articulable factors." Factors that prosecutors should

now consider include the defendant's conduct, criminal history, community needs, and "federal resources and priorities." The change in policy may signal broader discretion for federal prosecutors to bring less complex cases that result in lower sentences. In areas such as financial frauds resulting from the financial crisis, prosecutors who may not have been inclined to quickly bring complex cases may now have the ability to pursue more traditional, less complex criminal charges. For more information, please contact infobytes@buckleysandler.com.

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FINRA Fines Firm for Failure to Retain Emails. On May 24, the Financial Industry Regulatory Authority (FINRA) announced a settlement with Piper Jaffray & Co. for violations related to the investment banking firm's failure to retain approximately 4.3 million emails from November 2002 through December 2008. FINRA had requested the emails as part of an investigation of a former firm employee suspected of misconduct. According to the firm, the failure to produce the requested emails was the result of intermittent email retention and retrieval issues, which the firm did not previously disclose to FINRA. Piper Jaffray had previously been sanctioned for email retention failures in November 2002, in a joint action by the Securities and Exchange Commission, the New York Stock Exchange Regulation, and the National Association of Securities Dealers. Under the FINRA settlement, the firm admits to no wrongdoing and will pay a $700,000 fine. For a copy of the press release, please see here. For a copy of the settlement, please see http://bit.ly/o2OBEn.

State Issues

Illinois Law Requires Illinois Courts to Stay Mortgage Foreclosure Proceedings Against Combat Military Personnel. On June 1, Illinois Governor Pat Quinn signed into law HB 3762, a bill that requires an Illinois court to stay for 90 days foreclosure proceedings against a mortgagor who is a servicemember of the military on active duty and has been deployed to a combat (or combat support) posting within the previous 12 months. The stay is not automatic and must be requested by the servicemember. The bill takes effect January 1, 2011. For a copy of the bill, please see http://www.ilga.gov/legislation/publicacts/96/PDF/096-0901.pdf.

Minnesota Passes SAFE Act Legislation. On May 15, Minnesota Governor Tim Pawlenty signed SF 2510, an omnibus bill including provisions to effect the requirements of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act). The bill requires mortgage loan originators to (i) register with the Nationwide Mortgage Licensing System (NMLS), (ii) complete pre-license testing and education, (iii) submit to fingerprinting for the purpose of a criminal history background check, and (iv) pass a qualified written exam developed by the NMLS. The law becomes effective July 31, 2010. Unless a later date is approved by the Secretary of the U.S. Department of Housing and Urban Development, the licensing requirement provisions will also become effective on July 31, 2010. For a copy of the bill, please see https://www.revisor.mn.gov/laws/?id=347&doctype=Chapter&type=0&year=2010.

State Regulatory Registry Issues Second Annual Report. On May 14, the State Regulator Registry (SRR), which owns and operates the Nationwide Mortgage Licensing System (NMLS), issued its second annual report on system activities and Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act) compliance. According to the report, all covered jurisdictions except Puerto Rico have passed legislation enacting the SAFE Act's required provisions (Minnesota, also noted by the report as failing to enact SAFE Act-compliant legislation, has recently passed legislation to comply with the SAFE Act. Minnesota's SAFE Act compliance bill is reported above in the current issue of *InfoBytes*). The report further indicates that NMLS will develop a mortgage call report and provide information on disciplinary actions sometime in 2011 (tentatively) and that NMLS will, in the future, process consumer complaints. Finally, the report describes the progress that the NMLS has made in developing SAFE Act testing and education standards and in fostering cooperative state

regulation and supervision through its Multistate Mortgage Committee. For a copy of the SRR's report, please see http://bit.ly/pzVGp5.

Florida Law Expands Regulation of Consumer Debt Collection. On May 27, Florida Governor Charlie Crist approved SB 2086, a bill that amends the current statute regulating Florida consumer debt collection agencies. Specifically, the new law will:

- Enable the Florida Office of Financial Regulation (OFR) to more thoroughly investigate collection agencies through expanded subpoena power;
- Authorize the OFR to issue cease and desist orders and direct collection agencies to take corrective action;
- Grant the OFR discretion to promptly respond to a certified consumer complaint (currently, the OFR must wait for five certified complaints to accumulate within a 12-month period before taking action);
- Empower the Florida Attorney General to take action for debt collection violations in response to a certified consumer complaint;
- Require debt collection agencies to maintain books and records necessary to determine compliance with the debt collection provisions; and
- Increase the cap on administrative fines (from $1,000 to $10,000) for both out-of-state agencies operating without proper registry and for registered agencies.

The bill takes effect October 1, 2010. For the full text of the bill, please click here.

Courts

U.S. Supreme Court to Review Whether Class Action Waivers in Form Arbitration Clauses Are Preempted. On May 24, the U.S. Supreme Court granted certiorari to address whether the Federal Arbitration Act (FAA) preempts a state law rule that rendered unenforceable the class action waiver in a consumer arbitration clause. *AT&T Mobility LLC v. Concepcion* (No. 09-083). The dispute involves a class action claim that a telephone company's offer of a "free" phone to anyone who signs up for service is fraudulent because the phone company charges the new subscriber a sales tax based on the value of the phone. In the district court, the phone company moved to compel arbitration, pointing to an arbitration clause in the service agreement that bars class actions. The district court and, later, the U.S. Court of Appeals for the Ninth Circuit held that the class action waiver provision of the arbitration clause was unconscionable under California law and, thus, unenforceable. The Ninth Circuit based its finding of unconscionability on the ground that no consumer, as a practical matter, would seek arbitration involving an amount as predictably small as the sales tax on a phone without the potential for class relief; thus, preventing class-wide relief amounted to an unconscionable contractual term. The Ninth Circuit rejected the phone company's argument that the FAA preempted application of California's unconscionability rule because, under the FAA, a state law ground to revoke an arbitration clause is preempted unless it is applicable as a defense to revoke contracts in general (and not specifically to arbitration agreements). The phone company argued, among other things, that California's unconscionability rule—announced by the California Supreme Court in the arbitration context—is applicable only to arbitration agreements and is, therefore, preempted by the

FAA. The Ninth Circuit disagreed, teeing up the preemption question for the Supreme Court. For a copy of the Ninth Circuit's opinion, please see here. For a copy of the Supreme Court docket, please see here.

California State Court Holds HOLA Does Not Preempt California Statute Pertaining to the Obligations of Lenders Prior to Issuing a Notice of Default. On June 2, the California Court of Appeal held that Cal. Civil Code Section 2923.5, which is known as the Perata Mortgage Relief Act (PMRA) and prescribes the procedures that a lender must follow prior to filing a notice of default, provides for a limited private right of action and that the Home Owners' Loan Act (HOLA) and Office of Thrift Supervision (OTS) regulations do not preempt the PMRA. *Mabry v. Sup. Ct. of Orange Cty.,* G042911, 2010 WL 2180530 (Cal. Ct. App. June 2, 2010). In *Mabry*, the plaintiff borrower obtained a restraining order against the defendants (including the lender, a subsidiary of a federal thrift) to prevent the foreclosure of the borrower's home. The trial court subsequently vacated the restraining order and held that (i) HOLA and OTS regulations preempted the PMRA, (ii) the PMRA does not provide a private right of action, and (iii) tender was required to enjoin the foreclosure proceedings. After the borrower filed a writ proceeding, the Court of Appeal stayed the foreclosure and scheduled an order to show cause. The appellate court first held that the PMRA provides a limited private right of action for a borrower to obtain postponement of an impending foreclosure (*i.e.,* until a lender complies with the requirements of the PMRA) and that a borrower is not required to tender to exercise this right. The appellate court next held that HOLA and OTS regulations do not preempt the PMRA. The court stated that the burden on federal thrifts to assess a borrower's financial condition and to explore alternatives to foreclosure "might arguably push the [PMRA] out of the permissible category of state foreclosure law and into the federally preempted category of loan servicing or loan making," but that there must be evidence of such a burden for a court to make that finding. On the limited record of this case, the court determined that HOLA did not preempt the PMRA. For a copy of the opinion, please see here.

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court determined that the borrowers' claims–even though based on alleged misconduct by the broker–were preempted. For a copy of the opinion, please see here.

Firm News

Margo Tank and Donna Wilson will participate at the ACI Data Privacy & Information Security Conference June 3-4 in Dallas, TX. Margo will be speaking on the "Preventing and Managing Litigation Associated with the Complex Array of State Breach Notification Laws" panel. Donna's presentation will be "Business-to-Business Litigation Risks and Realities."

Andrew Sandler will be speaking on June 6-7 at CBA Live, the Consumer Banker Association Conference in Hollywood, Florida. Andrew will present a Fair Lending Industry Overview on Fair Lending on June 6 and will be speak on Auto Fair Lending on June 7.

Jon Langlois will be speaking on the panel "Financial Regulatory Reform: How Will It Affect Us?" at the National Reverse Mortgage Lenders Association Policy Conference on June 7.

Andrew Sandler will participate in four webinars by the Financial Services Roundtable taking place 12:15 p.m. - 2:00 p.m. ET on July 8, July 15, July 22, and July 29. The scheduled topic is "The Restoring American Financial Stability Act of 2010: Legislative Reform Meets Regulatory Reality."

Christopher Witeck will be speaking on the "Securitization and Secondary Market" panel at ACI's Reverse Mortgage Conference in New York on July 23.

An article by Jonice Gray Tucker, Ben Saul, and Lori Sommerfield, "Regulators Target Fair Servicing," appeared in Mortgage Banking (June 2010).

Andrew Sandler, Jeff Naimon, Christopher Witeck and Margo Tank participated in the Mortgage Bankers Association Legal and Regulatory Compliance Conference on May 3-5 in Coronado, CA. Christopher spoke on "Hot Secondary Market Issues" on May 3; Andrew spoke on a panel and roundtable session on the topic "Fair Lending" on May 4; Jeff discussed servicing issues on May 4; Margo spoke on the topic "Update on Legal Issues in Mortgage Technology and eMortgages" on May 5.

Margo Tank was the featured speaker in a webinar, "New Disclosure Regulations: How Consumer Lenders can Reduce Risk and Cost with E-Disclosures," on May 4

Christopher Witeckk spoke on the "Reverse Mortgage Secondary Market Panel" at the MBA's Secondary Market/Government Housing Conference in New York on May 24.

Kirk Jensen spoke on "Overcoming Problem Areas in Issuance and Utilization of Gift Cards" at the American Conference Institute's 4th National Advanced Forum on Financial Services Marketing Compliance in New York on May 26.

Sara Emley spoke on a DC Bar panel "What the Card Act Means for You: The Impact of the New Credit Card Rules on Banks, Consumers, and Businesses" on June 1.

Mortgages

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- Require debt collection agencies to maintain books and records necessary to determine compliance with the debt collection provisions; and
- Increase the cap on administrative fines (from $1,000 to $10,000) for both out-of-state agencies operating without proper registry and for registered agencies. The bill takes effect October 1, 2010. For the full text of the bill, please see here.

U.S. Supreme Court to Review Whether Class Action Waivers in Form Arbitration Clauses Are Preempted. On May 24, the U.S. Supreme Court granted certiorari to address whether the Federal Arbitration Act (FAA) preempts a state law rule that rendered unenforceable the class action waiver in a consumer arbitration clause. *AT&T Mobility LLC v. Concepcion* (No. 09-083). The dispute involves a class action claim that a telephone company's offer of a "free" phone to anyone who signs up for service is fraudulent because the phone company charges the new subscriber a sales tax based on the value of the phone. In the district court, the phone company moved to compel arbitration, pointing to an arbitration clause in the service agreement that bars class actions. The district court and, later, the U.S. Court of Appeals for the Ninth Circuit held that the class action waiver provision of the arbitration clause was unconscionable under California law and, thus, unenforceable. The Ninth Circuit based its finding of unconscionability on the ground that no consumer, as a practical matter, would seek arbitration involving an amount as predictably small as the sales tax on a phone without the potential for class relief; thus, preventing class-wide relief amounted to an unconscionable contractual term. The Ninth Circuit rejected the phone company's argument that the FAA preempted application of California's unconscionability rule because, under the FAA, a state law ground to revoke an arbitration clause is preempted unless it is applicable as a defense to revoke contracts in general (and not specifically to arbitration agreements). The phone company argued, among other things, that California's unconscionability rule—announced by the California Supreme Court in the arbitration context—is applicable only to arbitration agreements and is, therefore, preempted by the FAA. The Ninth Circuit disagreed, teeing up the preemption question for the Supreme Court. For a copy of the Ninth Circuit's opinion, please see here. For a copy of the Supreme Court docket, please see here.

Litigation

U.S. Supreme Court to Review Whether Class Action Waivers in Form Arbitration Clauses Are Preempted. On May 24, the U.S. Supreme Court granted certiorari to address whether the Federal Arbitration Act (FAA) preempts a state law rule that rendered unenforceable the class action waiver in a consumer arbitration clause. *AT&T Mobility LLC v. Concepcion* (No. 09-083). The dispute involves a class action claim that a telephone company's offer of a "free" phone to anyone who signs up for service is fraudulent because the phone company charges the new subscriber a sales tax based on the value of the phone. In the district court, the phone company moved to compel arbitration, pointing to an arbitration clause in the service agreement that bars class actions. The district court and, later, the U.S. Court of Appeals for the Ninth Circuit held that the class action waiver provision of the arbitration clause was unconscionable under California law and, thus, unenforceable. The Ninth Circuit based its finding of unconscionability on the ground that no consumer, as a practical matter, would seek arbitration involving an amount as predictably small as the sales tax on a phone without the potential for class relief; thus, preventing class-wide relief amounted to an unconscionable contractual term. The Ninth Circuit rejected the phone company's argument that the FAA preempted application of California's unconscionability rule because, under the FAA, a state law ground to revoke an arbitration clause is preempted unless it is applicable as a defense to revoke contracts in general (and not specifically to arbitration agreements). The phone company argued, among other things, that California's unconscionability rule—announced by the California Supreme Court in the arbitration context—is applicable only to arbitration agreements and is, therefore, preempted by the

FAA. The Ninth Circuit disagreed, teeing up the preemption question for the Supreme Court. For a copy of the Ninth Circuit's opinion, please see here. For a copy of the Supreme Court docket, please see here.

California State Court Holds HOLA Does Not Preempt California Statute Pertaining to the Obligations of Lenders Prior to Issuing a Notice of Default. On June 2, the California Court of Appeal held that Cal. Civil Code Section 2923.5, which is known as the Perata Mortgage Relief Act (PMRA) and prescribes the procedures that a lender must follow prior to filing a notice of default, provides for a limited private right of action and that the Home Owners' Loan Act (HOLA) and Office of Thrift Supervision (OTS) regulations do not preempt the PMRA. *Mabry v. Sup. Ct. of Orange Cty.,* G042911, 2010 WL 2180530 (Cal. Ct. App. June 2, 2010). In *Mabry*, the plaintiff borrower obtained a restraining order against the defendants (including the lender, a subsidiary of a federal thrift) to prevent the foreclosure of the borrower's home. The trial court subsequently vacated the restraining order and held that (i) HOLA and OTS regulations preempted the PMRA, (ii) the PMRA does not provide a private right of action, and (iii) tender was required to enjoin the foreclosure proceedings. After the borrower filed a writ proceeding, the Court of Appeal stayed the foreclosure and scheduled an order to show cause. The appellate court first held that the PMRA provides a limited private right of action for a borrower to obtain postponement of an impending foreclosure (*i.e.,* until a lender complies with the requirements of the PMRA) and that a borrower is not required to tender to exercise this right. The appellate court next held that HOLA and OTS regulations do not preempt the PMRA. The court stated that the burden on federal thrifts to assess a borrower's financial condition and to explore alternatives to foreclosure "might arguably push the [PMRA] out of the permissible category of state foreclosure law and into the federally preempted category of loan servicing or loan making," but that there must be evidence of such a burden for a court to make that finding. On the limited record of this case, the court determined that HOLA did not preempt the PMRA. For a copy of the opinion, please see here.

Michigan State Court Holds NBA Preempts Claims Against National Bank Related to Use of Unlicensed Broker. On May 25, the Michigan Court of Appeals held that claims against a national bank based on loans that were submitted by an unlicensed broker and made by the national bank were preempted by the National Bank Act (NBA) and regulations issued by the Office of the Comptroller of the Currency (OCC). *Patterson v. Citifinancial Mortgage Corp.,* No. 287370, 2010 WL 2076774 (Mich. Ct. App. May 25, 2010). In *Patterson*, the plaintiff borrowers sued the defendant national bank alleging that their mortgage loans were brokered by an entity that was not properly licensed to make loans in Michigan. The trial court held that the NBA preempted the claims and the borrowers appealed, arguing that any preemption afforded to a national bank was obviated by the use of a third party broker that was not subject to the NBA or OCC regulations. The Court of Appeals, however, rejected this argument, finding that "[t]he OCC regulations at issue here provide that [the national bank] may make real estate loans 'without regard to' state laws governing licensing or registration or the manner in which their mortgage were originated or processed." Thus, a court "focus[es] on the exercise of [the national bank's] power, granted by federal law, to make real estate transactions, not on [the national bank's] corporate or agency structure." Because the actions of the broker were performed in furtherance of the national bank's power to make loans under the NBA, the

court determined that the borrowers' claims–even though based on alleged misconduct by the broker–were preempted. For a copy of the opinion, please see here.

E-Financial Services

FHA to Expand Acceptance of Electronic Signatures. Assistant Secretary for Housing David Stevens recently announced that the Federal Housing Administration (FHA) intends to expand its acceptance of electronic signatures on certain documents. In April, the U.S. Department of Housing and Urban Development announced that FHA will accept electronic signatures on certain third-party documents (*e.g.,* sales contracts) included in the case binder for mortgage insurance endorsement, in accordance with the Electronic Signatures in Global and National Commerce Act and the Uniform Electronic Transactions Act (reported in *InfoBytes*, Apr. 9, 2010). According to the announcement, FHA intends to expand its acceptance of electronic signatures by accepting electronic signatures on Lender Originated Documents (*e.g.,* the Uniform Residential Loan Application) and loan disclosures that are signed by borrowers. The statement also indicates that FHA may, in the future, accept electronic signatures on lender originated documents to be signed by the lender's representative (*e.g.,* the underwriter certification). For a copy of the announcement, please see here.

FINRA Fines Firm for Failure to Retain Emails. On May 24, the Financial Industry Regulatory Authority (FINRA) announced a settlement with Piper Jaffray & Co. for violations related to the investment banking firm's failure to retain approximately 4.3 million emails from November 2002 through December 2008. FINRA had requested the emails as part of an investigation of a former firm employee suspected of misconduct. According to the firm, the failure to produce the requested emails was the result of intermittent email retention and retrieval issues, which the firm did not previously disclose to FINRA. Piper Jaffray had previously been sanctioned for email retention failures in November 2002, in a joint action by the Securities and Exchange Commission, the New York Stock Exchange Regulation, and the National Association of Securities Dealers. Under the FINRA settlement, the firm admits to no wrongdoing and will pay a $700,000 fine. For a copy of the press release, please see http://bit.ly/dfMGxO. For a copy of the settlement, please see http://bit.ly/o2OBEn.

Privacy/Data Security

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Credit Cards

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