November 6, 2010

Topics In This Issue

Federal Issues

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State Issues

Ohio Attorney General Files Complaint Against Mortgage Servicing Company. On November 5, Ohio Attorney General Richard Cordray filed a Complaint in the Court of Common Pleas, Cuyahoga County, Ohio, against American Home Mortgage Servicing Inc. (AHMSI), a Texas-based loan servicing company, which services more than 12,000 loans in Ohio. State of Ohio v. American Home Mortgage Servicing, Inc., CV 09 708888 (Cuyahoga Cty. Oh. C.P. Nov. 5, 2009). The Complaint alleges violations of the Ohio Consumer Sales Practices Act (CSPA), including incompetent and inadequate customer service and failure to offer timely or affordable loss mitigation options to borrowers. Among other allegations, the State of Ohio alleges that AHMSI required loan modification agreements forced consumers to pay excessive fees and waive their rights to get assistance. The Complaint seeks an injunction against AHMSI from engaging in the acts alleged in the lawsuit, a declaratory judgment, civil penalties, and consumer damages. The suit also requests that the court order AHMSI to implement processes designed to provide efficient, competent, and adequate customer service to all of its Ohio mortgage customers. Also on November 5, prior to the Ohio Attorney General filing suit, AHMSI filed a Complaint for a declaratory judgment against the State of Ohio in the Court of Common Pleas, Franklin County, Ohio. AHMSI seeks a declaration that its loss mitigation policies and customer service has not violated the CSPA, or any other Ohio law. For a copy of the Ohio Attorney General's Complaint, please click here.

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Massachusetts OCABR Announces Final Regulations Filed Regarding Data Security. On November 4, the Massachusetts Office of Consumer Affairs and Business Regulation (OCABR) announced that it filed final regulations regarding security standards for entities that own or license the personal information of consumers. The filed amendments differ from revisions to the regulations made in August 2009 (reported in *InfoBytes*, Aug. 21, 2009) by clarifying the deadline for third-party compliance. Under the filed final regulations, if an entity uses a third party to handle data, the contract must include the safeguard provisions by March 1, 2012. Existing contracts are not required to be updated before March 1, 2012, but new or renewal contracts executed after March 1, 2010 must include the safeguard provisions. The final regulations become effective March 1, 2010. On November 3, OCABR revised its Frequently Asked Questions (FAQs) regarding the regulations. For a copy of the revised FAQs, please click here. For a copy of the regulations, please click here. For a copy of the press release, please click here.

Courts

Hawaii Federal Court Finds That Preemption Applies to State-Law UDAP Claims Based on Alleged TILA Violations. On October 28, the U.S. District Court for the District of Hawaii held that a plaintiff's state-law Unfair and Deceptive Acts and Practices (UDAP) claims, which were based on violations of the Truth in Lending Act's (TILA's) disclosure requirements, are preempted by federal law. *Kauinui v. Citibank (South Dakota), N.A.*, Civ. No. 09-000258, 2009 WL 3530373 (D. Haw. Oct.

28, 2009). In this case, the plaintiff, a credit-card account holder, filed suit against her credit card company, a national bank, alleging that the bank violated TILA's disclosure requirements regarding the Annual Percentage Rate (APR) and/or the finance charge, and that the TILA violations constituted unfair and deceptive acts or practices under Hawaii's UDAP statutes. The defendant bank moved to dismiss the claims and to strike portions of the plaintiff's complaint. The court declined to grant dismissal on the TILA claims, finding that it is "plausible that the bank had violated the disclosure requirements of TILA," despite the plaintiff's failure to attach all pages of her credit card statement to the complaint. However, the court granted dismissal of the state UDAP claims. The court noted that federal preemption "does not apply to claims based on violations of generally applicable duties owed by all businesses, such as fraud and breach of contract." In this case, the court found that a violation of TILA's disclosure requirement was not a violation of a general law, but a specific allegation and was therefore preempted when applied to the national bank. The court also granted the defendant bank's motion to strike the plaintiff's request for statutory damages under TILA because statutory damages are not available for the type of disclosure violation alleged. For a copy of the opinion, please click here.

Illinois Federal Court Certifies Class in FDCPA Action. On October 23, the U.S. District Court for the Northern District of Illinois granted a consumer plaintiff's motion for class certification in a matter involving a collection agency's form letter that the consumer alleged violated the Fair Debt Collection Practices Act (FDCPA). *Hale v. AFNI, Inc.*, No. 08-CV-3918, 2009 WL 3578872 (N.D. Ill. Oct. 23, 2009). In *Hale*, the consumer alleged that the defendant collection agency's form letters, sent to consumers who inquired about their accounts, violated the FDCPA by (i) falsely stating that the agency was unable to investigate the account because the consumer had failed to provide sufficient information, and (ii) failing to disclose information about the account within five days of initial contact with the consumer. The consumer moved to certify the class and the court granted the motion. Finding that the class satisfied the commonality and typicality requirements for class certification, the court rejected the collection agency's argument that, because consumers were sent different initial communications from the collection agency, the plaintiff's claim differed from the other members of the class and that claims of the class members were subject to different defenses. The court further found that the proposed class satisfied the sufficiency and adequacy of representation requirements for class certification. Finally, the court found that the proposed class met the predominance and superiority requirements for class certification, reasoning that (i) "[the] predominance requirement is typically satisfied where the central, common issue is whether the collection agency's form letter violates the FDCPA," (ii) "[because] each individual's claim would likely be too small to vindicate through an individual suit, a class action is the most efficient, effective method to proceed." For a copy of the opinion, please click here.

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Firm News

Margo Tank will be speaking at the NCHELP Fall Training Conference in St. Pete Beach, Florida on November 16 on building electronic student lending platforms in compliance with ESIGN and the UETA.

Jeff Naimon spoke about developments in appraisal requirements and related risks at the North Carolina Bankers Association's Management Team Conference on October 20 in Greensboro, North Carolina.

Stephen Ambrose and Andrew Sandler spoke about Consumer Arbitration at the American Financial Services Association's Annual Law Committee meeting on October 26 in Washington, DC.

Andrew Sandler spoke at the District of Columbia Bar regarding the proposed Consumer Financial Protection Agency on October 27 in Washington, DC.

Mortgages

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New York Federal Court Holds Expired License Number Included on Debt Collection Letter Does Not Violate FDCPA. On October 15, the U.S. District Court for the Southern District of New York held that the listing of an expired license number on a debt collection letter by a debt collection agency operating under a new license number did not violate the Fair Debt Collection Practices Act (FDCPA). *Wayee v. Recovery's Unlimited, Inc.*, 09 Civ. 3809, 2009 WL 333463 (S.D.N.Y. Oct. 15, 2009). In*Wayee*, the plaintiff debtor alleged that the defendant collection agency's debt collection letter violated the FDCPA because the use of the expired license number constituted a "false, deceptive, or misleading representation or means in connection with the collection of any debt." The court rejected the debtor's argument and granted summary judgment for the collection agency. Quoting from a case involving similar facts, the court reasoned that, while the failure to list a license number may violate a New York City ordinance, 'there is no basis to conclude that this minor deficiency renders the [collection] [l]etter false, deceptive, or misleading within the meaning of the FDCPA.' For a copy of the opinion, please click here.

Litigation

Hawaii Federal Court Finds That Preemption Applies to State-Law UDAP Claims Based on Alleged TILA Violations. On October 28, the U.S. District Court for the District of Hawaii held that a plaintiff's state-law Unfair and Deceptive Acts and Practices (UDAP) claims, which were based on violations of the Truth in Lending Act's (TILA's) disclosure requirements, are preempted by federal law. *Kauinui v. Citibank (South Dakota), N.A.*, Civ. No. 09-000258, 2009 WL 3530373 (D. Haw. Oct. 28, 2009). In this case, the plaintiff, a credit-card account holder, filed suit against her credit card company, a national bank, alleging that the bank violated TILA's disclosure requirements regarding the Annual Percentage Rate (APR) and/or the finance charge, and that the TILA violations constituted unfair and deceptive acts or practices under Hawaii's UDAP statutes. The defendant bank moved to dismiss the claims and to strike portions of the plaintiff's complaint. The court declined to grant dismissal on the TILA claims, finding that it is "plausible that the bank had violated the disclosure requirements of TILA," despite the plaintiff's failure to attach all pages of her credit card statement to the complaint. However, the court granted dismissal of the state UDAP claims. The court noted that federal preemption "does not apply to claims based on violations of generally applicable duties owed by all businesses, such as fraud and breach of contract." In this case, the court found that a violation of TILA's disclosure requirement was not a violation of a general law, but a specific allegation and was therefore preempted when applied to the national bank. The court also granted the defendant bank's motion to strike the plaintiff's request for statutory damages under TILA because statutory damages are not available for the type of disclosure violation alleged. For a copy of the opinion, please click here.

Illinois Federal Court Certifies Class in FDCPA Action. On October 23, the U.S. District Court for the Northern District of Illinois granted a consumer plaintiff's motion for class certification in a matter involving a collection agency's form letter that the consumer alleged violated the Fair Debt Collection Practices Act (FDCPA). *Hale v. AFNI, Inc.*, No. 08-CV-3918, 2009 WL 3578872 (N.D. Ill. Oct. 23, 2009). In *Hale*, the consumer alleged that the defendant collection agency's form letters, sent to consumers who inquired about their accounts, violated the FDCPA by (i) falsely stating that the agency was unable to investigate the account because the consumer had failed to provide sufficient information, and (ii) failing to disclose information about the account within five days of initial contact with the consumer. The consumer moved to certify the class and the court granted the motion. Finding that the class satisfied the commonality and typicality requirements for class certification, the court rejected the collection agency's argument that, because consumers were sent different initial communications from the collection agency, the plaintiff's claim differed from the other members of the class and that claims of the class members were subject to different defenses. The court further found that the proposed class satisfied the sufficiency and adequacy of representation requirements for class certification. Finally, the court found that the proposed class met the predominance and superiority requirements for class certification, reasoning that (i) "[the] predominance requirement is typically satisfied where the central, common issue is whether the collection agency's form letter violates the FDCPA," (ii) "[because] each individual's claim would likely be too small to vindicate through an individual suit, a class action is the most efficient, effective method to proceed." For a copy of the opinion, please click here.

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E-Financial Services

Massachusetts OCABR Announces Final Regulations Filed Regarding Data Security. On November 4, the Massachusetts Office of Consumer Affairs and Business Regulation (OCABR) announced that it filed final regulations regarding security standards for entities that own or license the personal information of consumers. The filed amendments differ from revisions to the regulations made in August 2009 (reported in *InfoBytes*, Aug. 21, 2009) by clarifying the deadline for third-party compliance. Under the filed final regulations, if an entity uses a third party to handle data, the contract must include the safeguard provisions by March 1, 2012. Existing contracts are not required to be updated before March 1, 2012, but new or renewal contracts executed after March 1, 2010 must include the safeguard provisions. The final regulations become effective March 1, 2010. On November 3, OCABR revised its Frequently Asked Questions (FAQs) regarding the regulations. For a copy of the revised FAQs, please click here. For a copy of the regulations, please click here. For a copy of the press release, please click here.

Privacy/Data Security

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Credit Cards

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