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Financial Services Report

Staying Ahead of the Summons

Award Winning Newsletter

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Inside

Editor's Note

As usual, stuff happened. While others were lying on the beach applying SPF 15 (or higher) and muttering about bad cell phone reception or off eating pu-pu's on Poipu, we stayed plugged in all summer long. Of course, that meant we missed out on a few opportunities like the "Real Housewives of New Jersey" inviting us out for a pedicure, and the promoters of London's 23,000-seat "02" Arena calling to ask if we could take the fifty open dates after Michael Jackson canceled. Tempted? Yes, but our readership comes first. So, that is one reason you're not going to see an 80-foot inflatable likeness of us in Piccadilly Circus this fall. And why you didn't see our unsmiling faces instead of Bill Clinton's next to the Eternal President of the Republic of North Korea, Kim Jong-il.

What you will read are the news items we've gathered. Even with Congress off attending town hall meetings and such, things were busy. A huge fight is brewing over who gets to regulate banks and bank-alikes (*see* Consumer Financial Protection Agency Act of 2009). The Supremes decided *Cuomo v. The Clearing House Association*. There is legislation afoot that would force credit rating agencies to act like independent auditors. Consumer arbitration saw a further retreat. And no one can say taxpayers weren't getting value from their regulators who were busy promulgating new credit card rules. All of this in these pages, and more. ■

William L. Stern, Editor

MoFo Metrics

16¼	World's record for yo-yo "sleeping" (minutes)
57	Dollars Americans added to their personal savings in 2007, in billions
92	Dollars Americans spent in 2007 on legalized gambling, in billions
35	Percentage of an American's media time spent watching TV
34	Percentage of an American's media time spent online
16	Dollars (in thousands) earned by the Yankee's Alex Rodriguez, per pitch
25	Percentage of Americans whose only phone service is mobile
5	Percentage of world's adult population that takes illegal drugs

Beltway Report

WHO'S IN CHARGE?

The Treasury Department released its proposal to designate the FDIC (or the SEC in the case of registered brokers or dealers) as the conservator or receiver for bank holding companies whose failure would significantly affect economic conditions in the U.S. The 90-page proposed legislation, entitled "Resolution Authority for Large, Interconnected Financial Companies Act of 2009," states that the costs of operations will be funded by the Bank Holding Company Fund, created upon a default and capitalized through borrowing from the Treasury Department. The FDIC is required to recoup expenditures within five years of a failure through assessments of bank holding companies.

For more information, contact Rick Fischer at lfischer@mofo.com, Oliver Ireland at oireland@mofo.com, or Obrea Poindexter at opoindexter@mofo.com.

OVERHAULED

The Treasury Department issued a white paper setting forth proposals aimed at overhauling the nation's financial regulatory oversight structure, including comprehensive financial regulatory agency and oversight reform, comprehensive regulation of financial markets, enhanced consumer protections, assistance to failing institutions, and improved international regulatory standards and cooperation. In the consumer protection area, the Treasury proposes reform of the consumer protection supervisory framework for financial products, including the creation of a single regulatory agency focused on consumer protection in the market for financial products and services. The Treasury also proposes legislative, regulatory, and administrative reforms to promote transparency, simplicity, fairness, accountability, and access in consumer financial products and services.

For more information, contact Rick Fischer at lfischer@mofo.com, Oliver Ireland at oireland@mofo.com, or Obrea Poindexter at opoindexter@mofo.com.

BRAVE NEW WORLD

On June 30, 2009, a draft of the Consumer Financial Protection Agency Act of 2009 (the "CFPAA") was released, establishing a new agency (the "Agency") to oversee consumer protection in financial services. If enacted, the CFPAA will subject federally chartered financial institutions to state consumer protection laws that have, in the past, been preempted. The only exception will be for state laws that are inconsistent with or are less protective than the CFPAA. The CFPAA applies to "consumer financial products or services"—defined as financial products or services that are to be used primarily for personal, family or household purposes. The CFPAA would do a lot of other things as well, none of them particularly bank-friendly. You could pinch yourself, or you could read a complete synopsis at http://www.mofo.com/news/updates/files/090707CFPAA.pdf

For more information, contact Rick Fischer at lfischer@mofo.com, Oliver Ireland at oireland@mofo.com, or Obrea Poindexter at opoindexter@mofo.com.

NEW KIDS ON THE BLOCK

On July 24, 2009, the Administration released various legislative proposals and introduced several new agencies and regulators. Here's the rundown. A Financial Services Oversight Council will be created to coordinate financial regulatory policy. A National Bank Supervisor will take on the roles of the Office of Thrift Supervision and the Office of the Comptroller of the Currency, and the thrift charter will be eliminated. The Office of National Insurance (within the Treasury) will monitor the insurance industry and identify potential industry issues, recommend which insurance companies should be designated as Tier 1 FHCs, and consult and coordinate with state insurance regulators. Entities designated as Tier 1 FHCs will be subject to consolidated supervision and regulation by the Federal Reserve, and will be subject to the activity restrictions now applicable to bank holding companies. Tier 1 FHCs also will be subject to more stringent capital, liquidity, and risk management standards. The proposed legislation will require that all financial holding companies (not just Tier 1 FHCs) comply with higher minimum capital requirements. Finally, proposed legislation on payment systems authorizes the Federal Reserve Board to prescribe standards to manage risks posed by systemically important financial market utilities and for the conduct of systemically important payment, clearing, and settlement activities by financial institutions.

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PROPOSED REFORMS RELATING TO CREDIT RATING AGENCIES

Recently proposed legislation titled "Improvements to the Regulation of Credit Rating Agencies" seeks to increase transparency, tighten oversight, and reduce reliance on credit rating agencies. The legislation: (1) prohibits credit rating agencies from providing other services, like consulting services, to companies that contract for ratings; (2) prohibits, or requires the management and disclosure of, conflicts of interest arising from the way a rating agency is paid; and (3) requires that credit rating agencies implement procedures to review ratings of an issuer if the issuer has hired a rating agency employee within a year prior to its rating. Rating agencies will be required to designate a chief compliance officer who will report directly to the board or the senior officer of the credit rating agency. The legislation also puts forward a number of actions to reduce undue reliance by investors on ratings.

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BEST BUY

On July 2, the FDIC issued proposed guidelines that would significantly impact private equity investments in failed insured depository institutions. The Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions applies only to acquisitions of failed banks, but observers are concerned the FDIC may apply the same or similar guidelines in reviewing applications for approval of investments in operating institutions. Under the proposed guidelines, the FDIC would evaluate equity investors in institutions seeking to acquire a failed institution (or to assume deposits or acquire assets from a failed institution) to determine whether the investor provides sufficient capital and "experience, competence, and willingness to run" the institution "in a prudent manner." The FDIC also proposes to require such investors to "accept the responsibility to support" the banks when they face difficulties and protect the banks from insider transactions, apparently through additional capital commitments. For more detail on the proposed guidelines, please see the Morrison & Foerster LLP legal update alert at: http://www.mofo.com/news/updates/files/15750.html

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COMMENTS SOUGHT ON COMMUNITY REINVESTMENT ACT PROPOSAL

The federal bank and thrift regulatory agencies proposed revisions to regulations implementing the Community Reinvestment Act ("CRA") to require the agencies to consider low-cost education loans provided to low-income borrowers when assessing a financial institution's record of meeting community credit needs. This proposal would allows the agencies, when assessing an institution's record, to consider capital investments, loan participations, and other ventures by nonminority- and nonwomen-owned financial institutions in cooperation with minority- and women-owned institutions and low-income credit unions. This language codifies guidance in the Interagency Questions and Answers on Community Reinvestment, published on January 6, 2009. Although the agencies seek comment on all aspects of the proposal, they are focusing on the following questions: (1) How "education loans" should be defined, including whether private loans not governmentally insured or guaranteed and loans for elementary and secondary education should be covered, as well as loans for education expenses associated with unaccredited institutions; (2) Whether the proposed definition of "low-cost" is appropriate; and (3) Whether "low-income" should be defined differently from the way it is currently defined in the CRA regulations, including how the agencies should treat the student's family income or expected contribution. ■

For more information, contact Obrea Poindexter, opoindexter@mofo.com.

Credit Card Report

LOOK-BACK IN ANGER

The OCC issued guidance regarding the "look-back" provision of the Credit Card Accountability Responsibility and Disclosure Act ("CARD Act") of 2009, providing that increases in annual percentage rates after January 1, 2009, must be reviewed at least once every six months to assess whether factors contributing to the APR increase have changed. According to the OCC, APRs might require reduction if such factors are no longer present, although it notes that the CARD Act does not "require a reduction in any specific amount." Effective August 22, 2010, national banks must conduct such reviews on any accounts on which the APRs were increased on or after January 1, 2009. Both the FRB and OTS have issued similar guidance to the banks they supervise.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

WELCOME DELAY

The FTC announced that it will delay enforcement of its "Red Flags" rule to give creditors and financial institutions additional time to develop and implement written Identity Theft Prevention Programs. The new enforcement date is November 1, 2009. This is the second delay of the rule. The FTC had already delayed its implementation of the rule until August 1, 2009. This announcement does not affect the FTC's address discrepancy rule, which applies to all users of consumer reports, and its change-of-address rule, which applies to card issuers, both of which became effective November 1, 2008.

For more information, contact Andrew Smith at asmith@mofo.com.

FRB INTERIM FINAL RULE IMPLEMENTING CARD ACT

The FRB issued an interim final rule that amends Regulation Z to implement certain provisions of the CARD Act. The rule requires creditors to provide written notice to consumers 45 days before the creditor increases an APR on a credit card account or makes a significant change to the terms of a credit card account, and to inform consumers in the same notice of their right to cancel the credit card account before the increase or change goes into effect. It also requires creditors to mail or deliver periodic statements for credit cards and other open-end consumer credit accounts at least 21 days before payment is due. The interim final rule is the first stage in the FRB's implementation of the CARD Act. The CARD Act's amendments to TILA go into effect in three stages. This interim final rule implements the provisions of the CARD Act that go into effect on August 20, 2009. The remaining provisions go into effect on February 22 or August 22, 2010, and will be implemented by the Federal Reserve Board at a later date. Comments on the interim final rule must be received by September 21, 2009.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

FAQS ON IDENTITY THEFT RULES

The federal banking agencies and the FTC issued FAQs to assist financial institutions, creditors, users of consumer reports, and issuers of credit cards and debit cards in complying with the Fair and Accurate Credit Transactions Act regulations on identity theft and discrepancies in address changes. The FAQs discuss the types of entities and accounts that are covered, the establishment and administration of an Identity Theft Prevention Program, validation requirements applicable to card issuers, and obligations of users of consumer reports upon receipts of a notice of address discrepancy. ■

For more information, contact Andrew Smith at asmith@mofo.com.

Preemption Report

GLASS HALF FULL?

About the best we can say about *Cuomo v. The Clearing House Ass'n*, 129 S. Ct. 2710 (2009), is that it could have been worse. The Supreme Court ruled that the National Bank Act's grant of visitorial exclusivity to the OCC does not prohibit lawsuits filed by state governments seeking to enforce state laws, even if those suits involve the lending practices of national banks. The Court unanimously held, however, that states cannot rely on administrative subpoenas to obtain information from a national bank and must invoke the judicial process like any other litigant. We'll have to hold our collective breath to find out whether states accept the Supreme Court's invitation to file suit or whether the safeguards built into the litigation process, including Rule 11 and discovery limitations, will curtail the decision's impact.

For more information, see our Legal Update at http://www.mofo.com/news/updates/files/15728.html, or contact Rick Fischer at rfisher@mofo.com or James McGuire at jmcguire@mofo.com.

NOT SO FAST

In our last installment, we told you about two decisions from the Central District of California holding that TILA and OTS regulations completely preempt state law contract and tort claims challenging mortgage practices. A federal court in Arkansas doesn't see it that way. *Cole v. Pinter*, No. 08-6108, 2009 U.S. Dist. LEXIS 43038 (W.D. Ark. May 21, 2009). In *Cole*, the court remanded a case challenging a non-judicial foreclosure sale, rejecting defendants' argument that the state law claims asserted were completely preempted by the Home Owner's Loan Act (HOLA) and its implementing regulations. The court found HOLA did not meet the requirements of complete preemption because the statute has no private right of action or any indication that Congress intended to allow removal of state law claims.

For more information, contact Nancy Thomas at nthomas@mofo.com.

DOES DIDA DO OR DOES DIDA DON'T?

The Eighth Circuit says don't. It ruled that the Depository Institutions Deregulation and Monetary Control Act does not completely preempt state law claims of usury filed against state-chartered banks. *Thomas v. US Bank National Association ND*, No. 08-3302, 2009 U.S. App. LEXIS 17650 (8th Cir. Aug. 7, 2009). The court reasoned that unlike the National Bank Act, DIDA does not reflect Congress's intent to create an exclusive federal remedy because it applies only if the interest rate authorized by DIDA is higher than the interest rate authorized by state law. The court recognized that its ruling creates a circuit split in light of a contrary Fourth Circuit decision.

For more information, contact Nancy Thomas at nthomas@mofo.com.

MORTGAGE RELIEF

Proving there's a first time for everything, a federal court in Cleveland held that a state statute expressly preempted the City of Cleveland's claim that subprime lending created an "epidemic of foreclosures," constituting a public nuisance. That's rich. The City brought suit against defendants based on their alleged involvement in securitizing subprime loans into mortgage-backed securities, and sought to recover the costs associated with foreclosed property and the property tax revenue lost due to the impact of foreclosures on surrounding home values. A novel theory. But an Ohio statute expressly preempts municipal regulation of lending. The court rejected the City's argument, often made by plaintiffs in opposing National Bank Act preemption, that litigation does not regulate conduct. *City of Cleveland v. Ameriquest Mortgage Securities, Inc.*, 621 F. Supp. 2d 513, 518 (N.D. Ohio 2009). ■

For more information, contact Nancy Thomas at nthomas@mofo.com.

Operations Report

IT HAPPENED ONE NIGHT

The FDIC fund fell 20 percent to $10.4 billion in the second quarter as U.S. banks overall lost $3.7 billion. That's the fund's lowest point since 1992 at the height of the savings-and-loan crisis. Many analysts believe the fund could fall below zero by the end of the year. The FDIC estimates bank failures will cost the fund around $70 billion through 2013. It's slipped to 0.22 percent of insured deposits, below a congressionally mandated minimum of 1.15 percent.

COMMENTS SOUGHT ON PROPOSED INTERAGENCY GUIDANCE ON FUNDING AND LIQUIDITY RISK MANAGEMENT

The federal bank, thrift, and credit union regulatory agencies are seeking comment on the proposed Interagency Guidance on Funding and Liquidity Risk Management. This guidance brings the agencies' liquidity risk principles into alignment with the international guidance issued in September 2008 by the Basel Committee on Banking Supervision titled "Principles for Sound Liquidity Risk Management and Supervision." The proposed guidance emphasizes the importance of cash flow projections, diversified funding sources, stress testing, a cushion of liquid assets, and a formal, well-developed contingency funding plan for measuring, monitoring, and managing liquidity risk. The proposed guidance will apply to all domestic financial institutions, including banks, thrifts, and credit unions.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

GET A GRIP

On June 4, 2009, in a 4-3 decision, New York State's highest court issued a decision that, unless reversed by the United States Supreme Court, will have a significant impact on non-U.S. banks and their clients. In *Koehler v. Bank of Bermuda*, 2009 NY Slip. Op. 4297 (June 4, 2009), the New York Court of Appeals held that "a court sitting in New York may order a bank over which it has personal jurisdiction to deliver stock certificates owned by a judgment debtor (or cash equivalent to their value) to a judgment creditor ... when those stock certificates are located outside of New York." Another troubling aspect of the decision is that neither the judgment debtor nor the judgment creditor had any contacts with New York. The underlying dispute involved a business transaction in Bermuda. Even the default judgment was obtained by a plaintiff in Maryland, not in New York. Thus, other than the fact that the judgment debtor's non-U.S. bank was subject to personal jurisdiction in New York, there are no connections between this dispute and the State of New York. Nevertheless, the Court of Appeals ruled that *in rem* jurisdiction over the shares was not required, and that a New York court can order a bank over which it has *in personam* jurisdiction to deliver property over which the court has no *in rem* jurisdiction, regardless of what other contacts the dispute may or may not have with the State of New York.

For more information, contact Thomas Mueller at tmueller@mofo.com.

TELEMARKETING SALES RULE AMENDMENTS

The FTC issued a Notice of Proposed Rulemaking to amend its Telemarketing Sales Rule to address the sale of debt relief services. The proposal: (1) defines the term "debt relief service," (2) ensures that debt relief services telemarketing transactions are subject to the Telemarketing Sales Rule, regardless of the advertisement medium; (3) mandates certain disclosures and prohibits telemarketing misrepresentations; and (4) prohibits any person from requesting or receiving payment for debt relief services until the services have been fully performed and documented to the consumer. Comments on the proposal are due by October 9, 2009. ■

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Mortgage Report

FAIR LENDING LITIGATION

Previously, we reported on *NAACP v. Ameriquest* and the late July deadline to file dispositive motions on whether injunctive relief, the only relief sought by the NAACP, is viable. That deadline came and went with little fanfare and even fewer dispositive motions. Instead, most of the defendants who are no longer engaged in the challenged lines of business/business practices (subprime lending and underwriting ARM loans to teaser rates) reached individual agreements with the NAACP to extend the deadline by a few weeks to a few months. A couple of defendants have since filed such motions, which have not yet been fully briefed or heard.

Meanwhile, a GAO report released in August 2009 concluded that incomplete data collection and inconsistent regulatory oversight are impeding federal enforcement of the fair lending laws. The GAO report noted that key underwriting data not required by HMDA—such as credit scores, LTV ratios, and DTI ratios—would allow better analysis by federal regulators. The GAO said that Congress should consider the merits of additional HMDA data collection and reporting options.

For more information, contact Michael Agoglia at magoglia@mofo.com.

OPTION ARM LITIGATION

It is summertime, and the sparse activity could be blamed on the hot long days. After voluntary dismissals, plaintiffs' lawyers searching for a second life have slowly re-filed in state court a number of option ARM cases that were previously before Judge Stotler in the Central District of California. Defendants have removed back to the Central District of California. Remand motions are expected. Relatedly, version 3.5.7 of plaintiffs' complaint attempts to hold secondary purchasers liable for the alleged option ARM violations. Before, plaintiffs had focused on the originating lender.

For more information, contact Michael Agoglia at magoglia@mofo.com.

FREMONT SETTLES WITH STATE AG

Last spring, we reported on the Massachusetts attorney general's lawsuit against Fremont Reorganizing Corporation. On June 9, the state trial court entered a consent decree settling the Commonwealth's claims against Fremont for $10 million, a permanent injunction, and no admission of liability. Among other things, the Commonwealth alleged that Fremont had targeted low-income neighborhoods for "presumptively unfair" subprime loans, which resulted in borrower defaults and home foreclosures. Under the consent decree, before Fremont may initiate or advance a foreclosure, it must give the attorney general 45 days' advance written notice of the proposed foreclosure, identifying why foreclosure is reasonable. The consent decree also permanently enjoins Fremont from marketing or extending ARM loans to subprime borrowers in an unsafe and unsound manner that greatly increases the risk of borrower default. Examples include qualifying borrowers for loans based on a teaser rate and approving borrowers without adequate documentation or verification of income, to name a few.

For more information, contact Wendy Garbers at wgarbers@mofo.com.

CRAM-DOWN RESURRECTION?

In the past, we reported on Congressional bills that would give bankruptcy judges the power to rewrite the first mortgage on a homeowner's primary residence. In a 45 to 51 vote, the Senate killed one measure co-sponsored by Senator Richard Durbin that would have authorized bankruptcy judges to "cram down" mortgages. Twelve Democrats voted with Republicans who opposed the Senate measure. But more recent complaints about the glacial pace of voluntary loan modifications have caused Senator Durbin to threaten the revival of legislative efforts to allow the cramming down of mortgage loans. House Financial Services Committee Chairman Barney Frank sounded the same warning.

The White House reported in August that more than 230,000 trial modifications have begun under the Obama

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Administration's Making Home Affordable loan modification program. Loan servicers have pledged to reach half a million trial modifications by November 1.

For more information, contact Adam Lewis at alewis@mofo.com.

FTC RULEMAKING RE: UNFAIR AND DECEPTIVE MORTGAGE PRACTICES

With unscrupulous hucksters and scam artists circling for prey, the FTC in May initiated the rulemaking process directed to foreclosure rescue and loan modification services. The FTC sought public comments on Mortgage Assistance Relief Services to determine if certain practices by these companies are unfair or deceptive under the FTC Act. The FTC was specifically interested in prohibiting or restricting the payment of advance fees for services focused on distressed homeowners. Additionally, the FTC sought public comment for rulemaking on Mortgage Acts and Practices, which is directed to activities throughout the lifecycle of a mortgage loan, from marketing and advertising to origination to servicing. The public comment period ended on July 30, 2009. ■

For more information, contact Joe Gabai at jgabai@mofo.com.

Privacy Report

JUST THE FACTA

On July 1, 2009, the federal banking agencies, the National Credit Union Administration, and the Federal Trade Commission issued joint rules to implement FACT Act requirements for persons who furnish information to consumer reporting agencies ("CRAs"). The new rules will impose two separate, but related, duties on furnishers. First, a furnisher will be required to implement written policies and procedures regarding the accuracy and integrity of information that it furnishes to CRAs. For example, a furnisher must conduct a risk assessment of its information furnishing practices, determine the risks to the accuracy and integrity of information that it furnishes and the practices that can compromise accuracy and integrity and implement appropriate procedures accordingly. Second, a furnisher will be required to investigate disputes submitted directly to the furnisher by consumers regarding the accuracy of information in consumer reports that relate to accounts that the consumers have with the furnisher. The joint rules will be effective on July 1, 2010.

For more information, contact Andrew Smith at asmith@mofo.com.

MASSACHUSETTS AMENDS DATA SECURITY REGULATIONS…AGAIN

On August 17, 2009, the Massachusetts Office of Consumer Affairs and Business Regulation amended its data security regulations for the third time. The amended data security regulations, which will become effective on March 1, 2010, require that businesses implement comprehensive and detailed data security programs to protect personal information relating to Massachusetts residents. The latest revisions to the regulations include some significant substantive changes. [For example, the amended regulations once again require that when a business enters into a contract with a service provider that will have access to personal information, the service provider must comply with state regulations and, in a new addition, any applicable federal regulation.] The amended regulations also remove some substantive obligations that were in the previous regulation, including the obligation to limit the amount of personal information that is collected, the time period that personal information is retained, and the obligation to limit access to personal information to those persons who are required to know such information.

For more information, contact Nathan Taylor at ndtaylor@mofo.com.

MAINE ENACTS SWEEPING CHILDREN'S PRIVACY LAW

Maine's governor recently signed "An Act to Prevent Predatory Marketing Practices against Minors" ("Act"). The Act, which regulates the collection and use of personal information of

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children, is substantially more restrictive than the federal Children's Online Privacy Protection Act ("COPPA") and appears to prohibit many common, non-deceptive marketing practices. For example, the Act makes it unlawful for a person to knowingly collect or receive health-related information or personal information for marketing purposes from a minor without first obtaining the verifiable parental consent of that minor's parent or legal guardian. The Act also includes a private right of action, not available under COPPA, which substantially increases the legal exposure of businesses that collect and use personal information of Maine residents who are under 18 years old. The Act becomes effective in mid-September 2009. ■

For more information, contact Charlie Kennedy at ckennedy@mofo.com.

California Report

GRIPEMEISTERS

In our last group session, we discussed *Tobacco II Cases*, 46 Cal. 4th 298 (2009) and what it does to California's Unfair Competition Law, Bus. & Prof Code § 17200 ("UCL"). (*See* "Banging Our Spoon Against the High Chair," Fin. Serv. Rpt., Summer 2009, p. 9.) A few weeks later, the California Supreme Court issued two new opinions further defining who has "standing" to sue under post-Proposition 64's UCL.

In the first case, decided June 29, the court held that the requirement of Proposition 64 that the claimant must have suffered injury means that an *uninjured* claimant—say, a labor union—cannot take an assignment of a UCL claim from an injured assignor. For the same reason, there is no "associational standing" under the UCL even if the association's members have been injured. *Amalgamated Transit Union, Local 1756 v. Superior Court*, 46 Cal. 4th 993, 1002, 1004 (2009). In the other case, decided the same day, the Supremes held that a claimant seeking to recover under the UCL on behalf of others must comply with class action procedure. *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009).

For more information, contact Will Stern at wstern@mofo.com.

UCL CLAIM CAN'T BE BASED ON VIOLATION OF FDIC "SAFETY AND SOUNDNESS" REGULATION

In a case handled by the Firm, a federal judge in Sacramento granted a lender's motion to dismiss a counterclaim brought under the "unlawful" prong of the UCL where the counterclaimant attempted to borrow a purported violation of an FDIC safety and soundness regulation. *Intervest Mortgage Investment Co. v. Skidmore*, No. Civ. S-08-1543 LKK/DAD (E.D. Cal. June 2, 2009). The underlying dispute involved a construction loan guaranteed by the counterclaimant. When the lender attempted to enforce the guarantee after a borrower default, the guarantor brought a counterclaim under the UCL, arguing that he had no duty to repay the defaulted loan because the lender had purportedly failed to comply with an FDIC regulation, 12 C.F.R. pt. 365.2, that requires lenders to adopt "appropriate" lending policies. The court dismissed the claim because the guarantors fell outside the zone of interests sought to be protected by the UCL: It "violates common sense to suggest that a guarantor on a loan can sue a bank under the UCL for a potential violation of a regulation which seeks to protect depositors. The UCL could not have been intended to provide for private enforcement of the FDIC regulation ...." ■

For more information, contact Rebekah Kaufman at rkaufman@mofo.com.

Arbitration Report

"PRO-CONSUMER" ARBITRATION CLAUSE STRUCK DOWN

On May 26, 2009, the U.S. District Court for the Western District of Washington struck down an arbitration clause containing a class action waiver as "unconscionable" in a nationwide class action against AT&T Wireless and Cingular Wireless alleging fraud, breach of contract, and violation of state consumer protection statutes arising from AT&T Wireless's acquisition of Cingular Wireless in 2004. *Coneff v. AT&T Corp*, Case No. C06-944 RSM (W.D. Wash. May 22, 2009). AT&T argued that the arbitration clause was pro-consumer because it required AT&T to pay all costs and fees associated with the arbitration, and permitted consumers to recover punitive damages and double attorneys' fees. The court also invalidated the choice of law clause in the agreement, which selected the law of the individually named plaintiff's home state. The court held instead that Washington law should apply because the laws of plaintiffs' respective home states would permit AT&T to bar their residents from participating in the class action.

For more information, contact Rebekah Kaufman at rkaufman@mofo.com.

AAA AND NAF EXIT CONSUMER ARBITRATIONS

The National Arbitration Forum, the largest U.S. administrator of consumer arbitrations, announced that it would voluntarily cease to administer consumer arbitration disputes as of Friday, July 24, 2009, as part of a settlement agreement with the Minnesota attorney general. The Minnesota AG sued NAF on July 14 for consumer fraud, deceptive trade practices, and false advertising. The suit alleged conflicting ties between the NAF and debt-collection law firms that represented major credit card companies. The suit also alleged that New York hedge fund Accretive LLC owned stakes in such collection law firms and the NAF, sending arbitration business between the two. The San Francisco city attorney's office has also brought a lawsuit against NAF, alleging the company engaged in unfair business practices against consumers. *California v. National Arbitration Forum*, No. CGC-08-47359 (S.F. Super. Ct., filed March 24, 2008). The American Arbitration Association has also announced that it will halt consumer debt collection arbitrations, pending new guidelines.

For more information, contact Rebekah Kaufman at rkaufman@mofo.com.

In the wake of the announcement by NAF and AAA that they were exiting consumer arbitrations, lawmakers in Congress have pushed to pass legislation that would ban mandatory consumer arbitration.

LEGISLATION BANNING CONSUMER ARBITRATION GAINS MOMENTUM IN CONGRESS

In the wake of the announcement by NAF and AAA that they were exiting consumer arbitrations, lawmakers in Congress have pushed to pass legislation that would ban mandatory consumer arbitration. The Arbitration Fairness Act of 2009 (S. 931/H.R. 1020) would invalidate every pre-dispute contractual arbitration agreement that is part of a consumer, financial, or franchise dispute. The Fairness in Nursing Home Arbitration Act (S. 512/H.R. 1237) would eliminate pre-dispute mandatory arbitration in all nursing home contracts. A House Oversight and Government Reform subcommittee headed by Rep. Dennis Kucinich, D-Ohio, released a staff report, "Arbitration Abuse: An Examination of Claims Files of the National Arbitration Forum" finding "abuses" in consumer arbitration. Testifying before

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Arbitration Report

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Kucinich's subcommittee in July, Minnesota Attorney General Lori Swanson urged Congress to pass legislation to reform consumer arbitration, stating that "the underlying problems with mandatory pre-dispute arbitrations run across the industry and are systemic." In response, many Republicans have argued that arbitration provides consumers with fair, inexpensive dispute resolution that is a more efficient alternative to traditional litigation. Stay tuned.

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MASSACHUSETTS CONSUMER PROTECTION STATUTE TRUMPS CLASS WAIVER

In *Feeney v. Dell, Inc.*, SJC-10259, (July 2, 2009), the Massachusetts Supreme Court considered whether a statutory right to participate in class action lawsuits under Massachusetts' consumer protection statute can permissibly be foreclosed by a provision in a consumer contract compelling individual arbitration. The plaintiffs brought it as a putative class action, alleging that Dell improperly collected Massachusetts sales tax on the purchase of optional service contracts sold in connection with the purchase of Dell computers when (according to the plaintiffs) no such tax was due, and that the collection of such tax violated the Massachusetts consumer protection act. The court concluded that the provision compelling individual arbitration in the plaintiffs' consumer contracts is not enforceable because it is contrary to the fundamental public policy of Massachusetts favoring consumer class actions set forth in the consumer protection statute. ■

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