December 17, 2010

Topics In This Issue

Federal Issues

Treasury Department Announces Senior Leadership Hires for CFPB Implementation Team. On December 15, the US Department of the Treasury announced three new leadership hires for the Consumer Financial Protection Bureau's (CFPB) Implementation Team, including Richard Cordray as leader of the enforcement division, Leonard Chanin as leader of the rule writing team, and David Silberman as leader of the card markets division. Richard Cordray is currently Ohio's Attorney General. As the leader of the enforcement division his responsibilities will include building the enforcement team and preparing for the exercise of enforcement. Leonard Chanin is currently Deputy Director of the Federal Reserve Board's Division of Consumer and Community Affairs. As the leader of the rule writing team his responsibilities will include building the rule writing team and developing initial proposals. Prior to joining the CFPB Implementation Team, David Silberman served as General Counsel and Executive Vice President of Kessler Financial. For a copy of the press release, please click here.

HUD Launches Investigations of Discrimination Allegations Against 22 Banks and Mortgage Lenders. The U.S. Department of Housing and Urban Development (HUD) has announced that it is launching multiple investigations into the practices of certain mortgage lenders to determine if their home loan policies illegally deny qualified African American and Latino borrowers access to credit. The investigations are in response to 22 complaints that the National Community Reinvestment Coalition (NCRC) filed with HUD. The NCRC had previously sent letters to those banks and mortgage lenders (as reported in *InfoBytes*, November 26, 2010) alleging that the loan activities of those mortgage originators are discriminatory and advising the banks that the NCRC would file complaints with HUD. NCRC claims that the institutions' home lending practices deny FHA-insured loans to African Americans and Latinos with credit scores as high as 640 despite Federal Housing Administration (FHA) guidelines, which permit mortgages to borrowers with credit scores above 580, provided the borrowers make down payments of at least 3.5 percent of the loan amount, or credit scores above 500, provided the borrowers make down payments of at least 10 percent of the loan amount. For the complete HUD press release announcing these investigations, see http://1.usa.gov/expjWp.

Federal Reserve Board Proposes Rules to Amend Regulations Z and M. On December 13, the Federal Reserve Board (Board) proposed two rules that would expand consumer protection regulations to cover credit transactions and leases of higher dollar amounts. Currently, consumer loans of more than $25,000 are exempt from the Truth in Lending Act (TILA) and consumer leases exceeding $25,000 are exempt from the Consumer Leasing Act (CLA). The Dodd-Frank Act requires that the protections of the TILA and the CLA apply to consumer credit transactions and leases up to $50,000. This amount will be adjusted annually to reflect increases in the Consumer Price Index. Accordingly, the proposed rules would amend Regulation Z (Truth in Lending) and Regulation M (Consumer Leasing) to implement this change. Public comments may be submitted by the later of 30 days after publication in the *Federal Register* or February 1, 2011. For a copy of the press release, see http://www.federalreserve.gov/newsevents/press/bcreg/20101213a.htm.

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State Issues

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$430,955.10. High cost home loans in New Jersey are subject to additional lender requirements under the New Jersey Home Ownership Security Act of 2002. When the New Jersey Home Ownership Security Act of 2002 (Act) became effective in 2003, the maximum principal amount that would trigger the "high cost home loan" provisions of the Act was $350,000. Pursuant to a requirement in the Act to annually review and, if necessary, adjust the maximum principal amount that will trigger the "high cost home loan" provisions of the Act, the maximum principal amount was last adjusted in 2008 to $428,615.60. The Department made the adjustment to $430,955.10. The Department made this adjustment based upon the United States Department of Labor, Bureau of Labor Statistics' Consumer Price Index for the New York - Northern New Jersey Region. This increase in the definition of a high cost home loan is effective for all completed loan applications received by a lender on or after January 1, 2011. For a copy of the bulletin, please see http://www.state.nj.us/dobi/bulletins/blt10_33.pdf.

Courts

New York District Court Dismisses RESPA Excessive Fee and Illegal Kickback Claim against Title Insurers. The United States District Court of the Eastern District of New York dismissed a class-action suit alleging excessive title insurance rates in violation of the Real Estate Settlement Procedures Act (RESPA), because the defendants and their title agents performed actual services and because the claims were barred by the filed-rate doctrine. *Galiano v. Fidelity National Title Insurance Co., et al.*, No. 08-CV-4711, (E.D.N.Y. Nov. 8, 2010). The plaintiffs claimed that the defendant title insurers illegally based a portion of their title insurance rates on illegal fee splitting arrangements and illegal kickbacks in violation of RESPA. The court disagreed, noting that RESPA's fee prohibitions are subject to RESPA's "safe-harbor" provision, which makes clear that when actual services are performed, RESPA's fee prohibitions do not apply. In the defendants' fee-splitting arrangement, the title insurer and the title agentperformed "*bona fide*" services (such as title searches and examinations), which made them exempt from RESPA's fee prohibitions. Moreover, the court held that the filed-rate doctrine, which establishes that "rates filed with a regulatory agency" are "*per se* reasonable and unassailable in judicial proceedings," bars plaintiff's RESPA claim. The defendants filed their rates with the New York Insurance Department and the court determined that because the plaintiffs only paid the filed rate and were alleging that the filed rate was excessive because a portion of it was earmarked-when filed-for illegal kickbacks, the court had to dismiss the claim because the kickback allegations were already rejected on the grounds that actual services were provided for the payments. The payments, therefore, could not be illegal kickbacks that that would bar the filed-rate doctrine's applicability. For a copy of the opinion, please click here.

Court Grants Default Judgment in FACTA Truncation Case, But Denies Class Certification. On December 3, a Florida federal court adjudicating a "truncation" violation claim under the Fair and Accurate Credit Transactions Act (FACTA) granted default judgment for the plaintiff but denied class certification. *Ehren v. Moon, Inc.*, No. 09-21222, 2010 WL 5014712 (S.D. Fla. 2010). In this case, the defendant business provided a receipt that failed to redact the plaintiff's credit card number and expiration date, and the court, after the defendant's failure to appear, granted the plaintiff's motion for default judgment. Notably, however, the court refused to certify the class action in the case. In examining whether certification was proper under Federal Rule of Civil Procedure 23, the court cited the fact that because the complaint had no indication of actual damages, "the aggregated relief could be oppressive in consequence and difficult to justify." As such, the court found that certifying the class would not be superior to other methods of litigation, and noted that adequate alternatives under FACTA for incentivizing plaintiffs to bring suit still exist. For a copy of the opinion, please click here.

Eleventh Circuit Holds That Money Owed to PayPal Constituted A Debt That Is Subjected To The Federal Debt Collection Practices Act. On December 7, the U.S. Court of Appeals for the Eleventh Circuit found that a "debt" existed for purposes of the Federal Debt Collection Practices Act (FDCPA) and the Florida Consumer Collection Practices Act (FCCPA) when an individual using PayPal to sell a personal laptop was required to repay PayPal when PayPal reversed the payment made to the seller's account upon discovering that the purchaser of the laptop remitted fraudulent funds. *Oppenheim v. I.C. System, Inc.*, No. 8:09-cv-00497 (11th Cir. Dec. 7, 2010). Plaintiff sold items online by acquiring services offered by PayPal, which facilitates online sales by accepting funds from a buyer and depositing those funds into a seller's account. Plaintiff sold a laptop using PayPal. The laptop buyer deposited funds into plaintiff's PayPal account, which plaintiff then transferred to his bank account. PayPal notified plaintiff that the laptop buyer's payment was fraudulent and PayPal never received the funds from the buyer. PayPal thus "reversed" the laptop transaction. Pursuant to plaintiff's contractual agreement with PayPal, plaintiff was required to reimburse PayPal for the amount of funds plaintiff transferred from his PayPal account. Plaintiff refused to repay PayPal, which then retained defendant to recover the funds from plaintiff. After defendant made a series of phone calls to plaintiff, plaintiff sued defendant, alleging harassment and misrepresentations and bringing claims under the FDCPA, the Florida analogue of the FDCPA, and the common law invasion of privacy. The district court granted defendant's motion for summary judgment on the invasion of privacy claim, denied summary judgment on the two statutory claims, and ultimately found for plaintiff on the merits. On appeal of the summary judgment motion, the 11th Circuit explained that to recover under the FDCPA, a plaintiff must show that the money being collected constitutes a "debt" as defined by the FDCPA. The mere obligation to pay does not amount to a debt, but rather a debt arises when there is a payment owed by (i) a consumer arising out of (ii) a transaction that is (iii) primarily for personal, family, or household purposes. The 11th Circuit held that plaintiff was a consumer because the relevant issue was not plaintiff selling his laptop, but plaintiff acquiring PayPal's services. A transaction occurred because plaintiff bought PayPal's services. Defendant waived the issue of whether the transaction was personal because defendant did not raise the issue in its initial brief; the court still held in dicta that the transaction was personal because plaintiff did not run a business, registered his PayPal account as a personal account, and sold a laptop that was a personal, rather than business, item. The court applied the same reasoning in finding that a debt occurred for purposes of the Florida analogue to the FDCPA, because the Florida statute used the same definition for "debt." For a copy of the opinion, please click here.

Supreme Court Refuses to Hear Challenge to Standard of Review Applicable to Arbitration Rewards. On December 13, the U.S. Supreme Court denied a petition for certiorari to hear a case in which the U.S. Court of Appeals from the Ninth Circuit reversed a district courts vacatur of an arbitration award and held that the district court improperly applied the "manifest disregard of the law" standard in reviewing and vacating the award. Certain *Underwriters at Lloyd's, London v. Lagstein*, 607 F.3d 634 (9th Cir. 2010) *cert. denied*, No. 10-534. In that case, after two years of unsuccessful attempts to collect disability benefits under the terms of his insurance policy, the plaintiff sued his insurance underwriters in federal court. The district court stayed the case while the parties entered into binding arbitration pursuant to the terms of the disability policy. The arbitration culminated with a $6 million dollar award to the plaintiff for unpaid claims, emotional distress, and punitive damages. The defendant-insurers appealed the arbitration award in district court, which vacated the award on the ground that it was excessive and in "manifest disregard of the law." The plaintiff then appealed to the Ninth Circuit, which reversed the district court's vacatur, stating that the district court erred in concluding that the size of the arbitration award demonstrated manifest disregard of the law. The Ninth Circuit noted that in order to vacate an arbitration award on the basis of "manifest disregard of the law," it must be clear from the record that the arbitrators recognized the applicable law and then ignored it, and the district court failed to cite any applicable law that the panel recognized and ignored. Although the "manifest disregard of the law" standard predominates in the arbitration setting, it is not included in the official list of legal grounds for overturning arbitration awards that is set out in the Federal Arbitration Act (FAA). Application of the standard is thus presumptively at odds with previous Supreme Court decisions that prohibit expanding the scope of judicial review under the FAA by consent. Despite the manifest conflict in the law, the Supreme Court denied certiorari. For a copy of the Ninth Circuit's decision, please click here.

Firm News

James Parkinson will speak in the Strafford web conference, "The FCPA's Exception and Affirmative Defenses: Complying with the Requirements for Gifts, Hospitality, and Facilitation Payments" at 1pm EST on December 21. This 75-minute CLE webinar will provide guidance to counsel for U.S. Companies conducting business internationally on navigating the facilitation-payment exception and affirmative defenses under the FCPA in order to avoid violations and penalties.

James Parkinson will be speaking at the web conference "FCPA Compliance: Best Practices for Your Anti-Corruption Compliance Program," hosted by National Constitution Center Conferences on January 19, 2011.

Donna Wilson will be speaking at the ACI Privacy & Security of Consumer & Employee Information Conference on January 25-26, 2011 in Washington, DC. The topic will be "Responding to the Latest Cyber Threats: Mobile Workforces, Technology, Data Thefts, and Cloud Computing."

Andrew Sandler will be speaking at the American Conference Institute's 10th Annual Advanced Forum on Consumer Finance Class Actions & Litigation on January 27, 2011 at 11am. The conference is taking place at The Helmsley Park Lane Hotel, 36 Central Park South, NYC. The topic will be Emerging Federal and State Regulatory and Enforcement Initiatives: FTC, DOJ, SEC, FRB, and State AGs Perspectives. Also on the panel with Andy will be Attorney General William Sorrell, AG, State of Vermont and Attorney General Greg Zoeller, AG, State of Indiana.

Miscellany

United States Files Civil Suit Alleging Mortgage Fraud Conspiracy Among 14 Lenders, Sellers, and Appraisers. On December 13, the U.S. Attorney's Office for the Southern District of New York filed a civil lawsuit against fourteen lenders, home sellers, and appraisers, alleging that the defendants conspired to sell at least 17 homes at vastly inflated prices, to finance loans to the buyers knowing that they could not afford the sale prices, and to make false statements about eligibility for Department of Housing and Urban Development (HUD) insurance. The appraiser co-conspirators allegedly filed false appraisal reports to further the scheme. The suit alleges fifteen violations of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as well as two violations of the False Claims Act for fraudulent claims to HUD for mortgage insurance. The suit also seeks an injunction against one seller and his company for continuing to fraudulently flip homes at inflated prices. For a copy of the press release, please click here.

Mortgages

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Banking

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Litigation

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