BURR FORMAN

DODD-FRANK NEWS

November 2013

The Dodd-Frank Wall Street Reform and Consumer Protection Act was enacted as a measure to promote financial stability and protection for consumers through increased regulation of nearly every aspect of the consumer finance industry. In the two years since its enactment, the Dodd-Frank Act has led to significant industry reforms and the promulgation of numerous new laws and regulations. In an effort to stay apprised of these significant industry changes, Burr & Forman's Dodd-Frank Newsletter will serve as a periodic update of recent case law, news, and developments related to the Dodd-Frank Act.

- - RECENT CASES - -

Dodd-Frank Prohibition on Arbitration

Weller v. HSBC Mortgage Services, Inc., No. 13-cv-00185-REB-MJW, -- F. Supp. 2d -- , 2013 WL 4882758 (D. Colo. Sept. 11, 2013).

The U.S. District Court for the District of Colorado recently held that the Dodd-Frank Act did not apply retroactively to nullify an arbitration agreement contained in a mortgage loan contract.

In *Weller*, the plaintiff mortgagor brought a putative class action alleging violations of the civil RICO statute and Truth in Lending Act, breach of contract, and other claims arising from the mortgagee's "force placement" of insurance on the mortgaged property. The mortgagee moved to compel arbitration pursuant to an arbitration agreement entered by the parties upon execution of the plaintiff's loan contract.

Plaintiff argued the arbitration agreement was unenforceable pursuant to section 1639c(e)(3) of the Dodd-Frank Act, which provides that "[n]o provision of any residential mortgage loan . . . shall be applied or interpreted so as to bar a consumer from bringing an action in an appropriate district court of the United States, or any other court of competent jurisdiction . . ." 15 U.S.C. § 1639c(e)(3). Importantly, however, the effective date of the Dodd-Frank amendment was July 21, 2010, several years after the plaintiff executed the arbitration agreement at issue. The Court, therefore, turned to whether the Dodd-Frank amendment could be applied retroactively.

Finding in the negative, the Court first noted that "Congress did not specifically articulate a clear intent to give section 1639c(e)(3) of the Dodd-Frank Act retroactive effect." 2013 WL 4882758 at *3. It then addressed whether retroactive application of the amendment would "affect substantive rights, liabilities, or duties arising from conduct prior to the date of enactment." *Id.* While noting there is "a split in authority among the district courts that have considered retroactive application of the Dodd-Frank amendments governing arbitrability," the Court ultimately agreed with decisions finding that "the right to insist on arbitration is not just a matter of where the claims may be heard but a question of vested, contractual rights, which may not be retroactively withdrawn absent clear congressional intent to that effect." *Id.* at *4 (citing cases). Thus, the Court held the Dodd-Frank amendments did not operate retroactively to nullify the plaintiff's arbitration agreement. *Id.*

Statutory Damages Under TILA

Zevon v. Department Stores Nat'l Bank, No. 12 Civ 7799(PAC), 2013 WL 5903024 (S.D.N.Y. Nov. 4, 2013).

The U.S. District Court for the Southern District of New York recently held that the increased statutory cap on class action damages under the Truth-in-Lending Act ("TILA") became effective January 21, 2013, rather than upon the Dodd-Frank's enactment.

Plaintiff Marcy Zevon filed suit against Department Stores National Bank ("DSNB") alleging DSNB violated TILA and Regulation Z by failing to include the full text of Regulation Z's model billing rights notice in monthly statements sent to Macy's credit card holders. DSNB moved to dismiss or, in the alternative, strike Plaintiff's request for $1,000,000 in statutory damages.

DSNB first argued that Plaintiff's complaint should be dismissed because even if DSNB did violate Regulation Z's requirements for short-form notices, plaintiff was not entitled to statutory damages for that violation because short-form notices are only mentioned in Regulation Z, and not in any of the provisions of 15 U.S.C. § 1640(a) governing damages under TILA. Although noting that "[c]ourts routinely disallow statutory damages for violations of TILA provisions that are not enumerated in Section 1640(a)," the Court rejected DSNB's argument. 2013 WL 5903024 at *3. Specifically, the Court held that "if a violated provision [of Regulation Z] was promulgated pursuant to an enumerated statute," an award of statutory damages would be appropriate. *Id.* Section 1637(a)(7) of TILA requires creditors to provide "[a] statement, in a form prescribed by regulations of the Bureau." Although not originally contemplated by the statute, the CFPB "had the authority to make an 'adjustment' designed to 'effectuate the purposes of TILA' and did so in providing for this alternative form." *Id.* Thus, the Court held that because the violated provision, 12 C.F.R. § 1026.9(a), was promulgated pursuant to 15 U.S.C. § 1637(a)(7), a provision enumerated in 15 U.S.C. § 1640(a), statutory damages were available for its violation. *Id.* at *4.

Finding that damages were potentially available, the Court turned to the extent of those damages. As part of the Dodd-Frank Act, Congress increased the ceiling for statutory damages in class actions under TILA from $500,000 to $1,000,000. DSNB argued, however, that the increased cap should not apply because it was not effective until January 21, 2013, more than three months after Plaintiff filed her Complaint. In response, Plaintiff argued that the increased cap should be considered effective as of the day after the Dodd-Frank Act was enacted, or July 22, 2010. Finding the text of the Act ambiguous regarding the proper effective date, the Court considered the Dodd-Frank's legislative history, specifically the testimony of Senator Chris Dodd explaining that "[i]t is the intention of the conferees that provisions in title XIV that do not require regulations become effective no later than 18 months after the designated transfer to the CFPB." 2013 WL 5903024 at *5. Thus, the Court held that "the new ceiling went into effect on January 21, 2013" and did not apply retroactively. Because Plaintiff brought her Complaint before the $1,000,000 statutory cap was in place, the Court found "she is not entitled to its benefit." *Id.*

Preemption

Henning v. Wachovia Mortg., FSB, No. 11-11428-WGY, 2013 WL 5229837 (D. Mass. Sept. 17, 2013).

The U.S. District Court for the District of Massachusetts recently agreed with numerous decisions of other courts finding that the preemption provisions of the Dodd-Frank Act do not apply retroactively.

Plaintiff, a mortgagor, filed suit against Wachovia Mortgage raising a number of claims based on Wachovia's purported wrongful conduct in providing him with a subprime stated-income loan knowing that he would likely default. After removal, Wachovia moved to dismiss based on preemption, arguing that the Court should apply the preemption standards under HOLA and its implementing regulations, 12 C.F.R. § 500-99, which occupied the field of federal lending regulation at all times relevant to plaintiff's claims. Plaintiff argued the Court should instead interpret HOLA preemption in light of the Dodd-Frank Act.

The Court noted that following the "mortgage meltdown," Congress enacted the Dodd-Frank and "significantly diminished the extent to which HOLA and its implementing regulations may preempt state law." 2013 WL 5229837 at *5. Importantly, however, "the provisions of Dodd-Frank are not retroactive." *Id.* Thus, while noting that courts are split on the exact date the Dodd-Frank preemption provisions became effective, the Court held that "HOLA preemption applies to mortgages originated before either July 21, 2010 or July 21, 2011." *Id.* Because Plaintiff's loan at issue in the case originated in 2006, the Court found it did not need to weigh in on the exact date of effectiveness, and the "appropriate preemption standard to apply to [Plaintiff's] claims is that extant prior to the effective date of Dodd-Frank." *Id.*

New Mexico v. Capital One Bank (USA), N.A., No. 12cv00513 WJ/RHS, -- F. Supp. 2d --, 2013 WL 5874318 (D.N.M. Oct. 29, 2013).

The U.S. District for the District of New Mexico recently clarified that both field and express preemption theories continue to apply to National Bank Act ("NBA") regulations after the enactment of the Dodd-Frank Act.

New Mexico's Attorney General filed suit against Capital One Bank (USA), N.A. alleging violations of the New Mexico Unfair Practices Act ("NMUPA") and a federal disclosure regulation enacted under the Dodd-Frank Act related to the sale and administration of payment protection plans and credit monitoring plans. Capital One moved to dismiss, arguing (1) the State had failed to adequately state its claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure; and (2) the NMUPA claim was preempted by federal law.

Finding initially that both claims were adequately pled, the Court turned to whether the NMUPA claim was preempted under the NBA. The State argued that the only preemption analysis which could apply to NBA claims is conflict preemption, relying on *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25 (1996), and 12 U.S.C. § 25b, which was enacted as part of the Dodd-Frank Act. The Court disagreed, noting that "*Barnett* does not preclude the application of the other two theories of preemption to banking regulation" and nothing in 12 U.S.C. § 25b states that only conflict preemption applies. 2013 WL 5874318 at *6. Rather, the Court found that § 25b's reference to conflict preemption "is simply meant to clarify that if conflict preemption is used, the standard set forth in *Barnett* is the correct standard to apply." *Id.* Further, nothing in the OCC regulations provide a basis for arguing that conflict preemption is the only standard, as 12 C.F.R. § 7.4008(e) "does not stand for this proposition; it simply states the areas of law that are not expressly preempted." *Id.*

Accordingly, the Court held that "[f]ield and express preemption theories continue to apply to NBA regulations even after the enactment of the Dodd-Frank Act," and, therefore, "other 'fields' under the NBA besides banking as a whole may be preempted." *Id.* at *7. Indeed, the Court noted that there are "a number of instances where the NBA and the regulations enacted to enforce it include express preemption." *Id.* (citing 12 C.F.R. §§ 37.1(c), §7.4008(d)).Thus, while acknowledging other courts have held that express and field preemption do not apply to a preemption analysis of the NBA, the Court concluded these cases "ignore basic statutory construction."

Based on this finding, the Court undertook an analysis of whether the NBA and the regulations enacting its goals preempted Plaintiff's NMUPA claim under all three theories -- conflict preemption, field preemption, and express preemption -- and ultimately held the State's NMUPA claim was preempted as pled and should be dismissed without prejudice.

Declaratory Relief

Turpin v. Bank of America, N.A., No. 2:12-cv-01694-GMN-PAL, 2013 WL 5308244 (D. Nev. Sept. 19, 2013).

In a concise opinion, the U.S. District Court for the District of Nevada recently found the Dodd-Frank Act provided no support for plaintiffs' request for a declaratory judgment regarding a lender's obligations to establish a claim of interest in a borrower's property.

The plaintiffs in *Turpin* claimed defendant Bank of America did not hold any interest in two properties owned by plaintiffs and sought a declaratory judgment pursuant to the Nevada Uniform Declaratory Judgment Act that Bank of America was "required to show original loan documentation, proof of legality of ownership, including Chain of Title." 2013 WL 5308244 at *1-2. As support for their request, the plaintiffs referred to the Dodd-Frank Act, the "Volcker Rule," and the National Mortgage Settlement.

Bank of America moved to dismiss, providing publicly recorded copies of the Deed of Trust and Assignment for each of the two properties at issue in support. Based on these documents, the Court held it could not "find that any genuine uncertainty or controversy has been pleaded by Plaintiffs so as to justify the Court's exercise of discretion in entering declaratory judgment." *Id.* at *3. It further explained that "Plaintiffs' references to the 'Dodd-Frank Wall Street Reform and Consumer Protection Act,' the 'Volcker Rule,' and 'The National Mortgage Settlement' also provide no support for

Plaintiffs' request." *Id.* Accordingly, because there was no "factual basis to support Plaintiffs' apparent claim that Bank of America has asserted an illegitimate claim to the properties," the Court granted the motion to dismiss.

HAMP Claims

Perino v. Wells Fargo Bank, N.A., No. 12-cv-15182, 2013 WL 5340800 (E.D. Mich. Sept. 23, 2013).

The U.S. District Court for the Eastern District of Michigan recently held that nothing under the Dodd-Frank Act could support plaintiffs' claim based on allegations that a lender failed to comply with obligations under the Home Affordable Modification Program ("HAMP").

In *Perino*, plaintiffs asserted a number of claims against their lender, Wells Fargo Bank, following the foreclosure on their home. On Wells Fargo Bank's motion to dismiss or for summary judgment, the Court initially held the plaintiffs lacked standing to challenge the assignment of the mortgage from MERS to Wells Fargo Bank, and that the plaintiffs' post-redemption challenge to the foreclosure sale was without merit. 2013 WL 5340800 at *4-6. It then turned to the plaintiffs' claim under the Dodd-Frank Act.

Plaintiffs' complaint sought "equitable, declaratory and injunctive relief" purportedly under the Dodd-Frank Act, though it did not cite any specific provision of the Act under which the plaintiffs so moved. In their response to Well Fargo Bank's motion to dismiss, however, the plaintiffs indicated they were basing their claim on the Bank's alleged obligation under HAMP "to make certain disclosures when denying a request for loan modification." *Id.* at *8. Rejecting this argument, the Court first noted that "[n]o private right of action is available under HAMP." *Id.* Further, "[i]t is equally well-established that Plaintiffs cannot claim to be third party beneficiaries of the HAMP agreements." *Id.* Thus, the Court concluded the plaintiffs failed to plead any plausible claim for relief under the Dodd-Frank Act based on their HAMP allegations. *Id.*

Because the Court further found that plaintiffs' breach of contract and Michigan Consumer Protection Act claims were without merit, it granted Wells Fargo Bank's motion and dismissed the plaintiffs' complaint in its entirety. *See id.* at *10.

Constitutional Challenge to Dodd-Frank

Morgan Drexen, Inc. v. Consumer Financial Protection Bureau, No. 12-01112, -- F. Supp. 2d --, 2013 WL 5664696 (D.D.C. Oct. 17, 2013).

Plaintiffs Morgan Drexen, Inc., a paralegal services company, and Connecticut attorney Kimberly A. Pisinski recently filed suit against the Consumer Financial Protection Bureau ("CFPB") alleging that Title X of the Dodd-Frank Act, 12 U.S.C. §§ 5841 *et seq.*, is unconstitutional as a violation of separation of powers principles. Specifically, plaintiffs argued the CFPB overstepped its authority by asking Ms. Pisinski and Morgan Drexen to hand over information related Ms. Pisinski's clients which Morgan Drexen and Pisinski considered to be protected by the attorney-client privilege. The CFPB moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim.

With respect to subject matter jurisdiction, the CFPB argued that because Morgan Drexen could obtain complete relief on its constitutional claim in the CFPB's pending enforcement action against it in the Central District of California, injunctive and declaratory relief in the District of Columbia would be inappropriate. The CFPB further argued that Ms. Pisinski lacked Article III standing to pursue her claims against the Bureau.

The Court agreed with the CFPB, finding that Morgan Drexen had failed to establish the absence of an adequate remedy at law or the existence of irreparable harm as required for a claim of injunctive relief. Specifically, Morgan Drexen had an adequate remedy at law because it could move to dismiss the pending enforcement action in California on the basis of unconstitutionality, and the harm alleged by Morgan Drexen could be remedied by a favorable ruling in the California proceeding. *See* 2013 WL 5664696 at *5. Further, the inquiry into whether Morgan Drexen was entitled to injunctive relief was not, as argued by Morgan Drexen, one of statutory interpretation, but rather, "requires the application of long-standing equitable principles." *Id.* at *7. Finally, the Court rejected Morgan Drexen's argument that denying injunctive relief would "permit[] the CFPB to adjudicate constitutional challenges 'on its own terms,'" as the Court's denial of injunctive relief was limited to the specific facts of the present case and would "hardly require[] that all plaintiffs seeking to challenge the CFPB's constitutionality must do so as a defense in a Bureau enforcement action." *Id.*

Turning to Morgan Drexen's request for declaratory relief, the Court similarly found that "the balance of the relevant factors counsels against exercising jurisdiction over this action," as adjudication of the action would not "finally settle the controversy between the parties" and Morgan Drexen had other remedies available because it could raise its constitutional claim in the California proceeding. *Id.* at *8-9.

Finally, the Court found that Ms. Pisinski, who was not a party to the California enforcement action, did not have standing to bring a constitutional challenge to the CFPB's existence. First the Court held that Ms. Pisinski had failed to allege standing based on interference with the attorney-client privilege, as any injury arising therefrom was strictly illusory given the Bureau's limitation of its requests to non-privileged materials. Likewise, Ms. Pisinski could not assert standing based on the alleged injury of the CFPB's interference with the provision of services Ms. Pisinski received from Morgan Drexen, as such an injury is "far too speculative to support standing" and Pisinski had provided no evidence that she would be unable to find a substitute for Morgan Drexen's services. *Id.* at *12. Accordingly, the Court granted the CFPB's motion to dismiss the claims of Morgan Drexen and Pisinski without prejudice.

Whistleblower Protection

Ellington v. Giacoumakis, No. 13-11791-RGS, -- F. Supp. 2d --, 2013 WL 5631046 (D. Mass. Oct. 16, 2013).

The U.S. District Court for the District of Massachusetts recently held the plaintiff, Richard Ellington, sufficiently stated a claim against his former employer based on a termination of his employment in violation of the whistleblower protection provisions of the Dodd-Frank Act, 15 U.S.C. § 78u-6(h)(1).

Plaintiff claimed he was fired because he complained to his employer's compliance officer about violations of certain securities laws. The plaintiff argued these disclosures were protected under the whistleblower provisions of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, which were incorporated into the protections afforded to whistleblowers under the Dodd-Frank Act.

Defendant moved for judgment on the pleadings, arguing that plaintiff complained to the Securities and Exchange Commission ("SEC") only after he was fired, and therefore did not meet the statutory definition of a whistleblower under Dodd-Frank. Rejecting this argument, the Court adopted the SEC's construction of § 78u-6(h)(1)(B)(i), finding "Congress intended that an employee terminated for reporting Sarbanes-Oxley violations to a supervisor or an outside compliance officer, and ultimately to the SEC, have a private right of action under Dodd-Frank whether or not the employer wins the race to the SEC's door with a termination notice." 2013 WL 5631046 at *3. Accordingly, the Court found plaintiff adequately stated a clam under the Dodd-Frank Act and denied defendant's motion for judgment on the pleadings.

- - NEWS & DEVELOPMENTS - -

CFPB Issues Final Interpretive Rule Regarding Homeownership Counseling

On November 14, 2013, the CFPB issued a final rule interpreting the requirement under Dodd-Frank and its implementing regulations that lenders provide a list of homeownership counseling organizations.

Specifically, the rule describes how lenders may comply with this requirement by utilizing a database maintained by the Department of Housing and Urban Development ("HUD"). The HUD database contains a number of data fields related to each homeownership counseling organization, and is accessible through a publicly-available application programming interface ("API").

The final rule becomes effective January 10, 2014.

For more information, visit: https://www.federalregister.gov/articles/2013/11/14/2013-27300/homeownership-counseling-organizations-lists-interpretive-rule

CFPB Holds Forum on Indirect Auto Lending

On November 14, 2013, the CFPB held a forum on indirect auto lending. While the CFPB lacks jurisdiction over auto dealers, it does have the authority to regulate indirect auto financiers, and has been expanding its regulatory reach into this industry.

At the forum, director Cordray discussed his concern about discrimination in the auto lending industry, and encouraged auto lenders to develop compliance programs and practices to avoid unfair lending. Such practices might include, according to Cordray, a flat fee charged per transaction, or a fixed percentage charged based upon the amount borrowed.

To read Cordray's remarks, visit: http://www.consumerfinance.gov/newsroom/director-cordray-remarks-at-the-cfpb-auto-finance-forum/

CFPB Issues Advance Notice of Proposed Rulemaking Regarding Debt Collection

On November 12, 2013, the CFPB issued an advance notice of proposed rulemaking regarding debt collection.

According to the CFPB, significant consumer protection problems related to debt collection have persisted despite the enactment of the Fair Debt Collection Practices Act ("FDCPA"). The CFPB notes that the FTC has received more complaints about debt collectors than any other industry in the past several years.

Moreover, the CFPB notes that it is unclear whether, and to what extent, the FDCPA applies to new technological developments, such as email and text messaging. The CFPB believes that rulemaking which accounts for these new technologies would improve protection for consumers while reducing uncertainty for debt collectors.

Additionally, the CFPB intends to consider whether creditors collecting in their own names should continue to be excluded from the purview of federal debt collection laws. The CFPB notes that the FTC has been receiving tens of thousands of complaints each year related to first-party collection efforts.

In light of these concerns, the CFPB is exploring rulemaking proceedings in an attempt to improve the debt collection market, and is seeking public comment about debt collection practices. The deadline for submitting comments is February 10, 2014.

To learn more, visit: https://www.federalregister.gov/articles/2013/11/12/2013-26875/debt-collection-regulation-f

CFPB Releases Online Homeownership Counseling Tool and Regulatory Guidance

On November 8, 2013, the CFPB issued a bulletin providing guidance to lenders regarding the homeownership counseling list requirement contained in the 2013 mortgage final rules.

The 2013 mortgage final rules require lenders to provide a written list of HUD-approved counseling agencies to applicants for federally-related mortgages. A lender may fulfill this requirement by either (1) obtaining the lists through the CFPB's website or (2) generating the lists on its own using the CFPB's database.

Lenders who intended to utilize the second approach advised the CFPB that developing a system to interact with the CFPB's database may take up to six months. Therefore, the CFPB has advised lenders who intend to use this approach to direct borrowers to the CFPB using the following text:

> Housing counseling agencies approved by the U.S. Department of Housing and Urban Development (HUD) can offer independent advice about whether a particular set of mortgage loan terms is a good fit based on your objectives and circumstances, often at little or no cost.
>
> If you are interested in contacting a HUD-approved housing counseling agency in your area, you can visit the Consumer Financial Protection Bureau's (CFPB) website, www.consumerfinance.gov/find-a-housing-counselor, and enter your zip code.
>
> You can also access HUD's housing counseling agency website via www.consumerfinance.gov/mortgagehelp.
>
> For additional assistance with locating a housing counseling agency, call the CFPB at 1-855-411-CFPB (2372).

According to the CFPB, “These steps, if taken by lenders in good faith while they are building their systems or are working with vendors to build systems, would achieve the goals of the regulation and would not raise supervisory or enforcement concerns.”

To read the bulletin, visit: http://files.consumerfinance.gov/f/201311_cfpb_bulletin_homeownership-counseling-list-requirements.pdf

To view the online homeownership counseling tool, visit: http://www.consumerfinance.gov/find-a-housing-counselor/

CFPB Issues Semi-Annual Report to Congress

The CFPB recently released its semi-annual report to Congress, providing an update on the agency's activities and accomplishments during the spring and summer of 2013.

The report begins by discussing challenges consumers face in obtaining financial services. Over the past year, the CFPB has received more than 100,000 complaints from consumers, half of which were related to mortgage products, twelve percent of which were related to credit card products, and twelve percent of which were related to credit reporting.

The majority of mortgage-related complaints were related to loan modification, collection, and foreclosure. Many of the credit card related complaints involved billing disputes. Consumers have also voiced numerous frustrations about a lack of clarity in credit scoring methodology.

The report then discusses the steps the CFPB intends to take to level the playing field for consumers, including educational programs, outreach efforts, and regulatory programs.

To read the report, visit: http://files.consumerfinance.gov/f/201311_cfpb_semi-annual-report.pdf

CFPB Issues Updated Regulation E Examination Procedures

On October 30, 2013, the CFPB issued updated examination procedures for Regulation E, the implementing regulation for the Electronic Fund Transfer Act (“EFTA”). The EFTA exists to protect consumers engaging in electronic funds transfers and remittance transfers.

To read the updated examination procedures, visit: http://files.consumerfinance.gov/f/201310_cfpb_updated-regulation-e-examination-procedures_including-remittances.pdf

CFPB Director Cordray Remarks to Mortgage Bankers Association

On October 28, 2013, CFPB director Richard Cordray issued remarks at the Mortgage Bankers Association Annual Convention. Cordray discussed the ability-to-repay and qualified mortgage rules, and estimated that over 95 percent of mortgages being issued in today’s market would constitute qualified mortgages as defined by the rules.

To read Cordray’s remarks, visit: http://www.consumerfinance.gov/newsroom/director-cordray-remarks-at-the-mortgage-bankers-association-annual-convention/

CFPB Issues Interim Final Rule Amending 2013 Mortgage Rules

On October 23, 2013, the CFPB published an interim final rule amending the 2013 mortgage rules, including Regulation X of the Real Estate Settlement Procedures Act (“RESPA”), Regulation Z of the Truth in Lending Act (“TILA”), and Regulation X of the Homeownership Counseling Amendments to RESPA. The purpose of the final rule is to clarify compliance requirements as they relate to the Fair Debt Collection Practices Act (“FDCPA”) and bankruptcy law.

The FDCPA places limitations on how a servicer may communicate with a debtor after he or she has sent a cease and desist request. Similarly, bankruptcy law restricts how a servicer may communicate with a debtor after he or she has filed for bankruptcy. However, certain provisions of the Dodd-Frank Act require that servicers send certain communications to debtors even after the debtor has sent a cease and desist request or filed for bankruptcy.

In order to clarify how these laws interact, the final rule creates exemptions for certain types of communications. If a debtor has sent a cease and desist request, a lender is exempt from notices of rate change for adjustable-rate mortgages under section 1026.20(c) and the early intervention requirements of section 1024.39. If a debtor has filed for bankruptcy, a lender is exempt from the early intervention and periodic statement requirements.

The final rule becomes effective January 10, 2014.

For more information, visit: https://www.federalregister.gov/articles/2013/10/23/2013-24521/amendments-to-the-2013-mortgage-rules-under-the-real-estate-settlement-procedures-act-regulation-x

CFPB Issues Remittance Transfer Examination Procedures

On October 22, 2013, the CFPB issued examination procedures related to the Dodd-Frank Act's remittance transfer rules. A "remittance transfer" is an electronic transfer of money from a consumer in the U.S. to a person or business in a foreign country. The Electronic Fund Transfer Act ("EFTA") as amended by the Dodd-Frank Act requires remittance transfer providers to make certain disclosures to consumers regarding fees and exchange rates.

These procedures are to be used in examining the compliance efforts of institutions that provide remittances in the normal course of business. The goals of examination are to assess the quality of an institution's compliance procedures, identify practices that materially increase the risk of noncompliance, and to detect existing violations.

To read the procedures, visit: http://files.consumerfinance.gov/f/201310_cfpb_remittance-transfer-examination-procedures.pdf

CFPB Updates Mortgage Rule Small Entity Compliance Guide

On October 17, 2013, the CFPB released an updated version of its small entity compliance guide for the ability-to-repay and qualified mortgage rules.

Key changes to the guide include what must be considered as "loan originator compensation" in points-and-fees calculation, what must be included as non-consumer payments for purposes of points-and-fees calculation, and what time period must be considered in determining small creditor status.

To read the guide, visit: http://files.consumerfinance.gov/f/201310_cfpb_atr-qm-small-entity_compliance-guide.pdf

CFPB Issues Bulletin on Implementation of 2013 RESPA and TILA Final Rules

On October 15, 2013, the CFPB issued a bulletin entitled "Implementation Guidance for Certain Mortgage Servicing Rules," intended to provide guidance to lenders in implementing certain of the 2013 final mortgage rules.

Specifically, the bulletin provides guidance on policies and procedures servicers must maintain regarding communications with any successor in interest of a deceased borrower, communication with borrowers under the early intervention rule, and servicers' duties to provide certain notices to borrowers who have invoked the cease and desist provisions of the FDCPA.

To read the bulletin, visit: http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf

CFPB Issues Bulletin Regarding Home Mortgage Disclosure Act and Reg C

On October 9, 2011, the CFPB issued a bulletin intended to provide guidance to lenders on complying with the Home Mortgage Disclosure Act ("HMDA") and its implementing regulation, Regulation C.

Specifically, the bulletin provides guidance on how lenders may effectively structure HMDA compliance management systems, announces the CFPB's HMDA resubmission schedule and guidelines, and discusses factors the CFPB may consider in deciding whether to pursue an enforcement action.

To read the bulletin, visit: http://files.consumerfinance.gov/f/201310_cfpb_hmda_compliance-bulletin_fair-lending.pdf

CFPB Issues Final Rule Addressing Best Practices for Temporary Cease-and-Desist Orders

On September 26, 2013, the CFPB issued an interim final rule regarding temporary cease and desist orders ("TCDOs") issued pursuant to section 1053(c) of the Dodd-Frank Act. In developing the final rule, the CFPB considered procedures used by other agencies in responding to cease and desist requests. The final rule most closely resembles the approach used by the FDIC.

The purpose of the final rule is to clarify the basis for issuance of a TCDO; the content, scope, and form of a TCDO; procedures and remedies related to a TCDO; and the rights of persons subject to a TCDO.

The final rule became effective immediately on September 26, 2013.

For more information, visit: https://www.federalregister.gov/articles/2013/09/26/2013-23229/rules-of-practice-for-issuance-of-temporary-cease-and-desist-orders

Numerous Agencies Issue Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults

On September 24, 2013, the Federal Reserve, CFTC, CFPB, FDIC, FTC, NCUA, OCC, and SEC jointly issued guidance clarifying the applicability of privacy provisions of the Gramm-Leach-Bliley Act ("GLBA") to reporting of suspected financial exploitation of older adults.

Under the GLBA, the general rule is that a financial institution may not disclose nonpublic personal information about a consumer to any nonaffiliated third party unless it first complies with certain notice and opt-out provisions. However, certain state and federal laws encourage or require employees of financial services providers to report suspected financial exploitation of older adults.

The guidance clarifies that reporting of such suspected elder abuse is not a violation of the GLBA. Moreover, the guidance notes that many of the GLBA's exceptions--for instance, disclosures required in order to comply with other laws-- would permit the reporting of elder abuse.

To read the guidance, visit: http://files.consumerfinance.gov/f/201309_cfpb_elder-abuse-guidance.pdf

- - ABOUT THE EDITORS - -

David A. Elliott

Partner, Litigation

Ph: (205) 458-5324 ● delliott@burr.com

About David: David serves as chair of the firm's Financial Services Litigation practice group, and has represented banks, finance companies and mortgage companies in all areas of statutory and common law litigation, as well as in asset based recovery actions. David also has extensive experience with enforcing arbitration agreements and with corresponding litigation before various arbitration associations. David was listed in the *Best Lawyers in America* for 2011 in the field of Commercial Litigation, and for 2012 in Business Litigation and Banking & Finance Litigation. David was also recognized by *Alabama Super Lawyers* for 2011 and 2012 in Business Litigation. David is admitted to practice in Alabama, Florida, and South Carolina.

Rachel B. Cash

Associate, Litigation

Ph: (205) 458-5483 ● rcash@burr.com

About Rachel: Rachel practices in the Financial Services Litigation practice group. She received her J.D., *summa cum laude* from the University of Alabama School of Law, where she was Senior Editor of the Alabama Law Review and was selected as a member of Order of the Coif. Rachel received her B.S., *summa cum laude*, in Real Estate and Finance from Florida State University.

Kristen Peters Watson

Associate, Litigation

Ph: (205) 458-5169 ● kpeters@burr.com

About Kristen: Kristen practices in the firm's Financial Services Litigation practice group. She received her J.D., *magna cum laude*, from the Cumberland School of Law at Samford University, where she served as the Writing Editor of the *Cumberland Law Review*. In addition, she was a Judge Abraham Caruthers Teaching Fellow and a Dean's Merit Scholar. Kristen received her B.A. from the University of Virginia.

E. Jordan Teague

Associate, Litigation

Ph: (205) 458-5488 ● jteague@burr.com

About Jordan: Jordan practices in the firm's Financial Services Litigation practice group. She received her J.D. from Vanderbilt University, where she was the Senior Technology Editor of the *Vanderbilt Journal of Entertainment and Technology Law*. Jordan received her B.A., *magna cum laude,* in Mathematics-Economics from Furman University.

BURR • FORMAN LLP

Alabama • Florida • Georgia • Mississippi • Tennessee

Burr & Forman's Financial Services Litigation Team

NICK AGNELLO	Ft. Lauderdale	(954) 414-6202	nagnello@burr.com
BRIAN BALOGH	Birmingham	(205) 458-5469	bbalogh@burr.com
STEPHEN BUMGARNER	Birmingham	(205) 458-5355	sbumgarner@burr.com
RACHEL CASH	Birmingham	(205) 458-5483	rcash@burr.com
JOHN CHILES	Ft. Lauderdale	(954) 414-6203	jchiles@burr.com
MICHAEL CLEMMER	Birmingham	(205) 458-5476	mclemmer@burr.com
ED COTTER	Birmingham	(205) 458-5130	ecotter@burr.com
KATRINA DANNHEIM	Ft. Lauderdale	(954) 414-6208	kdannheim@burr.com
MATT DEVINE	Orlando	(407) 540-6679	mdevine@burr.com
DAVID ELLIOTT	Birmingham	(205) 458-5324	delliott@burr.com
RACHEL FRIEDMAN	Birmingham	(205) 458-5267	rfriedman@burr.com
ALEX HADDAD	Tampa	(813) 367-5725	ahaddad@burr.com
JACKIE HUTZELL	Birmingham	(205) 458-5181	jhutzell@burr.com
BEN KATZ	Ft. Lauderdale	(954) 414-6209	bkatz@burr.com
JOHN MICHAEL KEARNS	Atlanta	(404) 685-4251	jkearns@burr.com
RICHARD KELLER	Birmingham	(205) 458-5323	rkeller@burr.com
ALAN LEETH	Birmingham	(205) 458-5499	aleeth@burr.com
REID MANLEY	Birmingham	(205) 458-5439	rmanley@burr.com
ZACHARY MILLER	Birmingham	(205) 458-5250	zmiller@burr.com
MATT MITCHELL	Birmingham	(205) 458-5317	mmitchell@burr.com
CHRISTY NASH	Tampa	(813) 367-5751	cnash@burr.com
JOHN NEFFLEN	Nashville	(615) 724-3219	jnefflen@burr.com
CHRISTY PARRISH	Orlando	(407) 540-6627	cparrish@burr.com
FRANK SPRINGFIELD	Birmingham	(205) 458-5187	fspringfield@burr.com
MEGAN STEPHENS	Birmingham	(205) 458-5289	mstephens@burr.com
BRENDAN SWEENEY	Ft. Lauderdale	(954) 414-6210	bsweeney@burr.com
JONATHAN SYKES	Orlando	(407) 540-6636	jsykes@burr.com
LAURA TANNER	Tampa	(813) 367-5758	ltanner@burr.com
JORDAN TEAGUE	Birmingham	(205) 458-5488	jteague@burr.com
JOSHUA THREADCRAFT	Birmingham	(205) 458-5132	jthreadcraft@burr.com
RIK TOZZI	Birmingham	(205) 458-5152	rtozzi@burr.com
BRAD VANCE	Jackson	(601) 709-3456	bvance@burr.com
KRISTEN WATSON	Birmingham	(205) 458-5169	kwatson@burr.com
AMANDA WILSON	Atlanta	(404) 685-4273	awilson@burr.com
JENNIFER ZIEMANN	Atlanta	(404) 685-4336	jziemann@burr.com

ATLANTA
171 Seventeenth Street, NW
Suite 1100
Atlanta, GA 30363
(404) 815-3000

BIRMINGHAM
420 North 20th Street
Suite 3400, Wachovia Tower
Birmingham, AL 35203
(205) 251-3000

FT. LAUDERDALE
Las Olas Centre I
450 East Las Olas Boulevard
Suite 700
Ft. Lauderdale, FL 33301
(954) 414-6200

JACKSON
The Heritage Building
401 East Capitol Street
Suite 100 Jackson, MS 39201
(601) 355-3434

MOBILE
RSA Tower
11 North Water Street
Suite 22200
Mobile, AL 36602
(251) 344-5151

MONTGOMERY
201 Monroe Street
Suite 1950, RSA Tower
Montgomery, AL 36104
(334) 241-7000

NASHVILLE
700 Two American Center
3102 West End Avenue
Nashville, TN 37203
(615) 724-3200

ORLANDO
200 S. Orange Avenue
Suite 800
Orlando, FL 32801
(407) 540-6600

TAMPA
One Tampa City Center
Suite 3200
201 North Franklin Street
Tampa, FL 33602
(813) 221-2626