Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

September 18, 2010

Topics In This Issue

Federal Issues

FDIC Conducts Pilot Sale of Receivership Assets Under the Legacy Loan Program. On September 16, the Federal Deposit Insurance Corporation (FDIC) announced that it signed a bid confirmation letter with Residential Credit Solutions (RCS), which submitted the winning bid in the FDIC's pilot sale of receivership assets under the Legacy Loans Program (LLP). The pilot sale, conducted on August 31, 2009, consisted of 12 bidders competing to purchase a limited liability company (LLC) holding a portfolio of residential mortgage loans with an unpaid principal balance of approximately $1.3 billion owned by the FDIC as Receiver of Franklin Bank, SSB, Houston, Texas. Bidders for the pilot sale had the option to leverage their bids with LLP funds at 6-to-1 or 4-to-1, or to submit a cash bid for a 20 percent ownership interest. Ultimately, the winning bidder, RCS, financed the sale using the 6-to-1 leverage option, paying a total of $64,215,000 in cash for a 50 percent equity stake in the LLC. The LLC will issue a note of $727,770,000 to the FDIC as Receiver, guaranteed by FDIC in its corporate capacity. Based on the FDIC's analysis and assumptions, the present value of RCS' bid equals 70.63 percent of the outstanding principal balance of the portfolio. Once the deal closes, RCS will manage the portfolio and service the loans consistent with the Home Affordable Modification Program (HAMP) guidelines. For a copy of the FDIC's press release, please see http://www.fdic.gov/news/news/press/2009/pr09172.html.

Federal Reserve Issues Consumer Affairs Letter on a Consumer Compliance Supervision Policy for Nonbank Subsidiaries of Bank Holding Companies and Foreign Banking Organizations. On September 14, 2009, the Federal Reserve issued a Consumer Affairs Letter announcing the establishment of an immediately-effective policy for conducting risk-focused consumer compliance supervision of, and the investigation of consumer complaints against, nonbank subsidiaries of bank holding companies and foreign banking organizations. The Federal Reserve implemented the policy to enhance its understanding of the risk profile of the aforementioned organizations and to guide its supervisory activities for these entities. To that end, the Federal Reserve has tasked consumer compliance examiners with the necessary expertise to develop institutional profiles, consumer compliance risk assessments and supervisory plans for these entities

through both off-site activities and on-site discovery reviews. These activities will be risk-focused and will include continuous monitoring, discovery reviews and target or full-scope examinations with transaction testing. Similarly, the consumer compliance examiners will supervise and investigate consumer complaints against nonbank subsidiaries. This framework will be assessed and adjusted as the program is implemented. The results of these assessments will result in ratings based on the Consumer Compliance Risk Management rating system that is included in the draft Risk-Focused Consumer Compliance Supervision Program. For a copy of the Consumer Affairs Letter, please see http://www.federalreserve.gov/boarddocs/caletters/2009/0908/caltr0908.htm.

FDIC Launches Foreclosure Prevention Initiative to Stop Foreclosure Rescue Scams. On September 16, the Federal Deposit Insurance Company (FDIC) began a program to help prevent both unnecessary foreclosures and fraudulent rescue scams by (i) encouraging loan modification, (ii) providing an FDIC phone line to direct borrowers to legitimate mortgage counselors, and (iii) creating a foreclosure information "tool kit" available electronically. The FDIC is utilizing the Making Home Affordable program to encourage loan modifications; however, the program is undermined by fraudulent foreclosure solution companies, which often charge large up-front fees for the promise of resolving a foreclosure. Typically, these scams fail to assist borrowers with their pending foreclosure and often worsen the situation by instructing borrowers to send loan payments directly to the fraudulent company rather than to the lender. The FDIC's new information tool kit aims to inform homeowners facing foreclosure about the proper steps to obtaining a loan modification, and provides tips and advice on how to detect and avoid foreclosure rescue scams. Finally, consumers and lenders are encouraged to report suspected scams to the FDIC through the FDIC call center at 1-877-ASK-FDIC or online through www.fdic.gov. For more information, please see http://www.fdic.gov/news/news/financial/2009/fil09054.pdf.

FTC Approves Final Consent Order Regarding Sears Online Tracking Software. On September 9, Commissioners voted 4-0 to approve a consent order (reported in *InfoBytes*, June 5, 2009) settling charges that Sears Holdings Management Corporation (Sears) engaged in unfair or deceptive acts or practices in violation of the FTC Act. In its complaint, the Federal Trade Commission (FTC) alleged that Sears did not adequately disclose that it used software to monitor consumers' online secure sessions – including sessions on third parties' Web sites – and to collect consumers' personal information transmitted in those sessions, such as the contents of shopping carts, online bank statements, drug prescription records, video rental records, library borrowing histories, and the sender, recipient, subject, and size for Web-based e-mails. Under the settlement, Sears must stop collecting data from consumers who downloaded the software and destroy any previously-collected data. Additionally, before installing software tracking software, Sears must make clear and prominent disclosures regarding how the software will monitor, record, or transmit data. These disclosures must be separate from any other license agreement and must disclose whether any data will be used by a third party. For a copy of the FTC's press release, please see http://www.ftc.gov/opa/2009/09/sears.shtm. For a copy of the final consent order, please see http://www.ftc.gov/os/caselist/0823099/090604searsdo.pdf.

FTC to Host Public Roundtables Addressing Evolving Consumer Privacy Issues. On September 15, the FTC issued a news release publicizing its upcoming series of day-long, public, consumer privacy roundtable discussions. These Privacy Roundtables will explore the privacy challenges posed by the vast array of 21st century technology, such as social networking, cloud computing, online behavioral advertising, and the collection and use of information by third-party applications. Roundtable participants will include stakeholders representing a range of views from academics, privacy experts, consumer advocates, industry participants and associations, technology experts, legislators, international representatives, and others. The goal of the Roundtables will be to determine how best to protect consumer privacy while supporting beneficial uses of information and technological innovation. The first Privacy Roundtable will be held on December 7, 2009, at the FTC Conference Center on 601 New Jersey Avenue, N.W. in Washington D.C. For a copy of the FTC's announcement, please click here.

State Issues

California Bill Proposes Prohibition of Advance Fees for Loan Modification Consultants. On September 9, A.B. 764, a bill to prohibit certain loan modification consultants from receiving fees in advance of modifying a loan, was enacted by the California legislature and is currently pending approval by Governor Arnold Schwarzenegger. The proposed bill would prohibit any person performing loan modification services from claiming, demanding, charging, receiving, collecting or contracting for a fee from a borrower under a loan modification agreement until the terms of the loan have been modified. However, real estate brokers would be exempt from the fee prohibition to the extent that they comply with the provisions of the law. In addition, the bill would further exempt licensed residential mortgage lenders and servicers from the fee prohibition. Among other things, the bill would also prohibit certain advertisements that may be deemed misleading to prospective borrowers. Under the bill, violations of the statute would carry the following penalties: (i) for individuals, a maximum fine of $20,000 and/or imprisonment for up to 12 months; and (ii) for corporations, a maximum fine of $60,000. The bill includes a sunset provision of January 1, 2013. For the full text of the bill, please click here.

California Legislature Passes Data Breach Notification Bill. On September 8, the California Assembly passed S.B. 20, a bill that would amend the state's data breach notification law to require persons, businesses, and agencies that own or license computerized personal data to notify the state attorney general of certain data breaches, and to provide specific information in the notification to California residents affected by the security breach. Specifically, the bill would require any person, business, or agency that is required to issue a security breach notification to more than 500 California residents as a result of a data breach to submit a single sample copy of that security breach notification (excluding personally identifiable information) to the State Attorney General. The bill would also require that any security breach notification sent to California residents be written in plain language and include certain elements, such as the types of personal information that were or are reasonably believed to have been the subject of a breach, the date or estimated date or date range when the breach occurred, a general description of the breach, and the toll-free telephone numbers and addresses of the major credit reporting agencies if the breach exposed a social security number

or a driver's license or California identification card number. The bill has been enrolled but has not been signed by Governor Schwarzenegger. For a copy of S.B. 20, please click here.

Courts

Michigan Federal Court Holds FACTA Not Violated by Printing First Digit of Card Number on Receipt. On September 1, a federal district court in Michigan held that a merchant did not violate the Fair and Accurate Credit Transactions Act's (FACTA) truncation requirement by printing the first digit and the last four digits of a MasterCard number on a receipt. *Broderick v. 119TCbay, LLC*, No. 1:08-CV-813, 2009 WL 2878531 (W.D. Mich. Sept. 1, 2009). Although the parties agreed that the first digit of any credit card number merely identifies the credit card brand, which may lawfully be printed in word form on a receipt, the plaintiff argued that the plain language of FACTA's truncation requirement prohibited printing the brand identity in the form of the first digit. According to the court, however, the language and syntax of the statute, the context of the statutory text, and Congress' own statement of its purpose in enacting FACTA "demonstrate that Congress did not intend such an incongruous result." Thus, the court concluded that "Congress meant to limit the personal identifying information that could be printed on a credit card receipt, but not to regulate receipt content of innocuous, non-identifying information, such as the brand name or associated brand number of the credit card." For a copy of the opinion, please click here.

New York Federal Court Holds that Browsewrap Agreement May Proceed Where No Notice of Agreement Terms Was Shown. On September 4, the U.S. District Court for the Eastern District of New York allowed the customer's claims challenging the applicability of "browsewrapped" terms and conditions of an online vendor to survive the defendant vendor's motion to dismiss. *Hines v. Overstock.com, Inc.*, 2009 U.S. Dist. LEXIS 81204 (E.D.N.Y. Sept. 4, 2009). The case arose after the plaintiff sued Overstock.com, an online retail vendor, for charging her a "restocking fee" after she returned an item she bought through Overstock's Web site. The plaintiff claimed that the fee was inadequately disclosed, because it was concealed in a browsewrap hyperlink (i) that customers did not need to read to consummate their transactions and (ii) that could not be read unless customers scrolled to the bottom of Overstock's Web page. Overstock sought to enforce the terms and conditions of the browsewrap agreement, arguing that, in keeping with typical browsewrap agreements, the plaintiff, by virtue of using the Web site, had agreed to the terms and conditions. The court found Overstock's argument unconvincing, noting that the plaintiff was not adequately advised of the Web site's terms and conditions, because (i) she was never prompted to review them, and (ii) the link to view them was not prominently displayed such that she would have had reasonable notice of them. Therefore, the court held that, in the absence of evidence that the plaintiff actually read the terms and conditions, such terms and conditions were unenforceable. As a result, the court denied Overstock's motion to dismiss. For a copy of the opinion, please click here.

Arbitration Agreement Waiving Class Actions Not Unconscionable. On September 9, the U.S. Court of Appeals for the Third Circuit affirmed a decision enforcing an arbitration agreement that contained a class action waiver in a case alleging violations of the Fair Credit Reporting Act (FCRA). *Cronin v. CitiFinancial Services, Inc.*, No. 09-2310, 2009 WL 2873252 (3d Cir. Sept. 9, 2009). In *Cronin*, the plaintiff brought a putative class action alleging that the defendant violated FCRA by

providing inaccurate loan information to credit reporting agencies. The defendant moved to compel arbitration based on the arbitration agreement executed by the parties at the closing of the loan. The district court granted the defendant's motion and the parties proceeded to arbitration, where the defendant was awarded the outstanding amount of the debt, plus attorneys' fees. On appeal, the plaintiff argued that the decision to compel arbitration was error because the arbitration agreement, which precluded him from bringing class claims, was unconscionable under the public policy of Pennsylvania, and therefore unenforceable. For this argument, the plaintiff relied upon *Homa v. American Express Co.*, 558 F.3d 225 (3d Cir. 2009) (reported in *InfoBytes*, March 6, 2009), in which the Third Circuit held that an arbitration agreement that completely deprived an individual of the ability to pursue class-wide relief was unconscionable and unenforceable under the public policy of New Jersey. In response, the defendant relied upon *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007), in which the Third Circuit enforced an arbitration agreement prohibiting class action litigation because it did not meet Virginia's "shock the conscience" test for unconscionability. Finding neither case dispositive, and applying Pennsylvania's own unconscionability standard, the Third Circuit held that the class action waiver provision in the instant case was not unconscionable. Specifically, the Third Circuit recognized that "Pennsylvania's public policy rejects contracts mandating individual litigation or arbitration in those cases where 'defendant corporations are effectively immunized from redress of grievances.'" Thus, "the critical issue [in determining unconscionability] is whether the particular class action waiver effectively ensures that a defendant will never face liability for wrongdoing." Applying that standard to this case, the Third Circuit held that the defendant was not "effectively immunized" from liability because FCRA permits the plaintiff to receive actual and punitive damages, plus costs and attorneys' fees, rendering the plaintiff's FCRA claim valuable even without the prospect of bringing those claims on behalf of a class. Accordingly, the Third Circuit affirmed the district court's order enforcing the arbitration agreement. For a copy of the opinion, please click here.

Citigroup Cleared in ERISA Fiduciary Duty Breach Case. The U.S. District Court for the Southern District of New York recently determined that Citigroup did not breach its fiduciary duties under the Employee Retirement Income Security Act (ERISA) by offering its stock as a retirement plan investment option while its stock was incurring major losses. In re *Citigroup ERISA Litigation*, No. 07 Civ. 9790, 2009 WL 2762708 (S.D.N.Y. Aug. 31, 2009). In this case, Citigroup employees who purchased Citigroup stock as part of their 401(k) retirement plans filed suit, claiming that the plans' fiduciaries breached their duties by purchasing the stock while it was losing value. The court rejected the plaintiffs' claim, finding that the retirement plans "unequivocally" required that Citigroup stock be offered as an investment option. Thus, the defendants were actually not acting as fiduciaries regarding the investment in Citigroup stock because they had no discretion to remove the stock as an option under the plan. Additionally, the court noted that the plan's fiduciaries were not at fault, even though there were losses, because they "were adhering to the mandatory terms of a plan that was designed not to guarantee income but to encourage employee stock ownership." For a copy of the opinion, please click here.

Rhode Island Superior Court Finds MERS, While Not a Lender, May Still Foreclose as a Nominee-Mortgagee. Recently, the Superior Court of Rhode Island held that Mortgage Electronic Registration Systems, Inc. (MERS), while not a lender, may still foreclose as a nominee-mortgagee. *Bucci v. Lehman Bros. Bank*, No. PC-09-3888, 2009 R.I. Super. LEXIS 110 (R.I. Super. Ct. Aug. 25,

2009). The case arose after plaintiffs executed a note with Lehman Brothers and a mortgage with MERS. Following plaintiffs' default, MERS initiated a foreclosure action. Plaintiffs challenged the action, arguing that MERS did not have the authority to foreclose on the property, because (i) the mortgage designated Lehman Brothers as the lender and paragraph 22 of the mortgage stated only that the lender may invoke the power of sale, and (ii) Rhode Island law prohibits MERS from invoking the statutory power of sale. The court rejected both arguments. First, it found that MERS had the authority to foreclose under the mortgage, because, despite paragraph 22 language, other provisions in the mortgage granted MERS a power of sale and paragraph 22 did not negate those provisions. Next, the court addressed plaintiff's argument that MERS was precluded from bring a foreclose action by Rhode Island law. To support their claim, plaintiffs argued that Rhode Island's foreclosure statute allows only mortgagees to exercise a power of sale and that MERS, as a nominee-mortgagee, could not exercise that power. The court disagreed, holding that such an interpretation of the statue would create an absurd result, because it would prevent all servicers from acting on behalf of mortgagees and lenders. As a result, the court denied plaintiffs requests for declaratory and injunctive relief and ruled the MERS had standing to bring its foreclosure action. For a copy of the opinion, please click here.

Texas Federal Court Holds that Disclosures Authorizing a Business to Debit Consumer Accounts are not Deceptive When Placed Next to Sign-up Box on the Business' Web Page. Recently, the U.S. District Court for the Southern District of Texas held that a company does not violate Massachusetts' Unfair Trade Practices Act (MUTPA) when its Web page displays disclosures authorizing it to charge a consumer's account next to the sign-up box for its product. In re *Vistaprint Corp. Marketing Sales Practices Litig.*, No. 4:08-md-1994 (S.D. Tex. Aug. 31, 2009). The case arose after a printing company offered a promotion whereby its customers received a $10 gift card if they agreed to sign-up for the company's rewards program. To the immediate left of the sign-up box for the program, the company disclosed the terms of the program, including that the company could charge the customer's credit or debit card a $14.95 monthly membership fee if the customer did not cancel his or her membership within 30 days. Plaintiffs sued the company, alleging that its practices were deceptive and in violation of, among other things, the MUTPA. In considering the plaintiffs' claims, the court determined that other courts often look to FTC guidance on deceptive acts and practices when interpreting the MUTPA. The court then reviewed the FTC's "Dot Com Disclosures: Information about Online Advertising" guidelines, and determined that disclosures are deceptive unless they are "'clear and conspicuous' based on the placement of the disclosure on the Web page and its proximity to the other relevant information." Applying that standard, the court determined that the company's disclosures were not deceptive, because (i) the disclosures were as near as possible to the sign-in box with no need to scroll down the screen or to access a hyperlink to view the disclosures; (ii) the language was clear and simple; (iii) the disclosures are made before a customer clicks to agree to the terms; and (iv) the heading of the disclosure was in bold print. Since the company's disclosures complied with the FTC's guidelines, the court found that they were not deceptive as a matter of law. As a result, the court dismissed the plaintiff's MUTPA claims. For a copy of the opinion, please see http://bit.ly/pEPO0i.

Firm News

Andrew Sandler and Jeff Naimon will be speaking at the 2009 CRA and Fair Lending Colloquium October 4-7 in New Orleans. Andrew Sandler will speak on Regulatory Reform, and Jeff Naimon will speak on Navigating a HMDA Data Analysis. For registration or additional information about this conference, go to www.cracolloquium.com.

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

Margo Tank gave an audio conference entitled "Building Effective Electronic Records and Electronic Records Management Systems: Navigating the Legal Traps" on September 10. For more information, please see http://www.alexinformation.com/store/10700909.php.

Chris Witeck gave a presentation at the Mortgage Bankers Association's Reverse Mortgage Conference in San Diego on September 10 entitled "The HECM Challenge." He also moderated the "Secondary Market Update" panel on September 11.

Jeff Naimon and Chris Witeck spoke at the Mortgage Bankers Association's Regulatory Compliance Conference in Washington D.C. held on September 14-16. Jeff Naimon addressed fair lending developments as part of the "Hot Topics" Panel. Chris Witeck spoke on the Secondary Market Panel.

Mortgages

FDIC Conducts Pilot Sale of Receivership Assets Under the Legacy Loan Program. On September 16, the Federal Deposit Insurance Corporation (FDIC) announced that it signed a bid confirmation letter with Residential Credit Solutions (RCS), which submitted the winning bid in the FDIC's pilot sale of receivership assets under the Legacy Loans Program (LLP). The pilot sale, conducted on August 31, 2009, consisted of 12 bidders competing to purchase a limited liability company (LLC) holding a portfolio of residential mortgage loans with an unpaid principal balance of approximately $1.3 billion owned by the FDIC as Receiver of Franklin Bank, SSB, Houston, Texas. Bidders for the pilot sale had the option to leverage their bids with LLP funds at 6-to-1 or 4-to-1, or to submit a cash bid for a 20 percent ownership interest. Ultimately, the winning bidder, RCS, financed the sale using the 6-to-1 leverage option, paying a total of $64,215,000 in cash for a 50 percent equity stake in the LLC. The LLC will issue a note of $727,770,000 to the FDIC as Receiver, guaranteed by FDIC in its corporate capacity. Based on the FDIC's analysis and assumptions, the present value of RCS' bid equals 70.63 percent of the outstanding principal balance of the portfolio. Once the deal closes, RCS will manage the portfolio and service the loans consistent with the Home Affordable Modification Program (HAMP) guidelines. For a copy of the FDIC's press release, please see http://www.fdic.gov/news/news/press/2009/pr09172.html.

California Bill Proposes Prohibition of Advance Fees for Loan Modification Consultants. On September 9, A.B. 764, a bill to prohibit certain loan modification consultants from receiving fees in advance of modifying a loan, was enacted by the California legislature and is currently pending approval by Governor Arnold Schwarzenegger. The proposed bill would prohibit any person performing loan modification services from claiming, demanding, charging, receiving, collecting or contracting for a fee from a borrower under a loan modification agreement until the terms of the loan have been modified. However, real estate brokers would be exempt from the fee prohibition to the extent that they comply with the provisions of the law. In addition, the bill would further exempt licensed residential mortgage lenders and servicers from the fee prohibition. Among other things, the bill would also prohibit certain advertisements that may be deemed misleading to prospective borrowers. Under the bill, violations of the statute would carry the following penalties: (i) for individuals, a maximum fine of $20,000 and/or imprisonment for up to 12 months; and (ii) for corporations, a maximum fine of $60,000. The bill includes a sunset provision of January 1, 2013. For the full text of the bill, please click here.

Rhode Island Superior Court Finds MERS, While Not a Lender, May Still Foreclose as a Nominee-Mortgagee. Recently, the Superior Court of Rhode Island held that Mortgage Electronic Registration Systems, Inc. (MERS), while not a lender, may still foreclose as a nominee-mortgagee. *Bucci v. Lehman Bros. Bank*, No. PC-09-3888, 2009 R.I. Super. LEXIS 110 (R.I. Super. Ct. Aug. 25, 2009). The case arose after plaintiffs executed a note with Lehman Brothers and a mortgage with MERS. Following plaintiffs' default, MERS initiated a foreclosure action. Plaintiffs challenged the action, arguing that MERS did not have the authority to foreclose on the property, because (i) the mortgage designated Lehman Brothers as the lender and paragraph 22 of the mortgage stated only that the lender may invoke the power of sale, and (ii) Rhode Island law prohibits MERS from invoking the statutory power of sale. The court rejected both arguments. First, it found that MERS had the authority to foreclose under the mortgage, because, despite paragraph 22 language, other provisions in the mortgage granted MERS a power of sale and paragraph 22 did not negate those provisions. Next, the court addressed plaintiff's argument that MERS was precluded from bring a foreclose action by Rhode Island law. To support their claim, plaintiffs argued that Rhode Island's foreclosure statute allows only mortgagees to exercise a power of sale and that MERS, as a nominee-mortgagee, could not exercise that power. The court disagreed, holding that such an interpretation of the statue would create an absurd result, because it would prevent all servicers from acting on behalf of mortgagees and lenders. As a result, the court denied plaintiffs requests for declaratory and injunctive relief and ruled the MERS had standing to bring its foreclosure action. For a copy of the opinion, please click here.

Banking

FDIC Conducts Pilot Sale of Receivership Assets Under the Legacy Loan Program. On September 16, the Federal Deposit Insurance Corporation (FDIC) announced that it signed a bid confirmation letter with Residential Credit Solutions (RCS), which submitted the winning bid in the FDIC's pilot sale of receivership assets under the Legacy Loans Program (LLP). The pilot sale, conducted on August 31, 2009, consisted of 12 bidders competing to purchase a limited liability company (LLC) holding a portfolio of residential mortgage loans with an unpaid principal balance of

approximately $1.3 billion owned by the FDIC as Receiver of Franklin Bank, SSB, Houston, Texas. Bidders for the pilot sale had the option to leverage their bids with LLP funds at 6-to-1 or 4-to-1, or to submit a cash bid for a 20 percent ownership interest. Ultimately, the winning bidder, RCS, financed the sale using the 6-to-1 leverage option, paying a total of $64,215,000 in cash for a 50 percent equity stake in the LLC. The LLC will issue a note of $727,770,000 to the FDIC as Receiver, guaranteed by FDIC in its corporate capacity. Based on the FDIC's analysis and assumptions, the present value of RCS' bid equals 70.63 percent of the outstanding principal balance of the portfolio. Once the deal closes, RCS will manage the portfolio and service the loans consistent with the Home Affordable Modification Program (HAMP) guidelines. For a copy of the FDIC's press release, please see http://www.fdic.gov/news/news/press/2009/pr09172.html.

Federal Reserve Issues Consumer Affairs Letter on a Consumer Compliance Supervision Policy for Nonbank Subsidiaries of Bank Holding Companies and Foreign Banking Organizations. On September 14, 2009, the Federal Reserve issued a Consumer Affairs Letter announcing the establishment of an immediately-effective policy for conducting risk-focused consumer compliance supervision of, and the investigation of consumer complaints against, nonbank subsidiaries of bank holding companies and foreign banking organizations. The Federal Reserve implemented the policy to enhance its understanding of the risk profile of the aforementioned organizations and to guide its supervisory activities for these entities. To that end, the Federal Reserve has tasked consumer compliance examiners with the necessary expertise to develop institutional profiles, consumer compliance risk assessments and supervisory plans for these entities through both off-site activities and on-site discovery reviews. These activities will be risk-focused and will include continuous monitoring, discovery reviews and target or full-scope examinations with transaction testing. Similarly, the consumer compliance examiners will supervise and investigate consumer complaints against nonbank subsidiaries. This framework will be assessed and adjusted as the program is implemented. The results of these assessments will result in ratings based on the Consumer Compliance Risk Management rating system that is included in the draft Risk-Focused Consumer Compliance Supervision Program. For a copy of the Consumer Affairs Letter, please see http://www.federalreserve.gov/boarddocs/caletters/2009/0908/caltr0908.htm.

Consumer Finance

FDIC Launches Foreclosure Prevention Initiative to Stop Foreclosure Rescue Scams. On September 16, the Federal Deposit Insurance Company (FDIC) began a program to help prevent both unnecessary foreclosures and fraudulent rescue scams by (i) encouraging loan modification, (ii) providing an FDIC phone line to direct borrowers to legitimate mortgage counselors, and (iii) creating a foreclosure information "tool kit" available electronically. The FDIC is utilizing the Making Home Affordable program to encourage loan modifications; however, the program is undermined by fraudulent foreclosure solution companies, which often charge large up-front fees for the promise of resolving a foreclosure. Typically, these scams fail to assist borrowers with their pending foreclosure and often worsen the situation by instructing borrowers to send loan payments directly to the fraudulent company rather than to the lender. The FDIC's new information tool kit aims to inform homeowners facing foreclosure about the proper steps to obtaining a loan modification, and provides tips and advice on how to detect and avoid foreclosure rescue scams. Finally, consumers and lenders

are encouraged to report suspected scams to the FDIC through the FDIC call center at 1-877-ASK-FDIC or online through www.fdic.gov. For more information, please see **http://www.fdic.gov/news/news/financial/2009/fil09054.pdf.**

California Bill Proposes Prohibition of Advance Fees for Loan Modification Consultants. On September 9, A.B. 764, a bill to prohibit certain loan modification consultants from receiving fees in advance of modifying a loan, was enacted by the California legislature and is currently pending approval by Governor Arnold Schwarzenegger. The proposed bill would prohibit any person performing loan modification services from claiming, demanding, charging, receiving, collecting or contracting for a fee from a borrower under a loan modification agreement until the terms of the loan have been modified. However, real estate brokers would be exempt from the fee prohibition to the extent that they comply with the provisions of the law. In addition, the bill would further exempt licensed residential mortgage lenders and servicers from the fee prohibition. Among other things, the bill would also prohibit certain advertisements that may be deemed misleading to prospective borrowers. Under the bill, violations of the statute would carry the following penalties: (i) for individuals, a maximum fine of $20,000 and/or imprisonment for up to 12 months; and (ii) for corporations, a maximum fine of $60,000. The bill includes a sunset provision of January 1, 2013. For the full text of the bill, please click here.

Arbitration Agreement Waiving Class Actions Not Unconscionable. On September 9, the U.S. Court of Appeals for the Third Circuit affirmed a decision enforcing an arbitration agreement that contained a class action waiver in a case alleging violations of the Fair Credit Reporting Act (FCRA). *Cronin v. CitiFinancial Services, Inc.*, No. 09-2310, 2009 WL 2873252 (3d Cir. Sept. 9, 2009). In *Cronin*, the plaintiff brought a putative class action alleging that the defendant violated FCRA by providing inaccurate loan information to credit reporting agencies. The defendant moved to compel arbitration based on the arbitration agreement executed by the parties at the closing of the loan. The district court granted the defendant's motion and the parties proceeded to arbitration, where the defendant was awarded the outstanding amount of the debt, plus attorneys' fees. On appeal, the plaintiff argued that the decision to compel arbitration was error because the arbitration agreement, which precluded him from bringing class claims, was unconscionable under the public policy of Pennsylvania, and therefore unenforceable. For this argument, the plaintiff relied upon *Homa v. American Express Co.*, 558 F.3d 225 (3d Cir. 2009) (reported in *InfoBytes*, March 6, 2009), in which the Third Circuit held that an arbitration agreement that completely deprived an individual of the ability to pursue class-wide relief was unconscionable and unenforceable under the public policy of New Jersey. In response, the defendant relied upon *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007), in which the Third Circuit enforced an arbitration agreement prohibiting class action litigation because it did not meet Virginia's "shock the conscience" test for unconscionability. Finding neither case dispositive, and applying Pennsylvania's own unconscionability standard, the Third Circuit held that the class action waiver provision in the instant case was not unconscionable. Specifically, the Third Circuit recognized that "Pennsylvania's public policy rejects contracts mandating individual litigation or arbitration in those cases where 'defendant corporations are effectively immunized from redress of grievances.'" Thus, "the critical issue [in determining unconscionability] is whether the particular class action waiver effectively ensures that a defendant will never face liability for wrongdoing." Applying that standard to this case, the Third Circuit held that the defendant was not "effectively immunized"

from liability because FCRA permits the plaintiff to receive actual and punitive damages, plus costs and attorneys' fees, rendering the plaintiff's FCRA claim valuable even without the prospect of bringing those claims on behalf of a class. Accordingly, the Third Circuit affirmed the district court's order enforcing the arbitration agreement. For a copy of the opinion, please click here.

Securities

Citigroup Cleared in ERISA Fiduciary Duty Breach Case. The U.S. District Court for the Southern District of New York recently determined that Citigroup did not breach its fiduciary duties under the Employee Retirement Income Security Act (ERISA) by offering its stock as a retirement plan investment option while its stock was incurring major losses. In re *Citigroup ERISA Litigation*, No. 07 Civ. 9790, 2009 WL 2762708 (S.D.N.Y. Aug. 31, 2009). In this case, Citigroup employees who purchased Citigroup stock as part of their 401(k) retirement plans filed suit, claiming that the plans' fiduciaries breached their duties by purchasing the stock while it was losing value. The court rejected the plaintiffs' claim, finding that the retirement plans "unequivocally" required that Citigroup stock be offered as an investment option. Thus, the defendants were actually not acting as fiduciaries regarding the investment in Citigroup stock because they had no discretion to remove the stock as an option under the plan. Additionally, the court noted that the plan's fiduciaries were not at fault, even though there were losses, because they "were adhering to the mandatory terms of a plan that was designed not to guarantee income but to encourage employee stock ownership." For a copy of the opinion, please click here.

Litigation

FTC Approves Final Consent Order Regarding Sears Online Tracking Software. On September 9, Commissioners voted 4-0 to approve a consent order (reported in *InfoBytes*, June 5, 2009) settling charges that Sears Holdings Management Corporation (Sears) engaged in unfair or deceptive acts or practices in violation of the FTC Act. In its complaint, the Federal Trade Commission (FTC) alleged that Sears did not adequately disclose that it used software to monitor consumers' online secure sessions – including sessions on third parties' Web sites – and to collect consumers' personal information transmitted in those sessions, such as the contents of shopping carts, online bank statements, drug prescription records, video rental records, library borrowing histories, and the sender, recipient, subject, and size for Web-based e-mails. Under the settlement, Sears must stop collecting data from consumers who downloaded the software and destroy any previously-collected data. Additionally, before installing software tracking software, Sears must make clear and prominent disclosures regarding how the software will monitor, record, or transmit data. These disclosures must be separate from any other license agreement and must disclose whether any data will be used by a third party. For a copy of the FTC's press release, please see http://www.ftc.gov/opa/2009/09/sears.shtm. For a copy of the final consent order, please see http://www.ftc.gov/os/caselist/0823099/090604searsdo.pdf.

Privacy/Data Security

Michigan Federal Court Holds FACTA Not Violated by Printing First Digit of Card Number on Receipt. On September 1, a federal district court in Michigan held that a merchant did not violate the Fair and Accurate Credit Transactions Act's (FACTA) truncation requirement by printing the first digit and the last four digits of a MasterCard number on a receipt. *Broderick v. 119TCbay, LLC*, No. 1:08-CV-813, 2009 WL 2878531 (W.D. Mich. Sept. 1, 2009). Although the parties agreed that the first digit of any credit card number merely identifies the credit card brand, which may lawfully be printed in word form on a receipt, the plaintiff argued that the plain language of FACTA's truncation requirement prohibited printing the brand identity in the form of the first digit. According to the court, however, the language and syntax of the statute, the context of the statutory text, and Congress' own statement of its purpose in enacting FACTA "demonstrate that Congress did not intend such an incongruous result." Thus, the court concluded that "Congress meant to limit the personal identifying information that could be printed on a credit card receipt, but not to regulate receipt content of innocuous, non-identifying information, such as the brand name or associated brand number of the credit card." For a copy of the opinion, please click here.

New York Federal Court Holds that Browsewrap Agreement May Proceed Where No Notice of Agreement Terms Was Shown. On September 4, the U.S. District Court for the Eastern District of New York allowed the customer's claims challenging the applicability of "browsewrapped" terms and conditions of an online vendor to survive the defendant vendor's motion to dismiss. *Hines v. Overstock.com, Inc.*, 2009 U.S. Dist. LEXIS 81204 (E.D.N.Y. Sept. 4, 2009). The case arose after the plaintiff sued Overstock.com, an online retail vendor, for charging her a "restocking fee" after she returned an item she bought through Overstock's Web site. The plaintiff claimed that the fee was inadequately disclosed, because it was concealed in a browsewrap hyperlink (i) that customers did not need to read to consummate their transactions and (ii) that could not be read unless customers scrolled to the bottom of Overstock's Web page. Overstock sought to enforce the terms and conditions of the browsewrap agreement, arguing that, in keeping with typical browsewrap agreements, the plaintiff, by virtue of using the Web site, had agreed to the terms and conditions. The court found Overstock's argument unconvincing, noting that the plaintiff was not adequately advised of the Web site's terms and conditions, because (i) she was never prompted to review them, and (ii) the link to view them was not prominently displayed such that she would have had reasonable notice of them. Therefore, the court held that, in the absence of evidence that the plaintiff actually read the terms and conditions, such terms and conditions were unenforceable. As a result, the court denied Overstock's motion to dismiss. For a copy of the opinion, please click here.

Arbitration Agreement Waiving Class Actions Not Unconscionable. On September 9, the U.S. Court of Appeals for the Third Circuit affirmed a decision enforcing an arbitration agreement that contained a class action waiver in a case alleging violations of the Fair Credit Reporting Act (FCRA). *Cronin v. CitiFinancial Services, Inc.*, No. 09-2310, 2009 WL 2873252 (3d Cir. Sept. 9, 2009). In *Cronin*, the plaintiff brought a putative class action alleging that the defendant violated FCRA by providing inaccurate loan information to credit reporting agencies. The defendant moved to compel arbitration based on the arbitration agreement executed by the parties at the closing of the loan. The district court granted the defendant's motion and the parties proceeded to arbitration, where the

defendant was awarded the outstanding amount of the debt, plus attorneys' fees. On appeal, the plaintiff argued that the decision to compel arbitration was error because the arbitration agreement, which precluded him from bringing class claims, was unconscionable under the public policy of Pennsylvania, and therefore unenforceable. For this argument, the plaintiff relied upon *Homa v. American Express Co.*, 558 F.3d 225 (3d Cir. 2009) (reported in *InfoBytes*, March 6, 2009), in which the Third Circuit held that an arbitration agreement that completely deprived an individual of the ability to pursue class-wide relief was unconscionable and unenforceable under the public policy of New Jersey. In response, the defendant relied upon *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007), in which the Third Circuit enforced an arbitration agreement prohibiting class action litigation because it did not meet Virginia's "shock the conscience" test for unconscionability. Finding neither case dispositive, and applying Pennsylvania's own unconscionability standard, the Third Circuit held that the class action waiver provision in the instant case was not unconscionable. Specifically, the Third Circuit recognized that "Pennsylvania's public policy rejects contracts mandating individual litigation or arbitration in those cases where 'defendant corporations are effectively immunized from redress of grievances.'" Thus, "the critical issue [in determining unconscionability] is whether the particular class action waiver effectively ensures that a defendant will never face liability for wrongdoing." Applying that standard to this case, the Third Circuit held that the defendant was not "effectively immunized" from liability because FCRA permits the plaintiff to receive actual and punitive damages, plus costs and attorneys' fees, rendering the plaintiff's FCRA claim valuable even without the prospect of bringing those claims on behalf of a class. Accordingly, the Third Circuit affirmed the district court's order enforcing the arbitration agreement. For a copy of the opinion, please click here.

Citigroup Cleared in ERISA Fiduciary Duty Breach Case. The U.S. District Court for the Southern District of New York recently determined that Citigroup did not breach its fiduciary duties under the Employee Retirement Income Security Act (ERISA) by offering its stock as a retirement plan investment option while its stock was incurring major losses. In re *Citigroup ERISA Litigation*, No. 07 Civ. 9790, 2009 WL 2762708 (S.D.N.Y. Aug. 31, 2009). In this case, Citigroup employees who purchased Citigroup stock as part of their 401(k) retirement plans filed suit, claiming that the plans' fiduciaries breached their duties by purchasing the stock while it was losing value. The court rejected the plaintiffs' claim, finding that the retirement plans "unequivocally" required that Citigroup stock be offered as an investment option. Thus, the defendants were actually not acting as fiduciaries regarding the investment in Citigroup stock because they had no discretion to remove the stock as an option under the plan. Additionally, the court noted that the plan's fiduciaries were not at fault, even though there were losses, because they "were adhering to the mandatory terms of a plan that was designed not to guarantee income but to encourage employee stock ownership." For a copy of the opinion, please click here

Rhode Island Superior Court Finds MERS, While Not a Lender, May Still Foreclose as a Nominee-Mortgagee. Recently, the Superior Court of Rhode Island held that Mortgage Electronic Registration Systems, Inc. (MERS), while not a lender, may still foreclose as a nominee-mortgagee. *Bucci v. Lehman Bros. Bank*, No. PC-09-3888, 2009 R.I. Super. LEXIS 110 (R.I. Super. Ct. Aug. 25, 2009). The case arose after plaintiffs executed a note with Lehman Brothers and a mortgage with MERS. Following plaintiffs' default, MERS initiated a foreclosure action. Plaintiffs challenged the action, arguing that MERS did not have the authority to foreclose on the property, because (i) the

mortgage designated Lehman Brothers as the lender and paragraph 22 of the mortgage stated only that the lender may invoke the power of sale, and (ii) Rhode Island law prohibits MERS from invoking the statutory power of sale. The court rejected both arguments. First, it found that MERS had the authority to foreclose under the mortgage, because, despite paragraph 22 language, other provisions in the mortgage granted MERS a power of sale and paragraph 22 did not negate those provisions. Next, the court addressed plaintiff's argument that MERS was precluded from bring a foreclose action by Rhode Island law. To support their claim, plaintiffs argued that Rhode Island's foreclosure statute allows only mortgagees to exercise a power of sale and that MERS, as a nominee-mortgagee, could not exercise that power. The court disagreed, holding that such an interpretation of the statue would create an absurd result, because it would prevent all servicers from acting on behalf of mortgagees and lenders. As a result, the court denied plaintiffs requests for declaratory and injunctive relief and ruled the MERS had standing to bring its foreclosure action. For a copy of the opinion, please click here.

Texas Federal Court Holds that Disclosures Authorizing a Business to Debit Consumer Accounts are not Deceptive When Placed Next to Sign-up Box on the Business' Web Page. Recently, the U.S. District Court for the Southern District of Texas held that a company does not violate Massachusetts' Unfair Trade Practices Act (MUTPA) when its Web page displays disclosures authorizing it to charge a consumer's account next to the sign-up box for its product. In re *Vistaprint Corp. Marketing Sales Practices Litig.*, No. 4:08-md-1994 (S.D. Tex. Aug. 31, 2009). The case arose after a printing company offered a promotion whereby its customers received a $10 gift card if they agreed to sign-up for the company's rewards program. To the immediate left of the sign-up box for the program, the company disclosed the terms of the program, including that the company could charge the customer's credit or debit card a $14.95 monthly membership fee if the customer did not cancel his or her membership within 30 days. Plaintiffs sued the company, alleging that its practices were deceptive and in violation of, among other things, the MUTPA. In considering the plaintiffs' claims, the court determined that other courts often look to FTC guidance on deceptive acts and practices when interpreting the MUTPA. The court then reviewed the FTC's "Dot Com Disclosures: Information about Online Advertising" guidelines, and determined that disclosures are deceptive unless they are "'clear and conspicuous' based on the placement of the disclosure on the Web page and its proximity to the other relevant information." Applying that standard, the court determined that the company's disclosures were not deceptive, because (i) the disclosures were as near as possible to the sign-in box with no need to scroll down the screen or to access a hyperlink to view the disclosures; (ii) the language was clear and simple; (iii) the disclosures are made before a customer clicks to agree to the terms; and (iv) the heading of the disclosure was in bold print. Since the company's disclosures complied with the FTC's guidelines, the court found that they were not deceptive as a matter of law. As a result, the court dismissed the plaintiff's MUTPA claims. For a copy of the opinion, please see http://bit.ly/pEPO0i.

FTC Approves Final Consent Order Regarding Sears Online Tracking Software. On September 9, Commissioners voted 4-0 to approve a consent order (reported in *InfoBytes*, June 5, 2009) settling charges that Sears Holdings Management Corporation (Sears) engaged in unfair or deceptive acts or practices in violation of the FTC Act. In its complaint, the Federal Trade Commission (FTC) alleged that Sears did not adequately disclose that it used software to monitor consumers' online secure

sessions – including sessions on third parties' Web sites – and to collect consumers' personal information transmitted in those sessions, such as the contents of shopping carts, online bank statements, drug prescription records, video rental records, library borrowing histories, and the sender, recipient, subject, and size for Web-based e-mails. Under the settlement, Sears must stop collecting data from consumers who downloaded the software and destroy any previously-collected data. Additionally, before installing software tracking software, Sears must make clear and prominent disclosures regarding how the software will monitor, record, or transmit data. These disclosures must be separate from any other license agreement and must disclose whether any data will be used by a third party. For a copy of the FTC's press release, please see http://www.ftc.gov/opa/2009/09/sears.shtm. For a copy of the final consent order, please see http://www.ftc.gov/os/caselist/0823099/090604searsdo.pdf.

FTC to Host Public Roundtables Addressing Evolving Consumer Privacy Issues. On September 15, the FTC issued a news release publicizing its upcoming series of day-long, public, consumer privacy roundtable discussions. These Privacy Roundtables will explore the privacy challenges posed by the vast array of 21st century technology, such as social networking, cloud computing, online behavioral advertising, and the collection and use of information by third-party applications. Roundtable participants will include stakeholders representing a range of views from academics, privacy experts, consumer advocates, industry participants and associations, technology experts, legislators, international representatives, and others. The goal of the Roundtables will be to determine how best to protect consumer privacy while supporting beneficial uses of information and technological innovation. The first Privacy Roundtable will be held on December 7, 2009, at the FTC Conference Center on 601 New Jersey Avenue, N.W. in Washington D.C. For a copy of the FTC's announcement, please click here.

California Legislature Passes Data Breach Notification Bill. On September 8, the California Assembly passed S.B. 20, a bill that would amend the state's data breach notification law to require persons, businesses, and agencies that own or license computerized personal data to notify the state attorney general of certain data breaches, and to provide specific information in the notification to California residents affected by the security breach. Specifically, the bill would require any person, business, or agency that is required to issue a security breach notification to more than 500 California residents as a result of a data breach to submit a single sample copy of that security breach notification (excluding personally identifiable information) to the State Attorney General. The bill would also require that any security breach notification sent to California residents be written in plain language and include certain elements, such as the types of personal information that were or are reasonably believed to have been the subject of a breach, the date or estimated date or date range when the breach occurred, a general description of the breach, and the toll-free telephone numbers and addresses of the major credit reporting agencies if the breach exposed a social security number or a driver's license or California identification card number. The bill has been enrolled but has not been signed by Governor Schwarzenegger. For a copy of S.B. 20, please click here.

We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes.
Email: **infobytes@buckleysandler.com**

For back issues of INFOBYTES (or other BuckleySandler LLP publications), visit **http://www.buckleysandler.com/infobytes/infobytes**