

Financial Services Report


 Award
Winning
Newsletter

Editor's Note

New York Mayor Michael Bloomberg wants to ban sodas sold in containers of more than 16 ounces. Thank you for asking our opinion. Or, as the young folks say, “no problem.”

It's a brilliant idea, but doesn't go far enough. Why just soda? If we were serious about obesity, we wouldn't let Banana Republic sell pants with waists larger than 38. We could solve the problem of rowdy frat boys by making them quaff beer from vessels no bigger than a shot glass. As for those obnoxious oldsters in their earsplitting Harley Hogs trying to channel “Easy Rider”? No more motorcycles with engines larger than a hamster wheel. Wait, we're just getting warmed up. Why shouldn't government wear a corset too? Imagine if every law passed by Congress had to fit inside a Starbucks “venti” cup. For federal regulators, we might downsize even more, say, to a Starbucks “tall” . . . with room for milk (low fat or soy, natch).

Alas, stuff happened this quarter. Stuff does that. There is news (reported in these pages) about SIFIs (see “Beltway Report”) and the Bureau's decision to go after prepaid cards and police everything for “disparate impact.” (See “Bureau Report.”) The Volcker Rule starts July 21, yet there are no final regulations. (See “Operations Report.”) In arbitration, it was a year since the SCOTUS decided *Concepcion*, for which we have a birthday celebration plus a report on what has happened since. (See “Arbitration Report.”) And speaking of SCOTUS, the *Freeman v. Quicken Loan* decision was a very big deal. (See “Mortgage Report.”) Finally, privacy continues to simmer. (See “Privacy Report.”) More action this quarter than a Secret Service party in Cartagena.

Until next time, steer clear of any of John Edwards's celebrity endorsements, avoid plaids with prints, and go pull out those misplaced Greek drachmas in the back of the sock drawer.

William Stern, Editor-in-chief

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MoFo Metrics

- 2:** Maximum height of shoe heel doctors recommend, in inches
- 50:** Percentage of shoes bought by women with heels over 3 inches
- 7.1:** Pounds of trash an average American discards, per day
- 2.5:** Pounds of trash an average Japanese citizen discards, per day
- 30:** Percent of married persons who lie to spouse about money
- 4:** Number of panda births, San Diego Zoo
- 43:** Percentage of CEOs who report their companies have a chief innovation officer
- 9:** Age of Mozart upon completing his first symphony

Beltway Report

Sticker Shock

You know those scrape-and-sue shakedowns where the guy scratches off a sticker from an ATM machine while his lawyer stands by with a camera and a complaint at the ready? Those guys may have to get into the unemployment line. Congress is poised to put an end to class action lawsuits under the Electronic Fund Transfer Act (EFTA) over ATMs that lack fee sticker notices. These lawsuits have long been a favorite of class action lawyers who troll for ATMs whose fee stickers may have been, um, misplaced. The EFTA currently requires dual notice of ATM fees (an on-screen notice and a fee sticker notice) and permits recovery of statutory damages up to \$500,000 for failure to comply. House and Senate bills would amend the EFTA to eliminate the fee sticker requirement, putting an end to these garbage lawsuits. If the legislation is enacted, ATM owners would only be required to provide notice of fees on screen at a point when consumers can still opt to cancel their transactions.

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

Are You My Regulator?

The Federal Reserve Board approved a final rule outlining the procedures for securities holding companies, nonbank companies owning at least one registered broker or dealer (SHC), to elect to be supervised by the Federal Reserve. This rule implements the Dodd-Frank provision authorizing SHCs to seek Federal Reserve supervision to satisfy foreign regulations requiring that the firm be subject to comprehensive, consolidated U.S. supervision to operate in the country. Upon effective registration, an SHC is supervised and regulated as if it were a bank holding company, but the Bank Holding Company Act restrictions on nonbanking activities do not apply.

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

Liquidation Logistics

FDIC Acting Chairman Martin Gruenberg outlined his strategy for unwinding distressed systemically important financial institutions (SIFIs) through the FDIC's orderly resolution authority. Under this strategy, the FDIC will place the top-tier holding company into receivership and attempt to maintain the operational integrity of subsidiary organizations. The process would have particular significance for the unsecured creditors of the holding company, whose claims would be paid out as stock, effectively converting them

THE FSOC PLANS TO DESIGNATE THE FIRST NONBANK FINANCIAL FIRMS BY THE END OF THE YEAR.

from creditors to shareholders. Want to know more? Read our Client Alert at: <http://www.mofo.com/files/Uploads/Images/120516-Orderly-Liquidation-Authority-FDIC-Announces-Its-Strategy.pdf>.

For more information, contact Dwight Smith at dsmith@mofo.com and Charles Horn at charleshorn@mofo.com.

Are You a SIFI?

Is there intelligent life in the universe? Wait, that's SETI (Search for Extraterrestrial Intelligence) not SIFI. Did we get our leaders mixed? You decide.

The Financial Stability Oversight Council issued a final rule and guidance for determining which nonbank firms pose a threat to U.S. financial stability and will be designated as SIFIs subject to FRB

supervision. The three-stage designation process will analyze companies with at least \$50 billion in total consolidated assets that meet one of five thresholds relating to credit and liquidity risk. The FSOC may consider other large nonbank financial firms as well, even if they do not meet these thresholds. Two-thirds of the FSOC must vote to designate a company as systemically important, and the Treasury Secretary must approve. The FSOC plans to designate the first nonbank financial firms by the end of the year.

For more information, contact Dwight Smith at dsmith@mofo.com and Charles Horn at charleshorn@mofo.com.

It's Finals Period

The FRB, FDIC, and OCC released final guidance on stress testing for banking organizations with more than \$10 billion in assets. The guidance builds on the instructions that the Federal Reserve had used for stress testing by the 19 largest banking organizations in 2009 and 2011, but it will reach approximately 60 firms in addition to the original 19. The guidance emphasizes the need for intensive, enterprise-wide testing, covering a wide range of possible adverse scenarios, including different methodologies, and assessing both capital and liquidity. Still to come are rules implementing the stress testing requirements of Dodd-Frank.

Community banks (institutions with less than \$10 billion in assets) did not escape. The same agencies issued a Joint Statement clarifying that these organizations are not subject to the requirements for larger banking organizations, but emphasizing that all banking firms should have the capacity to analyze the impact of adverse outcomes on their financial condition.

For more information, contact Dwight Smith at dsmith@mofo.com and Charles Horn at charleshorn@mofo.com.

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Bureau Report

Prepaid Cards in the Crosshairs

The CFPB has released an advance notice of proposed rulemaking (ANPR) to collect information about general-purpose reloadable prepaid cards (GPR cards), including bank-issued GPR cards. The CFPB is interested in learning more about the costs, benefits, and potential risks to consumers posed by these cards. The plan is for the CFPB to use the information gathered to determine whether to extend the consumer protections of Regulation E to GPR cards. The CFPB also launched a searchable online tool with answers to more than 80 questions about prepaid cards. For additional information on the ANPR, review our client alert: <http://www.mofo.com/files/Uploads/Images/120529-CFPB-Prepaid-Cards.pdf>.

For more information, contact Rick Fischer at rfischer@mofo.com or Obrea Poindexter at opindexter@mofo.com.

My Vendor, My Responsibility

The CFPB released a bulletin providing that financial institutions under its supervision may be held responsible for the actions of the companies with which they contract. The CFPB expects supervised financial institutions to have an effective process for managing the risks of service provider relationships, including taking steps to ensure that these business arrangements do not present unwarranted risks to consumers.

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

Discretion is the Better Part of Valor

The CFPB is proposing to amend Regulation Z provisions that limit credit card fee amounts in response to a federal court victory for the issuers of high-fee

credit cards. Although the CARD Act limited account-opening fees, the FRB issued a rule, later transferred to the CFPB, which also limited fees imposed before account opening. After a court struck down the rule as an unreasonable interpretation of the statute, the CFPB proposed to amend it in accordance with the court's ruling.

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

Smart Shopper Tool

The CFPB has released the beta version of an online tool designed to help families make informed decisions on student loans. The tool allows users to input the names of three colleges, gathers data from the Department of Education about the annual cost and the average amount of financial aid for each school, and displays the difference between the cost and the aid as the amount of required borrowing for each year in school. We can probably count on similar price comparison tools for other financial products and services to be released by the CFPB in the coming months and years.

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

Impactful

In the wake of the dismissal of *Magner v. Gallagher*, the Supreme Court case that would have decided the legitimacy of "disparate impact" discrimination claims under the Fair Housing Act, the CFPB released a Bulletin confirming that the "disparate impact" doctrine *does* apply under the Equal Credit Opportunity Act and Regulation B. "Disparate impact" discrimination occurs when a lender employs a facially neutral policy or practice, but the policy or practice has a disproportionate adverse impact on applicants from a protected group. The CFPB's position is consistent with a 1994 policy statement on fair lending issues published by the federal banking agencies, FTC, HUD, and DOJ, among others.

CFPB Director Richard Cordray gave a speech outlining the agency's commitment to fair lending. He singled out "mortgages, student loans, credit cards, and auto loans" for particular attention, and highlighted two lending practices in specific: "redlining" and the granting of discretion to loan officers to charge markups. The CFPB's pronouncements are further evidence of the very aggressive supervisory and law enforcement posture that the CFPB intends to take on this issue.

For more information, contact Tom Noto at tnoto@mofo.com and Wendy Garbers at wgarbers@mofo.com.

CFPB Small Business Panels

As required by Dodd-Frank, the CFPB is convening its first panel of small businesses to get their input on the effects of contemplated rulemaking on small businesses. Representatives from the CFPB, the Small Business Administration (SBA), and Office of Management and Budget will interview between 15 and 20 small businesses regarding the potential impact of anticipated rules regarding mortgage brokers (see Mortgage Report.) It appears from the CFPB's "fact sheet" that small businesses will be chosen by an invitation-only process in which the CFPB will develop a list of possible candidates and then select the representative businesses after consultation with the SBA.

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

The Shoe's On the Other Foot

The Government Accountability Office issued a report concluding that the CFPB should add several internal controls to prevent a misappropriation of assets and errors in its financial statements. The report indicates that the CFPB should enhance its internal control review procedures; establish an agency-wide information security system; implement procedures to ensure the recording of accurate contracts information; improve procedures for approving travel

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transactions; and conduct quarterly post-payment reviews. The report followed up on several control issues the GAO identified last year in its first CFPB audit.

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

Will You Get a Knock on the Door?

The CFPB has proposed rules setting forth procedures for when and how a non-bank “covered person” might become subject to CFPB supervision. Dodd-Frank gives the CFPB authority to supervise any non-bank it determines could pose risks to consumers in the offering or provision of consumer financial products or services. The proposed rule would prescribe procedures to notify a non-bank that it is being considered for supervision, provide the non-bank an opportunity to respond, and set out what the CFPB requires in the response. The proposal also would include a mechanism for non-banks to file a petition to terminate supervision authority after two years.

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

Playing Chicken with Privilege

As we reported in our last Newsletter, the House quickly passed the Dodd-Frank amendment clarifying that the disclosure of privileged information to the CFPB would not be construed as a waiver of the privilege. Despite strong bipartisan support, the bill has stalled in the Senate. Reportedly, Senator Corker is the key obstacle standing in the way of passage. He continues to hold out for a broader package of “technical” fixes.

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

Operations Report

Risky Business

According to Comptroller of the Currency Thomas J. Curry, the OCC is finding that increased operational risk at national banks is eclipsing credit risk as a safety and soundness concern. Defining operational risk as the risk of loss due to failures of people, processes, systems, and external events, Curry explained that banks should validate the reports, assumptions, and algorithms in their risk models, and avoid relying on a single approach.

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

One Step Forward, Two Steps Back

The Volcker Rule will take effect automatically on July 21, 2012, even though, the implementing regulations will not have been finalized by then. The statute does, however, provide a two-year conformance period, until July 21, 2014, for all banking entities. The federal banking agencies, the CFTC, and the SEC confirmed that banking entities will have the full two years in which to comply. The currently proposed regulation had suggested to some that the regulators might enforce the rule earlier.

The clarification also indicates that each banking entity is expected to develop a conformance plan to guide its work over the coming two years, and to make a “good faith” effort to ensure that it will be in full compliance on July 21, 2014. The agencies have noted as well that the recordkeeping and reporting requirements may be enforced earlier than that date.

For additional information, read our client alert at: <http://www.mofo.com/files/Uploads/Images/120419-Volcker-Rule-Conformance.pdf>.

For more information, contact Dwight Smith at dsmith@mofo.com and Charles Horn at charleshorn@mofo.com.

THE CFPB HAS PROPOSED RULES . . . FOR WHEN AND HOW A NON-BANK “COVERED PERSON” MIGHT BECOME SUBJECT TO CFPB SUPERVISION.

Big Banks, Big Bucks

The Treasury Department issued final and interim final rules to implement the Dodd-Frank provision directing the Treasury to establish a schedule for assessments of bank holding companies with total consolidated assets of \$50 billion or greater, and nonbank financial companies supervised by the FRB. The assessments will be used to pay the expenses of the Financial Stability Oversight Council and the Office of Financial Research, and those expenses of the Federal Deposit Insurance Corporation relating to its rule-writing and resolution planning under Dodd-Frank. The assessment schedule for bank holding companies is issued as a final rule, while that for systemically important nonbank financial institutions is issued as an interim final rule, to allow for the consideration of additional comments in conjunction with related FSOC rules. Treasury will begin to collect semiannual assessment fees from these companies on July 20, 2012.

For more information, contact Dwight Smith at dsmith@mofo.com and Charles Horn at charleshorn@mofo.com.

Was It Good for You?

The American Bankers Association (ABA) has begun a project to survey bankers about their satisfaction with exams. The ABA initiated the project in response to

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criticism from bankers that examiners had become more aggressive and less reasonable. Interim reports the ABA provided to the FDIC, OCC, and FRB show very similar results among the three agencies: about 1/3 of banks reported that they were “dissatisfied” or “very dissatisfied” with their exam, roughly half were satisfied with their exam, and the rest were neutral. The report also details the results of the exams themselves, including that at least 1/3 of banks are operating under some sort of written agreement with their regulator.

This same concern with examination fairness has led to a bill sponsored by Rep. Capito to allow supervised entities to appeal their examination results.

For more information, contact Ollie Ireland at oireland@mof.com and Charles Horn at charleshorn@mof.com.

Simplification at Last

The FRB announced a final rule to simplify the administration of reserve requirements and reduce administrative and operational costs for depository institutions and Federal Reserve Banks. The rule, which amends Regulation D, simplifies reserves administration by: creating a common two-week maintenance period and a penalty-free band around reserve balance requirements; discontinuing as-of adjustments related to deposit report revisions; replacing all other as-of adjustments with direct compensation; and eliminating the contractual clearing balance program.

For more information, contact Ombrea Poindexter at opindexter@mof.com.

Rad Result

On May 29, in an 8-0 decision, the U.S. Supreme Court in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank* held that secured creditors have the right to “credit bid”—that is, to bid what is owed them—

when a debtor proposes to sell the secured creditor’s collateral free and clear of the creditor’s lien in a Chapter 11 bankruptcy plan of reorganization. The case is *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*.

“Today’s decision protects the benefits of a secured creditor’s bargain,” said the Firm’s Deanne Maynard, who argued the case for the secured creditor, Amalgamated Bank. “A secured creditor bargains for the right to be repaid in full or, if not, to foreclose and take possession of its collateral. The Court’s decision will ensure that secured creditors have the ability to protect that bargain in bankruptcy. If the price for which its collateral is being sold in a bankruptcy auction is too low, the secured creditor can bid what it is owed and take possession of its collateral.”

For more information, see our Client Alert at: <http://www.mof.com/files/Uploads/Images/120529-Credit-Bidding.pdf>, or contact Adam Lewis at alewis@mof.com or Deanne Maynard at dmaynard@mof.com.

Arbitration Report

Concepcion Conga Line Continues

The Ninth Circuit confirmed again the breadth of the *Concepcion* ruling, rejecting plaintiff’s arguments that the Washington state version of the Discover Bank rule was outside the scope of the Supreme Court’s ruling because it required a case-by-case factual analysis of whether the class arbitration waiver was enforceable. *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012). The court threw plaintiffs a bone, though, explaining *Concepcion* recognized the “continued vitality” of the doctrine of procedural unconscionability, and remanding for analysis of whether any applicable state law allows the voiding of a contract based on procedural unconscionability alone.

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

No Dancing in New York

The Second Circuit has decided, and nothing the Supreme Court says is going to get them to change their mind. In a split decision, the Circuit denied American Express’s latest petition for rehearing en banc, which requested rehearing of the Circuit’s affirmance of the trial court’s decision that *Concepcion* does not change the previous denial of the motion to compel arbitration. The Second Circuit reaffirmed its view that class arbitration waivers are unenforceable when plaintiff proves the costs of arbitration on an individual basis would not allow plaintiff to vindicate federal rights. *Concepcion*, the court reasoned, concerned only state law claims. *In re: Am. Express Merchants’ Litig.*, 2012 U.S. App. LEXIS 10815 (2d Cir. May 29, 2012). The ruling creates a circuit split with the Ninth Circuit, which noted its disagreement with the Second Circuit’s approach. *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012).

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

What a Difference a Year Makes

In the year since *Concepcion* was decided, we have been reporting on the reverberations in the lower courts. If you were left with the impression that courts have generally been enforcing class arbitration bans, you were right. According to a report released in April by two consumer advocacy groups, Public Citizen and the National Association of Consumer Advocates (NACA), courts have cited *Concepcion* and upheld class arbitration waivers in 45 out of 76 cases. Courts refused to order arbitration in 14 of those cases, and authorized discovery or set an evidentiary hearing in a few of the remaining cases. But the fight is not over. See below.

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

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CFPB Crashes the Party

Likely in response to the statistics discussed above, the CFPB has decided now is the time to wade into the fray. Dodd-Frank requires the CFPB to submit a study to Congress regarding the use of mandatory arbitration clauses in consumer financial services contracts. The results of the study will determine whether the CFPB can regulate use of arbitration agreements or prohibit them altogether for entities within its authority. The CFPB launched its study on April 24 with a call for public comment by June 23. Stay tuned.

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

Mortgage Report

Two 2 Tango

On May 24, the U.S. Supreme Court delivered a unanimous ruling for Quicken Loans, holding that Section 8(b) of RESPA allows claims of unearned fees only if the fee is divided among at least two parties. See *Freeman v. Quicken Loans Inc.*, No. 10-1042, 2012 U.S. LEXIS 3940 (U.S. May 24, 2012). Penned by Justice Scalia, the decision holds that Section 8(b) “unambiguously covers only a settlement-service provider’s splitting of a fee with one or more other persons; it cannot be understood to reach a single provider’s retention of an unearned fee.” *Id.* at *2. The Fourth, Seventh, and Eighth Circuits had also held that Section 8(b) claims at least two parties.

Freeman means that “unearned fees” violate federal law only if the fees are split between two companies. In other words, Section 8(b) can’t be used, as some have urged, to police the *amount* of fees that

a single bank charges, or the general “unfairness” of mortgage-related fees. The CFPB, which under the Dodd-Frank Act inherited responsibility for RESPA from HUD, urged reversal of the Fifth Circuit ruling, arguing that Section 8(b) prohibits unearned fees regardless of whether they are split.

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

And the HAMP Goes On

Proving perhaps the wisdom of the maxim that no good deed goes unpunished, mortgage modification litigation remains quite active. These claims find their way into tens of thousands of individual cases, and are in play in well over a 100 putative class actions pending across the country. As we reported in our last issue, courts have split over whether the initial

of document mishandling, misleading statements about modification prospects, and failure to honor permanent modification agreements. The claims may be short-lived. Pending before several courts are challenges based on federal preemption under the National Bank Act, and the defense that the OCC Consent Orders against the major servicers last April divest courts of jurisdiction over these types of claims because those cases could conflict with consent order enforcement. Important decisions, at both the trial court level and in matters on appeal, are expected over the next six months.

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

Mortgage Origination Stays in the Spotlight

The CFPB provided a sneak peek at some of its proposals for regulating mortgage originations. Although proposed rules won’t be released for public comment until this summer, with final rules in late 2012 or early 2013, the CFPB couldn’t wait to preview its plans for a few of its favorite topics, including clearer periodic statements, advance notice of rate increases for adjustable rate mortgages, and new limits on force-placed insurance. It is weighing flat origination fees, a mandatory reduction in loan rates if borrowers pay discount points, and a requirement that borrowers have the option to choose a loan with no discount points. The CFPB is also considering qualification and screening standards for mortgage brokers and officers, including character and fitness requirements and background checks, as well as a ban on compensation for originators based on interest rates or certain other loan terms.

For more information, contact Tom Noto at tnoto@mofo.com.

Home Away from Home

The Treasury Department, working with the CFPB, announced changes to HAMP for military homeowners who are permanently displaced due to a

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LAW ONLY IF THE FEES
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form of the Trial Payment Plan (“TPP”) under HAMP guaranteed borrowers a permanent modification if they made the trial payments and submitted the required documents, regardless of whether they actually qualified under the broader HAMP eligibility guidelines. About a third of these cases have been dismissed at the outset, though a sizable number have progressed to discovery, including MDL proceedings consolidating such cases against Bank of America, Chase, and CitiMortgage.

The latest theories focus on customer service failures and other delays in the modification process, including claims

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job-related move. Under this new policy, servicemembers who have to leave their home because of a job change may still qualify as owner-occupants and be eligible for a HAMP mortgage modification as long as they do not own another home and intend to return to their current home at some point in the future.

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

Fannie’s, Freddie’s Future?

The Federal Housing Finance Agency is seeking public comment on a five-year strategic plan that includes building a new mortgage securitization platform that could replace the two government-sponsored housing finance enterprises Fannie Mae and Freddie Mac. Published May 15, the FHFA’s draft plan incorporates new conservatorship goals that the agency outlined to Congress in February.

For more information, contact Tom Noto at tnoto@mof.com.

Can You Hear Me Now?

Responding to consumer group reports that courts have been misinterpreting the Holder Rule, the FTC recently issued an advisory opinion clarifying the Rule’s scope. The Holder Rule requires sellers that arrange or offer loan sales to consumers to include a notice stating the purchaser is subject to all claims and defenses, which the borrower could assert against the seller, subject to recovery limitations. The FTC explains that the Rule “does not create any new claims or defenses for the consumer; it simply protects the consumer’s existing claims and defenses.” The advisory opinion concludes that the rule “places no limits on a consumer’s right to an affirmative recovery other than limiting recovery to a refund of monies paid under the contract. Further, the Rule does not limit affirmative

recovery only to those circumstances where rescission is warranted or where the goods or services sold to the consumer are worthless.”

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

Fourth Finds Fudge Factor Fine

In *Gilbert v. Residential Funding LLC*, No. 10-2295, 2012 U.S. App. LEXIS 9114, at *15 (4th Cir. May 3, 2012), the Fourth Circuit held TILA does not create a hard-stop at three years for rescission claims where the borrowers notified the lender within three years of loan origination, but filed suit after the three-year period had expired. The court recognized that its ruling created a split with the Ninth Circuit, but “refuse[d] to graft” the requirement of bringing suit onto TILA’s requirement that borrowers exercise their right to rescind within three years from the closing of the loan. The court further held that TILA’s one year statute of limitations for damages based on the alleged refusal to honor their rescission request did not accrue until the request was denied by the lender.

Industry trade associations recently filed a brief in *Rosenfield v. HSBC Bank USA*, No. 10-1442 (10th Cir. May 3, 2012), a case pending in the Tenth Circuit that raises the same rescission statute of limitations issue.

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

Privacy Report

Spy Tales

Are foreign governments intercepting customers’ private information when Bank of America sends it to foreign call centers? Not even the plaintiffs know, which defeated their suit filed in a District of Columbia court seeking to prohibit this transfer of financial information. *Floyd v. Bank of Am.*, No. 2011 CA 008011 B (D.C. Sup. Ct.). Plaintiffs

alleged that Bank of America put their privacy rights in jeopardy by transmitting it to overseas call centers because government agencies might intercept the information as part of “pervasive” covert international surveillance activities. The court dismissed the suit, holding plaintiffs lacked standing because they alleged only their subjective belief that their financial information was intercepted, and so failed to allege any actual harm caused by the hypothetical data interception.

For more information, contact Mark Ladner at mladner@mof.com and Michael Miller at mbmiller@mof.com, who represented Bank of America in this case.

Privacy Notice Exemptions Proposal

On May 17, 2012, Representative Luetkemeyer introduced a bill that would create exemptions from the Gramm-Leach-Bliley Act (GLBA) annual privacy policy disclosure requirement. The bill would allow financial institutions to bypass the annual privacy notice requirement if the institution: (1) provides nonpublic personal information only to service providers or pursuant to other GLBA exceptions; (2) does not share transaction and experience or other information with affiliates; and (3) has not changed its policies and practices with regard to disclosing nonpublic personal information from the policies and practices that were disclosed in the most recent privacy policy sent to consumers. The bill includes other exemptions for certain state-licensed financial institutions.

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

Privacy Gold Standard

On March 26, 2012, the FTC issued its final report detailing best practices for privacy. The report includes the FTC’s recommendations that companies build in consumer privacy protections at every stage in developing products (so-called “privacy by design”) and give consumers the option to decide what information is

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shared about them and with whom. The FTC outlined specific steps companies and self-regulatory bodies should take to implement the recommended principles, including urging data brokers to make their operations more transparent by creating a centralized website to identify themselves and disclose how they collect and use consumer data. The FTC also recommended that Congress consider enacting general privacy legislation, data security and breach notification legislation, and data broker legislation. For more information, read our Client Alert at: <http://www.mofo.com/files/Uploads/Images/120403-FTC-Final-Privacy-Report.pdf>.

For more information, contact Andrew Smith at asmith@mofo.com, Julie O’Neill at joneill@mofo.com, and Reed Freeman at rffreeman@mofo.com.

Mobile Payments Party

On April 26, 2012, the FTC hosted a public workshop focused on the use of mobile payments in the marketplace and the impact that mobile payments have on consumers. The event included consumer advocates, industry representatives, government agencies, technologists, and educators. The panelists examined a broad range of issues, including, for example, the risks of financial losses related to mobile payments as compared to other forms of payment, the recourse consumers have if they receive fraudulent, unauthorized, or inaccurate charges and privacy and data collection, and related disclosure practices.

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

There’s an App for That

On February 22, 2012, the California Attorney General announced an agreement with six companies whose platforms comprise the majority of the mobile apps market—Amazon, Apple, Google, Hewlett-

Packard, Microsoft, and Research In Motion. These companies committed themselves to improving privacy protections for consumers who access the Internet through apps. They also agreed to privacy principles designed to bring the industry in line with the California Online Privacy Protection Act, effectively establishing a nationwide standard for app privacy policies. Consumers will be able to review an app’s privacy policy before downloading the app, and these privacy policies will appear at a consistent location on the download screen. The companies also agreed to create a means for users to report apps that are not following the new rules.

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

Online Privacy Initiatives on Overdrive

On February 23, 2012, the Digital Advertising Alliance announced a self-regulatory program for online behavioral advertising under which Google, AOL, and others agreed to set a browser-based mechanism that will allow users to escape tracking cookies. The DAA indicated that this mechanism will be implemented within the next nine months. The stated goal is to balance innovation and consumer protection by allowing tracking for “socially-accepted, time-tested practices,” such as intellectual property protection and fraud prevention, but not for operations such as employment eligibility and health care treatment verification.

Following this announcement, Google consolidated its privacy policies across all of its services into a single umbrella statement. And Facebook announced updates to its “Download Your Information” tool, which will allow users to access additional information about their accounts.

Finally, the Interactive Advertising Bureau implemented new in-stream video advertising standards, which will allow consumers to skip unwanted ads and support in-ad privacy notice displays.

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

States Try to Keep Up

Data security legislation continues to be all the rage, with at least five state legislatures introducing bills. Of particular note, the Vermont legislature passed a bill that would, among other things, impose a 45-day deadline for consumer notification

**GOOGLE [AND]
AOL . . . WILL ALLOW
USERS TO ESCAPE
TRACKING COOKIES.**

after discovery of a breach and impose considerations for determining whether personal information has been acquired by an unauthorized party. A bill introduced in Connecticut would amend the state’s security breach notification law to require notice to the Connecticut AG of a breach. A New Jersey bill would impose a disposal obligation for information stored on copy machines. And proposed legislation in Hawaii would require businesses that retain personal information to develop comprehensive written information security programs with safeguards to protect, among other things, financial records.

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

Holy Data Breach Batman!

The Massachusetts Office of Consumer Affairs and Business Regulation (OCABR) released a report regarding notices to the Massachusetts AG and OCABR of data breaches since the state’s security breach notification law went into effect. As of September 30, 2011, the state had received over 1,800 notices of breaches involving information about 3.16 million

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people. Financial services firms accounted for the highest number of breaches with 955 reported breaches, followed by health care with 214 reported breaches.

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

Speaking of Which

On March 30, 2012, payment card processor Global Payments Inc. announced a breach of its card processing system. Global Payments reported that the affected portion of its processing system was confined to North America and that less than 1.5 million payment card numbers may have been “exported” from its system as a result of the breach. Global Payments further reported that Track 2 card data may have been stolen, but cardholder names, addresses, and Social Security numbers were not obtained. In response, Visa and MasterCard removed Global Payments from their lists of card processors in compliance with the Payment Card Industry Data Security Standard (PCI-DSS), which will require Global Payments to resubmit to the PCI-DSS certification process.

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

Do You Know Where Your Cellphone Is?

Symantec conducted an experiment to find out what happens to lost smartphones by intentionally leaving 50 smartphones in major cities and remotely monitoring what happened next. The results showed a very high likelihood that people who find a lost cell phone will attempt to access personal and business-related information from the phone. Symantec found that 96% of lost smartphones were accessed by the finders of the devices, and 70% of the devices were accessed for both business and personal-related applications and information.

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

Preemption Report

Car Wreck

The Fourth Circuit followed a recent Ninth Circuit decision in holding state law auto repossession notice requirements as applied to national banks are not preempted by the National Bank Act and OCC regulations. *Epps v. JP Morgan Chase Bank, N.A.*, 675 F.3d 315 (4th Cir. 2012). The court found the scope of expressly preempted disclosure and advertising state laws was limited to laws concerning the extension of credit and did not include disclosure laws relating to debt collection. The court also rejected the national bank’s argument under the OTS regulation savings clause for the same reason, explaining the bank could not show more than an incidental impact of the repossession disclosure statute on its extension of credit.

For more information, contact James McGuire at jmcguire@mofo.com.

You Say Tomato

More in the continuing saga and differences of opinion on whether HOLA and OTS regulations preempt wrongful foreclosure claims. Claims based on a servicer’s alleged failure to follow state-law foreclosure procedures or demonstrate authority to foreclose, including wrongful securitization theories, have “consistently” been rejected as “preempted by HOLA” by California federal courts. *Castillo v. Wachovia Mortg.*, No. C-12-0101 EMC, 2012 U.S. Dist. LEXIS 50926, at *15 (N.D. Cal. April 11, 2012) (collecting cases); accord *Thomas v. Deutsche Bank National Trust*, No. C 12-00472 CRB, 2012 U.S. Dist. LEXIS 63871 (N.D. Cal. May 7, 2012). These courts found foreclosure challenges were state laws regarding “servicing, sale or purchase of, or investment or participation in mortgages,” which are expressly preempted by OTS regulations.

However, a Massachusetts District Court recently disagreed, finding this reading of “servicing” was too broad as it renders other categories of preempted state laws redundant. *Sovereign Bank v. Sturgis*, No. 11-10601-DPW, 2012 U.S. Dist. LEXIS 38860, at *67 (D. Mass. March 22, 2012). Although the court recognized that foreclosure activity more than incidentally affected lending operations, it concluded the purpose of federal preemption, to preserve a uniform federal regulatory scheme in the absence of any federal foreclosure law. The court did hold state law limiting exercise of acceleration clauses and requiring an itemized accounting were preempted.

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

Challenge to Lending Activities by Any Other Name

A District of Columbia District Court found UDAP and common law claims preempted by HOLA to the extent they were based on the borrower’s theories that a national bank failed to consider her ability to repay her mortgage in its underwriting process, charged yield spread premiums, and misrepresented material facts about her mortgage. *Poindexter v. Wachovia Mortg. Corp.*, No. 1:9-cv-1392 (RLW), 2012 U.S. Dist. LEXIS 45144 (D.D.C. March 30, 2012). Because these claims were not laws directed at federal savings banks, the court looked to whether the claims, as applied, had more than an incidental effect on lending activities, concluding they all went directly to core lending functions and were therefore preempted.

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

We’re Not in Iowa Anymore

An Iowa state law requiring a contracting party to be registered to do business in Iowa in order to take advantage of the state’s long-arm statute is preempted as applied to a national bank. *Wells Fargo Bank v. Baker*, 204 Cal. App. 4th 1063 (2012). The court found that conditioning a national bank’s

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ability to use substitute service on obtaining a certificate of authority from the state burdened the national bank's debt collection activities and unfairly discriminated against national banks in favor of state-chartered banks. As a result, the national bank's substitute service on the California residents was effective and the trial court erred in vacating entry of the Iowa court's judgment.

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

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Lauren Max
Morrison & Foerster LLP
1290 Avenue of the Americas,
New York, NY 10104
imax@mofo.com

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The firm members who specialize in financial services are:

Los Angeles

Henry Fields	(213) 892-5275 hfields@mofo.com
Joseph Gabai	(213) 892-5284 jgabai@mofo.com
Robert Stern	(213) 892-5484 rstern@mofo.com
Nancy Thomas	(213) 892-5561 nthomas@mofo.com
Donna Zenor	(213) 892-5443 dzenor@mofo.com

New York

Jack Auspitz	(212) 468-8046 jauspitz@mofo.com
James Bergin	(212) 468-8033 jbergin@mofo.com
Chet Kerr	(212) 468-8043 ckerr@mofo.com
Mark Ladner	(212) 468-8035 mladner@mofo.com
Barbara Mendelson	(212) 468-8118 bmendelson@mofo.com
Anthony Radice	(212) 468-8020 aradice@mofo.com
Joan Warrington	(212) 506-7307 jwarrington@mofo.com

Sacramento

Michael Stusiak	(916) 325-1306 mstusiak@mofo.com
-----------------	--

San Francisco

Michael Agoglia	(415) 268-6057 magoglia@mofo.com
Roland Brandel	(415) 268-7093 rbrandel@mofo.com
Greg Dresser	(415) 268-6396 gdresser@mofo.com
Wendy Garbers	(415) 268-6664 wgarbers@mofo.com
Rebekah Kaufman	(415) 268-6148 rkaufman@mofo.com
Adam Lewis	(415) 268-7232 alewis@mofo.com
Jim McCabe	(415) 268-7011 jmccabe@mofo.com
James McGuire	(415) 268-7013 jmcguire@mofo.com
William Stern	(415) 268-7637 wstern@mofo.com

Washington, D.C./Northern Virginia

Steve Colangelo	(202) 887-1528 scolangelo@mofo.com
L. Richard Fischer	(202) 887-1566 lfischer@mofo.com
Charles Horn	(202) 887-1555 charleshorn@mofo.com
Oliver Ireland	(202) 778-1614 olireland@mofo.com
Ezra Levine	(202) 887-1597 elevine@mofo.com
Thomas Noto	(202) 887-1538 tnoto@mofo.com
Obrea Poindexter	(202) 887-8741 opoindexter@mofo.com
Andrew Smith	(202) 887-1558 andrewsmith@mofo.com
Dwight Smith	(202) 887-1562 dsmith@mofo.com