Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

January 20, 2012

Topics In This Issue

Federal Issues

CFPB Holds Field Hearing on Payday Lending. On January 19, the Consumer Financial Protection Bureau (CFPB) held a field hearing in Birmingham, Alabama to discuss payday lending products. The hearing, which was the first such hearing held by the CFPB, included three panels featuring CFPB staff, consumer groups, and industry representatives. In conjunction with the event, the CFPB also released its "Short-Term, Small-Dollar Lending Procedures," which is a field guide for use in examining bank and nonbank payday lenders. These procedures are structured to mirror payday lending activities ranging from initial advertising to collection practices. The CFPB will prioritize its supervision of payday lenders depending on the perceived risk to consumers, taking into account factors such as a lender's volume of business and the extent of existing state oversight. In remarks at the event, Director Richard Cordray stated that there are some payday lenders and practices that deserve more urgent attention because they present immediate risk to consumers and are "clearly illegal." The Director identified two examples of such practices, including (i) unauthorized debits on a consumer's checking account that can occur when the consumer unknowingly "is dealing with several businesses hidden behind a payday loan," any one of which could be a "fraudster" merely seeking the customer's private financial information, and (ii) "aggressive debt collection tactics" including "posing as federal authorities, threatening borrowers with criminal prosecution, trying to garnish wages improperly, and harassing the borrower." Click here for a copy of the CFPB hearing announcement; click here for a copy of the press release regarding the event and payday loan exam procedures; click here for Director Cordray's remarks at the event.

FDIC Approves Final Rule Regarding Resolution Plans. On January 17, the Federal Deposit Insurance Corporation (FDIC) approved a final rule establishing the requirements for submission and content of plans to assist the FDIC in the orderly resolution of insured depository institutions with total assets of at least $50 billion. The rule aims to help mitigate risks presented by insolvency of large and complex institutions by enhancing the FDIC's ability to reduce losses to the Deposit Insurance Fund and limit disruption to the broader financial system. The $50 billion asset threshold means that thirty-seven institutions currently will be required to submit resolution plans (also known as "living wills"). This final rule follows and amends an interim final rule published in September 2011 (see InfoBytes, September 23, 2011). Some amendments are designed to more closely align the rule with a similar rule issued jointly by FDIC and the Federal Reserve Board in October 2011 to require resolution plans for certain bank holding companies. (See InfoBytes, October 21, 2011). Other changes to the interim final rule address comments submitted by stakeholders, including changes to (i) require plans to identify potential barriers or other material obstacles to an orderly resolution, (ii) allow for recapitalization as a resolution option, and (iii) require the FDIC in its plan review process to consult with a covered institution's regulator before finding that an institution's data production capability is unacceptable. Resolution plans will be submitted in phases to address the largest institutions first. For example, the first phase requires covered institutions whose parent company had at least $250 billion of nonbank assets as of November 30, 2011 to submit plans on July 1, 2012. Each covered institution must submit plans annually on the anniversary date of their initial submission. Click here for a copy of the press release with a link to the final rule.

FDIC Approves Proposal for Large Bank Stress Testing. On January 17, the FDIC approved a proposed rule to implement annual capital-adequacy stress tests for FDIC-insured state nonmember banks and state-chartered savings associations with over $10 billion of total consolidated assets. As of September 30, 2011, there were twenty-three such institutions. Required by the Dodd-Frank Act, the stress tests would assist the FDIC in assessing risk presented by an institution's capitalization and help ensure the bank's financial stability. Under the proposal, the FDIC would annually provide covered banks with at least three sets of conditions - baseline, adverse, and severely adverse - that must be used in conducting an annual stress test. The tests would include calculations, for each quarter-end within a defined planning horizon, of the impact on the covered bank's (i) potential losses, (ii) pre-provision revenues, (iii) loan loss reserves, and (iv) pro forma capital positions, including the impact on capital levels and ratios. Covered banks also would be required to establish an oversight and documentation system to ensure that stress testing procedures are effective. Following a test, a covered bank would be required to submit the results to the FDIC and later release a summary to the public. Under the proposed timeline, each year (i) the FDIC would provide scenarios no later than mid-November, (ii) covered banks would submit their stress test reports by January 5, and (iii) by early April covered banks would publicly release a summary of results. Public comments on the rule will be accepted sixty days following publication of the rule in the Federal Register. Click here for a copy of the press release with a link to the proposed rule.

FTC Enhances Confidentiality of Investigations and Proposes Rule to Expedite Investigatory Processes. On January 13, by a vote of 5-0, the Federal Trade Commission (FTC) adopted a new rule of practice (Rule 2.17) that streamlines internal procedures for staff seeking a court order to prevent investigation targets from learning about subpoenas and civil investigative demands issued by the FTC. The rule allows individual FTC Commissioners or the FTC's general counsel to authorize the filing of a court action to delay notification to individuals required under the Right to Financial Privacy Act and the Electronic Communications Privacy Act when the FTC is seeking records from financial institutions or service providers. Click here for a copy of the FTC press release.

Also on January 13, the FTC proposed additional changes to Parts 2 and 4 of its Rules of Practice to expedite Commission investigations and ensure that the FTC's investigatory processes keep pace with electronic discovery advances. Among the proposed changes is a requirement for an accelerated meet-and-confer schedule to resolve electronic discovery disputes, as well as a proposal to relieve parties of their obligations to preserve documents after a year passes with no written communication from the FTC. The public can comment on the proposed rule changes through March 23, 2012. Click here for a copy of the FTC press release.

U.S. Sentencing Commission Proposes Harsher Sentences for Securities and Mortgage Fraud. On January 19, the U.S. Sentencing Commission proposed more severe sentencing guidelines for certain securities and mortgage fraud violations. The proposal implements two directives of the Dodd-Frank Act, which require the Commission to re-evaluate penalties in cases involving (i) securities fraud and similar offenses, and (ii) mortgage fraud and financial institution fraud. Generally, the Commission seeks comment on whether the current guidelines appropriately account for potential and actual harm to the public and financial markets from securities, mortgage, and financial institution fraud. With regard to securities fraud, the Commission proposes amendments to address sophisticated insider trading and frauds conducted by individuals holding certain positions of trust. In addressing the mortgage fraud directive, the Commission proposes changes to the calculation of loss in cases of a fraud involving a mortgage loan, including that (i) the loss should be determined by the amount recovered from the foreclosure sale where the collateral has been disposed of at a foreclosure sale; and (ii) reasonably foreseeable administrative costs to the lending institution associated with foreclosing on the mortgaged property may be included as reasonably foreseeable pecuniary harm provided that the lending institution exercised due diligence in the initiation, processing, and monitoring of the loan and the disposal of the collateral. Finally, with regard to more general financial institution fraud, the proposal seeks to provide an enhancement for offenses involving specific financial harms, such as jeopardizing the financial institution. The deadline for written public comments regarding the proposed amendments is March 19, 2012. Click here for a copy of the proposed amendments.

State Issues

Illinois Adds Short Sale Provisions. On January 13, Illinois enacted SB 1259, thereby amending the Code of Civil Procedure to require a mortgagee to respond within ninety days to a residential mortgagor's request to engage in a "short sale," which the amendment defines as "the sale of real estate that is subject to a mortgage for an amount that is less than the amount owed to the mortgagee on the outstanding mortgage note." In order to trigger the mortgagee's response requirement, the mortgagor must present a bona fide written offer from a third party to purchase the property as a short sale. A mortgagee's failure to accept the offer does not impair or abrogate its rights or affect the foreclosure proceedings, and the ninety-day response period does not stay the foreclosure proceedings. The bill became effective immediately upon passage.

Click here for a copy of SB 1259.

Courts

DOJ Obtains Settlement of FCPA Charges Against Japanese Trading Company, Loses Trial on FCPA Charges Related to Mexican Electricity Contract. On January 17, the Department of Justice (DOJ) announced the settlement of Foreign Corrupt Practices Act (FCPA) charges against a Japanese trading company for a bribery scheme involving Nigerian government officials in connection with a liquid natural gas project. The company agreed to pay a $54.6 million criminal penalty to resolve the charges. Concurrently, the DOJ filed a deferred prosecution agreement (DPA), as well as a criminal information that will be dismissed if the company abides by the terms of the DPA for two years.

Click here to review the DOJ release regarding its settlement.

On the same day, following a four-day jury trial, the U.S. District Court for the Southern District of Texas acquitted a former power company executive of multiple FCPA charges related to alleged bribes paid to Mexican officials in connection with an electrical equipment and services contract. The defendant still faces non-FCPA criminal charges, which previously were severed. In 2010, the company settled related charges it faced. Click here for a copy of the district court acquittal; click here for a copy of the indictment; click here for the press release regarding DOJ's earlier settlement.

U.S. Supreme Court Holds TCPA Litigation Not Confined to State Courts. On January 18, the U.S. Supreme Court unanimously held that the Telephone Consumer Protection Act (TCPA) does not require that private actions seeking redress under the TCPA be heard only by state courts. Mims v. Arrow Financial Services, LLC, No. 10-1195, 2012 WL 125429 (Jan. 18, 2012). The decision reversed an Eleventh Circuit decision upholding a district court's finding that Congress had placed exclusive jurisdiction over private TCPA actions in state courts. In so reversing, the Supreme Court contravened prior decisions from the Second, Third, Fourth, Fifth and Ninth circuits. Unlike those decisions, the Supreme Court found no reason to convert the TCPA's permissive grant of jurisdiction to state courts into an exclusive grant barring the federal-question jurisdiction of U.S. district courts. According to the Supreme Court, in the TCPA Congress enacted "detailed, uniform, federal substantive prescriptions" related to telemarketing and "provided for a regulatory regime administered by a federal agency." Congress could have, but did not, seek only to fill gaps in states' enforcement capability. Click here for a copy of the Court's decision.

Ninth Circuit Holds that California Law Cannot be Applied to a Nationwide Class. On January 12, the U.S. Court of Appeals for the Ninth Circuit reversed the certification of a forty-four state class of consumers, finding that California's consumer protection laws could not be applied to a nationwide class, and that even a California-only class failed the rigorous analysis required for certification recently affirmed in the Supreme Court's decision in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). Mazza v. American Honda Motor Co., Inc., No. 09-55376, 2012 WL 89176 (9th Cir. January 12, 2012). In Mazza, plaintiffs sued a California vehicle manufacturer for violations of California's unfair competition and false advertising laws as well as unjust enrichment, alleging that the manufacturer misrepresented and concealed material information in its marketing of vehicles equipped with a collision safety system. The court found that under California's choice of law rules, each state had an interest in the application of its own laws to the claims of those putative class members who purchased or leased vehicles in those states. Further, material differences among the forty-four states' laws required that each state's law must be applied to the transactions that occurred in-state. The court noted that each state has an interest in determining the level of liability faced by companies operating in-state, such that "[m]aximizing consumer and business welfare, and achieving the correct balance for society, does not inexorably favor greater consumer protection; instead, setting a baseline of corporate liability for consumer harm requires balancing the competing interests" in each state. Accordingly, the class could not be maintained under Federal Rule of Civil Procedure 23(b)(3) because the material variations in the laws of the multiple states "overwhelm common issues and preclude predominance for a single nationwide class." The court also held that even a California-only class failed the predominance requirement of Rule 23(b)(3) because class members could not be presumed to have relied on the manufacturer's "very limited" advertisements of the collision safety system. According to the court, unlike the sort of "extensive and long-term" fraudulent advertising campaign that could justify a presumption of reliance by members of the class, the manufacturer's campaign was neither temporally expansive nor affirmatively dishonest. Thus, the individual factual issues regarding whether each class member had actually seen the advertising prior to purchasing or leasing the vehicle precluded class certification. Click here for a copy of the court's opinion.

Massachusetts District Court Says Zip Codes Constitute Personal Identification Information. On January 6, the U.S. District Court for the District of Massachusetts found that a retailer's collection of ZIP codes during a credit card transaction can constitute a violation of Mass. Gen. Laws ch. 93, §105(a) (the Act), but held that a plaintiff must allege actual harm. Tyler v. Michaels Stores, Inc., No. 11-10920, 2012 WL 32208 (D. Mass. Jan. 6, 2012). The complaint, filed on behalf of a putative class, alleged that a retailer's request for customer ZIP codes when processing credit card transactions violates the Act because ZIP codes constitute protected personal identification information (PII). Noting that the plaintiff alleged only that she had received unwanted mail, not that the information was sold or otherwise exposed her to an increased risk of fraud, the court agreed with the retailer and held that the plaintiff failed to allege actual injury. However, the court found that ZIP codes are PII under the Act, and that plaintiff had alleged a per se statutory violation. The court warned that "[s]ince retailers so routinely request a customer's ZIP code at the point-of-sale in a credit card transaction, they ought note here that this Court holds [the retailer] potentially to have violated [the Act] if such request was made during a transaction in which the credit card issuer did not require such disclosure." The court's decision also distinguished the Act as "much narrower in scope" than California's Song-Beverly Act, which is intended not only to prevent fraud like the Act, but also to "prevent[] retailers from directly or indirectly obtaining personal identification information for marketing purposes," which was the subject of the California Supreme Court's holding in Pineda v. Williams Sonoma, Inc., 246 P.3d 612 (Cal. Sup. Ct. 2011). On January 13, plaintiff moved the court to certify the question of law at issue in this case to the Massachusetts Supreme Court. Click here for a copy of the court's decision.

First Circuit Finds Waiver of Rescission Rights Through Loan Modification, Affirms District Court Dismissal for Failure to State a Claim Under Massachusetts' TILA Equivalent. On January 6, the U.S. Court of Appeals for the First Circuit affirmed two prior court rulings against a plaintiff for failure to state a claim for relief under the Massachusetts Consumer Credit Cost Disclosure Act

(MCCCDA), Massachusetts' equivalent of the Truth in Lending Act (TILA). The First Circuit also concluded that execution of a loan modification meant that plaintiff waived any rescission rights under the MCCCDA, an issue which the district court did not reach. DiVittorio v. HSBC Bank USA, N.A., No. 11-1188, 2012 WL 33063 (1st Cir. Jan. 6, 2007). In DiVittorio, plaintiff sought to rescind a loan agreement on the ground that the disclosures made at closing did not comply with the MCCCDA. Plaintiff argued that he was entitled to rescission, damages and attorneys' fees because (i) the APR was not calculated in conformity with applicable regulations, (ii) the disclosure significantly underestimated the finance charge for the loan, and (iii) the disclosure failed to specify explicitly that payments were to be made monthly. The First Circuit, however, found that plaintiff, following repeated defaults on the loan obligation, knowingly and willingly entered into a loan modification agreement that contained a release by plaintiff with a waiver provision which waived any rescission rights he may have had. The modification had been entered into with the assistance of counsel and approved by the bankruptcy court. Independent of the modification agreement, the First Circuit concluded that plaintiff failed to state a claim for relief under TILA or the MCCCDA because (i) the performance-based reduction in interest rate was used in APR calculations, reflecting the parties' legal obligations, and was adequately set forth in the loan documents; (ii) there was no need to include in the disclosures any "unanticipated" additional interest charged as a result of late payments, as such falls outside the definition of "finance charge"; and (iii) the disclosure that there would be 360 payments spanning thirty years was sufficient such that a reasonable person would have understood that payments were to be made on a monthly basis, despite the form's failure to use the term "monthly" or to refer to the life of the loan over "360 months." Click here for a copy of the opinion.

Firm News

David Baris was recognized in the December edition of SmartCEO as a "Go-To Attorney" in the area of securities, corporate, transactional and regulatory matters. In the issue, David W. Pijor, Chairman and CEO of First Virginia Community Bank was quoted as saying "Mr. Baris is one of the best banking law attorneys in the country and understands the inner workings of the banking regulatory agencies, which allows him to provide top-notch advice and counsel." Click here to access the publication.

James Parkinson will be speaking at the Activist Investor Conference on January 23-24, 2012 in New York, on a panel entitled "Activism in China: Understanding Foreign Corrupt Practices Act (FCPA) Enforcement."

Benjamin Klubes will be speaking at the Mortgage Bankers Association's CampusMBA Workshop: "Prepare Now for Fair Lending Reviews and Enforcement" on January 24, 2012, from 10:15 AM to 12:00 PM in Washington, DC. Mr. Klubes' session is entitled: "Legal Theories," in which he will be addressing various fair lending issues, including the disparate impact standard and the possible impact of forthcoming Supreme Court decision in Magner v. Gallagher, as well as HUD's proposed amendment to the Fair Housing Act Rule. To register, please click here.

James Parkinson will be speaking on a panel at the ACI Latin America Summit on Anti-Corruption held in Sao Paulo, Brazil on February 8, 2012. The panel is entitled: "Assessing the Risk of Personal Liability in Bribery Investigations."

David Krakoff will be participating in a panel at the International Association of Defense Counsel's Midyear Meeting in Palms Springs, California on February 15, 2012. The panel is entitled "Worldwide Enforcement of Anti-Corruption Laws-Navigating the International Business Minefield."

James Shreve will be participating in the panel "When the Cloud Goes Bust: Data Breaches in the Cloud" on February 28, 2012 at the RSA Conference in San Francisco, CA. The panel will examine unique issues that may arise when a data security breach involves a company's data stored in a cloud and provide guidance on addressing cloud security breach incidents.

Margo Tank will be participating in a panel at the NACHA - The Electronic Payments Association's Internet Council Meeting in Tampa, Florida on February 29, 2012. The panel will explore the beneficial and harmful effects of data collection and usage, particularly as enabled by a mobile wallet.

Donna Wilson will be speaking at the ABA Section of Litigation Insurance Coverage CLE Seminar held at the Loews Ventana Canyon Resort in Tucson, Arizona from March 1-3, 2012. Ms. Wilson will be representing the defense counsel perspective in a plenary session panel entitled "The Credit Crisis and D&O Insurance Coverage: Challenges facing Insureds, Insurers, and Regulators" on March 1 from 1:00 PM to 2:10 PM.

Andrew Sandler will be speaking at PLI's A Guide to Financial Institutions 2012 Program in New York on March 6, 2012 at 4:00 PM in a session entitled "The New Era of Consumer Protection & Enforcement: The CFPB & Other Initiatives."

Margo Tank and **James Shreve** will be speaking on the panel "Meeting Consumer Protection Requirements in Mobile Payments" at the International Association of Privacy Professionals Global Privacy Summit in Washington, DC on March 7, 2012. The panel will explore the unique and often complex compliance issues for those involved in mobile payments. James Shreve also will be leading the panel "Addressing the Latest Wave of Global Breach Notice Requirements" at the IAPP Summit on March 7. This panel of attorneys from several countries will explore new US and international security breach notification requirements and compliance issues in addressing cross-border incidents.

James Parkinson will be chairing a panel at the International Bar Association's 10th Annual Anti-Corruption Conference in Paris, France on March 13 and 14, 2012. The panel is entitled: "The Privileged Profession: Risks faced by legal professionals advising in international transactions."

David Baris will be speaking in the ABA Banking Law Committee CLE panel, "Dealing with Enforcement Actions and Insider Liability," in Las Vegas on March 23, 2012.

Andrew Sandler will moderate a panel at the American Conference Institute's 8th National Forum on Residential Mortgage Litigation and Regulatory Enforcement on March 29, 2012 in Washington, DC.

The panel is titled, "Complying With and Responding to New and Emerging Federal and State Enforcement Actions."

James Parkinson will be speaking at a PLI program seminar entitled "Foreign Corrupt Practices Act 2012" in San Francisco, California on April 17, 2012 and in New York, New York on May 4, 2012.

Firm Publications

Warren Traiger published an article entitled, "Regulators Drop the Ball on CRA's Original Purpose" in American Banker on December 28, 2011. The article discusses federal regulators' approach to the Community Reinvestment Act. Even though its congressional purpose makes no mention of proscribing lending discrimination based on race, ethnicity, sex, or other prohibited factors, the CRA has become an important tool for enforcing laws that do, like the Fair Housing and Equal Credit Opportunity Acts. Click here for a copy of the full article.

Donna Wilson published an article entitled, "Neutralizing the Putative Lead Plaintiff" in InsideCounsel on January 5, 2012. The article discusses two recent cases -- Damasco v. Clearwire Corp. and Pitts v. Terrible Herbst, Inc. -- in which the 7th and 9th Circuits, respectively, reached conflicting results on the issue of whether an offer of judgment for the full amount of a putative lead plaintiff's own claim moots a class action complaint if the offer predates the plaintiff's filing of a motion to certify the action as a class. Click here for a copy of the full article.

Donna Wilson published an article entitled, "Courts Take a Broad View of Protected Personal Identification Information" in InsideCounsel on January 19, 2012. The article discusses the recent decision in Tyler v. Michaels Stores, Inc. and what it means for the definition of personal identification information and the common marketing practice of reverse data mining. Click here for a copy of the full article.

Kirk Jensen and **Jeffrey Naimon** published an article entitled, "The Fair Housing Act, Disparate Impact Claims, and Magner v. Gallagher: An Opportunity to Return to the Primacy of the Statutory Text" in the February 2012 volume of The Banking Law Journal. The authors discuss the text of the Fair Housing Act, its legislative history, and the past federal appellate court decisions holding that the FHA permits disparate impact claims. They argue that recent Supreme Court decisions cast doubt on the past federal appellate court decisions, and show that the statutory text of the FHA, unlike the text of some other civil rights laws, does not permit disparate impact claims. They also discuss the case currently pending before the Court in which the Court may address for the first time whether the FHA permits disparate impact claims. Click here for a copy of the full article.

Mortgages

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First Circuit Finds Waiver of Rescission Rights Through Loan Modification, Affirms District Court Dismissal for Failure to State a Claim Under Massachusetts' TILA Equivalent. On January 6, the U.S. Court of Appeals for the First Circuit affirmed two prior court rulings against a plaintiff for failure to state a claim for relief under the Massachusetts Consumer Credit Cost Disclosure Act (MCCCDA), Massachusetts' equivalent of the Truth in Lending Act (TILA). The First Circuit also concluded that execution of a loan modification meant that plaintiff waived any rescission rights under the MCCCDA, an issue which the district court did not reach. DiVittorio v. HSBC Bank USA, N.A., No. 11-1188, 2012 WL 33063 (1st Cir. Jan. 6, 2007). In DiVittorio, plaintiff sought to rescind a loan agreement on the ground that the disclosures made at closing did not comply with the MCCCDA. Plaintiff argued that he was entitled to rescission, damages and attorneys' fees because (i) the APR was not calculated in conformity with applicable regulations, (ii) the disclosure significantly underestimated the finance charge for the loan, and (iii) the disclosure failed to specify explicitly that payments were to be made monthly. The First Circuit, however, found that plaintiff, following repeated defaults on the loan obligation, knowingly and willingly entered into a loan modification agreement that contained a release by plaintiff with a waiver provision which waived any rescission rights he may have had. The modification had been entered into with the assistance of counsel and approved by the bankruptcy court. Independent of the modification agreement, the First Circuit concluded that plaintiff failed to state a claim for relief under TILA or the MCCCDA because (i) the performance-based reduction in interest rate was used in APR calculations, reflecting the parties' legal obligations, and was adequately set forth in the loan documents; (ii) there was no need to include in the disclosures any "unanticipated" additional interest charged as a result of late payments, as such falls outside the definition of "finance charge"; and (iii) the disclosure that there would be 360 payments spanning thirty years was sufficient such that a reasonable person would have understood that payments were to be made on a monthly basis, despite the form's failure to use the term "monthly" or to refer to the life of the loan over "360 months." Click here for a copy of the opinion.

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U.S. Supreme Court Holds TCPA Litigation Not Confined to State Courts. On January 18, the U.S. Supreme Court unanimously held that the Telephone Consumer Protection Act (TCPA) does not require that private actions seeking redress under the TCPA be heard only by state courts. Mims v. Arrow Financial Services, LLC, No. 10-1195, 2012 WL 125429 (Jan. 18, 2012). The decision reversed an Eleventh Circuit decision upholding a district court's finding that Congress had placed exclusive jurisdiction over private TCPA actions in state courts. In so reversing, the Supreme Court contravened prior decisions from the Second, Third, Fourth, Fifth and Ninth circuits. Unlike those decisions, the Supreme Court found no reason to convert the TCPA's permissive grant of jurisdiction to state courts into an exclusive grant barring the federal-question jurisdiction of U.S. district courts. According to the Supreme Court, in the TCPA Congress enacted "detailed, uniform, federal substantive prescriptions" related to telemarketing and "provided for a regulatory regime administered by a federal agency." Congress could have, but did not, seek only to fill gaps in states' enforcement capability.

Click here for a copy of the Court's decision.

Ninth Circuit Holds that California Law Cannot be Applied to a Nationwide Class. On January 12, the U.S. Court of Appeals for the Ninth Circuit reversed the certification of a forty-four state class of consumers, finding that California's consumer protection laws could not be applied to a nationwide class, and that even a California-only class failed the rigorous analysis required for certification recently affirmed in the Supreme Court's decision in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). Mazza v. American Honda Motor Co., Inc., No. 09-55376, 2012 WL 89176 (9th Cir. January 12, 2012). In Mazza, plaintiffs sued a California vehicle manufacturer for violations of California's unfair competition and false advertising laws as well as unjust enrichment, alleging that the manufacturer misrepresented and concealed material information in its marketing of vehicles equipped with a collision safety system. The court found that under California's choice of law rules, each state had an interest in the application of its own laws to the claims of those putative class members who purchased or leased vehicles in those states. Further, material differences among the forty-four states' laws required that each state's law must be applied to the transactions that occurred in-state. The court noted that each state has an interest in determining the level of liability faced by companies operating in-state, such that "[m]aximizing consumer and business welfare, and achieving the correct balance for society, does not inexorably favor greater consumer protection; instead, setting a baseline of corporate liability for consumer harm requires balancing the competing interests" in each state. Accordingly, the class could not be maintained under Federal Rule of Civil Procedure 23(b)(3) because the material variations in the laws of the multiple states "overwhelm common issues and preclude predominance for a single nationwide class." The court also held that even a California-only class failed the predominance requirement of Rule 23(b)(3) because class members could not be presumed to have relied on the manufacturer's "very limited" advertisements of the collision safety system. According to the court, unlike the sort of "extensive and long-term" fraudulent advertising campaign that could justify a presumption of reliance by members of the class, the manufacturer's campaign was neither temporally expansive nor affirmatively dishonest. Thus, the individual factual issues regarding whether each class member had actually seen the advertising prior to purchasing or leasing the vehicle precluded class certification. Click here for a copy of the court's opinion.

FTC Enhances Confidentiality of Investigations and Proposes Rule to Expedite Investigatory Processes. On January 13, by a vote of 5-0, the Federal Trade Commission (FTC) adopted a new rule of practice (Rule 2.17) that streamlines internal procedures for staff seeking a court order to prevent investigation targets from learning about subpoenas and civil investigative demands issued by the FTC. The rule allows individual FTC Commissioners or the FTC's general counsel to authorize the filing of a court action to delay notification to individuals required under the Right to Financial

Privacy Act and the Electronic Communications Privacy Act when the FTC is seeking records from financial institutions or service providers. Click here for a copy of the FTC press release.

Also on January 13, the FTC proposed additional changes to Parts 2 and 4 of its Rules of Practice to expedite Commission investigations and ensure that the FTC's investigatory processes keep pace with electronic discovery advances. Among the proposed changes is a requirement for an accelerated meet-and-confer schedule to resolve electronic discovery disputes, as well as a proposal to relieve parties of their obligations to preserve documents after a year passes with no written communication from the FTC. The public can comment on the proposed rule changes through March 23, 2012. Click here for a copy of the FTC press release.

Privacy/Data Security

Massachusetts District Court Says Zip Codes Constitute Personal Identification Information. On January 6, the U.S. District Court for the District of Massachusetts found that a retailer's collection of ZIP codes during a credit card transaction can constitute a violation of Mass. Gen. Laws ch. 93, §105(a) (the Act), but held that a plaintiff must allege actual harm. Tyler v. Michaels Stores, Inc., No. 11-10920, 2012 WL 32208 (D. Mass. Jan. 6, 2012). The complaint, filed on behalf of a putative class, alleged that a retailer's request for customer ZIP codes when processing credit card transactions violates the Act because ZIP codes constitute protected personal identification information (PII). Noting that the plaintiff alleged only that she had received unwanted mail, not that the information was sold or otherwise exposed her to an increased risk of fraud, the court agreed with the retailer and held that the plaintiff failed to allege actual injury. However, the court found that ZIP codes are PII under the Act, and that plaintiff had alleged a per se statutory violation. The court warned that "[s]ince retailers so routinely request a customer's ZIP code at the point-of-sale in a credit card transaction, they ought note here that this Court holds [the retailer] potentially to have violated [the Act] if such request was made during a transaction in which the credit card issuer did not require such disclosure." The court's decision also distinguished the Act as "much narrower in scope" than California's Song-Beverly Act, which is intended not only to prevent fraud like the Act, but also to "prevent[] retailers from directly or indirectly obtaining personal identification information for marketing purposes," which was the subject of the California Supreme Court's holding in Pineda v. Williams Sonoma, Inc., 246 P.3d 612 (Cal. Sup. Ct. 2011). On January 13, plaintiff moved the court to certify the question of law at issue in this case to the Massachusetts Supreme Court.

Click here for a copy of the court's decision.

Criminal Enforcement Action

DOJ Obtains Settlement of FCPA Charges Against Japanese Trading Company, Loses Trial on FCPA Charges Related to Mexican Electricity Contract. On January 17, the Department of Justice (DOJ) announced the settlement of Foreign Corrupt Practices Act (FCPA) charges against a Japanese trading company for a bribery scheme involving Nigerian government officials in connection with a liquid natural gas project. The company agreed to pay a $54.6 million criminal penalty to resolve the charges. Concurrently, the DOJ filed a deferred prosecution agreement (DPA), as well as a criminal information that will be dismissed if the company abides by the terms of the DPA for two years.

Click here to review the DOJ release regarding its settlement.

On the same day, following a four-day jury trial, the U.S. District Court for the Southern District of Texas acquitted a former power company executive of multiple FCPA charges related to alleged bribes paid to Mexican officials in connection with an electrical equipment and services contract. The defendant still faces non-FCPA criminal charges, which previously were severed. In 2010, the company settled related charges it faced. Click here for a copy of the district court acquittal; click here for a copy of the indictment; click here for the press release regarding DOJ's earlier settlement.