Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

February 25, 2011

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Federal Issues

Federal Reserve Board Announces Final Rule and Requests Public Comment on Second Rule to Revise Regulation Z Escrow Account Requirements. On February 23, the Board of Governors of the Federal Reserve System (Board) issued a final rule and requested public comment on a second rule that will revise the escrow account requirements for certain home mortgage loans under Regulation Z, which implements the Truth in Lending Act (TILA). The revisions are being made pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The final rule implements a provision of the Dodd-Frank Act that increases the annual percentage rate (APR) threshold for determining whether a mortgage lender must establish an escrow account for property taxes and insurance for first-lien, "jumbo" mortgage loans are higher-priced mortgage loans for which an escrow account must be established. As revised, the threshold for coverage of the escrow requirement for first-lien, jumbo loans is 2.5 percentage points in excess of the average prime offer rate, as of the date the transaction’s rate is set. The threshold was previously 1.5 percentage points. This final rule does not change the APR threshold for non-jumbo loans, and it does not apply to open-end credit plans or to loans to finance the initial construction of a dwelling, temporary or "bridge" loans with a term of 12 months or less, or reverse mortgages. The final rule is effective on April 1, 2011, for covered loans for which the creditor receives an application on or after that date. In addition to the final rule, the Board published a proposed rule that would (i) expand the minimum period for mandatory escrow accounts for first-lien, higher-priced mortgage loans from one to five years, and under certain circumstances longer, (ii) extend the partial exemption for certain loans secured by a condominium unit to planned unit developments and certain other, similar properties, and (iii) provide an exemption from the escrow requirement for certain creditors that operate primarily in "rural or underserved" counties, have annual originations of 100 or fewer first-lien mortgage loans, and do not escrow for any mortgage transaction it services. In addition, the proposed rule would implement new disclosure requirements contained in the Dodd-Frank Act. The Board is soliciting comment on the proposed rule for 60 days after publication in the *Federal Register*, which is expected shortly. Click here for a copy of the Board’s press release discussing both the final rule and the proposed rule.

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Senator Franken to Chair New Senate Subcommittee on Privacy, Technology and the Law. On February 14, the Senate Judiciary Committee announced the creation of a new subcommittee on Privacy, Technology and the Law, which will be chaired by Minnesota Senator Al Franken. The new subcommittee will focus on the oversight of laws and policies governing the collection, protection, use and dissemination of commercial information by the private sector, including online behavioral advertising; privacy within social networking websites and other online privacy issues; and enforcement and implementation of commercial information privacy laws among other issues. Oklahoma Republican Tom Coburn will serve as the panel's ranking member. For a copy of the press release, please click here.

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Treasury Announces Headquarters for Consumer Financial Protection Bureau. On February 18, the Treasury Department announced that the Consumer Financial Protection Bureau (CFPB) will be headquartered at 1700 G Street, NW in Washington, DC. In renovating the space for use, the CFPB plans to make the headquarters "a place where Americans of all ages can learn more about managing their finances." For a copy of the press release, please click here.

Courts

Seventh Circuit Finds Debt Collector Did Not Violate FDCPA When It Contacted The Debtor's Legal Counsel After Debtor Refused To Pay. Recently, the U.S. Court of Appeals for the Seventh Circuit upheld summary judgment in favor of the defendant debt collector in an action alleging a violation of the Fair Debt Collections Practices Act. *Tinsley v. Integrity Financial Partners, Inc.*, No. 10-2045 (7th Cir. Feb. 11, 2011). In this case, the plaintiff-debtor retained counsel who sent a letter stating that the plaintiff refused to pay and lacked assets that the creditor could seize in satisfaction of the debt. The letter also stated that further communications could be directed to the office of the plaintiff's counsel. Although the debt collector refrained from further contact with the plaintiff directly, it contacted the plaintiff's counsel requesting payment of the debt. The plaintiff brought suit, alleging that pursuant to 15 U.S.C. § 1692c(c) the debt collector was prohibited from contacting both the debtor and the debtor's counsel once it received the debtor's refusal to pay. The Seventh Circuit disagreed, explaining that, when section 1692c(c) is read in context of subsections (a) and (b) of section 1692c, "the words 'consumer' and 'attorney' must mean different things...." The court further explained that the plaintiff's reading was "implausible" because it would render pre-litigation discussions between lawyers impossible. In reaching its holding, the Seventh Circuit rejected the district court's reasoning in *Startare v. Credit Bureau of N. Am., LLC*, 2010 Y.S. Dist. Lexis 54830 (N.D. Ill. June 3, 2010). Click here for a copy of the opinion.

Tenth Circuit Court of Appeals Finds Financial Institution Bond Only Applied to Losses Due to Forgery or Alteration of Guaranty. Recently, the U.S. Court of Appeals for the Tenth Circuit affirmed a lower court decision holding that a provision in a Financial Institution Bond unambiguously applied to protect against loss resulting from extending credit based on a good faith reliance on a corporate guaranty only where that guaranty was forged or altered. *First Nat'l Bank of Oklahoma v. Progressive Cas. Ins. Co.*, No. 10-6132 (10th Cir. Feb. 1, 2011). In this case, a bank extended to a customer credit secured by a corporate guaranty. The customer defaulted and the corporate guaranty failed. The bank's judgment against the corporate guaranty was uncollectable, and it sought recovery from its insurer under its Financial Institution Bond. The court found that unambiguous language in the Financial Institution Bond and the related Insuring Agreement provided that the bank was insured against an instrument (*i.e.*, a corporate guaranty) that contained a forged signature or that was altered, lost, or stolen. The Insuring Agreement did not insure the bank against non-payment. Therefore, the Tenth Circuit affirmed the lower court's ruling granting summary judgment in favor of the insurer and denying the bank's cross-motion for summary judgment. For a copy of the opinion, please see http://www.ca10.uscourts.gov/opinions/10/10-6132.pdf.

Mississippi Appellate Court Holds Unsigned Employee Reimbursement of Costs Agreement Not Enforceable. On February 22, the Mississippi Court of Appeals held that a cost-reimbursement agreement contained in an emailed employee handbook could not be enforced where the employee had not signed the agreement in the designated space or otherwise acknowledged receipt. *Business Communications, Inc. v. Banks*, No. 2009-CA-00407 (Miss. Ct. App. Feb. 22, 2011) (en banc). When Banks was hired by BCI in 2001, he received an employee handbook, which he signed, and executed a separate Reimbursement of Costs Agreement (RCA), which required him to reimburse certain costs in the event he terminated his employment within one year of his hire. Several years later, BCI distributed by email a new employee handbook. The new handbook contained, among other things, a modified version of the RCA that expanded employees' reimbursement obligations. The revised RCA contained a designated place for employees to sign, but Banks did not do so, nor did he acknowledge receipt of the new handbook. Thereafter, Banks left BCI to join a competitor. BCI sued to enforce both a non-competition agreement and the revised RCA. The jury found for BCI on both issues, but the trial court granted Banks' motion for a judgment notwithstanding the verdict (JNOV). The Court of Appeals reversed the JNOV with respect to the non-competition agreement, finding it reasonable and enforceable. But with respect to the RCA, the Court of Appeals upheld the trial court's JNOV. Although the Court indicated that the agreement might have been enforceable by virtue of its inclusion in the employee handbook, the fact that it "specifically called for and, thus, required its execution by the employee" was dispositive. "We cannot conceive why the [RCA] form in the handbook would require a signature if such was not expected and necessary to advise the employee of his/her obligations to the company. The execution would represent the 'meeting of the minds' of the parties to place a possibly significant financial obligation on the employee." Click here for a copy of the opinion.

Firm News

BuckleySandler LLP will host its West Coast Mortgage Lending and Servicing Today Conference on Monday, April 11 at the Balboa Bay Club and Resort in Newport Beach, CA. The conference will focus on compliance, regulatory and litigation issues in today's changing mortgage lending and servicing environment. For more information, please visit http://fairlendingtoday.com/. To register for the conference, please email Anne McKenzie at amckenzie@buckleysandler.com.

Manley Williams will be moderating the Consumer Credit panel in the American University Law Review symposium, "Emerging From the Recession with the Help of Increased Consumer Protection and Heightened Corporate Responsibility," on March 3 in Washington, D.C. The speakers on Ms. Williams' panel include: Eric Chaffee, Associate Professor, University of Dayton Law School; Thomas B. Pahl, Federal Trade Commission, Bureau of Consumer Protection, Division of Financial Practices; and Travis Plunkett, Consumer Federation of America.

James Parkinson will speak on the Foreign Corrupt Practices Act as a Visiting Lecturer at Universidad Panamericana, Mexico (via videoconference), on March 16.

Margo Tank will be speaking at the E-Signature Summit for Banking Executives in New York on April 8.

James Parkinson will participate on a panel entitled "The Role of the Lawyer in Preventing Corruption," at the International Bar Association's Bar Leaders Conference in Miami, on May 4.

James Parkinson will be speaking at the ACI's "FCPA Compliance in Emerging Markets" program in Washington, D.C., on June 15-16.

Miscellany

Former Taylor, Bean & Whitaker Treasurer Pleads Guilty to Conspiracy to Commit Bank Fraud. On February 24, Desiree Brown, former Treasurer of Taylor, Bean & Whitaker (TBW), pleaded guilty in Virginia federal court to conspiracy to commit bank, wire and securities fraud, and admitted that she and her co-conspirators engaged in a scheme to defraud various entities and individuals, including Colonial Bank, Colonial BancGroup Inc., shareholders of Colonial BancGroup, investors in Ocala Funding LLC, the Troubled Asset Relief Program, and the investing public. Brown admitted that among other violations the co-conspirators pretended to sell hundreds of millions of dollars of fictitious mortgage loans or fictitious trades, or loans already sold to other parties, to Colonial Bank, and caused TBW to misappropriate over $1 billion in collateral from a mortgage lending facility that TBW owned. Brown faces up to 30 years in prison at sentencing. An alleged co-conspirator is scheduled to go to trial later this year. The case was brought in coordination with the federal Financial Fraud Enforcement Task Force. Also on February 24, the Securities and Exchange Commission filed an enforcement action against Brown in Virginia federal court. For a copy of the Department of Justice's press release, please click here.

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secured by a condominium unit to planned unit developments and certain other, similar properties, and (iii) provide an exemption from the escrow requirement for certain creditors that operate primarily in "rural or underserved" counties, have annual originations of 100 or fewer first-lien mortgage loans, and do not escrow for any mortgage transaction it services. In addition, the proposed rule would implement new disclosure requirements contained in the Dodd-Frank Act. The Board is soliciting comment on the proposed rule for 60 days after publication in the *Federal Register*, which is expected shortly. Click here for a copy of the Board's press release discussing both the final rule and the proposed rule.

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We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes.
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