Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

October 8, 2010

Topics In This Issue

Federal Issues

Fannie Mae Issues Letter Directing Servicers To Review Policies and Procedures Relating to the Execution of Affidavits, Verifications, and other Legal Documents In Connection with the Default Process. On October 1, Fannie Mae issued Lender Letter LL-2010-11 (the "Letter") directing all servicers to immediately review their policies and procedures for the execution of affidavits, verifications, and other legal documents in connection with the default process. The Letter indicates that the request for review was prompted by issues that have arisen with respect to defects in the execution process, including whether individuals executing affidavits on behalf of servicers have the required personal knowledge to execute the documents and whether the affidavits were properly notarized. Servicers must send any concerns resulting from their review to Fannie Mae in writing. Fannie Mae also reiterated its existing Mortgage Selling and Servicing Contract (the "Contract") and Servicing Guide provisions relevant to judicial foreclosure policies and procedures. Specifically, under the Contract, a lender must (i) take prompt and diligent action consistent with applicable law or regulations to foreclose on a loan; and (ii) properly manage, dispose of, and effect proper conveyance of title to a foreclosed property in accordance with the Contract, the Selling and Servicer Guides (the "Guides"), and any pertinent laws, regulations, or mortgage insurance policies or contracts. The Letter also notes that, in general, servicers must:

- Have sufficient and properly-trained staff, and adequate controls and written quality assurance procedures to, among other things, protect against fraud, misrepresentation, or negligence by any parties involved in the mortgage servicing process;
- Immediately contact Fannie Mae's Regional Counsel if any routine legal proceeding becomes contested, or if the servicer receives notice of a non-routine action involving a loan securitized or owned by Fannie Mae (regardless of whether Fannie Mae is also a named party);
- Comply with all applicable federal, state, or local laws addressing, among other things, the enforcement of any of the terms of a Fannie Mae loan; and
- Maintain adequate internal audit and management control systems to (i) ensure that Fannie Mae loans are serviced in accordance with sound mortgage banking and accounting principles; (ii) guard against dishonest, fraudulent, or negligent acts; and (iii) guard against

errors and omissions by officers, employees, or other authorized persons. The audit and control system must consist of, at a minimum, (i) a delinquent loan servicing system, (ii) a system to control and monitor bankruptcy proceedings, and (iii) a foreclosure monitoring system. In the event of a problem, servicers must promptly take appropriate corrective action. Further, servicers must keep a record of any activity under these systems, subject to review by Fannie Mae. The Letter instructs servicers to immediately conduct a review of existing servicing processes and to make any necessary corrections to those processes.

Fannie Mae notes that it may exercise any right or remedy provided under the Contract or the Guides (*e.g.*, terminate the Contract, require the repurchasing of the loan, require the indemnification of Fannie Mae, require the payment of compensatory fees, etc.) if a servicer fails to comply with any of Fannie Mae's policies and requirements. For a copy of Lender Letter LL-2010-11, please see here.

Freddie Mac Requires Servicers to Review Policies Relating to Execution of Affidavits Used in Foreclosure Proceedings by October 18, 2010. On October 1, Freddie Mac issued an Industry Letter, requiring all Freddie Mac servicers to review their policies, procedures, and processes related to the execution of affidavits used in foreclosure proceedings by October 18, 2010. The review must include all Freddie Mac foreclosures that are either pending or within the applicable judgment review period for the relevant jurisdiction. Servicers must specifically determine whether (i) the servicer's policies, procedures and processes are (and have been) adequate to ensure that signed affidavits are in compliance with applicable law (*e.g.*, individuals signing the affidavits had personal knowledge of the facts, signatures were properly notarized, etc.), and (ii) the servicer's employees and/or third parties responsible for executing affidavits followed the servicer's policies, procedures, and processes. A servicer must immediately notify Freddie Mac if the review "creates any question" as to whether the servicer maintained adequate policies, procedures or processes and whether they were followed by employees and/or third parties; moreover, the servicer must remedy any deficiencies to ensure compliance with applicable law and Freddie Mac's servicing requirements. For a copy of the Industry Letter, please see here.

HUD Urges Servicers to Conduct Full Review of Servicing Operations. On October 8, Federal Housing Commissioner, David Stevens, issued a recommendation to all FHA-approved servicers to conduct a review of their operations and ensure their compliance with HUD requirements. This recommendation comes in light of the recent investigations being conducted of the foreclosure documentation process used by mortgage servicers. The recommendation also reminds FHA-approved servicers of the sanctions for failure to comply with HUD statutes, regulations, handbook requirements, and mortgagee letters. For a copy of the letter, please see http://1.usa.gov/dpw66o.

Congress Passes Legislation Requiring Courts to Recognize Out-of-State Notarizations. On September 30, Congress passed H.R. 3808, the Interstate Recognition of Notarizations Act of 2010, and forwarded the legislation to President Obama for signature. The legislation requires federal and state courts to recognize notarizations made by licensed notaries public in other states, provided that any such notarization: (i) occurs in or affects interstate commerce; and (ii) a seal of office, as a symbol of the notary public's authority, is used. With regard to electronic records, the seal requirement is met if the seal information "is securely attached to, or logically associated with, the electronic record so as to render the record tamper-resistant." Notably, Congress' approval of H.R. 3808 comes shortly before the initiation of investigations by a number of state attorneys general into allegations that certain servicers may be "robo-signing" foreclosure affidavits without a notary present and without confirming the information in the affidavits (as reported in this issue of *InfoBytes*). According to media reports, President Obama will likely pocket veto the legislation. For a copy of H.R. 3808, please see here.

Council Established by Dodd-Frank Act Holds Inaugural Meeting. On October 1, the Financial Stability Oversight Council (Council), established under the Dodd-Frank Act and charged with identifying threats and risks and promoting market discipline to ensure financial stability, convened for its first meeting. At the meeting, the Council approved several documents and resolutions to aid in providing comprehensive monitoring of the financial system. The Council approved its bylaws, setting forth the procedures by which it will be governed. In an effort to engage stakeholders in an open process, the Council also adopted a transparency policy that will include open meetings as appropriate. Additionally, the meeting was a chance for the Council to begin fulfilling some of its duties under the Act. The Council approved an Advanced Notice of Proposed Rulemaking (ANPR) regarding its authority to require supervision and regulation of certain nonbank financial companies. The advanced notice consists of 15 questions that solicit public comment regarding the framework for the designation of nonbank financial companies for heightened supervision. The Council also approved a Notice and Request for Information to solicit public and industry input for the development of a study and recommendations regarding the "Volcker Rule" - which would prohibit proprietary trading activities and certain private fund investments. Lastly, the Council outlined a timeline of goals both for the Council and its independent member agencies in an effort to provide transparency as agencies move forward with financial reform. For a copy of the press release, please see http://www.ustreas.gov/press/releases/tg888.htm. For a copy of the Council's bylaws, Transparency Policy, the final ANPR, the Final Notice regarding the "Volcker Rule," and the Integrated Implementation Roadmap, please visit www.treas.gov/FSOC.

OTS Updates its Examination Procedures to Incorporate CARD Act Changes. On October 4, the Office of Thrift Supervision (OTS) issued Regulatory Bulletin 37-63, transmitting revised Examination Handbook Section 1305, which updated OTS' examination procedures to incorporate the amendments to Regulation Z that implement provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) that went into effect on August 22, 2010. The examination procedures for open-end credit were issued on an interagency basis. Because the CARD Act provisions and the amendments to Regulation Z were issued with a series of effective dates, the OTS revised its TILA examination procedures in phases with the intent that examiners have current tools as the rules become effective. Key aspects of the revised procedures (and related CARD Act rule changes) include:

- ***Reasonable and Proportional Penalty Fees*.** Penalty fees imposed by card issuers must be reasonable and proportional to the violation of the account terms. Issuers must reevaluate their costs at least annually.
- ***Safe Harbor*.** The CARD Act rule permits issuers to charge a penalty fee of $25 for the first violation and $35 for any additional violations of the same type during the next six billing

cycles. This "safe harbor" allows issuers to avoid the cost analysis necessary to set reasonable penalty fees.

- ***Fee Limits*.** The regulation allows only one fee for a single transaction and does not allow fees that exceed the dollar amount associated with the violation. If there is no dollar amount associated with the violation (*e.g.*, where the issuer declines to authorize a transaction or the account is inactive), the card issuer may not charge a penalty fee.
- ***Reevaluations of Interest Rates***. If a card issuer has increased interest rates on or after January 1, 2009, the CARD Act rule requires that the issuer reevaluate those rates at least every six months. If the increase was based on the consumer's credit risk, market conditions or other factors, the issuer must evaluate those factors and reduce the rate, if appropriate, within 45 days of completing the reevaluation. Issuers must have policies and procedures in place to conduct these reviews.
- ***Disclosing Reasons for Rate Increases*.** When issuers send notices of penalty rate increases for credit card accounts, the notices must include the principal reasons for the increase, in order of their importance. These notices must be sent 45 days before the increase is effective and indicate the balances to which it will apply. The notice must also describe the circumstances necessary for the rate to cease, or make it clear that the rate can remain in effect indefinitely.

For the full text of Regulatory Bulletin 37-63, please see http://www.ots.treas.gov/_files/74886.pdf. For the memorandum to chief executive officers summarizing key aspects of the changes, click here.

HUD Grants Limited RESPA Exemption For Assistance Loans. On October 6, HUD Secretary Shaun Donovan granted a narrow exemption from Sections 4 and 5 of the Real Estate Settlement Procedures Act (RESPA) for certain borrower-assistance subordinate loan transactions. The exemption applies primarily to subordinate loans offered via assistance programs such as state housing finance agencies, municipal governments, nonprofit organizations and their private partners. To fit the exemption, the loan must be a subordinate lien with a zero-percent interest rate and for the purpose of assisting the borrower with downpayment, closing cost, property rehabilitation, energy efficiency, or foreclosure avoidance or prevention. The loan must also meet certain deferred or forgiveness requirements and have settlement costs of less than one percent of the amount of the subordinate loan. The only fees that can be charged are the recordation fee, application fee, and a housing counseling fee. Finally, the borrower must receive at or before settlement a written disclosure that effectively describes the loan terms, repayment conditions and any costs associated with the loan. The letter providing the exemption can be found here.

DOJ Announces Antitrust Settlement with Visa and Mastercard That Eliminates Rules Restricting Price Competition; Proceeds with Lawsuit Against American Express. On October 4, the Department of Justice filed a civil antitrust lawsuit in the U.S. District Court for the Eastern District of New York against Visa, Mastercard, and American Express alleging violations of antitrust laws based in part on the card companies' rules preventing merchants from offering discounts, rewards and information about card costs to customers. According to the complaint, the rules prevent merchants from encouraging customers to use payment methods that cost less for the merchant, which ultimately results in consumers paying more for their purchases. The Justice Department simultaneously announced a settlement with Visa and Mastercard, which agreed to allow merchants to offer discounts to consumers who use less expensive cards. The proposed settlement (which is subject to court approval) also requires Visa and Mastercard to allow merchants to express a preference for the use of a particular credit card or card network, as well as to communicate to consumers the cost incurred by the merchant when the consumer uses a particular card. The on-going litigation against American Express seeks the same kind of arrangement proposed in the Visa and Mastercard settlement to allow merchants that accept American Express to engage in discounting and encouragement of lower cost options. For a copy of the press release, please click here.

FTC Issues Proposed Policy Statement Regarding Collecting From a Decedent's Estate. On October 4, the Federal Trade Commission (FTC) issued a proposed policy statement for public comment that would reconcile the Fair Debt Collection Practices Act (FDCPA) and state probate law developments regarding the question of who is authorized to pay a decedent's debts from the assets in the decedent's estate. The FDCPA generally allows collectors to contact only the decedent's spouse, or the executor or administrator of the decedent's estate. State probate laws are more expansive, however, and allow a broader group of individuals to pay such debts. Under the proposed policy statement (which will be published in the *Federal Register*), the FTC would not initial law enforcement action against a collector who communicated about a decedent's debts with the decedent's spouse, the executor or administrator of the estate, or anyone else who is authorized to pay the debts from the estate. The statement also describes what collectors must do to identify persons with whom they may communicate about paying the decedent's debt without improperly revealing the debt to others. The statement further notes that collectors may not create the misleading impression that a person is personally liable for the decedent's debts or could be required to pay the decedent's debts from his or her own assets or the assets held jointly with the decedent. The FTC is accepting public comments on the proposed policy statement until November 8, 2010. For a copy of the press release, please see http://www.ftc.gov/opa/2010/10/debtcollect.shtm. For a copy of the *Federal Register* Notice, please see http://www.ftc.gov/os/fedreg/2010/october/101004deceaseddebtcollection.pdf.

FDIC Settles with Monterey County Bank for Deceptive Practices. On September 29, Monterey County Bank (MCB), Monterey, California entered a settlement with the Federal Deposit Insurance Corporation in relation to alleged deceptive practices in violation of Section 5 of the Federal Trade Commission Act and Section 807 of the Fair Debt Collection Practices Act. MCB agreed to pay about $2 million in restitution and to donate $300,000 toward consumer financial education and counseling. MCB also agreed to establish an internal system of compliance monitoring that would be overseen by a Compliance Committee. The Committee would consist of at least three directors of the bank, who are not officers of the Bank. For a copy of the press release, please see http://www.fdic.gov/news/news/press/2010/pr10223a.pdf.

Technology Officer of Payday Loan Marketer Settles FTC Charges Based on Unfair and Deceptive Websites. On October 4, the Federal Trade Commission (FTC) announced that the technology officer of a payday loan marketer has settled FTC charges of an allegedly unfair and deceptive scheme that allegedly debited the bank accounts of consumers in violation of federal law.

According to the FTC's complaint in *Federal Trade Commission, v. Swish Marketing, Inc., et al.*, No. C09-03814 (N.D. Cal.), the payday loan marketer and the three named officers operated websites advertising "payday" loan matching services and included an online application that deceived consumers into ordering a debit card when they applied for a loan online, which led to improper charges up to $54.95 for each misled consumer. The FTC's amended complaint also alleged that the payday loan marketers sold consumers' bank account information to the debit card company without the consumers' consent. Among other things, the settlement order required the officer's ongoing cooperation in the litigation against the other two officers and the payday loan marketer and an $850,000 fine. For a copy of the press release click here.

State Issues

New California Statute Restricts Mortgage Deficiency Judgments. On September 30, the California legislature approved a statute prohibiting deficiency judgments in cases where the holders of first deed of trust or first mortgages consent to a sale of a dwelling for less than the remaining amount of indebtedness due at the time of the sale. Based on the holder's written consent, the holders cannot collect any deficiencies and must fully discharge the remaining amount of debt. The statute applies to first mortgages or first deeds of trust for dwellings that are 4 units or less. The mortgagee can seek compensation, if the mortgagor commits fraud in the sale of the property or causes damage to the property. For a copy of the California statute, please click here.

California Bill Shielding Refinanced Mortgages from Deficiency Judgments Vetoed by Governor Schwarzenegger. On October 1, Governor Schwarzenegger vetoed a bill that would have extended existing law, which currently prevents lenders from pursuing deficiency judgments against borrowers with purchase money mortgages, to encompass refinanced mortgages as well. Schwarzenegger explained that extending the law to refinanced loans might encourage borrowers to strategically default on loans even if they are capable of making their payments. He also said that extending the law to protect refinanced loans would alter and impair the nature of mortgage contracts because lenders understand that in agreeing to refinance a home loan, the borrower becomes personally liable for the gap between what is owed on the mortgage and the existing value of the home if the mortgage is foreclosed. Taking such recourse away would alter the contract. For a copy of the Governor's Veto Message, please click here. For a copy of the vetoed bill, please click here.

North Carolina Attorney General Investigates Foreclosure Tactics. On October 6, the Consumer Protection Division of the Office of the Attorney General of North Carolina announced that it had expanded its investigation of affidavit and document verification and execution to include fourteen more mortgage lenders. The AG's office asked the lenders to provide information about their foreclosure practices in North Carolina and to suspend foreclosures in the state until they can show that they comply with the law. For a copy of the press release, please click here.

Courts

Kansas Bankruptcy Court Allows Mortgage Rescission Based on TILA Violation. On September 7, a Kansas Bankruptcy Court permitted borrowers to rescind their mortgage based on a Truth in Lending Act (TILA) violation, but found that HSBC, the assignee mortgage holder, was not liable for statutory damages because the violation was not apparent on the face of the loan documents. *In re Regan*, 2010 WL 3522233, No. 08-21546, (D. Kansas September 7, 2010). Concurrent with the borrower/debtors' filing for Chapter 13 bankruptcy relief, they gave notice of rescission, alleging a TILA violation in connection with their loan closing three years earlier. HSBC denied the rescission claim and the borrower/debtors filed the instant complaint. Specifically, the borrower/debtors asserted that while TILA requires that each borrower receive a copy of the TILA disclosure statement, they were provided only a single copy at their loan closing. While the Bankruptcy Court accepted the borrower/debtors' allegations that they did not receive the requisite two copies and allowed rescission, the Court found their related claims for statutory damages and fees stemming from that violation was time barred. The Court further noted that even if the claim had not been time barred, HSBC, the assignee mortgage holder, would not have been liable for statutory damages "since the violation was not apparent from the face of the loan file." For a copy of the opinion, please click here.

Maryland Federal Court Dismisses TILA Rescission Claim As Time-Barred. On September 27, the U.S. District Court for the District of Maryland held that borrowers do not satisfy the Truth in Lending Act's (TILA) three-year statute of limitations for rescinding a mortgage loan when plaintiffs mail their rescission notice within three years of when the loan closed, but did not file their complaint until after the three years expired. *DeCosta v. U.S. Bancorp*, 2010 WL 3824224, No. 10-0301 (D. Md. Sept. 27, 2010). Plaintiffs obtained a mortgage loan on July 14, 2006, but mailed a rescission notice to defendant-servicer on July 13, 2009. The servicer declined to honor the rescission notice, and eventually brought a foreclosure action against plaintiffs in state court. Plaintiffs filed the instant action on February 5, 2010 against the servicer, the bank that owned the mortgage, and the trustee for the mortgage, alleging a rescission claim under TILA, as well as an additional TILA claim and claims under the Real Estate Settlement Procedures Act, the Fair Debt Collection Practices Act, and the Maryland Consumer Protection Act. Some of these additional claims were based on the premise that plaintiffs properly exercised their TILA right to rescind. Defendants moved to dismiss, arguing, *inter alia*, that the TILA rescission claim was time-barred because the statute of limitations on the claim had expired. The court agreed, holding that notifying the servicer within three years was not sufficient to satisfy the statute of limitations, but rather the operative date was when the complaint was filed. In dicta, the court noted that even if the claim had not been time-barred, issue preclusion would have barred the claim because of the prior decision in the state foreclosure proceeding. The court then dismissed Plaintiffs' remaining claims that were predicated on the TILA rescission claim, and dismissed all other claims for either being time-barred under other statutes of limitations, or for stating only legal conclusions rather than factual allegations. For a copy of the opinion, please click here.

Second Circuit Holds Bankruptcy Proof of Claim Cannot Form the Basis of an Action under the FDCPA. On October 5, the U.S. Court of Appeals for the Second Circuit held that a creditor's inflated proof of claim filed in bankruptcy court cannot form the basis of an action under the Fair Debt Collection Practices Act ("FDCPA"). *Simmons v. Roundup Funding, LLC*, 2010 WL 3859609, No. 09-

4984-cv (2nd Cir. Oct. 5, 2010). In this case, the debtors sought bankruptcy protection in October 2007. The creditor filed a timely proof of claim in the amount of $2,039.21. The debtors filed an objection to the claim and the bankruptcy court reduced it to $1,100, an amount the debtors conceded they owed. The debtors subsequently filed a putative class action suit against the creditor and the creditor's attorney, alleging they had violated the FDCPA by misrepresenting the amount of debt owed by the debtor and other consumers. In upholding the district court's dismissal of the action, the court held that while the "FDCPA is designed to protect defenseless debtors and give them remedies against abuse by creditors" there is "no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself." For a copy of the opinion, please see here.

Firm News

John McGuinness and Matthew Previn will be speaking at the American Conference Institute's 5th Annual Residential Mortgage Litigation & Regulatory Enforcement conference in Dallas Texas on a panel entitled "Defending Against the Latest Investor Lawsuits and Claims," Specifically he will be presenting on major litigation involving credit rating agencies.

Andrew Sandler will be a speaker at the Mortgage Bankers Association's Annual Convention & Expo on October 25 in Atlanta, Georgia. Mr. Sandler's panel is: Hot Topics in the Secondary Market.

Jonice Gray Tucker and Lori Sommerfield will co-present a webinar sponsored by Sheshunoff Information Services entitled "Fair Lending Enforcement is on the Rise: Will You Be Prepared for Your Next Exam?" on October 27.

Andrew Sandler will be a panel moderator at the American Conference Institute's 6th National Forum on Preventing, Detecting and Resolving Mortgage Fraud on October 28 in San Francisco. Mr. Sandler's panel is: The Changing Regulatory Focus on Mortgage Fraud: The Role of OTS, FHA Action, Where DOH and HUD Are Looking, Changing State Regulations, and Beyond. On the panel with Mr. Sandler is Mariana Rexroth, of the Office of Thrift Supervision, Michael Stolworthy from the Office of the Inspector General of HUD, Robert Kenny, Department of Treasury Financial Crimes Enforcement Network and Michael Blume, Assistant US Attorney, Eastern District of Pennsylvania. Contact Ulei Kou at u.kou@Americanconference.com for tickets.

Stephen F. Ambrose, Partner-in-Charge of BuckleySandler's New York office, along with Timothy Neary, the firm's Executive Director, will speak at the BITS seminar on November 3 on the subject of risk assessment of law firm service providers. BITS is a division of the Financial Services Roundtable, a membership association for 100 of the 150 largest US-based financial institutions.

Andrew Sandler will be co-chairing the PLI program Financial Crisis Fallout 2010: Emerging Enforcement Trends in New York City on November 4. David Krakoff and Sam Buffone will also be presenting at the seminar.

Andrew Sandler, Ben Klubes, and Jonice Gray Tucker will be speaking at the 2010 CRA & Fair Lending Colloquium in Las Vegas from November 7-10, 2010. Senior executives at financial services organizations will discuss their compliance and risk management concerns with top regulators and other industry leaders.

Margo Tank and Jerry Buckley will be speaking at the Electronic Signatures & Records Association's Fall Conference on November 9-10.

Andrew Sandler will be speaking at the American Conference Institute's 10th Annual Advanced Forum on Consumer Finance Class Actions & Litigation on January 27, 2011 at 11am. The conference is taking place at The Helmsley Park Lane Hotel, 36 Central Park South, NYC. The topic will be Emerging Federal and State Regulatory and Enforcement Initiatives: FTC, DOJ, SEC, FRB, and State AGs Perspectives. Also on the panel with Andy will be Attorney General William Sorrell, AG, State of Vermont and Attorney General Greg Zoeller, AG, State of Indiana.

Mortgages

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Maryland Federal Court Dismisses TILA Rescission Claim As Time-Barred. On September 27, the U.S. District Court for the District of Maryland held that borrowers do not satisfy the Truth in Lending Act's (TILA) three-year statute of limitations for rescinding a mortgage loan when plaintiffs mail their rescission notice within three years of when the loan closed, but did not file their complaint until after the three years expired. *DeCosta v. U.S. Bancorp*, 2010 WL 3824224, No. 10-0301 (D. Md. Sept. 27, 2010). Plaintiffs obtained a mortgage loan on July 14, 2006, but mailed a rescission notice to defendant-servicer on July 13, 2009. The servicer declined to honor the rescission notice, and eventually brought a foreclosure action against plaintiffs in state court. Plaintiffs filed the instant action on February 5, 2010 against the servicer, the bank that owned the mortgage, and the trustee for the mortgage, alleging a rescission claim under TILA, as well as an additional TILA claim and claims under the Real Estate Settlement Procedures Act, the Fair Debt Collection Practices Act, and the Maryland Consumer Protection Act. Some of these additional claims were based on the premise that plaintiffs properly exercised their TILA right to rescind. Defendants moved to dismiss, arguing, *inter alia*, that the TILA rescission claim was time-barred because the statute of limitations on the claim had expired. The court agreed, holding that notifying the servicer within three years was not sufficient to satisfy the statute of limitations, but rather the operative date was when the complaint was filed. In dicta, the court noted that even if the claim had not been time-barred, issue preclusion would have barred the claim because of the prior decision in the state foreclosure proceeding. The court then dismissed Plaintiffs' remaining claims that were predicated on the TILA rescission claim, and dismissed all other claims for either being time-barred under other statutes of limitations, or for stating only legal conclusions rather than factual allegations. For a copy of the opinion, please click here.

Banking

FDIC Settles with Monterey County Bank for Deceptive Practices. On September 29, Monterey County Bank (MCB), Monterey, California entered a settlement with the Federal Deposit Insurance Corporation in relation to alleged deceptive practices in violation of Section 5 of the Federal Trade Commission Act and Section 807 of the Fair Debt Collection Practices Act. MCB agreed to pay about $2 million in restitution and to donate $300,000 toward consumer financial education and counseling. MCB also agreed to establish an internal system of compliance monitoring that would be overseen by a Compliance Committee. The Committee would consist of at least three directors of the bank, who are not officers of the Bank. For a copy of the press release, please see http://www.fdic.gov/news/news/press/2010/pr10223a.pdf.

Consumer Finance

Congress Passes Legislation Requiring Courts to Recognize Out-of-State Notarizations. On September 30, Congress passed H.R. 3808, the Interstate Recognition of Notarizations Act of 2010, and forwarded the legislation to President Obama for signature. The legislation requires federal and state courts to recognize notarizations made by licensed notaries public in other states, provided that any such notarization: (i) occurs in or affects interstate commerce; and (ii) a seal of office, as a symbol of the notary public's authority, is used. With regard to electronic records, the seal requirement is met if the seal information "is securely attached to, or logically associated with, the electronic record so as to render the record tamper-resistant." Notably, Congress' approval of H.R. 3808 comes shortly before the initiation of investigations by a number of state attorneys general into allegations that certain servicers may be "robo-signing" foreclosure affidavits without a notary present and without confirming the information in the affidavits (as reported in this issue of *InfoBytes*). According to media reports, President Obama will likely pocket veto the legislation.

For a copy of H.R. 3808, please see here.

Council Established by Dodd-Frank Act Holds Inaugural Meeting. On October 1, the Financial Stability Oversight Council (Council), established under the Dodd-Frank Act and charged with identifying threats and risks and promoting market discipline to ensure financial stability, convened for its first meeting. At the meeting, the Council approved several documents and resolutions to aid in providing comprehensive monitoring of the financial system. The Council approved its bylaws, setting forth the procedures by which it will be governed. In an effort to engage stakeholders in an open process, the Council also adopted a transparency policy that will include open meetings as appropriate. Additionally, the meeting was a chance for the Council to begin fulfilling some of its duties under the Act. The Council approved an Advanced Notice of Proposed Rulemaking (ANPR) regarding its authority to require supervision and regulation of certain nonbank financial companies. The advanced notice consists of 15 questions that solicit public comment regarding the framework for the designation of nonbank financial companies for heightened supervision. The Council also approved a Notice and Request for Information to solicit public and industry input for the development of a study and recommendations regarding the "Volcker Rule" - which would prohibit proprietary trading activities and certain private fund investments. Lastly, the Council outlined a timeline of goals both for the Council and its independent member agencies in an effort to provide transparency as agencies move forward with financial reform. For a copy of the press release, please see http://www.ustreas.gov/press/releases/tg888.htm. For a copy of the Council's bylaws, Transparency Policy, the final ANPR, the Final Notice regarding the "Volcker Rule," and the Integrated Implementation Roadmap, please visit www.treas.gov/FSOC.

FTC Issues Proposed Policy Statement Regarding Collecting From a Decedent's Estate. On October 4, the Federal Trade Commission (FTC) issued a proposed policy statement for public comment that would reconcile the Fair Debt Collection Practices Act (FDCPA) and state probate law developments regarding the question of who is authorized to pay a decedent's debts from the assets in the decedent's estate. The FDCPA generally allows collectors to contact only the decedent's spouse, or the executor or administrator of the decedent's estate. State probate laws are more expansive, however, and allow a broader group of individuals to pay such debts. Under the proposed policy statement (which will be published in the *Federal Register*), the FTC would not initial law enforcement action against a collector who communicated about a decedent's debts with the decedent's spouse, the executor or administrator of the estate, or anyone else who is authorized to pay the debts from the estate. The statement also describes what collectors must do to identify persons with whom they may communicate about paying the decedent's debt without improperly revealing the debt to others. The statement further notes that collectors may not create the misleading impression that a person is personally liable for the decedent's debts or could be required to pay the decedent's debts from his or her own assets or the assets held jointly with the decedent. The FTC is accepting public comments on the proposed policy statement until November 8, 2010. For a copy of the press release, please see http://www.ftc.gov/opa/2010/10/debtcollect.shtm. For a copy of the *Federal Register* Notice, please see http://www.ftc.gov/os/fedreg/2010/october/101004deceaseddebtcollection.pdf.

Technology Officer of Payday Loan Marketer Settles FTC Charges Based on Unfair and Deceptive Websites. On October 4, the Federal Trade Commission (FTC) announced that the technology officer of a payday loan marketer has settled FTC charges of an allegedly unfair and deceptive scheme that allegedly debited the bank accounts of consumers in violation of federal law. According to the FTC's complaint in *Federal Trade Commission, v. Swish Marketing, Inc., et al.*, No. C09-03814 (N.D. Cal.), the payday loan marketer and the three named officers operated websites advertising "payday" loan matching services and included an online application that deceived consumers into ordering a debit card when they applied for a loan online, which led to improper charges up to $54.95 for each misled consumer. The FTC's amended complaint also alleged that the payday loan marketers sold consumers' bank account information to the debit card company without the consumers' consent. Among other things, the settlement order required the officer's ongoing cooperation in the litigation against the other two officers and the payday loan marketer and an $850,000 fine. For a copy of the press release click here.

Second Circuit Holds Bankruptcy Proof of Claim Cannot Form the Basis of an Action under the FDCPA. On October 5, the U.S. Court of Appeals for the Second Circuit held that a creditor's inflated proof of claim filed in bankruptcy court cannot form the basis of an action under the Fair Debt Collection Practices Act ("FDCPA"). *Simmons v. Roundup Funding, LLC*, 2010 WL 3859609, No. 09-4984-cv (2nd Cir. Oct. 5, 2010). In this case, the debtors sought bankruptcy protection in October 2007. The creditor filed a timely proof of claim in the amount of $2,039.21. The debtors filed an objection to the claim and the bankruptcy court reduced it to $1,100, an amount the debtors conceded they owed. The debtors subsequently filed a putative class action suit against the creditor and the creditor's attorney, alleging they had violated the FDCPA by misrepresenting the amount of debt owed by the debtor and other consumers. In upholding the district court's dismissal of the action, the court held that while the "FDCPA is designed to protect defenseless debtors and give them remedies against abuse by creditors" there is "no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself." For a copy of the opinion, please see here.

Litigation

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Credit Cards

OTS Updates its Examination Procedures to Incorporate CARD Act Changes. On October 4, the Office of Thrift Supervision (OTS) issued Regulatory Bulletin 37-63, transmitting revised Examination

Handbook Section 1305, which updated OTS' examination procedures to incorporate the amendments to Regulation Z that implement provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) that went into effect on August 22, 2010. The examination procedures for open-end credit were issued on an interagency basis.

Because the CARD Act provisions and the amendments to Regulation Z were issued with a series of effective dates, the OTS revised its TILA examination procedures in phases with the intent that examiners have current tools as the rules become effective. Key aspects of the revised procedures (and related CARD Act rule changes) include:

- ***Reasonable and Proportional Penalty Fees*.** Penalty fees imposed by card issuers must be reasonable and proportional to the violation of the account terms. Issuers must reevaluate their costs at least annually.
- ***Safe Harbor*.** The CARD Act rule permits issuers to charge a penalty fee of $25 for the first violation and $35 for any additional violations of the same type during the next six billing cycles. This "safe harbor" allows issuers to avoid the cost analysis necessary to set reasonable penalty fees.
- ***Fee Limits*.** The regulation allows only one fee for a single transaction and does not allow fees that exceed the dollar amount associated with the violation. If there is no dollar amount associated with the violation (*e.g.*, where the issuer declines to authorize a transaction or the account is inactive), the card issuer may not charge a penalty fee.
- ***Reevaluations of Interest Rates*.** If a card issuer has increased interest rates on or after January 1, 2009, the CARD Act rule requires that the issuer reevaluate those rates at least every six months. If the increase was based on the consumer's credit risk, market conditions or other factors, the issuer must evaluate those factors and reduce the rate, if appropriate, within 45 days of completing the reevaluation. Issuers must have policies and procedures in place to conduct these reviews.
- ***Disclosing Reasons for Rate Increases***. When issuers send notices of penalty rate increases for credit card accounts, the notices must include the principal reasons for the increase, in order of their importance. These notices must be sent 45 days before the increase is effective and indicate the balances to which it will apply. The notice must also describe the circumstances necessary for the rate to cease, or make it clear that the rate can remain in effect indefinitely. For the full text of Regulatory Bulletin 37-63, please see http://www.ots.treas.gov/_files/74886.pdf. For the memorandum to chief executive officers summarizing key aspects of the changes, click here.

DOJ Announces Antitrust Settlement with Visa and Mastercard That Eliminates Rules Restricting Price Competition; Proceeds with Lawsuit Against American Express. On October 4, the Department of Justice filed a civil antitrust lawsuit in the U.S. District Court for the Eastern District of New York against Visa, Mastercard, and American Express alleging violations of antitrust laws based in part on the card companies' rules preventing merchants from offering discounts, rewards and information about card costs to customers. According to the complaint, the rules prevent merchants from encouraging customers to use payment methods that cost less for the merchant, which ultimately results in consumers paying more for their purchases. The Justice Department simultaneously announced a settlement with Visa and Mastercard, which agreed to allow merchants to offer discounts to consumers who use less expensive cards. The proposed settlement (which is subject to court approval) also requires Visa and Mastercard to allow merchants to express a preference for the use of a particular credit card or card network, as well as to communicate to consumers the cost incurred by the merchant when the consumer uses a particular card. The on-going litigation against American Express seeks the same kind of arrangement proposed in the Visa and Mastercard settlement to allow merchants that accept American Express to engage in discounting and encouragement of lower cost options. For a copy of the press release, please click here.