Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

May 20, 2011

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Federal Issues

Treasury Requires Servicers of Non-GSE Mortgages to Have Single Point of Contact for Defaulting Borrowers. On May 18, the U.S. Department of the Treasury released Supplemental Directive 11-04 requiring certain servicers of mortgage loans that are not owned or guaranteed by Fannie Mae or Freddie Mac (Non-GSE Mortgages) to provide a "relationship manager" to serve as a single point of contact for defaulting borrowers who are potentially eligible for the Home Affordable Modification Program (HAMP), the Home Affordable Unemployment Program (UP), or the Home Affordable Foreclosure Alternatives Program (HAFA). This Directive applies to servicers of non-GSE Mortgages that (i) have executed a Servicer Participation Agreement and (ii) have a Program Participation Cap of $75 million or more as of May 18, 2011. The relationship manager must provide written notice and attempt to contact the borrower within five business days of assignment to the account. The relationship manager must also communicate to the borrower options for resolving the delinquency, track the borrower's documents, be knowledgeable about the borrower's loan, and coordinate other loss mitigation options. If the borrower's loan is referred to foreclosure, the relationship manager must continue to respond to the borrower's inquiries throughout the foreclosure process. These new requirements will become effective September 1, 2011. Click here for a copy of Supplemental Directive 11-04.

Consumer Financial Protection Bureau Announces Initiative to Combine Mortgage Loan Disclosures. On May 18, the Consumer Financial Protection Bureau (CFPB) announced the *Know Before You Owe* project, an effort to combine the Truth in Lending Act (TILA) mortgage disclosure and the Real Estate Settlement Procedures Act (RESPA) Good Faith Estimate into a single, simpler form. While the two forms, which are required under federal law to be provided to loan applicants within three days of application, are intended to convey basic facts about home loans to help consumers comparison shop, they contain overlapping information and complicated terms that can be difficult to understand. Combining them is intended to make the costs and risks of the loan clear and allow consumers to comparison shop for the best offer. The CFPB has begun testing two alternate prototype forms that are designed to be given to consumers who have just applied for a mortgage loan. The testing, which will precede and inform the CFPB's formal rulemaking process, is being conducted over the summer and involves interviewing consumers, lenders, and brokers in six cities

across the U.S., soliciting feedback from consumers through an online interactive tool; and reaching out to consumer and industry groups to gather input. The CFPB will also consider underlying regulatory issues and ways to refine closing-stage forms, a process that likely will extend into the fall and early next year. The CFPB is required by the Dodd-Frank Act to issue proposed forms and implementing regulations by July 2012 for formal notice and comment. Click here for a copy of the press release. Click here for the mortgage disclosure prototypes.

OCC Warns of a Phishing Scheme Involving Fraudulent Correspondence Attributed to the Agency. On May 17, the Office of the Comptroller of the Currency (OCC) issued an alert to the chief executive officers of all national banks, all state banking authorities, the Conference of State Bank Supervisors, and various government personnel warning them of the circulation of a fictitious letter, claiming to have been issued by the OCC. This fictitious letter, which likely is being circulated as part of a phishing scam to elicit funds or to perpetrate identity theft, directs the recipient to contact the Director of the Wire Transfer Department at Halifax Bank in London, England, regarding the receipt of an overdue payment. The letter also references the actual Acting Comptroller, John Walsh, and contains the forged signature of a former OCC employee. Next to this forged signature, the correspondence also includes the seal of the Office of Thrift Supervision. The OCC recommends that, before releasing personal information or paying fees in connection with any proposal, those receiving the alert should contact both the OCC and state/local law enforcement to verify the legitimacy of the proposal. Additionally, if the proposal appears to be fraudulent, the OCC asks that those receiving the alert contact either the Internet Crime Complaint Center or the U.S. Postal Inspection Service, depending on the method by which the letter was delivered. For a copy of the OCC's alert including an example of the fraudulent document, please see http://www.occ.treas.gov/news-issuances/alerts/2011/alert-2011-5.html.

FTC Comment Urges FCC To Hold Sellers Responsible for Calls Made by Outside Telemarketers. On May 16, the Federal Trade Commission (FTC) submitted a comment to the Federal Communications Commission (FCC) addressing two questions put forward by the FCC regarding a seller's liability under the Telemarketing Consumer Protection Act of 1991 (TCPA) and stressing that sellers should be held responsible for sales calls made by others on their behalf. The FCC's questions were: (i) Does a call placed by an entity that markets a seller's goods and services qualify as a call made on behalf of, and initiated by, the seller, even if the seller does not physically place the call?; and (ii) What should determine whether a telemarketing call is made "on behalf of" a seller, thus triggering liability under the TCPA? In its comments, the FTC urged the FCC to find that the seller is responsible for calls made on its behalf, even if the seller itself did not place the call, and that the plain meaning of "on behalf of" should be used in determining whether a seller should be held liable for the illegal actions of its marketer. The FTC's comments were based on the agency's experience in enforcing the Telemarketing Sales Rule and the Do Not Call Registry. Click here for a copy of the press release.

FINRA Launches New Disciplinary Actions Database. On May 16, the Financial Industry Regulatory Authority (FINRA) announced the launch of a web-based searchable system that makes its disciplinary actions accessible via its website. The FINRA Disciplinary Actions Online database enables users to perform searches free of charge for FINRA actions including Letters of Acceptance,

Waivers and Consent, settlements, National Adjudicatory Council decision, Office of Hearing Officers decisions and complaints. Actions can be searched by a number of parameters including case number, document text, document type, action date an individual name. FINRA actions can be viewed online, printed or downloaded as text-searchable PDF files. Previously, FINRA disciplinary actions could only be obtained by contacting FINRA directly. For a copy of the press release, please click here.

FTC Finds "Broad Compliance" with Holder in Due Course Rule Among Auto Dealers. On May 15, the Federal Trade Commission (FTC) announced that it was closing its investigations into auto dealers' compliance with the FTC's "Holder in Due Course" Rule, having found "broad compliance with the Rule." The Holder in Due Course Rule allows auto buyers who finance the purchase of a vehicle through the dealerto assert claims and defenses - for example, claims of fraud or misrepresentation regarding the credit terms - against the lender seeking to enforce the contract in cases where the dealer sells the obligation to the lender. The Rule also requires dealers to include a notice of this protection in their credit contracts. Having reviewed copies of consumer credit contracts from nearly 50 franchised and independent auto dealers across the country, as well as two online automobile dealers, the FTC found broad compliance with the Rule and announced that it was closing the investigation. For a copy of the press release, please see http://www.ftc.gov/opa/2011/05/holderrule.shtm.

Federal Reserve Proposes Rule Creating Protections for Senders of Remittance Transfers to Foreign Recipients. On May 12, the Federal Reserve Board (FRB) initiated formal rulemaking under Regulation E of the Electronic Fund Transfer Act that would require that remittance transfer providers make disclosures (in English and the appropriate foreign language) about the specific transfer, such as the exchange rate, applicable fees and taxes, and the amount to be received by the designated recipient. Promulgated in response to the Dodd-Frank Wall Street Reform and Consumer Protection Act, the proposed rule would additionally require transfer providers to issue a written receipt when payment is made for the remittance transfer with language that includes: (i) the pre-payment disclosures; (ii) the date of availability; (iii) the recipient's contact information; and (iv) information regarding the sender's error resolution and cancellation rights. Finally, the proposed rule sets forth two alternative approaches for implementing the standards of liability for remittance transfer providers. Comments on the proposal must be submitted within 60 days after publication. Click here for a copy of the press release. Click here for a copy of the *Federal Register* notice.

Courts

Indiana Appellate Court Holds That MERS as Nominee Has No Rights Apart From Those of Lender. On May 17, the Court of Appeals of Indiana held that Mortgage Electronic Registration Systems, Inc. (MERS), as the mere "nominee" of a mortgage lender, held nothing more than "bare legal title" to a mortgage, and therefore has no rights separate from those of the lender, including no rights to notice of a foreclosure claim by another lender. *CitiMortgage, Inc. v. Barabas*, No. 48A04-1004-CC-232 (Ind. Ct. App. May 17, 2011). In 2005, Barabas executed a mortgage that provided for the security interest to be "given to [MERS], (solely as nominee for Lender . . .), as mortgagee." The Lender was Irwin Mortgage Corporation (IMC). The mortgage included the addresses of both MERS

and IMC, but it stated that any notice to Lender was to be provided to IMC. Later, the holder of a second mortgage on the property, ReCasa Financial Group (ReCasa) sought to foreclose on the property and named IMC (but not MERS) as a defendant. IMC, however, disclaimed any interest in the property, and Barabas had discharged her debts in bankruptcy. Accordingly, the trial court entered a default judgment in favor of ReCasa and ordered the property sold at a judicial sale. ReCasa wound up repurchasing the property and then reselling it to a third party. Meanwhile, MERS assigned its interest in the original mortgage to CitiMortgage (Citi), which subsequently sought to vacate the default judgment and the subsequent sales. The trial court declined to vacate the default judgment, and the Court of Appeals affirmed. As to Citi's argument that the default judgment was defective because MERS had not received notice of the foreclosure claim, the Court (relying on *Landmark National Bank v. Kesler*, 216 P.3d 158 (Kan. 2009)), held that, notwithstanding the fact that the mortgage referred to MERS as both "nominee" and "mortgagee," MERS "served as the mortgagee 'solely as nominee' for [IMC]." Thus, when IMC disclaimed its interest in the property, "MERS, as mere nominee and holder of nothing more than bare legal title to the mortgage, did not have an enforceable right under the mortgage separate from the interest held by [IMC]." Because IMC received proper notice, there was no basis to set aside the default judgment. The Court also rejected Citi's claim under Indiana Code 32-29-8-3, which provides that a purchaser at a judicial sale without notice that the mortgage has been assigned holds the premises free and discharged of the lien, unless the assignee redeems the premises within one year of the sale. Although Citi did seek to redeem the premises within one year of the judicial sale, it had been more than one year since (i) ReCasa's foreclosure complaint and (ii) Citi's effort to intervene in Barabas's bankruptcy case to assert its rights to the property. Therefore, the Court determined that Citi's claim was "precluded . . . because it failed to intervene until more than a year after it first acquired interest in the property." For a copy of the opinion, please see http://www.in.gov/judiciary/opinions/pdf/05171101par.pdf.

Supreme Court Limits Use of Evidence Obtained from Governmental Sources in FCA Cases. On May 16, the Supreme Court ruled that documents obtained under the federal Freedom of Information Act (FOIA) cannot be used as the basis for a lawsuit under the federal False Claims Act. In *Schindler Elevator Corp. v. United States ex rel. Kirk*, No. 10-188,(May 16, 2011), the Court explained that records obtained through a FOIA request are "reports" under the False Claims Act subject to the public disclosure bar. In *Schindler Elevator*, Daniel Kirk, a former employee suspected the company of falsifying documents submitted to the government under a program that provides incentives to companies to employ veterans. To confirm his suspicions, Mr. Kirk's wife submitted a FOIA request to obtain copies of the documents the company filed to show compliance with the act, which Mr. Kirk then used to support his complaint. The closely divided court (by a 5-3 margin) held that a "report," though not expressly defined in the statute, includes FOIA responses because responding requires an agency to research the request, notify the subject of the request, and forward the final response to the requesting party. Additionally, records attached to any such request are considered part of the "report." Describing *Schindler Elevator* as a "classic example of the 'opportunistic' litigation that the public disclosure bar is designed to discourage," the Court reversed the Second Circuit's holding that FOIA documents were not False Claims Act "reports," and remanded the case for determination of whether the plaintiff had a claim without the FOIA reports. For more on this case, please see our *InfoBytes* Alert. For a copy of the opinion, please click here.

Federal Circuit Clarifies Spoliation and Sanctions for Violation. On May 13, the U.S. Court of Appeals for the Federal Circuit handed down a pair of decisions that elaborated upon the duty to preserve evidence and the standards to be applied when determining sanctions. *Hynix Semiconductor Inc. v. Rambus Inc.*, No. 2009-1299 (Fed. Cir. May 13, 2011); *Micron Tech., Inc. v. Rambus Inc.*, No. 2009-1263 (Fed. Cir. May 13, 2011). Both cases grew out of a patent lawsuit by Rambus against manufacturers that had used a competitor's allegedly infringing technology. The defendants asserted that Rambus' document retention policies resulted in spoliation, that is, "the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." In *Hynix*, the Federal Circuit vacated a district court's finding that Rambus was not guilty of spoliation because litigation was not imminent. The Federal Circuit clarified that litigation need only be "reasonably foreseeable" for the duty to preserve evidence to arise and that logistical hurdles to litigation that had been highlighted by the district court did not preclude such a finding because resolution of the hurdles was reasonably foreseeable in its own right. In *Micron*, the Federal Circuit upheld the district court's finding that Rambus was guilty of spoliation and noted that the reasonably foreseeable standard is an "objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation." As to sanctions, however, the Federal Circuit questioned the district court's dismissal of Rambus' claims as a "harsh sanction" and remanded for reconsideration, explaining that a sanction of dismissal requires a clear and convincing showing of bad faith (a deliberate intention to impair the opposing party) and prejudice (a material adverse effect on the opposing party), and a finding by the district court that no lesser sanction will suffice. Click here for a copy of the *Hynix Semiconductor Inc.* opinion. Click here for a copy of the *Micron Technology Inc.* opinion.

North Carolina Court of Appeals Denies Foreclosure Action Due to Improper Endorsement on Borrower's Note. The North Carolina Court of Appeals recently denied a lender's right to foreclose on a borrower's property, holding that the lender had not established by competent evidence that it was the owner and holder of the borrower's note and deed of trust. *In re Foreclosure by David A. Simpson*, No. COA10-361 (N.C. App. May 3, 2011). In this case, the borrower had executed a note to refinance an existing mortgage on his home in 2006 with payment and principal due to the First National Bank of Arizona. Two years later, the borrower ceased making payments on his note. In 2009, a substitution of trustee was recorded with the register of deeds and it identified Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 (Deutsche Bank RAL) as the new holder of the note and the lien. Soon thereafter, Deutsche Bank RAL commenced non-judicial foreclosure proceedings which were upheld, after appeal, in county superior court. The borrower appealed the superior court's order based on two claims. First, the borrower claimed that the debt was not valid due to recission; he contended that he had rescinded the transaction because the original lender failed to provide all material disclosures as required by the federal Truth in Lending Act, 15 U.S.C. § 1635 (TILA). The court rejected this argument, holding that because recission under TILA is an equitable remedy, it cannot be properly raised in a non-judicial foreclosure proceeding under North Carolina law, but must instead be brought in a separate civil action in superior court. Second, the borrower claimed that Deutsche Bank RAL was not the owner and holder of the note. The court agreed, finding that while both the original note and an allonge to that note evidenced the note's transfer, the party to whom the note was transferred to was not the

same party bringing the foreclosure action. Specifically, while the foreclosure action was brought by Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6, the endorsement to the note was in the name of Deutsche Bank Trust Company Americas only. Because the note was not properly endorsed to the named plaintiff in the foreclosure action, the court found that under the Uniform Commercial Code there was "not sufficient evidence that [the] Petitioner [was] the 'holder' of the Note." Click here for a copy of the opinion.

Firm News

Donna Wilson will be presenting at a CLE webinar on "Emerging Class Action Threat: Consumer Personal Identification Data Strategies to Minimize Litigation Risks and Maximize Insurance Coverage" on Thursday, May 26, time TBD. This seminar will analyze the Song-Beverly Act and its impact of ruling on class action litigation under other state privacy statutes. The Webinar is sponsored by the Legal Publishing Group of Strafford Publications.

Kirk Jensen will be the featured speaker on SCRA Developments at the Women in Housing and Finance luncheon on June 8.

Andrew Sandler will be speaking at CBA Live 2011 and presenting an Annual Fair Lending Report on Tuesday, June 14, at 3:30 pm in Orlando, Florida. Mr. Sandler will be giving an overview of current regulatory and enforcement developments and discussing the most significant fair lending risks confronting consumer lenders in the next twelve months.

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

Kirk Jensen will be speaking on Litigation Developments at the AFSA State Government Affairs & Legal Issues Forum on June 22.

Andrew Sandler will be participating on a panel at the Florida Bar Annual Convention on Friday, June 24 as part of the "Presidential Showcase". On the panel with Mr. Sandler is Paul Bland, Public Justice. The Moderator is Justice R. Fred Lewis, a Justice of the Florida Supreme Court, a former Chief Justice and founder of Justice Teaching.

Andrew Sandler will be teaching the Litigation Strategy Session: Developing Strong Protocols, Admissible Documentation & Comprehensive Strategies in Order to Survive Regulatory Enforcement Actions & Litigation Workshop on Tuesday, July 26, in Chicago. This workshop precedes ACI's Consumer Finance Class Actions & Litigation Conference taking place July 27-28 at the Sutton Place Hotel, Chicago, IL.

Jonice Gray Tucker will be moderating a panel focusing on Regulatory and Litigation Developments in Servicing at the California Mortgage Bankers' Servicing Conference on August 29 in Las Vegas.

Mortgages

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Federal Circuit Clarifies Spoliation and Sanctions for Violation. On May 13, the U.S. Court of Appeals for the Federal Circuit handed down a pair of decisions that elaborated upon the duty to preserve evidence and the standards to be applied when determining sanctions. *Hynix Semiconductor Inc. v. Rambus Inc.*, No. 2009-1299 (Fed. Cir. May 13, 2011); *Micron Tech., Inc. v. Rambus Inc.*, No. 2009-1263 (Fed. Cir. May 13, 2011). Both cases grew out of a patent lawsuit by Rambus against manufacturers that had used a competitor's allegedly infringing technology. The defendants asserted that Rambus' document retention policies resulted in spoliation, that is, "the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." In *Hynix*, the Federal Circuit vacated a district court's finding that Rambus was not guilty of spoliation because litigation was not imminent. The Federal Circuit clarified that litigation need only be "reasonably foreseeable" for the duty to preserve evidence to arise and that logistical hurdles to litigation that had been highlighted by the district court did not preclude such a finding because resolution of the hurdles was reasonably foreseeable in its own right. In *Micron*, the Federal Circuit upheld the district court's finding that Rambus was guilty of spoliation and noted that the reasonably foreseeable standard is an "objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation." As to sanctions, however, the Federal Circuit questioned the district court's dismissal of Rambus' claims as a "harsh sanction" and remanded for reconsideration, explaining that a sanction of dismissal requires a clear and convincing showing of bad faith (a deliberate intention to impair the opposing party) and prejudice (a material adverse effect on the opposing party), and a finding by the district court that no lesser sanction will suffice. Click here for a copy of the *Hynix Semiconductor Inc.* opinion. Click here for a copy of the *Micron Technology Inc.* opinion.

North Carolina Court of Appeals Denies Foreclosure Action Due to Improper Endorsement on Borrower's Note. The North Carolina Court of Appeals recently denied a lender's right to foreclose on a borrower's property, holding that the lender had not established by competent evidence that it was the owner and holder of the borrower's note and deed of trust. *In re Foreclosure by David A. Simpson*, No. COA10-361 (N.C. App. May 3, 2011). In this case, the borrower had executed a note to refinance an existing mortgage on his home in 2006 with payment and principal due to the First

National Bank of Arizona. Two years later, the borrower ceased making payments on his note. In 2009, a substitution of trustee was recorded with the register of deeds and it identified Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 (Deutsche Bank RAL) as the new holder of the note and the lien. Soon thereafter, Deutsche Bank RAL commenced non-judicial foreclosure proceedings which were upheld, after appeal, in county superior court. The borrower appealed the superior court's order based on two claims. First, the borrower claimed that the debt was not valid due to recission; he contended that he had rescinded the transaction because the original lender failed to provide all material disclosures as required by the federal Truth in Lending Act, 15 U.S.C. § 1635 (TILA). The court rejected this argument, holding that because recission under TILA is an equitable remedy, it cannot be properly raised in a non-judicial foreclosure proceeding under North Carolina law, but must instead be brought in a separate civil action in superior court. Second, the borrower claimed that Deutsche Bank RAL was not the owner and holder of the note. The court agreed, finding that while both the original note and an allonge to that note evidenced the note's transfer, the party to whom the note was transferred to was not the same party bringing the foreclosure action. Specifically, while the foreclosure action was brought by Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6, the endorsement to the note was in the name of Deutsche Bank Trust Company Americas only. Because the note was not properly endorsed to the named plaintiff in the foreclosure action, the court found that under the Uniform Commercial Code there was "not sufficient evidence that [the] Petitioner [was] the 'holder' of the Note." Click here for a copy of the opinion.

E-Financial Services

Federal Reserve Proposes Rule Creating Protections for Senders of Remittance Transfers to Foreign Recipients. On May 12, the Federal Reserve Board (FRB) initiated formal rulemaking under Regulation E of the Electronic Fund Transfer Act that would require that remittance transfer providers make disclosures (in English and the appropriate foreign language) about the specific transfer, such as the exchange rate, applicable fees and taxes, and the amount to be received by the designated recipient. Promulgated in response to the Dodd-Frank Wall Street Reform and Consumer Protection Act, the proposed rule would additionally require transfer providers to issue a written receipt when payment is made for the remittance transfer with language that includes: (i) the pre-payment disclosures; (ii) the date of availability; (iii) the recipient's contact information; and (iv) information regarding the sender's error resolution and cancellation rights. Finally, the proposed rule sets forth two alternative approaches for implementing the standards of liability for remittance transfer providers. Comments on the proposal must be submitted within 60 days after publication. Click here for a copy of the press release. Click here for a copy of the *Federal Register* notice.

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