MORRISON | FOERSTER

Financial Services Report

Staying Ahead of the Summons

Award Winning Newsletter

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Inside

Editor's Note

What kid wouldn't want to grow up to be pay czar? Now there's a job worth bribing for. Presidents have the power, rock stars the babes, and law firm newsletter editors the glam, but when it gets down to old fashioned payback no one equalizes quite like a pay czar. The fact is, we were born for the job. The office badly needs a makeover, and to start with we would offer this official seal: A wood carving relief of a Sears electric hair clipper, circa 1965, with the snap-on styling attachments for short, shorter, and shortest.

The idea of a pay czar is so inspired why waste it on bankers? Why not Donald Trump or just-fired Notre Dame football coach Charlie Weis? The mind reels … Jose Canseco, Keanu Reeves, every reunion rock band. Imagine the equality a pay czar could inflict on the Yankees' payroll. And who wouldn't want to give a buzz cut to New York Mayor Michael Bloomberg's re-election budget? We'd devise a special pay-constricting algorithm for reality TV producers (excepting "Real Housewives of New Jersey"), resulting in a negative salary that becomes more progressive with each episode. We would apply the same formula to Congress since they're both pretty much in the same line of work. After lunch, we'd level the TSA's playing field.

Enough happened this quarter that it almost kept our minds off the important stuff. If only. The Yankees won the World Series. (*See* Pay Czar, *supra*.) President Obama gave the Japanese Emperor a wow bow. Donny Osmond became dancing queen. The Balloon Boy was able to make us cry, and then laugh—a rare twofer.

Halloween fright came early, with Rep. Barney Frank wearing a scary Consumer Financial Protection Agency mask, replete with fangs. (Memo to self: Unfriend Barney.) Overdraft fees as we know them are nearly kaput, the new CARD Act rules go into effect in February, and pressure is being applied at the state level to accomplish mortgage cramdowns in the name of loan modification. We cover all this in these pages, and more. But be warned: It is enough to make you want to get into the "downward dog" yoga pose and stay there.

Until next time, come out of the downward dog, close your eyes and take a deep Kapalabhati breath, and imagine a wonderful holiday and Happy New Year. ■

William L. Stern, Editor

MoFo Metrics

2.3	Text messages sent and received by average teen, per month, thousands
9	Hours per week average teen spends on social networking
14	Hours per year average commuter spent in rush-hour traffic, 1982
32	Hours per year average commuter spent in rush-hour traffic, 2007
5	Number of extra years of life expectancy, golfers vs. non-golfers
20	Percentage of global economy attributable to U.S. consumers
25	Percentage decline in median income for U.S. realtors, since 2004
15	Percentage of U.S. credit card accounts expected to close in 2010

Beltway Report

NEW KID ON THE BLOCK

The House Financial Services Committee approved the Consumer Financial Protection Agency Act of 2009 (the "CFPA Act"), which concentrates federal consumer protection for financial matters in a new federal agency, the Consumer Financial Protection Agency ("CFPA"). The CFPA Act would transfer rule writing, examination, and enforcement authority for thirteen specified consumer protection statutes related to financial services, such as TILA and the FCRA, from the federal banking agencies to the CFPA. Moreover, the CFPA would have broad authority to write various regulations, including regulations prohibiting unfair, deceptive, or abusive acts or practices in connection with consumer financial services.

This one is a game-changer. We've written a white paper, and you can access it at http://www.mofo.com/news/updates/files/090618WhitePaper.pdf. Or for more information, contact Oliver Ireland at oireland@mofo.com, or Nate Taylor at ndtaylor@mofo.com.

PARENTS RESPONSIBLE FOR ALL CHILDREN

On September 14, 2009, the Federal Reserve Board issued a new policy that requires its staff to conduct risk-focused consumer compliance supervision of nonbank subsidiaries of bank holding companies and to investigate consumer complaints against these entities. Targeted or full-scope examinations will result in ratings based on the Consumer Compliance Risk Management rating system and will be "appropriately considered" when the Bank Holding Company rating or the U.S. Combined Assessment is assigned to the bank holding company.

For additional information, see our Legal Update at: http://www.mofo.com/news/updates/files/15971.html, or contact Barbara R. Mendelson at bmendelson@mofo.com or Rick Fischer at lfischer@mofo.com.

HAMP HEFT

The federal banking agencies issued a final rule providing that mortgage loans modified under the Home Affordable Mortgage Program ("HAMP") will generally retain the risk weight assigned to the mortgage loan prior to modification. The final rule clarifies that mortgage loans whose HAMP modifications are in the trial period, and not yet permanent, qualify for the risk-based capital treatment contained in the rule. The final rule will take effect 30 days after publication in the *Federal Register*, which is expected shortly.

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

GOODBYE OVERDRAFT FEES

FRB announced final rules that prohibit financial institutions from charging consumers fees for paying overdrafts on ATM and one-time debit card transactions, unless a consumer consents, or opts in, to the overdraft service for those types of transactions. The final rules, along with a model opt-in notice, are issued under Regulation E, which implements the Electronic Fund Transfer Act. The final rules require institutions to provide consumers who do not opt in with the same account terms, conditions, and features (including pricing) that they provide to consumers who do opt in.

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

WANNABE PAY CZAR

The Federal Reserve Board ("FRB") issued for comment a proposal designed to ensure that the incentive compensation policies of banks do not undermine their safety and soundness. While the FRB is not dictating pay or specifying what kind of compensation plans banking organizations must adopt, the proposal will create a two-tier system supervising compensation, using different approaches for the largest banking organizations. Under the proposal, incentive compensation would be reviewed during each bank's regular examination. The comment period ends 30 days after publication of the proposed guidance in the Federal Register, but banking organizations are expected to immediately review their incentive compensation arrangements to ensure that

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they do not encourage excessive risk-taking and to implement corrective programs where needed.

For more information, see our Legal Update at http://www.mofo.com/news/updates/files/16093.htm, or contact Barbara Mendelson at bmendelson@mofo.com or Rick Fischer at lfischer@mofo.com.

A BIGGER TARP

The Obama Administration wants to encourage small business lending by providing capital support to community banks. Community banks will have access to lower-cost capital, if they submit a plan demonstrating that the capital will allow them to increase lending to small businesses. Participants would have to submit quarterly reports detailing their small business lending activities. Banks could receive capital totaling up to 2% of risk-weighted assets, and capital would be available at an initial dividend rate of 3%, compared to the Capital Purchase Program's 5%. The dividend rate would increase to 9% after five years to encourage timely repayment. The primary banking regulator has to approve a bank's participation. ■

For more information, contact Rick Fischer at lfischer@mofo.com or Obrea Poindexter at opoindexter@mofo.com.

MORRISON & FOERSTER SEEKS NOMINATIONS FOR 2010 REGULATORY INNOVATION AWARD

Morrison & Foerster is seeking nominations for the 2010 Regulatory Innovation Award. Morrison & Foerster established the award last year through the Burton Foundation to honor an academic or non-elected public official whose innovative ideas have made a significant contribution to the discourse on regulatory reform in the areas of corporate governance, securities, capital markets or financial institutions. The 2009 Regulatory Innovation Award was presented to Sheila Bair, Chair of the FDIC.

Nominations are due by February 19, 2010. The nomination form can be found here. There is no fee to submit and all candidates must be academics or non-elected public officials. The 2010 honoree will be announced by March 31, 2010, and will be selected by an independent committee including academics and business leaders. The committee consults with representatives of the Burton Foundation as part of the selection process. For more information on the 2010 Regulatory Innovation Award, please visit www.regulatoryinnovationaward.com. ■

Credit Card Report

FEDERAL RESERVE BOARD PROPOSES GIFT CARD RULES

FRB released a proposed rule to implement the gift card provisions contained in the Credit Card Accountability Responsibility and Disclosure Act ("CARD Act") that would restrict the fees and expiration dates that apply to gift cards. The proposed rule prohibits imposing dormancy, inactivity, or service fees with respect to a gift certificate, store gift card or general-use prepaid card, unless certain conditions are met. The proposed rule would also require gift cards to have an expiration date of not less than five years. The comment period will end 30 days after the publication of the proposed rule in the Federal Register, which is expected shortly.

For more information, see our Legal Update at: http://www.mofo.com/news/updates/files/16171.html and http://www.mofo.com/news/updates/files/16192.html, or contact Rick Fischer at lfischer@mofo.com or Oliver Ireland at oireland@mofo.com.

FRB RELEASES PROPOSED CREDIT CARD RULES

Washington's birthday. That's when the FRB issued final rules that go into effect—February 22, 2010. They will amend Regulation Z to implement certain provisions of the CARD Act. The proposal generally prohibits the application of increased annual percentage rates and certain fees to existing balances, with some exceptions. Creditors will be prohibited from increasing an APR during an account's first year. Certain account opening and other fees charged during the first year, other than late payment, returned payment, and over-the-limit fees, will be limited to 25% of the initial credit limit. After the first year, creditors will be allowed to increase the APR applicable to new transactions upon 45 days' advance notice. The proposal requires that both new and existing consumers opt in to the imposition of over-the-limit fees. Periodic statements that reflect an over-the-limit fee will have to contain a notice of the consumer's right to revoke consent to such fee, and credit card issuers will be required to include certain minimum payment disclosures on periodic statements.

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

OTS REQUIRES MINIMUM MONTHLY PAYMENTS

The OTS issued a Letter to Bank CEOs on "no interest, no payment" credit card programs that allow borrowers to defer making payments for extended periods. OTS stated that it expects all lenders to require minimum payments that will amortize the current balance over a reasonable period of time, in accordance with the Account Management and Loss Allowance Guidance for Credit Card Lending. OTS stated that the minimum monthly payment should cover **at least** 1% of the principal balance plus all assessed monthly fees. OTS noted that while banks may offer "no interest" promotions, they would have a policy of minimum monthly payments even during the promotional period. OTS indicated that it expects full compliance by February 22, 2010, the same date by which most CARD Act requirements must be implemented.

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

LADY GAGA

The OCC issued a bulletin on the FRB's interim final rule implementing certain provisions of the CARD Act that became effective August 20, 2009. Under the rule, creditors must notify customers 45 days in advance of any rate increase or significant changes in credit card account terms, and disclose that their customers have the right to reject those changes but can apply the new rates or terms to any transaction that occurs more than 14 days after the notice is provided, even if the customer ultimately rejects the changes. The rule does not require creditors to tell their customers that new terms can be applied during the 45-day period. In the bulletin, the OCC directs national banks to include an additional disclosure to notify consumers of this consequence until the issue is clarified by the FRB. The bulletin contains sample disclosure language. ■

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

Preemption Report

STATE AUTO FINANCE LAW FINISHED

Morrison & Foerster won a preemption victory in a class action alleging that U.S. Bank violated a California state statute requiring specific post-repossession disclosures. In *Aguayo v. U.S. Bank*, __ F. Supp. 2d __, 2009 WL 3149607 (S.D. Cal. Sept. 24, 2009), the court held the OCC regulations expressly preempted state law claims seeking to regulate disclosures on credit-related documents. The court rejected plaintiffs' argument that state law notice requirements are preempted only if they conflict with federal law. The court also ruled the savings clause in the OCC regulations did not apply, adopting the OTS's interpretation of its parallel regulations because "the OCC interprets the preemptive scope of the NBA and HOLA to be the same." *Id.* at *7.

For more information, contact James McGuire at jmcguire@mofo.com or Sylvia Rivera at srivera@mofo.com.

CALIFORNIA CONFLICT—WHAT'S NEW?

Whether the OTS's interpretation of the scope of the savings clause applies to the OCC regulations is a matter of some debate. A federal court in Los Angeles reached a conclusion opposite to the result of the *Aguayo* court, finding the OTS, unlike the OCC, occupies the field in federal lending and the OTS regulations are "more sweeping" than the OCC regulations. *Davis v. Chase Bank USA, N.A.*, __ F. Supp. 2d __, 2009 WL 2868817 (C.D. Cal. Sept. 3, 2009). The court held state law claims were not preempted to the extent they challenged allocation of payments contrary to promises made in advertisements or the contract, but those claims were preempted to the extent they sought to require Chase Bank to apply payments in a certain way.

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

NEW YORK COURT ALSO DRAWS LINES

In *McAnaney v. Astoria Financial Corp.*, __ F. Supp. 2d __, 2009 WL 3150430 (E.D.N.Y. September 29, 2009), a federal court distinguished between different types of state law claims: those alleging federal thrifts failed to comply with their contracts or committed fraud or deceptive practices in charging certain mortgage payoff fees were not preempted by OTS regulations; those seeking to require defendants to provide free payoff statements and complete the satisfaction of mortgages within a specific time frame were preempted because they directly impacted lending activities. The court rejected plaintiffs' arguments that claims challenging conduct violating federal law cannot be preempted and that the Supreme Court's recent decisions in *Wyeth v. Levine* and *Cuomo v. Clearing House Association, LLC,* limited the preemptive effect of HOLA.

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

NINTH ROCKS

Someone actually agrees with the Ninth Circuit? Yes, it's shocking, but in a good way. The Eighth Circuit adopted the Ninth Circuit's conclusion in *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001 (9th Cir. 2008), that state laws that do not expressly mention lending are preempted under the OTS regulations if, as applied, they seek to regulate federal thrifts in an area listed in the regulations. *Casey v. FDIC*, 583 F.3d 586 (8th Cir. 2009). The court held state statutory and common law claims alleging the charging of certain mortgage-related fees constituted the unauthorized practice of law were expressly preempted by the regulations.

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

BROKERS OVER AND OUT

Who's afraid of a little friendly competition? Mortgage brokers, apparently. They filed suit against credit reporting agencies challenging the selling of "trigger leads," a practice by which CRAs sell to other lenders "pre-screened" consumer reports containing names of potential borrowers identified by mortgage broker requests for credit reports. The Second Circuit affirmed the trial court's decision dismissing certain state law statutory and common law claims as preempted by section 1681t(b)(1)(A) of

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Preemption Report

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FCRA, which preempts state law requirements "relating to the prescreening of consumer reports." *Premium Mortgage Corp. v. Equifax, Inc.*, 583 F.3d 103 (2d Cir. 2009). The court declined to consider whether common law claims alleging fraud, breach of contract, or tortious interference claims were preempted, finding they had not been properly pleaded.

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

PREEMPTION AMMUNITION

As Congress debates whether to end or greatly limit federal preemption for national banks and federal thrifts, the American Bankers Association has weighed in by issuing two white papers detailing the history and economic benefits of federal preemption. "A Preemption Primer" provides a good overview of the legal landscape, and "The Economic Impact of Eliminating Preemption of State Consumer Laws" details how consumers will be harmed if Congress eliminates preemption. The papers are available at

www.aba.com/aba/documents/winnews/Preemption_Primer_092109.pdf

www.aba.com/aba/documents/winnews/Preemption_EconomicImpactPaper_092109.pdf. ■

For more information, contact Ollie Ireland at oireland@mofo.com.

Operations Report

FDIC REQUIRES BANKS TO PAY THREE YEARS IN ADVANCE

The FDIC board unanimously approved a final rule that requires banks to prepay three years of estimated insurance assessments. The prepayment allows the FDIC to strengthen the cash position of the Deposit Insurance Fund immediately. Payment is due on December 30, 2009, and includes estimated quarterly assessments through 2012. This prepayment will not immediately affect bank earnings because banks will book the payments at the end of each quarter.

For more information, contact Rick Fischer at lfischer@mofo.com or Obrea Poindexter at opoindexter@mofo.com.

REIMBURSEMENT REVISIONS TO REG S

FRB issued a revision to Regulation S, which sets the rates and conditions under which a government agency must reimburse a financial institution for costs incurred in producing customer financial records under the Right to Financial Privacy Act. The revision, effective January 1, 2010, changes Regulation S in several ways by increasing significantly the personnel fees chargeable for searching and processing document requests, and encouraging electronic document productions by not allowing a $0.25 per page fee to be charged by a financial institution for printing electronically stored information without the requesting agency's consent. The amended regulation includes a mechanism for automatically updating the labor rates found in the regulation every three years, and makes other technical changes to the rule.

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

FDIC EXTENDS SECURITIZATION SAFE HARBOR

On November 12, 2009, the FDIC board adopted an interim final rule (the "Interim Rule") amending the "Securitization Rule" regarding the FDIC's treatment, as conservator or receiver, of financial assets transferred in connection with a securitization or participation. The Interim Rule was adopted in response to recent changes to GAAP that will require many securitizations and participations currently accounted for as "sales" under GAAP to be accounted for as secured on-balance borrowings commencing with the sponsoring depository institution's first fiscal year that begins after November 15, 2009.

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The Interim Rule provides that all securitizations and participations for which financial assets were transferred, or for revolving securitization trusts for which securities are issued, prior to March 31, 2010 will remain "legally isolated" so long as those securitizations and participations would been accounted for as sales under GAAP as in effect before November 15, 2009, and satisfy all other conditions of the Securitization Rule. ■

For more information, see our Legal Update at http://www.mofo.com/news/updates/files/091118FDIC_Extends.pdf, or contact Rick Fischer at lfischer@mofo.com or Obrea Poindexter at opoindexter@mofo.com.

Mortgage Report

MOD MODS

A lot of bad mortgage loans are located in California, and California has a loan modification law, Civ. Code 2923.6, that is similar to many others enacted around the country. Is a lender's failure to offer a loan modification privately actionable?

In September, a district court in Fresno said no in *Nool v. Homeq Servicing*, No. 1:09-CV-0885 OWW (E.D. Cal., Sept. 4, 2009). Although some courts have decided otherwise, Judge Wanger held that "the language of section (b) belies the imposition of any duty to engage in loan modification discussions, as the provision merely expresses legislative 'intent' that the mortgagee, beneficiary, or authorized agent offer the borrower a loan modification if doing so is consistent with its authority." Other cases agreeing with Judge Wanger include *Pantoja v. Countrywide Home Loans, Inc.*, __ F. Supp. 2d __, 2009 WL 2423707 (N.D. Cal. 2009); *Farner v. Countrywide Home Loans*, 2009 WL 189025, at *2 (S.D. Cal. Jan.26, 2009) ("[N]othing in Cal. Civ.Code § 2923.6 imposes a duty on servicers of loans to modify the terms of loans or creates a private right of action for borrowers.").

For more information, contact Joe Gabai at jgabai@mofo.com.

CRAMDOWN, AND UP

Demonizing mortgage lenders is all the rage. So, the Speaker of the California Assembly introduced a new mortgage cramdown bill in the waning days of the 2009 session that is an eye-popper.

Demonizing mortgage lenders is all the rage. So, the Speaker of the California Assembly introduced a new mortgage cramdown bill in the waning days of the 2009 session that is an eye-popper.

AB 1588 would establish the Monitored Mortgage Workout Program that would be offered to all borrowers. Any notice of default of a residential real property would require that the borrower be given a notice of the borrower's right to participate in the MMW Program. If the borrower elects the program, the foreclosure would stop, a monitor would be appointed and, at the conclusion of the "MMW Program sessions" the monitor would prepare a loan modification proposal. It could include any of the following: An interest rate reduction for a fixed term of at least five years, extension of the mortgage term not to exceed 40 years, deferral of a portion of the principal amount of the unpaid principal balance until maturity of the loan, or reduction of the principal balance. Yikes!

If the borrower accepts, "the terms of the proposal shall have immediate effect." The trustee doesn't get to reject the proposed terms; if it does, and if the monitor determines that the trustee "has failed to meaningfully participate" or has "failed

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Mortgage Report

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to act in good faith" the borrower may sue "to enforce the monitor's loan modification" and, if that happens, "the court *shall* enforce the terms of the loan modification proposal in an expedited proceeding" and "shall award attorney's fees and costs to the prevailing party." Only if the borrower rejects the loan modification proposal is the trustee permitted to proceed with the foreclosure.

We expect the bill will get revived in early 2010, to pass in the Assembly and possibly also the Senate. It may call for Governor Terminator.

For more information, contact Joe Gabai at jgabai@mofo.com.

RESPA AND CAPTIVE REINSURANCE

The Third Circuit in late October held that in alleging a violation of the RESPA anti-kickback provisions a consumer does not have to allege that he suffered an overcharge. *Alston v. Countrywide Fin. Corp.*, __ F. 3d __, (3d Cir. October 28, 2009). *Alston* was a class action filed against Countrywide Financial Corporation, Countrywide Home Loans, and Balboa Reinsurance Company alleging violations of section 8(d)(2) of RESPA, 12 U.S.C. § 2607(d)(2). Plaintiffs alleged that "[plaintiffs'] private mortgage insurance premiums were channeled into an unlawful 'captive reinsurance arrangement' – essentially, a kickback scheme – operated by their mortgage lender, Countrywide Home Loans…and its affiliated reinsurer, Balboa Reinsurance…in violation of RESPA section 8(a) and section 8(b)." Defendants moved to dismiss, contending that because plaintiffs' PMI premiums were filed with the Pennsylvania Insurance Department, the rates were *per se* reasonable under the filed rate doctrine and, as such, plaintiffs could not have suffered an overcharge and therefore lacked Article III standing. The district court agreed, and dismissed.

The Third Circuit reversed: "What is before us for decision turns on a question of statutory interpretation—does or does not the plain language of RESPA section 8 indicate that Congress created a private right of action without requiring an overcharge allegation? We conclude that it does. Accordingly, we will reverse the Order of the District Court." The Third Circuit rejected the no-standing argument as well as the defendant's filed-rate argument. ■

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

Privacy Report

A MODEL OF PRIVACY

The federal banking agencies and the CFTC, FTC, NCUA and SEC issued a final rule amending their respective privacy rules under Title V of the Gramm-Leach-Bliley Act ("GLBA") to provide a model privacy form that financial institutions may use to describe their privacy policies and to provide consumers with the opportunity to opt out of the sharing of information with nonaffiliated third parties, as required by the GLBA. The model form also addresses relevant opt-outs under the Fair Credit Reporting Act relating to the sharing of information with affiliates. The final model form, which had been under development for several years, is substantially similar to the form proposed by the agencies in 2007. The final rule provides numerous, detailed requirements for how the model form must be presented and what information must be included. While use of the model privacy form will not be required, a financial institution that uses the form will be deemed in compliance with the GLBA notice content requirements for privacy policies and opt-out notices. ■

For more information, contact Obrea Poindexter at opoindexter@mofo.com or Nate Taylor at ndtaylor@mofo.com.

Arbitration Report

AT&T'S REVISED CLASS ACTION WAIVER FOUND UNCONSCIONABLE

In a class action claiming that AT&T's offer of a "free" phone to anyone who signed up for its service was fraudulent to the extent AT&T charged the new subscriber sales tax on the retail value of each "free" phone, the Ninth Circuit affirmed the denial of the telephone company's motion to compel arbitration on the ground that the arbitration clause contains an unconscionable class action waiver. *Laster v. AT&T Mobility, LLC*, No. 08-56394 (9th Cir. Oct. 27, 2009). The arbitration clause provided for a payment of $7,500 if a customer receives an arbitration award greater than the amount of AT&T's last written settlement offer. The court rejected AT&T's argument that the potential for a payment overcomes the problem of "predictably small damages" that would otherwise act as a disincentive for an individual to bring a solo action to prosecute his or her rights. The court reasoned that "AT&T will simply pay the face value of the claim [$30.22] before the selection of an arbitrator to avoid potentially paying $7,500." Thus, "the maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22."

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

CROP CIRCLES

What happens when two parties sign an arbitration agreement that says the arbitrator should decide claims about the formation or enforceability of the agreement and one of the parties challenges the agreement as unconscionable? The Ninth Circuit recently answered this question in *Jackson v. Rent-A-Center West, Inc.*, No. 07-16164 (9th Cir. Sept. 9, 2009), a case involving race discrimination claims brought by an employee against his employer. Finding that the court, not the arbitrator, must decide unconscionability, the Ninth Circuit stated "where a party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine, applying the relevant state contract law principles. This rule applies even where the agreement's express terms delegate that determination to the arbitrator."

Finding that the court, not the arbitrator, must decide unconscionability, the Ninth Circuit stated "where a party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine, applying the relevant state contract law principles. This rule applies even where the agreement's express terms delegate that determination to the arbitrator."

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

THINK TWICE BEFORE YOU REQUIRE A THREE-ARBITRATOR PANEL

Requiring a three-arbitrator panel and prohibiting parties from joining their claims in a single proceeding can render an arbitration clause unenforceable, rules a California appellate court in *Parada v. Superior Court*, 98 Cal.Rptr.3d 743 (Aug. 26, 2009). In *Parada*, the court refused to enforce a contractual arbitration provision between an investment company and its investors on unconscionability grounds, relying on evidence that the investors would have to pay at least $20,800 in arbitrators' fees to arbitrate claims for losses that ranged from

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only $44,000 to $130,000. The court also noted that the investment company failed to justify the need for three arbitrators, and concluded that the company included the provision "deliberately for the improper purpose of discouraging or preventing its customers from vindicating their rights." The prohibition on joinder of claims only further drove up the costs per party of arbitration. Take away: When drafting an arbitration provision, consider your customers' potential ability to pay arbitration costs and don't require a three-arbitrator panel unless you can justify a need for more than one arbitrator.

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

CLASS ACTION WAIVER ENFORCED

In an action alleging that Chase improperly increased the interest rate charged on credit card balances, the Eighth Circuit reversed a finding that a class action waiver in a cardholder agreement was unconscionable. *Cicle v. Chase Bank USA*, No. 08-1362 (8th Cir. Oct. 6, 2009). The court was swayed by the fact that the arbitration clause specifically provided an exception to binding arbitration in that plaintiff could file her claim individually in small claims court. The court rejected an argument that the agreement was procedurally unconscionable because it was presented to the consumer on a take-it-or-leave-it basis. "These sorts of take-it-or-leave-it agreements between businesses and consumers are used all the time in today's business world. If they were deemed to be unconscionable and unenforceable contracts of adhesion, or if individual negotiation were required to make them enforceable, much of commerce would screech to a halt." ■

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