InfoBytes

October 21, 2011

Topics In This Issue

Federal Issues

FRB and FDIC Approve Final Rule on Implementation of Dodd-Frank Section 165(d) "Living Will" Resolution Plans. On October 17, the Federal Reserve Board (Board) and the Federal Deposit Insurance Corporation (FDIC) announced their approval of a final rule for implementation of the resolution plan requirements imposed by Section 165(d) of the Dodd-Frank Act. According to the Board's press release on the final rule, it will require bank holding companies with assets of $50 billion or more to submit annual resolution plans to both the Board and the FDIC. Each such plan will describe the covered company's strategy for rapid and orderly resolution in bankruptcy during times of financial distress, and must also describe specific proposed actions to be taken in such a resolution. Each resolution plan must also include a description of the company's organizational structure, material entities, interconnections and dependencies, and management and information systems (the rule, at pp. 9 - 10 provides "key definitions" for several of the elements of each plan; for example, a "Material entity" means "a subsidiary or foreign office of the covered company that is significant for the continuation and funding of critical operations."). The final rule will further require covered companies to submit initial resolution plans on a staggered basis. Generally, those with $250 billion or more in non-bank assets must do so on or before July 1, 2012. Companies subject to the rule with $100 billion or more, but less than $250 billion in such assets must submit their initial plans on or before July 1, 2013; those with less than $100 billion in non-bank assets must submit their plans on or before December 31, 2013. Click here for the Board's press release regarding the final rule. Click here for the final rule.

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Federal Agencies Release Guidance and Proposed Revisions to Interagency Questions and Answers Regarding Flood Insurance. On October 14, the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Farm Credit Administration, and National Credit Union Administration (collectively, the Agencies) published guidance and proposed revisions to the Interagency Questions and Answers Regarding Flood Insurance, most recently published on July 21, 2009. The Agencies finalized two new questions and answers, one relating to insurable value and one relating to force placement, and withdrew one question and answer regarding insurable value. The guidance also significantly revises and requests comments on three questions and answers regarding force placement of flood insurance. Under the new guidance, the Agencies reaffirm that the insurable value for certain residential or condominium properties should be written to the replacement cost value (RCV) but, in calculating the required amount of insurance, the lender and borrower may choose from a variety of approaches or methods to establish a reasonable valuation. In addition, the Agencies provided that any delay in purchasing a flood insurance policy must be brief when the borrower has failed to purchase an appropriate policy within the 45-day notice period, and the lender must provide a reasonable explanation for any such delay. The final questions and answers are effective as of the date of publication in the Federal Register, and comments on the proposed questions and answers must be submitted within 45 days after such publication. Click here for a copy of the revised guidance and proposed updates to the Interagency Questions and Answers Regarding Flood Insurance.

Courts

West Virginia Federal Court Holds That A State Debt Collection Law Is Not Preempted Under Dodd-Frank. On October 13, the U.S. District Court for the Southern District of West Virginia held that the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank or Act) did not preempt provisions of the West Virginia Consumer Credit and Protection Act (WVCCPA) that regulate debt collection activities. *Cline v. Bank of America, N.A.*, Case No. 2:10-1295 (S.D. W. Va. Oct. 13, 2011). Plaintiff's complaint alleged that national bank defendant harassed him in violation of the WVCCPA in order to collect on a motorcycle loan. Defendant moved for a judgment on the pleadings, arguing that the WVCCPA was preempted by the National Bank Act (NBA) and a preemption regulation promulgated by the Office of the Comptroller of the Currency (OCC). The court noted that Dodd-Frank amended the NBA by providing that a state consumer financial law is preempted if in accordance with *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), the state law prevents or significantly interferes with the exercise of a national bank power. The court stated that the preemption standard set forth in *Barnett Bank* is whether the state law (i) imposes an obligation on a national bank in direct conflict with federal law or (ii) is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The court also noted that the OCC amended its preemption regulation pursuant to Dodd-Frank to clarify that its focus is no longer on whether a state law obstructed, impaired, or conditioned a national bank power or more than incidentally affected the exercise of that power, but whether the state law is preempted based on an application of *Barnett Bank*. The court next discussed whether the preemption provisions contained in Dodd-Frank applied to the instant case, because the Act provides that it does not alter or affect OCC regulations governing the applicability of state law to any contract entered on or before July 21, 2010. The court concluded that this Dodd-Frank provision was intended only to preserve existing contracts by national banks, and not to protect national banks from state consumer protection laws. Therefore, the Dodd-Frank preemption provisions applied to the instant action. The court then found that Dodd-Frank's preemption provisions only concerned state consumer financial laws, and that if a state law is not a state consumer financial law, the state law is not preempted by the NBA.* The court held that the state law protects West Virginia residents from unfair and abusive collection practices, and thus is not a consumer financial law. Accordingly, the court concluded that none of plaintiff's claims were preempted. The court then analyzed whether plaintiff's claims were preempted under the OCC's amended regulation. The court stated

that the OCC's new regulation tied preemption to *Barnett Bank*, and that in this case, the West Virginia law did not impose an obligation on defendant in direct conflict with federal law or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The court thus denied defendant's motion. Click here for a copy of the opinion.

**Note that this opinion is a district court opinion subject to appeal and that a preliminary analysis raises significant questions, including whether the court is correct that the NBA does not preempt state laws that are not consumer financial laws, and whether the court applied the correct preemption standard given its lack of a robust analysis regarding whether the state law prevented or significantly interfered with the exercise of a national bank power.*

Alabama Federal Court Denies Motion to Dismiss Putative TILA Class Action. On October 18, the U.S. District Court for the Southern District of Alabama denied mortgage lender defendant's motion to dismiss or amend a putative class action alleging a violation of the Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq. *Reed v. Chase Home Finance, LLC*, 1:11-cv-00412, *1 (D. Ala. Oct. 18, 2011). Specifically, plaintiff alleged that defendant failed to provide the borrower with notice that it was a "new creditor" as required by Section 1641(g) when it was assigned "an ownership interest" in plaintiff's mortgage and note. The sole ground of defendant's motion was that the complaint failed to meet the pleading requirements set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2005) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Defendant argued that plaintiff's contention that the note was assigned to defendant, explicitly pled in the complaint, must be "supported by factual material rendering the assertion plausible." *Reed* at 2. The court disagreed, holding that the plaintiff's pleading that the mortgage was assigned, in addition to plaintiff's claim that under Alabama law the mortgage and note travel together, was sufficient to render plausible the assertion regarding assignment of the note. The court expressed no opinion regarding the ultimate viability of plaintiff's claims. Click here for a copy of the opinion.

Massachusetts' Highest Court Upholds Dismissal of Purchaser's Try Title Action Because of Defects in Underlying Foreclosure. On October 18, the Massachusetts Supreme Judicial Court held that a homeowner who purchased a property from a foreclosing lender could not establish that he held record title to a property because of defects in the underlying foreclosure. *Bevilacqua v. Rodriguez*, Slip Op. SJC-10880 (Mass. Oct. 18, 2011). As a result, the Court upheld the Land Court's decision dismissing a try title action (quiet title action) brought by the homeowner. The alleged defect in the underlying foreclosure sale was the failure of the foreclosing party to show that it was a valid assignee of the mortgage prior to commencing the foreclosure proceeding. In January 2011 the Court held in *U.S. Bank Nat'l Ass'n v. Ibanez* (as reported in *InfoBytes*, January 7, 2011) that a foreclosing party is required to show that it was the holder of the relevant mortgage at the time of the publication of notice and at the time of the foreclosure sale, pursuant to an effective assignment. In *Ibanez* the court noted that "[a] plaintiff that cannot make this modest showing cannot justly proclaim that it was unfairly denied a declaration of clear title." Despite the urging of amici to reconsider the *Ibanez* holding, the court refused to do so, extending the *Ibanez* standard to a homeowner who purchases from a foreclosing party that cannot make the requisite showing. The court did, however, note that the try title action should have been dismissed without prejudice so as to not prevent the homeowner "from bringing other actions regarding title to the property." Click here for a copy of the opinion.

Firm News

Podcast: Saul and Naimon Weigh In on the Impact of *Wal-Mart v. Dukes*: In a podcast moderated by **Elizabeth McGinn**, **Ben Saul** and **Jeff Naimon** discuss litigation and enforcement developments that have

followed in the wake of the Supreme Court's *Wal-Mart v. Dukes* decision, including how *Dukes* is influencing the defense of class actions and fair lending law suits. Click here to listen: http://bit.ly/pQSUOS

Benjamin Klubes will be moderating a panel titled, "The Path Ahead for Housing Finance: Just Changing Lanes or Time for a New Road?" at George Washington University Law School's "Dodd-Frank's Future Direction: On Course or Off Track" symposium on October 21. BuckleySandler is a sponsor for this symposium.

Benjamin Klubes will be speaking at the ACI's 7th Annual Forum on Preventing, Detecting and Resolving Mortgage Fraud from October 24-25 in Washington, DC. Mr. Klubes' session is entitled: "The New and Complex World of HUD/FHA Lending Requirements: Using Lessons Learned from Investigations of Cases by the Agencies to Avoid Costly Penalties, Including Expulsion from the Program".

Jonice Gray Tucker, **Robyn Quattrone**, and **Liana Prieto** will be speaking at the Women in Housing & Finance Regulatory Taskforce Lunch in Washington, D.C. on October 25. Their presentation will focus on the current state of the Consumer Financial Protection Bureau including its structure, rulemaking efforts, and anticipated regulatory and enforcement priorities.

Jerry Buckley will participate in a panel discussion on Dodd Frank, the Settlement activities and related items at the FocusPoints Conference in Orlando Florida on October 26. the conference is sponsored by QBE First.

Jonice Gray Tucker will be speaking at the Fall Meeting of the ABA Banking Law Committee in Washington, D.C. on November 4. Ms. Tucker will be discussing enforcement trends related to mortgage servicing.

Andrew Sandler and **Benjamin Klubes** will be speaking at the 15th Annual CRA & Fair Lending Colloquium which will be held in Baltimore, Maryland from November 6-8, 2011. Mr. Sandler will be addressing "Hot, Hot, Hot Compliance Topics: Reform Impact, Oversight Trends, Enforcement Actions and More!" on November 7. Mr. Klubes will be moderating a panel on "Non-Mortgage Lending: The Fair Lending Dragon is Breathing Fire" on November 8. For further details on the colloquium please see www.cracolloquium.com.

Margo Tank and **John Richards** will participate in the ESRA Fall Conference in Washington, D.C. on November 9 and 10. For details on registration, accommodations, and agenda, please see http://esignrecords.org/events/.

David Krakoff will be participating in a panel at the International Association of Defense Counsel program on worldwide anti-corruption laws in Palm Springs in February 2012.

Firm Publications

Jonice Gray Tucker and **Valerie Hletko** authored Fair Lending Refocused: Loan Modification and Loss Mitigation Outcome Reviews, which was published in the September 2011 issue of *LexisNexis Emerging Issues*.

Mortgages

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Insurance

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We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes.
Email: **infobytes@buckleysandler.com**

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