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InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

January 7, 2011

Topics In This Issue

Federal Issues

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CFPB and CSBS Sign MOU to Coordinate State and Federal Financial Supervision. On January 4, the Conference of State Bank Supervisors (CSBS) announced that it signed a memorandum of understanding (MOU) with the Consumer Financial Protection Bureau (CFPB) to coordinate state and federal supervision of providers of consumer financial products and services. The MOU provides that state regulators and the CFPB will (i) promote consistent examination procedures and effective enforcement of state and federal consumer laws, (ii) minimize regulatory burden and efficiently deploy supervisory resources, and (iii) consult each other regarding compliance examination standards, procedures, and practices. Click here for a copy of the press release.

President Signs Law Extending Service Member Foreclosure Protection. On December 29, the President signed the Helping Heroes Keep Their Homes Act of 2010 (Act), making it Pub. L 111-34. The Act amends the Housing and Economy Recovery Act of 2008 (HERA) by extending the extended stay of foreclosure protections for service members from the nine-month period after the service member's release from active duty imposed by HERA. It also extends the stay from the December 31, 2011 date announced by Freddie Mac (as reported in *InfoBytes*, Dec. 31, 2010). The Act extends the stay of foreclosure to December 31, 2012. Click here for a copy of the Act.

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State Issues

Rhode Island Delays Filing of Banking Regulation 6. On January 5, the Rhode Island Department of Business Regulation (Department) provided notice that it does not intend to file a final Banking Regulation 6, which, as previously proposed, would have taken effect on January 18, 2011. The proposed rule would implement new statutory requirements for mortgage loan originators regarding surety bonds and minimum net worth (as reported in *InfoBytes* Nov. 12, 2010). The Department stated that it needed additional time to consider the numerous comments it received regarding the proposed Banking Regulation 6. For a copy of the notice, please click here.

Nevada Regulator Provides Guidance on Implementation of MARS Rule. Recently, the Nevada Division of Mortgage Lending (Division), released a letter outlining how it intends to conduct examinations of licensees for compliance with the Federal Trade Commission's Mortgage Assistance Relief Services Providers Rule (Rule). The Rule regulates "mortgage assistance relief service providers," which includes all persons licensed under NRS 645F [Nevada's Mortgage Lending Act] and Regulation R052-09. The Rule prohibits licensees from making false or misleading claims about their services, requires that certain disclosures be made to consumers, and bans licensees from requesting or receiving advance fees. The Division will review all contracts entered into by consumers and licensees, on or after December 29, 2010, for compliance with the Rule's mandatory disclosure requirements and advertising prohibitions. The letter makes clear that the Rule's requirements are in addition to Nevada's requirements, but recognizes that, in some cases, the rule will supersede

Nevada's requirements. As such, the Division will conduct examinations to the standards of Nevada law and the Rule, as applicable. Click here for a copy of the letter.

Montana Division of Banking and Financial Institutions Adopts and Repeals Rules. Recently, the Montana Department of Administration, Division of Banking and Financial Institutions (Division) adopted new rules pertaining to the availability of exemptions under Montana's Mortgage Broker, Mortgage Lender and Mortgage Loan Originator Licensing Act and the amount of the surety bond required for new mortgage broker or mortgage lender applicants. The new rules also set December 31, 2010 as the deadline by which individuals holding a conditional mortgage loan originator license were required to successfully complete the Montana examination. The Division also repealed four rules related to temporary licenses and license renewal fees. The Department did not receive any comments to the proposed rules during the comment period. For a copy of the Notice of Adoption and Repeal, please see http://doa.mt.gov/content/2-59-443adp-arm.pdf. For the Notice of Proposed Adoption and Repeal, please click here.

CSBS Announces Tennessee, Ohio, and New Jersey Regulators' Receipt of Certificate of Accreditation. Recently, the Conference of State Bank Supervisors (CSBS) announced that the Ohio Division of Financial Institutions and the New Jersey Department of Banking and Insurance successfully renewed its Certificate of Accreditation. Additionally, the CSBS also announced that the Tennessee Department of Financial Institutions received a Certificate of Accreditation, making it the fifth state to receive accreditation for mortgage supervision. CSBS accreditation means that an external review has concluded that the regulatory agency is meeting CSBS's Accreditation Program's threshold supervision standards and practices. Click here for Tennessee's announcement; click here for Ohio's announcement; click here for New Jersey's announcement.

Courts

Massachusetts Supreme Court Affirms Decision Invalidating Foreclosures by Securitization Trustees Who Failed to Demonstrate Valid Pre-foreclosure Assignments. On January 7, the Supreme Judicial Court of Massachusetts (Supreme Court) affirmed the decision of a lower court invalidating foreclosures by two securitization trustees (Trustees) who failed to demonstrate that they were the mortgage holder pursuant to valid pre-foreclosure assignments. *U.S. Bank National Association v. Ibanez*, No. SJC-10694 (Mass. Sup. Ct. Jan. 7, 2011) The case arose when the Trustees conducted non-judicial foreclosure sales pursuant to powers of sale contained in the underlying mortgages. The Trustees purchased the underlying properties at those foreclosure sales. Following the foreclosure sales, the Trustees recorded assignments of the relevant mortgages that they obtained after the completion of the foreclosure sales (though one of the assignments recited that it was effective as of a date prior to the sale). They then brought actions in the Massachusetts Land Court (Land Court) seeking a declaration that they held clear title in fee simple to the foreclosed properties. The Land Court ruled against them, finding that neither Trustee had shown by sufficient evidence that it was the holder of the relevant mortgage, thus invalidating the foreclosures. The Supreme Court affirmed the invalidation. The Supreme Court relied on a provision of Massachusetts law that allows the exercise of a statutory power of sale only by "the mortgagee or his executors, administrators, successors or assigns....Any effort to foreclose by a party lacking 'jurisdiction and

authority' to carry out a foreclosure under these statutes is void." [Citations omitted.] Each of the Trustees was thus required to show that it was--at the time of the foreclosure sale--the holder of the relevant mortgage pursuant to an effective assignment. The Supreme Court noted that "[a] plaintiff that cannot make this modest showing cannot justly proclaim that it was unfairly denied a declaration of clear title." In addition to affirming the Land Court's invalidation of the foreclosure sales, the Supreme Court held (i) that assignments do not have to be recorded or in recordable form to be effective, (ii) that assignments in blank "convey nothing and are void", (iii) that the mortgage does not follow the promissory note if not validly assigned (though the mortgage holder then holds the mortgage in trust for the noteholder) and (iv) that confirmatory assignments of earlier valid assignments are acceptable. Click here for a copy of the opinion.

U.S. District Court Dismisses RESPA and TILA Claims for Insufficient Pleading. On January 3, the United States District Court for the Southern District of California granted Defendants' joint motion to dismiss in *Copeland v. Lehman Brothers Bank, FSB*, No. 09-1774, 2011 WL 9503 (S.D. Cal. Jan. 3, 2011). Plaintiff homeowner sued Lehman Brothers Bank, FSB, which funded his loan, and Aurora Loan Services, Inc., which serviced his loan, for violations of the Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act (TILA).The court ruled that the RESPA claims were insufficiently pled because Plaintiff's allegations that Defendants' failure to fully comply with RESPA procedures caused pecuniary loss (which is required for actual damages) and that this failure was part of a pattern or practice of noncompliance (which is required for statutory damages) were wholly conclusory in nature. TILA claims were likewise dismissed because Plaintiff failed to allege in concrete terms why his otherwise time-barred claims should be subject to equitable tolling, which applies only where timely discovery of violations was not possible despite exercise of reasonable diligence. Click here for a copy of the opinion.

New York Supreme Court Judge Allows Use of Statistical Sampling For Insurer's Fraud and Breach of Contract Claims Against Mortgage Securitizer. On December 22, Justice Eileen Bransten of the New York Supreme Court granted a plaintiff-bond insurer's motion in limine to use statistical sampling to support its fraud and breach of contract claims against defendants involved in the securitization of mortgage-backed securities. *MBIA Ins. Co. v. Countrywide Home Loans, Inc.*, Order on Pl. Mot. In Limine Re Sampling, Index No. 602825-2008, (N.Y. Dec. 22, 2010). In this matter, the plaintiff-bond insurer claimed that the defendants, who were in the business of securitizing and selling residential mortgage-backed securities to investors, fraudulently induced plaintiff into providing billions of dollars worth of credit enhancements and financial guaranty insurance on the securities. Plaintiff contended that defendants' fraudulent practices led plaintiff to pay more than $459 million on its guarantees for the loans and exposed it to several hundred million dollars in claims for thousands of mortgages that are now in default or foreclosure. To analyze the 15 securitizations at issue, plaintiffs filed a motion in limine in order to obtain the court's permission to use statistical sampling. In support of their motion, plaintiffs argued that without sampling, they would have to present voluminous evidence regarding the completeness and accuracy of information provided by defendants regarding each of the 368,000 mortgage loans underlying the 15 securitizations. The court agreed. The court found that the use of statistical sampling is widely used and not novel and generally accepted in the scientific community. The court also found the plaintiff's proposed methodology valid and reliable; analyzing 400 loans from each of the 15 securitizations which the

plaintiff's asserted will provide a 95% confidence level and only a 5% margin of error. The court noted that defendants were free to not only challenge plaintiff's methods at trial but also to offer their own methodology for analyzing the securitizations. Regardless, the court noted the method would save significant litigation time and streamline the action. Click here for a copy of the opinion.

Firm News

Jeffrey Naimon will be speaking at the Winter Meeting of the Consumer Financial Services Committee of the Business Law Section of the American Bar Association on January 10 in Naples, Florida on the impact of legislative changes arising under the Dodd-Frank Act on the mortgage industry.

James Parkinson will be speaking at the web conference "FCPA Compliance: Best Practices for Your Anti-Corruption Compliance Program," hosted by National Constitution Center Conferences on January 19.

Donna Wilson will be speaking at the ACI Privacy & Security of Consumer & Employee Information Conference on January 25-26, in Washington, DC. The topic will be "Responding to the Latest Cyber Threats: Mobile Workforces, Technology, Data Thefts, and Cloud Computing."

Benjamin Klubes will be speaking at the American Conference Institute's 10th Annual Advanced Forum on Consumer Finance Class Actions & Litigation on January 27 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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