Buckley Sandler LLP

INFOBYTES, JULY 15, 2011

TOPICS - COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

Treasury to End Sale of Paper U.S. Savings Bonds. On July 13, the Bureau of the Public Debt announced that paper savings bonds will no longer be sold at financial institutions as of January 1, 2012 but electronic savings bonds will remain available in Series EE and I. Electronic savings bonds are available for purchase through TreasuryDirect, which is a secure, web-based system operated by the Bureau of Public Debt on which one can buy, manage, and redeem electronic bonds. Ending the sale of paper bonds at financial institutions is part of the U.S. Department of the Treasury's all-electronic initiative and is expected to save American taxpayers approximately $70 million over the first five years. Paper savings bond holders still can redeem their bonds at financial institutions, and bonds that have not matured that have been lost, stolen, or destroyed can be reissued in paper or electronic form. For more information about the elimination of paper bonds and how to enroll in TreasuryDirect, visit www.treasurydirect.gov. For a copy of the announcement, please see http://www.treasurydirect.gov/news/pressroom/pressroom_comotcend0711.htm .

HUD Releases Technical and Clarifying Amendments to Regulation X. On July 11, the U.S. Department of Housing and Urban Development (HUD) issued technical corrections and clarifying amendments to Regulation X, which implements the Real Estate Settlement Procedures Act (RESPA). These amendments are intended to further illuminate the amendments to Regulation X that HUD issued on November 17, 2008, which became effective on January 1, 2010. The amendments emphasize the following points: (i) borrowers must express an intent to continue with the transaction after receiving the good faith estimate (GFE), before any fees, except for credit report fees, may be charged, as indicated in the preamble but accidentally omitted from the regulation text, (ii) a "revised" GFE, instead of the mislabeled "new" GFE, may be issued when there are changed circumstances that affect settlement charges, (iii) for all changed circumstances that enable a revised GFE, the changes must increase the charges, (iv) the provisions related to "new home purchases" apply to new "construction" home purchases only, not homes new to the borrower, and (v) settlement services that were listed on the GFE but ended up not being purchased must not be included in the HUD-1 settlement statement, including the comparison chart, to avoid manipulation. HUD also corrected minor typographical errors. HUD stated that the changes are merely technical corrections and clarifying

amendments of existing rules and therefore do not require a public comment procedure. The amendments are consistent with informal guidance HUD has issued on these topics and become effective on August 10, 2011. For a copy of the Federal Register notice, see http://www.buckleysandler.com/Technical_Correction_and_Claryfing_Amendments_to_RESPA.pdf .

HUD Settles Two RESPA Referral Fee Cases. This past week, the U.S. Department of Housing and Urban Development (HUD) announced two settlements with respect to companies allegedly paying improper kickbacks or referral fees in violation of the Real Estate Settlement Procedures Act (RESPA). In its settlement with Prospect Mortgage, LLC, HUD alleged that Prospect had created series LLCs which were sham business arrangements through which it shared profits with brokers, lenders, and real estate service providers in exchange for referrals and had allegedly permitted non FHA-approved branch offices to originate FHA-insured mortgages. In its settlement with Fidelity National Financial, Inc. (FNF), HUD alleged that FNF subsidiaries paid referral fees to real estate brokers as part of sub-licensee agreements for transactions conducted through a web-based platform in connection with the selection of home warranties and title insurance. FNF agreed to pay HUD $4.5 million to resolve the complaint, and Prospect agreed to dissolve the sham business arrangements and pay HUD $3.1 million. The Prospect settlement announcement can be found at http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2011/HUDNo.11-146, and the FNF settlement announcement can be found at http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2011/HUDNo.11-142 .

STATE ISSUES

Hawaii Amends Provisions Relating To Mortgage Loan Originators. On July 7, 2011, Hawaii Senate Bill 1519, which amended Chapter 454F, a statute that relates to mortgage loan originators, became effective. Among other provisions, the bill (i) authorizes certain persons exempt from licensing to register with the Nationwide Mortgage Licensing System (Licensing System) to sponsor certain mortgage loan originators, (ii) requires all mortgage loan originators to be sponsored by an exempt or non-exempt sponsoring mortgage loan originator company, (iii) provides for an administrative hearing in connection with a denied license application, (iv) provides for certain license applications to be considered abandoned, (v) sets forth the duties of a "qualified individual" and a "branch manager," (vi) requires certain exempt sponsoring mortgage loan originator companies to register with the Licensing System and pay related fees, (vii) provides for automatic secondary review of license applications, and (viii) prohibits unfair or deceptive practices related to mortgage loan origination activities. For a copy of the bill, please see http://www.capitol.hawaii.gov/session2011/bills/SB1519_CD1_.pdf .

Maine Consumer Credit Code Amended. On July 6, Maine enacted Senate Paper 415, which amended the Maine Consumer Credit Code To Conform with Federal Law (the Act). The Act incorporates consumer protections provided by federal law and regulation, including restrictions on credit card lending provided by the Credit CARD Act of 2009 and the implementing provisions of Regulation Z. It also amends the Maine Consumer Credit Code's truth in lending provisions, based on authority granted by the Dodd-Frank Act, and sections of the Maine Consumer Credit Code relating to the registration of loan officers. For a copy of the Act, please see http://www.mainelegislature.org/legis/bills/bills_125th/chappdfs/PUBLIC427.pdf .

New Hampshire Amends Definition of "Mortgage Loan Originator." On July 5, New Hampshire enacted Senate Bill 189, which amended the definition of "mortgage loan originator" for purposes of the state's mortgage banker and mortgage broker licensing statute. Under the bill, "mortgage loan originator" has been redefined so as to exclude any individual "who performs purely administrative or clerical tasks as an employee at the direction of and subject to the supervision and instruction of a licensed person who is described in subparagraph (a)" and who is not otherwise described in subparagraph (a). The change will be effective as of September 3, 2011. For a copy of the bill, please see http://www.gencourt.state.nh.us/legislation/2011/SB0189.html .

Rhode Island Eliminates Minimum Net Worth Requirement for Mortgage Loan Originators. On June 29, the Rhode Island General Assembly enacted Senate Bill 507, which amended the Federal Secure and Fair Enforcement for Mortgage Licensing Act of 2009. Among other provisions, the bill (i) exempts certain mortgage loan originators from the requirement to obtain and maintain annually a state license to originate mortgage loans, and (ii) eliminates the minimum net worth requirement for mortgage loan originators, while retaining the surety bond requirement. For a copy of the bill, please see http://www.rilin.state.ri.us/PublicLaws/law11/law11145.htm.

COURTS

Third Circuit Holds Law Firm Debt Collection Letter Misleadingly Implies Attorney Involvement Notwithstanding Disclaimer of Attorney Involvement. On June 21, the U.S. Court of Appeals for the Third Circuit held that debt collection letters sent by a law firm were misleading under the Fair Debt Collection Practices Act (FDCPA) because they "falsely implied" attorney involvement even though the letters included disclaimers stating that no attorney had reviewed the account. *Lesher v. Law Offices of Mitchell N. Kay, P.C.*, No. 10-3194,2011 WL 2450964 (3d Cir. June 21, 2011). The letters were printed on the law firm's stationary and advised the debtor that his account "is being handled by this office." Below a large-type notice to send payments to the "Law Office of Mitchell N. Kay, P.C." was a boxed notice to "see reverse side for important information." The reverse side of the letters contained several statements, including one stating that "[a]t this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account." The debtor sued, claiming that the letters misleadingly implied that an attorney was involved in the debt collection effort and would take legal action against him if he failed to pay the debt. The district court granted summary judgment in favor of the debtor, and a panel of the Third Circuit affirmed over a dissent. The majority began by noting that, because FDCPA is a remedial statute, the letters must be analyzed from the perspective of the "least sophisticated debtor." The majority held that such a debtor could have been misled into believing that an attorney was involved, and that it was significant because the involvement of an attorney instead of a debt collection agency tells the debtor that "the price of poker has just gone up." Moreover, even though the "least sophisticated debtor" is required to be somewhat reasonable and to read the entire debt collection letter, the disclaimer of attorney involvement on the reverse side was insufficient to "make clear to the least sophisticated debtor that the [attorney] is acting solely as a debt collector and not in any legal capacity." This was because the disclaimer "completely contradicted the message sent on the front of the letters - that the creditor retained a law firm to collect the debt." Also, in a footnote, the majority stated it was "not convinced that the disclaimer, which . . . was printed on the back of the letters, effectively mitigated the impression of attorney involvement." The dissent agreed with the standard used, but indicated that because attorneys are allowed to collect debts, the majority opinion went too far, leaving it too difficult for attorneys to comply. For a copy of the opinion, please see http://www.ca3.uscourts.gov/opinarch/103194p.pdf .

First Circuit Overturns Motion for Summary Judgment Ruling Where Borrower Signed and Submitted Falsified Mortgage Loan Application. On July 7, the U.S. Court of Appeals for the First Circuit partially granted the borrower's request to vacate the district court's decision to dismiss the borrower's claims that his lender's alleged predatory lending practices had violated Massachusetts law. *Frappier v. Countrywide Home Loans, Inc.,* No. 10-2193, 2011 WL 2638149 (1st Cir. July 7, 2011). The borrower applied for three mortgage loans in 2006, ultimately receiving one home mortgage loan and one home equity loan. Of the three applications, at least one application was for a stated income, stated asset mortgage loan, and all three applications contained falsified information that inflated the borrower's job title and significantly inflated his income. He admitted signing the mortgage applications but denied reading them or knowing false statements were present. After he defaulted on both mortgage loans in 2008, the lender foreclosed on the home. The borrower sued, (i) alleging the lender had fraudulently inflated his title and income so he could qualify for a mortgage loan that he otherwise should not have and that the lender knew he could not repay, and (ii) claiming a violation of Mass. Gen. Laws ch. 93A (chapter 93A), unjust enrichment, a violation of the implied covenant of good faith and fair dealing,

negligence, and entitlement to equitable relief. The district court granted the lender's motion for summary judgment, finding no evidence that the lender "knew, believed, or intended" the borrower would default. However, upon review, the circuit court found that a dispute about whether the borrower had deliberately falsified the loan application was a question of fact suitable for trial. Also suitable for trial was the borrower's claim that he had signed the loan applications without knowing they contained false information. The circuit court found the lender's purported lack of recognition of the borrower's potential for default to be unreasonable and stated that the Massachusetts Supreme Judicial Court has "read chapter 93A to hold that making a loan that the lender knows cannot be paid back may be an 'unfair or deceptive act[] or practice[]" . . . giving the borrower a cause of action" (citation omitted). The circuit court dismissed the negligence claim, noting that Massachusetts courts specifically have declined to extend chapter 93A liability to cover "mere negligence," and dismissed the claim for equitable relief because the borrower had not offered a contrary argument to the district court's basis for dismissal. Because the chapter 93A, unjust enrichment, and implied covenant of good faith and fair dealing claims were based on the borrower's "likely to default" theory, the circuit court remanded the three claims for further proceedings. For a copy of the opinion, please see http://www.ca1.uscourts.gov/pdf.opinions/10-2193P-01A.pdf .

D.C. Circuit Holds Prevailing Party in OCC Administrative Proceeding Entitled to Fees Under Equal Access to Justice Act. On July 12, the U.S. Court of Appeals for the D.C. Circuit held that Carlos Loumiet, a partner in law firm Greenberg Traurig, LLP (Greenberg), is entitled to fees incurred from an administrative proceeding in which he prevailed, which the Office of the Comptroller of the Currency (OCC) had brought against him in connection with his work for Hamilton Bank, N.A. (the Bank). *Loumiet v. Office of the Comptroller of the Currency*, No. 10-1288, 2011 WL 2683200 (D.C. Cir. July 12, 2011). The OCC had disagreed with the results of Greenberg's 2000 independent investigation into certain Bank activity involving ratio swaps and in 2006 brought an enforcement action against Loumiet, claiming that Loumiet was an "institution affiliated party" (IAP) of the Bank and thus was subject to OCC action. In 2008, the administrative law judge (ALJ) recommended dismissal of the action, and, in 2009, the Comptroller agreed that dismissal was appropriate. Loumiet then filed an application for attorneys' fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, which the ALJ recommended be denied, "concluding that the [OCC's] position in the underlying agency proceeding was 'substantially justified . . . in both law and fact'" (citation omitted). Because neither party appealed, the ALJ's recommendation became final. However, finding that "the evidence in the record did not establish a 'significant adverse effect' on the Bank," the evidence in the record [did not] establish that the [OCC] was 'substantially justified' under the EAJA to bring the underlying agency proceeding," and no evidence support[ed] an inference that the Bank suffered any 'adverse effect' . . ." (citations omitted), the circuit court granted the petition for review and remanded the case to the Comptroller to calculate the appropriate fees due to Loumiet. For a copy of the opinion, please see - http://www.cadc.uscourts.gov/internet/opinions.nsf/A0EA66E5A1334874852578CB004D7AA1/$file/10-1288-1318030.pdf.

FIRM NEWS

Andrew Sandler and Jonice Gray Tucker will speak during an American Bar Association webinar on mortgage servicing issues on July 21 at 1:00 p.m. The webinar, which is entitled "Mortgage Servicing Under Fire: Regulatory, Litigation, and Enforcement Trends Stemming from the Foreclosure Crisis and More" will also feature Terry Goddard, the former Arizona Attorney General, as a speaker.

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 July 26, in Chicago. This workshop precedes ACI's Consumer Finance Class Actions & Litigation Conference taking place on July 27-28 at the Sutton Place Hotel in Chicago.

Buckley Sandler LLP

Andrew Sandler will be speaking at the ACI's Consumer Finance Class Actions & Litigation Conference on July 28. Mr. Sandler's panel is: "Class Action Developments: What Recent Cases and Pending Policy Changes Mean for Your Litigation, Investigation and Settlement Strategies."

James Parkinson will speak on the Foreign Corrupt Practices Act as a Visiting Lecturer at Universidad Panamericana, Mexico on August 25.

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.

FIRM PUBLICATIONS

John Kromer and Melissa Klimkiewicz authored OCC Issues Proposed Rule to Implement Dodd-Frank Preemption, which was published in the June 22 issue of *Consumer Financial Services Law Report*.

Jonathan Cannon authored The Recent Detroit Lending Discrimination Settlement, which was published in the June 20 issue of *Westlaw Journal.*

About BuckleySandler LLP (www.BuckleySandler.com)

With over 125 lawyers in Washington, DC, Los Angeles and New York, BuckleySandler provides best-in-class legal counsel to meet the challenges of its financial services industry and other corporate and individual clients across the full-range of government enforcement actions, complex and class action litigation and transactional, regulatory and public policy issues. The Firm represents many of the nation's leading financial services institutions. "The best at what they do in the country." (Chambers USA, 2010).

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- **Los Angeles: 100 Wilshire Boulevard, Suite 1000, Santa Monica, CA 90401, (424) 203-1000**
- **New York: 1133 Avenue of the Americas, Suite 3100, New York, NY 10036, (212) 600-2400**

For back issues of InfoBytes, please see http://www.buckleysandler.com/infobytes/.

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

In addition, please feel free to email our attorneys. A list of attorneys can be found at: **http://www.buckleysandler.com/attorneys/**.

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MORTGAGES

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BANKING

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CONSUMER FINANCE

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LITIGATION

Third Circuit Holds Law Firm Debt Collection Letter Misleadingly Implies Attorney Involvement Notwithstanding Disclaimer of Attorney Involvement. On June 21, the U.S. Court of Appeals for the Third Circuit held that debt collection letters sent by a law firm were misleading under the Fair Debt Collection Practices Act (FDCPA) because they "falsely implied" attorney involvement even though the letters included disclaimers stating that no attorney had reviewed the account. *Lesher v. Law Offices of Mitchell N. Kay, P.C.*, No. 10-3194,2011 WL 2450964 (3d Cir. June 21, 2011). The letters were printed on the law firm's stationary and advised the debtor that his account "is being handled by this office." Below a large-type notice to send payments to the "Law Office of Mitchell N. Kay, P.C." was a boxed notice to "see reverse side for important information." The reverse side of the letters contained several statements, including one stating that "[a]t this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account." The debtor sued, claiming that the letters misleadingly implied that an attorney was involved in the debt collection effort and would take legal action against him if he failed to pay the debt. The district court granted summary judgment in favor of the debtor, and a panel of the Third Circuit affirmed over a dissent. The majority began by noting that, because FDCPA is a remedial statute, the letters must be analyzed from the perspective of the "least sophisticated debtor." The majority held that such a debtor could have been misled into believing that an attorney was involved, and that it was significant because the involvement of an attorney instead of a debt collection agency tells the debtor that "the price of poker has just gone up." Moreover, even though the "least sophisticated debtor" is required to be somewhat reasonable and to read the entire debt collection letter, the disclaimer of attorney involvement on the reverse side was insufficient to "make clear to the least sophisticated debtor that the [attorney] is acting solely as a debt collector and not in any legal capacity." This was because the disclaimer "completely contradicted the message sent on the front of the letters - that the creditor retained a law firm to collect the debt." Also, in a footnote, the majority stated it was "not convinced that the disclaimer, which . . . was printed on the back of the letters, effectively mitigated the impression of attorney involvement." The dissent agreed with the standard used, but indicated that because attorneys are allowed to collect debts, the majority opinion went too far, leaving it too difficult for attorneys to comply. For a copy of the opinion, please see http://www.ca3.uscourts.gov/opinarch/103194p.pdf.

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potential for default to be unreasonable and stated that the Massachusetts Supreme Judicial Court has "read chapter 93A to hold that making a loan that the lender knows cannot be paid back may be an 'unfair or deceptive act[] or practice[]" . . . giving the borrower a cause of action" (citation omitted). The circuit court dismissed the negligence claim, noting that Massachusetts courts specifically have declined to extend chapter 93A liability to cover "mere negligence," and dismissed the claim for equitable relief because the borrower had not offered a contrary argument to the district court's basis for dismissal. Because the chapter 93A, unjust enrichment, and implied covenant of good faith and fair dealing claims were based on the borrower's "likely to default" theory, the circuit court remanded the three claims for further proceedings. For a copy of the opinion, please see http://www.ca1.uscourts.gov/pdf.opinions/10-2193P-01A.pdf.

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E-FINANCIAL SERVICES

Treasury to End Sale of Paper U.S. Savings Bonds. On July 13, the Bureau of the Public Debt announced that paper savings bonds will no longer be sold at financial institutions as of January 1, 2012 but electronic savings bonds will remain available in Series EE and I. Electronic savings bonds are available for purchase through TreasuryDirect, which is a secure, web-based system operated by the Bureau of Public Debt on which one can buy, manage, and redeem electronic bonds. Ending the sale of paper bonds at financial institutions is part of the U.S. Department of the Treasury's all-electronic initiative and is expected to save American taxpayers approximately $70 million over the first five years. Paper savings bond holders still can redeem their bonds at financial institutions, and bonds that have not matured that have been lost, stolen, or destroyed can be reissued in paper or electronic form. For more information about the elimination of paper bonds and how to enroll in TreasuryDirect, visit www.treasurydirect.gov. For a copy of the announcement, please see http://www.treasurydirect.gov/news/pressroom/pressroom_comotcend0711.htm.

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