June 11, 2010

Topics In This Issue

Federal Issues

House Approves FHA Reforms. On June 10, the U.S. House of Representatives passed H.R. 5072, the "FHA Reform Act of 2010," by a vote of 406 to 4. The bill would amend the National Housing Act to authorize the Secretary of Housing and Urban Development (HUD) to increase the maximum annual premium payments for mortgage insurance from the current 0.55% cap to 1.55%. The bill contains a number of provisions to improve the financial soundness of the Federal Housing Administration (FHA) and specifically includes provisions that would give the HUD Secretary heightened authority to terminate mortgagee approval and mandates the indemnification of mortgage loans that are either not originated or underwritten in accordance with HUD's requirements or that involve fraud or misrepresentation. The House rejected amendments to the bill that would have (i) raised the FHA down payment requirement from 3.5% to 5%, (ii) capped FHA market share at 10% of total loans originated in the U.S. per year, and (iii) created a maximum loan limit of $500,000 for single family units. For a copy of the bill, please see http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h5072rh.txt.pdf.

FTC Announces Settlement Regarding Default Servicing Practices. On June 7, the Federal Trade Commission (FTC) announced a settlement to address certain servicing practices allegedly conducted by Countrywide entities prior to being acquired by Bank of America. The defendants did not admit or concede that any wrongdoing was committed, but agreed to the Consent Order to settle and resolve the disputes. Additionally, the complaint does not allege any wrongdoing by Bank of America, N.A. The complaint was brought under the FTC's authority under Section 5 of the FTC Act to prohibit unfair or deceptive acts or practices. The particular practices cited in the complaint related to default-related services performed on loans where the borrower was either in default or in bankruptcy. For borrowers in default, the complaint alleged that the defendants were using affiliates to conduct default services in a "vertical integration strategy" that resulted in "marked up" fees to borrowers. Secondly, the complaint alleged that the defendants conducted impermissible practices in servicing loans for borrowers in Chapter 13 bankruptcy proceedings. Specifically, the FTC alleged that the defendants made errors in servicing loans in bankruptcy that led to inaccurate payment posting and unauthorized fees, failed to disclose fees and escrow shortages and deficiencies that accrued while the borrower was in bankruptcy, and impermissibly sought to collect the accrued amounts after the bankruptcy case had closed. Under the terms of the settlement, the defendants (i) must pay $108 million to refund borrowers that the FTC alleged were overcharged, (ii) may only charge servicing fees that are authorized by the loan instruments, by law, or by the consumer, (iii) may only charge a fee for a default-related service that is a reasonable fee charged by a third party (including an affiliate) for work actually performed, and, if the fee is charged by an affiliate, is market-based and is in line of specified allowables, (iv) must advise consumers if it intends to use affiliates for default-related servicers, and if so, it is required to provide a fee schedule, and (v) is required to send borrowers in Chapter 13 bankruptcy a monthly notice that informs the borrower what the borrower currently owes, including any fees assessed during the prior month. For the complaint, consent judgment, and press release, please see http://www.ftc.gov/os/caselist/0823205/index.shtm.

FCIC Subpoenas Goldman Sachs. On June 7, the Financial Crisis Inquiry Commission (FCIC) issued subpoenas to Goldman Sachs & Co. (Goldman) after Goldman failed to timely comply with earlier requests by the FCIC to produce documents and personnel for interviews. The FCIC alleged that Goldman failed to comply with the FCIC's requests by both failing to produce relevant documents and producing a massive amount (approximately 2.5 billion pages) of documents. The subpoena seeks to compel Goldman to (i) produce documents relating to synthetic and hybrid collateralized debt obligations based on mortgage-backed securities, (ii) produce a key to allow the FCIC to identify Goldman customers' names from customer numbers in previously-produced documents regarding derivatives transactions, and (iii) identify documents produced to the Senate Permanent Subcommittee on Investigations that are responsive to the FCIC's requests. Finally, the subpoena seeks to compel the testimony of certain Goldman officials. For more information, please see http://bit.ly/b2hC6j and http://bit.ly/bx6DWP.

FDIC Issues Guidance Letter on Deposit Placement, Collection Activities. On June 7, the Federal Deposit Insurance Corporation (FDIC) clarified what steps insured institutions that collect or place deposits on behalf of customers must take to insure that customers' deposits are eligible for pass-through insurance when an institution enters into third-party arrangements to collect and place deposits. Under the guidance, institutions must (i) maintain records showing that the deposit is eligible for pass through insurance, (ii) maintain detailed records of the name and location of the institution receiving the deposits, the owners of the deposits, and the amount, interest rate and maturity date of the deposits, (iii) provide customers with the name of the receiving institution and the amount deposited, (iv) ensure that marketing materials, customer statements, and disclosures are not misleading and accurately represent FDIC coverage of the deposits, and (v) provide training for all relevant personnel involved in collecting and placing deposits from third parties and affinity groups. For a copy of the Financial Institution Letter, please see here. For a copy of the guidance, please see here.

Federal Banking, Thrift Agencies Issue Guidance on Bargain Purchases, Assisted Acquisitions. On June 7, the federal banking and thrift agencies issued supervisory guidance regarding modified approval procedures and conditions for business combinations to address the risk associated with retrospective adjustments to estimates of bargain purchase gains. Bargain purchase gains potentially resulting from assisted acquisitions by the Federal Deposit Insurance Corporation (FDIC) and National Credit Union Administration (NCUA) are indicated in business combination applications and are used in the computation of regulatory capital. However, because fair value estimates indicated in such applications are only preliminary, the guidance states that bargain purchase gains are subject to retrospective adjustments during the accounting measurement period. In order to protect against the risk that these adjustments will result in a shortage of capital, the guidance provides certain accounting standards and indicates that the approval of acquisitions may now be conditioned on a commitment by the acquiring institution to maintain specified levels of capital. The guidance applies to institutions regulated by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, the FDIC, and the NCUA. For a copy of the Financial Institution Letter, please see here. For a copy of the guidance, please see here.

State Issues

Colorado Creates Board of Mortgage Loan Originators to Regulate Mortgage Companies. On May 26, Colorado Governor Bill Ritter, Jr. signed a bill (H.B. 10-1141) that (i) creates a new state mortgage regulatory division, the Board of Mortgage Loan Originators, and (ii) establishes registration deadlines for mortgage loan originators and mortgage companies via the Nationwide Mortgage Licensing System (NMLS). The law establishes a new licensing category of “mortgage company,” defined as entities that take residential mortgage loan applications or offer or negotiate the terms of a residential mortgage loan. The new law exempts from mortgage company licensing requirements banks, savings associations, subsidiaries owned and controlled by a bank or savings association, employees of bank or savings association or its subsidiaries, credit unions, and employees of credit unions. Mortgage companies will be overseen by the newly-created Board of Mortgage Loan Originators, which will, among other things, have the authority to impose fines and deny license applications or renewals. Mortgage companies, as well as individual mortgage loan originators, must be licensed via NMLS by January 1, 2011. For a copy of the bill, please see http://bit.ly/pOGbdO.

Minnesota Law Amends Requirements for Reverse Mortgages, Foreclosure Notices. On May 19, Minnesota Governor Tim Pawlenty signed SF 2430, a bill that amends reverse mortgage loan and foreclosure notice requirements. Regarding reverse mortgage loans, the law:

- Provides for a seven-day “cooling off” period subsequent to a borrower’s written acceptance of a reverse mortgage. During the period, a borrower cannot be required to proceed with or close the reverse mortgage. The law requires lenders to provide notice of this period to borrowers, and the period cannot be waived;
- Provides that a lender that fails to make required loan advances and fails to cure an actual default after notice forfeits any right to repayment for reverse mortgages that are not federally

insured. Once forfeiture has occurred, the mortgage may then be declared null and void by a court;
- Prohibits making the purchase of insurance, annuities, or related products a condition of obtaining, or obligation of, a reverse mortgage loan, as well as prohibits lenders from receiving compensation for providing referrals for these services; and
- Requires lenders to provide at least 3 independent housing counseling agencies to the applicant. Lenders must receive and maintain (for the duration of the mortgage) certification from the applicant that the applicant received the required counseling.

Regarding foreclosure notice requirements, the bill provides borrowers new "redemption rights" and requires a "results of sale" notice. In addition to prescribing the content of the notices, the bill provides a private right of action to recover damages and attorneys' fees and costs for violations of the "notice of results of foreclosure sale" requirements. The notice requirements become effective August 1, 2010 and apply to notices delivered on or after that date. For a copy of the bill, please see here.

Vermont Enacts Mediation Requirement for Foreclosures. On May 29, Vermont Governor Jim Douglas signed HB 590, a bill establishing a mediation program for mortgage foreclosure actions involving loans subject to federal Home Affordable Modification Program (HAMP) guidelines. The law requires a court to refer a foreclosure case to mediation whenever the mortgagor enters an appearance or requests mediation within four months after judgment is entered. The court may, for good cause, shorten the four month period or, alternatively, decline to order mediation upon finding that the mortgagor is attempting to delay the case. Mediation is not required if the mortgagee files a motion detailing its compliance with the applicable HAMP requirements. During the mediation period, the law requires the mortgagee to consider available foreclosure preventions tools, "including reinstatement, loan modification, forbearance, and short sale, and the calculations, assumptions, and forms established by the HAMP guidelines." A mortgagee must produce documentation of its consideration of these options, as well as any pooling or servicing agreements, if applicable, to the mortgagor. The cited provisions take effect July 1, 2010. For a copy of the bill, please see http://www.leg.state.vt.us/docs/2010/Acts/ACT132.pdf.

Hawaii Amends SAFE Act Compliance Legislation; Extends Deadline for Mortgage Loan Originator Registration. On May 7, Hawaii Governor Linda Lingle signed into law legislation (S.B. 2603) to amend Hawaii's Secure and Fair Enforcement for Mortgage Licensing Act (SAFE Act) compliance law, which was passed last year (reported in *InfoBytes*, July 17, 2009). The law delays the registration deadline for the licensure of mortgage loan originators via the Nationwide Mortgage Licensing System (NMLS) until January 1, 2011. Additionally, mortgage loan originators who are licensed with Hawaii as of December 31, 2010 have until November 30, 2011 to be licensed via NMLS. The law also requires certain independent contractors (including mortgage loan originators, processors and underwriters) to be licensed as "mortgage loan originators." Finally, the law replaces an existing surety bond requirement with the Mortgage Loan Recovery Fund, which assesses a fee to licensees based on the number of registered offices and mortgage loan originators. For a copy of the bill, please see here.

Courts

New York State Court Holds HOLA/FIRREA Do Not Preempt Cause of Action by New York Attorney General Regarding Appraisal Practices. On June 8, the Supreme Court of New York, Appellate Division (First Department) affirmed that the Home Owner's Lending Act (HOLA) and the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) do not preempt the enforcement of Uniform Standards and Professional Appraisal Practice standards under state law. *People of the State of New York v. First American Corp.*, 2010 NY Slip Op 04868, 2010 WL 2266832 (N.Y. Sup. Ct. June 8, 2010). The New York Attorney General claimed that the defendants engaged in fraudulent, deceptive and illegal business practices by allegedly permitting residential real estate appraisers to be influenced by a nonparty bank to increase real estate property values on appraisal reports for the purpose of inflating home prices. The defendants moved for dismissal, asserting that HOLA and FIRREA impliedly place the responsibility for oversight of appraisal management companies on the Office of Thrift Supervision (OTS). The defendants also asserted that the New York Attorney General lacked standing to bring these claims. Regarding the preemption issue, the court relied in part on an October 25, 2004 OTS opinion letter requiring thrifts using agents to perform activities such as appraisals to enter into written agreements acknowledging OTS's statutory authority to take enforcement action against such agents. Noting the absence of such an agreement, the court concluded that the applicable federal statutes, regulations, and guidelines did not preempt or preclude the Attorney General from pursuing the action. The court further concluded that the Attorney General had standing to bring suit, rejecting the defendants' argument that the Attorney General's action was actually a federal cause of action characterized as a state law claim. For a copy of the opinion, please see http://www.courts.state.ny.us/reporter/3dseries/2010/2010_04868.htm.

Ninth Circuit Holds Credit Card Companies Not Required to Negotiate Billing Disputes with Non-Obligor Authorized Cardholders. On May 19, the U.S. Court of Appeals for the Ninth Circuit held that creditors' billing dispute duties under the Truth in Lending Act (TILA) run only to the person obligated to the creditor to repay the debt, and not to consumers solely authorized to use the account by the accountholder. *Edwards v. Wells Fargo and Co.*, No. 06-16892, 2010 WL 1980725 (9th Cir. May 19, 2010). In this dispute, the defendant bank issued a credit card to two obligors who added authorization for a third party (the plaintiff) to use the card. The plaintiff disputed several charges with the bank; however, the bank eventually settled those disputes with the obligors of the card and not the plaintiff. As a result, the plaintiff sued the bank for violations of state law and TILA, under the theory that, despite not being an "obligor" on the card, he was entitled to dispute resolution procedures under TILA as a "consumer" or "cardholder." In arriving at its decision, the court reasoned that "consumers" can trigger a dispute resolution process under Regulation Z but that several credit card issuers' duties to cardholders (including mailing periodic statements and responding to dispute requests) under Regulation Z are owed solely to consumers who are also obligors. As a result, the court held that an authorized user who is not an obligor on a card is not a "consumer" entitled to dispute resolution under Regulation Z. The court noted that it would be a "big step" for Regulation Z to convert the duty owed to an obligor under TILA to one owed to any cardholder. For a copy of the opinion, please see http://www.ca9.uscourts.gov/datastore/opinions/2010/05/19/06-16892.pdf.

Washington Federal Court Holds Washington Consumer Protection Act Claims Preempted by NBA. The U.S. District Court for the Western District of Washington recently vacated its March 9, 2010 order (reported in *InfoBytes*, Apr. 16, 2010) finding that a national bank is subject to the Washington Consumer Protection Act (WCPA). *Deming v. First Franklin*, C09-54182010, 2010 WL 2194830 (W.D. Wash. Apr. 23, 2010). In *Deming*, the plaintiff borrower alleged that the defendant banks engaged in fraud and breach of contract and violated the WCPA when the banks charged “Administration” and “Compliance Review” fees in connection with the borrower’s real estate loans. The banks argued that the claims were preempted by the National Bank Act (NBA). The court disagreed, finding that “the OCC chose not to address fees related to real estate lending specifically." In ruling on the motion for reconsideration, the court stated that the recent case *Martinez v. Wells Fargo Home Mortgage, Inc*., 598 F.3d 549 (9th Cir. 2010) is binding law in the Ninth Circuit (*Martinez* was reported in *InfoBytes*, Mar. 12, 2010). In *Martinez*, the Ninth Circuit held that claims under California’s Unfair Competition Law were preempted by the NBA and regulations issued by the Office of the Comptroller of the Currency (OCC). Based on the *Martinez* case, the *Deming* court found that the WCPA similarly conflicted with the NBA and the OCC regulations and was, thus, preempted. However, the court held that the state common law contract and tort claims were not preempted because these claims are based on state law of general application and do not conflict the NBA or OCC regulations. For a copy of the opinion, please see here.

Virginia Federal Court Rejects Hyper-Technical Construction of TILA. On May 20, the U.S. District Court for the Eastern District of Virginia refused to adopt an “unreasonably hyper-technical construction” of the Truth in Lending Act (TILA) to resolve claims made by a refinance borrower regarding allegedly inadequate TILA disclosures. *Larrabee v. Bank of America, N.A.* , No. 3:09CV712, 2010 WL 2089260 (E.D. Va. May 20, 2010). In *Larrabee*, the plaintiff borrower asserted that the defendants (the original lender and the immediate transferee) failed to “accurately articulate the amount, number and due dates of payments,” maintaining that a strict reading of the disclosure statement conveyed that all payments but one were due 45 days after closing. The court rejected the borrower’s “strained interpretation” of the disclosure form, noting that it “defies objective reasonableness,” and more generally that the borrower’s “strict liability approach” made “logic and commonsense [] a secondary consideration at best.” The borrower also asserted that when she engaged in a second refinance transaction with the immediate transferee continuing as the lender, the fact that the Notice of Right to Cancel/Rescission characterized immediate transferee as a “Different Lender” rather than the “Same Lender” violated TILA. The court noted that because the original lender and immediate transferee were, in fact, different lenders, the form was accurate. The court also noted that even if the form was technically incorrect, there was no TILA violation because it “clearly and conspicuously apprised Plaintiff of her rights to rescind,” as required by Regulation Z. For a copy of the opinion, please see here.

Washington Federal Court Denies Summary Judgment in RESPA Section 8(b) “Unearned” Fee Case. On June 1, the U.S. District Court for the Western District of Washington denied a defendant’s motion for summary judgment in a class-action dispute claiming that a reconveyance fee charged by the defendant violated Section 8 of the Real Estate Settlement Procedures Act (RESPA) because, while the fee consisted of both processing and tracking fees, the defendant did not perform the processing. *Bushbeck v. Chicago Title Ins. Co.*, No. C08-0755, 2010 WL 2262340 (W.D. Wash. Jun.

1, 2010). In *Bushbeck*, the plaintiff borrower refinanced a first-lien and second-lien mortgage loan, and, as part of the transaction, the prior liens were required to be extinguished through a reconveyance. The title insurance company performing escrow settlement services charged the borrower a reconveyance fee consisting of processing and tracking fees. The lender completed the reconveyance and the title insurance company tracked the reconveyances. The borrower alleged, among other things, that the title insurance company collected an unearned fee in violation of Section 8(b) of RESPA, which prohibits collecting fees other than for services actually performed. The title insurance company claimed that it did not violate RESPA because it performed some reconveyance services (tracking the reconveyance), such that the fee was earned, and, even if the fee was marked up from its actual cost, RESPA does not apply to overcharges. The court held that Section 8(b) “extends to any portion of the charge for which the service provider does not perform services.” Because the title insurance company conceded that the fee disclosed as a “reconveyance” fee on the HUD-1 actually consisted of component parts, and because the title company did not perform any services in connection with one of those component parts, the court denied the defendant’s motion for summary judgment on the RESPA claims. The court also denied summary judgment for a number of state-law claims, in particular, denying summary judgment on claims under the Washington Consumer Protection Act. For a copy of the opinion, please see here.

California Federal Court Awards Substantially Reduced Attorneys’ Fees in FCRA Dispute. On May 20, the U.S. District Court for the Northern District of California awarded only one-third of class counsel’s requested fees in a Fair Credit Reporting Act (FCRA) dispute because of the immense unlikelihood of success of the claim when the litigation was commenced. *Yeagley v. Wells Fargo & Co.*, No. C 05-3403, 2010 WL 2077013 (N.D. Cal. May 20, 2010). In *Yeagley*, a consumer class action complaint asserted that the defendant bank’s unsolicited mailings to class members violated FCRA because the solicitations did not state a definite amount of credit being offered or the interest rate on the credit offered and, thus, did not qualify as permissible “firm offers” of credit under FCRA. A settlement was reached under which the bank would provide two free credit reports to each member of the class, a value well below the damages sought in the complaint. The court refused to award approximately 2000 hours of attorneys’ fees requested by class counsel, noting the case was a “longshot” at the outset because FCRA does not explicitly require the amount of credit and the interest rate to be included in a firm offer of credit. The court also noted the minimal value of the settlement to the class, which was demonstrated by the “dismal” response rate of less than one-percent of class members. The court awarded class counsel only one-third of the requested attorneys’ fees, representing the time a reasonable lawyer would spend determining the case had little merit, pursuing settlement, and then distributing settlement. For a copy of the opinion, please see here.

Firm News

The *National Law Journal* named Andrew Sandler a "Visionary" in its third annual Legal Times Awards. The *National Law Journal* writes that Andrew “has an impeccable sense of timing” in forming BuckleySander LLP by combining his practice group with the former Buckley Kolar LLP in 2009. Visionaries are "attorneys whose business or legal acumen has been key to expanding their firms, improving government or advancing the law.” To read the full article, please click here.

Andrew Sandler and Bob Cook will be speaking on at the American Bankers Association's Regulatory Compliance Conference in San Diego, CA on June 14.

Clinton Rockwell and Joe Kolar will be speaking about buyback strategies at the American Mortgage Lenders Conference in Washington, DC on June 15.

Andrew Sandler will participate in four webinars by the Financial Services Roundtable taking place 12:15 p.m. - 2:00 p.m. ET on July 8, July 15, July 22, and July 29. The scheduled topic is "The Restoring American Financial Stability Act of 2010: Legislative Reform Meets Regulatory Reality."

Christopher Witeck will be speaking on the "Securitization and Secondary Market" panel at ACI's Reverse Mortgage Conference in New York on July 23.

An article by Jonice Gray Tucker, Ben Saul, and Lori Sommerfield, "Regulators Target Fair Servicing," appeared in*Mortgage Banking* (June 2010).

An article by Jonice Gray Tucker, Lori Sommerfield, and Thomas Dowell, "Fair-Lending Principles Must Underpin Loss Mit," appeared in *Servicing Management* (June 2010). The article is available here.

Christopher Witeck spoke on the "Reverse Mortgage Secondary Market Panel" at the MBA's Secondary Market/Government Housing Conference in New York on May 24.

Kirk Jensen spoke on "Overcoming Problem Areas in Issuance and Utilization of Gift Cards" at the American Conference Institute's 4th National Advanced Forum on Financial Services Marketing Compliance in New York on May 26.

Sara Emley spoke on a DC Bar panel, "What the Card Act Means for You: The Impact of the New Credit Card Rules on Banks, Consumers, and Businesses," on June 1.

Margo Tank and Donna Wilson participated in the ACI Data Privacy & Information Security Conference June 3-4 in Dallas, TX. Margo spoke on the "Preventing and Managing Litigation Associated with the Complex Array of State Breach Notification Laws" panel. Donna's presentation was "Business-to-Business Litigation Risks and Realities."

Andrew Sandler spoke on June 6-7 at CBA Live, the Consumer Banker Association Conference in Hollywood, Florida. Andrew presented a Fair Lending Industry Overview on June 6 and spoke on Auto Fair Lending on June 7.

Jon Langlois spoke on the panel "Financial Regulatory Reform: How Will It Affect Us?" at the National Reverse Mortgage Lenders Association Policy Conference on June 7.

Mortgages

House Approves FHA Reforms. On June 10, the U.S. House of Representatives passed H.R. 5072, the "FHA Reform Act of 2010," by a vote of 406 to 4. The bill would amend the National Housing Act to authorize the Secretary of Housing and Urban Development (HUD) to increase the maximum annual premium payments for mortgage insurance from the current 0.55% cap to 1.55%. The bill contains a number of provisions to improve the financial soundness of the Federal Housing Administration (FHA) and specifically includes provisions that would give the HUD Secretary heightened authority to terminate mortgagee approval and mandates the indemnification of mortgage loans that are either not originated or underwritten in accordance with HUD's requirements or that involve fraud or misrepresentation. The House rejected amendments to the bill that would have (i) raised the FHA down payment requirement from 3.5% to 5%, (ii) capped FHA market share at 10% of total loans originated in the U.S. per year, and (iii) created a maximum loan limit of $500,000 for single family units. For a copy of the bill, please see here.

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Washington Federal Court Denies Summary Judgment in RESPA Section 8(b) "Unearned" Fee Case. On June 1, the U.S. District Court for the Western District of Washington denied a defendant's motion for summary judgment in a class-action dispute claiming that a reconveyance fee charged by the defendant violated Section 8 of the Real Estate Settlement Procedures Act (RESPA) because, while the fee consisted of both processing and tracking fees, the defendant did not perform the processing. *Bushbeck v. Chicago Title Ins. Co.*, No. C08-0755, 2010 WL 2262340 (W.D. Wash. Jun. 1, 2010). In *Bushbeck*, the plaintiff borrower refinanced a first-lien and second-lien mortgage loan, and, as part of the transaction, the prior liens were required to be extinguished through a reconveyance. The title insurance company performing escrow settlement services charged the borrower a reconveyance fee consisting of processing and tracking fees. The lender completed the reconveyance and the title insurance company tracked the reconveyances. The borrower alleged, among other things, that the title insurance company collected an unearned fee in violation of Section 8(b) of RESPA, which prohibits collecting fees other than for services actually performed. The title insurance company claimed that it did not violate RESPA because it performed some reconveyance services (tracking the reconveyance), such that the fee was earned, and, even if the fee was marked up from its actual cost, RESPA does not apply to overcharges. The court held that Section 8(b) "extends to any portion of the charge for which the service provider does not perform services." Because the title insurance company conceded that the fee disclosed as a "reconveyance" fee on the HUD-1 actually consisted of component parts, and because the title company did not perform any services in connection with one of those component parts, the court denied the defendant's motion for summary judgment on the RESPA claims. The court also denied summary judgment for a number of state-law claims, in particular, denying summary judgment on claims under the Washington Consumer Protection Act. For a copy of the opinion, please see here.

Banking

FCIC Subpoenas Goldman Sachs. On June 7, the Financial Crisis Inquiry Commission (FCIC) issued subpoenas to Goldman Sachs & Co. (Goldman) after Goldman failed to timely comply with earlier requests by the FCIC to produce documents and personnel for interviews. The FCIC alleged that Goldman failed to comply with the FCIC's requests by both failing to produce relevant documents and producing a massive amount (approximately 2.5 billion pages) of documents. The subpoena seeks to compel Goldman to (i) produce documents relating to synthetic and hybrid collateralized debt obligations based on mortgage-backed securities, (ii) produce a key to allow the FCIC to identify Goldman customers' names from customer numbers in previously-produced documents regarding derivatives transactions, and (iii) identify documents produced to the Senate Permanent Subcommittee on Investigations that are responsive to the FCIC's requests. Finally, the subpoena seeks to compel the testimony of certain Goldman officials. For more information, please see http://www.fcic.gov/news/pdfs/2010-0607-Advisory.pdf and http://www.fcic.gov/news/pdfs/GS_Details_-_Final.pdf.

FDIC Issues Guidance Letter on Deposit Placement, Collection Activities. On June 7, the Federal Deposit Insurance Corporation (FDIC) clarified what steps insured institutions that collect or place deposits on behalf of customers must take to insure that customers' deposits are eligible for pass-through insurance when an institution enters into third-party arrangements to collect and place deposits. Under the guidance, institutions must (i) maintain records showing that the deposit is eligible for pass through insurance, (ii) maintain detailed records of the name and location of the institution receiving the deposits, the owners of the deposits, and the amount, interest rate and maturity date of the deposits, (iii) provide customers with the name of the receiving institution and the amount deposited, (iv) ensure that marketing materials, customer statements, and disclosures are not misleading and accurately represent FDIC coverage of the deposits, and (v) provide training for all relevant personnel involved in collecting and placing deposits from third parties and affinity groups. For a copy of the Financial Institution Letter, please see here. For a copy of the guidance, please see here.

Federal Banking, Thrift Agencies Issue Guidance on Bargain Purchases, Assisted Acquisitions. On June 7, the federal banking and thrift agencies issued supervisory guidance regarding modified approval procedures and conditions for business combinations to address the risk associated with retrospective adjustments to estimates of bargain purchase gains. Bargain purchase gains potentially resulting from assisted acquisitions by the Federal Deposit Insurance Corporation (FDIC) and National Credit Union Administration (NCUA) are indicated in business combination applications and are used in the computation of regulatory capital. However, because fair value estimates indicated in such applications are only preliminary, the guidance states that bargain purchase gains are subject to retrospective adjustments during the accounting measurement period. In order to protect against the risk that these adjustments will result in a shortage of capital, the guidance provides certain accounting standards and indicates that the approval of acquisitions may now be conditioned on a commitment by the acquiring institution to maintain specified levels of capital. The guidance applies to institutions regulated by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, the FDIC, and the NCUA. For a copy of the Financial Institution Letter, please see http://www.fdic.gov/news/news/financial/2010/fil10030.pdf. For a copy of the guidance, please see http://www.fdic.gov/news/news/financial/2010/fil10030a.pdf.

New York State Court Holds HOLA/FIRREA Do Not Preempt Cause of Action by New York Attorney General Regarding Appraisal Practices. On June 8, the Supreme Court of New York, Appellate Division (First Department) affirmed that the Home Owner's Lending Act (HOLA) and the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) do not preempt the enforcement of Uniform Standards and Professional Appraisal Practice standards under state law. *People of the State of New York v. First American Corp.*, 2010 NY Slip Op 04868, 2010 WL 2266832 (N.Y. Sup. Ct. June 8, 2010). The New York Attorney General claimed that the defendants engaged in fraudulent, deceptive and illegal business practices by allegedly permitting residential real estate appraisers to be influenced by a nonparty bank to increase real estate property values on appraisal reports for the purpose of inflating home prices. The defendants moved for dismissal, asserting that HOLA and FIRREA impliedly place the responsibility for oversight of appraisal management companies on the Office of Thrift Supervision (OTS). The defendants also asserted that the New York Attorney General lacked standing to bring these claims. Regarding the preemption issue, the court relied in part on an October 25, 2004 OTS opinion letter requiring thrifts using agents to perform activities such as appraisals to enter into written agreements acknowledging OTS's statutory authority to take enforcement action against such agents. Noting the absence of such an agreement, the court concluded that the applicable federal statutes, regulations, and guidelines did not preempt or preclude the Attorney General from pursuing the action. The court further concluded that the Attorney General had standing to bring suit, rejecting the defendants' argument that the Attorney General's action was actually a federal cause of action characterized as a state law claim. For a copy of the opinion, please see http://www.courts.state.ny.us/reporter/3dseries/2010/2010_04868.htm.

Washington Federal Court Holds Washington Consumer Protection Act Claims Preempted by NBA. The U.S. District Court for the Western District of Washington recently vacated its March 9, 2010 order (reported in *InfoBytes*, Apr. 16, 2010) finding that a national bank is subject to the Washington Consumer Protection Act (WCPA). *Deming v. First Franklin*, C09-54182010, 2010 WL 2194830 (W.D. Wash. Apr. 23, 2010). In *Deming*, the plaintiff borrower alleged that the defendant banks engaged in fraud and breach of contract and violated the WCPA when the banks charged "Administration" and "Compliance Review" fees in connection with the borrower's real estate loans. The banks argued that the claims were preempted by the National Bank Act (NBA). The court disagreed, finding that "the OCC chose not to address fees related to real estate lending specifically." In ruling on the motion for reconsideration, the court stated that the recent case *Martinez v. Wells Fargo Home Mortgage, Inc*., 598 F.3d 549 (9th Cir. 2010) is binding law in the Ninth Circuit (*Martinez* was reported in *InfoBytes*, Mar. 12, 2010). In *Martinez*, the Ninth Circuit held that claims under California's Unfair Competition Law were preempted by the NBA and regulations issued by the Office of the Comptroller of the Currency (OCC). Based on the *Martinez* case, the *Deming* court found that the WCPA similarly conflicted with the NBA and the OCC regulations and was, thus, preempted.

However, the court held that the state common law contract and tort claims were not preempted because these claims are based on state law of general application and do not conflict the NBA or OCC regulations. For a copy of the opinion, please see here.

Consumer Finance

Ninth Circuit Holds Credit Card Companies Not Required to Negotiate Billing Disputes with Non-Obligor Authorized Cardholders. On May 19, the U.S. Court of Appeals for the Ninth Circuit held that creditors' billing dispute duties under the Truth in Lending Act (TILA) run only to the person obligated to the creditor to repay the debt, and not to consumers solely authorized to use the account by the accountholder. *Edwards v. Wells Fargo and Co.*, No. 06-16892, 2010 WL 1980725 (9th Cir. May 19, 2010). In this dispute, the defendant bank issued a credit card to two obligors who added authorization for a third party (the plaintiff) to use the card. The plaintiff disputed several charges with the bank; however, the bank eventually settled those disputes with the obligors of the card and not the plaintiff. As a result, the plaintiff sued the bank for violations of state law and TILA, under the theory that, despite not being an "obligor" on the card, he was entitled to dispute resolution procedures under TILA as a "consumer" or "cardholder." In arriving at its decision, the court reasoned that "consumers" can trigger a dispute resolution process under Regulation Z but that several credit card issuers' duties to cardholders (including mailing periodic statements and responding to dispute requests) under Regulation Z are owed solely to consumers who are also obligors. As a result, the court held that an authorized user who is not an obligor on a card is not a "consumer" entitled to dispute resolution under Regulation Z. The court noted that it would be a "big step" for Regulation Z to convert the duty owed to an obligor under TILA to one owed to any cardholder. For a copy of the opinion, please see http://www.ca9.uscourts.gov/datastore/opinions/2010/05/19/06-16892.pdf.

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Virginia Federal Court Rejects Hyper-Technical Construction of TILA. On May 20, the U.S. District Court for the Eastern District of Virginia refused to adopt an "unreasonably hyper-technical construction" of the Truth in Lending Act (TILA) to resolve claims made by a refinance borrower regarding allegedly inadequate TILA disclosures. *Larrabee v. Bank of America, N.A.* , No. 3:09CV712, 2010 WL 2089260 (E.D. Va. May 20, 2010). In *Larrabee*, the plaintiff borrower asserted that the defendants (the original lender and the immediate transferee) failed to "accurately articulate the amount, number and due dates of payments," maintaining that a strict reading of the disclosure statement conveyed that all payments but one were due 45 days after closing. The court rejected the borrower's "strained interpretation" of the disclosure form, noting that it "defies objective reasonableness," and more generally that the borrower's "strict liability approach" made "logic and commonsense [] a secondary consideration at best." The borrower also asserted that when she engaged in a second refinance transaction with the immediate transferee continuing as the lender, the fact that the Notice of Right to Cancel/Rescission characterized immediate transferee as a "Different Lender" rather than the "Same Lender" violated TILA. The court noted that because the original lender and immediate transferee were, in fact, different lenders, the form was accurate. The court also noted that even if the form was technically incorrect, there was no TILA violation because it "clearly and conspicuously apprised Plaintiff of her rights to rescind," as required by Regulation Z. For a copy of the opinion, please see here.

California Federal Court Awards Substantially Reduced Attorneys' Fees in FCRA Dispute. On May 20, the U.S. District Court for the Northern District of California awarded only one-third of class counsel's requested fees in a Fair Credit Reporting Act (FCRA) dispute because of the immense unlikelihood of success of the claim when the litigation was commenced. *Yeagley v. Wells Fargo & Co.*, No. C 05-3403, 2010 WL 2077013 (N.D. Cal. May 20, 2010). In *Yeagley*, a consumer class action complaint asserted that the defendant bank's unsolicited mailings to class members violated FCRA because the solicitations did not state a definite amount of credit being offered or the interest rate on the credit offered and, thus, did not qualify as permissible "firm offers" of credit under FCRA. A settlement was reached under which the bank would provide two free credit reports to each member of the class, a value well below the damages sought in the complaint. The court refused to award approximately 2000 hours of attorneys' fees requested by class counsel, noting the case was a "longshot" at the outset because FCRA does not explicitly require the amount of credit and the interest rate to be included in a firm offer of credit. The court also noted the minimal value of the settlement to the class, which was demonstrated by the "dismal" response rate of less than one-percent of class members. The court awarded class counsel only one-third of the requested attorneys' fees, representing the time a reasonable lawyer would spend determining the case had little merit, pursuing settlement, and then distributing settlement. For a copy of the opinion, please see here.

Securities

FCIC Subpoenas Goldman Sachs. On June 7, the Financial Crisis Inquiry Commission (FCIC) issued subpoenas to Goldman Sachs & Co. (Goldman) after Goldman failed to timely comply with earlier requests by the FCIC to produce documents and personnel for interviews. The FCIC alleged that Goldman failed to comply with the FCIC's requests by both failing to produce relevant documents and producing a massive amount (approximately 2.5 billion pages) of documents. The subpoena seeks to compel Goldman to (i) produce documents relating to synthetic and hybrid collateralized debt obligations based on mortgage-backed securities, (ii) produce a key to allow the FCIC to identify Goldman customers' names from customer numbers in previously-produced documents regarding derivatives transactions, and (iii) identify documents produced to the Senate Permanent Subcommittee on Investigations that are responsive to the FCIC's requests. Finally, the subpoena seeks to compel the testimony of certain Goldman officials. For more information, please see http://www.fcic.gov/news/pdfs/2010-0607-Advisory.pdf and http://www.fcic.gov/news/pdfs/GS_Details_-_Final.pdf.

Insurance

Washington Federal Court Denies Summary Judgment in RESPA Section 8(b) "Unearned" Fee Case. On June 1, the U.S. District Court for the Western District of Washington denied a defendant's motion for summary judgment in a class-action dispute claiming that a reconveyance fee charged by the defendant violated Section 8 of the Real Estate Settlement Procedures Act (RESPA) because, while the fee consisted of both processing and tracking fees, the defendant did not perform the processing. *Bushbeck v. Chicago Title Ins. Co.*, No. C08-0755, 2010 WL 2262340 (W.D. Wash. Jun. 1, 2010). In *Bushbeck*, the plaintiff borrower refinanced a first-lien and second-lien mortgage loan, and, as part of the transaction, the prior liens were required to be extinguished through a reconveyance. The title insurance company performing escrow settlement services charged the borrower a reconveyance fee consisting of processing and tracking fees. The lender completed the reconveyance and the title insurance company tracked the reconveyances. The borrower alleged, among other things, that the title insurance company collected an unearned fee in violation of Section 8(b) of RESPA, which prohibits collecting fees other than for services actually performed. The title insurance company claimed that it did not violate RESPA because it performed some reconveyance services (tracking the reconveyance), such that the fee was earned, and, even if the fee was marked up from its actual cost, RESPA does not apply to overcharges. The court held that Section 8(b) "extends to any portion of the charge for which the service provider does not perform services." Because the title insurance company conceded that the fee disclosed as a "reconveyance" fee on the HUD-1 actually consisted of component parts, and because the title company did not perform any services in connection with one of those component parts, the court denied the defendant's motion for summary judgment on the RESPA claims. The court also denied summary judgment for a number of state-law claims, in particular, denying summary judgment on claims under the Washington Consumer Protection Act. For a copy of the opinion, please see here.

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Privacy/Data Security

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Credit Cards

Ninth Circuit Holds Credit Card Companies Not Required to Negotiate Billing Disputes with Non-Obligor Authorized Cardholders. On May 19, the U.S. Court of Appeals for the Ninth Circuit held that creditors' billing dispute duties under the Truth in Lending Act (TILA) run only to the person obligated to the creditor to repay the debt, and not to consumers solely authorized to use the account by the accountholder. *Edwards v. Wells Fargo and Co.*, No. 06-16892, 2010 WL 1980725 (9th Cir. May 19, 2010). In this dispute, the defendant bank issued a credit card to two obligors who added authorization for a third party (the plaintiff) to use the card. The plaintiff disputed several charges with the bank; however, the bank eventually settled those disputes with the obligors of the card and not the plaintiff. As a result, the plaintiff sued the bank for violations of state law and TILA, under the theory that, despite not being an "obligor" on the card, he was entitled to dispute resolution procedures under TILA as a "consumer" or "cardholder." In arriving at its decision, the court reasoned that "consumers" can trigger a dispute resolution process under Regulation Z but that several credit card issuers' duties to cardholders (including mailing periodic statements and responding to dispute requests) under Regulation Z are owed solely to consumers who are also obligors. As a result, the court held that an authorized user who is not an obligor on a card is not a "consumer" entitled to dispute resolution under Regulation Z. The court noted that it would be a "big step" for Regulation Z to convert the duty owed to an obligor under TILA to one owed to any cardholder. For a copy of the opinion, please see http://www.ca9.uscourts.gov/datastore/opinions/2010/05/19/06-16892.pdf.

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