Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

April 29, 2011

Topics In This Issue

Federal Issues

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administrative charge that should be disclosed as part of Block 1, "Our Origination Charge," on the GFE regardless of whether the charge is paid to a third party or directly to the IRS. For a copy of the April issue of RESPA Roundup, please click here.

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Courts

U.S. Supreme Court Rules Consumer Arbitration Agreements with Class Action Waivers are Enforceable. On April 27, the U.S. Supreme Court held that the Federal Arbitration Act (FAA) preempts states from "conditioning the enforcement of an arbitration agreement on the availability of particular procedures," including class actions. *AT&T Mobility LLC v. Concepcion*, No. 09-893. In *Concepcion*, the plaintiffs challenged whether a cellular phone provider could assess customers sales tax on phones provided for free under service contracts, and argued that the class action waiver contained in the service contracts was unconscionable under California law. The Court disagreed, reversing a line of California state and federal court decisions, which had limited companies' rights to arbitrate by finding that, under the FAA, state substantive contract law could render an arbitration clause unenforceable. Justice Scalia, writing for *Concepcion*'s five-justice majority, explained that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." Accordingly, section 2 of the FAA cannot "stand as an obstacle to the accomplishment of the FAA's objectives." The Court held that if a contract requires disputes to be arbitrated on an individual basis, proceeding as a class action "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." The Court further clarified that the FAA applies to all consumer arbitration agreements, including those found in "contracts of adhesion," noting that "the times in which consumer contracts were anything other than adhesive are long past." For a copy of the opinion, please click here.

Court Permits "No-Discharge" Chapter 13 Debtor to Discharge Wholly Unsecured Second Lien. On April 19, a Wisconsin federal court held that a Chapter 13 bankruptcy debtor is permitted to "strip-off" a second lien on the debtor's principal residence when the lien is wholly unsecured, even where the debtor is ineligible for discharge of the lien because of a recent Chapter 7 discharge. *In re Fair*, No. 10-C-1128 (E.D. Wis. Apr. 19, 2011). In this case, the borrower filed for Chapter 13 bankruptcy one month after obtaining a Chapter 7 discharge, and asked the court to treat the second mortgage as a wholly unsecured claim and to "strip off" (*i.e.*, avoid) the rights of the second lien, based on the fact that her property value was less than the amount of the first lien and secured no part of the second lien. In reversing the bankruptcy court's decision, the district court noted that (i) lien stripping is not permitted in Chapter 7 bankruptcy, and (ii) section 1328(f)(1) of the Bankruptcy Code prevents a court from discharging debts in a Chapter 13 plan if the debtor received a discharge under Chapter 7 within the preceding 4 years of filing for relief. Noting the split in authority, the court found that the plain language of the statute only prevents a "discharge" of all debts, and that a discharge only extinguishes an action against the debtor in personam, as opposed to an action in rem, which therefore preserves the ability to enforce the lien against the property. The court further found that Congress was aware of this distinction and did not intend to eliminate the ability to strip off a lien under Chapter 13. However, the court noted that debtors do not enjoy an absolute right to strip off unsecured liens and that courts have a duty to ensure that Chapter 13 proceedings are conducted in good faith. Ultimately, the court reversed and remanded the case to the bankruptcy court to determine whether the borrower filed the Chapter 13 proceeding in good faith. Click here for a copy of the opinion.

Firm News

James Parkinson will participate on a panel entitled "The Role of the Lawyer in Preventing Corruption," at the International Bar Association's Bar Leaders Conference in Miami, on May 4.

Jonathan Jerison will be presenting a webinar on "Update on Managing HELOCs - Consumer Laws and Recent Litigation on May 5 at 11am CT. For more information, and to register, please see http://www.smslp.com/events/HELOCs-management

Margo Tank will be speaking at the Mortgage Bankers Association's Legal Issues and Regulatory Compliance Conference on May 15 in Boca Raton, Florida. Her remarks will focus on a legal and regulatory update on mortgage implementation issues.

Ben Klubes will be speaking at the Mortgage Bankers Association's Legal Issues and Regulatory Compliance Conference on May 15 in Boca Raton, Florida on "Litigation Challenges Involving the Mortgage Origination Process".

Jonice Gray Tucker will be speaking at the Mortgage Bankers Association's Legal Issues and Regulatory Compliance Conference on May 15 in Boca Raton, Florida. Her remarks will focus on Litigation Involving Servicing and Foreclosure.

Warren Traiger will be speaking about potential changes to the CRA regulations and the current regulatory environment during a webinar hosted by the CRA Qualified Investment Fund, on Thursday, May 19 at 2pm.

Donna Wilson will be presenting at a CLE webinar on "Emerging Class Action Threat: Consumer Personal Identification Data Strategies to Minimize Litigation Risks and Maximize Insurance Coverage" on Tuesday, May 24. This seminar will analyze the Song-Beverly Act and its impact of ruling on class action litigation under other state privacy statutes. The Webinar is sponsored by the Legal Publishing Group of Strafford Publications.

James Parkinson will be speaking at the ACI's "FCPA Compliance in Emerging Markets" program in Washington, D.C., on June 15 -16.

Andrew Sandler will be speaking at CBA Live 2011 and presenting an Annual Fair Lending Report on Tuesday, June 14 at 3:30 pm in Orlando, Florida. Mr. Sandler will be giving an overview of current regulatory and enforcement developments and discussing the most significant fair lending risks confronting consumer lenders in the next twelve months.

Andrew Sandler will be participating on a panel at the Florida Bar Annual Convention on Friday, June 24 as part of the "Presidential Showcase". On the panel with Mr. Sandler is Paul Bland, Public Justice. The Moderator is Justice R. Fred Lewis, a Justice of the Florida Supreme Court, a former Chief Justice and founder of Justice Teaching.

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

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.

Miscellany

Bank Pays Restitution for Failure to Detect and Report Investment Fraud Scheme. On April 27, the Department of Justice (DOJ) announced that a North Carolina bank has entered into a deferred prosecution agreement for failure to file a suspicious activity report (SAR) and maintain an effective anti-money laundering program. The bank will pay $400,000, which is 16% of its value, toward restitution for victims of a $40 million ponzi scheme operated by a bank customer through accounts at the bank. The Bank Secrecy Act requires banks to maintain programs designed to detect and report suspicious activity. Under the agreement, the bank, which had been critically undercapitalized, will be allowed to undergo a merger and recapitalization to survive. In a separate action, the customer was convicted of securities fraud, wire fraud and money laundering, and faces a maximum prison sentence of 80 years. For a copy of the DOJ press release, please click here.

Mortgages

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Criminal Enforcement Action

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