Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

September 17, 2010

Topics In This Issue

Federal Issues

Elizabeth Warren Appointed Assistant to the President and Special Advisor to the Secretary of the Treasury on the Consumer Financial Protection Bureau. On September 17, President Obama named Elizabeth Warren to serve as Assistant to the President and Special Advisor to the Secretary of the Treasury on the Consumer Financial Protection Bureau. Neither appointment requires confirmation by the Senate. As Special Advisor, Warren will play a key role in establishing of the Bureau of Consumer Financial Protection (BCFP), which was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act this past July. For a copy of the White House press release announcing the appointment, please click here.

Banking Agencies Support Basel III Agreement. On September 12, U.S. banking regulators (represented by the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Insurance Deposit Insurance Corporation) expressed their support for the Basel III Agreement of the G-10 Governors and Heads of Supervision. The Basel III Agreement seeks "to increase the quality, quantity, and international consistency of capital, to strengthen liquidity standards, to discourage excessive leverage and risk taking, and to reduce procyclicality in regulatory requirements." The Basel III Agreement also seeks to reduce the incidence and severity of future financial crises and to foster a more stable international banking system. For a copy of the Basel III agreement press release and text, please see http://www.bis.org/press/p100912.pdf?noframes=1. For a copy of the FDIC press release, please see http://www.fdic.gov/news/news/press/2010/pr10206.html.

FTC Settles Deceptive Credit Card Marketing Charges. On September 14, the Federal Trade Commission (FTC) announced that it had reached a settlement with six defendants who marketed a credit card that only could be used to buy products from their low-cost merchandise catalog. The FTC alleged in its complaint, inter alia, that the defendants falsely claimed that the card: (i) could be used to fully finance purchases, (ii) would provide access to a no-fee, low cost, or guaranteed cash advance benefit or unsecured line of credit, and (iii) could, by its use, improve consumers' credit ratings. Under the settlement, the defendants are permanently barred from misrepresenting the above-stated claims. The settlement order, which was filed in the U.S. District Court for the District of

Oregon, Portland Division, also imposes a $28.5 million judgment against four defendants, and another $28.5 million judgment against the remaining two defendants, both of which will be suspended when certain financial payments-well below the amount of the total judgments-have been satisfied. However, the full judgments will become due if the defendants have misrepresented their financial conditions. For a copy of the press release, please see http://www.ftc.gov/opa/2010/09/lowpay.shtm.

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FDIC Issues Guidance on Erasing Digital Images Stored in Copiers, Printers, and Fax Machines. On September 15, the Federal Deposit Insurance Corporation (FDIC) issued Financial Institution Letter FIL-56-2010, which provides guidance on mitigating the potential risk posed by customer information stored in photocopiers, fax machines, or printers, and requires financial institutions to implement written policies and procedures for data erasure. These machines may contain hard drives or flash memory that store digital images of the documents printed, copied, or transmitted. Because financial institutions use these machines to print, copy, or transmit sensitive customer data, the FDIC recognized a risk that such data might remain on the machines when they are returned to leasing companies or otherwise sold or disposed of. Under the new guidance, financial institutions should implement written policies and procedures to determine which devices might store such data, and to ensure that any hard drives or flash memory in the devices are erased, encrypted, or destroyed prior to disposal or return to a leasing company. The FDIC cautioned that examiners may ask to review such policies or procedures and their implementation. For a copy of Financial Institution Letter FIL-56-2010, please click here.

Courts

Third Circuit Sets Out Requirements for § 1981 Claim Based Upon Discriminatory Lending. On September 13, the U.S. Court of Appeals for the Third Circuit affirmed the district court's grant of summary judgment and held that plaintiffs could not make a satisfactory showing of harm under § 1981. *Anderson v. Wachovia Mort. Corp.*, 2010 WL 3528903, No. 09-2275 (3d Cir. 2010). Plaintiff-appellants African-American mortgagors sued defendant-appellee bank alleging racial discrimination in its lending practices in violation of 42 U.S.C. § 1981, which provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts." Because there was no direct evidence of discrimination, the court applied the familiar *McDonnell Douglas*burden-shifting framework under which a prima facie showing of discrimination shifts the burden to a defendant to present a legitimate, non-discriminatory basis for its action, which can only be rebutted if the plaintiff shows the explanation

to be pretext. As a matter of first impression, the court held that a prima facie showing of discriminatory lending under § 1981 requires: (i) membership in a protected class, (ii) qualification for the credit/loan in question, (iii) denial of the credit/loan or acceptance made subject to unreasonable/overly burdensome conditions, and (iv) some additional evidence of a casual nexus between the treatment and membership in the protected class. Without passing on whether the plaintiffs had or could make out a prima facie case, the court upheld the grant of summary judgment on the ground that the plaintiffs could not rebut Wachovia's non-discriminatory explanation for its action, namely that it adopted loan conditions pursuant to Fannie Mae guidelines, to which Wachovia planned to sell the subject loans on the secondary market. For a copy of the opinion, please click here.

California Federal Court Dismisses TILA, Fraud, Unfair Business Practices, and Quiet Title Claims. On August 25, the U.S. District Court for the Northern District of California granted defendant's motion to dismiss without prejudice because, *inter alia*, plaintiff failed to comply with Truth in Lending Act (TILA) requirements and did not plead his fraud claim with particularity. *Briosos v. Wells Fargo Bank*, 2010 WL 3341043, No. C 10-02834 LB (N.D. Cal. Aug. 25, 2010). Plaintiff alleged that defendant made fraudulent statements and concealed information about his ability to afford the loans in order to induce him to obtain a refinance loan. Plaintiff also alleged that the defendant failed to provide him with disclosures required under TILA and refused his request to rescind one of the loans. The court found that although plaintiff had not filed suit until after the three-year limitations period for TILA rescission claims had expired, plaintiff had timely exercised his right to rescission by making a rescission request by letter within three years after the transaction was consummated. However, plaintiff did not adequately allege facts demonstrating his ability to tender the loan proceeds, and thus his TILA rescission claim failed. The court further held that plaintiff failed to plead fraud with particularity and failed to assert his quiet title claim in a verified complaint, as is required under California law. As plaintiff failed to sufficiently plead his fraud and TILA claims, his § 17200 claim could not proceed because that claim depends on an underlying violation of federal or state law. For a copy of the opinion, please click here.

First Circuit Holds That Credit Card Company Is Not Obligated to Investigate Credit Dispute Under FCRA Absent Notification from Credit Reporting Agency. On September 9, the U.S. Court of Appeals for the First Circuit affirmed a grant of summary judgment against claims brought under the Fair Credit Reporting Act (FCRA) because a credit card company had no obligation to investigate a dispute on his credit report. *Chiang v. FIA Card Services, N.A.*, 2010 WL 3505084, No. 09-2323 (1st Cir. Sept. 9, 2010). In this case, the consumer disputed a delinquency notice on his credit report and brought the matter to the attention of both his credit card company and the credit reporting agencies (CRAs). When the delinquency was not resolved, the consumer brought suit alleging that under the FCRA, the credit card company was obligated to investigate any dispute over the completeness or accuracy of the information furnished by the consumer and then notify the CRAs of any corrections. The court of appeals disagreed with plaintiff, holding that this obligation, and the right to sue under the FCRA, only takes hold when the CRA, "acting as a gatekeeper," has previously notified the credit card company of the consumer's dispute, and is not triggered when the consumer provides notice of the disputed information directly to the credit card company. Here, the court found

no evidence which showed the CRA had contacted the credit card company about the consumer's objections. For a copy of the opinion, please click here.

Firm News

David Krakoff will be speaking at the ALI-ABA Environmental Crimes Conference on September 23.

Jeff Naimon will be speaking on the Servicing Issues Panel at the Mortgage Bankers Association's Regulatory Compliance Conference in Washington, D.C. on September 27. Jonice Gray Tucker will be moderating the Litigation Update Panel.

Andrew Sandler will be speaking on two panels at the Mortgage Bankers Association's Regulatory Compliance Conference in Washington, D.C.. The first panel, to be held on Sunday, September 26 at 3:30 p.m., will address the topic "Claims Against Partners and Other Players." The panel on Tuesday, September 28 at 11:15am will cover the subject "Hot Secondary Market Issues."

Andrew Sandler will be speaking at the NACHA Council MEGA Meeting on September 30 in Baltimore, Maryland. Mr. Sandler's panel is "A New Regulatory Era for Financial Services - Impacts to the Payments Industry." This panel will focus specifically on the anticipated impact of the creation of the Consumer Financial Protection Bureau and the Durbin amendment. On the panel with Mr. Sandler is Steve Kenneally, Vice President of the American Bankers Association.

Jamie Parkinson will be speaking on the Foreign Corrupt Practices Act at the International Bar Association conference on October 2 in Vancouver.

Jamie Parkinson will present at a US-India Business Council event on October 5 in Palo Alto. The topic will be the Foreign Corrupt Practices Act.

Andrew Sandler will be co-chairing the PLI program "Financial Crisis Fallout 2010: Emerging Enforcement Trends," in New York City on November 4. David Krakoff and Sam Buffone will also be presenting at the seminar.

Margo Tank and Jerry Buckley will be speaking at the Electronic Signatures & Records Association's Fall Conference on November 9-10.

Andrew Sandler will be speaking at the American Conference Institute's 10th Annual Advanced Forum on Consumer Finance Class Actions & Litigation in New York, N.Y. on January 27, 2011 at 11am. The topic will be "Emerging Federal and State Regulatory and Enforcement Initiatives: FTC, DOJ, SEC, FRB, and State AGs Perspectives." Other panelists include Vermont Attorney General William Sorrell and Indiana Attorney General Greg Zoeller.

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Privacy/Data Security

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

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