Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

October 15, 2010

Topics In This Issue

Federal Issues

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President Vetoes Notarization Act. On October 8, President Obama vetoed the Interstate Recognition of Notarizations Act of 2010 (H.R. 3808) (Bill). The legislation would have required that federal and state courts recognize notarizations made by licensed notaries public in other states (as reported in *InfoBytes*, October 8, 2010.) The President stated that it was necessary to have further deliberations about the possible unintended impact of the Bill before the Bill could be finalized. For a copy of the Presidential Memorandum, please see http://1.usa.gov/a3kvQ6.

President Signs Bill Aimed at Making Internet and Telephones More Accessible to People with Disabilities. On October 8, President Obama signed the Twenty-First Century Communications and Video Accessibility Act of 2010 (Act), making it Public Law No. 111-26. The Act will improve communications access for people with disabilities by imposing requirements on telecommunication service providers and manufacturers (as reported in *InfoBytes*, October 1, 2010.) For a copy of the Act, please see http://1.usa.gov/b8z6Rw.

FDIC Announces Mark Pearce as Director of New Division. On October 12, the Federal Deposit Insurance Corporation (FDIC) announced the appointment of Mark Pearce as director for the Division of Depositor and Consumer Protection (DCP). Newly-created, the DCP was established to provide increased focus on the FDIC's compliance examination, enforcement and outreach program. Former President and Chief Operating Officer of the Center for Responsible Lending and a leading expert in consumer protection in financial services, Mr. Pearce has been the Chief Deputy Commissioner of Banks for North Carolina since 2006 managing non-depository financial institutions operating in the state. Mr. Pearce also developed and managed the North Carolina Foreclosure Prevention Project. He received his B.A. in political science from the University of North Carolina at Chapel Hill and a J.D. from Harvard Law School. For a copy of the press release, please see http://www.fdic.gov/news/news/press/2010/pr10225.html.

HUD Proposes to Strengthen FHA Lender Indemnification Process. On October 8, the Department of Housing and Urban Development (HUD) proposed a new rule relating to indemnification of the FHA for insurance claims paid on mortgages that did not meet agency guidelines. The proposed rule will provide guidance regarding mortgage indemnification to HUD in the case of fraud, misrepresentation, or noncompliance with origination requirements. In order to maintain Lender Insurance authority, the proposed rule also requires that mortgagees maintain the acceptable claim and default rate required for initial eligibility. Under the proposed rule, HUD will also review Lender Insurance mortgagee performance on a continual basis, and revise the methodology for determining acceptable claim and default rates. For a copy of HUD's press release, please see http://1.usa.gov/9H33mK; for a copy of the proposed rule, please see http://portal.hud.gov/portal/page/portal/HUD/documents/HUD_LI_Rule.pdf.

FDIC Proposes New Rule on Closing Financial Institutions. On October 8, the Board of Directors of the Federal Deposit Insurance Corporation (FDIC) voted to approve new measures that clarify the procedures that it will follow when liquidating large firms. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the FDIC has the authority to act as a receiver for financial institutions whose failure and liquidation under traditional bankruptcy procedures would pose a significant risk to the financial stability of the United States. The proposed rule states that when the FDIC acts as a receiver in this capacity, shareholder, long-term bondholders and subordinated debt holders will be prohibited from participating in any bridge entities that are formed to manage surviving parts of otherwise failed firms. Where their participation is deemed essential to the operation of the bridge entity, certain short-term creditors may be allowed to participate. The public has 30 days to comment on the proposed rule. A copy of the FDIC Press Release and the proposed rule is available at http://www.fdic.gov/news/news/press/2010/pr10224.html.

State Issues

Attorneys General for All 50 States Issue a Joint Statement on Foreclosures. On October 13, the Attorneys General of all 50 states and certain state bank and mortgage regulators issued a joint statement on mortgage foreclosures. The joint statement addresses the industry practice of "robo-signing," by which employees of mortgage loan servicers sign affidavits or other foreclosure documentation without confirming the accuracy of such documentation. According to the joint statement, all 50 states are concerned that robo-signing may constitute a deceptive act, an unfair practice, or some other violation of state laws. In order to address the practice, the states have formed a bi-partisan multistate group comprised of both state Attorneys General and state bank and mortgage regulators. To the greatest extent possible, the group will coordinate state corrective actions. The multistate group also contains an executive committee comprised of the following states and regulators: Arizona, California, Colorado, Connecticut, Florida, Illinois, Iowa, New York, North Carolina, Ohio, Texas, Washington, the Maryland Office of the Commissioner of Financial Regulation, the New York State Banking Department, and the Pennsylvania Department of Banking. For a copy of the press release announcing the task force, please see http://www.naag.org/joint-statement-of-the-mortgage-foreclosure-multistate-group.php.

Courts

Minnesota Federal Court Holds that Reporting a Debt to a CRA is a "Collection" Activity Under FDCPA. On September 29, the U.S. District Court for the District of Minnesota held that a debt collector's reporting of a debt to a consumer reporting agency (CRA) is a "collection" activity prohibited by the Fair Debt Collection Practices Act (FDCPA) after a written dispute is received and no verification has been obtained and provided to the debtor. *Edeh v. Midland Credit Mgmt., Inc.*, 2010 WL 3893604, No. 09-CV-1706, (D. Minn. Sept. 29, 2010). The court also held that in order to state a claim under the Fair Credit Reporting Act (FCRA) for failure to *reasonably* investigate a disputed debt, the plaintiff must be able to show that the reported debt being challenged was inaccurate. In *Edeh*, the plaintiff debtor alleged that the defendant debt collector violated, among other statutes, the FDCPA by reporting the plaintiff's disputed debt to CRAs before verifying the debt. Under the FDCPA, a debt collector must either verify a debt or cease "collection" efforts after receiving a dispute directly from a consumer. The defendant debt collector argued that reporting the debt to CRAs does not constitute "collection" activities. The court disagreed, holding that reporting to a CRA is a collection activity prohibited by the FDCPA after a written dispute is received and no verification has been provided. The court reasoned that threatening to report and reporting debts to CRAs is "one of the most commonly-used arrows in the debt collector's quiver." The plaintiff further argued that the defendant violated the FDCPA when it, in response to inquiries from CRAs, verified the debt to CRAs before first verifying it to the plaintiff, arguing that each verification to an agency was an attempted "collection" in violation of the FDCPA. The court disagreed with the plaintiff's theory and held that a debt collector's*response* to a CRA's inquiry is not a collection activity because the debt collector is acting not on its own initiative, but rather is acting in response to a notice sent by the CRA. The court further noted that the debt collector's response to a CRA's inquiry is not for the purpose of collecting a debt, but rather to avoid violating FCRA, which requires a debt collector to respond to the CRA within a certain period of time after receiving notification from it that a consumer

has disputed a debt. In addition to his FDCPA claim, the plaintiff alleged that the defendant debt collector violated FCRA by failing to *reasonably* investigate the plaintiff's debt after being informed by the CRAs that the plaintiff disputed it. The defendant argued that an investigation that results in a furnisher verifying accurate information about a debt is necessarily "reasonable" for purposes of FCRA. The court agreed, holding that consumers bringing claims against furnishers for failure to conduct a reasonable investigation under FCRA must show that the information being challenged was inaccurate. Because the plaintiff admitted that he owed the full amount of the debt and could not show that the information about his debt was inaccurate, he could not recover from the defendant under FCRA. For a copy of the opinion, please see here.

Seventh Circuit Holds That Failure to Provide Note to Assignee of Mortgage Caused Damages. On October 5, the U.S. Court of Appeals for the Seventh Circuit held that a mortgagee whose foreclosure action was rejected because it could not produce the note could proceed with a breach of contract claim against the prior mortgagee for failing to transfer the note. *Cogswell v. CitiFinancial Mortgage Co.*, 2010 WL 3927694, No. 08-2153 (7th Cir. Oct. 5, 2010). The defendant assigned its interest in a mortgage to the plaintiff, but did not deliver the underlying note. The plaintiff's subsequent effort to foreclose on the mortgage was rejected by the state court, which held that the failure to produce the note meant that the plaintiff had failed as a matter of Illinois law to establish its ownership of the debt and therefore its right to foreclose. The plaintiff then filed a breach of contract claim against the defendant, but the District Court granted summary judgment for the defendant because (i) the plaintiff had not proven that transfer of the note was required by the parties' contractual agreement and (ii) the plaintiff's failure to produce the note had not caused its foreclosure action to fail. The Seventh Circuit reversed and remanded. First, the court held that the plaintiff had produced sufficient evidence that a fact-finder could have found that the defendant had agreed to deliver the note. It also observed (but did not decide) that the obligation to transfer the note could be considered an implied term of all mortgage assignments. Second, the court held that the plaintiff had established that the defendant's failure to provide the note had caused its damages because a reasonable state court would have allowed the foreclosure to proceed if the plaintiff had possessed the note. The court rejected the defendant's argument that the plaintiff could have proceeded with the foreclosure had it obtained a "lost note affidavit." Such affidavits are typically used to establish the terms of a debt, not its ownership. In the few cases that have utilized lost note affidavits to establish ownership (and thus the right to foreclose), the affidavits have attached a copy of the note. Here, the plaintiff did not have even a copy of the note, nor any other evidence that could have been combined with a lost note affidavit to establish its ownership of the debt. To the contrary, the evidence revealed a gap in the chain of title, creating genuine uncertainty as to ownership. Finally, the court rejected the defendant's argument that the plaintiff should simply have filed a personal judgment action against the mortgagors because such an action would also have required the plaintiff to prove its ownership of the debt. For a copy of the opinion, please see http://bit.ly/iqFXbx.

Firm News

An article by Jerry Buckley entitled "Be Prepared on These Five Postcrisis Reg Issues" appeared in the October 6, 2010 issue of *The American Banker*.

An article by John McGuinness entitled "Insurance Coverage in Consumer Class Actions" first appeared in the October 2010 issue of *The Corporate Counselor*.

David Krakoff was mentioned in an article entitled "Q&A With Gibson Dunn's Joseph Warin" in the October 14, 2010 issue of*Law360 White Collar*.

John McGuinness and Matthew Previn will be speaking at the American Conference Institute's 5th Annual Residential Mortgage Litigation & Regulatory Enforcement conference in Dallas,Texas Monday October 18, though Tuesday October 19. Mr. McGuinness and Mr. Previn will be on a panel entitled "Defending Against the Latest Investor Lawsuits and Claims." Specifically, they will be presenting on major litigation involving credit rating agencies.

John Stoner will be speaking to the Risk Management Association's Warehouse Lenders' Roundtable in Atlanta on October 24.

Andrew Sandler will be a speaker at the Mortgage Bankers Association's Annual Convention & Expo on October 25, in Atlanta, Georgia. Mr. Sandler's panel is: Hot Topics in the Secondary Market.

Jonice Gray Tucker and Lori Sommerfield will co-present a webinar on October 27 sponsored by Sheshunoff Information Services entitled "Fair Lending Enforcement is on the Rise: Will You Be Prepared for Your Next Exam?"

Andrew Sandler will be a panel moderator at the American Conference Institute's 6th National Forum on Preventing, Detecting and Resolving Mortgage Fraud on October 28, in San Francisco. Mr. Sandler's panel is entitled: "The Changing Regulatory Focus on Mortgage Fraud: The Role of OTS, FHA Action, Where DOH and HUD Are Looking, Changing State Regulations, and Beyond." On the panel with Mr. Sandler is Mariana Rexroth from the Office of Thrift Supervision, Michael Stolworthy from the Office of the Inspector General of HUD, Robert Kenny from the Department of Treasury Financial Crimes Enforcement Network, and Michael Blume, Assistant US Attorney, Eastern District of Pennsylvania. Contact Ulei Kou at u.kou@americanconference.com for tickets.

Stephen F. Ambrose, Partner-in-Charge of BuckleySandler's New York office, along with Timothy Neary, the firm's Executive Director, will speak at the BITS seminar on November 3, on the subject of risk assessment of law firm service providers. BITS is a division of the Financial Services Roundtable, a membership association for 100 of the 150 largest US-based financial institutions.

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.

Andrew Sandler, Ben Klubes, and Jonice Gray Tucker will be speaking at the 2010 CRA & Fair Lending Colloquium in Las Vegas from November 7-10. Senior executives at financial services organizations will discuss their compliance and risk management concerns with top regulators and other industry leaders.

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 a speaking at PLI's Banking Law Institute 2010 entitled "The Future is Here," on December 8. Mr. Sandler's session is entitled: "Consumer Financial Protection & Enforcement Proceedings under the New Legislation."

Donna Wilson will be speaking at the ACI Privacy & Security of Consumer & Employee Information Conference on January 25-26, 2011 in Washington, DC. First, she will be speaking at a pre-conference workshop on Monday, January 24th entitled "Privacy & Security 101: Understanding the Technology & Key Regulations and Laws, along with Kandi Parsons of the Division of Privacy and Identity Protection at the Federal Trade Commission. Second, on Wednesday, January 26th, Ms. Wilson will be speaking on a panel entitled "Responding to the Latest Cyber Threats: Mobile Workforces, Technology, Data Thefts, and Cloud Computing." Contact c.griffith@americanconference.com for further information regarding registration for the conference.

Andrew Sandler will be speaking at the American Conference Institute's 10th Annual Advanced Forum on Consumer Finance Class Actions & Litigation on January 27, 2011 at 11AM. The conference is taking place at The Helmsley Park Lane Hotel, 36 Central Park South, NYC. The topic will be "Emerging Federal and State Regulatory and Enforcement Initiatives: FTC, DOJ, SEC, FRB, and State AGs Perspectives." Also on the panel with Mr. Sandler will be Attorney General William Sorrell, AG, State of Vermont and Attorney General Greg Zoeller, AG, State of Indiana.

Miscellany

Loan Originators Sentenced to Prison For Mortgage Fraud. On October 12, several defendants were sentenced to prison sentences ranging from 18 months to 135 months in prison for mortgage fraud. Between 2005 and 2008, the defendants used straw buyers and falsified documents to purchase and resell properties. The defendants were sentenced in the U.S. District Court for the Western District of Washington in Seattle. For a copy of the press release, please see here.

Partners in Investment Company Charged with Defrauding Investors. On October 7, the U.S. Department of Justice announced that Barbra Alexander, Beth Pina and Michael Swanson, managing partners of an investment company named APS Funding, Inc. (APS), had been indicted by a federal grand jury in San Jose, California on counts of mail fraud, wire fraud, securities fraud, money laundering, and conspiracy to commit mail and wire fraud. Alexander, Pina and Swanson are alleged to have created several investment funds through APS which offered short-term, high-interest loans (known as "hard money lending") for business and real estate development purposes. The partners sold shares in those funds to investors and assured the investors that their investments would be

used to fund the loans. Instead of using the investments to fund the loans, however, the partners are alleged to have used investor money to pay for their personal expenses. The prosecution is the result of an investigation by the Federal Bureau of Investigation, the Securities and Exchange Commission, and the Monterey District Attorney's Office, and was brought in coordination with President Barack Obama's Financial Fraud Enforcement Task Force. For a copy of the press release, please see http://www.stopfraud.gov/news/news-10072010-2.html.

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Litigation

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E-Financial Services

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Criminal Enforcement Actions

Stay current on U.S. FCPA enforcement actions and international anti-corruption news by visiting our
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