Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

February 4, 2011

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Federal Issues

Fed Likely to Abandon Proposed Reg. Z Rules. On February 1, the Federal Reserve Board (the Board) announced that it will not finalize three pending rulemakings under Regulation Z before its rulemaking authority is transferred to the Consumer Financial Protection Bureau (CFPB) this July. The proposed rules were part of the Board's comprehensive review of its mortgage lending regulations under the Truth in Lending Act (TILA). The first two proposed rulemakings, issued in August of 2009, would have reformed the consumer disclosures for closed-end mortgage loans and home equity lines of credit (Docket Nos. R-1366 and R-1367). The third rulemaking, issued in September 2010 (Docket No. R-1390), would have amended consumer disclosures to explain the consumer's right to rescind certain loans and would have clarified the responsibilities of the creditor if a consumer exercises this rescission right. Additionally, the September 2010 proposal would have (i) changed the disclosures for reverse mortgages, (ii) proposed new disclosures for loan modifications, (iii) placed restrictions on certain advertising and sales practices for reverse mortgages, and (iv) changed the disclosure obligations for loan servicers. However, because the Dodd-Frank Wall Street Reform and Consumer Protection Act mandated that the CFPB combine TILA and RESPA disclosures, the Board determined that proceeding with the 2009 and 2010 proposals was not in the public interest. Click here for a copy of the Board's press release.

Federal Regulatory Agencies Announce Start of Federal Registration of Mortgage Loan Originators. On January 31, various federal bank, thrift, and credit union regulatory agencies, acting pursuant to the Secure and Fair Enforcement for Mortgage Licensing Act, announced that federal registration of mortgage loan originators is now available via the Nationwide Mortgage Licensing System and Registry. The initial registration period will run until July 29, 2011, at which time employees of covered loan originators will be prohibited from originating residential mortgage loans if they have not met the registration requirements. Click here for more information on the registration process. Click here for a copy of the joint press release.

HUD Proposes Rule to Ensure Equal Access to Housing Regardless of Sexual Orientation or Gender Identity. On January 24, the U.S. Department of Housing and Urban Development (HUD) proposed a new rule aimed at ensuring equal access to housing in HUD programs regardless of sexual orientation or gender identity. This rule comes in response to evidence collected by HUD suggesting that lesbian, gay, bisexual, and transgender individuals and families are being arbitrarily excluded from some housing opportunities in the private sector. If implemented, the rule will (i) prohibit owners and operators of HUD-assisted housing or housing whose financing is insured by HUD from inquiring about the sexual orientation or gender identity of an applicant for, or occupant of, the dwelling, (ii) prohibit lenders from considering actual or perceived sexual orientation or gender identity when making a determination of the adequacy of a single-family mortgagor's income in Federal Housing Administration (FHA) programs, and (iii) clarify that all otherwise eligible families, regardless of marital status, sexual orientation, or gender identity, have the opportunity to participate in HUD programs. HUD is currently seeking public comment on this rule through March 25, 2011. Click here for a copy of the proposed rule.

Freddie Mac Revises Single-Family Seller/Servicer Guide; Introduces New Software. Freddie Mac recently released Bulletin 2011-1, announcing revisions to its Single-Family Seller/Servicer Guide (Guide) and the implementation of the Freddie Mac Service Loans application and the Freddie Mac Reimbursement System. The announced revisions cover extended protections for service members, the collection of Escrow, payment of tax liens, and the designation of 11 new counsel for Florida. Specifically, Freddie Mac revised the Guide to reflect, as of January 1, 2011, the extension of the stay of foreclosure protections for service members through December 31, 2012 pursuant to the Helping Heroes Keep Their Homes Act of 2010. Freddie Mac also announced that, effective immediately, the amount of Escrow a Servicer collects may include any "cushion" permitted by applicable law, and a Servicer must discontinue collecting Escrow if required by law. In addition, Servicers must now obtain written approval from Freddie Mac before paying a taxing authority when a tax lien would take priority over Freddie Mac's First Lien. The Guide was further updated to add 11 new firms to the Designated Counsel Program in Florida. This Bulletin also detailed the phased introduction of the Service Loans application, a web-based portal for reporting defaults, foreclosure sales, deeds-in-lieu, and loan-level exception/non-exception activity. Freddie Mac announced that migration will begin in April 2011 and end by September 30, 2011. Freddie Mac also announced that the Online Reimbursement System will be retired on March 31, 2011, and the Bulletin further specifies the requirements for submitting requests through the new Reimbursement System. Click here for a copy of Freddie Mac Bulletin 2011-1.

Fannie Mae Updates Selling Guide. On January 27, Fannie Mae updated its Selling Guide (Guide) to reflect changes regarding community land trusts and non-standard payment collection options, and to include a number of other miscellaneous updates and clarifications. The updates regarding community land trusts include the new version of Fannie Mae's ground lease rider, labeled the Community Land Trust Ground Lease Rider, and the requirement that the lender document the community land trust's approval of any refinance transaction when a loan is being delivered to Fannie Mae. A new Guide topic, B2-1.4-06, Non-Standard Payment Collection Options, was added to reflect Fannie Mae's policies regarding such payment collection options, which involve agreements between the lender and borrower that allow the borrower to make principal and interest payments on a

schedule other than once per month. Both updates are effective immediately. For a copy of Fannie Mae's Announcement SEL-2011-01 regarding the Guideupdates, please see https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2011/sel1101.pdf.

Commerce Department Receives Feedback on Privacy Policy Changes. The Commerce Department recently published and invited comments on a report entitled "Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework" as a vehicle to spur further discussion with Internet stakeholders on this area of policy development. The comment period closed on January 28 with comments filed by consumer advocates, technology firms, the business community, and others. To view the report, please see http://www.ntia.doc.gov/internetpolicytaskforce/; to view the comments, please see http://www.ntia.doc.gov/comments/101214614-0614-01/.

FHFA Proposes Rule on Private Transfer Fee Covenants. On February 1, the Federal Housing Finance Agency (FHFA) initiated formal rulemaking that would limit the ability of Fannie Mae, Freddie Mac and the Federal Home Loan Banks to deal in mortgages on properties encumbered by certain types of private transfer fee covenants (or in certain types of related securities). Transfer fees are contractual arrangements where the owner of the property is required to pay a fee to a third party - often the developer or its trustee - upon each resale of the property. According to FHFA, such covenants are "adverse to the liquidity and stability of the housing finance market, and to financial safety and soundness." The proposed rule would generally apply only prospectively to covenants created on or after the date of publication of the proposed rule and would exclude private transfer fees paid to homeowner associations, condominiums, cooperatives, and certain tax-exempt organizations that use private transfer fee proceeds to benefit the property. Comments on the proposed rule are due within 60 days of its publication. Click here for the FHFA press release announcing the proposed rule. Click here for the proposed rule.

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State Issues

Delaware Court of Chancery Issues ESI Preservation Guidelines. On January 18, the Delaware Court of Chancery issued a reminder to all counsel appearing before the Court of their duty to preserve electronically stored information (ESI). The guideline, which does not have the force of a formal court rule, states that parties to litigation must take reasonable steps to preserve ESI. The guideline stresses that reasonableness of the efforts undertaken to preserve ESI will be determined on a case-by-case basis, but goes on to state that best practices include counsel oversight of a collaborative process to preserve ESI, the issuance of written litigation hold notices and the documentation of steps taken to preserve ESI. The Court's guideline specifically identifies the pervasive use of laptops and portable storage devices, such as USB flash drives, as challenges to be addressed by counsel when addressing ESI preservation matters. For more information, see http://courts.delaware.gov/forms/download.aspx?id=50988.

Courts

California Federal Court Holds Domain Names With Identical Roots But Different Suffixes Are Not Necessarily Interchangeable. On January 21, the U.S. District Court for the Central District of California held that a contractual agreement may or may not have been reached when a party offered to buy two domain names with identical roots and different suffixes, but the seller responded that it would accept the offer to sell one of the domain names. *Done! Ventures, LLC v. Gen. Elec. Co.*, No. 2:10-cv-04420 (C.D. Cal. Jan. 21, 2011). The defendants listed two domain names - Women.com and Women.net - for sale via the online domain marketplace Sedo.com. The plaintiff's CEO sent an email offering to purchase both domains for $1 million. Sedo.com replied, stating that "the offer for Women.com has been accepted" and that the "next steps" would involve the defendants creating a proposed bill of sale. A few days later, however, the defendants informed the plaintiff that they would not transfer the domain names. Moreover, the defendants allegedly set the disputed domain names to redirect web traffic to their own iVillage.com site, which would be a direct competitor of the plaintiff's potential websites. The plaintiff filed suit, claiming breach of contract under California law and seeking a temporary restraining order (TRO) enjoining the defendants from redirecting web traffic, while the defendants moved to dismiss the claims on the ground that no contract had been established. The court denied both motions. As to the motion for a TRO, the court held that the plaintiff had failed to demonstrate a likelihood of success on the merits because the reply email from Sedo.com referred to only one of the two domain names that were the subject of the offer. Despite

the plaintiff's insistence that the parties used the term "Women.com" to refer to both domains and that it was industry practice to do so, the court held that the plaintiff had not "sufficiently established a meeting of the minds." In addition, the email's reference to "next steps" in the process made it unclear whether there was a complete agreement, as opposed to an agreement on only some of the key terms. The court also held that the TRO should be denied because the plaintiff had failed to show that it faced irreparable harm from the defendants' diversion of web traffic since the alleged harm was "speculative because it is entirely based on plaintiff's not-yet-developed business." Turning to the motion to dismiss, the court held that the allegations that the parties used the term "Women.com" to refer to both domain names, while not enough to establish a likelihood of success on the merits warranting a TRO, were sufficient to state a claim that there had been an offer and acceptance. Click here for a copy of the opinion.

Oregon Federal Court Holds That Borrowers State Claims For Rescission Under HOEPA Despite Lack Of Notice To Assignee And Inability To Tender And For Breach Of Contract Based On Violation Of Underwriting Policies. On January 27, the U.S. District Court for the District of Oregon held that borrowers could proceed to trial on several claims arising out of a mortgage broker's use of false statements to induce the borrowers to take out two mortgage loans. *James v. Bridge Capital Corp.*, No. 08-CV-397 (D. Or. Jan. 27, 2011). First, the court held that the borrowers could pursue rescission claims under the Home Ownership and Equity Protection Act, 15 U.S.C. §§ 1601-1667f (HOEPA), against the assignee of the loans notwithstanding the fact that the originator failed to notify the assignee that one of the loans was subject to HOEPA as required by 15 U.S.C. § 1641. Although this failure might give rise to a claim against the assignor, the court, mindful of the requirement that it interpret HOEPA broadly to further the goal of protecting consumers against predatory lending tactics, declined to find that the omission affected the borrowers' rights. Next, the court acknowledged that it appeared unlikely that the borrowers would be able to tender the proceeds of the loans, as required when exercising the right of rescission. However, the court held that there was no statutory time limit governing the borrowers' tender obligation and, in the exercise of its "equitable discretion" based on its "weigh[ing] of the equities," the court declined to preclude the borrowers' pursuit of rescission and instead simply deferred ruling on the issue. The court also permitted the borrowers to pursue a rescission claim against the assignor of the loan because, even though the assignor no longer held any security interest, the borrowers could seek to recover fees and interest paid prior to the assignment. Finally, the court held that the borrowers could pursue breach of contract claims against the originator based on the originator's violation of its own underwriting guidelines. Click here for a copy of the opinion.

Borrower States Claims for Promissory Estoppel and Fraud Based on Bank's Breach of Promise to Negotiate Loan Modification. On January 27, a California Court of Appeal held that a borrower had stated claims for promissory estoppel and fraud based on allegations that her bank induced her to forego a Chapter 13 bankruptcy proceeding by promising to work with her to modify her loan, but then surreptitiously sold the borrower's home under a power of sale clause. *Aceves v. U.S. Bank, N.A.*, B220922 (Los Angeles County Super. Ct. No. BC410890) (Cal. Ct. App. Jan. 27, 2011). The borrower had fallen behind on her mortgage payments and filed for Chapter 7 bankruptcy protection, intending to convert the case to a Chapter 13 proceeding and, with financial assistance from her husband, to make good on the loan payments over time. When the borrower informed the

bank of this plan, the bank replied that it would work with her on a loan modification if she would forego further bankruptcy proceedings. In reliance on this promise, the borrower did not convert the case to Chapter 13 and did not contest the bank's motion to lift the bankruptcy stay. Representatives of the servicer contacted the borrower several times over the following weeks, but never disclosed that the bank was preparing to sell the borrower's home following a nonjudicial foreclosure. The borrower filed suit, alleging promissory estoppel, fraud and other claims. The trial court dismissed the case on demurrer, but the appellate court reversed as to the promissory estoppel and fraud claims. First, the bank had breached its promise to "work with" the borrower on a loan modification by failing to negotiate with her. Second, the borrower reasonably and foreseeably relied on the promise. The court emphasized that, by promising to work with the borrower to modify the loan, the bank was offering something that a Chapter 13 proceeding could not, because long-term loans cannot be modified under Chapter 13. Third, the borrower's reliance was to her detriment because it deprived her of the ability to take advantage of the time that Chapter 13 provides for making good on the loan. The court noted, however, that because a promissory estoppel claim only entitles the plaintiff to the damages available for breach of contract, there was no basis to invalidate the foreclosure. Finally, the court held that the fraud claim survived because, in addition to the elements of promissory estoppel, the borrower had adequately alleged that the bank knew that its promise to negotiate was false when made. For a copy of the opinion, please see http://www.courtinfo.ca.gov/opinions/documents/B220922.PDF.

Firm News

Kirk Jensen and Jeff Naimon will present a webinar on February 9 at 1pm EST entitled "New Wave of SCRA Enforcement: Developments, Priorities, and Building a Robust Compliance Program". The webinar will share insights gleaned from their experience in defending institutions in government investigations and enforcement actions, advising financial institutions on SCRA compliance, and enhancing their SCRA policies and procedures. They will discuss compliance hot spots and challenges, as well as steps industry can take to enhance compliance. To register for the webinar, please visit https://www1.gotomeeting.com/register/149431416.

Benjamin Klubes will be speaking as a panelist on the litigation update panel of the American Securitization Forum in Orlando, Florida on Tuesday, February 8.

Andrew Sandler and Jonice Gray Tucker will be presenting at the ABA's web conference "The Foreclosure Crisis Tsunami" on Tuesday, February 8. The 90-minute webinar will cover emerging litigation and enforcement trends as well as strategies for practicing in the current environment. Also on the panel will be Eric I. Halperin, Special Counsel for Fair Lending, Civil Rights Division, DOJ.

Andrew Sandler will be speaking at the 2011 ABA National Conference for Community Bankers on Tuesday, February 22 in San Diego. Mr. Sandler's session is: The Federal Bank Regulatory and Enforcement Environment Post-Dodd-Frank. Speaking with Mr. Sandler is Mark W. Olson, Co-Chairman, Treliant Risk Advisors LLC.

James Parkinson will speak on the Foreign Corrupt Practices Act as a Visiting Lecturer at Universidad Panamericana, Mexico, on March 16.

Margo Tank will be speaking at the E-Signature Summit for Banking Executives on April 8 in New York.

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.

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

Mortgages

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Borrower States Claims for Promissory Estoppel and Fraud Based on Bank's Breach of Promise to Negotiate Loan Modification. On January 27, a California Court of Appeal held that a borrower had stated claims for promissory estoppel and fraud based on allegations that her bank induced her to forego a Chapter 13 bankruptcy proceeding by promising to work with her to modify her loan, but then surreptitiously sold the borrower's home under a power of sale clause. *Aceves v. U.S. Bank, N.A.*, B220922 (Los Angeles County Super. Ct. No. BC410890) (Cal. Ct. App. Jan. 27, 2011). The borrower had fallen behind on her mortgage payments and filed for Chapter 7 bankruptcy protection, intending to convert the case to a Chapter 13 proceeding and, with financial assistance from her husband, to make good on the loan payments over time. When the borrower informed the bank of this plan, the bank replied that it would work with her on a loan modification if she would forego further bankruptcy proceedings. In reliance on this promise, the borrower did not convert the case to Chapter 13 and did not contest the bank's motion to lift the bankruptcy stay. Representatives of the servicer contacted the borrower several times over the following weeks, but never disclosed that the bank was preparing to sell the borrower's home following a nonjudicial foreclosure. The borrower filed suit, alleging promissory estoppel, fraud and other claims. The trial court dismissed the case on demurrer, but the appellate court reversed as to the promissory estoppel and fraud claims. First, the bank had breached its promise to "work with" the borrower on a loan modification by failing to negotiate with her. Second, the borrower reasonably and foreseeably relied on the promise. The court emphasized that, by promising to work with the borrower to modify the loan, the bank was offering something that a Chapter 13 proceeding could not, because long-term loans cannot be modified under Chapter 13. Third, the borrower's reliance was to her detriment because it deprived her of the ability to take advantage of the time that Chapter 13 provides for making good on the loan. The court noted, however, that because a promissory estoppel claim only entitles the plaintiff to the damages available for breach of contract, there was no basis to invalidate the foreclosure. Finally, the court held that the fraud claim survived because, in addition to the elements of promissory estoppel, the borrower had adequately alleged that the bank knew that its promise to negotiate was false when made. For a copy of the opinion, please see http://www.courtinfo.ca.gov/opinions/documents/B220922.PDF.

E-Financial Services

Delaware Court of Chancery Issues ESI Preservation Guidelines. On January 18, the Delaware Court of Chancery issued a reminder to all counsel appearing before the Court of their duty to preserve electronically stored information (ESI). The guideline, which does not have the force of a formal court rule, states that parties to litigation must take reasonable steps to preserve ESI. The guideline stresses that reasonableness of the efforts undertaken to preserve ESI will be determined on a case-by-case basis, but goes on to state that best practices include counsel oversight of a collaborative process to preserve ESI, the issuance of written litigation hold notices and the documentation of steps taken to preserve ESI. The Court's guideline specifically identifies the pervasive use of laptops and portable storage devices, such as USB flash drives, as challenges to be addressed by counsel when addressing ESI preservation matters. For more information, see http://courts.delaware.gov/forms/download.aspx?id=50988.

California Federal Court Holds Domain Names With Identical Roots But Different Suffixes Are Not Necessarily Interchangeable. On January 21, the U.S. District Court for the Central District of California held that a contractual agreement may or may not have been reached when a party offered to buy two domain names with identical roots and different suffixes, but the seller responded that it would accept the offer to sell one of the domain names. *Done! Ventures, LLC v. Gen. Elec. Co.*, No. 2:10-cv-04420 (C.D. Cal. Jan. 21, 2011). The defendants listed two domain names - Women.com and Women.net - for sale via the online domain marketplace Sedo.com. The plaintiff's CEO sent an email offering to purchase both domains for $1 million. Sedo.com replied, stating that "the offer for Women.com has been accepted" and that the "next steps" would involve the defendants creating a proposed bill of sale. A few days later, however, the defendants informed the plaintiff that they would not transfer the domain names. Moreover, the defendants allegedly set the disputed domain names to redirect web traffic to their own iVillage.com site, which would be a direct competitor of the plaintiff's potential websites. The plaintiff filed suit, claiming breach of contract under California law and seeking a temporary restraining order (TRO) enjoining the defendants from redirecting web traffic, while the defendants moved to dismiss the claims on the ground that no contract had been established. The court denied both motions. As to the motion for a TRO, the court held that the plaintiff had failed to demonstrate a likelihood of success on the merits because the reply email from Sedo.com referred to only one of the two domain names that were the subject of the offer. Despite the plaintiff's insistence that the parties used the term "Women.com" to refer to both domains and that it was industry practice to do so, the court held that the plaintiff had not "sufficiently established a meeting of the minds." In addition, the email's reference to "next steps" in the process made it unclear whether there was a complete agreement, as opposed to an agreement on only some of the key terms. The court also held that the TRO should be denied because the plaintiff had failed to show that it faced irreparable harm from the defendants' diversion of web traffic since the alleged harm was "speculative because it is entirely based on plaintiff's not-yet-developed business." Turning to the motion to dismiss, the court held that the allegations that the parties used the term "Women.com" to refer to both domain names, while not enough to establish a likelihood of success on the merits warranting a TRO, were sufficient to state a claim that there had been an offer and acceptance. Click here for a copy of the opinion.

Privacy/Data Security

Commerce Department Receives Feedback on Privacy Policy Changes. The Commerce Department recently published and invited comments on a report entitled "Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework" as a vehicle to spur further discussion with Internet stakeholders on this area of policy development. The comment period closed on January 28 with comments filed by consumer advocates, technology firms, the business community, and others. To view the report, please see http://www.ntia.doc.gov/internetpolicytaskforce/; to view the comments, please see http://www.ntia.doc.gov/comments/101214614-0614-01/.

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