

December 16, 2011

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## Federal Issues

**CFPB Announces Whistleblower Program.** On December 15, the Consumer Financial Protection Bureau (CFPB) issued Bulletin 2011-05 announcing its program to collect whistleblower information and law enforcement tips. As described more fully in the Bulletin, section 1057 of the Dodd-Frank Act protects certain employees from retaliation who submit information about their employers' potential violations of the consumer financial protection laws now enforced by the CFPB. The Bureau has established for immediate use an email address and phone number for submitting whistleblower tips. In addition, the CFPB expects to make a web site portal for whistleblowers available in early 2012. In the Bulletin, the CFPB states that it "welcomes information from current or former employees of potential violators, contractors, vendors, and competitor companies." [Click here for a CFPB press release about this program, including a link to the Bulletin.](#)

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comment, the CFPB outlines its plan to conduct one-on-one cognitive think-aloud interviews to develop its model forms and disclosures. The CFPB invites comment on, among other things, whether the information it plans to collect will have practical utility. Comments are due by January 13, 2012. [Click here for a copy of the CFPB notice.](#)

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The suit follows a December 8 FHFA directive to Fannie Mae and Freddie Mac requiring them to, among other things: (i) draft revised servicing guidelines instructing servicers to make payments pursuant to the ordinance only under protest and with a full reservation of rights, (ii) establish a mechanism to track amounts paid under the ordinance and the costs to comply with the ordinance's property maintenance requirements, and (iii) propose new pricing for future mortgages originated or refinanced in Chicago to reflect the costs of complying with the ordinance. On December 12, Fannie Mae and Freddie Mac issued industry notices pursuant to the FHFA directive instructing servicers to: (i) review the directive, (ii) track expenses related to the ordinance and preserve payment documentation, and (iii) watch for additional servicing guidelines to implement the FHFA directive.

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## Courts

**Connecticut Supreme Court Confirms MERS Assignee Has Standing to Foreclose.** On December 13, the Connecticut Supreme Court held that state law conferred standing on the holder of a promissory note to foreclose on a borrower and that a mortgage naming Mortgage Electronic Registration Systems, Inc. (MERS) mortgagee, as nominee of the original lender, was valid. *RMS Residential Properties, Inc. v. Miller*, No. SC 18746, 2011 WL 6033011 (Conn. Dec. 13, 2011). The borrower executed a promissory note to the lender and conveyed a mortgage deed to MERS as nominee of the lender. After the borrower failed to make a single payment, the mortgage was assigned to the plaintiff RMS, which also became holder of the promissory note before it commenced the foreclosure action. In affirming the trial court's grant of summary judgment in favor of the plaintiff, the Court rejected the borrower's argument that the plaintiff lacked standing as a mere holder of the note. The Court also rejected the borrower's contention that the mortgage was void because MERS was not the original lender or the party secured by the mortgage. The Court found that the mortgage made clear that the lender named MERS mortgagee and that to hold such mortgages void would frustrate the intentions of both mortgagors and mortgagees.

[Click here for a copy of the opinion.](#)

**DOJ and SEC Announce FCPA Cases Against Former Siemens Executives.** On December 13, the Department of Justice (DOJ) announced criminal charges against eight former Siemens executives for violation of the Foreign Corrupt Practices Act (FCPA). The indictment alleges that over \$100 million in bribes were paid to Argentinean officials in connection with a substantial contract to provide national identity cards. Concurrently, the Securities and Exchange Commission (SEC) announced a parallel action against seven of those Siemens personnel to pursue civil remedies related to the same FCPA violations. [Click here for the DOJ and SEC announcements regarding these cases, as well as additional related materials, at BuckleySandler's FCPA Score Card.](#)

**Florida Supreme Court to Decide Issue Related to Sanctions for Fraudulent Assignment Despite Parties' Joint Dismissal of Case.** On December 8, the Florida Supreme Court decided it will rule on whether the trial court may grant relief from a plaintiff's voluntary dismissal of a foreclosure action when the defendant alleges that the plaintiff filed a fraudulent mortgage assignment despite the parties' joint stipulated dismissal of the case. *Pino v. Bank of New York*, No. SC11-697, 2011 WL 6089978 (Fla. Dec. 8, 2011). In the trial court, the borrower in a foreclosure action challenged the lender's assignment documents as fraudulent and moved for sanctions. The lender voluntarily dismissed the case before a decision on the motion for sanctions. The trial court denied the



borrower's subsequent motion to vacate the voluntary dismissal. The Florida Fourth District Appellate Court affirmed, but certified to the Florida Supreme Court the question of whether a trial court has authority to grant relief from a voluntary dismissal before the plaintiff has obtained any affirmative relief when the movant alleges a fraud on the court. While that question was pending, the parties settled and filed a joint stipulation of dismissal. The Florida Supreme Court denied the joint request for dismissal because the question presented was of "great public importance." [Click here for the court's opinion.](#)

**California Federal Court Denies Class Certification in Action Alleging Violations of California Song-Beverly Credit Card Act.** Recently, the U.S. District Court for the Central District of California denied a motion to certify a putative class in an action alleging violations of California's Song-Beverly Credit Card Act ([Cal. Civ. Code § 1747.08](#)) (Song-Beverly Act), on the grounds that the proposed class includes individuals who had not suffered the statutory violation the plaintiff sought to redress in the lawsuit, and a case-by-case inquiry into whether each customer voluntarily disclosed personal identification information (PII) violates the commonality and typicality requirements of Federal Rule of Civil Procedure 23(a). *Rothman v. Gen. Nutrition Corp.*, No. 11-03617 (C.D. Cal. Nov. 17, 2011). The Song-Beverly Act prohibits retailers from requesting or recording a customer's personal identification information as a condition to accepting a customer's credit card as payment, and then recording that information. The plaintiff alleged that the defendant "requested and/or required" her to provide her ZIP code in completing a credit card purchase. Relying, at least in part, on *Wal-Mart Stores, Inc. v. Dukes*, the court held that the plaintiff failed to cite any evidence to support her contention that the defendant had a uniform policy of requesting ZIP code information (or other PII) from its customers, and there are unique defenses specific to various class members, including that they provided their information voluntarily or for shipping or delivery purposes. Further, the court held that if the PII is requested as opposed to required, whether there has been a violation would depend upon whether the individual consumer reasonably believed that providing his PII was a condition of consummating the credit card transaction, and the analysis will vary with each customer based on when during the transaction the information was requested and the exact wording of the request. This appears to be the first time that a court has decided class certification in an action involving claims under the Song-Beverly Act. [For a copy of the order, please click here.](#)

## Firm News

[Jonice Gray Tucker](#) will be speaking in an ALI-ABA phone seminar, titled "CFPB: Redefining the Consumer Credit Market by Defining 'Abusive' Standards," on December 21, 2011. The seminar will discuss the the CFPB's structure, powers, and enforcement priorities; key initiatives; the new Supervisory Manual; anticipated collaboration with other government regulators; and the Bureau's interim rules. For more information on this seminar, visit: [www.ali-aba.org/TSTK01](http://www.ali-aba.org/TSTK01)

[Donna Wilson](#) will be participating as a panelist at the Round Table on 2011-2012 Legal Developments and Trends for the Retail and Fashion Industries on January 19, 2012 in New York, New York.

[James Parkinson](#) will be speaking on a panel at the ACI Latin America Summit on Anti-Corruption held in Sao Paulo, Brazil on February 8, 2012. The panel is entitled: "Assessing the Risk of Personal Liability in Bribery Investigations."

[David Krakoff](#) will be participating in a panel at the International Association of Defense Counsel program on worldwide anti-corruption laws in Palm Springs in February 2012.

[Donna Wilson](#) will be speaking at the ABA Section of Litigation Insurance Coverage CLE Seminar held at the Loews Ventana Canyon Resort in Tucson, Arizona from March 1-3, 2012. Ms. Wilson will be representing the defense counsel perspective in a plenary session panel entitled "The Credit Crisis and D&O Insurance Coverage: Challenges facing Insureds, Insurers, and Regulators" on March 1 from 1:00 PM to 2:10 PM.

[Andrew Sandler](#) will be speaking at PLI's A Guide to Financial Institutions 2012 Program in New York on March 6, 2012 at 4:00 PM in a session entitled "The New Era of Consumer Protection & Enforcement: The CFPB & Other Initiatives."

[James Parkinson](#) will be chairing a panel at the International Bar Association's 10th Annual Anti-Corruption Conference in Paris, France on March 13 and 14, 2012. The panel is entitled: "The Privileged Profession: Risks faced by legal professionals advising in international transactions."

[James Parkinson](#) will be speaking at a PLI program seminar entitled "Foreign Corrupt Practices Act 2012" in San Francisco, California on April 17, 2012 and in New York, New York on May 4, 2012.

## Mortgages

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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](mailto:infobytes@buckleysandler.com)

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