Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

October 22, 2010

Topics In This Issue

Federal Issues

Federal Agencies Meet as Part of Coordinated Investigation Into Foreclosure Crisis. On October 20 representatives of 11 federal agencies and entities met at the White House to coordinate a burgeoning federal investigation into all aspects of the foreclosure crisis, including whether those responsible for submitting flawed court documents violated federal criminal laws. In an interview with Bloomberg after the meeting, the Secretary of Housing and Urban Development, Shaun Donovan, said that the federal agencies are coordinating with state Attorneys General and that "there are questions, criminal questions, about behavior and willful fraud." Secretary Donovan also stated that the criminal issues are only part of a broader inquiry and that, while there is no evidence to date of "systemic problems" associated with the foreclosure filings, there are "significant concerns that particular institutions have not followed requirements" to make efforts to keep homeowners in their homes. See "Firm News" below for related RMA audio conference, "Mortgage Foreclosure Crisis: Preparing for the Worst" which will focus on criminal risks arising from the mortgage foreclosure crisis. For a description of this subject, click here.

FDIC Board Proposes Fund Management Plan and Issues Notice of Proposed Rulemaking Concerning Changes to Rate Schedules. The Board of Directors of the Federal Deposit Insurance Corporation (FDIC Board) voted on October 19 to propose a long-range plan for deposit insurance fund management with the stated goals of maintaining a positive fund balance, even during periods of large fund losses, and maintaining steady assessment rates throughout economic and credit cycles. The plan was prepared in response to changes to the FDIC's authority to manage the Deposit Insurance Fund contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). As part of the fund management plan, the FDIC Board adopted a new Restoration Plan (i) to ensure that the fund reserve ratio reaches 1.35 percent by September 30, 2020, as required by the Dodd-Frank Act, and (ii) which keeps the current rate schedule in effect and forgoes the uniform 3 basis point assessment rate increase previously scheduled to go into effect January 1, 2011. Finally, the FDIC Board also adopted a notice of proposed rulemaking that would (i) set the designated reserve ratio at 2 percent as a long-term, minimum goal, (ii) adopt a lower assessment

rate schedule when the reserve ratio reaches 1.15 percent so that the average rate over time should be about 8.5 basis points, and (iii) in lieu of dividends, adopt lower rate schedules when the reserve ratio reaches 2 percent and 2.5 percent so that average rates will decline about 25 percent and 50 percent, respectively. For the complete press release of the FDIC regarding the Board's proposals, please see http://www.fdic.gov/news/news/press/2010/pr10229.html.

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Federal Reserve Board Proposes Amendment to Regulation Z to Clarify Credit Card Act. On October 19, the Federal Reserve Board (FRB) proposed a rule amending Regulation Z to clarify portions of the FRB's final rules implementing the Credit Card Accountability Responsibility and Disclosure Act of 2009, which was enacted in May 2009. Specifically, the proposal would clarify that (i) promotional programs that waive interest charges for a specified period of time and those that apply reduced rates for a promotional period are subject to the same protections, (ii) application and similar fees a consumer is required to pay before opening a credit card account are covered by the same limitations on fees charged during the first year after the account is opened, and (iii) card issuers must consider information regarding the consumer's independent income when evaluating his ability to make the required payments before opening a new account or increasing a credit limit. For a copy of the press release, please click here.

FTC Rule Prohibits Debt Relief Companies from Collecting Advance Fees. On October 20, the Federal Trade Commission (FTC) announced that, effective October 27, companies that sell debt relief services over the telephone cannot charge fees before settling or reducing a customer's credit card or other unsecured debt. Under changes to the FTC's Telemarketing Sales Rule (the Rule) made last July, debt relief companies may not collect fees until (i) at least one of the consumer's debts is settled or changed, (ii) the consumer and creditor have a settlement agreement, debt

management plan, or other agreement, and (iii) the consumer has made at least one payment to the creditor under the agreement negotiated by the debt relief provider. The advance fee ban does not apply retroactively. Another provision of the Rule places additional restrictions on providers that require consumers to set aside provider fees and savings used to pay creditors in a dedicated account, including that (i) the consumer must own the funds in the account and any interest and (ii) the consumer must be able to withdraw from the debt relief service at any time without penalty and receive unearned provider fees and savings within seven business days. The Rule covers only for-profit debt relief services (not non-profit services), including credit counseling, debt settlement, and debt negotiation services. For a copy of the press release, please click here.

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New York Banking Department Asks Servicers to Conduct Internal Review and Halt Foreclosures. The New York State Banking Department (Department) recently issued a letter to several mortgage loan servicers requesting that they conduct internal reviews of their foreclosure practices in New York and requesting that they suspend pending New York foreclosure actions in the interim. The Department requested that each servicer respond to the Department by October 22, 2010 with information regarding its internal review, including (i) steps taken to review the foreclosure process, (ii) the results of such review, including a description of the process for verifying affidavits submitted in support of foreclosure actions and identifying employees or agents who have executed foreclosure documents with irregularities or without direct personal knowledge of the facts, (iii) corrective action taken or being taken in response to the internal review, (iv) measures taken or being taken to ensure that affidavits filed in foreclosure actions are executed in compliance with New York law, and (v) the status of pending foreclosure actions in New York and measures taken to suspend such actions pending review. For a copy of the Industry Letter, please see http://www.banking.state.ny.us/ilmb101008.htm.

Maryland Court of Appeals Approves Emergency Rule on Screening Foreclosure Documentation and Special Master Reviews. On October 19, the Maryland Court of Appeals approved Emergency Rule 14-207.1 and amendments to Maryland Court Rules 1-311 and 14-207, authorizing Maryland courts to adopt procedures to screen pleadings and documents, including affidavits, filed in foreclosure proceedings for compliance with legal requirements. Where a court has reason to believe an affiant in a foreclosure proceeding (i) may not have read or personally signed an affidavit, (ii) did not have a sufficient basis to attest to the accuracy of the facts in the affidavit, or (iii) failed to appear before a notary, the court may order the party to show cause why the affidavit should not be stricken, and why the action should not be dismissed. The Rule also empowers courts to order affiants and notaries to testify under penalty of perjury as to the circumstances of the signing of the affidavits, and provides that special masters may be appointed to screen foreclosure documents, and to conduct the proceedings in which affiants or notaries may be required to testify. Plaintiffs have 30

days to demonstrate compliance if a pleading or affidavit is questioned. If a party attempts to amend, supplement, or confirm a previously filed affidavit or pleading, the party must serve the new document on all parties and their attorneys, regardless of whether the original affidavit or pleading required service. Finally, attorneys who submit an improperly signed pleading or paper, or one signed with intent to defeat the purposes of the rule requiring an attorney signature, may have the pleading or paper stricken and be subject to discipline. The new Rules took effect for all new actions commenced on or after October 20, 2010, and "insofar as practicable to all actions then pending." For a copy of the Emergency Rule, please see http://www.courts.state.md.us/rules/rodocs/ro166.pdf. For a copy of the Rules Committee's letter transmitting the Emergency Rule to the Court of Appeals, please see http://www.courts.state.md.us/rules/docs/166threport.pdf.

Courts

Eleventh Circuit Vacates Prior Decision That Narrowly Interpreted CAFA, And Overrules District Court Ruling Denying. The Eleventh Circuit Court of Appeals recently vacated a prior decision in which the panel narrowly interpreted the Class Action Fairness Act (CAFA) to limit a federal court's original or removal jurisdiction to cases where at least one plaintiff satisfied the $75,000 amount-in-controversy requirement of 28 U.S.C. § 1332(a). *Cappuccitti v. DirecTV, Inc.*, 2010 WL 4027719, No. 09-14107 (11th Cir. Oct. 15, 2010). The 11th Circuit granted rehearing and vacated the earlier opinion, acknowledging that their previous interpretation of CAFA was "incorrect." The opinion explicitly stated that "CAFA's text does not require at least one plaintiff in a class action to meet the amount in controversy requirement of 28 U.S.C. § 1332(a)." In the underlying case, a purported state-wide class action, the plaintiff asserted that it would be "unconscionable" to force him to arbitrate his claim for recovery of a $420 early cancellation fee because (i) the amount he could recover would be less than the expenses he would incur in seeking such recovery, and (ii) his inability to recover attorneys' fees for the arbitration, coupled with the arbitration agreement's prohibition on consolidating claims or engaging in class arbitration, effectively precluded him from obtaining legal counsel. The district court had accepted the plaintiff's unconscionability theory and denied DirecTV's motion to compel arbitration. The Eleventh Circuit reversed the ruling, pointing to the plaintiff's election to rely exclusively on common law claims, which prohibit a prevailing party from recovering attorneys' fees. The Court went on to state, however, that the plaintiff could have sued under the Georgia Fair Business Practices Act, which permits such recovery. According to the Eleventh Circuit, the trial court must conduct a fact-intensive exercise to determine unconscionability and "consider all of the remedies available to Cappuccitti under Georgia law at the moment he contracted with DirecTV" - not just those limited remedies set forth by the plaintiff's attorneys. For a copy of the opinion, please click here.

Ninth Circuit Holds That Plaintiffs Can Seek Class Certification in FACTA Case Despite Size of Potential Liability. The U.S. Court of Appeals for the Ninth Circuit recently held that a plaintiff may seek class certification for claims brought under the Fair and Accurate Credit Transactions Act (FACTA), even though a class action lawsuit could result in a high amount of statutory damages. *Bateman v. American Multi-Cinema, Inc.*, 2010 WL 3733555, No. 09-55108 (9th Cir. Sept. 27, 2010). In *Bateman*, the plaintiff brought a putative class action lawsuit contending that the defendant violated FACTA by including more than the last five digits of consumers' credit or debit card numbers on

electronically printed receipts. Plaintiff sought to recover $100 to $1,000 in statutory damages for each willful violation, which could result in a potential liability against the defendant for as much as $29 million to $290 million if the class is certified. The Ninth Circuit explained that to certify a class a plaintiff must show that (i) the questions of law or fact common to class members predominate over any questions affecting only individual members, and (ii) a class action lawsuit is superior to other available methods of fairly and efficiently adjudicating the controversies. The district court denied class certification based on its finding that plaintiff failed to show superiority because of (i) the enormity of the potential damages, (ii) the disproportionality between the potential liability and the actual harm suffered, and (iii) defendant's good faith compliance after the lawsuit was filed. The Ninth Circuit reversed. Although it acknowledged that many courts have viewed issues of enormity and disproportionality as bases for finding that the superiority requirement unsatisfied in FACTA cases,it found otherwise. The court reasoned that considerations of the enormity or disproportionality of potential liability must turn on ascertaining the congressional intent underlying the particular statute pursuant to which the plaintiff brings her claims. Reviewing FACTA's background and statutory language, the court concluded that those issues are not factors to be considered in a FACTA claim superiority analysis because FACTA's statutory damages are compensatory, and thus Congress intended that any potential class member be entitled to compensation for harm. The court also found that denying class certification due to the enormity or proportionality of potential liability would undermine the deterrent purpose of such damages because the largest violators of FACTA, by creating large potential liability, would escape liability. The court reserved judgment, however, on whether a court could consider the enormity of potential liability in a FACTA case if the liability might be ruinous to the defendant, and on whether the size of an award granted *after* trial might be reduced for being unconstitutionally excessive. With respect to the good faith compliance basis for denying certification, the Ninth Circuit also rejected good faith compliance as a basis for denying certification, finding that it would reduce deterrence since any potential defendant would know that it could violate FACTA and simply avoid a class action lawsuit by complying only after the lawsuit was filed. For a copy of the opinion, please see here.

Federal Court Addresses Scope of FACTA. The U.S. District Court for the Western District of Missouri recently addressed arguments relating to the scope of the Fair and Accurate Credit Transactions Act (FACTA) in ruling on cross motions for summary judgment. *Hammer v. JP's Southwestern Foods*, 2010 WL 3743673, No. 08-0339 (W.D. MO Sept. 13, 2010). The plaintiff brought a purported class action lawsuit against the defendant restaurant for providing customers with receipts including the customer's entire credit card number in violation of FACTA. The plaintiff did not allege any actual damages as a result of the non-compliant receipts, but sought statutory damages of not less than $100 and not more than $1000 for each willful violation, plus punitive damages, attorneys' fees and costs. The estimated damages were between $4.5 million and $45 million. In ruling on the parties' cross motions for summary judgment, the court held (i) although there were no allegations of actual injury, the plaintiff had suffered an injury sufficient to confer standing because FACTA has created a legally protected interest in receiving compliant receipts, (ii) the statutory penalties are not unconstitutional as grossly excessive punishment because the defendant did not show that there was no set of circumstances under which the statutory damages would be valid, and an "as applied" constitutional challenge would be appropriate only after a verdict is entered, (iii) although FACTA applies to both consumer and business transactions, only consumer card

holders may recover damages, (iv) class members who are not card owners but who were provided non compliant receipts, as authorized card holders or otherwise, may remain members of the class, and (v) whether the defendant knowingly and intentionally violated the statute-a prerequisite to recovery of statutory damages where there are no actual damages-is a question for the jury. For a copy of the opinion, please click here.

Firm News

Jerry Buckley, Sam Buffone and Ben Klubes will be presenting an Risk Management Association audio conference on "Mortgage Foreclosure Crisis: Preparing for the Worst" on November 3 at 2:00PM focusing on potential criminal enforcement risks. A special discounted price of $100 is available to *InfoBytes* subscribers. If you register by phone (800-677-7621), please mention the MFAS100 code for the discount, or you can register online by clicking here.

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: 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, of the Office of Thrift Supervision, Michael Stolworthy from the Office of the Inspector General of HUD, Robert Kenny, 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 Klubesand Jonice Gray Tucker will be speaking at the 2010 CRA & Fair Lending Colloquium in Las Vegas from November 7-10, 2010. 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: The Future is Here, on December 8. Mr. Sandler's session is: 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. The topic will be "Responding to the Latest Cyber Threats: Mobile Workforces, Technology, Data Thefts, and Cloud Computing."

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 Andy will be Attorney General William Sorrell, AG, State of Vermont and Attorney General Greg Zoeller, AG, State of Indiana.

Mortgages

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SEC Seeks Public Comment on Asset-Backed Securities Rules. Recently, the Securities and Exchange Commission (SEC) announced that it was seeking public comment on proposed regulations to require issuers of asset-backed securities (ABS) and the credit rating agencies that rate ABS to provide investors with new disclosures about representations, warranties and enforcement mechanisms. Amid concerns about the representations and warranties as to the characteristics and the quality of the loans that undergird ABS, the SEC's proposed rules would, among other things, (i) require ABS issuers to disclose the repurchase history for all outstanding ABS, (ii) require ABS issuers to include the repurchase history for the last three years for ABS of the same asset class in their prospectuses, and (iii) require ratings agencies to disclose how the representations, warranties and enforcement mechanisms of a particular ABS differ from those of similar ABS. The public comment period for the proposed SEC rules ends on November 15, 2010. For a copy of the press release, please see here.

Litigation

Eleventh Circuit Vacates Prior Decision That Narrowly Interpreted CAFA, And Overrules District Court Ruling Denying. The Eleventh Circuit Court of Appeals recently vacated a prior decision in which the panel narrowly interpreted the Class Action Fairness Act (CAFA) to limit a federal court's original or removal jurisdiction to cases where at least one plaintiff satisfied the $75,000 amount-in-controversy requirement of 28 U.S.C. § 1332(a). *Cappuccitti v. DirecTV, Inc.*, 2010 WL 4027719, No. 09-14107 (11th Cir. Oct. 15, 2010). The 11th Circuit granted rehearing and vacated the earlier opinion, acknowledging that their previous interpretation of CAFA was "incorrect." The opinion explicitly stated that "CAFA's text does not require at least one plaintiff in a class action to meet the amount in controversy requirement of 28 U.S.C. § 1332(a)." In the underlying case, a purported state-wide class action, the plaintiff asserted that it would be "unconscionable" to force him to arbitrate his claim for recovery of a $420 early cancellation fee because (i) the amount he could recover would be less than the expenses he would incur in seeking such recovery, and (ii) his inability to recover attorneys' fees for the arbitration, coupled with the arbitration agreement's prohibition on consolidating claims or engaging in class arbitration, effectively precluded him from obtaining legal counsel. The district court had accepted the plaintiff's unconscionability theory and denied DirecTV's motion to compel arbitration. The Eleventh Circuit reversed the ruling, pointing to the plaintiff's election to rely exclusively on common law claims, which prohibit a prevailing party from recovering attorneys' fees. The Court went on to state, however, that the plaintiff could have sued under the Georgia Fair Business Practices Act, which permits such recovery. According to the Eleventh Circuit, the trial court must conduct a fact-intensive exercise to determine unconscionability and "consider all of the remedies available to Cappuccitti under Georgia law at the moment he contracted with DirecTV" - not just those limited remedies set forth by the plaintiff's attorneys. For a copy of the opinion, please click here.

Ninth Circuit Holds That Plaintiffs Can Seek Class Certification in FACTA Case Despite Size of Potential Liability. The U.S. Court of Appeals for the Ninth Circuit recently held that a plaintiff may seek class certification for claims brought under the Fair and Accurate Credit Transactions Act

(FACTA), even though a class action lawsuit could result in a high amount of statutory damages. *Bateman v. American Multi-Cinema, Inc.*, 2010 WL 3733555, No. 09-55108 (9th Cir. Sept. 27, 2010). In *Bateman*, the plaintiff brought a putative class action lawsuit contending that the defendant violated FACTA by including more than the last five digits of consumers' credit or debit card numbers on electronically printed receipts. Plaintiff sought to recover $100 to $1,000 in statutory damages for each willful violation, which could result in a potential liability against the defendant for as much as $29 million to $290 million if the class is certified. The Ninth Circuit explained that to certify a class a plaintiff must show that (i) the questions of law or fact common to class members predominate over any questions affecting only individual members, and (ii) a class action lawsuit is superior to other available methods of fairly and efficiently adjudicating the controversies. The district court denied class certification based on its finding that plaintiff failed to show superiority because of (i) the enormity of the potential damages, (ii) the disproportionality between the potential liability and the actual harm suffered, and (iii) defendant's good faith compliance after the lawsuit was filed. The Ninth Circuit reversed. Although it acknowledged that many courts have viewed issues of enormity and disproportionality as bases for finding that the superiority requirement unsatisfied in FACTA cases,it found otherwise. The court reasoned that considerations of the enormity or disproportionality of potential liability must turn on ascertaining the congressional intent underlying the particular statute pursuant to which the plaintiff brings her claims. Reviewing FACTA's background and statutory language, the court concluded that those issues are not factors to be considered in a FACTA claim superiority analysis because FACTA's statutory damages are compensatory, and thus Congress intended that any potential class member be entitled to compensation for harm. The court also found that denying class certification due to the enormity or proportionality of potential liability would undermine the deterrent purpose of such damages because the largest violators of FACTA, by creating large potential liability, would escape liability. The court reserved judgment, however, on whether a court could consider the enormity of potential liability in a FACTA case if the liability might be ruinous to the defendant, and on whether the size of an award granted *after* trial might be reduced for being unconstitutionally excessive. With respect to the good faith compliance basis for denying certification, the Ninth Circuit also rejected good faith compliance as a basis for denying certification, finding that it would reduce deterrence since any potential defendant would know that it could violate FACTA and simply avoid a class action lawsuit by complying only after the lawsuit was filed. For a copy of the opinion, please see here.

Federal Court Addresses Scope of FACTA. The U.S. District Court for the Western District of Missouri recently addressed arguments relating to the scope of the Fair and Accurate Credit Transactions Act (FACTA) in ruling on cross motions for summary judgment. *Hammer v. JP's Southwestern Foods*, 2010 WL 3743673, No. 08-0339 (W.D. MO Sept. 13, 2010). The plaintiff brought a purported class action lawsuit against the defendant restaurant for providing customers with receipts including the customer's entire credit card number in violation of FACTA. The plaintiff did not allege any actual damages as a result of the non-compliant receipts, but sought statutory damages of not less than $100 and not more than $1000 for each willful violation, plus punitive damages, attorneys' fees and costs. The estimated damages were between $4.5 million and $45 million. In ruling on the parties' cross motions for summary judgment, the court held (i) although there were no allegations of actual injury, the plaintiff had suffered an injury sufficient to confer standing because FACTA has created a legally protected interest in receiving compliant receipts, (ii) the

statutory penalties are not unconstitutional as grossly excessive punishment because the defendant did not show that there was no set of circumstances under which the statutory damages would be valid, and an "as applied" constitutional challenge would be appropriate only after a verdict is entered, (iii) although FACTA applies to both consumer and business transactions, only consumer card holders may recover damages, (iv) class members who are not card owners but who were provided non compliant receipts, as authorized card holders or otherwise, may remain members of the class, and (v) whether the defendant knowingly and intentionally violated the statute-a prerequisite to recovery of statutory damages where there are no actual damages-is a question for the jury. For a copy of the opinion, please see http://72.10.49.200/uploads/36/doc/Hammer_v_JPs_Southwestern_Foods_LLC.pdf.

Credit Cards

Federal Reserve Board Proposes Amendment to Regulation Z to Clarify Credit Card Act. On October 19, the Federal Reserve Board (FRB) proposed a rule amending Regulation Z to clarify portions of the FRB's final rules implementing the Credit Card Accountability Responsibility and Disclosure Act of 2009, which was enacted in May 2009. Specifically, the proposal would clarify that (i) promotional programs that waive interest charges for a specified period of time and those that apply reduced rates for a promotional period are subject to the same protections, (ii) application and similar fees a consumer is required to pay before opening a credit card account are covered by the same limitations on fees charged during the first year after the account is opened, and (iii) card issuers must consider information regarding the consumer's independent income when evaluating his ability to make the required payments before opening a new account or increasing a credit limit. For a copy of the press release, please click here.