Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

January 13, 2012

Topics In This Issue

Federal Issues

CFPB Releases Mortgage Origination Exam Procedures. On January 11, the Consumer Financial Protection Bureau (CFPB) took its first action to implement its nonbank supervision program by releasing the procedures it will use in examining all bank and nonbank mortgage originators. The Mortgage Origination Examination Procedures describe the types of information examiners will collect to (i) evaluate policies and procedures, (ii) assess compliance with applicable consumer financial services law, and (iii) identify risks to consumers throughout the mortgage origination process. CFPB mortgage origination exams will focus on specific products and will cover one or more of the following modules: (i) company business model; (ii) advertising and marketing; (iii) loan disclosures and terms; (iv) underwriting, appraisals, and originator compensation; (v) closing; (vi) fair lending; and (vii) privacy. These newly released procedures are an extension of the Supervision and Examination Manual the CFPB released in October 2011 (see BuckleySandler Special Alert, October 17, 2011). Click here for a copy of the CFPB press release with a link to the procedures.

DOJ Releases Memorandum on Legality of Recess Appointments. On January 12, the Department of Justice Office of Legal Counsel, which is responsible for providing legal advice to the President, released the memorandum it prepared in advance of the President's recent decision to appoint Richard Cordray as CFPB Director. In short, the memorandum finds when the Senate is in a periodic pro forma session in which no business is to be conducted, the President may (i) conclude that the Senate is unavailable to perform its advise-and-consent function and (ii) exercise his power to make recess appointments. Pro forma sessions do not have the legal effect of interrupting an intrasession recess otherwise long enough to qualify as a "Recess of the Senate" under the Constitution. The conclusions are based on three considerations explored in detail in the memorandum: (i) the original understanding of the framers and the "longstanding views" of the executive and legislative branches with regard to the practical availability of the Senate to consider nominees, (ii) the inconsistent result of allowing pro forma sessions to prevent Presidential recess appointments given the purpose of the recess appointment clause and historical practice in similar situations, and (iii) the need to preserve constitutional separation of powers. Click here to review the memorandum.

Fannie Mae CEO Announces Resignation. On January 10, Fannie Mae CEO Michael Williams announced his plans to resign. Mr. Williams will continue to serve in his current role until the Fannie Mae board of directors appoints a successor. Click here for a copy of the Fannie Mae press release.

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determination process, and, by eliminating appeals, HUD will be able to release annual loan limits earlier, thereby providing more certainty to the market. HUD also noted that, because of the availability of transaction data, it received zero requests for appeal of the 2011 loan limits. Click here for a copy of the proposal.

FRB Governor Reviews Mortgage Servicing Enforcement Actions. On January 7, Federal Reserve Board (FRB) Governor Sarah Bloom Raskin, in a speech to the Association of American Law Schools, reviewed the status of federal banking regulators' enforcement responses to what she characterized as the "foreclosure crisis". Governor Raskin described the enforcement actions brought last year by the FRB and other banking regulators against mortgage servicers as "only a start in a comprehensive enforcement response to the foreclosure crisis" and provided a reminder that anticipated monetary penalties for alleged deficient servicing and foreclosure practices are still to come. Further, Governor Raskin identified strong enforcement as a necessary incentive to developing an improved mortgage servicing model. Click here for a copy of the speech.

State Issues

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For a copy of the final regulations, please click here.

Courts

U.S. Supreme Court Rules Credit Repair Organizations Act Does Not Override Arbitration Agreements. On January 10, the U.S. Supreme Court ruled (8-1) that the Credit Repair Organizations Act (CROA) does not override the Federal Arbitration Act's (FAA) broad requirement that arbitration agreements be enforced according to their terms. CompuCredit Corp. v. Greenwood, No. 10-948, 2012 WL 43514 (Jan. 10, 2012). This case involves a proposed class of consumers alleging CompuCredit violated the CROA when it marketed and provided a no-deposit credit card to consumers with poor credit and then charged fees against the credit limit. CompuCredit sought to compel arbitration to enforce the terms of the card agreement, which mandated individual arbitration of disputes. The district court and Ninth Circuit both sided with the proposed class, finding the arbitration clause in conflict with the CROA's "right to sue" provision and therefore void. On appeal,

the consumer respondents urged the Supreme Court to follow the Ninth Circuit and hold that because the CROA requires a disclosure that a consumer has the right to sue a violating credit repair organization, and because the CROA prohibits waiver of any right given under the CROA, the right to file suit cannot be waived by an arbitration agreement. The Supreme Court rejected the Ninth Circuit's line of reasoning and reversed, holding instead that (i) the FAA establishes a liberal policy requiring enforcement of arbitration agreements according to their terms, (ii) the CROA is silent on arbitration and its disclosure provisions do not create a right to sue that overrides the broad FAA mandate, and (iii) Congress could have specifically prohibited arbitration provisions in the CROA.

Click here for a copy of the Court's decision.

Upromise Settles with FTC Over Collection of Consumers' Personal Information. On January 5, the Federal Trade Commission (FTC) announced that Upromise had agreed to settle charges that its collection of consumers' personal information was deceptive and an unfair practice, and that the collection violated federal law. Upromise's website offered consumers a "TurboSaver Toolbar" download with a "Personalized Offers" feature to tailor savings opportunities to the consumer. The FTC alleged that the feature collected and transmitted, without encryption, the names of websites consumers visited, which links they clicked on, and information entered into webpages such as search terms, user names, and passwords. According to the FTC, the information collected also included credit card and financial account numbers, security codes and expiration dates, and Social Security numbers. Upromise's privacy statement, however, stated that (i) the toolbar would only infrequently and inadvertently collect personal identifying information, (ii) personal information would be removed before the data was transmitted, and (iii) Upromise automatically encrypts users' sensitive information. The proposed settlement requires in part that Upromise (i) destroy data collected, (ii) update its disclosures, (iii) notify consumers regarding the type of information collected and how to disable the toolbar, and (iv) obtain a biennial independent audit for the next twenty years. The proposed settlement is open for public comment through February 6. Click here for a copy of the complaint, consent order, FTC press release, and related materials.

Rhode Island Court Appoints Special Master to Oversee Foreclosure-Related Negotiations. On January 5, the U.S. District Court for the District of Rhode Island judge responsible for handling "hundreds" of cases related to mortgage servicing and foreclosure practices appointed Merrill Sherman as special master to assist with resolution of the backlog of pending cases. In re Mortgage Foreclosure Cases, Misc. No. 11-mc-88-M-LDA (D.R.I. Jan. 5, 2012). Under the order, Ms. Sherman, formerly the President and CEO of Bancorp Rhode Island, Inc., has authority to, among other things, (i) order parties to meet and engage in settlement negotiations, (ii) order production of information to facilitate negotiations, and (iii) establish certain other procedural mechanisms to support discussions. The special master also may, among other things, make recommendations for court action to facilitate settlement or better manage the litigation. For a copy of the court's order, please click here.

Washington District Court Rules ISP Contract Terms Were Not Reasonably Conspicuous. On January 3, the U.S. District Court for the Western District of Washington denied an Internet service provider's (ISP) motion to compel arbitration, holding in part that the ISP's terms of service agreement containing the arbitration clause was not reasonably conspicuous. Kwan v. Clearwire Corp., No. C09-

1392JLR, 2012 WL 32380 (W.D. Wash. Jan. 3, 2012). In this case, plaintiffs filed suit on behalf of a putative class against an ISP and its debt-collection vendors for violations of federal and state consumer-protection laws based on the defendants' repeated attempts to collect payments the ISP claimed it was due under mobile Internet service contracts. The ISP moved to compel arbitration, asserting (i) that its customers are required to acknowledge and agree to certain terms of service, including an agreement to arbitrate disputes, before using the ISP's services (i.e., a so-called "clickwrap agreement"); and (ii) that the ISP sent to customers order-confirmation e-mails that also included a link to the terms of service (i.e., a so-called "browsewrap agreement"). Relying on the Second Circuit's analysis in Specht v. Netscape Comms. Corp., 605 F.3d 17 (2nd Cir. 2002), the court identified as the central issue whether the consumer had notice of and access to the terms and conditions of the contract prior to the conduct that allegedly indicated the consumer's assent. With regard to the confirmation e-mail, the court found that the e-mail did not contain a direct link to the terms of service but rather a link to the ISP's homepage that provided subsequent links to the terms of service. Further, the link that was provided in the confirmation e-mail did not appear until the third page of the e-mail. Thus, the court held that access to the terms of service did not constitute sufficient or reasonably conspicuous notice of those terms. However, the court also held that the consumers' acceptance of terms through the clickwrap agreement would have bound them to the terms of service and the arbitration clause, but that issues of fact exist as to whether the named plaintiffs actually clicked to accept the terms. The court deferred resolution of those issues for a factual hearing, as well as a decision on whether a consumer who specifically declines to accept the terms of service is still bound by those terms by virtue of simply accessing the terms of service. For a copy of the court's order, please click here.

Oklahoma District Court Dismisses Most Claims in Putative Wrongful Foreclosure Class Action. On January 6, the U.S. District Court for the Western District of Oklahoma dismissed the majority of claims brought by two borrowers seeking to represent a class of borrowers against Bank of America Corporation, Bank of America N.A., and BAC Home Loans Servicing, LP (collectively BAC) for alleged wrongful foreclosure practices. Risener v. Bank of Am. Corp., No. 10-1110 (W.D. Okla. Jan 6, 2012). In this case, the borrowers claim that after their original servicer ceased operations, their loan servicing was assigned to BAC and their loan was inaccurately recorded as being in default. According to the borrowers, multiple attempts to prove that the borrowers were not in default were ignored by the defendants. Further, according to the borrowers, BAC Home Loans Servicing, LP, continued to send default notices and threatened to foreclose, refused to verify the borrowers' default status, and reported false information about borrowers to credit reporting agencies. As such, the borrowers allege that defendants (i) violated the Fair Debt Collections Practices Act (FDCPA) by using false, deceptive, or misleading representations in the collection of debts and by failing to provide certain required notices; and (ii) violated the Fair Credit Reporting Act (FCRA) by providing false information to credit reporting agencies and by failing to investigate the disputed default loan status. Agreeing with a recent Georgia decision involving a similar fact pattern, the court held that because the borrowers allege their loan was not in default, BAC could not have been "debt collectors" subject to the FDCPA, because the FDCPA requires a loan to be "in default", not "allegedly in default." Further, the borrowers do not allege that Bank of America Corporation or Bank of America, N.A. ever attempted to collect a debt and, therefore, regardless of their status as a debt collector, cannot be found in violation of the FDCPA. With regard to the borrowers' FCRA claims, the

court held that the FCRA does not include a cause of action for the act of providing false information but that borrowers' claims that BAC Home Loans Servicing failed to investigate were sufficiently supported by the allegations in the complaint and therefore could proceed. For a copy of the court's opinions, please click here.

Ninth Circuit Clarifies TILA Delivery Requirements. The U.S. Court of Appeals for the Ninth Circuit recently held that lender compliance with the Truth In Lending Act's (TILA) delivery obligation requires that the borrower be permitted to keep written copies of the right-to-rescind notice. Balderas v. Countrywide Bank, N.A., No. 10-55064, 2011 WL 6824977 (9th Cir. Dec. 29, 2011). In this case, the borrowers allege that the lender improperly pressured them into a loan and then refused to grant their request to rescind the loan, which allegedly occurred within the three-day rescission period. The borrowers claim that the lender provided defective copies of the Notice of Right to Cancel, which did not include the closing date or the expiration date for the rescission period. TILA requires that when the rescission notice is provided in writing, as it was in this case, the lender must deliver to the borrower two copies including the rescission expiration date. The district court ruled that a copy of the Notice of Right to Cancel attached to the complaint proved that the rescission notice was delivered to the borrowers, and on that basis dismissed the case. The Ninth Circuit disagreed, holding that the Notice of Right to Cancel in the record proves only that borrowers signed the document possessed by the lender. To "deliver" the notice in compliance with TILA requires a "permanent physical transfer from one party to another"; momentary delivery does not suffice. While the document in the record provides the lender with a rebuttable presumption of delivery, it does not prove that two copies were delivered to the borrowers as required. The court held that the borrowers should be permitted to attempt to rebut the presumption and prove their allegations of improper delivery to a trier of fact. Click here for a copy of the court's opinion.

Miscellany

EU Data Protection Supervisor Identifies Priorities for 2012. On January 10, the European Union Data Protection Supervisor (EDPS) published a strategic plan for legislative consultation in 2012. The EDPS intends to concentrate on the following issues in 2012: (i) the revision of the legal framework for data protection, (ii) technological developments and European Commission Digital Agenda, and (iii) further development of the EU policy freedom, security, and justice policy area. In addition to those primary areas of responsibility, the EDPS has identified financial sector reform as an area of focus for 2012. With regard to the EU's efforts to revise its data protection legislative framework, the EDPS plans to release an official opinion on the legislative proposals early this year, which will pay special attention to, among other things, jurisdiction for trans-border data processing, data subjects' rights, and data controllers' obligations. In the area of financial sector reform, the EDPS will issue in 2012 a package of opinions on policy proposals, including attempts to legislate reforms to (i) banking legislation, (ii) market abuse regulation, (iii) regulation and directive on markets in financial instruments, and (iv) credit rating agency regulation.

Click here for a copy of the EDPS 2012 strategic plan.

Firm News

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 at the Activist Investor Conference on January 23-24, 2012 in New York, on a panel entitled "Activism in China: Understanding Foreign Corrupt Practices Act (FCPA) Enforcement."

Benjamin Klubes will be speaking at the Mortgage Bankers Association's CampusMBA Workshop: "Prepare Now for Fair Lending Reviews and Enforcement" on January 24, 2012, from 10:15 AM to 12:00 PM in Washington, DC. Mr. Klubes' session is entitled: "Legal Theories," in which he will be addressing various fair lending issues, including the disparate impact standard and the possible impact of forthcoming Supreme Court decision in Magner v. Gallagher, as well as HUD's proposed amendment to the Fair Housing Act Rule. To register, please click here.

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's Midyear Meeting in Palms Springs, California on February 15, 2012. The panel is entitled "Worldwide Enforcement of Anti-Corruption Laws-Navigating the International Business Minefield."

James Shreve will be participating in the panel "When the Cloud Goes Bust: Data Breaches in the Cloud" on February 28, 2012 at the RSA Conference in San Francisco, CA. The panel will examine unique issues that may arise when a data security breach involves a company's data stored in a cloud and provide guidance on addressing cloud security breach incidents.

Margo Tank will be participating in a panel at the NACHA - The Electronic Payments Association's Internet Council Meeting in Tampa, Florida on February 29, 2012. The panel will explore the beneficial and harmful effects of data collection and usage, particularly as enabled by a mobile wallet.

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."

Margo Tank and **James Shreve** will be speaking on the panel "Meeting Consumer Protection Requirements in Mobile Payments" at the International Association of Privacy Professionals Global Privacy Summit in Washington, DC on March 7, 2012. The panel will explore the unique and often complex compliance issues for those involved in mobile payments. James Shreve also will be leading the panel "Addressing the Latest Wave of Global Breach Notice Requirements" at the IAPP Summit on March 7. This panel of attorneys from several countries will explore new US and international security breach notification requirements and compliance issues in addressing cross-border incidents.

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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Washington District Court Rules ISP Contract Terms Were Not Reasonably Conspicuous. On January 3, the U.S. District Court for the Western District of Washington denied an Internet service provider's (ISP) motion to compel arbitration, holding in part that the ISP's terms of service agreement containing the arbitration clause was not reasonably conspicuous. Kwan v. Clearwire Corp., No. C09-1392JLR, 2012 WL 32380 (W.D. Wash. Jan. 3, 2012). In this case, plaintiffs filed suit on behalf of a putative class against an ISP and its debt-collection vendors for violations of federal and state consumer-protection laws based on the defendants' repeated attempts to collect payments the ISP claimed it was due under mobile Internet service contracts. The ISP moved to compel arbitration, asserting (i) that its customers are required to acknowledge and agree to certain terms of service, including an agreement to arbitrate disputes, before using the ISP's services (i.e., a so-called "clickwrap agreement"); and (ii) that the ISP sent to customers order-confirmation e-mails that also included a link to the terms of service (i.e., a so-called "browsewrap agreement"). Relying on the Second Circuit's analysis in Specht v. Netscape Comms. Corp., 605 F.3d 17 (2nd Cir. 2002), the court identified as the central issue whether the consumer had notice of and access to the terms and conditions of the contract prior to the conduct that allegedly indicated the consumer's assent. With

regard to the confirmation e-mail, the court found that the e-mail did not contain a direct link to the terms of service but rather a link to the ISP's homepage that provided subsequent links to the terms of service. Further, the link that was provided in the confirmation e-mail did not appear until the third page of the e-mail. Thus, the court held that access to the terms of service did not constitute sufficient or reasonably conspicuous notice of those terms. However, the court also held that the consumers' acceptance of terms through the clickwrap agreement would have bound them to the terms of service and the arbitration clause, but that issues of fact exist as to whether the named plaintiffs actually clicked to accept the terms. The court deferred resolution of those issues for a factual hearing, as well as a decision on whether a consumer who specifically declines to accept the terms of service is still bound by those terms by virtue of simply accessing the terms of service. For a copy of the court's order, please click here.

Oklahoma District Court Dismisses Most Claims in Putative Wrongful Foreclosure Class Action. On January 6, the U.S. District Court for the Western District of Oklahoma dismissed the majority of claims brought by two borrowers seeking to represent a class of borrowers against Bank of America Corporation, Bank of America N.A., and BAC Home Loans Servicing, LP (collectively BAC) for alleged wrongful foreclosure practices. Risener v. Bank of Am. Corp., No. 10-1110 (W.D. Okla. Jan 6, 2012). In this case, the borrowers claim that after their original servicer ceased operations, their loan servicing was assigned to BAC and their loan was inaccurately recorded as being in default. According to the borrowers, multiple attempts to prove that the borrowers were not in default were ignored by the defendants. Further, according to the borrowers, BAC Home Loans Servicing, LP, continued to send default notices and threatened to foreclose, refused to verify the borrowers' default status, and reported false information about borrowers to credit reporting agencies. As such, the borrowers allege that defendants (i) violated the Fair Debt Collections Practices Act (FDCPA) by using false, deceptive, or misleading representations in the collection of debts and by failing to provide certain required notices; and (ii) violated the Fair Credit Reporting Act (FCRA) by providing false information to credit reporting agencies and by failing to investigate the disputed default loan status. Agreeing with a recent Georgia decision involving a similar fact pattern, the court held that because the borrowers allege their loan was not in default, BAC could not have been "debt collectors" subject to the FDCPA, because the FDCPA requires a loan to be "in default", not "allegedly in default." Further, the borrowers do not allege that Bank of America Corporation or Bank of America, N.A. ever attempted to collect a debt and, therefore, regardless of their status as a debt collector, cannot be found in violation of the FDCPA. With regard to the borrowers' FCRA claims, the court held that the FCRA does not include a cause of action for the act of providing false information but that borrowers' claims that BAC Home Loans Servicing failed to investigate were sufficiently supported by the allegations in the complaint and therefore could proceed. For a copy of the court's opinions, please click here.

Ninth Circuit Clarifies TILA Delivery Requirements. The U.S. Court of Appeals for the Ninth Circuit recently held that lender compliance with the Truth In Lending Act's (TILA) delivery obligation requires that the borrower be permitted to keep written copies of the right-to-rescind notice. Balderas v. Countrywide Bank, N.A., No. 10-55064, 2011 WL 6824977 (9th Cir. Dec. 29, 2011). In this case, the borrowers allege that the lender improperly pressured them into a loan and then refused to grant their request to rescind the loan, which allegedly occurred within the three-day rescission period. The

borrowers claim that the lender provided defective copies of the Notice of Right to Cancel, which did not include the closing date or the expiration date for the rescission period. TILA requires that when the rescission notice is provided in writing, as it was in this case, the lender must deliver to the borrower two copies including the rescission expiration date. The district court ruled that a copy of the Notice of Right to Cancel attached to the complaint proved that the rescission notice was delivered to the borrowers, and on that basis dismissed the case. The Ninth Circuit disagreed, holding that the Notice of Right to Cancel in the record proves only that borrowers signed the document possessed by the lender. To "deliver" the notice in compliance with TILA requires a "permanent physical transfer from one party to another"; momentary delivery does not suffice. While the document in the record provides the lender with a rebuttable presumption of delivery, it does not prove that two copies were delivered to the borrowers as required. The court held that the borrowers should be permitted to attempt to rebut the presumption and prove their allegations of improper delivery to a trier of fact. Click here for a copy of the court's opinion.

Privacy/Data Security

EU Data Protection Supervisor Identifies Priorities for 2012. On January 10, the European Union Data Protection Supervisor (EDPS) published a strategic plan for legislative consultation in 2012. The EDPS intends to concentrate on the following issues in 2012: (i) the revision of the legal framework for data protection, (ii) technological developments and European Commission Digital Agenda, and (iii) further development of the EU policy freedom, security, and justice policy area. In addition to those primary areas of responsibility, the EDPS has identified financial sector reform as an area of focus for 2012. With regard to the EU's efforts to revise its data protection legislative framework, the EDPS plans to release an official opinion on the legislative proposals early this year, which will pay special attention to, among other things, jurisdiction for trans-border data processing, data subjects' rights, and data controllers' obligations. In the area of financial sector reform, the EDPS will issue in 2012 a package of opinions on policy proposals, including attempts to legislate reforms to (i) banking legislation, (ii) market abuse regulation, (iii) regulation and directive on markets in financial instruments, and (iv) credit rating agency regulation.

Click here for a copy of the EDPS 2012 strategic plan