July 2, 2010

Topics In This Issue

Federal Issues

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State Issues

Louisiana Passes Law Regulating Reverse Mortgages. On June 21, Governor Bobby Jindal signed into law H.B. 1468, which provides for the regulation of reverse mortgage lending. Specifically, the law:

- Requires upfront disclosure of any mortgage that secures a reverse mortgage loan;
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The law becomes effective August 15, 2010. For the full text of the bill, please see here.

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Rhode Island Passes Law Regulating Title Insurance Companies. On June 12, Rhode Island enacted H 7709, the "Rhode Island Title Insurers Act," which becomes effective January 1, 2011. Among other things, the law (i) establishes minimum capital and surplus requirements for title insurers, (ii) sets certain asset and reserve requirements, (iii) requires prior written approval for title insurers to deviate from certain business diversification standards, (iv) establishes guidelines for policyholder treatment, (v) prohibits rebates and fee splitting, (vi) establishes rate and form filing procedures, and (vii) establishes penalties for violations of the law. For a copy of the bill, please see here.

Courts

Supreme Court Limits Scope of Honest-Services Fraud. On June 24, the U.S. Supreme Court handed down its much-anticipated decision in *Skilling v. United States*, which resolves important issues about the scope of federal anti-fraud statutes. *Skilling v. United States*, 561 U.S. __, 2010 WL 2518587 (U.S. June 24, 2010). In this case, former Enron CEO Jeffrey Skilling was convicted of committing wire fraud by conspiring to inflate the company's stock prices by exaggerating its financial health. Under 18 U.S.C. § 1346, the crime of wire fraud includes a scheme or artifice to deprive persons of their "right to honest services." Congress enacted § 1346 in response to an earlier Supreme Court case limiting federal anti-fraud statutes to the deprivation of money or property and rejecting an expansion of their reach to intangible rights, including the right to honest services. Lower courts had interpreted this language to extend to corporate executives who violate their fiduciary duty by failing to disclose conflicts of interest or self-dealing. On appeal, Skilling argued that § 1346 was unconstitutionally vague because its generalized language (i) did not give fair notice to the public as to what, exactly, was illegal, and (ii) created a risk for arbitrary and discriminatory prosecution. The Supreme Court held that § 1346 was unconstitutionally vague, except as applied to cases where the defendant receives "bribes and kickbacks." Thus, violations of fiduciary duty alone are no longer grounds for prosecution under § 1346. Six Justices joined in the Court's opinion; the remaining three issued a separate opinion finding that § 1346 was unconstitutionally vague on the whole-and thus unconstitutionally vague even as to bribery or kickback prosecutions. The Supreme Court also rejected Skilling's claim that trying him in Houston, the site of intense media coverage of Enron's collapse, denied him the right to a fair trial by an impartial jury. It found that the jury-selection process, which included the use of a 14-page questionnaire to pre-screen the juror pool and five hours of judge-led *voir dire*, combined with the jurors' statements that they could be impartial, satisfied the Constitution's guarantee of the right to a fair trial. For a copy of the opinion, please see here.

Ohio Federal Court Denies Summary Judgment in RESPA Affiliated Business Arrangement Case. On June 29, the U.S. District Court for the Northern District of Ohio denied a defendant mortgage company's motion for summary judgment in a case alleging a violation of the affiliated business arrangement (AfBA) provisions of the Real Estate Settlement Procedures Act (RESPA) because the defendant's AfBA disclosure form varied from the form prescribed in RESPA's regulations. *Toldy v. Fifth Third Mortgage Co.*, No. 1:09-CV-377 (N.D. Ohio Jun. 29, 2010). In *Toldy*, the plaintiff borrower obtained a mortgage loan from the defendant mortgage company and, as part of the transaction, utilized the services of the mortgage company's affiliated settlement service provider. The borrower had received an AfBA disclosure, intended to comply with a safe harbor provision of RESPA for AfBAs (Section 8(c)), as part of a 68-page booklet containing 19 different forms and disclosures. However, the AfBA disclosure did not contain a signature and acknowledgment box. Instead, the booklet contained a blanket signature and acknowledgment applicable to all of the disclosures and forms in the booklet. The court, in denying the defendants' motion for summary judgment, first determined that the borrower had sufficiently alleged a violation of the prohibition against kickbacks and referral fees in Section 8(a) of RESPA because the settlement service provider made payment of dividends to the common parent holding company that it shared with the mortgage company. The court also held that the defendants had not satisfied the Section 8(c) safe harbor requirements because the AfBA disclosure was not on a "separate" piece of paper, and because it lacked an acknowledgement and signature line. For a copy of the opinion, see here.

Ohio Federal Court Holds HUD Policy Statement on Sham AfBAs Unconstitutionally Vague. On June 30, the U.S. District Court for the Northern District of Ohio granted summary judgment to defendants in an anti-kickback case under the Real Estate Settlement Procedures Act (RESPA), finding that their affiliated business arrangements (AfBAs) complied with RESPA's requirements and holding that HUD's Policy Statement aimed at identifying "sham" AfBAs was unconstitutionally vague. *Carter v. Welles-Bowen Realty, Inc.*, No. 3:09 CV 400 (N.D. Ohio June 30, 2010). In *Carter*, the plaintiffs, who were purchasers of real estate, alleged that the defendants (including a title insurance company and a real estate agency) violated RESPA by setting up sham title insurance companies as conduits for kickbacks. The defendants moved for summary judgment, arguing that the title insurance providers were AfBAs exempt from RESPA's anti-kickback provisions because they (i) disclosed the ownership arrangement, (ii) did not require the borrowers to use a particular provider, and (iii) compensated their owners based purely on ownership interest. In response, the plaintiffs argued that the court must also determine whether the entities were sham entities by application of HUD's ten-factor test for distinguishing a "sham" AfBA from a "bona fide provider of settlement services," as set forth in HUD Policy Statement 1996-2 (the Policy Statement). The defendants argued that HUD's ten-factor test is unconstitutionally vague, and the court-without addressing whether the statement is entitled to judicial deference-agreed. According to the court, half of the factors in the Policy Statement used inherently vague terms (e.g., whether the AfBA has "sufficient" operating capital and net worth, without providing guidance as to what level would be "sufficient"). The court also found that the vagueness of the individual factors was "compounded by the subjective balancing process inherent in the test" because the ten factors would be "considered together" to make a final determination. According to the court, "[a]ny entity wishing to operate as an [AfBA] (an arrangement RESPA specifically condones, with certain limitations) is thus confronted with a massive gray area [where] [a]t some point . . . both civil and criminal liability might attach." Finding that the Policy Statement was void for vagueness, and that the defendants had complied with the AfBA requirements set forth in RESPA, the court granted the defendants' motion for summary judgment. For a copy of the opinion, please see here.

New Jersey Superior Court Requires Plaintiff in Foreclosure Action to Produce the Note. On June 29, the New Jersey Superior Court dismissed a plaintiff's foreclosure action because the plaintiff was unable to establish that it had "physical possession of the note as of the date the complaint was filed." *Bank of New York v. Raftogianis*, No. F-7356-09 (N.J. Super. June 29, 2010). In this case, a mortgage lender recorded a borrower's mortgage in the Mortgage Electronic Registration System (MERS), and the note and mortgage were subsequently securitized, without notice to the borrower. A foreclosure action was brought five years later by the plaintiff, a trust that was created as part of the securitization process. The defendant borrower challenged the plaintiff's right to proceed with the foreclosure because the plaintiff could not prove that it possessed the note at the time it initiated the foreclosure action. The court concluded that it was appropriate to require the plaintiff to establish that it had physical possession of the note as of the date the complaint was filed, and, as an evidentiary matter, held that the plaintiff "failed to establish that it was entitled to enforce the note as of the time the complaint was filed." The court reasoned that, under the Uniform Commercial Code, the plaintiff had no authority to enforce the note or mortgage without possession of the note.The court added that, in addition to producing the note, a foreclosing plaintiff "should be prepared" to provide additional disclosures about the securitization process (e.g., how the debt was transferred, copies of loan purchase, pooling, or servicing agreements, and applicable schedules). As a result, the court dismissed the plaintiff's complaint without prejudice to institute a new foreclosure action, subject to the court's holding. The court, however, rejected the defendant's argument that the original lender's use of MERS created a "separation" of the note from the mortgage that barred foreclosure. For a copy of the opinion, please see here.

New Jersey Federal Court Holds Recording Fee Overcharge Not a RESPA Violation. On June 16, the U.S. District Court for the District of New Jersey held that a recording fee overcharge by a title agency in connection with a mortgage refinancing did not constitute a violation of Section 8(b) of the Real Estate Settlement Procedures Act (RESPA). *Kiley v. NRT Title Agency, LLC*, No. 09-3549, 2010 WL 2541627 (D.N.J. June 16, 2010). In *Kiley*, the plaintiff borrowers sued their mortgage refinancing settlement agent, alleging that the settlement agent violated RESPA by charging them a $15 unearned fee as part of the recording fee. The borrowers claimed that, although the settlement agent played no role in recording the release of their prior mortgage, it "'nevertheless illegally charged [them] $15 for purportedly having performed this task.'" The court rejected the borrowers' argument, holding that because the settlement agent did not engage any third party to record the release or the new mortgage, it therefore "did not illegally markup the cost of any services performed by third parties." The court noted that the total recording fee covered the actual costs of recording, or was otherwise retained by the settlement agent, which performed services related to the recording of the new mortgage. The court, therefore, reasoned that "[the settlement agent], at worst, overcharged the [borrowers] for its services by lumping the two recording fee costs into one charge, an act that is not covered by the protections [of Section 8(b) of RESPA]." For a copy of the opinion, please see here.

Ninth Circuit Holds No Overcharge Necessary to Assert RESPA Section 8(b) Claim. On June 21, the U.S. Court of Appeals for the Ninth Circuit held that a plaintiff has standing to bring a claim against a settlement service provider under the Real Estate Settlement Procedures Act (RESPA), even if the plaintiff has not been overcharged for such services. *Edwards v. First American Corp.*, No. 08-56536, 2010 WL 2471900 (9th Cir. Jun. 21, 2010). In *Edwards*, the plaintiff borrower alleged that the defendants, a title insurance company and its parent company, entered into exclusive agency agreements wherein thousands of title insurance agencies were authorized to sell policies in exchange for the defendants purchasing a minority interest in the insurance agencies. The borrower filed suit, alleging that this practice violated RESPA's Section 8 anti-kickback provisions. On appeal, the defendants asserted that the borrower lacked standing because she failed to show an injury-in-fact. Under Ohio law, all title insurers must charge the same price, and therefore the charge to the plaintiff was not higher than it would have been without the exclusivity agreement. The Ninth Circuit rejected the borrower's argument and affirmed the district court, finding that "the damages provision in RESPA gives rise to a statutory cause of action whether or not an overcharge occurred." Therefore, the plaintiff demonstrated sufficient injury to provide standing to pursue her claim. The Ninth Circuit's holding is in agreement with decisions from the Third and Sixth Circuits holding that "a plaintiff has standing to sue a settlement service provider under RESPA, even if that plaintiff was not overcharged for settlement services." For a copy of the opinion, please see here.

California Federal Court Finds No Private Right of Action Under HAMP, National Housing Act. On June 15, the U.S. District Court for the Eastern District of California held that the Home Affordable Modification Program (HAMP), the National Housing Act (NHA) and the California Perata Mortgage Relief Act (PMRA) do not create private rights of action. *Zendejas v. Wholesale Mortgage Corp.*, No. 1:10-CV-00184, 2010 WL 2490975 (E.D. Ca. June 15, 2010). In *Zendejas*, the plaintiff debtors borrowed $220,500 from the lender to refinance their home mortgage. The debtors defaulted on the loan and requested a loan modification from the lender, who was a participant in HAMP. The parties were unable to come to an agreement on the loan modification due to the debtors decreasing income, and the property was subsequently foreclosed. The debtors brought suit, claiming the lender failed to offer them an acceptable loan modification or any other satisfactory options prior to foreclosure. More specifically, the debtors, in addition to various other claims, alleged the lenders failed to (i) conform to the provisions of HAMP, which require the lender to offer certain loan modification and foreclosure prevention services, (ii) comply with the notice requirements of the NHA, which required the lender to advise the debtors of any home ownership counseling they may be eligible for, and (iii) contact the debtors prior to default and foreclosure as required by the PMRA. The debtors also claimed that the failure to provide a loan modification constituted unfair or fraudulent business practices, in violation of California state law. The lenders rejected these claims and filed a motion to dismiss, which the court granted in its entirety. The court found that the debtors did not have standing to sue under HAMP, reasoning that HAMP does not create a private right of action. The court noted that a "borrower to a HAMP agreement would not be reasonable in relying on [it] as manifesting an intention to confer a right on him because the [HAMP] does not require a servicer to modify eligible loans." Likewise, the court stated that the NHA did not create a cause of action because the NHA gives a borrower no claim in the event that the lender "fail[s] to follow the statute or its implementing regulations." The court additionally found that California legislature did not intend to create a private right of action for borrowers for violations of the PMRA. Finally, the court rejected the state unfair or fraudulent business practice claim on the basis that no law required the lenders to provide a loan modification. For a copy of the opinion, please see here.

Illinois Federal Court Holds TCPA Damages Are Available on a Per-Call Basis Only. On June 25, the U.S. District Court for the Northern District of Illinois held that statutory damages under the Telephone Consumer Protection Act (TCPA) are available on a per-call basis, and not on a per-violation basis. *Martin v. PPP, Inc.*, No. 10 C 140, 2010 WL 2572524 (N.D. Ill. June 25, 2010). In this case, the plaintiff consumer claimed that he was entitled to damages for each of two separate violations of the TCPA that took place during a single phone call. The court acknowledged that although the Seventh Circuit has yet to address whether TCPA damages are available on a per-violation basis, the Sixth Circuit recently held that damages under a different section of the TCPA were available only on a per-call basis in *Charvat v. GVN Michigan, Inc.*, No. 08-3282 (6th Cir. 2009) (reported in *InfoBytes*, May 8, 2009). The court agreed with the Sixth Circuit, reasoning that the use of the word "violation" instead of "call" in the TCPA did not indicate an intent to allow plaintiffs to recover for each violation in a single call. Instead, as the court explained, "violation" merely clarified that the section applies to both fax transmissions and telephone calls. For a copy of the opinion, please see here.

Firm News

Andrew Sandler will participate in four webinars by the Financial Services Roundtable taking place 12:15 p.m. - 2:00 p.m. ET on July 8, July 15, July 22, and July 29. The scheduled topic is "The Restoring American Financial Stability Act of 2010: Legislative Reform Meets Regulatory Reality."

Jerry Buckley and Mark Olson will present a free A.S. Pratt audio conference, "The Financial Reform Act: What You Need to Know," on July 13 and July 15. For more information and to register, please visit http://bit.ly/qER5qN.

Christopher Witeck will be speaking on the "Securitization and Secondary Market" panel at ACI’s Reverse Mortgage Conference in New York on July 23.

Andrew Sandler will be the chairperson for Banking Crisis Fallout 2010 at PLI New York Center in New York City on November 4; the topic will be "Emerging Enforcement Trends."

The Chambers USA 2010 edition ranks BuckleySandler as a Band 1 firm in the Financial Services Regulation: Consumer Finance (Compliance) practice area, and as a Band 2 firm in the Financial Services Regulation: Banking (Enforcement & Investigations) practice area. Chambers quotes sources as saying that BuckleySandler is “[t]he best at what they do in the country.” For the full write up, please visit http://www.chambersandpartners.com/USA/Editorial/37050#org_139031.

The *National Law Journal* named Andrew Sandler a "Visionary" in its third annual Legal Times Awards. The *National Law Journal* writes that Andrew "has an impeccable sense of timing" in forming BuckleySandler LLP by combining his practice group with the former Buckley Kolar LLP in 2009. Visionaries are "attorneys whose business or legal acumen has been key to expanding their firms, improving government or advancing the law." To read the full article, please click here.

An article by Jonice Gray Tucker, Ben Saul, and Lori Sommerfield, "Regulators Target Fair Servicing," appeared in*Mortgage Banking* (June 2010).

An article by Jonice Gray Tucker, Lori Sommerfield, and Thomas Dowell, "Fair-Lending Principles Must Underpin Loss Mit," appeared in *Servicing Management* (June 2010). The article is available here.

Sara Emley spoke on a DC Bar panel, "What the Card Act Means for You: The Impact of the New Credit Card Rules on Banks, Consumers, and Businesses," on June 1.

Margo Tank and Donna Wilson participated in the ACI Data Privacy & Information Security Conference June 3-4 in Dallas, TX. Margo spoke on the panel "Preventing and Managing Litigation Associated with the Complex Array of State Breach Notification Laws." Donna's presentation was titled "Business-to-Business Litigation Risks and Realities."

Andrew Sandler spoke on June 6-7 at CBA Live, the Consumer Banker Association Conference in Hollywood, Florida. Andrew presented a Fair Lending Industry Overview on June 6 and spoke on Auto Fair Lending on June 7.

Jon Langlois spoke on the panel "Financial Regulatory Reform: How Will It Affect Us?" at the National Reverse Mortgage Lenders Association Policy Conference on June 7.

Andrew Sandler and Bob Cook spoke at the American Bankers Association's Regulatory Compliance Conference in San Diego, CA on June 14.

Clinton Rockwell and Joe Kolar spoke about buyback strategies at the American Mortgage Lenders Conference in Washington, DC on June 15.

Katy Ryan, Melissa Klimkiewicz, and Clinton Rockwell presented a webinar, "New Challenges - FHA Compliance and Enforcement & Multi-State Examination Process," on June 23 for West Professional Development and on June 24 for the California Mortgage Bankers Association.

Jerry Buckley presented "Coping with the Bank Regulatory Environment" at the Massachusetts Executive Officers Conference in New Castle, NH on June 25.

Miscellany

House, Senate Resolutions Designate June 30, 2010 National ESIGN Day. On July 1, the U.S. House of Representatives passed a resolution designating June 30th as "National ESIGN Day." June 30, 2010 is the 10th Anniversary of the signing of the Electronic Signatures in Global and National Commerce Act (ESIGN). On June 30, the U.S. Senate submitted and agreed to a resolution designating June 30, 2010 as National ESIGN Day. For a copy of the Industry Letter of support for National ESIGN Day, please contact Margo Tank. For a copy of the House resolution, please see http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:hc290ih.txt.pdf. For a copy of the Congressional Record, please see http://www.buckleysandler.com/ESIGN_Day_Congressional_Record.pdf.

Mortgages

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(MERS), and the note and mortgage were subsequently securitized, without notice to the borrower. A foreclosure action was brought five years later by the plaintiff, a trust that was created as part of the securitization process. The defendant borrower challenged the plaintiff's right to proceed with the foreclosure because the plaintiff could not prove that it possessed the note at the time it initiated the foreclosure action. The court concluded that it was appropriate to require the plaintiff to establish that it had physical possession of the note as of the date the complaint was filed, and, as an evidentiary matter, held that the plaintiff "failed to establish that it was entitled to enforce the note as of the time the complaint was filed." The court reasoned that, under the Uniform Commercial Code, the plaintiff had no authority to enforce the note or mortgage without possession of the note.The court added that, in addition to producing the note, a foreclosing plaintiff "should be prepared" to provide additional disclosures about the securitization process (*e.g.*, how the debt was transferred, copies of loan purchase, pooling, or servicing agreements, and applicable schedules). As a result, the court dismissed the plaintiff's complaint without prejudice to institute a new foreclosure action, subject to the court's holding. The court, however, rejected the defendant's argument that the original lender's use of MERS created a "separation" of the note from the mortgage that barred foreclosure. For a copy of the opinion, please see here.

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California Federal Court Finds No Private Right of Action Under HAMP, National Housing Act. On June 15, the U.S. District Court for the Eastern District of California held that the Home Affordable Modification Program (HAMP), the National Housing Act (NHA) and the California Perata Mortgage Relief Act (PMRA) do not create private rights of action. *Zendejas v. Wholesale Mortgage Corp.*, No. 1:10-CV-00184, 2010 WL 2490975 (E.D. Ca. June 15, 2010). In *Zendejas*, the plaintiff debtors borrowed $220,500 from the lender to refinance their home mortgage. The debtors defaulted on the loan and requested a loan modification from the lender, who was a participant in HAMP. The parties were unable to come to an agreement on the loan modification due to the debtors decreasing income, and the property was subsequently foreclosed. The debtors brought suit, claiming the lender failed to offer them an acceptable loan modification or any other satisfactory options prior to foreclosure. More specifically, the debtors, in addition to various other claims, alleged the lenders failed to (i) conform to the provisions of HAMP, which require the lender to offer certain loan modification and foreclosure prevention services, (ii) comply with the notice requirements of the NHA, which required the lender to advise the debtors of any home ownership counseling they may be eligible for, and (iii) contact the debtors prior to default and foreclosure as required by the PMRA. The debtors also claimed that the failure to provide a loan modification constituted unfair or fraudulent business practices, in violation of California state law. The lenders rejected these claims and filed a motion to dismiss, which the court granted in its entirety. The court found that the debtors did not have standing to sue under HAMP, reasoning that HAMP does not create a private right of action. The court noted that a "borrower to a HAMP agreement would not be reasonable in relying on [it] as manifesting an intention to confer a right on him because the [HAMP] does not require a servicer to modify eligible loans." Likewise, the court stated that the NHA did not create a cause of action because the NHA gives a borrower no claim in the event that the lender "fail[s] to follow the statute or its implementing regulations." The court additionally found that California legislature did not intend to create a private right of action for borrowers for violations of the PMRA. Finally, the court rejected the state unfair or fraudulent business practice claim on the basis that no law required the lenders to provide a loan modification. For a copy of the opinion, please see here.

Banking

House Passes Financial Reform Bill. On June 30, the U.S. House of Representatives passed (by a 237-192 vote) the Dodd-Frank Bill. Approval by the U.S. Senate, previously anticipated prior to the July 4 holiday, has been delayed. If and when the bill passes, BuckleySandler LLP will issue a *Regulatory Restructuring Report* containing a detailed summary of the legislation. For a summary of major provisions of the bill, please see *InfoBytes*, June 25, 2010 and http://1.usa.gov/kP1qGM.

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Rhode Island Passes Law Regulating Title Insurance Companies. On June 12, Rhode Island enacted H 7709, the "Rhode Island Title Insurers Act," which becomes effective January 1, 2011. Among other things, the law (i) establishes minimum capital and surplus requirements for title insurers, (ii) sets certain asset and reserve requirements, (iii) requires prior written approval for title insurers to deviate from certain business diversification standards, (iv) establishes guidelines for policyholder treatment, (v) prohibits rebates and fee splitting, (vi) establishes rate and form filing procedures, and (vii) establishes penalties for violations of the law. For a copy of the bill, please see here.

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Litigation

Supreme Court Limits Scope of Honest-Services Fraud. On June 24, the U.S. Supreme Court handed down its much-anticipated decision in *Skilling v. United States*, which resolves important issues about the scope of federal anti-fraud statutes. *Skilling v. United States*, 561 U.S. __, 2010 WL 2518587 (U.S. June 24, 2010). In this case, former Enron CEO Jeffrey Skilling was convicted of committing wire fraud by conspiring to inflate the company's stock prices by exaggerating its financial health. Under 18 U.S.C. § 1346, the crime of wire fraud includes a scheme or artifice to deprive persons of their "right to honest services." Congress enacted § 1346 in response to an earlier Supreme Court case limiting federal anti-fraud statutes to the deprivation of money or property and rejecting an expansion of their reach to intangible rights, including the right to honest services. Lower courts had interpreted this language to extend to corporate executives who violate their fiduciary duty by failing to disclose conflicts of interest or self-dealing. On appeal, Skilling argued that § 1346 was unconstitutionally vague because its generalized language (i) did not give fair notice to the public as to what, exactly, was illegal, and (ii) created a risk for arbitrary and discriminatory prosecution. The Supreme Court held that § 1346 was unconstitutionally vague, except as applied to cases where the defendant receives "bribes and kickbacks." Thus, violations of fiduciary duty alone are no longer grounds for prosecution under § 1346. Six Justices joined in the Court's opinion; the remaining three issued a separate opinion finding that § 1346 was unconstitutionally vague on the whole-and thus unconstitutionally vague even as to bribery or kickback prosecutions. The Supreme Court also rejected Skilling's claim that trying him in Houston, the site of intense media coverage of Enron's collapse, denied him the right to a fair trial by an impartial jury. It found that the jury-selection process, which included the use of a 14-page questionnaire to pre-screen the juror pool and five hours of judge-led *voir dire*, combined with the jurors' statements that they could be impartial, satisfied the Constitution's guarantee of the right to a fair trial. For a copy of the opinion, please see here.

Ohio Federal Court Denies Summary Judgment in RESPA Affiliated Business Arrangement Case. On June 29, the U.S. District Court for the Northern District of Ohio denied a defendant mortgage company's motion for summary judgment in a case alleging a violation of the affiliated business arrangement (AfBA) provisions of the Real Estate Settlement Procedures Act (RESPA) because the defendant's AfBA disclosure form varied from the form prescribed in RESPA's regulations. *Toldy v. Fifth Third Mortgage Co.*, No. 1:09-CV-377 (N.D. Ohio Jun. 29, 2010). In *Toldy*, the plaintiff borrower obtained a mortgage loan from the defendant mortgage company and, as part of the transaction, utilized the services of the mortgage company's affiliated settlement service provider. The borrower had received an AfBA disclosure, intended to comply with a safe harbor provision of RESPA for AfBAs (Section 8(c)), as part of a 68-page booklet containing 19 different forms and disclosures. However, the AfBA disclosure did not contain a signature and acknowledgment box.

Instead, the booklet contained a blanket signature and acknowledgment applicable to all of the disclosures and forms in the booklet. The court, in denying the defendants' motion for summary judgment, first determined that the borrower had sufficiently alleged a violation of the prohibition against kickbacks and referral fees in Section 8(a) of RESPA because the settlement service provider made payment of dividends to the common parent holding company that it shared with the mortgage company. The court also held that the defendants had not satisfied the Section 8(c) safe harbor requirements because the AfBA disclosure was not on a "separate" piece of paper, and because it lacked an acknowledgement and signature line. For a copy of the opinion, see here.

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E-Financial Services

House, Senate Resolutions Designate June 30, 2010 National ESIGN Day. On July 1, the U.S. House of Representatives passed a resolution designating June 30th as "National ESIGN Day." June 30, 2010 is the 10th Anniversary of the signing of the Electronic Signatures in Global and National Commerce Act (ESIGN). On June 30, the U.S. Senate submitted and agreed to a resolution designating June 30, 2010 as National ESIGN Day. For a copy of the Industry Letter of support for National ESIGN Day, please contact Margo Tank. For a copy of the House resolution, please see http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:hc290ih.txt.pdf. For a copy of the Congressional Record, please see http://www.buckleysandler.com/ESIGN_Day_Congressional_Record.pdf.