

October 29, 2010

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Federal Issues

FTC Defers Enforcement of Rule Banning Advance Fees as to Tax Debt Relief Services. On October 27, the Federal Trade Commission (FTC) issued an enforcement policy statement deferring enforcement, for tax debt relief services only, of a rule prohibiting companies that sell debt relief services over the telephone from charging advance fees. Under previous changes to the FTC's Telemarketing Sales Rule (the Rule), which became effective October 27, debt relief companies may not collect fees before settling or reducing a consumer's credit card or other unsecured debt (as reported in [InfoBytes, October 22, 2010](#)). Certain tax debt relief services raised concerns about whether the Rule applied to them, and argued that it did not because tax debts were not unsecured. The FTC announced that, while considering the tax debt relief services' concerns, it will defer enforcement of the Rule as to tax debt relief services until further notice. The Rule will be enforced as to all other debt relief services within the scope of the Rule. For a copy of the press release, please see <http://www.ftc.gov/opa/2010/10/debtrelief2.shtm>.

HUD Eliminates Requirement that Sum of All Liens Not Exceed Geographical Maximum Mortgage Amount. On October 22, the Department of Housing and Urban Development (HUD) issued Mortgagee Letter 10-36, which rescinds a prior requirement that the sum of all liens-including both an FHA-insured first mortgage and any subordinate lien-not exceed both the applicable FHA loan-to-value (LTV) ratio and the applicable geographical maximum mortgage amount. Instead, for both purchase and refinance transactions, only the FHA-insured first lien is counted toward the geographical maximum mortgage amount. All liens, combined, still may not exceed the applicable LTV ratio. Mortgage Letter 10-36 supersedes Mortgagee Letter 2010-24, which had rescinded the unlimited Combined Loan-to-Value ratio for refinance transactions. The Mortgagee Letter applies to all case numbers assigned on or after September 7, 2010. [For a copy of Mortgagee Letter 10-36, please click here.](#)

FTC Announces Settlement Barring Credit Repair Operation from Making False Claims and Charging Up-Front Fees. On October 28, the Federal Trade Commission (FTC) announced that it had reached a settlement with a credit repair operation, Nationwide Credit Services, Inc. and its president James R. Dooley, which allegedly took hundreds of dollars in fees from consumers to

remove negative information from their credit reports, but rarely if ever performed those services. According to the FTC's complaint, which was filed as part of the agency's October 2008 "Operation Clean Sweep," the defendants charged consumers advance and monthly fees to "legally erase" negative information from their credit reports, but did not perform on those promises. As part of the settlement, the defendants agreed not to make misrepresentations about their goods or services, agreed not to charge up-front fees, and agreed not to collect payments from consumers who purchased services before October 20, 2008. The settlement order imposes a judgment of more than \$1.3 million, which will be suspended upon the defendants' surrender of funds frozen by the court. The defendants did not admit liability in the settlement. For a copy of the press release, please see <http://www.ftc.gov/opa/2010/10/nationwide.shtm>.

DOJ Announces Settlement in Housing Discrimination Suit Against Indiana Condominium Association. On October 22, the Department of Justice announced a settlement with the Autumn Ridge Condominium Association, located in Munster, Indiana, and three members of its Board of Directors, in which the defendants agreed to pay \$120,000 to resolve allegations that they violated the Fair Housing Act when they refused to approve the sale of a condominium to an African-American couple because of their race and because they had children. The settlement funds will be split between the couple and their real estate agents, and the United States. The proposed settlement (which is subject to court approval) also requires Autumn Ridge to revise its rules to remove any restrictions on occupancy by families with children, to obtain training regarding the Fair Housing Act for its board members, and requires the president of the Board of Directors, a named defendant, to resign permanently from the board. The defendants did not admit liability in the settlement. [For a copy of the press release, please click here.](#)

New York Federal Court Sentences Founder of Cobalt Companies to 85 Years in Prison for Real Estate Fraud. On October 21, Mark Alan Shapiro, the founder of the Cobalt Companies, was sentenced to 85 years in prison and three years of supervised release, and was ordered to pay over \$22 million in restitution and to forfeit over \$23 million in proceeds from his offenses. Following a three week jury trial Shapiro, along with co-defendants Irving Stitsky and William B. Foster, was found guilty of securities fraud, mail fraud, wire fraud, and conspiracy. The defendants were accused of using a sham group of companies to fraudulently induce victims to invest over \$23 million in private placement real estate offerings involving multi-family real estate properties around the country. Stitsky and Foster were previously sentenced to 85 years, and 3 years, in prison, respectively, and have appealed their convictions. [For a copy of the Department of Justice's press release, please click here.](#)

State Issues

New York Gives Borrowers Right to Recover Attorneys' Fees in Foreclosure Proceedings. On October 20, the Governor of New York signed into law the Access to Justice in Lending Act, which grants borrowers the right to recover reasonable attorneys' fees and/or expenses from the mortgagee in a foreclosure of a residential property. Under the new Section 282 of New York's real property law, if a residential mortgage permits the mortgagee to recover attorneys' fees and/or expenses as a result of the borrower's failure to perform any covenant or agreement in the mortgage, then the mortgage is construed to contain a reciprocal right on behalf of the borrower to recover reasonable

attorneys' fees and/or expenses if the mortgagee fails to perform any covenant or agreement in the mortgage. The borrower may recover such fees and expenses in successful defense of a foreclosure action, by counterclaim, or in a separate action against the mortgagee. Waiver of rights under the new Section 282 is void as against public policy. The Act takes effect on December 19, 2010. [For the text of the Act, please click here.](#)

New York Amends Law to Prohibit Fees for Payment by Mail or Receipt of Paper Billing Statement. On October 20, the Governor of New York signed into law amendments to New York General Business Law Chapter 556, prohibiting businesses from charging additional rates or fees, or a differential in rate or fee associated with payment on an account, when a consumer chooses to pay by U.S. mail or to receive a paper billing statement. The new Section 399-zzz does not prohibit a business from offering a credit or other incentive to consumers to elect a specific payment or billing option. Each violation of the new Section is deemed a deceptive act and practice. The amendment takes effect on April 18, 2011. [For the text of the amendment, please click here.](#)

New Jersey Permits Compensation for Mortgage Solicitor or Origination Activity if Licensee Was Authorized at Time of Activity. On October 26, the Commissioner of the New Jersey Department of Banking and Insurance (the Department), issued Bulletin 10-29, which provides guidance on licensees' and former licensees' ability to pay and receive compensation for residential mortgage solicitor or loan origination activity. According to Bulletin 10-29, the Department construes the Residential Mortgage Lenders Act as permitting compensation to be paid and received when the activity took place in full while the person paying or receiving the compensation was duly authorized under a then-existing license, registration, or order. The compensation is considered to have been paid or received at the time of the activity, regardless of the date of the actual payment or receipt of such compensation. For a copy of the Bulletin, please see http://www.state.nj.us/dobi/bulletins/blt10_29.pdf.

Courts

Washington Federal Court Dismisses TILA and RESPA Claims Against Servicer. On October 15, the U.S. District Court for the Western District of Washington granted in part and denied in part a motion to dismiss federal and state claims against one defendant, a mortgage servicer, related to an alleged failure to disclose that a refinance loan was adjustable rate, and to disclose the extent of a yield spread premium. In *McGinley v. American Home Mortgage Servicing, Inc., et al.*, 2010 WL 4065826, No. 2:10cv01157(W.D. Wash. Oct. 15, 2010), the plaintiff borrowers alleged violations of the Truth in Lending Act (TILA), Real Estate Settlement Procedures Act (RESPA), and Washington's Consumer Protection Act (CPA), and various common law claims. The plaintiffs alleged that they were told by their mortgage broker that the loan they were receiving was a fixed-rate loan with no prepayment penalty, but the loan they actually received was a negative amortization adjustable rate mortgage with a prepayment penalty. The court held that the plaintiffs' TILA and RESPA damages claims were time-barred and that they failed to allege any facts supporting equitable tolling. The court also rejected the plaintiffs' claims under the CPA because the servicer could not be liable as an assignee, and rejected common law claims of breach of fiduciary duty and intentional infliction of emotional distress. The plaintiffs' unjust enrichment claim was allowed to proceed because they

adequately alleged that the defendant received a benefit at the plaintiffs' expense by charging a "non-specified yield spread premium." The court granted leave to amend the Complaint to allege facts with specificity in support of the plaintiffs' fraud claim and to allege their ability to tender the proceeds of the loan in support of a TILA rescission claim. [For a copy of the opinion, please click here.](#)

Firm News

[Jerry Buckley](#), [Sam Buffone](#) and [Ben Klubes](#) will be presenting a 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.

[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 Klubes](#), and [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 speaking at PLI's Banking Law Institute 2010: The Future is Here, on December 8, 2010. 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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