Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

July 6, 2012

Topics In This Issue

Federal Issues

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State Issues

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provide a timeframe within which a license application must be completed before it is deemed abandoned by the Board. The regulations took effect on June 22, 2012.

Courts

New York State Appeals Court Upholds Decision Dismissing Buyback Lawsuit. On June 28,

the Appellate Division of the Supreme Court of New York, First Department unanimously confirmed the New York Supreme Court's dismissal of a mortgage-buyback lawsuit brought by investors against a bank, holding that the investors' action was barred by the "no-action" clause in the Pooling and Servicing Agreements (PSAs). *Walnut Place LLC v. Countrywide Home Loans, Inc.*, No. 8046, 650497/11, 2012 slip op. 0521 (N.Y. App. Div. June 28, 2012). The Appellate Division found that the "no-action" clause-a clause limiting the right to sue-was not ambiguous and only allowed investors to sue under an "event of default" provision which was not applicable under the set of facts before the court. The case was brought by several entities collectively known as Walnut Place LLC, who had invested more than $1 billion in securities backed by the bank's mortgages. The investors claimed that the bank made false representations about the characteristics and credit quality of loans underlying the securities in the PSAs.

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Mobile App Developer Agrees to Stop Collecting and Using Children's Data in Settlement. On June 27, the New Jersey Attorney General's office announced a consent decree and injunction against 24x7digital LLC, a mobile app company, settling charges under the Children's Online Privacy Protection Act (COPPA). The company created a series of apps for children in preschool through second grade that encouraged children to provide their first and last names and photos for personal profiles. Under the settlement, the company agreed to stop collecting, using, and disclosing children's personal information without verifiable parental consent. The company also agreed to provide direct notice to parents of the types of information it collects and what it does with that information.

Seventh Circuit Compels Coverage Under D&O Policy Despite "Insured vs. Insured" Exclusion. On June 29, the U.S. Court of Appeals for the Seventh Circuit directed a D&O insurance provider to cover certain claims against defendants insured under the same policy as some plaintiffs despite an "insured vs. insured" exclusion from coverage under the insurance arrangement. *Miller v. St. Paul Mercury Ins. Co.*, No. 10-3839 (7th Cir. June 29, 2012). The dispute began when five

plaintiffs sued Strategic Capital Bancorp, Inc. ("SCBI") for fraud and other state law claims flowing from SCBI's alleged material misstatements relating to the company's financial condition. Three of the plaintiffs were directors or officers covered under SCBI's policy; the other two plaintiffs were not insureds under the policy. When SCBI notified its insurance carrier and requested indemnity and defense coverage under the insurance agreement, the carrier refused, citing the policy's "insured vs. insured" provision. All parties to that initial lawsuit then filed a new action against the carrier in an effort to force it to provide coverage. The Seventh Circuit reversed the district court's dismissal of those claims brought by the two non-insured plaintiffs. In a lawsuit involving both insured and non-insured plaintiffs, the court ruled, the insurance carrier must "provide indemnity for losses on claims by non-insured plaintiffs but not for losses on claims by insured plaintiffs." The court reasoned that such a holding conforms to the parties' expectations, minimizes the risk of arbitrary results, and discourages efforts to manipulate the result through strategic party joinder or case consolidation.

New York Federal Court Certifies Class in MBS Litigation. On June 29, the U.S. District Court for the Southern District of New York granted the plaintiffs' motion to certify a class in a putative class action concerning the sale of mortgage backed securities (MBS) by an investment bank. *Tsereteli v. Residential Asset Securitization Trust* 2006-A8, No. 08 Civ. 10637, 2012 WL 2532172 (S.D.N.Y. June 29, 2012). In *Tsereteli*, the plaintiffs alleged that the sale of the MBS violated the Securities Act of 1933, because the offering documents falsely represented that the underlying mortgage loans were originated in accordance with the lender's underwriting standards. According to the plaintiffs, the lender had in fact abandoned its underwriting standards and routinely made "loans to borrowers who were unable to meet their repayment obligations." The bank, among other things, argued that Rule 23's predominance requirement was not met because certain sophisticated investors were aware of the alleged misstatements when they purchased the securities. The court, however, found that "[g]eneral investment sophistication of certain class members does not show that any of the class members knew anything at all about [the lender's] alleged deviation from its underwriting guidelines."

Massachusetts Federal Court Finds On-Demand Web Streaming Service Falls within the ADA's Scope. On June 19, the U.S. District Court for the District of Massachusetts ruled that Netflix's "Watch Instantly" on-demand movie and television streaming service is a "place of public accommodation" subject to the Americans with Disabilities Act's (ADA) bar on disability-based discrimination. *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, No. 11-30168 (D. Mass. June 19, 2012). Plaintiffs asserted that the streaming service provided inadequate closed-captioned content and sought declaratory and injunctive relief directing the company to provide closed-captioning for all "Watch Instantly" offerings. Netflix moved for judgment on the pleadings, arguing that the ADA did not apply to its on-demand service and that the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) precluded the plaintiffs' interpretation of the ADA. The court disagreed, finding that the plaintiffs adequately pled their claim that the scope of the ADA applies to the company's on-demand service. In addition, the court rejected the company's argument that the CVAA precluded the plaintiffs' ADA claim, concluding that the CVAA's specific requirements related to captioning of streamed video did not present an irreconcilable conflict with the ADA.

Firm News

Please Join Us for a Complimentary Webinar - The Consumer Financial Protection Bureau: How to Prepare for an Examination

As the first anniversary of the CFPB approaches, many banks and non-banks are experiencing their first examination by the CFPB. In this webinar,

Jeffrey Naimon, **Jonice Gray Tucker**, and **Lori Sommerfield** will provide guidance on what to expect from the CFPB, how to prepare for and manage the exam, and how best to interact with the Bureau concerning examination findings and ratings. During this webinar, we will also highlight key developments, including recent changes to CFPB leadership, the status of critical rulemakings, and enforcement activity.

Date & Time: Thursday, July 26, 2012, 2:00 - 3:15 PM ET

Click here to register: **https://www1.gotomeeting.com/register/543845256**

Registration required. This webinar is open to all financial services companies and others subject to CFPB oversight. Please no outside law firms, government agency personnel, consulting firms, or media. After registering and being approved, you will receive a confirmation email containing instructions for joining the webinar.

Jeffrey Naimon will speak at National Mortgage News' 4th Annual Best Practices in Loss Mitigation Conference in Dallas, TX on July 19, 2012. Mr. Naimon's panel is entitled, "Current Regulatory Issues and Political Outlook" and will provide an overview of the regulatory and legislative developments affecting the mortgage servicing market, review current regulatory issues, and discuss how the issues and election year political moving parts might affect the current regulatory landscape.

Matthew Previn and **Andrew Schilling** will present a one-hour PLI telephone briefing entitled "From False Claims Act to FIRREA: The Government's Expanding Enforcement Arsenal Against Financial Institutions" on July 26, 2012 at 1:00 pm. Mr. Previn and Mr. Schilling will be joined by Pierre G. Armand, Deputy Chief of the Civil Frauds Unit at the U.S. Attorney's Office for the Southern District of New York, to discuss the government's recent approach to civil enforcement actions against mortgage lenders and other financial institutions.

Jonice Gray Tucker and **Jay Laifman** will participate in the California Mortgage Bankers Association's Western States Loan Servicing Conference on July 30, 2012 in Las Vegas, Nevada. Ms. Tucker will moderate a panel of current and former state and federal officials regarding the implementation and enforcement of new mortgage servicing standards. Mr. Laifman will speak on a panel that will explore best practices for compliance with the new servicing standards. For further information or registration, you may click the following link: http://www.cmba.com/new/brochures/WSLC12Reg.pdf.

Andrew Sandler will speak at the National Mortgage News 2nd Annual Mortgage Regulatory Forum taking place September 13-14, 2012, in Arlington, VA. The Mortgage Regulatory Forum is created to provide the most up-to-date information on newly implemented regulation, and regulation in the pipeline, for both those on the origination side of the business, as well as mortgage servicing.

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