June 25, 2010

Topics In This Issue

Federal Issues

House, Senate Reach Agreement on Regulatory Reform Bill. On June 25, House and Senate conferees came to an agreement on far-reaching financial regulatory reform legislation, known as the Dodd-Frank Bill. The House is expected to take up consideration of the final bill next Tuesday, with a final vote expected to come before the July 4 recess. If and when the bill passes, BuckleySandler LLP will issue a *Regulatory Restructuring Report* containing a detailed summary of the legislation. While the bill includes numerous crucial provisions regulating the financial services industry, highlights of several provisions of the bill include:

- Creating within the Federal Reserve Board (FRB) a new Consumer Financial Protection Bureau (CFPB) with rulemaking and limited enforcement power. Banks with less than $10 billion in assets will have a limited exemption from CFPB oversight. There are now exemptions in the bill for auto dealers and practicing attorneys.
- Instituting new minimum underwriting standards for mortgages and prohibiting certain compensation structures for mortgage brokers and originators.
- Exempting from new risk-retention requirements issuances containing only “qualified mortgages.”
- Allowing the Office of the Comptroller of the Currency (OCC) to preempt state laws only if they “prevent or significantly” interfere with the business of banking.
- Eliminating the Office of Thrift Supervision, but retaining the thrift charter, with oversight of savings and loans going to the OCC and savings and loans holding company oversight transferred to the FRB.
- Establishing the Financial Stability Oversight Council to continuously monitor for systematic risks to the nation’s financial stability. The council will also be charged with reviewing and commenting on accounting standards. Further, the bill gives regulators the authority to seize and liquidate large financial institutions that pose a systemic risk.
- Establishing new capital requirements and rules for trust-preferred securities.
- Placing restrictions on proprietary trading by certain large financial institutions.

Although the final bill text is not yet available, legislative language considered throughout the conference is available at http://1.usa.gov/9zbucZ.

Federal Agencies Issue Final Guidance on Incentive Compensation. On June 21, the federal banking and thrift regulatory agencies issued final guidance requiring financial institutions to align incentive compensation schemes with certain risk management standards. The new standards apply to the compensation of executives and other employees whose activities may expose the institution to "material" amounts of risk. The guidance states that (i) incentive compensation arrangements must balance risk and financial results in a manner that does not encourage employees to expose their organizations to imprudent risks, (ii) risk management processes and internal controls must reinforce and support sound incentive compensation plans (*e.g.* through employment of a non-incentivized expert risk manager), and (iii) corporate boards of directors must have an active oversight role over an organization's compensation practices. The guidelines include additional requirements for large banking organizations. The guidance becomes effective upon its publication in the *Federal Register* and applies to institutions regulated by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Office of the Comptroller of the Currency, and the Federal Reserve Board. For a copy of the guidance, please click here.

HUD Issues Interpretive Rule Pertaining to Compensation Arrangements Between Home Warranty Companies and Real Estate Brokers, Agents. On June 25, the U.S. Department of Housing and Urban Development (HUD) published in the *Federal Register*an interpretive rule discussing whether compensation paid by home warranty companies (HWCs) to real estate brokers and agents violates the anti-kickback provisions of Section 8 of the Real Estate Settlement Procedures Act (RESPA). According to the interpretive rule, HUD will first determine whether the compensation is (i) contingent on an arrangement that prohibits the real estate broker or agent from performing services for other HWCs (this may be evidenced by a real estate broker or agent being compensated for performing HWC services for only one company), and (ii) based on, or is adjusted to reflect, the number of transactions referred by the real estate broker or agent. The interpretive rule also clarifies HUD's method of determining whether services were "actually performed" by the real estate broker or agent and whether the compensation is "reasonably related" to the value of the service provided. Public comments may be submitted by July 26, 2010; however, the interpretive rule is currently effective. For a copy of the *Federal Register* notice, please see http://www.gpo.gov/fdsys/pkg/FR-2010-06-25/pdf/2010-15355.pdf.

Assistant Attorney General Perez Promises "Vigorous Enforcement" on Fair Lending. On June 23, Assistant U.S. Attorney General Thomas Perez delivered a speech at the Brookings Institution in which he promised "vigorous enforcement and clear regulation" on fair lending issues. Assistant Attorney General Perez, citing numerous recent studies, stated that "while the foreclosure crisis has touched so many communities across America, communities of color have been hit particularly hard, and have suffered greater consequences." The speech touted numerous Obama administration efforts to prevent unfair lending, including funding through the U.S. Department of Housing and Urban Development's Neighborhood Stabilization Program, the establishment of the Financial Fraud Enforcement Task Force, and the creation of the Fair Lending Unit within the Department of Justice. According to Assistant Attorney General Perez, the Fair Lending Unit currently has 50 matters open, including 18 investigations, addressing issues such as discrimination in underwriting, redlining, reverse redlining, steering minority borrowers into less favorable loans, and gender, marital status, or age discrimination in lending. The speech noted that the goal of Fair Lending Unit litigation is to "make people and communities whole" by, among other things, requiring lenders to provide equal access to credit, repairing borrowers' credit scores, and demanding that lenders invest in communities. For the full text of the speech, please click here.

Center for Responsible Lending Releases Report on Demographics of Foreclosures. On June 18, the Center for Responsible Lending (CRL) released a report estimating the total number of completed foreclosures across the country, as well as foreclosure rates for racial and ethnic groups. Relying on government and industry data, CRL estimates that 2.5 million foreclosures were completed from 2007–2009. According to the report, of these foreclosures, African-American and Latino families were disproportionately affected relative to their share of mortgage originations, even when controlling for patterns in income differences (8% of both groups, compared to 4.5% of non-Hispanic whites, lost their homes to foreclosure). Based on CRL's review of Mortgage Bankers Association National Delinquency Survey data, which tracks the number of mortgages in the foreclosure process, and from the number of borrowers who are behind on two or more payments, the report estimates that 5.7 million homes are at imminent risk of foreclosure. Of these 5.7 million homes, the report finds that non-Hispanic whites represent the majority of at-risk borrowers; however, African-American and Latino borrowers are more likely to be at imminent risk of foreclosure (21.6% and 21.4%, respectively) than non-Hispanic white borrowers (14.8%). For a copy of the report, please click here.

FinCEN Proposes Rules to Apply BSA Regulations to Non-Bank Providers of Prepaid Access Products. On June 21, the Financial Crimes Enforcement Network (FinCEN) released a Notice of Proposed Rulemaking (NPRM) that would impose Bank Secrecy Act (BSA) reporting requirements relating to money laundering and terrorist financing on non-banks that issue certain pre-paid access products. The proposed rules implement provisions of the Credit Card Accountability, Responsibility and Disclosure Act of 2009 relating to stored value products. Specifically, the NPRM would remove the exemption for "stored value" products under the BSA and rename "stored value" products to "prepaid access" products. Prepaid access products include gift cards (but not credit or debit cards), mobile phones, and related devices. The party in a transaction chain with "predominant oversight and control" will be responsible for BSA compliance requirements (including filing suspicious activity reports) for prepaid access products. However, the NPRM exempts certain categories of prepaid access products and services that pose lower risks from certain BSA reporting requirements. Comments must be submitted within 30 days after publication in the *Federal Register*. The NPRM is available here. For a copy of the press release, please click here.

Banking Agencies Publish Revised Host State Loan-To-Deposit Ratios. On June 24, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency publicized the host state loan-to-deposit ratios used to determine compliance with Section 109 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. In general, Section 109 prohibits a bank from establishing or acquiring a branch or branches outside of its home state primarily for the purpose of deposit production. Section

106 of the Gramm-Leach-Bliley Act amended coverage of Section 109 of the Interstate Act to include any branch of a bank controlled by an out-of-state bank holding company. For the current host state loan-to-deposit ratios, please click here.

Revised FAQs on HAMP Conversion Campaign Available. On June 21, a revised Frequently Asked Questions (FAQs) document, directed at servicers participating in the Home Affordable Modification Program (HAMP), was released to clarify certain details of the 2009-2010 HAMP Conversion Campaign. For a copy of the revised FAQs, please click here.

FDIC Extends Transaction Account Guarantee Program for Six Months. On June 22, the Federal Deposit Insurance Corporation (FDIC) adopted a final rule extending the Transaction Account Guarantee portion of the Temporary Liquidity Guarantee Program for an additional six months (through December 31, 2010). The FDIC will continue to charge participating institutions an annual assessment rate and participating institutions may opt out of the extension. For a copy of the final rule, please click here.

CRA "Community Development" Proposed Rule Comment Deadline July 26, 2010. On June 24, the federal banking and thrift regulatory agencies published in the *Federal Register* a notice of proposed rulemaking to expand the definition of "community development" in the Community Reinvestment Act (CRA) to include loans, investments, and services by financial institutions that support projects and activities that meet Housing and Economic Recovery Act of 2008 criteria and are conducted in Neighborhood Stabilization Program (NSP) areas approved by the U.S. Department of Housing and Urban Development (the proposed rule was reported in *InfoBytes*, June 18, 2010). Under the proposal, a financial institution making community development loans and investments would receive favorable CRA consideration in its own assessment area and, as long as it has addressed the needs of its area, receive CRA consideration for NSP-eligible activities outside of its area. Comments are due by July 26, 2010. For a copy of *Federal Register* notice, please see http://edocket.access.gpo.gov/2010/pdf/2010-15119.pdf.

State Issues

Vermont Adopts Third Party Loan Servicer Licensing Law. On May 8, Vermont Governor Jim Douglas signed SB 287, a bill that will require entities to secure a license to act as a third party loan servicer for loans to Vermont borrowers. The bill defines "third party loan servicer" as "a person who engages in the business of servicing a loan, directly or indirectly, owed or due or asserted to be owed or due another." The bill exempts various parties from licensure, including certain depository institutions and licensed lenders that retain the servicing rights on a loan originally closed in the lender's name and are subsequently sold (in whole or in part) to a third party. The bill (i) sets forth license application and suspension procedures, (ii) requires third party loan servicers to maintain segregated accounts for borrower funds, and (iii) establishes penalties for violations of the law. The bill also defines certain loan servicer activities that constitute an unfair and deceptive act or practice under the Vermont Consumer Fraud Act (*e.g.*, using "unfair or unconscionable" means to service a loan). The bill becomes effective January 1, 2011. For the full text of the bill, please see http://www.leg.state.vt.us/docs/2010/Acts/ACT096.pdf.

Vermont Law Regulates Disclosures for Trigger Lead Solicitations. On May 10, Vermont Governor Jim Douglas signed HB 622, which will require increased disclosures for mortgage loan “trigger lead” solicitations. The legislation requires that solicitors disclose (i) that they are not affiliated with a consumer’s financial institution, (ii) that the financial institution did not supply the consumer’s personal or financial information, and (iii) who will be paid for the trigger lead. The bill authorizes financial institutions that are misrepresented through a trigger lead solicitation to bring an action against the solicitor for damages and attorneys’ fees. The law will take effect July 1, 2010. For a copy of the bill, please see http://www.leg.state.vt.us/docs/2010/Acts/ACT100.pdf.

Illinois Amends Consumer Installment Loan Act; Caps Interest Rates, Eliminates Fees. On June 21, Illinois Governor Pat Quinn signed HB0537, which amends the Illinois Consumer Installment Loan Act by placing a cap on interest rates, introducing income-based repayment measures, eliminating balloon payments and pre-payment penalties, and expanding the monitoring of licensed lenders. Under the new provisions, the interest rate on loans over $4,000 will be capped at 36% and the interest rate on certain loans under $1,500 will be capped at 99%. Moreover, the interest rate that may be charged on the unpaid balance of a delinquent account on small consumer loans will be capped at 18% per year. Lenders are prohibited from making small consumer loans that would result in a monthly payment exceeding 22.5% of the borrower’s gross monthly income. Lenders also may not condition the extension of credit on the consumer’s agreement to repay the loan using preauthorized electronic fund transfers. Finally, the bill requires certain information pertaining to small consumer loans to be entered into a state-wide electronic database. The amendments become effective March 21, 2011. For a copy of the bill, please see http://www.ilga.gov/legislation/publicacts/96/PDF/096-0936.pdf.

Courts

Utah Federal Court Extends "Complete Preemption" Doctrine to National Banking Act. On June 18, the U.S. District Court for the District of Utah issued a memorandum opinion explaining its June 11 order to vacate a preliminary injunction entered by a Utah state court, which had enjoined a defendant national bank and its trustee services company from conducting foreclosure sales in Utah (the order to vacate was reported in *InfoBytes*, June 18, 2010). *Cox v. ReconTrust Co., N.A.*, No. 2:10-CV-492, 2010 WL 2519716 (D. Utah June 18, 2010). In *Cox*, the plaintiff, a borrower who was facing foreclosure, originally filed suit in state court claiming that the defendants, both national banks licensed under the National Banking Act (NBA), (i) were foreign companies not registered to transact business in Utah, (ii) were not qualified to act as trustees under Utah code, and (iii) violated the Real Estate Settlement Procedures Act (RESPA). Citing the federal claim under RESPA, the defendants removed the case to federal court. Thereafter, the borrower voluntarily dismissed her RESPA claim and moved for remand. Rejecting the motion for remand, the district court found that it retained original jurisdiction because the state law claims were subject to complete preemption under the NBA. The district court concluded that Congress intended for the NBA to exclusively control how national banks transact business nationwide and act as trustees and, thus, provided removal jurisdiction. This interpretation of the NBA also defeated the preliminary injunction because the NBA preempted the borrower’s state law claims that a national bank must be registered with Utah as a foreign corporation to foreclose on a property and must comply with Utah's statutory requirements for trustees. For a copy of the opinion, please click here.

U.S. Supreme Court Grants Cert in TILA Dispute. On June 21, the U.S. Supreme Court granted a petition for certiorari to hear a case in which the U.S. Court of Appeals for the Ninth Circuit previously held that the Truth in Lending Act (TILA) requires a creditor to provide contemporaneous notice of discretionary interest rate increases that occur as a result of borrower default—even though the contractual terms governing the account did not change and the card agreement provided authority for the rate increase (the Ninth Circuit's opinion was reported in *InfoBytes*, Mar. 27, 2009). *McCoy v. Chase Manhattan Bank, USA, N.A.*, No. 09-329. In *McCoy*, the plaintiff cardholder alleged that the defendant bank increased his credit card interest rate retroactively to the beginning of his payment cycle as a result of a late payment. The cardholder alleged that this increase violated TILA and Delaware law because the bank did not give notice of this increase until after the increase had taken effect. The bank contended that the cardholder was provided "specific" terms of the increase in the card agreement, which, among other things, set a maximum rate increase in case of default. The Ninth Circuit reversed a district court decision to find that TILA requires notice to the cardholder when the cardholder's interest rate increases because of default, and that the notice must be contemporaneous with the rate increase. The case will be decided in the court's next session, which begins in October. In the interim since the case was filed, the Credit Card Accountability Responsibility and Disclosure Act of 2009 amended TILA to require 45-day advance notice for an account rate increase. For a copy of the Ninth Circuit's opinion, please click here. For a copy of the Supreme Court docket, please click here.

U.S. Supreme Court Establishes New Rule for Challenges to Arbitration Agreements. On June 21, by a 5-4 vote, the U.S. Supreme Court established a new rule for who decides certain challenges to arbitration agreements, making it more difficult for employees and consumers to bring unconscionability challenges to arbitration agreements. *Rent-A-Center, West, Inc. v. Jackson*, 559 U.S. – , 2010 WL 2471058 (U.S. June 21, 2010). In this case, an employee filed an employment discrimination suit against his former employer in federal district court. His former employer responded by filing a motion under the Federal Arbitration Act (FAA) to dismiss or stay the proceedings and to compel arbitration, pursuant to an arbitration agreement that the employee had signed as a condition of his employment. The employee opposed the motion on the ground that the arbitration agreement was unenforceable because it was unconscionable under state law. The employer argued in response that the employee's unconscionability claim was not properly before the district court because the arbitration agreement expressly provided that the arbitrator would have exclusive authority to resolve disputes about the enforceability of the agreement. The district court granted the employer's motion to dismiss and compel arbitration. The U.S. Court of Appeals for the Ninth Circuit reversed the ruling in relevant part, finding that "the threshold question of unconscionability is for the court" to decide. On appeal, the majority of the Supreme Court found that (i) the current "controversy" between the parties was over whether or not the agreement was unconscionable, and (ii) the agreement contained a "delegation provision," or "an agreement to arbitrate threshold issues concerning the arbitration agreement," that delegates resolution of that controversy to the arbitrator. The majority then found that because the employee had not specifically challenged that delegation provision, that provision must be treated as valid. Thus, an arbitrator, and not a federal district court, must decide whether an arbitration agreement as a whole is unconscionable if the agreement explicitly delegates that issue to the arbitrator through a delegation clause and the plaintiff fails to specifically challenge that delegation clause. In dissent, Justice Stevens, joined by Justices Ginsburg, Breyer and Sotomayor, argued that certain issues, including unconscionability, are "'gateway matter[s]' because they are necessary antecedents to enforcement of an arbitration agreement" and "because they raise a 'question of arbitrability,'" and noted that "the FAA commits those gateway matters, specific to the arbitration agreement, to the court." For a copy of the opinion, please see http://www.supremecourt.gov/opinions/09pdf/09-497.pdf.

First Circuit Reduces Court Sanctions Against Servicer. On June 14, the U.S. Court of Appeals for the First Circuit found that a bankruptcy court's sanction of $250,000 against a mortgage loan servicer was excessive and unreasonable where the mortgage loan servicer wrongly claimed in a court filing that it was the holder of the borrower's note. *In re Nosek*, No. 09-1806, 2010 WL 2350579 (1st Cir. June 14, 2010). In this dispute, the mortgage loan servicer initially originated the borrower's mortgage loan. It subsequently assigned the note to an asset securitization trust but retained the power to service it. When the borrower fell behind on payments, the trustee filed a foreclosure action; that action was stayed by the borrower's bankruptcy. The servicer filed a claim in bankruptcy court; however, its motion incorrectly stated that it was the holder of the mortgage note, when in fact, the trustee was the owner. When the mistake was revealed in a later filing, the bankruptcy court sua sponte imposed sanctions of $250,000 on the servicer under Federal Rules of Bankruptcy Procedure Rule 9011, and the district court affirmed. On appeal, the servicer admitted to the violation but claimed that the imposed sanctions were unreasonable, and the First Circuit agreed. The court noted that while bankruptcy courts have a "legitimate interest in policing" their filings, a number of factors should be considered when determining an appropriate sanctions amount. Those factors include, among others, whether the conduct was willful or negligent, whether it was an isolated event, and whether the other party was prejudiced. While the court suggested that mortgage holders routinely file inaccurate claims, the servicer here had an otherwise exemplary record in proceedings and its actions were not a deliberate attempt to mislead the borrower or the court, nor could the borrower show any actual prejudice. Accordingly, the court decreased the imposed sanction amount to $5,000. For a copy of the opinion, please see http://www.ca1.uscourts.gov/pdf.opinions/09-1806P-01A.pdf.

Ohio Federal Court Indicates Intent to Certify Question to Ohio Supreme Court to Resolve Applicability of Ohio Consumer Sales Practices Act to Servicers. On June 18, the U.S. District Court for the Northern District of Ohio stated its intent to certify to the Ohio Supreme Court the question of whether the Ohio Consumer Sales Practices Act (OCSPA) applies to mortgage loan servicers. *Anderson v. Barclays Capital Real Estate, Inc.*, No. 3:09-cv-2335 (N.D. Ohio June 18, 2010). In *Anderson*, the plaintiff borrower asserted that the defendant, a mortgage servicer, violated the Real Estate Settlement Procedures Act (RESPA) and the OCSPA by allegedly misapplying the borrower's mortgage loan payments and by allegedly failing to adequately respond to her qualified written request (QWR). The borrower also asserted common law claims for unjust enrichment and conversion. The servicer moved to dismiss all claims, challenging the sufficiency of the pleadings and specifically arguing that the OCSPA does not apply to mortgage servicers because they are not "suppliers," nor were the servicer's dealings with the borrower "consumer transactions" within the meaning of the OCSPA. With respect to the OCSPA claim, the court noted that there was no binding

Ohio authority regarding whether the OCSPA applies to mortgage servicers and stated its intent to certify the question to the Ohio Supreme Court. With regard to the RESPA claim, the court found that the complaint sufficiently pled a breach of RESPA duties to survive a motion to dismiss by alleging a failure to adequately respond to a QWR. The court also ruled, however, that the borrower failed to adequately plead damages to state a RESPA claim, and therefore held its decision on the servicer's motion to dismiss in abeyance to allow the borrower an opportunity to amend the complaint. The court also ruled that the borrower had sufficiently pled her common law claims to state plausible claims for relief to survive the motion to dismiss. For a copy of the decision, please click here.

Fifth Circuit Holds Bankruptcy Courts May Certify Class Actions Of Debtors Under Federal Bankruptcy Rules. On June 18, the U.S. Court of Appeals for the Fifth Circuit upheld a bankruptcy court's determination that a bankruptcy court may certify class actions of debtors. *In re Wilborn*, No. 09-20415, 2010 WL 2433091 (5th Cir. June 18, 2010). In this dispute, the plaintiffs attempted to certify a class of debtors, alleging that the defendant bank impermissibly charged post-petition fees and costs without obtaining approval from the bankruptcy court. Acknowledging disagreement between courts as to whether a bankruptcy judge may certify a class action of debtors, the Fifth Circuit concluded that Federal Rules of Bankruptcy Procedure (F.R.B.P.) Rule 7023 authorizes a bankruptcy judge to certify a class action of debtors where the class certification requirements of both Federal Rules of Civil Procedure (F.R.C.P.) Rule 23 and F.R.B.P. Rule 7023 are met. In this case, however, the Fifth Circuit vacated class certification upon determining that the bankruptcy court's class certification was inappropriate. The Fifth Circuit reasoned that the class did not meet the predominance and superiority requirements of F.R.C.P. Rule 23, and that the class representative inadequately represented the class. For a copy of the opinion, please see http://www.ca5.uscourts.gov/opinions/pub/09/09-20415-CV0.wpd.pdf.

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://www.sheshunoff.com/wallstreetreform/2010/06/08/free/.

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 visit http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202459238721&CHAMPIONS__VISIONARIES.

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 at http://www.mortgageorb.com/e107_plugins/content/content.php?content.6024.

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.

Mortgages

House, Senate Reach Agreement on Regulatory Reform Bill. On June 25, House and Senate conferees came to an agreement on far-reaching financial regulatory reform legislation, known as the Dodd-Frank Bill. The House is expected to take up consideration of the final bill next Tuesday, with a final vote expected to come before the July 4 recess. If and when the bill passes, BuckleySandler LLP will issue a *Regulatory Restructuring Report* containing a detailed summary of the legislation. While the bill includes numerous crucial provisions regulating the financial services industry, highlights of several provisions of the bill include:

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Revised FAQs on HAMP Conversion Campaign Available. On June 21, a revised Frequently Asked Questions (FAQs) document, directed at servicers participating in the Home Affordable Modification Program (HAMP), was released to clarify certain details of the 2009-2010 HAMP Conversion Campaign. For a copy of the revised FAQs, please click here.

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Vermont Law Regulates Disclosures for Trigger Lead Solicitations. On May 10, Vermont Governor Jim Douglas signed HB 622, which will require increased disclosures for mortgage loan "trigger lead" solicitations. The legislation requires that solicitors disclose (i) that they are not affiliated with a consumer's financial institution, (ii) that the financial institution did not supply the consumer's personal or financial information, and (iii) who will be paid for the trigger lead. The bill authorizes financial institutions that are misrepresented through a trigger lead solicitation to bring an action against the solicitor for damages and attorneys' fees. The law will take effect July 1, 2010. For a copy of the bill, please see http://www.leg.state.vt.us/docs/2010/Acts/ACT100.pdf.

Utah Federal Court Extends "Complete Preemption" Doctrine to National Banking Act. On June 18, the U.S. District Court for the District of Utah issued a memorandum opinion explaining its June 11 order to vacate a preliminary injunction entered by a Utah state court, which had enjoined a defendant national bank and its trustee services company from conducting foreclosure sales in Utah (the order to vacate was reported in *InfoBytes*, June 18, 2010). *Cox v. ReconTrust Co., N.A.*, No. 2:10-CV-492, 2010 WL 2519716 (D. Utah June 18, 2010). In *Cox*, the plaintiff, a borrower who was facing foreclosure, originally filed suit in state court claiming that the defendants, both national banks licensed under the National Banking Act (NBA), (i) were foreign companies not registered to transact business in Utah, (ii) were not qualified to act as trustees under Utah code, and (iii) violated the Real Estate Settlement Procedures Act (RESPA). Citing the federal claim under RESPA, the defendants removed the case to federal court. Thereafter, the borrower voluntarily dismissed her RESPA claim and moved for remand. Rejecting the motion for remand, the district court found that it retained original jurisdiction because the state law claims were subject to complete preemption under the NBA. The district court concluded that Congress intended for the NBA to exclusively control how national banks transact business nationwide and act as trustees and, thus, provided removal jurisdiction. This interpretation of the NBA also defeated the preliminary injunction because the NBA preempted the borrower's state law claims that a national bank must be registered with Utah as a foreign corporation to foreclose on a property and must comply with Utah's statutory requirements for trustees. For a copy of the opinion, please click here.

First Circuit Reduces Court Sanctions Against Servicer. On June 14, the U.S. Court of Appeals for the First Circuit found that a bankruptcy court's sanction of $250,000 against a mortgage loan servicer was excessive and unreasonable where the mortgage loan servicer wrongly claimed in a court filing that it was the holder of the borrower's note. *In re Nosek*, No. 09-1806, 2010 WL 2350579 (1st Cir. June 14, 2010). In this dispute, the mortgage loan servicer initially originated the borrower's mortgage loan. It subsequently assigned the note to an asset securitization trust but retained the power to service it. When the borrower fell behind on payments, the trustee filed a foreclosure action; that action was stayed by the borrower's bankruptcy. The servicer filed a claim in bankruptcy court; however, its motion incorrectly stated that it was the holder of the mortgage note, when in fact, the trustee was the owner. When the mistake was revealed in a later filing, the bankruptcy court sua sponte imposed sanctions of $250,000 on the servicer under Federal Rules of Bankruptcy Procedure Rule 9011, and the district court affirmed. On appeal, the servicer admitted to the violation but claimed that the imposed sanctions were unreasonable, and the First Circuit agreed. The court noted that while bankruptcy courts have a "legitimate interest in policing" their filings, a number of factors should be considered when determining an appropriate sanctions amount. Those factors include, among others, whether the conduct was willful or negligent, whether it was an isolated event, and whether the other party was prejudiced. While the court suggested that mortgage holders routinely file inaccurate claims, the servicer here had an otherwise exemplary record in proceedings and its actions were not a deliberate attempt to mislead the borrower or the court, nor could the borrower show any actual prejudice. Accordingly, the court decreased the imposed sanction amount to $5,000. For a copy of the opinion, please see http://www.ca1.uscourts.gov/pdf.opinions/09-1806P-01A.pdf.

Ohio Federal Court Indicates Intent to Certify Question to Ohio Supreme Court to Resolve Applicability of Ohio Consumer Sales Practices Act to Servicers. On June 18, the U.S. District Court for the Northern District of Ohio stated its intent to certify to the Ohio Supreme Court the question of whether the Ohio Consumer Sales Practices Act (OCSPA) applies to mortgage loan servicers. *Anderson v. Barclays Capital Real Estate, Inc.*, No. 3:09-cv-2335 (N.D. Ohio June 18, 2010). In *Anderson*, the plaintiff borrower asserted that the defendant, a mortgage servicer, violated the Real Estate Settlement Procedures Act (RESPA) and the OCSPA by allegedly misapplying the borrower's mortgage loan payments and by allegedly failing to adequately respond to her qualified written request (QWR). The borrower also asserted common law claims for unjust enrichment and conversion. The servicer moved to dismiss all claims, challenging the sufficiency of the pleadings and specifically arguing that the OCSPA does not apply to mortgage servicers because they are not "suppliers," nor were the servicer's dealings with the borrower "consumer transactions" within the meaning of the OCSPA. With respect to the OCSPA claim, the court noted that there was no binding Ohio authority regarding whether the OCSPA applies to mortgage servicers and stated its intent to certify the question to the Ohio Supreme Court. With regard to the RESPA claim, the court found that the complaint sufficiently pled a breach of RESPA duties to survive a motion to dismiss by alleging a failure to adequately respond to a QWR. The court also ruled, however, that the borrower failed to adequately plead damages to state a RESPA claim, and therefore held its decision on the servicer's motion to dismiss in abeyance to allow the borrower an opportunity to amend the complaint. The court also ruled that the borrower had sufficiently pled her common law claims to state plausible claims for relief to survive the motion to dismiss. For a copy of the decision, please click here.

Banking

House, Senate Reach Agreement on Regulatory Reform Bill. On June 25, House and Senate conferees came to an agreement on far-reaching financial regulatory reform legislation, known as the Dodd-Frank Bill. The House is expected to take up consideration of the final bill next Tuesday, with a final vote expected to come before the July 4 recess. If and when the bill passes, BuckleySandler LLP will issue a *Regulatory Restructuring Report* containing a detailed summary of the legislation. While the bill includes numerous crucial provisions regulating the financial services industry, highlights of several provisions of the bill include:

- Creating within the Federal Reserve Board (FRB) a new Consumer Financial Protection Bureau (CFPB) with rulemaking and limited enforcement power. Banks with less than $10 billion in assets will have a limited exemption from CFPB oversight. There are now exemptions in the bill for auto dealers and practicing attorneys.
- Instituting new minimum underwriting standards for mortgages and prohibiting certain compensation structures for mortgage brokers and originators.
- Exempting from new risk-retention requirements issuances containing only "qualified mortgages."

- Allowing the Office of the Comptroller of the Currency (OCC) to preempt state laws only if they "prevent or significantly" interfere with the business of banking.
- Eliminating the Office of Thrift Supervision, but retaining the thrift charter, with oversight of savings and loans going to the OCC and savings and loans holding company oversight transferred to the FRB.
- Establishing the Financial Stability Oversight Council to continuously monitor for systematic risks to the nation's financial stability. The council will also be charged with reviewing and commenting on accounting standards. Further, the bill gives regulators the authority to seize and liquidate large financial institutions that pose a systemic risk.
- Establishing new capital requirements and rules for trust-preferred securities.
- Placing restrictions on proprietary trading by certain large financial institutions.

Although the final bill text is not yet available, legislative language considered throughout the conference is available at http://1.usa.gov/9zbucZ.

Federal Agencies Issue Final Guidance on Incentive Compensation. On June 21, the federal banking and thrift regulatory agencies issued final guidance requiring financial institutions to align incentive compensation schemes with certain risk management standards. The new standards apply to the compensation of executives and other employees whose activities may expose the institution to "material" amounts of risk. The guidance states that (i) incentive compensation arrangements must balance risk and financial results in a manner that does not encourage employees to expose their organizations to imprudent risks, (ii) risk management processes and internal controls must reinforce and support sound incentive compensation plans (*e.g.* through employment of a non-incentivized expert risk manager), and (iii) corporate boards of directors must have an active oversight role over an organization's compensation practices. The guidelines include additional requirements for large banking organizations. The guidance becomes effective upon its publication in the Federal Register and applies to institutions regulated by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Office of the Comptroller of the Currency, and the Federal Reserve Board. For a copy of the guidance, please click here.

Assistant Attorney General Perez Promises "Vigorous Enforcement" on Fair Lending. On June 23, Assistant U.S. Attorney General Thomas Perez delivered a speech at the Brookings Institution in which he promised "vigorous enforcement and clear regulation" on fair lending issues. Assistant Attorney General Perez, citing numerous recent studies, stated that "while the foreclosure crisis has touched so many communities across America, communities of color have been hit particularly hard, and have suffered greater consequences." The speech touted numerous Obama administration efforts to prevent unfair lending, including funding through the U.S. Department of Housing and Urban Development's Neighborhood Stabilization Program, the establishment of the Financial Fraud Enforcement Task Force, and the creation of the Fair Lending Unit within the Department of Justice. According to Assistant Attorney General Perez, the Fair Lending Unit currently has 50 matters open, including 18 investigations, addressing issues such as discrimination in underwriting, redlining, reverse redlining, steering minority borrowers into less favorable loans, and gender, marital status, or age discrimination in lending. The speech noted that the goal of Fair Lending Unit litigation is to "make people and communities whole" by, among other things, requiring lenders to provide equal access to credit, repairing borrowers' credit scores, and demanding that lenders invest in communities. For the full text of the speech, please click here.

Banking Agencies Publish Revised Host State Loan-To-Deposit Ratios. On June 24, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency publicized the host state loan-to-deposit ratios used to determine compliance with Section 109 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. In general, Section 109 prohibits a bank from establishing or acquiring a branch or branches outside of its home state primarily for the purpose of deposit production. Section 106 of the Gramm-Leach-Bliley Act amended coverage of Section 109 of the Interstate Act to include any branch of a bank controlled by an out-of-state bank holding company. For the current host state loan-to-deposit ratios, please click here.

FDIC Extends Transaction Account Guarantee Program for Six Months. On June 22, the Federal Deposit Insurance Corporation (FDIC) adopted a final rule extending the Transaction Account Guarantee portion of the Temporary Liquidity Guarantee Program for an additional six months (through December 31, 2010). The FDIC will continue to charge participating institutions an annual assessment rate and participating institutions may opt out of the extension. For a copy of the final rule, please click here.

CRA "Community Development" Proposed Rule Comment Deadline July 26, 2010. On June 24, the federal banking and thrift regulatory agencies published in the *Federal Register* a notice of proposed rulemaking to expand the definition of "community development" in the Community Reinvestment Act (CRA) to include loans, investments, and services by financial institutions that support projects and activities that meet Housing and Economic Recovery Act of 2008 criteria and are conducted in Neighborhood Stabilization Program (NSP) areas approved by the U.S. Department of Housing and Urban Development (the proposed rule was reported in *InfoBytes*, June 18, 2010). Under the proposal, a financial institution making community development loans and investments would receive favorable CRA consideration in its own assessment area and, as long as it has addressed the needs of its area, receive CRA consideration for NSP-eligible activities outside of its area. Comments are due by July 26, 2010. For a copy of *Federal Register* notice, please see http://edocket.access.gpo.gov/2010/pdf/2010-15119.pdf.

Utah Federal Court Extends "Complete Preemption" Doctrine to National Banking Act. On June 18, the U.S. District Court for the District of Utah issued a memorandum opinion explaining its June 11 order to vacate a preliminary injunction entered by a Utah state court, which had enjoined a defendant national bank and its trustee services company from conducting foreclosure sales in Utah (the order to vacate was reported in *InfoBytes*, June 18, 2010). *Cox v. ReconTrust Co., N.A.*, No. 2:10-CV-492, 2010 WL 2519716 (D. Utah June 18, 2010). In *Cox*, the plaintiff, a borrower who was facing foreclosure, originally filed suit in state court claiming that the defendants, both national banks licensed under the National Banking Act (NBA), (i) were foreign companies not registered to transact business in Utah, (ii) were not qualified to act as trustees under Utah code, and (iii) violated the Real Estate Settlement Procedures Act (RESPA). Citing the federal claim under RESPA, the defendants removed the case to federal court. Thereafter, the borrower voluntarily dismissed her RESPA claim and moved for remand. Rejecting the motion for remand, the district court found that it retained original jurisdiction because the state law claims were subject to complete preemption under the NBA. The district court concluded that Congress intended for the NBA to exclusively control how national banks transact business nationwide and act as trustees and, thus, provided removal jurisdiction. This interpretation of the NBA also defeated the preliminary injunction because the NBA preempted the borrower's state law claims that a national bank must be registered with Utah as a foreign corporation to foreclose on a property and must comply with Utah's statutory requirements for trustees. For a copy of the opinion, please click here.

Consumer Finance

House, Senate Reach Agreement on Regulatory Reform Bill. On June 25, House and Senate conferees came to an agreement on far-reaching financial regulatory reform legislation, known as the Dodd-Frank Bill. The House is expected to take up consideration of the final bill next Tuesday, with a final vote expected to come before the July 4 recess. If and when the bill passes, BuckleySandler LLP will issue a *Regulatory Restructuring Report* containing a detailed summary of the legislation. While the bill includes numerous crucial provisions regulating the financial services industry, highlights of several provisions of the bill include:

- Creating within the Federal Reserve Board (FRB) a new Consumer Financial Protection Bureau (CFPB) with rulemaking and limited enforcement power. Banks with less than $10 billion in assets will have a limited exemption from CFPB oversight. There are now exemptions in the bill for auto dealers and practicing attorneys.
- Instituting new minimum underwriting standards for mortgages and prohibiting certain compensation structures for mortgage brokers and originators.
- Exempting from new risk-retention requirements issuances containing only "qualified mortgages."
- Allowing the Office of the Comptroller of the Currency (OCC) to preempt state laws only if they "prevent or significantly" interfere with the business of banking.
- Eliminating the Office of Thrift Supervision, but retaining the thrift charter, with oversight of savings and loans going to the OCC and savings and loans holding company oversight transferred to the FRB.
- Establishing the Financial Stability Oversight Council to continuously monitor for systematic risks to the nation's financial stability. The council will also be charged with reviewing and commenting on accounting standards. Further, the bill gives regulators the authority to seize and liquidate large financial institutions that pose a systemic risk.
- Establishing new capital requirements and rules for trust-preferred securities.
- Placing restrictions on proprietary trading by certain large financial institutions.

Although the final bill text is not yet available, legislative language considered throughout the conference is available at http://1.usa.gov/9zbucZ.

FinCEN Proposes Rules to Apply BSA Regulations to Non-Bank Providers of Prepaid Access Products. On June 21, the Financial Crimes Enforcement Network (FinCEN) released a Notice of Proposed Rulemaking (NPRM) that would impose Bank Secrecy Act (BSA) reporting requirements relating to money laundering and terrorist financing on non-banks that issue certain pre-paid access products. The proposed rules implement provisions of the Credit Card Accountability, Responsibility and Disclosure Act of 2009 relating to stored value products. Specifically, the NPRM would remove the exemption for "stored value" products under the BSA and rename "stored value" products to "prepaid access" products. Prepaid access products include gift cards (but not credit or debit cards), mobile phones, and related devices. The party in a transaction chain with "predominant oversight and control" will be responsible for BSA compliance requirements (including filing suspicious activity reports) for prepaid access products. However, the NPRM exempts certain categories of prepaid access products and services that pose lower risks from certain BSA reporting requirements. Comments must be submitted within 30 days after publication in the *Federal Register*. The NPRM is available here. For a copy of the press release, please click here.

Illinois Amends Consumer Installment Loan Act; Caps Interest Rates, Eliminates Fees. On June 21, Illinois Governor Pat Quinn signed HB0537, which amends the Illinois Consumer Installment Loan Act by placing a cap on interest rates, introducing income-based repayment measures, eliminating balloon payments and pre-payment penalties, and expanding the monitoring of licensed lenders. Under the new provisions, the interest rate on loans over $4,000 will be capped at 36% and the interest rate on certain loans under $1,500 will be capped at 99%. Moreover, the interest rate that may be charged on the unpaid balance of a delinquent account on small consumer loans will be capped at 18% per year. Lenders are prohibited from making small consumer loans that would result in a monthly payment exceeding 22.5% of the borrower's gross monthly income. Lenders also may not condition the extension of credit on the consumer's agreement to repay the loan using preauthorized electronic fund transfers. Finally, the bill requires certain information pertaining to small consumer loans to be entered into a state-wide electronic database. The amendments become effective March 21, 2011. For a copy of the bill, please see http://www.ilga.gov/legislation/publicacts/96/PDF/096-0936.pdf.

U.S. Supreme Court Grants Cert in TILA Dispute. On June 21, the U.S. Supreme Court granted a petition for certiorari to hear a case in which the U.S. Court of Appeals for the Ninth Circuit previously held that the Truth in Lending Act (TILA) requires a creditor to provide contemporaneous notice of discretionary interest rate increases that occur as a result of borrower default—even though the contractual terms governing the account did not change and the card agreement provided authority for the rate increase (the Ninth Circuit's opinion was reported in *InfoBytes*, Mar. 27, 2009). *McCoy v. Chase Manhattan Bank, USA, N.A.*, No. 09-329. In *McCoy*, the plaintiff cardholder alleged that the defendant bank increased his credit card interest rate retroactively to the beginning of his payment cycle as a result of a late payment. The cardholder alleged that this increase violated TILA and Delaware law because the bank did not give notice of this increase until after the increase had taken effect. The bank contended that the cardholder was provided "specific" terms of the increase in the card agreement, which, among other things, set a maximum rate increase in case of default. The Ninth Circuit reversed a district court decision to find that TILA requires notice to the cardholder when the cardholder's interest rate increases because of default, and that the notice must be contemporaneous with the rate increase. The case will be decided in the court's next session, which begins in October. In the interim since the case was filed, the Credit Card Accountability Responsibility and Disclosure Act of 2009 amended TILA to require 45-day advance notice for an account rate increase. For a copy of the Ninth Circuit's opinion, please click here. For a copy of the Supreme Court docket, please click here.

U.S. Supreme Court Establishes New Rule for Challenges to Arbitration Agreements. On June 21, by a 5-4 vote, the U.S. Supreme Court established a new rule for who decides certain challenges to arbitration agreements, making it more difficult for employees and consumers to bring unconscionability challenges to arbitration agreements. *Rent-A-Center, West, Inc. v. Jackson*, 559 U.S. – , 2010 WL 2471058 (U.S. June 21, 2010). In this case, an employee filed an employment discrimination suit against his former employer in federal district court. His former employer responded by filing a motion under the Federal Arbitration Act (FAA) to dismiss or stay the proceedings and to compel arbitration, pursuant to an arbitration agreement that the employee had signed as a condition of his employment. The employee opposed the motion on the ground that the arbitration agreement was unenforceable because it was unconscionable under state law. The employer argued in response that the employee's unconscionability claim was not properly before the district court because the arbitration agreement expressly provided that the arbitrator would have exclusive authority to resolve disputes about the enforceability of the agreement. The district court granted the employer's motion to dismiss and compel arbitration. The U.S. Court of Appeals for the Ninth Circuit reversed the ruling in relevant part, finding that "the threshold question of unconscionability is for the court" to decide. On appeal, the majority of the Supreme Court found that (i) the current "controversy" between the parties was over whether or not the agreement was unconscionable, and (ii) the agreement contained a "delegation provision," or "an agreement to arbitrate threshold issues concerning the arbitration agreement," that delegates resolution of that controversy to the arbitrator. The majority then found that because the employee had not specifically challenged that delegation provision, that provision must be treated as valid. Thus, an arbitrator, and not a federal district court, must decide whether an arbitration agreement as a whole is unconscionable if the agreement explicitly delegates that issue to the arbitrator through a delegation clause and the plaintiff fails to specifically challenge that delegation clause. In dissent, Justice Stevens, joined by Justices Ginsburg, Breyer and Sotomayor, argued that certain issues, including unconscionability, are "'gateway matter[s]' because they are necessary antecedents to enforcement of an arbitration agreement" and "because they raise a 'question of arbitrability,'" and noted that "the FAA commits those gateway matters, specific to the arbitration agreement, to the court." For a copy of the opinion, please see http://www.supremecourt.gov/opinions/09pdf/09-497.pdf.

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Fifth Circuit Holds Bankruptcy Courts May Certify Class Actions Of Debtors Under Federal Bankruptcy Rules. On June 18, the U.S. Court of Appeals for the Fifth Circuit upheld a bankruptcy court's determination that a bankruptcy court may certify class actions of debtors. *In re Wilborn*, No. 09-20415, 2010 WL 2433091 (5th Cir. June 18, 2010). In this dispute, the plaintiffs attempted to certify a class of debtors, alleging that the defendant bank impermissibly charged post-petition fees and costs without obtaining approval from the bankruptcy court. Acknowledging disagreement between courts as to whether a bankruptcy judge may certify a class action of debtors, the Fifth Circuit concluded that Federal Rules of Bankruptcy Procedure (F.R.B.P.) Rule 7023 authorizes a bankruptcy judge to certify a class action of debtors where the class certification requirements of both Federal Rules of Civil Procedure (F.R.C.P.) Rule 23 and F.R.B.P. Rule 7023 are met. In this case, however, the Fifth Circuit vacated class certification upon determining that the bankruptcy court's class certification was inappropriate. The Fifth Circuit reasoned that the class did not meet the predominance and superiority requirements of F.R.C.P. Rule 23, and that the class representative inadequately represented the class. For a copy of the opinion, please see http://www.ca5.uscourts.gov/opinions/pub/09/09-20415-CV0.wpd.pdf.

Securities

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U.S. Supreme Court Establishes New Rule for Challenges to Arbitration Agreements. On June 21, by a 5-4 vote, the U.S. Supreme Court established a new rule for who decides certain challenges to arbitration agreements, making it more difficult for employees and consumers to bring unconscionability challenges to arbitration agreements. *Rent-A-Center, West, Inc. v. Jackson*, 559 U.S. – , 2010 WL 2471058 (U.S. June 21, 2010). In this case, an employee filed an employment discrimination suit against his former employer in federal district court. His former employer responded by filing a motion under the Federal Arbitration Act (FAA) to dismiss or stay the proceedings and to compel arbitration, pursuant to an arbitration agreement that the employee had signed as a condition of his employment. The employee opposed the motion on the ground that the arbitration agreement was unenforceable because it was unconscionable under state law. The employer argued in response that the employee's unconscionability claim was not properly before the district court because the arbitration agreement expressly provided that the arbitrator would have exclusive authority to resolve disputes about the enforceability of the agreement. The district court granted the employer's motion to dismiss and compel arbitration. The U.S. Court of Appeals for the Ninth Circuit reversed the ruling in relevant part, finding that "the threshold question of unconscionability is for the court" to decide. On appeal, the majority of the Supreme Court found that (i) the current "controversy" between the parties was over whether or not the agreement was unconscionable, and (ii) the agreement contained a "delegation provision," or "an agreement to arbitrate threshold issues concerning the arbitration agreement," that delegates resolution of that controversy to the arbitrator. The majority then found that because the employee had not specifically challenged that delegation provision, that provision must be treated as valid. Thus, an arbitrator, and not a federal district court, must decide whether an arbitration agreement as a whole is unconscionable if the agreement explicitly delegates that issue to the arbitrator through a delegation clause and the plaintiff fails to specifically challenge that delegation clause. In dissent, Justice

Stevens, joined by Justices Ginsburg, Breyer and Sotomayor, argued that certain issues, including unconscionability, are "'gateway matter[s]' because they are necessary antecedents to enforcement of an arbitration agreement" and "because they raise a 'question of arbitrability,'" and noted that "the FAA commits those gateway matters, specific to the arbitration agreement, to the court." For a copy of the opinion, please see http://www.supremecourt.gov/opinions/09pdf/09-497.pdf.

First Circuit Reduces Court Sanctions Against Servicer. On June 14, the U.S. Court of Appeals for the First Circuit found that a bankruptcy court's sanction of $250,000 against a mortgage loan servicer was excessive and unreasonable where the mortgage loan servicer wrongly claimed in a court filing that it was the holder of the borrower's note. *In re Nosek*, No. 09-1806, 2010 WL 2350579 (1st Cir. June 14, 2010). In this dispute, the mortgage loan servicer initially originated the borrower's mortgage loan. It subsequently assigned the note to an asset securitization trust but retained the power to service it. When the borrower fell behind on payments, the trustee filed a foreclosure action; that action was stayed by the borrower's bankruptcy. The servicer filed a claim in bankruptcy court; however, its motion incorrectly stated that it was the holder of the mortgage note, when in fact, the trustee was the owner. When the mistake was revealed in a later filing, the bankruptcy court sua sponte imposed sanctions of $250,000 on the servicer under Federal Rules of Bankruptcy Procedure Rule 9011, and the district court affirmed. On appeal, the servicer admitted to the violation but claimed that the imposed sanctions were unreasonable, and the First Circuit agreed. The court noted that while bankruptcy courts have a "legitimate interest in policing" their filings, a number of factors should be considered when determining an appropriate sanctions amount. Those factors include, among others, whether the conduct was willful or negligent, whether it was an isolated event, and whether the other party was prejudiced. While the court suggested that mortgage holders routinely file inaccurate claims, the servicer here had an otherwise exemplary record in proceedings and its actions were not a deliberate attempt to mislead the borrower or the court, nor could the borrower show any actual prejudice. Accordingly, the court decreased the imposed sanction amount to $5,000. For a copy of the opinion, please see http://www.ca1.uscourts.gov/pdf.opinions/09-1806P-01A.pdf.

Ohio Federal Court Indicates Intent to Certify Question to Ohio Supreme Court to Resolve Applicability of Ohio Consumer Sales Practices Act to Servicers. On June 18, the U.S. District Court for the Northern District of Ohio stated its intent to certify to the Ohio Supreme Court the question of whether the Ohio Consumer Sales Practices Act (OCSPA) applies to mortgage loan servicers. *Anderson v. Barclays Capital Real Estate, Inc.*, No. 3:09-cv-2335 (N.D. Ohio June 18, 2010). In *Anderson*, the plaintiff borrower asserted that the defendant, a mortgage servicer, violated the Real Estate Settlement Procedures Act (RESPA) and the OCSPA by allegedly misapplying the borrower's mortgage loan payments and by allegedly failing to adequately respond to her qualified written request (QWR). The borrower also asserted common law claims for unjust enrichment and conversion. The servicer moved to dismiss all claims, challenging the sufficiency of the pleadings and specifically arguing that the OCSPA does not apply to mortgage servicers because they are not "suppliers," nor were the servicer's dealings with the borrower "consumer transactions" within the meaning of the OCSPA. With respect to the OCSPA claim, the court noted that there was no binding Ohio authority regarding whether the OCSPA applies to mortgage servicers and stated its intent to certify the question to the Ohio Supreme Court. With regard to the RESPA claim, the court found that the complaint sufficiently pled a breach of RESPA duties to survive a motion to dismiss by alleging a failure to adequately respond to a QWR. The court also ruled, however, that the borrower failed to adequately plead damages to state a RESPA claim, and therefore held its decision on the servicer's motion to dismiss in abeyance to allow the borrower an opportunity to amend the complaint. The court also ruled that the borrower had sufficiently pled her common law claims to state plausible claims for relief to survive the motion to dismiss. For a copy of the decision, please click here.

Fifth Circuit Holds Bankruptcy Courts May Certify Class Actions Of Debtors Under Federal Bankruptcy Rules. On June 18, the U.S. Court of Appeals for the Fifth Circuit upheld a bankruptcy court's determination that a bankruptcy court may certify class actions of debtors. *In re Wilborn*, No. 09-20415, 2010 WL 2433091 (5th Cir. June 18, 2010). In this dispute, the plaintiffs attempted to certify a class of debtors, alleging that the defendant bank impermissibly charged post-petition fees and costs without obtaining approval from the bankruptcy court. Acknowledging disagreement between courts as to whether a bankruptcy judge may certify a class action of debtors, the Fifth Circuit concluded that Federal Rules of Bankruptcy Procedure (F.R.B.P.) Rule 7023 authorizes a bankruptcy judge to certify a class action of debtors where the class certification requirements of both Federal Rules of Civil Procedure (F.R.C.P.) Rule 23 and F.R.B.P. Rule 7023 are met. In this case, however, the Fifth Circuit vacated class certification upon determining that the bankruptcy court's class certification was inappropriate. The Fifth Circuit reasoned that the class did not meet the predominance and superiority requirements of F.R.C.P. Rule 23, and that the class representative inadequately represented the class. For a copy of the opinion, please see http://www.ca5.uscourts.gov/opinions/pub/09/09-20415-CV0.wpd.pdf.

Credit Cards

U.S. Supreme Court Grants Cert in TILA Dispute. On June 21, the U.S. Supreme Court granted a petition for certiorari to hear a case in which the U.S. Court of Appeals for the Ninth Circuit previously held that the Truth in Lending Act (TILA) requires a creditor to provide contemporaneous notice of discretionary interest rate increases that occur as a result of borrower default—even though the contractual terms governing the account did not change and the card agreement provided authority for the rate increase (the Ninth Circuit's opinion was reported in *InfoBytes*, Mar. 27, 2009). *McCoy v. Chase Manhattan Bank, USA, N.A.*, No. 09-329. In *McCoy*, the plaintiff cardholder alleged that the defendant bank increased his credit card interest rate retroactively to the beginning of his payment cycle as a result of a late payment. The cardholder alleged that this increase violated TILA and Delaware law because the bank did not give notice of this increase until after the increase had taken effect. The bank contended that the cardholder was provided "specific" terms of the increase in the card agreement, which, among other things, set a maximum rate increase in case of default. The Ninth Circuit reversed a district court decision to find that TILA requires notice to the cardholder when the cardholder's interest rate increases because of default, and that the notice must be contemporaneous with the rate increase. The case will be decided in the court's next session, which begins in October. In the interim since the case was filed, the Credit Card Accountability Responsibility and Disclosure Act of 2009 amended TILA to require 45-day advance notice for an account rate increase. For a copy of the Ninth Circuit's opinion, please click here. For a copy of the Supreme Court docket, please click here.

We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes.
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