Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

August 6, 2010

Topics In This Issue

Federal Issues

FHFA Proposes Rules of Procedure, Practice for Civil Enforcement Proceedings; Proposes Establishing Office of Ombudsman. On August 4, the Federal Housing Finance Agency (FHFA) announced a proposed rule implementing provisions of the Housing and Economic Recovery Act 2008 (HERA) relating to FHFA's civil enforcement powers and the Rules of Practice and Procedure for enforcement proceedings. The proposed rule would consolidate in FHFA the civil enforcement authority of the Office of Federal Housing Enterprise Oversight (OFHEO), formerly responsible for regulating the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, and the Federal Housing Finance Board (Finance Board), formerly responsible for regulating the Federal Home Loan Banks. The proposed rule would replace procedures and related rules for administrative enforcement proceedings previously used by OFHEO and the Finance Board. The proposed rule would also implement stronger cease and desist and civil money penalty provisions contained in HERA. Finally, the proposed rule would delineate the process for the removal or suspension of individuals associated with regulated entities for specified grounds or for those who are charged with or convicted of a felony. Comments on the proposed rule are due 60 days following publication in the *Federal Register*. For a copy of the proposed rule, please see http://www.fhfa.gov/webfiles/16217/RulesPandPtoFR8410.pdf; for a copy of the press release, please see http://www.fhfa.gov/webfiles/16218/FedRegPR8410RulesPractProc.pdf. On August 5, FHFA proposed an additional regulation to establish within FHFA an Office of the Ombudsman, which would be responsible for considering complaints and appeals from entities regulated by FHFA, or from any person that has a business relationship with a regulated entity or the Office of Finance, for matters relating to the regulation and supervision of FHFA's regulated entities. Comments on this proposed rulemaking are also due 60 days following publication in the *Federal Register*. For a copy of the proposed rule, please see http://www.fhfa.gov/webfiles/16456/OmbudsmanNPR.pdf.

Senate Passes Bill Authorizing an Increase in the Annual Mortgage Insurance Premiums on FHA Guaranteed Loans. On August 4, the U.S. Senate passed legislation (H.R. 5981) that would amend the National Housing Act to grant the Federal Housing Administration (FHA) the authority to raise annual mortgage insurance premiums on FHA guaranteed loans. Under the bill, the cap on mortgage insurance premiums for mortgages below 95% percent of value could be increased from .5% to 1.5% while the mortgage insurance premium on mortgages at or above 95% of value could be increased from .55% to 1.55%. President Obama is expected to sign the bill into law. For a copy of the bill, please see http://1.usa.gov/oWeFpt.

FDIC Sells Performing Loans from Failed Banks in Pilot Securitization. On July 30, the Federal Deposit Insurance Corporation (FDIC) announced that it had completed a sale of securities under a pilot securitization consisting of performing single-family mortgages held by several failed banks. The securitization program represents the first time during the financial crisis that the FDIC has sold assets as part of a securitization. Under the securitization program, the underlying securities were divided into three tranches: FDIC-guaranteed senior certificates that represented 85% of the capital structure, a mezzanine class of subordinated certificates, and an over collaterilization class, that together make up the remaining 15% of the capital structure. Any delinquent mortgages will be considered for loan modification consistent with the Home Affordable Modification Program or the FDIC loan modification program. To view the press release, please see http://www.fdic.gov/news/news/press/2010/pr10173.html.

Fannie Mae Instructs Seller/Servicers to Notify Mortgage Insurers to Provide Information to Fannie Mae on Request. On July 27, Fannie Mae issued Announcement SVC-2010-09, which instructs seller/servicers to notify mortgage insurers in writing that they are required to, upon request, provide Fannie Mae with any information, data, or materials relating to mortgage loans owned or guaranteed now, or in the future by Fannie Mae. Seller/servicers must comply with this requirement by October 1, 2010. Henceforth the notification must be provided by seller/servicers to mortgage insurers at the outset of their business relationship. Fannie Mae also announced that it is in the process of developing a web service capable of validating mortgage insurance coverage data with the mortgage insurer prior to delivery. Once operational, mortgage loans will be ineligible for delivery until the coverage data has been validated. Until such time, Fannie Mae will instruct the seller/servicer to either confirm or change the submitted data if there is a difference in the data provided by a mortgage servicer and a seller/servicer. For a copy of the announcement, please click here.

Courts

Seventh Circuit Allows FHA Claim Against Bank, Appraisal Services Company to Proceed. On July 30, a divided panel of the U.S. Court of Appeals for the Seventh Circuit held that a *pro se* plaintiff adequately alleged violations of the Fair Housing Act (FHA) solely by identifying the type of alleged discrimination, who allegedly committed the discrimination, and when the discrimination occurred. *Swanson v. Citibank, N.A.*, No. 10-1122, 2010 WL 2977297 (7th Cir. July 30, 2010). In *Swanson*, the *pro se* plaintiff alleged fraud and violations of the FHA and the Equal Credit Opportunity Act (ECOA) after the defendant bank denied her application for a home equity loan. The plaintiff alleged that the defendants (a bank, an appraiser, and the appraiser's employer) discriminated against her on the

basis of her race by providing a low appraisal of her home and subsequently denying her a loan. The district court dismissed all claims against all defendants. On appeal, the plaintiff challenged the dismissal of her FHA and fraud claims. As to the FHA claim, the Seventh Circuit reversed the district court, holding that the complaint adequately alleged a violation of the FHA because it identified the type of discrimination that allegedly occurred, who allegedly committed the discrimination, and when the violation occurred. The Seventh Circuit, however, upheld the district court's dismissal of the plaintiff's fraud claim because it lacked specificity and failed to plead damages resulting from the denial of her loan application. Judge Posner dissented from the portion of the opinion reversing the dismissal of the FHA claim. The dissent concluded that the plaintiff's FHA allegations were implausible because the denial of the loan was likely due to the low value of the plaintiff's home appraisal and that there were insufficient allegations that suggested race-based discrimination (*e.g.*, that the plaintiff was competing with a similarly situated white borrower for the loan). For a copy of the opinion, please click here.

California Federal Court Certifies Class Action of Borrowers Against Wholesale Mortgage Lender. On July 20, the U.S. District Court for the Northern District of California certified a class of borrowers in an action against a wholesale mortgage lender for claims of discriminatory mortgage lending practices. *Ramirez v. Greenpoint Mortgage Funding, Inc.*, No. C08-0369, 2010 WL 2867068 (N.D. Cal. July 20, 2010). In *Ramirez*, a group of borrowers sued a wholesale mortgage lender, claiming that the lender engaged in discriminatory mortgage lending practices in violation of the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA). The borrowers had each used various mortgage brokers to obtain wholesale mortgage loans from the defendant wholesale lender. The borrowers alleged that the lender's discretionary pricing policy led the mortgage brokers to charge higher interest rates and fees to African American and Latino borrowers compared to similarly situated white borrowers. The borrowers claimed that the lender incentivized this abuse by basing a portion of its mortgage broker's compensation on its ability to lock borrowers into mortgage loans with high interest rates and fees.

The court found that the plaintiffs' suit met the requirements for class certification under Federal Rule of Civil Procedure 23(a). The borrowers presented statistical evidence showing that the annual percentage rates (APRs) on mortgage loans of ethnic minority borrowers were significantly higher than those of similarly situated white borrowers. The court concluded that the plaintiffs' statistical evidence established that the claims of all class members hinged on a common question: whether the lender's "discretionary pricing policy had a disparate impact on minority borrowers." Next, the court rejected the defendant's argument that the claims lacked typicality because the plaintiffs made false statements on their loan applications and, thus, their claims may be subject to the unique defense of unclean hands. The court noted that the plaintiffs were likely unaware of the misstatements because of their limited English skills and that the unclean hands defense "has not been applied where Congress authorizes broad equitable relief to serve important national polices," as is the case under ECOA and FHA. The court also found that the plaintiffs did not lack standing because they actually obtained a better APR than similarly situated white borrowers. The court concluded that the plaintiffs had "advanced a viable theory showing the harm" produced by the alleged discrimination stemming from defendant's discretionary pricing policy. Finding that the plaintiffs also met the adequacy and

numerosity requirements under Rule 23(a), as well as the requirements under Rule 23(b), the court certified the class. For a copy of the opinion, please click here.

South Carolina Federal Court Holds No Private Right of Action under RESPA for Failure to Provide Information Booklet, GFE. On July 22, the U.S. District Court for the District of South Carolina held that there is no private right of action for an alleged failure to provide the information booklet and good faith estimate (GFE) required by the Real Estate Settlement Procedures Act (RESPA). *Harris v. Sand Canyon Corp.*, No. 2:08-CV-3692, 2010 WL 2902771 (D.S.C. July 22, 2010). In *Harris*, the plaintiffs alleged, among other things, that the defendant mortgage company violated RESPA Section 2604(c) by failing to provide the plaintiff borrowers with an information booklet and GFE prior to the consummation of their mortgage loan transaction. The mortgage company moved for summary judgment, arguing that RESPA does not provide a private right of action for such claims. Acknowledging that the Fourth Circuit has not decided this question, the court joined other district courts within the Fourth Circuit, and other federal courts of appeal, to hold that there is no private right of action under RESPA Section 2604(c). The court reasoned that the section does not explicitly authorize a private right of action and that Congress had previously eliminated a private right of action under this section. For a copy of the opinion, please click here.

Illinois Federal Court Holds Issuance of General-Purpose Credit Cards Is Subject to TILA Requirements. On July 20, the U.S. District Court for the Northern District of Illinois denied a motion to dismiss a lawsuit seeking damages for alleged violations of the Truth in Lending Act (TILA), as well as state law claims including fraud and breach of contract, in connection with the issuance of general-purpose credit cards. *Acosta v. Target Corp.*, No. 05 C 7068, 2010 WL 2925885 (N.D. Ill. July 20, 2010). In*Acosta*, an individual plaintiff, on behalf of himself and a putative class of similarly-situated individuals, sued defendants Target Corp., Target National Bank, N.A., and Target Receivables Corp. The putative class representative alleged that the defendants sent unsolicited credit cards under an "autosub" program designed to replace certain store-only credit cards (guest cards) with general-purpose, store-related VISA cards (general-purpose cards) to current and former guest card users. According to the plaintiff, the general-purpose cards had higher rates and fees and "stricter underwriting" and the plaintiff's account was ultimately frozen and his credit limit was reduced. The plaintiff sued, asserting state law claims and alleging that the defendants had violated Section 1642 of TILA, which prohibits the issuance of unsolicited cards, and Sections 1637(a) and (c) of TILA, which require that issuers send out certain disclosures when opening a new account. The defendants moved to dismiss both TILA claims on the grounds that general-purpose cards were "substitute cards" for the guest cards rather than new accounts. The court rejected this argument, finding that the consumer had alleged facts sufficient to establish that the general-purpose card constituted the opening of a new account, including (i) the general-purpose card was a new credit card, (ii) the general-purpose and guest cards had different account numbers, and the general-purpose card was not derived from or related to the guest card, (iii) the general-purpose card included "new features or benefits," (iv) the general-purpose card could be used for transactions at many more merchants than the guest card, and (v) the defendants implemented the general-purpose card on an individual basis. The court also rejected the defendants' argument that TILA preempted the consumer's fraud claim, reasoning that the ability of consumers to assert state law fraud claims helps to enforce TILA's disclosure requirements. For a copy of the opinion, please click here.

Firm News

Jonice Gray Tucker will be speaking on issues related to "Fair Servicing" at the American Bar Association's Annual Meeting on August 7 in San Francisco, CA.

John Kromer will be the co-moderator of a panel on the implementation of the SAFE Mortgage Licensing Act at the American Bar Association Annual Meeting on August 7 in San Francisco, CA.

Jeff Naimon will be the vice-chair of the panel "Current Topics in TILA" at the American Bar Association Annual Meeting on August 7 in San Francisco, CA.

Andrew Sandler will be chairing the Retail Banking & Consumer Law Panel at the American Bar Association Annual Meeting on August 8 in San Francisco, CA.

Jonice Gray Tucker will be speaking at the California Mortgage Bankers Association's Servicing Conference on August 9. The topic is enforcement activity related to loan modifications and default servicing.

Jon Langlois will be a panelist in a webinar for the National Reverse Mortgage Lenders Association titled "Financial Services Reform: How Does It Effect Us?" on August 10.

John Kromer will be a panelist on the Mortgage Industry Panel at the American Association of Residential Mortgage Regulators' Annual Conference on August 11 in St. Louis, MO addressing regulatory developments impacting non-bank lenders.

Jamie Parkinson will be speaking at the Institute of Continuing Legal Education in Georgia's FCPA seminar "International Business and Crime: An Overview" in Atlanta on September 2. Mr. Parkinson's session is titled "FCPA Compliance Tools and Techniques" and will focus on detection and compliance.

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.

Andrew Sandler, Ben Klubes, and Jonice Gray Tucker will be speaking at the "CRA & Fair Lending Colloquium" hosted by Wolters Kluwer Financial Services November 7-10 in Las Vegas, NV. Senior executives at financial services organizations will discuss their compliance and risk management concerns with top regulators and other industry leaders. Other confirmed speakers include Thomas E. Perez, assistant attorney general for DOJ's Civil Rights Division, and Sandra Braunstein, director of the Federal Reserve Board's Consumer and Community Affairs Division. Online registration is available at http://www.cracolloquium.com.

Andrew Sandler participated in a webinar by Thomson Reuters, "Enforcement, Governance & Consumer Protection," on July 26.

Andrew Sandler participated in a webinar by the American Bankers Association, "How Financial Regulatory Reform Legislation Will Impact Banks," on July 28.

Andrew Sandlerrecently participated in four webinars offered by the Financial Services Roundtable on the topic "The Restoring American Financial Stability Act of 2010: Legislative Reform Meets Regulatory Reality."

On August 2-3, Clint Rockwell, Melissa Klimkiewicz, and Jonathan Cannon presented at the Lenders One Summer Conference. On August 2, Clint gave a presentation on the Dodd-Frank Reform Act. On August 3, Clint and Melissa gave a presentation on "Surviving FHA's Enforcement Environment," and Jonathan and Melissa gave a presentation on "Repurchase Defense Strategies and RESPA Developments."

Mortgages

FHFA Proposes Rules of Procedure, Practice for Civil Enforcement Proceedings; Proposes Establishing Office of Ombudsman. On August 4, the Federal Housing Finance Agency (FHFA) announced a proposed rule implementing provisions of the Housing and Economic Recovery Act 2008 (HERA) relating to FHFA's civil enforcement powers and the Rules of Practice and Procedure for enforcement proceedings. The proposed rule would consolidate in FHFA the civil enforcement authority of the Office of Federal Housing Enterprise Oversight (OFHEO), formerly responsible for regulating the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, and the Federal Housing Finance Board (Finance Board), formerly responsible for regulating the Federal Home Loan Banks. The proposed rule would replace procedures and related rules for administrative enforcement proceedings previously used by OFHEO and the Finance Board. The proposed rule would also implement stronger cease and desist and civil money penalty provisions contained in HERA. Finally, the proposed rule would delineate the process for the removal or suspension of individuals associated with regulated entities for specified grounds or for those who are charged with or convicted of a felony. Comments on the proposed rule are due 60 days following publication in the *Federal Register*. For a copy of the proposed rule, please see http://www.fhfa.gov/webfiles/16217/RulesPandPtoFR8410.pdf; for a copy of the press release, please see http://www.fhfa.gov/webfiles/16218/FedRegPR8410RulesPractProc.pdf. On August 5, FHFA proposed an additional regulation to establish within FHFA an Office of the Ombudsman, which would be responsible for considering complaints and appeals from entities regulated by FHFA, or from any person that has a business relationship with a regulated entity or the Office of Finance, for matters relating to the regulation and supervision of FHFA's regulated entities. Comments on this proposed rulemaking are also due 60 days following publication in the *Federal Register*. For a copy of the proposed rule, please see http://www.fhfa.gov/webfiles/16456/OmbudsmanNPR.pdf.

Senate Passes Bill Authorizing an Increase in the Annual Mortgage Insurance Premiums on FHA Guaranteed Loans. On August 4, the U.S. Senate passed legislation (H.R. 5981) that would amend the National Housing Act to grant the Federal Housing Administration (FHA) the authority to raise annual mortgage insurance premiums on FHA guaranteed loans. Under the bill, the cap on mortgage insurance premiums for mortgages below 95% percent of value could be increased from

.5% to 1.5% while the mortgage insurance premium on mortgages at or above 95% of value could be increased from .55% to 1.55%. President Obama is expected to sign the bill into law. http://1.usa.gov/oWeFpt.

FDIC Sells Performing Loans from Failed Banks in Pilot Securitization. On July 30, the Federal Deposit Insurance Corporation (FDIC) announced that it had completed a sale of securities under a pilot securitization consisting of performing single-family mortgages held by several failed banks. The securitization program represents the first time during the financial crisis that the FDIC has sold assets as part of a securitization. Under the securitization program, the underlying securities were divided into three tranches: FDIC-guaranteed senior certificates that represented 85% of the capital structure, a mezzanine class of subordinated certificates, and an over collaterilization class, that together make up the remaining 15% of the capital structure. Any delinquent mortgages will be considered for loan modification consistent with the Home Affordable Modification Program or the FDIC loan modification program. To view the press release, please see http://www.fdic.gov/news/news/press/2010/pr10173.html.

Fannie Mae Instructs Seller/Servicers to Notify Mortgage Insurers to Provide Information to Fannie Mae on Request. On July 27, Fannie Mae issued Announcement SVC-2010-09, which instructs seller/servicers to notify mortgage insurers in writing that they are required to, upon request, provide Fannie Mae with any information, data, or materials relating to mortgage loans owned or guaranteed now, or in the future by Fannie Mae. Seller/servicers must comply with this requirement by October 1, 2010. Henceforth the notification must be provided by seller/servicers to mortgage insurers at the outset of their business relationship. Fannie Mae also announced that it is in the process of developing a web service capable of validating mortgage insurance coverage data with the mortgage insurer prior to delivery. Once operational, mortgage loans will be ineligible for delivery until the coverage data has been validated. Until such time, Fannie Mae will instruct the seller/servicer to either confirm or change the submitted data if there is a difference in the data provided by a mortgage servicer and a seller/servicer. For a copy of the announcement, please click here.

California Federal Court Certifies Class Action of Borrowers Against Wholesale Mortgage Lender. On July 20, the U.S. District Court for the Northern District of California certified a class of borrowers in an action against a wholesale mortgage lender for claims of discriminatory mortgage lending practices. *Ramirez v. Greenpoint Mortgage Funding, Inc.*, No. C08-0369, 2010 WL 2867068 (N.D. Cal. July 20, 2010). In *Ramirez*, a group of borrowers sued a wholesale mortgage lender, claiming that the lender engaged in discriminatory mortgage lending practices in violation of the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA). The borrowers had each used various mortgage brokers to obtain wholesale mortgage loans from the defendant wholesale lender. The borrowers alleged that the lender's discretionary pricing policy led the mortgage brokers to charge higher interest rates and fees to African American and Latino borrowers compared to similarly situated white borrowers. The borrowers claimed that the lender incentivized this abuse by basing a portion of its mortgage broker's compensation on its ability to lock borrowers into mortgage loans with high interest rates and fees.

The court found that the plaintiffs' suit met the requirements for class certification under Federal Rule of Civil Procedure 23(a). The borrowers presented statistical evidence showing that the annual percentage rates (APRs) on mortgage loans of ethnic minority borrowers were significantly higher than those of similarly situated white borrowers. The court concluded that the plaintiffs' statistical evidence established that the claims of all class members hinged on a common question: whether the lender's "discretionary pricing policy had a disparate impact on minority borrowers." Next, the court rejected the defendant's argument that the claims lacked typicality because the plaintiffs made false statements on their loan applications and, thus, their claims may be subject to the unique defense of unclean hands. The court noted that the plaintiffs were likely unaware of the misstatements because of their limited English skills and that the unclean hands defense "has not been applied where Congress authorizes broad equitable relief to serve important national polices," as is the case under ECOA and FHA. The court also found that the plaintiffs did not lack standing because they actually obtained a better APR than similarly situated white borrowers. The court concluded that the plaintiffs had "advanced a viable theory showing the harm" produced by the alleged discrimination stemming from defendant's discretionary pricing policy. Finding that the plaintiffs also met the adequacy and numerosity requirements under Rule 23(a), as well as the requirements under Rule 23(b), the court certified the class. For a copy of the opinion, please click here.

South Carolina Federal Court Holds No Private Right of Action under RESPA for Failure to Provide Information Booklet, GFE. On July 22, the U.S. District Court for the District of South Carolina held that there is no private right of action for an alleged failure to provide the information booklet and good faith estimate (GFE) required by the Real Estate Settlement Procedures Act (RESPA). *Harris v. Sand Canyon Corp.*, No. 2:08-CV-3692, 2010 WL 2902771 (D.S.C. July 22, 2010). In *Harris*, the plaintiffs alleged, among other things, that the defendant mortgage company violated RESPA Section 2604(c) by failing to provide the plaintiff borrowers with an information booklet and GFE prior to the consummation of their mortgage loan transaction. The mortgage company moved for summary judgment, arguing that RESPA does not provide a private right of action for such claims. Acknowledging that the Fourth Circuit has not decided this question, the court joined other district courts within the Fourth Circuit, and other federal courts of appeal, to hold that there is no private right of action under RESPA Section 2604(c). The court reasoned that the section does not explicitly authorize a private right of action and that Congress had previously eliminated a private right of action under this section. For a copy of the opinion, please click here.

Banking

FDIC Sells Performing Loans from Failed Banks in Pilot Securitization. On July 30, the Federal Deposit Insurance Corporation (FDIC) announced that it had completed a sale of securities under a pilot securitization consisting of performing single-family mortgages held by several failed banks. The securitization program represents the first time during the financial crisis that the FDIC has sold assets as part of a securitization. Under the securitization program, the underlying securities were divided into three tranches: FDIC-guaranteed senior certificates that represented 85% of the capital structure, a mezzanine class of subordinated certificates, and an over collaterilization class, that together make up the remaining 15% of the capital structure. Any delinquent mortgages will be considered for loan modification consistent with the Home Affordable Modification Program or the

FDIC loan modification program. To view the press release, please see http://www.fdic.gov/news/news/press/2010/pr10173.html.

Seventh Circuit Allows FHA Claim Against Bank, Appraisal Services Company to Proceed. On July 30, a divided panel of the U.S. Court of Appeals for the Seventh Circuit held that a *pro se* plaintiff adequately alleged violations of the Fair Housing Act (FHA) solely by identifying the type of alleged discrimination, who allegedly committed the discrimination, and when the discrimination occurred. *Swanson v. Citibank, N.A.*, No. 10-1122, 2010 WL 2977297 (7th Cir. July 30, 2010). In *Swanson*, the *pro se* plaintiff alleged fraud and violations of the FHA and the Equal Credit Opportunity Act (ECOA) after the defendant bank denied her application for a home equity loan. The plaintiff alleged that the defendants (a bank, an appraiser, and the appraiser's employer) discriminated against her on the basis of her race by providing a low appraisal of her home and subsequently denying her a loan. The district court dismissed all claims against all defendants. On appeal, the plaintiff challenged the dismissal of her FHA and fraud claims. As to the FHA claim, the Seventh Circuit reversed the district court, holding that the complaint adequately alleged a violation of the FHA because it identified the type of discrimination that allegedly occurred, who allegedly committed the discrimination, and when the violation occurred. The Seventh Circuit, however, upheld the district court's dismissal of the plaintiff's fraud claim because it lacked specificity and failed to plead damages resulting from the denial of her loan application. Judge Posner dissented from the portion of the opinion reversing the dismissal of the FHA claim. The dissent concluded that the plaintiff's FHA allegations were implausible because the denial of the loan was likely due to the low value of the plaintiff's home appraisal and that there were insufficient allegations that suggested race-based discrimination (*e.g.*, that the plaintiff was competing with a similarly situated white borrower for the loan). For a copy of the opinion, please click here.

Consumer Finance

Seventh Circuit Allows FHA Claim Against Bank, Appraisal Services Company to Proceed. On July 30, a divided panel of the U.S. Court of Appeals for the Seventh Circuit held that a *pro se* plaintiff adequately alleged violations of the Fair Housing Act (FHA) solely by identifying the type of alleged discrimination, who allegedly committed the discrimination, and when the discrimination occurred. *Swanson v. Citibank, N.A.*, No. 10-1122, 2010 WL 2977297 (7th Cir. July 30, 2010). In *Swanson*, the *pro se* plaintiff alleged fraud and violations of the FHA and the Equal Credit Opportunity Act (ECOA) after the defendant bank denied her application for a home equity loan. The plaintiff alleged that the defendants (a bank, an appraiser, and the appraiser's employer) discriminated against her on the basis of her race by providing a low appraisal of her home and subsequently denying her a loan. The district court dismissed all claims against all defendants. On appeal, the plaintiff challenged the dismissal of her FHA and fraud claims. As to the FHA claim, the Seventh Circuit reversed the district court, holding that the complaint adequately alleged a violation of the FHA because it identified the type of discrimination that allegedly occurred, who allegedly committed the discrimination, and when the violation occurred. The Seventh Circuit, however, upheld the district court's dismissal of the plaintiff's fraud claim because it lacked specificity and failed to plead damages resulting from the denial of her loan application. Judge Posner dissented from the portion of the opinion reversing the dismissal of the FHA claim. The dissent concluded that the plaintiff's FHA allegations were

implausible because the denial of the loan was likely due to the low value of the plaintiff's home appraisal and that there were insufficient allegations that suggested race-based discrimination (*e.g.*, that the plaintiff was competing with a similarly situated white borrower for the loan). For a copy of the opinion, please click here.

Illinois Federal Court Holds Issuance of General-Purpose Credit Cards Is Subject to TILA Requirements. On July 20, the U.S. District Court for the Northern District of Illinois denied a motion to dismiss a lawsuit seeking damages for alleged violations of the Truth in Lending Act (TILA), as well as state law claims including fraud and breach of contract, in connection with the issuance of general-purpose credit cards. *Acosta v. Target Corp.*, No. 05 C 7068, 2010 WL 2925885 (N.D. Ill. July 20, 2010). In*Acosta*, an individual plaintiff, on behalf of himself and a putative class of similarly-situated individuals, sued defendants Target Corp., Target National Bank, N.A., and Target Receivables Corp. The putative class representative alleged that the defendants sent unsolicited credit cards under an "autosub" program designed to replace certain store-only credit cards (guest cards) with general-purpose, store-related VISA cards (general-purpose cards) to current and former guest card users. According to the plaintiff, the general-purpose cards had higher rates and fees and "stricter underwriting" and the plaintiff's account was ultimately frozen and his credit limit was reduced. The plaintiff sued, asserting state law claims and alleging that the defendants had violated Section 1642 of TILA, which prohibits the issuance of unsolicited cards, and Sections 1637(a) and (c) of TILA, which require that issuers send out certain disclosures when opening a new account. The defendants moved to dismiss both TILA claims on the grounds that general-purpose cards were "substitute cards" for the guest cards rather than new accounts. The court rejected this argument, finding that the consumer had alleged facts sufficient to establish that the general-purpose card constituted the opening of a new account, including (i) the general-purpose card was a new credit card, (ii) the general-purpose and guest cards had different account numbers, and the general-purpose card was not derived from or related to the guest card, (iii) the general-purpose card included "new features or benefits," (iv) the general-purpose card could be used for transactions at many more merchants than the guest card, and (v) the defendants implemented the general-purpose card on an individual basis. The court also rejected the defendants' argument that TILA preempted the consumer's fraud claim, reasoning that the ability of consumers to assert state law fraud claims helps to enforce TILA's disclosure requirements. For a copy of the opinion, please click here.

Securities

FDIC Sells Performing Loans from Failed Banks in Pilot Securitization. On July 30, the Federal Deposit Insurance Corporation (FDIC) announced that it had completed a sale of securities under a pilot securitization consisting of performing single-family mortgages held by several failed banks. The securitization program represents the first time during the financial crisis that the FDIC has sold assets as part of a securitization. Under the securitization program, the underlying securities were divided into three tranches: FDIC-guaranteed senior certificates that represented 85% of the capital structure, a mezzanine class of subordinated certificates, and an over collaterilization class, that together make up the remaining 15% of the capital structure. Any delinquent mortgages will be considered for loan modification consistent with the Home Affordable Modification Program or the FDIC loan modification program. To view the press release, please see

http://www.fdic.gov/news/news/press/2010/pr10173.html.

Insurance

Senate Passes Bill Authorizing an Increase in the Annual Mortgage Insurance Premiums on FHA Guaranteed Loans. On August 4, the U.S. Senate passed legislation (H.R. 5981) that would amend the National Housing Act to grant the Federal Housing Administration (FHA) the authority to raise annual mortgage insurance premiums on FHA guaranteed loans. Under the bill, the cap on mortgage insurance premiums for mortgages below 95% percent of value could be increased from .5% to 1.5% while the mortgage insurance premium on mortgages at or above 95% of value could be increased from .55% to 1.55%. President Obama is expected to sign the bill into law. For a copy of the bill, please see http://1.usa.gov/oWeFpt.

Fannie Mae Instructs Seller/Servicers to Notify Mortgage Insurers to Provide Information to Fannie Mae on Request. On July 27, Fannie Mae issued Announcement SVC-2010-09, which instructs seller/servicers to notify mortgage insurers in writing that they are required to, upon request, provide Fannie Mae with any information, data, or materials relating to mortgage loans owned or guaranteed now, or in the future by Fannie Mae. Seller/servicers must comply with this requirement by October 1, 2010. Henceforth the notification must be provided by seller/servicers to mortgage insurers at the outset of their business relationship. Fannie Mae also announced that it is in the process of developing a web service capable of validating mortgage insurance coverage data with the mortgage insurer prior to delivery. Once operational, mortgage loans will be ineligible for delivery until the coverage data has been validated. Until such time, Fannie Mae will instruct the seller/servicer to either confirm or change the submitted data if there is a difference in the data provided by a mortgage servicer and a seller/servicer. For a copy of the announcement, please click here.

Litigation

Seventh Circuit Allows FHA Claim Against Bank, Appraisal Services Company to Proceed. On July 30, a divided panel of the U.S. Court of Appeals for the Seventh Circuit held that a *pro se* plaintiff adequately alleged violations of the Fair Housing Act (FHA) solely by identifying the type of alleged discrimination, who allegedly committed the discrimination, and when the discrimination occurred. *Swanson v. Citibank, N.A.*, No. 10-1122, 2010 WL 2977297 (7th Cir. July 30, 2010). In *Swanson*, the *pro se* plaintiff alleged fraud and violations of the FHA and the Equal Credit Opportunity Act (ECOA) after the defendant bank denied her application for a home equity loan. The plaintiff alleged that the defendants (a bank, an appraiser, and the appraiser's employer) discriminated against her on the basis of her race by providing a low appraisal of her home and subsequently denying her a loan. The district court dismissed all claims against all defendants. On appeal, the plaintiff challenged the dismissal of her FHA and fraud claims. As to the FHA claim, the Seventh Circuit reversed the district court, holding that the complaint adequately alleged a violation of the FHA because it identified the type of discrimination that allegedly occurred, who allegedly committed the discrimination, and when the violation occurred. The Seventh Circuit, however, upheld the district court's dismissal of the plaintiff's fraud claim because it lacked specificity and failed to plead damages resulting from the denial of her loan application. Judge Posner dissented from the portion of the opinion reversing the

dismissal of the FHA claim. The dissent concluded that the plaintiff's FHA allegations were implausible because the denial of the loan was likely due to the low value of the plaintiff's home appraisal and that there were insufficient allegations that suggested race-based discrimination (*e.g.*, that the plaintiff was competing with a similarly situated white borrower for the loan). For a copy of the opinion, please click here.

California Federal Court Certifies Class Action of Borrowers Against Wholesale Mortgage Lender. On July 20, the U.S. District Court for the Northern District of California certified a class of borrowers in an action against a wholesale mortgage lender for claims of discriminatory mortgage lending practices. *Ramirez v. Greenpoint Mortgage Funding, Inc.*, No. C08-0369, 2010 WL 2867068 (N.D. Cal. July 20, 2010). In *Ramirez*, a group of borrowers sued a wholesale mortgage lender, claiming that the lender engaged in discriminatory mortgage lending practices in violation of the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA). The borrowers had each used various mortgage brokers to obtain wholesale mortgage loans from the defendant wholesale lender. The borrowers alleged that the lender's discretionary pricing policy led the mortgage brokers to charge higher interest rates and fees to African American and Latino borrowers compared to similarly situated white borrowers. The borrowers claimed that the lender incentivized this abuse by basing a portion of its mortgage broker's compensation on its ability to lock borrowers into mortgage loans with high interest rates and fees. The court found that the plaintiffs' suit met the requirements for class certification under Federal Rule of Civil Procedure 23(a). The borrowers presented statistical evidence showing that the annual percentage rates (APRs) on mortgage loans of ethnic minority borrowers were significantly higher than those of similarly situated white borrowers. The court concluded that the plaintiffs' statistical evidence established that the claims of all class members hinged on a common question: whether the lender's "discretionary pricing policy had a disparate impact on minority borrowers." Next, the court rejected the defendant's argument that the claims lacked typicality because the plaintiffs made false statements on their loan applications and, thus, their claims may be subject to the unique defense of unclean hands. The court noted that the plaintiffs were likely unaware of the misstatements because of their limited English skills and that the unclean hands defense "has not been applied where Congress authorizes broad equitable relief to serve important national polices," as is the case under ECOA and FHA. The court also found that the plaintiffs did not lack standing because they actually obtained a better APR than similarly situated white borrowers. The court concluded that the plaintiffs had "advanced a viable theory showing the harm" produced by the alleged discrimination stemming from defendant's discretionary pricing policy. Finding that the plaintiffs also met the adequacy and numerosity requirements under Rule 23(a), as well as the requirements under Rule 23(b), the court certified the class. For a copy of the opinion, please click here.

South Carolina Federal Court Holds No Private Right of Action under RESPA for Failure to Provide Information Booklet, GFE. On July 22, the U.S. District Court for the District of South Carolina held that there is no private right of action for an alleged failure to provide the information booklet and good faith estimate (GFE) required by the Real Estate Settlement Procedures Act (RESPA). *Harris v. Sand Canyon Corp.*, No. 2:08-CV-3692, 2010 WL 2902771 (D.S.C. July 22, 2010). In *Harris*, the plaintiffs alleged, among other things, that the defendant mortgage company violated RESPA Section 2604(c) by failing to provide the plaintiff borrowers with an information

booklet and GFE prior to the consummation of their mortgage loan transaction. The mortgage company moved for summary judgment, arguing that RESPA does not provide a private right of action for such claims. Acknowledging that the Fourth Circuit has not decided this question, the court joined other district courts within the Fourth Circuit, and other federal courts of appeal, to hold that there is no private right of action under RESPA Section 2604(c). The court reasoned that the section does not explicitly authorize a private right of action and that Congress had previously eliminated a private right of action under this section. For a copy of the opinion, please click here.

Illinois Federal Court Holds Issuance of General-Purpose Credit Cards Is Subject to TILA Requirements. On July 20, the U.S. District Court for the Northern District of Illinois denied a motion to dismiss a lawsuit seeking damages for alleged violations of the Truth in Lending Act (TILA), as well as state law claims including fraud and breach of contract, in connection with the issuance of general-purpose credit cards. *Acosta v. Target Corp.*, No. 05 C 7068, 2010 WL 2925885 (N.D. Ill. July 20, 2010). In*Acosta*, an individual plaintiff, on behalf of himself and a putative class of similarly-situated individuals, sued defendants Target Corp., Target National Bank, N.A., and Target Receivables Corp. The putative class representative alleged that the defendants sent unsolicited credit cards under an "autosub" program designed to replace certain store-only credit cards (guest cards) with general-purpose, store-related VISA cards (general-purpose cards) to current and former guest card users. According to the plaintiff, the general-purpose cards had higher rates and fees and "stricter underwriting" and the plaintiff's account was ultimately frozen and his credit limit was reduced. The plaintiff sued, asserting state law claims and alleging that the defendants had violated Section 1642 of TILA, which prohibits the issuance of unsolicited cards, and Sections 1637(a) and (c) of TILA, which require that issuers send out certain disclosures when opening a new account. The defendants moved to dismiss both TILA claims on the grounds that general-purpose cards were "substitute cards" for the guest cards rather than new accounts. The court rejected this argument, finding that the consumer had alleged facts sufficient to establish that the general-purpose card constituted the opening of a new account, including (i) the general-purpose card was a new credit card, (ii) the general-purpose and guest cards had different account numbers, and the general-purpose card was not derived from or related to the guest card, (iii) the general-purpose card included "new features or benefits," (iv) the general-purpose card could be used for transactions at many more merchants than the guest card, and (v) the defendants implemented the general-purpose card on an individual basis. The court also rejected the defendants' argument that TILA preempted the consumer's fraud claim, reasoning that the ability of consumers to assert state law fraud claims helps to enforce TILA's disclosure requirements. For a copy of the opinion, please click here.

Credit Cards

Illinois Federal Court Holds Issuance of General-Purpose Credit Cards Is Subject to TILA Requirements. On July 20, the U.S. District Court for the Northern District of Illinois denied a motion to dismiss a lawsuit seeking damages for alleged violations of the Truth in Lending Act (TILA), as well as state law claims including fraud and breach of contract, in connection with the issuance of general-purpose credit cards. *Acosta v. Target Corp.*, No. 05 C 7068, 2010 WL 2925885 (N.D. Ill. July 20, 2010). In*Acosta*, an individual plaintiff, on behalf of himself and a putative class of similarly-situated individuals, sued defendants Target Corp., Target National Bank, N.A., and Target Receivables Corp.

The putative class representative alleged that the defendants sent unsolicited credit cards under an "autosub" program designed to replace certain store-only credit cards (guest cards) with general-purpose, store-related VISA cards (general-purpose cards) to current and former guest card users. According to the plaintiff, the general-purpose cards had higher rates and fees and "stricter underwriting" and the plaintiff's account was ultimately frozen and his credit limit was reduced. The plaintiff sued, asserting state law claims and alleging that the defendants had violated Section 1642 of TILA, which prohibits the issuance of unsolicited cards, and Sections 1637(a) and (c) of TILA, which require that issuers send out certain disclosures when opening a new account. The defendants moved to dismiss both TILA claims on the grounds that general-purpose cards were "substitute cards" for the guest cards rather than new accounts. The court rejected this argument, finding that the consumer had alleged facts sufficient to establish that the general-purpose card constituted the opening of a new account, including (i) the general-purpose card was a new credit card, (ii) the general-purpose and guest cards had different account numbers, and the general-purpose card was not derived from or related to the guest card, (iii) the general-purpose card included "new features or benefits," (iv) the general-purpose card could be used for transactions at many more merchants than the guest card, and (v) the defendants implemented the general-purpose card on an individual basis. The court also rejected the defendants' argument that TILA preempted the consumer's fraud claim, reasoning that the ability of consumers to assert state law fraud claims helps to enforce TILA's disclosure requirements. For a copy of the opinion, please click here.