

# InfoBytes

September 16, 2011

## Topics In This Issue

- [Federal Issues](#)
- [Courts](#)
- [Firm News](#)
- [Mortgages](#)
- [Banking](#)
- [Litigation](#)
- [E-Financial Services](#)

## Federal Issues

### **FinCEN Proposes Mandatory Electronic Filing of Reports Filed Under the Bank Secrecy Act.**

On September 14, the Financial Crimes Enforcement Network (FinCEN), a bureau of the Department of the Treasury, announced a proposal to mandate electronic filing (E-Filing) of FinCEN reports required under the Bank Secrecy Act (BSA) beginning on June 30, 2012. This proposal is aimed at improving efficiency, reducing costs for the financial services industry, and enhancing the ability of investigators, analysts, and examiners to gain better, timelier access to important financial information. BSA E-Filing is a free, web-based electronic filing system that enables filers to submit FinCEN reports through a secure network. Exempt from this E-Filing obligation is the Currency and Monetary Instrument Report (CMIR), usually completed by individuals crossing the border into the United States. FinCEN is accepting comments on this proposal for 60 days after its publication in the Federal Register. [Click here for a copy of FinCEN's announcement.](#)

**Freddie Mac Announces Requirements for Standard Modification.** On September 12, the Federal Home Loan Mortgage Corporation (Freddie Mac) issued Single-Family Seller/Servicer Guide (Guide) Bulletin 2011-16, which announced the complete requirements for the Freddie Mac Standard Modification, portion of the Servicing Alignment Initiative. The Standard Modification is designed to be an alternative option for borrowers who are ineligible for the Home Affordable Modification Program. The Standard Modification replaces the previous Debt Coverage Ratio modification program. The requirements for the Standard Modification, which are available in Sections B65.11 through B65.26 of the Guide, include requirements regarding borrower, property, and mortgage eligibility; evaluation of borrowers; documentation; property valuation; modification terms; Trial Period Plans; processing and closing modifications; and reporting. Any modification evaluation performed on or after January 1, 2012 must be conducted in accordance with the revised Guide, and under certain circumstances, servicers may begin evaluations pursuant to the revised guide before that date. [Click here for a copy of the Bulletin.](#)

## Courts

**Bank's Affidavit of Debt Ruled Inadmissible as Hearsay.** On September 7, a Florida appeals court reversed summary judgment of foreclosure in favor of LaSalle Bank on the basis that the evidence in support of summary judgment was insufficient to establish the amount due by the appellants (the Glarums) under the note and mortgage. *Glarum v. LaSalle Bank National Association*, No. 4D10-1372 (Fla. Dist. Ct. App.). To establish the amount due by the Glarums, LaSalle Bank filed the affidavit of Ralph Orsini, a loan specialist for the loan servicer. In his deposition, Orsini explained that he obtained information on the amount of the debt from the loan servicer's computer system, but stated that he did not know who entered the data into the system, could not verify that the figures were correct, was not familiar with the procedures used by the supplier of the data, and could not say whether such records were made in the regular course of business. The appeals court found that "Orsini's affidavit constituted inadmissible hearsay and, as such, could not support LaSalle's motion for summary judgment." [Click here for a copy of the opinion.](#)

**California District Court Allows Missouri Resident to Advance Class-Action Disability Claim Linked to Online Identity Verification.** On September 7, in *Earll v. eBay Inc.*, No. 5:11-cv-00262-JF (N.D. Cal., Sept. 7, 2011) the U.S. District Court for the Northern District of California ruled that a Missouri resident could proceed with a putative class action claim against eBay, challenging its web-based identity verification system under California's civil rights and disability laws, notwithstanding that she lived out-of-state. The hearing-impaired plaintiff originally alleged that the defendant's automated, phone-based seller verification system discriminated against the deaf in violation of the Americans with Disabilities Act (ADA) and California's Unfair Competition Law (UCL), but later sought to amend her complaint to remove the UCL claim and add a claim under the state's Unruh Civil Rights Act (Unruh). The court held that public policy favored allowing the plaintiff to pursue California state law claims where eBay had sought transfer of the case from Missouri and California and, in doing so, had relied upon a forum selection clause in its user agreement providing that the agreement was governed by California law. The court also held that while the ADA was limited to actual physical spaces, the Unruh and the state's Disabled Persons Act apply to websites as a kind of business establishment and accommodation, and that no "nexus to physical [places] need be shown." Because the plaintiff did not plead sufficient facts to assess whether a standard implicated under either state law was met, the court ordered the plaintiff to file an amended complaint within 30 days. [Click here for a copy of the opinion.](#)

**NJ Supreme Court Applies State Consumer Fraud Act to Post-Foreclosure Judgment Forbearance Agreement.** In *Gonzalez v. Wilshire Credit Corp.*, No. 065564 (N.J. Aug. 29, 2011) a unanimous New Jersey Supreme Court recently held that a post-foreclosure judgment forbearance agreement qualified as a stand-alone extension of credit under the New Jersey Consumer Fraud Act (CFA), which provides a private cause of action to consumers subjected to "any unconscionable commercial practice . . . in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance" thereof, including the extension of consumer credit. After obtaining a judgment for foreclosure, the defendant mortgage servicer entered into an agreement with plaintiff mortgagor whereby the defendant agreed to refrain from proceeding with the sheriff's foreclosure sale in exchange for a lump sum, up-front payment and a series of monthly

payments that included various fees to reinstate the loan and bring it current. Noting that the CFA, a remedial statute, was intended to be "flexible enough to combat newly packaged forms of fraud," the New Jersey Court ruled that a post-judgment forbearance agreement may be reviewed for unconscionable practices relating to both origination and execution as "a lender or its servicing agent cannot use unconscionable practices" in "fashioning and collecting" any loan. The court rejected the defendant's argument that applying the CFA to work-out agreements would discourage servicers from negotiating such forbearance agreements and lead to increased loss of homes, noting application of the CFA had not chilled extensions of credit in other industries. The court opined that "[t]hose businesses dealing with the public fairly and honestly . . . have nothing to fear" from the CFA. The court, was, however, careful to note that its holding was limited to the applicability of the CFA to post-foreclosure judgment agreements involving stand-alone extensions of credit and did not extend to settlement agreements in general. [Click here for a copy of the opinion.](#)

## Firm News

[Jeff Naimon](#) will be participating in a panel titled "The Future of Lending" at the National Mortgage News Mortgage Regulatory Forum which will be held at the Washington Marriott in Washington, D.C. from September 19-20. Mr. Naimon will be discussing the effect of recent regulatory and enforcement developments on the direction of the mortgage market, including QM/QRM, Loan Officer Compensation rules, and Federal Housing Administration and fair lending enforcement efforts.

[Benjamin Klubes](#) will be moderating a panel focusing on Preparing for and Responding to New and Emerging Federal and State Enforcement Actions at the ACI's Residential Mortgage Litigation and Regulatory Enforcement Conference on Tuesday, September 20 in Dallas, Texas.

[Andrew Sandler](#), [Benjamin Klubes](#), and [Jonice Gray Tucker](#) will be speaking at the Mortgage Bankers Association's Regulatory Compliance Conference which will be held in Washington, D.C. from September 25-27. Mr. Sandler will be addressing enforcement priorities. Mr. Klubes will address litigation and enforcement trends relating to loan originations, and Ms. Tucker will speak on developments in mortgage servicing.

[Benjamin Klubes](#) will be speaking at the 2011 PCI CRA and Fair Lending Colloquium on November 7 in Baltimore, MD on "Hot Compliance Topics: Reform Impact, Oversight Trends, Enforcement Actions and More!"

[Margo Tank](#) and [John Richards](#) will participate in the ESRA Fall Conference in Washington, D.C. on November 9 and 10. For details on registration, accommodations and agenda, please see <http://esignrecords.org/events/>.

[David Krakoff](#) will be participating in a panel at the International Association of Defense Counsel program on worldwide anti-corruption laws in Palm Springs in February 2012.

## Mortgages

**Freddie Mac Announces Requirements for Standard Modification.** On September 12, the Federal Home Loan Mortgage Corporation (Freddie Mac) issued Single-Family Seller/Servicer Guide (Guide) Bulletin 2011-16, which announced the complete requirements for the Freddie Mac Standard Modification, portion of the Servicing Alignment Initiative. The Standard Modification is designed to be an alternative option for borrowers who are ineligible for the Home Affordable Modification Program. The Standard Modification replaces the previous Debt Coverage Ratio modification program. The requirements for the Standard Modification, which are available in Sections B65.11 through B65.26 of the Guide, include requirements regarding borrower, property, and mortgage eligibility; evaluation of borrowers; documentation; property valuation; modification terms; Trial Period Plans; processing and closing modifications; and reporting. Any modification evaluation performed on or after January 1, 2012 must be conducted in accordance with the revised Guide, and under certain circumstances, servicers may begin evaluations pursuant to the revised guide before that date. [Click here for a copy of the Bulletin.](#)

## Banking

**FinCEN Proposes Mandatory Electronic Filing of Reports Filed Under the Bank Secrecy Act.** On September 14, the Financial Crimes Enforcement Network (FinCEN), a bureau of the Department of the Treasury, announced a proposal to mandate electronic filing (E-Filing) of FinCEN reports required under the Bank Secrecy Act (BSA) beginning on June 30, 2012. This proposal is aimed at improving efficiency, reducing costs for the financial services industry, and enhancing the ability of investigators, analysts, and examiners to gain better, timelier access to important financial information. BSA E-Filing is a free, web-based electronic filing system that enables filers to submit FinCEN reports through a secure network. Exempt from this E-Filing obligation is the Currency and Monetary Instrument Report (CMIR), usually completed by individuals crossing the border into the United States. FinCEN is accepting comments on this proposal for 60 days after its publication in the Federal Register. [Click here for a copy of FinCEN's announcement.](#)

## Litigation

**Bank's Affidavit of Debt Ruled Inadmissible as Hearsay.** On September 7, a Florida appeals court reversed summary judgment of foreclosure in favor of LaSalle Bank on the basis that the evidence in support of summary judgment was insufficient to establish the amount due by the appellants (the Glarums) under the note and mortgage. *Glarum v. LaSalle Bank National Association*, No. 4D10-1372 (Fla. Dist. Ct. App.). To establish the amount due by the Glarums, LaSalle Bank filed the affidavit of Ralph Orsini, a loan specialist for the loan servicer. In his deposition, Orsini explained that he obtained information on the amount of the debt from the loan servicer's computer system, but stated that he did not know who entered the data into the system, could not verify that the figures were correct, was not familiar with the procedures used by the supplier of the data, and could not say whether such records were made in the regular course of business. The appeals court found that "Orsini's affidavit constituted inadmissible hearsay and, as such, could not support LaSalle's motion for summary judgment." [Click here for a copy of the opinion.](#)

**California District Court Allows Missouri Resident to Advance Class-Action Disability Claim Linked to Online Identity Verification.** On September 7, in *Earll v. eBay Inc.*, No. 5:11-cv-00262-JF (N.D. Cal., Sept. 7, 2011) the U.S. District Court for the Northern District of California ruled that a Missouri resident could proceed with a putative class action claim against eBay, challenging its web-based identity verification system under California's civil rights and disability laws, notwithstanding that she lived out-of-state. The hearing-impaired plaintiff originally alleged that the defendant's automated, phone-based seller verification system discriminated against the deaf in violation of the Americans with Disabilities Act (ADA) and California's Unfair Competition Law (UCL), but later sought to amend her complaint to remove the UCL claim and add a claim under the state's Unruh Civil Rights Act (Unruh). The court held that public policy favored allowing the plaintiff to pursue California state law claims where eBay had sought transfer of the case from Missouri and California and, in doing so, had relied upon a forum selection clause in its user agreement providing that the agreement was governed by California law. The court also held that while the ADA was limited to actual physical spaces, the Unruh and the state's Disabled Persons Act apply to websites as a kind of business establishment and accommodation, and that no "nexus to physical [places] need be shown." Because the plaintiff did not plead sufficient facts to assess whether a standard implicated under either state law was met, the court ordered the plaintiff to file an amended complaint within 30 days. [Click here for a copy of the opinion.](#)

**NJ Supreme Court Applies State Consumer Fraud Act to Post-Foreclosure Judgment Forbearance Agreement.** In *Gonzalez v. Wilshire Credit Corp.*, No. 065564 (N.J. Aug. 29, 2011) a unanimous New Jersey Supreme Court recently held that a post-foreclosure judgment forbearance agreement qualified as a stand-alone extension of credit under the New Jersey Consumer Fraud Act (CFA), which provides a private cause of action to consumers subjected to "any unconscionable commercial practice . . . in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance" thereof, including the extension of consumer credit. After obtaining a judgment for foreclosure, the defendant mortgage servicer entered into an agreement with plaintiff mortgagor whereby the defendant agreed to refrain from proceeding with the sheriff's foreclosure sale in exchange for a lump sum, up-front payment and a series of monthly payments that included various fees to reinstate the loan and bring it current. Noting that the CFA, a remedial statute, was intended to be "flexible enough to combat newly packaged forms of fraud," the New Jersey Court ruled that a post-judgment forbearance agreement may be reviewed for unconscionable practices relating to both origination and execution as "a lender or its servicing agent cannot use unconscionable practices" in "fashioning and collecting" any loan. The court rejected the defendant's argument that applying the CFA to work-out agreements would discourage servicers from negotiating such forbearance agreements and lead to increased loss of homes, noting application of the CFA had not chilled extensions of credit in other industries. The court opined that "[t]hose businesses dealing with the public fairly and honestly . . . have nothing to fear" from the CFA. The court, was, however, careful to note that its holding was limited to the applicability of the CFA to post-foreclosure judgment agreements involving stand-alone extensions of credit and did not extend to settlement agreements in general. [Click here for a copy of the opinion.](#)

## E-Financial Services

**California District Court Allows Missouri Resident to Advance Class-Action Disability Claim Linked to Online Identity Verification.** On September 7, in *Earll v. eBay Inc.*, No. 5:11-cv-00262-JF (N.D. Cal., Sept. 7, 2011) the U.S. District Court for the Northern District of California ruled that a Missouri resident could proceed with a putative class action claim against eBay, challenging its web-based identity verification system under California's civil rights and disability laws, notwithstanding that she lived out-of-state. The hearing-impaired plaintiff originally alleged that the defendant's automated, phone-based seller verification system discriminated against the deaf in violation of the Americans with Disabilities Act (ADA) and California's Unfair Competition Law (UCL), but later sought to amend her complaint to remove the UCL claim and add a claim under the state's Unruh Civil Rights Act (Unruh). The court held that public policy favored allowing the plaintiff to pursue California state law claims where eBay had sought transfer of the case from Missouri and California and, in doing so, had relied upon a forum selection clause in its user agreement providing that the agreement was governed by California law. The court also held that while the ADA was limited to actual physical spaces, the Unruh and the state's Disabled Persons Act apply to websites as a kind of business establishment and accommodation, and that no "nexus to physical [places] need be shown." Because the plaintiff did not plead sufficient facts to assess whether a standard implicated under either state law was met, the court ordered the plaintiff to file an amended complaint within 30 days. [Click here for a copy of the opinion.](#)

© BuckleySandler LLP. INFOBYTES is not intended as legal advice to any person or firm. It is provided as a client service and information contained herein is drawn from various public sources, including other publications.

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

Email: [infobytes@buckleysandler.com](mailto:infobytes@buckleysandler.com)

For back issues of INFOBYTES (or other BuckleySandler LLP publications), visit <http://www.buckleysandler.com/infobytes/infobytes>