

April 15, 2011

Topics In This Issue

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

Federal Issues

Federal Banking Agencies Take Enforcement Actions Against 14 Servicers and 2 Service Providers for Foreclosure Practices. On April 13, the Office of the Comptroller of the Currency (OCC), the Federal Reserve Board (FRB) and the Office of Thrift Supervision (OTS) announced orders issued to 14 large mortgage servicers and 2 service providers based on the interagency horizontal review of foreclosure practices. According to the agencies, the interagency review found deficiencies in many aspects of the foreclosure process, including the filing of inaccurate affidavits, inadequate supervision of third parties, and ineffective coordination of the loan modification and foreclosure process to assist borrowers in avoiding foreclosures. The agencies released a joint report, *Interagency Review of Foreclosure Policies and Practices*, detailing their findings. The enforcement actions require servicers to take corrective action including, but not limited to, (i) ensuring that foreclosures not be pursued once a mortgage modification had been approved unless payments are not made as required under the modification, (ii) enhancing policies and procedures related to foreclosure and loss mitigation activities, and (iii) retaining an independent consultant to conduct an independent review of foreclosures in 2009 and 2010. Pursuant to the foreclosure review, the servicers are required to remediate borrowers for any financial injury and/or improper foreclosure. The agencies indicated that the enforcement orders are only a first step in remedying deficiencies in the foreclosure process and that civil money penalties may be assessed against these institutions and that institutions with smaller servicing portfolios will be subject to similar regulatory foreclosure reviews. [For a copy of the press releases, please click here.](#) [For the enforcement actions, please click here.](#) [For the the joint report, please click here.](#)

Fannie Mae Updates Requirements on Conventional Mortgage Loan Modification. On April 4, Fannie Mae announced that it was updating the requirements to modify conventional mortgage loans as described in its Servicing Guide. The affected sections are Part VII, Section 601.02: Using HomeSaver Solutions Network, Section 602: Mortgage Modifications, and Section 602.02: Modifying Conventional Mortgage Loans. Servicers will need to follow the updated policies and procedures when submitting a non-delegated modification case through the HomeSaver Solutions Network (HSSN). The announcement summarizes eligibility criteria for a covered loan to be considered for a

Fannie Mae modification, including that (i) the borrower not be eligible for a HAMP modification, (ii) the borrower be experiencing financial hardship, (iii) and the loan is delinquent or a default is reasonably foreseeable. The announcement also summarizes underwriting, modification process, mortgage insurer approval and reporting, and reporting requirements. The updated requirements are effective April 15, 2011. For a copy of the announcement, please see <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2011/svc1103.pdf>.

OCC and FRB Issue Supervisory Guidance on Model Risk Management. On April 4, the Federal Reserve Board (FRB) and the Office of the Comptroller of the Currency (OCC) jointly issued Supervisory Guidance on Model Risk Management. This guidance sets forth the agencies' expectations for effective management of model risk, which include (i) robust model development, implementation, and use, (ii) effective validation, and (iii) strong governance, policies, and controls. The guidance is applicable to all types of models used by institutions. Practical application of the guidance should be commensurate with a bank's risk exposures, business activities, and the extent and complexity of model use. The guidance includes an expectation that a bank's board of directors and senior management will establish an organization-wide approach to model risk management. The new OCC guidance replaces Bulletin OCC 2000-16, *Model Validation*, dated May 30, 2000. [For a copy of the announcements, please see FRB SR 11-7 here; and the OCC NR 2011-12 here.](#)

Courts

Arkansas Supreme Court Affirms Ruling that an Online Applications with Electronic Signature Qualifies as a Written Rejection of Insurance Coverage. Recently, the Arkansas Supreme Court affirmed an order from the lower court granting summary judgment and dismissing a claim for medical benefits under an automobile insurance policy on the grounds that an electronically generated record containing an electronic signature meets the requirement that a rejection of no-fault coverage be "in writing" under Arkansas law. *Barwick v. Government Employee Insurance Co., Inc.*, 2011 Ark. 128 (2011). When the appellant's wife purchased insurance coverage online with GEICO she did not select coverage for medical benefits. Subsequent to that purchase the appellant, a named insured on the policy, was involved in an accident and presented a claim for medical expenses, which GEICO denied. GEICO claimed the rejection of coverage was valid under the Uniform Electronic Transactions Act (UETA), found in Arkansas Code Annotated sections 25-32-101 to 120 (Repl. 2002 & Supp. 2009). The circuit court granted GEICO's motion for summary judgment, ruling that the online rejection of coverage and electronic signature satisfied the statutory requirement for a rejection of medical coverage to be in writing under the Arkansas Code. The Arkansas Supreme Court affirmed, holding that there was no conflict between the insurance statute and the Arkansas UETA statute and that read together they mean that an electronic record fulfills the requirement of a written rejection of coverage. [For a copy of the opinion, please see here.](#)

Massachusetts Federal Court Denies Servicer Motion to Dismiss UDAP Claim for HAMP Violation. In a recent decision, a Massachusetts federal court denied a mortgage servicer's motion to dismiss a complaint that the servicer's failure to timely comply with a request for modification under the federal Home Affordable Modification Program (HAMP) gave rise to a violation under Massachusetts' unfair and deceptive trade practices statute (Chapter 93A). *Morris v. BAC Home*

Loans Servicing, L.P., No. 1:10-11572 (D. Mass. Apr. 4, 2011). In this case, plaintiffs alleged that the defendant violated Chapter 93A when it failed to evaluate or respond to the plaintiffs' request for a modification under HAMP. The defendant moved to dismiss, arguing that HAMP does not provide for a private right of action and that, therefore, the plaintiffs had failed to state a claim. The court disagreed, reasoning that a violation of HAMP would be actionable under Chapter 93A if the violation was unfair or deceptive and that recovery under Chapter 93A would be compatible with the objectives and enforcement mechanisms of HAMP. However, the court found that the plaintiffs had failed to plead sufficient facts to make the showing that the defendant's alleged violations of HAMP rose to the level of unfair or deceptive. As a result, the court denied the motion to dismiss, and instructed the plaintiffs to amend the complaint within 30 days. [Click here for a copy of the opinion.](#)

California Bankruptcy Court Denies Bank's Request for Relief from Automatic Stay Because of Failure to Record Assignment of Deed of Trust Prior to Foreclosure. In a recent decision, the United States Bankruptcy Court for the Southern District of California held that a national bank was not entitled to relief from an automatic bankruptcy stay in order to proceed with a foreclosure-related action because the bank did not record its assignment of the deed of trust. *In re: Eleazar Salazar*, Bankruptcy No. 10-17456 (Bankr. Ct. S.D. Cal. Jan. 25, 2011). The original lender's interest in the promissory note and a deed of trust executed by the debtor were later assigned to a national bank, but the bank did not record the assignment. The debtor defaulted on the note, leading the bank to conduct a non-judicial foreclosure on debtor's property and to file an unlawful detainer action against the debtor in state court. The debtor filed for Chapter 13 bankruptcy the day before trial on the unlawful detainer action. The bank then moved in the bankruptcy court for relief from the automatic bankruptcy stay. The debtor challenged the bank's motion, arguing that the foreclosure sale was defective because the bank did not record the assignment of its interest in the deed of trust as required by California Civil Code § 2932.5. The court concluded that the bank had to satisfy two requirements contained in § 2932.5 in order for the nonjudicial foreclosure to be valid: (i) the bank must have obtained an assignment of the right to be paid the mortgage debt, and (ii) the power of sale must have been recorded. The court found an endorsement in blank by the lender to be sufficient to meet the first requirement. However, the court found that the bank failed to record its assignment and, therefore, failed to comply with § 2932.5. The court rejected the bank's arguments that the fact that MERS was a nominal beneficiary on the original deed of trust eliminated the need to record the assignment and that the MERS foreclosure process is an alternative to statutory foreclosure law because only the state legislature can change statutory requirements. [Click here for a copy of the opinion.](#)

U.S. District Court Certifies Class in Disparate Impact Case. On March 21, the United States District Court for the District of Massachusetts, in a case alleging violations of the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA), certified a class of "all African-American borrowers who obtained a mortgage loan from [Option One Mortgage Corporation and Option One Mortgage Services, Inc.]". *Barrett v. H&R Block, Inc.*, No. 08-10157-RWZ (D. Mass. March 21, 2011). The plaintiffs' claim is based on the defendants' policy of allowing authorized brokers to impose additional fees on borrowers' mortgage loans that were unrelated to the borrowers' creditworthiness, a policy that allegedly had a disparate impact on African-American borrowers and resulted in those borrowers being charged higher rates than similarly situated white borrowers. As described in the

Court's decision, a borrower's final price was comprised of two components. The first component was a base, or "par", price based on an objective assessment of a borrower's creditworthiness and loan terms. Brokers were not compensated for loans priced at par. The second component was subjective, allowing brokers to charge loan origination and processing fees resulting in a rate higher than the "par" rate. Brokers' compensation was based on these additional fees. While the Court noted that the discretionary charges were negotiated between the borrower and an independent broker, the Court chose to certify the class and allow the plaintiffs' to proceed with their allegations that the combined effect of these pricing policies was a disparate impact on African-American borrowers. For a copy of the opinion, please see <http://bit.ly/ohVa6P>.

Firm News

Join Us! 2011 Fair Lending Today Conference on Compliance, Regulatory & Litigation Issues in Today's Changing Enforcement Environment, hosted by BuckleySandlerLLP.

2011 Panel Topics Include:

- Fair and Responsible Lending Enforcement and Litigation Overview
- Fair Mortgage Servicing: The Foreclosure Affidavit Crisis and More Challenges for Servicers
- The New Wave of SCRA Enforcement
- Dodd-Frank and the Consumer Financial Protection Bureau: Implementation, Preemption, State Regulation, and UDAP
- The New Enforcement Environment and Financial Services Regulation
- Privacy, Data Security, and Data Breach Litigation Nationally and Internationally
- Community Reinvestment Act: A Revitalized Statute?
- Key Trends in Fair Lending Risk Management Programs
- Fair Lending Issues Impact on Bank Merger & Acquisition Activity

When: Monday, May 2

Where: The Fairmont Hotel in Washington, DC

Register or Learn More: Visit

<http://fairlendingtoday.com> or email fairlending@buckleysandler.com.

[Donna Wilson](#) will be presenting at a CLE webinar on "FCRA and FACTA Class Actions: Leveraging New Developments in Certification, Damages and Preemption" on Tuesday, April 26 at 1pm EDT/10am PDT. This seminar will address recent developments in FCRA and FACTA class action litigation, particularly the issue of proportionality of damages at the class certification stage and state law preemption, and litigation strategies for plaintiffs and defendants bringing or defending these claims. The webinar is sponsored by the legal publishing group of Strafford Publications.

[James Parkinson](#) will participate on a panel entitled "The Role of the Lawyer in Preventing Corruption," at the International Bar Association's Bar Leaders Conference in Miami, on May 4.

[Margo Tank](#) will be speaking at the Mortgage Bankers Association's Legal Issues and Regulatory Compliance Conference on May 15 in Boca Raton, Florida. Her remarks will focus on a legal and regulatory update on mortgage implementation issues.

[Jonice Gray Tucker](#) will be speaking at the Mortgage Bankers Association's Legal Issues and Regulatory Compliance Conference on May 15 in Boca Raton, Florida. Her remarks will focus on Litigation Involving Servicing and Foreclosure.

[Warren Traiger](#) will be speaking about potential changes to the CRA regulations and the current regulatory environment during a webinar hosted by the CRA Qualified Investment Fund, on Thursday, May 19 at 2pm.

[Donna Wilson](#) will be presenting at a CLE webinar on "Emerging Class Action Threat: Consumer Personal Identification Data Strategies to Minimize Litigation Risks and Maximize Insurance Coverage" on Tuesday, May 24. This seminar will analyze the Song-Beverly Act and its impact of ruling on class action litigation under other state privacy statutes. The Webinar is sponsored by the Legal Publishing Group of Strafford Publications.

[James Parkinson](#) will be speaking at the ACI's "FCPA Compliance in Emerging Markets" program in Washington, D.C., on June 15 -16.

[Andrew Sandler](#) will be speaking at CBA Live 2011 and presenting an Annual Fair Lending Report on Tuesday, June 14 at 3:30 pm in Orlando, Florida. Mr. Sandler will be giving an overview of current regulatory and enforcement developments and discussing the most significant fair lending risks confronting consumer lenders in the next twelve months.

[Andrew Sandler](#) will be participating on a panel at the Florida Bar Annual Convention on Friday, June 24 as part of the "Presidential Showcase". On the panel with Mr. Sandler is Paul Bland, Public Justice. The Moderator is Justice R. Fred Lewis, a Justice of the Florida Supreme Court, a former Chief Justice and founder of Justice Teaching.

[Andrew Sandler](#) will be teaching the Litigation Strategy Session: Developing Strong Protocols, Admissible Documentation & Comprehensive Strategies in Order to Survive Regulatory Enforcement Actions & Litigation Workshop on Tuesday, July 26 in Chicago. This workshop precedes ACI's Consumer Finance Class Actions & Litigation Conference taking place July 27-28 at the Sutton Place Hotel, Chicago, IL.

[Jonice Gray Tucker](#) will be moderating a panel focusing on Regulatory and Litigation Developments in Servicing at the California Mortgage Bankers' Servicing Conference on August 29 in Las Vegas.

Miscellany

Mortgage Relief Companies and Individual Defendants Agree to \$6.1 Million Judgment to Settle FTC Suit. On April 11, the Federal Trade Commission (FTC) announced a settlement with two companies and three individuals who misrepresented themselves as consumer mortgage lenders, servicers, or affiliates, and falsely promised to modify consumers' loans and make their mortgage payments more affordable. The action is part of the FTC's ongoing effort to stop scams that target financially strapped homeowners seeking mortgage relief. The settlement agreement bans Kirkland Young LLC, Attorney Aid LLC, and three individuals from the mortgage relief services business and imposes a \$6.1 million judgment to be used to fund consumer refunds. The proposed consent order was filed in the U.S. District Court for the Southern District of Florida, and is subject to court approval. In November 2010, after the filing of this case, the FTC issued the Mortgage Assistance Relief Services Rule which prohibits the collection of advance fees for mortgage foreclosure rescue and loan modification services until the mortgage relief company had provided consumers with a written offer from their lender or servicer that the homeowner finds acceptable. For a copy of the press release, please see <http://www.ftc.gov/opa/2011/04/kirkland.shtm>.

JGC Corporation Agrees to Pay \$218.8 Million Criminal Penalty in Connection with FCPA Investigation. On April 6, the Justice Department's Criminal Division announced that JGC Corporation, headquartered in Japan, agreed to pay a \$218.8 million criminal penalty to resolve charges related to the Foreign Corrupt Practices Act (FCPA) for its participation in a scheme to bribe Nigerian government officials to obtain various engineering, procurement and construction (EPC) contracts from the Nigerian Government. The nearly \$219 million penalty is the latest in a series of penalties in connection with bribery of Nigerian officials that have been imposed against the four companies that form the TSKJ joint venture and various officers, directors and agents of those companies. TSKJ was a joint venture between JGC, Kellogg Brown & Root Inc., Technip S.A. and Snamprogetti Netherlands B.V., formed for the purpose of obtaining EPC contracts in Nigeria. The penalties levied against the TSKJ joint venture companies total approximately \$1.5 billion. According to court documents, JGC authorized the TSKJ joint venture to hire agents to pay bribes to a range of Nigerian government officials, including top-level executive branch officials. In addition to monetary fines, the Justice Department filed a deferred prosecution agreement against JGC in the U.S. District Court for the Southern District of Texas in which the Department agreed to defer prosecuting of JGC for two years, during which time JGC agreed to retain an independent compliance consultant to review the design and implementation of its compliance program and to cooperate with the department in ongoing investigations. [For a copy of the press release, please click here.](#)

Mortgages

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disagreed, reasoning that a violation of HAMP would be actionable under Chapter 93A if the violation was unfair or deceptive and that recovery under Chapter 93A would be compatible with the objectives and enforcement mechanisms of HAMP. However, the court found that the plaintiffs had failed to plead sufficient facts to make the showing that the defendant's alleged violations of HAMP rose to the level of unfair or deceptive. As a result, the court denied the motion to dismiss, and instructed the plaintiffs to amend the complaint within 30 days. [Click here for a copy of the opinion.](#)

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Court for the Southern District of Texas in which the Department agreed to defer prosecuting of JGC for two years, during which time JGC agreed to retain an independent compliance consultant to review the design and implementation of its compliance program and to cooperate with the department in ongoing investigations. [For a copy of the press release, please click here.](#)

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

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