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DODD-FRANK
NEWS
March 2014

The Dodd-Frank Wall Street Reform and Consumer Protection Act was enacted as a measure to promote financial stability and protection for consumers through increased regulation of nearly every aspect of the consumer finance industry. In the two years since its enactment, the Dodd-Frank Act has led to significant industry reforms and the promulgation of numerous new laws and regulations. In an effort to stay apprised of these significant industry changes, Burr & Forman's Dodd-Frank Newsletter will serve as a periodic update of recent case law, news, and developments related to the Dodd-Frank Act.

RECENT CASES

JANUARY THROUGH MARCH 2014

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Dodd-Frank Amendments to RESPA

Ali v. Wells Fargo Bank, N.A., 2014 WL 345243 (W.D. Okla. Jan. 24, 2014).

This action is one of the first decisions issued regarding the forced-placed insurance provision pursuant to the new mortgage servicing regulations under the "Dodd-Frank Wall Street Reform and Consumer Protection Act" ("Dodd-Frank"). In *Ali*, Plaintiff brought suit against her mortgage lender, mortgage loan servicer, and an insurance company asserting multiple theories of liability related to lender-placed insurance ("LPI"), by which the lender prevented a lapse of coverage for the mortgaged property. LPI, or force-placed insurance, may be obtained by a servicer on behalf of the owner or assignee of a mortgage loan that insures the property securing the loan. *See* 12 C.F.R. §1024.37. Specifically, Plaintiff alleged Defendants violated section 2605 of RESPA by, *inter alia*, "charging premiums that [were] unfairly and egregiously costly . . . [that] cost up to ten times the amount of standard insurance that a borrower was previously paying or could obtain on the open market" and receiving a "kickback or commission on each policy" purchased by Defendants. *See* Pl.'s Compl., ¶¶ 68-77. Defendants moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(6).

Plaintiff argued section 2605(m) became effective on July 22, 2010, the date that Dodd-Frank was enacted. Defendants argued, on the other hand, that Plaintiff's claim based on an alleged violation of section 2605(m) of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §2601 et seq., failed because that section did not become effective until January 10, 2014, and was not in effect when the alleged violation of it occurred.

The court noted that, pursuant to Dodd-Frank, "the effective date of a newly-added RESPA section is either the date on which the final regulations implementing such section take effect or, if the regulations have not been issued on the date that is 18 months after the designated transfer date, then the section shall take effect on that date." *See Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1146 n.3 (10th Cir. 2013). For purposes of the LPI regulation, the date that is 18 months after the designated transfer date is January 21, 2013. *Id*. But the Court noted that the regulations implementing section 2506(m) were promulgated before January 21, 2013, and were schedule to take effect on January 10, 2014. *See* 78 Fed. Reg. 10696 (Feb. 14, 2013). Accordingly, the Court held that the LPI provision pursuant to section 2605(m) of Dodd-Frank took on January 10, 2014, and was not in effect when Defendants obtained LPI on Plaintiff's real property. Thus, the Court dismissed Plaintiff's claim for violation of section 2605(m) of RESPA for failure to state a claim on which relief can be granted.

Cataldi v. New York Community Bank, 2014 WL 359954 (N.D. GA Feb. 3, 2013)

This action involves one of the first decisions issued pursuant to the new mortgage servicing regulations under the "Dodd–Frank Wall Street Reform and Consumer

Protection Act." Plaintiff sought injunctive relief for violation of the Act, including a claim that the Defendant did not fairly offer and negotiate loss mitigation options and pursued "dual track" foreclosure. The facts established that the parties engaged in modification negotiations, that one or more modifications were offered, that Plaintiff did not agree to the offered modifications, and that foreclosure notices issued after the modification was denied. Plaintiff alleged that the offer was inadequate and in fact a "blatant fraudulent attempt" at "illegal extortion."

The court noted that the claims appeared to be based on a new regulation enacted by the Consumer Financial Protection Bureau ("Regulation X," 12 C.F.R. §1024.41). The Court declared that the regulation can be privately enforced under Section 6(f) of the Real Estate Settlement Procedures Act (12 U.S.C. 2605(f)), but that Section 6(f) of RESPA only allows suits for damages and costs, not injunctive relief. Therefore, the Court held that the claim was inapposite to a request for preliminary injunctive relief. In addition, the Court held that "[n]othing in §1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option." 12 C.F.R. §1024.41(a). Finally, the Court declared that Plaintiff failed to allege any fraud with the particularity required by law, and failed to state any facts showing a likelihood of success with regard to the allegation that Defendant's offer of a modification violated any legal duty under Regulation X or otherwise.

Fowler v. U.S. Bank, Nat. Ass'n, 2014 WL 850527 (S.D. Tex. Mar. 4, 2014)

In this action, plaintiff alleged, *inter alia*, a cause of action under TILA §1639b(c) (relating to the payment of a "yield spread premium") stemming from a residential mortgage loan transaction plaintiffs entered into with defendants in 2006.

Plaintiffs alleged the broker and original lender's conduct in connection with a payment of a yield spread premium violated 15 U.S.C. §1639b(c) because such conduct amounted to a steering incentive, which the statute was designed to prohibit. Defendants argued plaintiffs' claim was barred by the three-year statute of limitations for claims under §1639b(c). The court recognized that although 15 U.S.C. §1640(k) provides an exception to the three-year statute of limitation for claims brought in the context of foreclosure, plaintiffs' §1639b(c) claim failed because it did not retroactively apply to their 2006 mortgage loan transaction. After analyzing the legislative history of the loan originator compensation rule, 15 U.S.C. §1639b, the court held that the final rule was effective on January 1, 2014 and that the CFPB's implementing regulations did not intend to apply the regulations retroactively. According to the court, "the operative presumption, after all, is that Congress intends its laws to govern prospectively only." Without any basis to infer otherwise, the court presumed that §1639b(c) does not apply retroactively to the 2006 mortgage loan transaction. Thus, although the conduct complained of by plaintiffs was prohibited under 12 C.F.R. §226.36 as early as April 1, 2011, plaintiff's claim under §1639b(c) was due to be dismissed.

Dodd-Frank Prohibition on Arbitration Clauses

State ex rel. Ocwen Loan Servicing, LLC v. Webster, 752 S.E.2d 372, 380 (2013)

The Supreme Court of Appeals of West Virginia recently held that retroactive application of Dodd-Frank's prohibition of an arbitration provision in a residential mortgage loan does not apply retroactively. The court recognized a recent split in authority among district courts that have considered retroactive application of Dodd-Frank amendments governing arbitrabilitiy. *See Weller v. HSBC Mortgage Servs., Inc.*, 2013 WL 4882758 (D. Colo. Sept. 11, 2013) (discussing the split in authority).

In October 2006, the Currys obtained an adjustable rate mortgage loan that was ultimately serviced by Ocwen Loan Servicing ("Ocwen"). In connection with the loan, the Currys executed an arbitration rider. After the Currys defaulted on the loan, Ocwen assessed a number of fees, and the Currys eventually filed a complaint against Ocwen alleging various violations of the West Virginia Consumer Credit and Protection Act. Ocwen responded by filing a motion to compel arbitration and dismiss pursuant to the arbitration rider and 15 U.S.C. §1639c(e)(1). The lower court denied Ocwen's motion, finding, *inter alia*, the inclusion of an arbitration agreement was unenforceable pursuant to a provision of the Dodd-Frank Act prohibiting the inclusion of such provisions

in connection with a residential mortgage loan. *See* 15 U.S.C. §1639c(e)(1) (2010).

In reversing the lower court, the court noted that the general effective date of the Act was July 22, 2010 and some provisions did not become effective until a later date. Nothing within Dodd-Frank expressly states that §1639c is to be given retroactive application. Because Dodd-Frank neither expressly nor impliedly states that §1639c is to be given retroactive application, the court asked whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of affecting substantive rights, liabilities, or duties on the basis of conduct arising from its enactment. The court held that rendering a properly executed arbitration agreement unenforceable would fundamentally interfere with the parties' contractual rights and would impair the predictability and stability of their earlier agreement. Therefore, retroactive application of the Dodd-Frank prohibition on the enforceability of arbitration agreements in connection with residential mortgage loans was in error.

Whistleblower Protection Under Dodd-Frank

Khazin v. TD Ameritrade Holding Corp., 2014 WL 940703 (D.N.J. Mar. 11, 2014)

Plaintiff Boris Khazin filed suit against his former employers T.D. Ameritrade and Amerivest Investment Management Company, alleging wrongful termination as retaliation for whistleblowing, state law claims, common law claims, and violations of the Dodd-Frank Act. Specifically, plaintiff alleged that around April of 2012, he became aware that a particular AmeriVest financial product was not in compliance with relevant securities regulations and was improperly priced, resulting in customers paying additional overhead for the product in the amount of approximately $2,000,000. Plaintiff conducted a revenue impact analysis at the direction of his supervisor and determined that instituting a corrective change would result in defendants losing $1,150,000 in revenues. Thereafter, plaintiff was terminated and claimed that he reported defendants' alleged violations to the SEC.

The crux of the parties' arguments in this case was whether plaintiff qualified as a "whistleblower" under the Dodd-Frank Act. *See* 15 U.S.C. §78u-6(h)(1)(A). If plaintiff was a whistleblower, for purposes of Dodd-Frank, plaintiff would receive specific statutory protections. Specifically, the parties disputed whether an individual must provide information to the SEC *before* being terminated to qualify as a "whistleblower" under the statute.

Defendants argued that plaintiff was not a whistleblower because he did not report the alleged securities violations to the SEC *prior* to his termination and, therefore, could not have been terminated in retaliation by defendants. On the other hand, plaintiff contended that he qualified as a whistleblower under Dodd-Frank because he reported the alleged violations internally and to the SEC post-termination. Specifically, plaintiff argued that the statute has no temporal requirement necessitating his report to the SEC be *prior* to his termination and, that the statute's "catch-all" provision incorporates sections of the Sarbanes-Oxley Act which affords protections to whistleblowers who only report violations internally.

At the outset, the court recognized a split in authority regarding the scope of the whistleblower provision and the lack of guiding authority on the issue. The court adopted the majority view on the issue—that the Dodd-Frank Act is ambiguous with respect to who qualifies as a whistleblower for purposes of the anti-retaliation provision of the statute. Accordingly, the court looked to the SEC's final rule defining whistleblower. Under the SEC's rule, Dodd-Frank's anti-retaliation protection includes individuals who report potential violations to a supervisory authority and not to the SEC itself. Specifically, the SEC's rule explains that "the anti-retaliation whistleblower protection provisions of Dodd-Frank require a [p]laintiff to show that he either provided information to the SEC *or* that his disclosures fell under the four categories listed in Section 78u-6(h)(1)(A)(iii)." *See Murray v. UBS Sec., LLC*, 2013 WL 2190084, at *7 (S.D.N.Y. May 21, 2013). Because plaintiff alleged that he possessed a reasonable belief that there were potential securities violations and he reported them to his supervisor, his internal reporting of the potential violations was sufficient to qualify as a whistleblower under Dodd-Frank's anti-retaliation provision. Therefore, plaintiff's post-termination report to the SEC was not necessary to invoke the provision.

- - NEWS & DEVELOPMENTS - -

CFPB Seeks Comment on International Money Transfer Market Rule

On January 31, 2014, the CFPB published a proposed rule that would amend the definition of larger participants of certain consumer financial product and service markets.

The Dodd-Frank Act authorizes the CFPB to supervise certain nonbank covered entities, including "larger participants" of markets for consumer financial products or services. The proposed rule would define a market for "international money transfers" and define "larger participants" of this market.

The CFPB seeks public comment on the proposed rule. Comments are due by April 1, 2014.

To read the proposed rule, visit: https://www.federalregister.gov/articles/2014/01/31/2014-01606/defining-larger-participants-of-the-international-money-transfer-market

CFPB Proposes Consumer Debt Collection Survey

On March 7, 2014, the CFPB announced its intention to conduct a mail survey of consumers regarding their interactions with the debt collection industry.

Entitled, "Debt Collection Survey from the Consumer Credit Panel," the survey will ask consumers about their experiences with debt collectors, their preferences regarding contact from debt collectors, their knowledge as to their rights regarding debt collection, and their opinions on potential regulation of the debt collection industry.

Survey data will be used in a CFPB rulemaking effort regarding debt collection.

To learn more, visit: https://www.federalregister.gov/articles/2014/03/07/2014-05010/agency-information-collection-activities-comment-request

Credit Reporting Agencies Now Accepting Supporting Documentation for Consumer Disputes

The three major credit reporting agencies--Equifax, Experian, and TransUnion--recently added a function to their consumer dispute resolution process. Now, consumers may upload, mail, or fax supporting documentation to explain the errors which they dispute.

To learn more, visit: http://www.consumerfinance.gov/blog/now-you-have-better-options-to-dispute-a-credit-report-error/

CFPB Releases Source Code for HUD-Approved Counselor Tool

The CFPB recently published the source code to their HUD-approved counsel web tool, which was released on November 8, 2013. Making the source code readily available will allow lenders to build their own tools to find the 10 closest HUD-approved housing counselors to an applicant's location.

To download the source code, visit: https://github.com/cfpb?utm_source=newsletter&utm_medium=email&utm_campaign=20140306+regimp

To read more, visit: http://regreformtracker.aba.com/2014/03/cfpb-source-code-for-finding-hud.html?utm_source=regreformtracker&utm_medium=ABA+Dodd-Frank+Tracker

CFPB to Hold Public Roundtable on Dodd-Frank

On April 3, 2014, the CFPB will host a discussion for end-users regarding the Dodd-Frank Act.

Consisting of three discussion panels, the roundtable will cover topics such as the following: the obligations of end-users regarding recordkeeping related to commodity interest and related transactions; regulation regarding the swap dealing de minimus threshold; and regulation regarding forward contracts with embedded volumatric optionality.

To learn more, visit: http://www.cftc.gov/PressRoom/Events/opaevent_cftcstaff040314

Regulators Release Medium-Sized Bank Stress Test Guidance

The FDIC, Federal Reserve, and OCC finalized stress test guidance for medium-sized banks, namely, institutions with assets between $10 billion and $50 billion. These institutions are required to complete their first test by March 31, 2014.

To learn more, visit: https://twitter.com/intent/tweet?text=Regulators+Finalize+Stress+Test+Guidance+for+Medium-Sized+Banks&url=http%3A%2F%2Fregreformtracker.aba.com%2F2014%2F03%2Fregulators-finalize-stress-test.html&via=abaregpolicy

According to Survey, Dodd-Frank Has Significantly Increased Operating Costs for Community Banks

According to a study conducted by George Mason University on 200 banks with assets under $10 billion, the Dodd-Frank Act has had a major impact on community banks and their customers due to high compliance-related costs.

The study shows that 83% of respondents have seen compliance costs rise by 5% or more since 2010. 70% of respondents have had to add one or more full-time employees as a result of Dodd-Frank requirements. 93% stated that Dodd-Frank was at least as burdensome, if not more so, than the Bank Secrecy Act.

To learn more, visit: http://mercatus.org/publication/how-are-small-banks-faring-under-dodd-frank

House Passes Bill Passed at CFPB Reform

The House of Representatives recently passed a bill, H.R. 3193, aimed at reforming the CFPB.

Specifically, the reforms would include replacing the director with a bipartisan five-member commission, addressing the CFPB's consumer data collection practices, changing the Financial Stability Oversight Council voting standard, and funding the CFPB through congressional appropriations.

Although the bill passed 232-82 in the House, it is not predicted to pass in the Senate.

To learn more, visit: http://mercatus.org/publication/how-are-small-banks-faring-under-dodd-frank

Updated Mortgage Rule Exam Procedures Released

The FDIC released revised interagency consumer compliance exam procedures for the Dodd-Frank mortgage rules that recently took effect.

To read the procedures, visit: http://www.fdic.gov/regulations/compliance/manual/index.html

Fannie Mae Reports Overall 2013 Profits

In 2013, Fannie Mae posted $84.4 billion in overall income, with $6.6 billion in fourth-quarter profits.

To read more, visit: http://www.fanniemae.com/portal/about-us/media/financial-news/2014/6083.html

CFPB Remarks on Mortgage Servicing Expectations

According to CFPB Deputy-Director Steve Antonakes, "business as usual has ended in mortgage servicing." At a trade group event in Orlando, Florida, Antonakes laid out numerous expectations that the CFPB has over mortgage servicers under the January mortgage rules.

Specifically, the CFPB expects servicers to reach out to defaulted borrowers and help them understand options for avoiding foreclosure.

To read the speech, visit: http://www.consumerfinance.gov/newsroom/deputy-director-steven-antonakes-remarks-at-the-mortgage-bankers-association/

CFPB Proposing Changes to Home Mortgage Disclosure Act

The CFPB recently announced that it is exploring potential changes to the Home Mortgage Disclosure Act's disclosure requirements. The agency is seeking input from small lenders on these changes.

The CFPB is also seeking input on improvements to the reporting, data entry, and coverage tests that determine which institutions must file HMDA data. For instance, while banks and nonbanks are currently subject to different reporting thresholds, the CFPB is considering requiring both types of entities to report if they make 25 loans or more per year.

To learn more, visit: http://files.consumerfinance.gov/f/201402_cfpb_factsheet_sbrefa.pdf

CFPB Releases Report on Problems in Mortgage Servicing

The CFPB recently released a report on issues it uncovered in the mortgage servicing industry in late 2013. During this time period, the CFPB notes that there were numerous servicer violations of Dodd-Frank's ban on unfair, abusive, or deceptive acts and practices. This was the time period immediately prior to the implementation of the new mortgage rules.

The rules that went into effect in January require servicers to give borrowers greater access to servicing personnel, maintain accurate records, and correct errors on request.

To learn more, visit: http://www.consumerfinance.gov/newsroom/cfpb-supervision-report-highlights-mortgage-servicing-problems-in-2013/

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No representation is made that the quality of services to be performed is greater than the quality of legal services performed by other lawyers.

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