Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

March 9, 2012

Topics In This Issue

Federal Issues

CFPB Director Addresses State Attorneys General, Spotlight on Payday Lenders, Debt Collectors, and Servicing Rules. The National Association of Attorneys General (NAAG) met this week in Washington, DC. Among the topics covered at the annual meeting was the ongoing and future coordination between federal and state law enforcement with regard to financial services. CFPB Director Cordray, a former state attorney general, noted that NAAG and the CFPB already have several working groups organized to address payday loans, foreclosure scams, auto loans, and debt collection. These efforts will be supported through a formal Memorandum of Understanding that is expected to be finalized soon. In his remarks and in follow up questioning, Director Cordray specifically addressed enforcement and supervision with regard to payday lenders and debt collectors. It was reported that Director Cordray indicated that the CFPB and the FTC are "zoning in" on issues related to payday lenders associated with Native American tribes. Regarding debt collectors, the Director stated that aggressive enforcement by the FTC and states is not enough, and that the CPFB would like federal and state regulators and enforcement agencies to develop a national strategic plan that leverages the CFPB's supervision and enforcement capabilities. Finally, on planned rulemaking by the CFPB, the Director noted ongoing efforts to develop rules governing mortgage servicing, including force-placed insurance products and hybrid ARMs.

CFPB Releases SAFE Act Exam Procedures. On March 7, the CFPB updated its Supervision and Examination Manual with SAFE Act examination procedures. The procedures set forth the background and requirements of the SAFE Act, and its federal implementing regulations, for use in examining federally regulated depository institutions for compliance with the SAFE Act.

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FTC Expands Enforcement Action Against Tribe-Affiliated Payday Lenders. On March 7, the FTC announced the expansion of an existing enforcement action against several payday lending firms and their owner alleging that they sought to force borrowers throughout the country to travel to South Dakota to appear before a tribal court that did not have jurisdiction over their cases. The defendants are facing a number of claims relating to alleged attempts to garnish employees' wages without appropriate court orders. The amended complaint adds allegations that the loan contracts issued by the defendants illegally state that the contracts are subject solely to the jurisdiction of the Cheyenne River Sioux Tribe. The defendants have brought suit in the tribal court against non-tribal members to obtain garnishment orders. The FTC contends that the tribal court does not have jurisdiction over claims against people who do not belong to the Cheyenne River Sioux Tribe and who do not reside on the reservation or elsewhere in South Dakota.

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markets the acquired property. The Lender Letter also clarifies policies related to implementation of the HHF unemployment, reinstatement, and loan modification assistance programs, including clarifications regarding (i) collection and solicitation activity, (ii) foreclosure actions, and (iii) servicer obligations when dealing with housing finance agencies.

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State Issues

Virginia Enacts Two Mortgage-Related Bills. On March 1, Virginia enacted two mortgage-related bills, both effective July 1, 2012.

HB 570 exempts employees of bona fide nonprofit organizations from licensing and registration requirements applicable to mortgage loan originators. It also, among other things, (i) adds definitions for dwelling and residential mortgage loan, (ii) revises the definitions for loan processor or underwriter, mortgage loan originator, real estate brokerage activities, registered mortgage loan originator, and unique identifier, (iii) revises the licensing requirement for mortgage loan originators and adds exemptions for certain individuals, and (iv) prohibits licensees from using unique identifiers for any purpose other than the SAFE Act and the Virginia Mortgage Loan Originators law. HB 572 exempts from licensure under the NMLS persons who make loans or extend credit for any part of the purchase price of real property that the person owns.

Oregon Adopts Temporary Servicer Rules, Enacts Law Regarding Affordable Housing Covenants. Recently, Oregon adopted temporary rules that declare certain mortgage servicing practices to be unlawful trade practices. Effective January 27, 2012 through July 24, 2012, it is unfair and deceptive for a mortgage loan servicer to (i) assess late fees or delinquency charges for payments received by the payment's due date or within any applicable grace period, (ii) assess or collect default-related fees that the servicer is not legally authorized to collect under the terms of the

residential mortgage loan, deed of trust, or mortgage, (iii) fail to follow guidelines issued by the FHFA for loans made or held by government sponsored enterprises for borrowers pursuing an alternative to foreclosure, (iv) misrepresent any material information regarding a loan modification, (v) fail to provide a borrower with notice that the borrower's request for loan modification has been denied or rejected within ten days of the denial or rejection, but in no event, less than twenty days before a scheduled trustee sale, (vi) fail to comply with certain provisions of RESPA, and (vii) fail to deal with a borrower in good faith.

Oregon also enacted, on February 27, 2012, SB 1535. The law authorizes affordable housing covenants contained in a recorded master form instrument to be incorporated by reference in a short form instrument recorded for a real property transaction. The change is effective immediately and is intended to reduce errors in the recording of affordable housing covenants.

South Dakota Adds Mortgage Licensing Exemption, Adjusts Register of Deeds Fees. On March 2, South Dakota enacted HB 1229, which exempts certain individuals from the requirement of obtaining a mortgage loan originator license, including attorneys under specified circumstances. On the same day, the state enacted HB 1130, which, among other things, (i) sets a new schedule of fees to be charged by the register of deeds for various services, and (ii) allows an assignment of a mortgage to be recorded as a mortgage under specified conditions. Both bills take effect July 1, 2012.

Nevada Delays Effective Date for New Motor Vehicle Credit Sale Forms. On March 1, the Nevada Financial Institutions Division issued an order delaying implementation of its amended motor vehicle credit sales application and contract forms. Creditors now will have until July 1, 2012 to begin using the new forms.

New York Extends Emergency Rules Regarding Mortgage Originator Licensing. On March 7, the New York Department of Financial Services extended through May 16, 2012 existing emergency rules regarding the licensing of mortgage loan originators. New York intends to adopt the rules as permanent at some future date.

Courts

Federal Circuit Courts Issue More Rulings Enforcing Arbitration Agreements. On March 7, the U.S. Court of Appeals for the Ninth Circuit held that a national bank could compel arbitration of a dispute involving student loans.

Kilgore v. KeyBank, Nat'l Ass'n, No. 09-16703,2012 WL 718344 (9th Cir. Mar. 7, 2012). A group of students filed a class action in state court alleging that KeyBank violated state law in its offering of loans to students of a helicopter pilot school, which subsequently misappropriated the student loan funds. KeyBank removed the action to federal court and moved to compel arbitration. The district court denied the motion and KeyBank appealed. While the case was on appeal, the Supreme Court in AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011),set a new standard for assessing the enforceability of arbitration clauses. That new standard required the Ninth Circuit to hold in KeyBank that the Federal Arbitration Act preempts California's rule prohibiting arbitration of claims for broad,

public injunctive relief. The court also held that the arbitration clause was not procedurally unconscionable because it clearly provided a sixty-day opt-out provision and a "conspicuous and comprehensive explanation of the arbitration agreement." The court did not address the issue of whether the arbitration agreement was substantively unconscionable.

The U.S. Court of Appeals for the Eleventh Circuit recently issued two separate, but substantively similar, opinions regarding arbitration agreements, both in cases consolidated in the multidistrict overdraft fee litigation pending in the U.S. District Court for the Southern District of Florida. Hough v. Regions Financial Corp., No. 11-14317, 2012 WL 686311 (11th Cir. Mar. 5, 2012); Buffington v. SunTrust Banks, Inc., No. 11-14316, 2012 WL 660974 (11th Cir. Mar. 1, 2012). In both cases, based on Concepcion, the court previously vacated district court rulings that the banks' arbitration clauses were substantively unconscionable under Georgia law because they contained a class action waiver. On remand, the banks renewed their motions to compel arbitration. The district court denied the motions again, this time on the ground that the arbitration clauses were substantively unconscionable under Georgia law because a provision granting the banks' the unilateral right to recover their expenses for arbitration allocated disproportionately to the plaintiffs the risks of error and loss inherent in dispute resolution. The Eleventh Circuit held that, under Georgia law, an agreement is not unconscionable because it lacks mutuality of remedy. It also rejected the district court's holding that the clauses were procedurally unconscionable because the contract did not meet the Georgia standard that for an agreement to be procedurally unconscionable it must be so one-sided that "'no sane man not acting under a delusion would make [it] and ... no honest man would' participate in the transaction." The Eleventh Circuit vacated the district court's orders and remanded both cases with specific instructions to compel arbitration.

Ninth Circuit Holds Nevada AG Suit Against Bank Not Removable Under CAFA. On March 2, the U.S. Court of Appeals for the Ninth Circuit held that a parens patriae suit brought by Nevada's Attorney General (AG) related to mortgage modification and foreclosure practices could not be removed from state court under the Class Action Fairness Act (CAFA). Nevada v. Bank of America Corp., No 12-15005, 2012 WL 688552 (9th Cir. Mar. 2, 2012). The AG alleges that Bank of America Corp. (BAC) violated state law by misleading Nevada consumers about the terms and operation of its home mortgage modification and foreclosure processes, and that it violated a consent judgment entered between the state and several of its subsidiaries. BAC removed the case to federal court under CAFA. The district court denied the state's motion to remand, finding that (i) it had jurisdiction over the suit as a CAFA "class action," but not as a "mass action," and (ii) it had federal question jurisdiction because the allegations require interpretation of the federal HAMP program and the Fair Debt Collections Practices Act. On appeal, the Ninth Circuit consistent with its opinion in Washington v. Chimei Innolux Corp., 659 F.3d 842 (9th Cir. 2011), which was issued after the district court ruled on Nevada's motion, held that a parens patriae suit does not qualify as a class action removable under CAFA, and does not otherwise satisfy CAFA's "mass action" requirements. The court reasoned that Nevada is the real party in interest and therefore held that the case could not qualify as a mass action removable under CAFA. The Ninth Circuit also held that, because only state law causes of action are alleged and there is no overriding federal interest, the district court does not have federal question jurisdiction.

Jury Convicts Stanford on Ponzi Scheme Charges. On March 6, a federal jury in the U.S. District Court for the Southern District of Texas convicted Allen Stanford on thirteen of fourteen fraud counts for orchestrating a major Ponzi scheme. U.S. v. Stanford, No 09-00342 (S.D. Tex. Mar. 6, 2012). The jury found that, over the course of twenty years, Mr. Stanford and others at his firm, Stanford International Bank Ltd., misappropriated $7 billion in certificates of deposit purchased by investors. The jury subsequently found that $330 million sitting in various frozen accounts controlled by Mr. Stanford could be pursued as proceeds from the scheme. The court has set June 14, 2012 as the sentencing date, following which Mr. Stanford plans to appeal the conviction.

Firm News

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InfoBytes Blog!

Have you had a chance to check out our new InfoBytes Blog? In addition to regular "bytes," the blog will contain additional real-time firm content and commentary on news and developments affecting financial services providers and other financial system participants. Click here to visit the blog and sign up to receive RSS feeds. Of course, we will continue to publish our weekly InfoBytes newsletter. **www.infobytesblog.com**

David Baris and **Noel Gruber** will be speaking on March 13, 2012 at the ICBA 2012 Annual Convention in Nashville, Tennessee in a session entitled "How Do Publicly Held Community Banks and Holding Companies Comply?"

James Parkinson will be chairing a panel at the International Bar Association's 10th Annual Anti-Corruption Conference in Paris, France on March 13 and 14, 2012. The panel is entitled: "The Privileged Profession: Risks faced by legal professionals advising in international transactions."

Donna Wilson will be participating in a CLE webinar entitled "Consumer Finance Class Actions: FCRA and FACTA: Leveraging New Developments in Certification, Damages and Preemption" on March 21, from 1:00pm-2:30pm EDT.

David Baris will be speaking in the ABA Business Law Section CLE panel, "Dealing with Enforcement Actions and Insider Liability," in Las Vegas on March 23, 2012.

Jonice Gray Tucker will be speaking at the ABA Business Law Section's Spring Meeting in Las Vegas on March 23, 2012 on a panel entitled "The CFPB Approaches One Year: Experiences and Exposures." The panel will include speakers from PNC Financial Services Group, PayPal, Treliant Risk Advisors, the Consumer Federation of America, and the Federal Trade Commission.

Andrew Sandler will moderate a panel at the American Conference Institute's 8th National Forum on Residential Mortgage Litigation and Regulatory Enforcement on March 29, 2012 in Washington, DC.

The panel is titled, "Complying With and Responding to New and Emerging Federal and State Enforcement Actions."

David Baris will be speaking at the 2012 Virginia Bank Directors Symposium on March 29, 2012 in Tysons Corner, Virginia. Mr. Baris will discuss how bank directors can minimize their risk of personal liability.

David Baris will be speaking at the NACD/AABD Bank Director Workshop on April 12, 2012 in Fort Lauderdale, Florida. The topic of the presentation is "Bank Director Liability and Practical Steps to Minimize It."

Donna Wilson will be moderating a panel entitled "BANKS UNDER SIEGE: The Civil, Criminal, Regulatory and Insurance Fallout from Mortgage Foreclosures and Bank Failures" at the ABA Section of Litigation annual meeting in Washington DC, April 18-21, 2012.

David Krakoff will be speaking at ACI's 27th National Conference on the Foreign Corrupt Practices Act in New York, NY on April 17, 2012. Mr. Krakoff's session will focus on defending executives in FCPA investigations.

James Parkinson will be speaking at a PLI program seminar entitled "Foreign Corrupt Practices Act 2012" in San Francisco, California on April 17, 2012 and in New York, New York on May 4, 2012.

Andrew Sandler will be speaking at the 2012 Marquis National Compliance Conference in Fort Worth, Texas on April 18, 2012. Mr. Sandler's session will cover the view from Washington, DC on CRA, HMDA, and Fair Lending.

David Krakoff will be speaking at the ALI-ABA Environmental Crimes Conference in Washington, DC on April 26, 2012. Mr. Krakoff's session will discuss the key issues at the outset of an environmental criminal action.

Mortgages

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CFPB Acknowledges Student Loan Complaint System. On March 5, the CFPB's student loan ombudsman, Rohit Chopra, acknowledged in a blog post that the CPFB had launched its student loan complaint system. The CFPB outlined its expectations regarding financial institution response and resolution times. It expects institutions to respond to complaints with fifteen days, and resolve complaints within sixty days. Concurrent with the opening of the complaint system, the CFPB sent a letter to university officials advising them of this new resource available for their students and alumni.

FTC Expands Enforcement Action Against Tribe-Affiliated Payday Lenders. On March 7, the FTC announced the expansion of an existing enforcement action against several payday lending firms and their owner alleging that they sought to force borrowers throughout the country to travel to South Dakota to appear before a tribal court that did not have jurisdiction over their cases. The defendants are facing a number of claims relating to alleged attempts to garnish employees' wages without appropriate court orders. The amended complaint adds allegations that the loan contracts issued by the defendants illegally state that the contracts are subject solely to the jurisdiction of the Cheyenne River Sioux Tribe. The defendants have brought suit in the tribal court against non-tribal

members to obtain garnishment orders. The FTC contends that the tribal court does not have jurisdiction over claims against people who do not belong to the Cheyenne River Sioux Tribe and who do not reside on the reservation or elsewhere in South Dakota.

Nevada Delays Effective Date for New Motor Vehicle Credit Sale Forms. On March 1, the Nevada Financial Institutions Division issued an order delaying implementation of its amended motor vehicle credit sales application and contract forms. Creditors now will have until July 1, 2012 to begin using the new forms.

Litigation

Federal Circuit Courts Issue More Rulings Enforcing Arbitration Agreements. On March 7, the U.S. Court of Appeals for the Ninth Circuit held that a national bank could compel arbitration of a dispute involving student loans.

Kilgore v. KeyBank, Nat'l Ass'n, No. 09-16703,2012 WL 718344 (9th Cir. Mar. 7, 2012). A group of students filed a class action in state court alleging that KeyBank violated state law in its offering of loans to students of a helicopter pilot school, which subsequently misappropriated the student loan funds. KeyBank removed the action to federal court and moved to compel arbitration. The district court denied the motion and KeyBank appealed. While the case was on appeal, the Supreme Court in AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011),set a new standard for assessing the enforceability of arbitration clauses. That new standard required the Ninth Circuit to hold in KeyBank that the Federal Arbitration Act preempts California's rule prohibiting arbitration of claims for broad, public injunctive relief. The court also held that the arbitration clause was not procedurally unconscionable because it clearly provided a sixty-day opt-out provision and a "conspicuous and comprehensive explanation of the arbitration agreement." The court did not address the issue of whether the arbitration agreement was substantively unconscionable.

The U.S. Court of Appeals for the Eleventh Circuit recently issued two separate, but substantively similar, opinions regarding arbitration agreements, both in cases consolidated in the multidistrict overdraft fee litigation pending in the U.S. District Court for the Southern District of Florida. Hough v. Regions Financial Corp., No. 11-14317, 2012 WL 686311 (11th Cir. Mar. 5, 2012); Buffington v. SunTrust Banks, Inc., No. 11-14316, 2012 WL 660974 (11th Cir. Mar. 1, 2012). In both cases, based on Concepcion, the court previously vacated district court rulings that the banks' arbitration clauses were substantively unconscionable under Georgia law because they contained a class action waiver. On remand, the banks renewed their motions to compel arbitration. The district court denied the motions again, this time on the ground that the arbitration clauses were substantively unconscionable under Georgia law because a provision granting the banks' the unilateral right to recover their expenses for arbitration allocated disproportionately to the plaintiffs the risks of error and loss inherent in dispute resolution. The Eleventh Circuit held that, under Georgia law, an agreement is not unconscionable because it lacks mutuality of remedy. It also rejected the district court's holding that the clauses were procedurally unconscionable because the contract did not meet the Georgia standard that for an agreement to be procedurally unconscionable it must be so one-sided that "'no sane man not acting under a delusion would make [it] and ... no honest man would' participate in the

transaction." The Eleventh Circuit vacated the district court's orders and remanded both cases with specific instructions to compel arbitration.

Ninth Circuit Holds Nevada AG Suit Against Bank Not Removable Under CAFA. On March 2, the U.S. Court of Appeals for the Ninth Circuit held that a parens patriae suit brought by Nevada's Attorney General (AG) related to mortgage modification and foreclosure practices could not be removed from state court under the Class Action Fairness Act (CAFA). Nevada v. Bank of America Corp., No 12-15005, 2012 WL 688552 (9th Cir. Mar. 2, 2012). The AG alleges that Bank of America Corp. (BAC) violated state law by misleading Nevada consumers about the terms and operation of its home mortgage modification and foreclosure processes, and that it violated a consent judgment entered between the state and several of its subsidiaries. BAC removed the case to federal court under CAFA. The district court denied the state's motion to remand, finding that (i) it had jurisdiction over the suit as a CAFA "class action," but not as a "mass action," and (ii) it had federal question jurisdiction because the allegations require interpretation of the federal HAMP program and the Fair Debt Collections Practices Act. On appeal, the Ninth Circuit consistent with its opinion in Washington v. Chimei Innolux Corp., 659 F.3d 842 (9th Cir. 2011), which was issued after the district court ruled on Nevada's motion, held that a parens patriae suit does not qualify as a class action removable under CAFA, and does not otherwise satisfy CAFA's "mass action" requirements. The court reasoned that Nevada is the real party in interest and therefore held that the case could not qualify as a mass action removable under CAFA. The Ninth Circuit also held that, because only state law causes of action are alleged and there is no overriding federal interest, the district court does not have federal question jurisdiction.

Criminal Enforcement

Jury Convicts Stanford on Ponzi Scheme Charges. On March 6, a federal jury in the U.S. District Court for the Southern District of Texas

convicted Allen Stanford on thirteen of fourteen fraud counts for orchestrating a major Ponzi scheme. U.S. v. Stanford, No 09-00342 (S.D. Tex. Mar. 6, 2012). The jury found that, over the course of twenty years, Mr. Stanford and others at his firm, Stanford International Bank Ltd., misappropriated $7 billion in certificates of deposit purchased by investors. The jury subsequently found that $330 million sitting in various frozen accounts controlled by Mr. Stanford could be pursued as proceeds from the scheme. The court has set June 14, 2012 as the sentencing date, following which Mr. Stanford plans to appeal the conviction.