

June 29, 2012

## Topics In This Issue

- [Federal Issues](#) - [State Issues](#) - [Courts](#) - [Firm News](#) - [Mortgages](#) - [Banking](#)
- [Consumer Finance](#) - [Litigation](#) - [E-Commerce](#) - [Privacy/Data Security](#) - [Credit Cards](#)

## Federal Issues

**FTC Sues Hotel Corporation and Subsidiaries Over Data Protection Practices.** On June 26, [the FTC filed a complaint](#) in the U.S. District Court for the District of Arizona alleging that Wyndham Worldwide Corporation (and several of its subsidiaries) violated the FTC Act by misrepresenting the adequacy of their data security procedures. The FTC specifically maintains that Wyndham and its subsidiaries engaged in unfair and deceptive practices when they represented on their website that they maintained measures adequate to protect customers' personal information. In truth, the FTC alleges, Wyndham failed to maintain such protections. According to the FTC, the companies' lack of reasonable data security allowed intruders to obtain unauthorized access to that information on three separate occasions. These breaches purportedly resulted in more than \$10.6 million in fraud loss and the export to a foreign-registered domain of payment card account information for hundreds of thousands of consumers.

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**CFPB Finalizes Rule Governing Treatment of Privileged Information.** On June 28, the CFPB released a final rule that will govern how it handles privileged information submitted by supervised financial institutions. In the final rule, [the CFPB adopted the proposed rule](#) without modification. The rule allows parties to submit information to the CFPB in the supervisory or regulatory process without waiving any applicable privileges; it further permits the CFPB to share that information with federal and state agencies without affecting federal or state privileges. The rule takes effect 30 days following its publication in the Federal Register.

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## State Issues

**North Carolina Overhauls Banking Statute.** On June 21, North Carolina Governor Bev Perdue signed Senate Bill 816, which rewrites substantial portions of the state's banking laws. The bill derives from a Joint Legislative Study Commission report, which found several deficiencies in the state's existing state banking laws. In particular, the report found that the state's banking laws (i) needed to be modernized in the wake of the Dodd-Frank Act and other changes in federal law, (ii) encouraged banks to avoid the burden of the banking law by forming holding companies under the more liberal standards of the North Carolina Business Corporation Act, and (iii) failed to address changes in banks' capital needs. To remedy these and other issues, the bill revises several parts of the existing law, including: (i) the size and composition of the Banking Commission, (ii) the rules regarding bank governance, powers, and operations, and (iii) the framework for bank supervision and liquidation.

**Incoming NAAG President to Focus on Privacy Issues.** On June 22, after being elected president of the National Association of State Attorneys General (NAAG), Maryland Attorney General Doug Gansler announced a year-long Presidential Initiative titled "Privacy in the Digital Age." The Initiative

will explore the best ways to manage consumer privacy risks in light of "emerging technologies and business models" that are challenging consumers' ability to control their personal information. Through the Initiative, state Attorneys General will attempt to ensure that "the Internet's major players protect online privacy and provide meaningful options for privacy control" to consumers.

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**Oklahoma High Court Approves Rules for Electronic Filing and Signatures.** On June 21, the Supreme Court of Oklahoma issued new state court rules governing the electronic filing of court documents in that state. These rules apply to a new statewide electronic management system that will replace the mix of electronic and paper-based record systems previously used in Oklahoma. Among other things, the rules provide for the use of electronic signatures where any statute or court rule requires a person's signature in an Oklahoma state court. Like the new electronic system, the new rules will be phased in gradually; they become effective in each district and appellate court at the time the Oklahoma Unified Case Management System is implemented in that court.

## Courts

**Sixth Circuit Holds Foreclosure Filing Before Transfer of Mortgage and Note May Violate FDCPA.** On June 26,

the U.S. Court of Appeals for the Sixth Circuit concluded that a misrepresentation of the creditor's name in a foreclosure action may constitute a false representation actionable under Section 1692e of the FDCPA. *Wallace v. Washington Mut. Bank, F.A.*, No. 10-3694, 2012 WL 2379664 (6th Cir. June 26, 2012). In *Wallace*, a law firm allegedly brought a foreclosure action before the firm's bank client received an assignment of the mortgage and transfer of the promissory note. The borrower contended that the law firm violated the FDCPA in foreclosing on behalf of the bank before the transfer and assignment occurred. The district court dismissed the case, holding that the failure to record an assignment before filing a foreclosure action is not a deceptive practice under the FDCPA. The Sixth Circuit disagreed and reversed, holding that the borrower's allegations were sufficient to support a claim of material misrepresentation that would confuse or mislead an unsophisticated consumer.

**Massachusetts Supreme Judicial Court Rules That Lenders May Foreclose Without Possessing Mortgage Note, But Only In Certain Circumstances.** On June 22, the Massachusetts Supreme Judicial Court held that lenders do not need to be in physical possession of a mortgage note to foreclose on a property, but that they must establish that they are acting on behalf of the noteholder. *Eaton v. Federal Nat'l Mortgage Ass'n*, No. SJC-11041, 2012 WL 2349008 (Mass. June

22, 2012). The lower court had preliminarily enjoined defendant Fannie Mae from evicting the plaintiff following a foreclosure sale; that court interpreted the term "mortgagee," as used in Massachusetts' statutes, to refer to a person holding both the mortgage and the mortgage note. At the time of the foreclosure, the foreclosing party held only the mortgage. Reversing the lower court, the Supreme Judicial Court found that the term "mortgagee" refers to a person who (i) holds the mortgage, *and* (ii) either physically holds the mortgage note or acts on behalf of the mortgage note holder. Recognizing that it was common prior practice to interpret the term "mortgagee" as requiring possession of only the mortgage, the court held that its new interpretation of "mortgagee" should be given only prospective effect.

**California Supreme Court Ruling Stops Convenience Check Class Action.** On June 21, the California Supreme Court held that the National Bank Act (NBA) preempts California Civil Code section 1748.9, which requires that certain disclosures accompany preprinted checks provided by a credit card issuer to its cardholders. *Parks v. MBNA Am. Bank, N.A.*, No. S183703, 2012 WL 2345006 (Cal. June 21, 2012). In a unanimous decision, the court concluded that the NBA preempts section 1748.9 because the law is an obstacle to the broad grant of power given to national banks to conduct the business of banking. The court held that the specific disclosure obligations imposed by section 1748.9, including precise language and placement of the disclosures, exceeded any federal law requirements. In addition, the court recognized that the NBA was intended to prevent banks from complying with a patchwork of local disclosure requirements like section 1748.9.

**California Appeals Court Holds Brokerage Agreement Sufficiently Incorporated Arbitration Provision.** On June 21, the California Second District Court of Appeals held that a defendant brokerage firm had established an agreement to arbitrate, where the brokerage account application signed by the plaintiffs incorporated by reference certain arbitration provisions of a separate client agreement. *Rodriguez v. Citigroup Global Markets, Inc.*, No. B230310, 2012 WL 2354637 (Cal. Ct. App. June 21, 2012). The appeals court observed that the plaintiffs had signed an account application that explicitly stated that any signatories had also agreed to all terms of a separate client agreement. Another paragraph of the same application, located directly above the signature lines, included an express acknowledgement that the client agreement included an arbitration provision. The court rejected several arguments proffered by the plaintiffs, including that (i) the references to the arbitration provision were unreadable, (ii) the plaintiffs had never received the client agreement containing the arbitration provision, (iii) the client agreement itself was not signed, and (iv) the client agreement was confusing.

**New York Appellate Court Holds Electronically Signed Affirmations Admissible.** On June 21, a New York state appellate court held that an electronically signed affirmation is admissible under state court rules. *Martin v. Portexit Corp.*, No. 303854/07, 2012 WL 2344889 (N.Y. App. Div. June 21, 2012). In this personal injury case, the defendants moved for summary judgment in the trial court and relied on two electronically signed expert affirmations. In opposing the motion, the plaintiff argued that the electronically signed affirmations were inadmissible because they did not comply with court rules. The trial court agreed. On appeal, the court determined that the term "subscribed" in state court rules does in fact include electronic signatures; as such, electronic signatures have the same legal effect



as handwritten signatures. Further, the court held that under the federal E-SIGN Act and state law, a party to a suit need not prove who placed the electronic signature on an affirmation.

## Firm News

### **Please Join Us for a Complimentary Webinar - The Consumer Financial Protection Bureau: How to Prepare for an Examination**

As the first anniversary of the CFPB approaches, many banks and non-banks are experiencing their first examination by the CFPB. In this webinar,

**Jeffrey Naimon**, **Jonice Gray Tucker**, and **Lori Sommerfield** will provide guidance on what to expect from the CFPB, how to prepare for and manage the exam, and how best to interact with the Bureau concerning examination findings and ratings. During this webinar, we will also highlight key developments, including recent changes to CFPB leadership, the status of critical rulemakings, and enforcement activity.

**Date & Time:** Thursday, July 26, 2012, 2:00 - 3:15 PM ET

**Click here to register:** <https://www1.gotomeeting.com/register/543845256>

**Registration required.** This webinar is open to all financial services companies and others subject to CFPB oversight. Please no outside law firms, government agency personnel, consulting firms, or media. After registering and being approved, you will receive a confirmation email containing instructions for joining the webinar.

**Jeffrey Naimon** will speak at National Mortgage News' 4th Annual Best Practices in Loss Mitigation Conference in Dallas, TX on July 19, 2012. Mr. Naimon's panel is entitled, "Current Regulatory Issues and Political Outlook" and will provide an overview of the regulatory and legislative developments affecting the mortgage servicing market, review current regulatory issues, and discuss how the issues and election year political moving parts might affect the current regulatory landscape.

**Matthew Previn** and **Andrew Schilling** will present a one-hour PLI telephone briefing entitled "From False Claims Act to FIRREA: The Government's Expanding Enforcement Arsenal Against Financial Institutions" on July 26, 2012 at 1:00 pm. Mr. Previn and Mr. Schilling will be joined by Pierre G. Armand, Deputy Chief of the Civil Frauds Unit at the U.S. Attorney's Office for the Southern District of New York, to discuss the government's recent approach to civil enforcement actions against mortgage lenders and other financial institutions.

**Jonice Gray Tucker** and **Jay Laifman** will participate in the California Mortgage Bankers Association's Western States Loan Servicing Conference on July 30, 2012 in Las Vegas, Nevada. Ms. Tucker will moderate a panel of current and former state and federal officials regarding the implementation and enforcement of new mortgage servicing standards. Mr. Laifman will speak on a panel that will explore best practices for compliance with the new servicing standards. For further

information or registration, you may click the following link:  
<http://www.cmba.com/new/brochures/WSLC12Reg.pdf>.

**Andrew Sandler** will speak at the National Mortgage News 2nd Annual Mortgage Regulatory Forum taking place September 13-14, 2012, in Arlington, VA. The Mortgage Regulatory Forum is created to provide the most up-to-date information on newly implemented regulation, and regulation in the pipeline, for both those on the origination side of the business, as well as mortgage servicing.

## Mortgages

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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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