Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

February 18, 2011

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Federal Issues

Regulators Update Senate Banking on Key Initiatives, Including the Horizontal Servicing Review and "Qualified Residential Mortgages". On Thursday, in testimony before the Senate Banking Committee, Acting Comptroller John Walsh offered details on a wide range of key OCC regulatory initiatives. Walsh offered details about the preliminary findings and goals for the agencies' horizontal servicing review. Walsh said that the exams found critical deficiencies and shortcomings in a wide range of foreclosure processes that violated state and local laws, regulations and rules and have adversely impacted the functioning of mortgage markets and the economy. Walsh did, however, note that only in a small number of foreclosure sales were borrowers wrongly foreclosed upon, and in fact in most cases the servicer maintained adequate documentation demonstrating perfection in the interest in the mortgage, which would support the legal standing to foreclose.

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Department of Justice, HUD, Treasury and the CFPB. The OCC reportedly hoped that the orders, as well as a global settlement, would be issued sometime in March.

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State Issues

CSBS Announces Louisiana and North Carolina Regulators' Receipt of Certificate of Accreditation. Recently, the Conference of State Bank Supervisors (CSBS) announced that the Louisiana Office of Financial Institutions and the North Carolina Office of the Commissioner of Banks each received a Certificate of Accreditation, making them the seventh and eighth states, respectively, to receive accreditation for mortgage supervision. CSBS accreditation means that an external review has concluded that the regulatory agency is meeting CSBS's Accreditation Program's threshold supervision standards and practices. Click here to view Louisiana's announcement. Click here for North Carolina's announcement.

Courts

Illinois Appellate Court Holds That Assignee of Legal Title May Sue To Collect Debt In Own Name. In a recent case, an Illinois state appellate court concluded that the Illinois Collection Agency Act permits an assignee of an account to sue in its own name to collect on the account, but the assignee must prove a valid assignment in order to do so. *Unifund CCR Partners v. Shah*, No. 1-10-0855, 2011 WL 477725 (Ill. App. Ct. Feb. 1, 2011). In this case, the plaintiff, an assignee of the account, sued to collect on a defaulted credit card debt. The defendant moved to dismiss, arguing that the plaintiff could not prove a valid assignment because the plaintiff could not produce one document that included all of the information required under section 8b of the Illinois Collection Agency Act (*i.e.*, the account information, the consideration paid for the assignment, and the effective date of the assignment). The circuit court denied the motion to dismiss, but certified two questions for the appellate court to review, (i) does an assignee for collection of a debt only have standing to sue in its own name; and (ii) can a plaintiff properly plead that an assignment exists using multiple documents?

Answering the first question, the court relied on two statutes, one which provides that an assignee and owner of a non-negotiable chose in action may sue in his or her own name, and a second in the Collection Agency Act which permits an account to be assigned to a collection agency in order to enable collection of the account in the agency's name as assignee. The court found that the specific statute in the Collection Agency Act is broad enough to encompass not just assignees who take complete ownership of an account, but assignees who take legal title for the purposes of collection while the creditor retains a beneficial interest and equitable title.

To address the second question, the court recited the rule in the Collection Agency Act that permits an agency to bring suit only when "the assignment is manifested by a written agreement, separate from and in addition to any document intended for the purpose of listing a debt with a collection agency." The court found that the phrase "written agreement" signifies a term that refers to the parties' entire bargain in written form, and not just a single document. Therefore, an assignment must be manifested in a written contract, but such contract can include or incorporate all or part of other instruments or documents by reference. As such, a valid assignment can be established through multiple documents, as long as the documents include the required information under section 8b. The court did add that the Collection Agency Act's provision specifying a written contract must prove the existence of an assignment is not broad enough to permit a valid assignment to be proven by affidavit. For a copy of the opinion, please click here.

Oregon Bankruptcy Court Allows MERS Wrongful Foreclosure Claim To Proceed. On February 7, the U.S. Bankruptcy Court for the District of Oregon allowed a wrongful foreclosure claim to proceed based in part on plaintiff's allegation that not every transfer of the loan was recorded in the land records. *McCoy v. BNC Mortgage, Inc. et al.*, No. 10-06224 (Bankr. D. Or. Feb. 7, 2011). In *McCoy*, plaintiff received a mortgage loan secured by a deed of trust naming MERS as the "Beneficiary." According to the allegations in plaintiff's complaint, the beneficial interest in the loan was sold several times, and was eventually securitized into a mortgage-backed security. According to plaintiff, none of the transfers was recorded in the county land records. Plaintiff eventually defaulted on the loan and, after the substitute trustee issued a notice of default, filed a chapter 7 bankruptcy petition. The assignee of the deed of trust was granted relief from the automatic stay to foreclose and plaintiff was discharged. Simultaneous with the discharge, plaintiff filed a chapter 13 bankruptcy, despite having been "informed by the court that he [was] ineligible for a discharge of debts due to the discharge received in the previously filed chapter 7 case." The assignee was again granted relief from the stay. Plaintiff then filed a lawsuit for wrongful foreclosure and to quiet title in state court. The lawsuit was removed from state court to federal court and then transferred to the bankruptcy court, where the assignee moved to dismiss both claims. The court dismissed the quiet title claim, which was based on the allegation that plaintiff no longer owed any money on the loan because his obligation was paid by "income from the trust, credit default swaps, TARP money, or federal bailout funds," because it was based on "conclusory legal allegations." The court allowed the wrongful foreclosure claim to proceed, however, finding that plaintiff's allegations state a plausible claim that the assignee did not satisfy Oregon's non-judicial foreclosure requirements. According to the court, the Oregon non-judicial foreclosure requirements were not met because - according to the allegations in the complaint - MERS was not a beneficiary as defined by the Oregon foreclosure statute (regardless of how it was defined under the deed of trust) and because not every transfer of the beneficial interest in the loan was recorded. The court noted in dicta, however, that Oregon's judicial foreclosure statute allows for foreclosures where not every transfer has been recorded. Click here for a copy of the opinion.

Bankruptcy Court States - But Does Not Hold - That MERS Lacks Authority to Assign Mortgages. On February 10, a judge in the United States Bankruptcy Court for the Eastern District of New York concluded, in dicta, that the Mortgage Electronic Registration System (MERS) lacks authority under New York law to assign interests in mortgages among its members. *In re Agard*, No. 810-77338 (Bankr. E.D.N.Y. Feb. 10, 2011). The issue arose on a mortgage servicer's motion to lift the automatic stay in order to foreclose on the home of a Chapter 7 debtor. In such a situation, only a secured creditor (or a servicer acting on its behalf) has standing to seek to lift the stay. The debtor argued that the servicer lacked standing because the assignment of the security interest to the purported creditor, accomplished through the MERS system, was invalid. The court did not need to confront that issue to resolve the case, as it held that a prior state court judgment, which could not be challenged in federal court under the *Rooker-Feldman* and *res judicata* doctrines, had sufficiently established the servicer's status as a secured creditor. Nevertheless, the court proceeded to consider the MERS issue in order to establish a "precedential effect" on the many other pending cases questioning whether an "entity which acquires its interests in a mortgage by way of assignment from MERS, as nominee, is a valid secured creditor with standing to seek relief from the automatic stay," notwithstanding the questionable precedential effect of the lengthy analysis in dicta. The court concluded that the servicer had failed to establish that the alleged creditor was the rightful holder of the Note or of the Mortgage, either of which was sufficient to defeat standing. With respect to the Note, the court determined that there was no evidence of either the creditor's physical possession of the Note or of a valid written assignment because there was no proof that an assignment according to MERS's standard processes had actually taken place. With respect to the Mortgage, the court's dicta concluded that the servicer had failed to show a valid assignment from the original lender to the current creditor for several reasons:

- First, a note and mortgage are not "inseparable," as MERS "admits that the very foundation of its business model as described herein requires that the Note and Mortgage travel on divergent paths."
- Second, the mortgage documents themselves, which referred to MERS as the lender's "nominee" or as the "mortgagee of record," were insufficient to give MERS the authority to transfer the Mortgage because the law affords those statuses very limited powers. However, this defect could have been cured had the lender executed a document clearly authorizing MERS to act as its agent for purposes of transferring the Mortgage.
- Third, the MERS membership rules, to which all of the relevant institutions have agreed, do not contain any explicit reference to an agency relationship and "do not grant any clear authority to MERS to take any action with respect to the mortgages held by MERS members, including but not limited to executing assignments."
- Fourth, the agency relationship claimed by MERS constitutes an "interest in real property" because it would authorize MERS as agent to assign the Mortgage. Therefore, the New York statute of frauds requires the agency relationship be committed to writing, but "none of the documents expressly creates an agency relationship or even mentions the word 'agency.'"
- Finally, MERS's claim that, in addition to being the mortgagee's agent, it possesses the rights of the mortgagee itself by virtue of its designation as "mortgagee of record" is "absurd, at best."

In sum, the court's dicta concluded that "MERS's theory that it can act as a 'common agent' for undisclosed principals is not support[ed] by the law." Thus, notwithstanding the court's recognition that "an adverse ruling regarding MERS's authority to assign mortgages or act on behalf of its member/lenders could have a significant impact on MERS and upon the lenders which do business with MERS throughout the United States," it would have held that the servicer lacked standing to lift the stay and proceed with foreclosure but for the prior state court judgment. Click here for a copy of the opinion.

California Supreme Court Prohibits Businesses from Requesting and Recording Cardholder's Zip Code. On February 10, the Supreme Court of California reversed a Court of Appeal decision that a ZIP code does not constitute personal identification information under The Song-Beverly Credit Card Act of 1971 (Credit Card Act), instead finding that a ZIP code is part of a person's address, which does constitute personal identification information. *Pineda v. Williams-Sonoma Stores, Inc.*, No. S178241 (Cal. Feb. 10, 2011). In *Pineda*, the plaintiff was asked for and provided her ZIP code while paying for purchases with her credit card at one of Defendant's stores, and the ZIP code was recorded. The plaintiff alleged asking for and recording her ZIP Code during a credit card transaction violated the Credit Card Act, which prohibits businesses from requesting "personal identification information" during a credit card transaction. The trial court and Court of Appeal disagreed, finding that a ZIP code, without more, does not constitute personal identification information. The Supreme Court, however, reversed the lower courts, finding that personal identification information, which includes a cardholder's address, is intended to include all components of the address, and a ZIP Code is commonly understood to be a component of an address. The Supreme Court further stated that the Court of Appeal's interpretation would create inconsistency and permit retailers to obtain indirectly what they are clearly prohibited from obtaining directly, since such information could be used to locate a cardholder's complete address or telephone number. For a copy of the opinion, please see http://www.courtinfo.ca.gov/opinions/documents/S178241.PDF.

Eighth Circuit Rules Document Summarizing Multiple CRA Reports did not Create a Genuine Issue of Material Fact in an FCRA Case. On February 9, the United States Court of Appeals for the Eighth Circuit upheld summary judgment in favor of a loan servicer in an action brought under the Fair Credit Reporting Act (FCRA), where the only document creating a potential issue of fact was a third party report summarizing the findings of defendant credit reporting agencies (CRAs). *Anderson v. EMC Mortg. Corp.*, No. 09-3906 (8th Cir. Feb. 9, 2011). In *Anderson*, the defendant reported plaintiff's account as late after a substitute check submitted to plaintiff's former bank was rejected because he closed the account. According to the complaint, the negative report damaged plaintiff's credit rating, causing him to lose favorable financing for a real estate purchase. Plaintiff alleged that defendant violated FCRA by furnishing inaccurate information. On defendant's motion for summary judgment, the trial court found that plaintiff's account was past due and that defendant reported the delinquency accurately. On appeal, plaintiff argued that the trial court erred because a document he submitted summarizing what multiple CRAs were reporting about his account created a question of fact regarding whether a credit report generated by one of the CRAs was accurate. The Eighth Circuit rejected this argument and affirmed the trial court, noting that the summary document plaintiff submitted was generated by an unidentified third party and was contradicted by information submitted by the CRA in its own report. Click here for a copy of the opinion.

New York Court Rejects Electronically Signed Documents. Recently, a Rochester City Court judge issued an opinion explaining his rejection of electronically signed documents in two DUI cases. *People v. Hernandez*, No. 10-14889, 2011 Slip Op. 21022 (NY Sup. Ct. Jan. 26, 2011). The documents, which related to breath tests, did not have "pen & ink" signatures, but instead "bore what looked like a twentieth-generation Xerox copy of a signature" with the notation that the document was "[d]igitally signed under [the Electronic Signatures and Records Act]." As a result, the court held that the documents were inadmissible. According to the court, the documents did not indicate whether the party who e-signed the documents relating to the breath tests actually performed the test. The court reasoned that, while Courts must "be sensitive to innovation and not seize on petty irregularities to exclude otherwise trustworthy evidence, there is also the countervailing interest of fairness to the party against whom the records are admitted, and especially so in a criminal case, where the accused has a constitutional right of confrontation." For a copy of the opinion, please see http://www.courts.state.ny.us/Reporter/3dseries/2011/2011_21022.htm.

Tenth Circuit Holds Credit Reporting Agency Did Not Willfully Violate FCRA. On February 7, the U.S. Court of Appeals for the Tenth Circuit held that a defendant credit reporting agency did not willfully violate the Fair Credit Reporting Act (FCRA) in the course of responding to notices regarding inaccurate information appearing on the plaintiff's credit report, and that the plaintiff was not entitled to amend his complaint to name a new defendant, when he had already been aware of the prospective defendant's identify for at least nine months. *Birmingham v. Experian Information Solutions, Inc.*, 2011 WL 359366, No. 09-4146 (10th Cir. Feb. 7, 2011). In *Birmingham*, the plaintiff sought to hold the three major credit reporting agencies-Experian, Equifax, and TransUnion (Agencies)-and several Verizon entities (Verizon Defendants) liable under the FCRA and Utah law after the Verizon Defendants allegedly submitted incorrect reports to the Agencies that the plaintiff had failed to pay charges owed on his Verizon Wireless accounts. The plaintiff had disputed the reports and was dissatisfied with the Agencies' responses. On appeal, the plaintiff challenged the district court's award of summary judgment to Experian and the dismissal of his claims against the Verizon Defendants without granting him leave to add a defendant.

The court first found that the plaintiff was not entitled to liquidated or punitive damages from Experian under FCRA and upheld the district court's award of summary judgment to Experian because there was no evidence that Experian intentionally or recklessly failed to adequately investigate the plaintiff's dispute with Verizon. Instead, the court determined that Experian's standard procedures for ensuring the accuracy of credit entries appeared reasonable, and that no evidence had been presented demonstrating that those practices or Experian's specific actions with respect to the plaintiff had been reckless. The court also upheld the district court's dismissal of the plaintiff's claims against the Verizon Defendants, after finding that the entity responsible for submitting the contested reports to the Agencies had not been named as a defendant in the case and that the plaintiff was not entitled to amend his complaint to add the appropriate entity as a defendant. The court arrived at this decision after finding, among other things, that the plaintiff had known for at least nine months that the entity responsible for submitting the inaccurate information to the Agencies had not been named as a defendant, but rather waited to move to add the entity as a defendant until just minutes before the final pre-trial conference (during which the district court was to rule if the case could proceed). For a copy of the opinion, please click here.

Firm News

Kirk Jensen and Jeff Naimon conducted a webinar on February 9 entitled "New Wave of SCRA Enforcement: Developments, Priorities, and Building a Robust Compliance Program." In the presentation, they shared insights gleaned from their experience in defending institutions in government investigations and enforcement actions and from advising companies on enhancing their SCRA policies and procedures and related compliance programs. They further discussed compliance hot button issues and challenges, as well as steps the industry can take to improve their SCRA compliance. The slides and a recording of the webinar are available on the BuckleySandler website by clicking here.

Andrew Sandler will be speaking at the 2011 ABA National Conference for Community Bankers on February 22 in San Diego. Mr. Sandler's session is entitled "The Federal Bank Regulatory and Enforcement Environment Post-Dodd-Frank." Speaking with Mr. Sandler is Mark W. Olson, Co-Chairman, Treliant Risk Advisors LLC.

Manley Williams will be moderating the Consumer Credit panel in the American University Law Review symposium, "Emerging From the Recession with the Help of Increased Consumer Protection and Heightened Corporate Responsibility," on March 3 in Washington, D.C. The speakers on Ms. Williams' panel include: Eric Chaffee, Associate Professor, University of Dayton Law School; Thomas B. Pahl, Federal Trade Commission, Bureau of Consumer Protection, Division of Financial Practices; and Travis Plunkett, Consumer Federation of America.

James Parkinson will speak on the Foreign Corrupt Practices Act as a Visiting Lecturer at Universidad Panamericana, Mexico (via videoconference), on March 16.

Margo Tank will be speaking at the E-Signature Summit for Banking Executives in New York on April 8.

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.

James Parkinson will be speaking at the ACI's "FCPA Compliance in Emerging Markets" program in Washington, D.C., on June 15-16, 2011.

Mortgages

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Litigation

Illinois Appellate Court Holds That Assignee of Legal Title May Sue To Collect Debt In Own Name. In a recent case, an Illinois state appellate court concluded that the Illinois Collection Agency Act permits an assignee of an account to sue in its own name to collect on the account, but the assignee must prove a valid assignment in order to do so. *Unifund CCR Partners v. Shah*, No. 1-10-0855, 2011 WL 477725 (Ill. App. Ct. Feb. 1, 2011). In this case, the plaintiff, an assignee of the account, sued to collect on a defaulted credit card debt. The defendant moved to dismiss, arguing that the plaintiff could not prove a valid assignment because the plaintiff could not produce one document that included all of the information required under section 8b of the Illinois Collection Agency Act (*i.e.*, the account information, the consideration paid for the assignment, and the effective date of the assignment). The circuit court denied the motion to dismiss, but certified two questions for the appellate court to review, (i) does an assignee for collection of a debt only have standing to sue in its own name; and (ii) can a plaintiff properly plead that an assignment exists using multiple documents?

Answering the first question, the court relied on two statutes, one which provides that an assignee and owner of a non-negotiable chose in action may sue in his or her own name, and a second in the Collection Agency Act which permits an account to be assigned to a collection agency in order to enable collection of the account in the agency's name as assignee. The court found that the specific statute in the Collection Agency Act is broad enough to encompass not just assignees who take complete ownership of an account, but assignees who take legal title for the purposes of collection while the creditor retains a beneficial interest and equitable title.

To address the second question, the court recited the rule in the Collection Agency Act that permits an agency to bring suit only when "the assignment is manifested by a written agreement, separate from and in addition to any document intended for the purpose of listing a debt with a collection agency." The court found that the phrase "written agreement" signifies a term that refers to the parties' entire bargain in written form, and not just a single document. Therefore, an assignment must be manifested in a written contract, but such contract can include or incorporate all or part of other instruments or documents by reference. As such, a valid assignment can be established through multiple documents, as long as the documents include the required information under section 8b. The court did add that the Collection Agency Act's provision specifying a written contract must prove the existence of an assignment is not broad enough to permit a valid assignment to be proven by affidavit. For a copy of the opinion, please click here.

Oregon Bankruptcy Court Allows MERS Wrongful Foreclosure Claim To Proceed. On February 7, the U.S. Bankruptcy Court for the District of Oregon allowed a wrongful foreclosure claim to proceed based in part on plaintiff's allegation that not every transfer of the loan was recorded in the land records. *McCoy v. BNC Mortgage, Inc. et al.*, No. 10-06224 (Bankr. D. Or. Feb. 7, 2011). In *McCoy*, plaintiff received a mortgage loan secured by a deed of trust naming MERS as the "Beneficiary." According to the allegations in plaintiff's complaint, the beneficial interest in the loan was sold several times, and was eventually securitized into a mortgage-backed security. According to plaintiff, none of the transfers was recorded in the county land records. Plaintiff eventually defaulted on the loan and, after the substitute trustee issued a notice of default, filed a chapter 7 bankruptcy petition. The assignee of the deed of trust was granted relief from the automatic stay to foreclose and plaintiff was discharged. Simultaneous with the discharge, plaintiff filed a chapter 13 bankruptcy, despite having been "informed by the court that he [was] ineligible for a discharge of debts due to the discharge received in the previously filed chapter 7 case." The assignee was again granted relief from the stay. Plaintiff then filed a lawsuit for wrongful foreclosure and to quiet title in state court. The lawsuit was removed from state court to federal court and then transferred to the bankruptcy court, where the assignee moved to dismiss both claims. The court dismissed the quiet title claim, which was based on the allegation that plaintiff no longer owed any money on the loan because his obligation was paid by "income from the trust, credit default swaps, TARP money, or federal bailout funds," because it was based on "conclusory legal allegations." The court allowed the wrongful foreclosure claim to proceed, however, finding that plaintiff's allegations state a plausible claim that the assignee did not satisfy Oregon's non-judicial foreclosure requirements. According to the court, the Oregon non-judicial foreclosure requirements were not met because - according to the allegations in the complaint - MERS was not a beneficiary as defined by the Oregon foreclosure statute (regardless of how it was defined under the deed of trust) and because not every transfer of the beneficial interest in the loan was recorded. The court noted in dicta, however, that Oregon's judicial foreclosure statute allows for foreclosures where not every transfer has been recorded. Click here for a copy of the opinion..

Bankruptcy Court States - But Does Not Hold - That MERS Lacks Authority to Assign Mortgages. On February 10, a judge in the United States Bankruptcy Court for the Eastern District of New York concluded, in dicta, that the Mortgage Electronic Registration System (MERS) lacks authority under New York law to assign interests in mortgages among its members. *In re Agard*, No. 810-77338 (Bankr. E.D.N.Y. Feb. 10, 2011). The issue arose on a mortgage servicer's motion to lift the automatic stay in order to foreclose on the home of a Chapter 7 debtor. In such a situation, only a secured creditor (or a servicer acting on its behalf) has standing to seek to lift the stay. The debtor argued that the servicer lacked standing because the assignment of the security interest to the purported creditor, accomplished through the MERS system, was invalid. The court did not need to confront that issue to resolve the case, as it held that a prior state court judgment, which could not be challenged in federal court under the*Rooker-Feldman* and *res judicata* doctrines, had sufficiently established the servicer's status as a secured creditor. Nevertheless, the court proceeded to consider the MERS issue in order to establish a "precedential effect" on the many other pending cases questioning whether an "entity which acquires its interests in a mortgage by way of assignment from MERS, as nominee, is a valid secured creditor with standing to seek relief from the automatic stay," notwithstanding the questionable precedential effect of the lengthy analysis in dicta. The court concluded that the servicer had failed to establish that the alleged creditor was the rightful holder of the Note or of the Mortgage, either of which was sufficient to defeat standing. With respect to the Note, the court determined that there was no evidence of either the creditor's physical possession of the Note or of a valid written assignment because there was no proof that an assignment according to MERS's standard processes had actually taken place. With respect to the Mortgage, the court's dicta concluded that the servicer had failed to show a valid assignment from the original lender to the current creditor for several reasons:

- First, a note and mortgage are not "inseparable," as MERS "admits that the very foundation of its business model as described herein requires that the Note and Mortgage travel on divergent paths."
- Second, the mortgage documents themselves, which referred to MERS as the lender's "nominee" or as the "mortgagee of record," were insufficient to give MERS the authority to transfer the Mortgage because the law affords those statuses very limited powers. However,

this defect could have been cured had the lender executed a document clearly authorizing MERS to act as its agent for purposes of transferring the Mortgage.

- Third, the MERS membership rules, to which all of the relevant institutions have agreed, do not contain any explicit reference to an agency relationship and "do not grant any clear authority to MERS to take any action with respect to the mortgages held by MERS members, including but not limited to executing assignments."
- Fourth, the agency relationship claimed by MERS constitutes an "interest in real property" because it would authorize MERS as agent to assign the Mortgage. Therefore, the New York statute of frauds requires the agency relationship be committed to writing, but "none of the documents expressly creates an agency relationship or even mentions the word 'agency.'"
- Finally, MERS's claim that, in addition to being the mortgagee's agent, it possesses the rights of the mortgagee itself by virtue of its designation as "mortgagee of record" is "absurd, at best."

In sum, the court's dicta concluded that "MERS's theory that it can act as a 'common agent' for undisclosed principals is not support[ed] by the law." Thus, notwithstanding the court's recognition that "an adverse ruling regarding MERS's authority to assign mortgages or act on behalf of its member/lenders could have a significant impact on MERS and upon the lenders which do business with MERS throughout the United States," it would have held that the servicer lacked standing to lift the stay and proceed with foreclosure but for the prior state court judgment. Click here for a copy of the opinion.

California Supreme Court Prohibits Businesses from Requesting and Recording Cardholder's Zip Code. On February 10, the Supreme Court of California reversed a Court of Appeal decision that a ZIP code does not constitute personal identification information under The Song-Beverly Credit Card Act of 1971 (Credit Card Act), instead finding that a ZIP code is part of a person's address, which does constitute personal identification information. *Pineda v. Williams-Sonoma Stores, Inc.*, No. S178241 (Cal. Feb. 10, 2011). In *Pineda*, the plaintiff was asked for and provided her ZIP code while paying for purchases with her credit card at one of Defendant's stores, and the ZIP code was recorded. The plaintiff alleged asking for and recording her ZIP Code during a credit card transaction violated the Credit Card Act, which prohibits businesses from requesting "personal identification information" during a credit card transaction. The trial court and Court of Appeal disagreed, finding that a ZIP code, without more, does not constitute personal identification information. The Supreme Court, however, reversed the lower courts, finding that personal identification information, which includes a cardholder's address, is intended to include all components of the address, and a ZIP Code is commonly understood to be a component of an address. The Supreme Court further stated that the Court of Appeal's interpretation would create inconsistency and permit retailers to obtain indirectly what they are clearly prohibited from obtaining directly, since such information could be used to locate a cardholder's complete address or telephone number. For a copy of the opinion, please see http://www.courtinfo.ca.gov/opinions/documents/S178241.PDF.

Eighth Circuit Rules Document Summarizing Multiple CRA Reports did not Create a Genuine Issue of Material Fact in an FCRA Case. On February 9, the United States Court of Appeals for the Eighth Circuit upheld summary judgment in favor of a loan servicer in an action brought under the Fair Credit Reporting Act (FCRA), where the only document creating a potential issue of fact was a third party report summarizing the findings of defendant credit reporting agencies (CRAs). *Anderson v. EMC Mortg. Corp.*, No. 09-3906 (8th Cir. Feb. 9, 2011). In *Anderson*, the defendant reported plaintiff's account as late after a substitute check submitted to plaintiff's former bank was rejected because he closed the account. According to the complaint, the negative report damaged plaintiff's credit rating, causing him to lose favorable financing for a real estate purchase. Plaintiff alleged that defendant violated FCRA by furnishing inaccurate information. On defendant's motion for summary judgment, the trial court found that plaintiff's account was past due and that defendant reported the delinquency accurately. On appeal, plaintiff argued that the trial court erred because a document he submitted summarizing what multiple CRAs were reporting about his account created a question of fact regarding whether a credit report generated by one of the CRAs was accurate. The Eighth Circuit rejected this argument and affirmed the trial court, noting that the summary document plaintiff submitted was generated by an unidentified third party and was contradicted by information submitted by the CRA in its own report. Click here for a copy of the opinion.

New York Court Rejects Electronically Signed Documents. Recently, a Rochester City Court judge issued an opinion explaining his rejection of electronically signed documents in two DUI cases. *People v. Hernandez*, No. 10-14889, 2011 Slip Op. 21022 (NY Sup. Ct. Jan. 26, 2011). The documents, which related to breath tests, did not have "pen & ink" signatures, but instead "bore what looked like a twentieth-generation Xerox copy of a signature" with the notation that the document was "[d]igitally signed under [the Electronic Signatures and Records Act]." As a result, the court held that the documents were inadmissible. According to the court, the documents did not indicate whether the party who e-signed the documents relating to the breath tests actually performed the test. The court reasoned that, while Courts must "be sensitive to innovation and not seize on petty irregularities to exclude otherwise trustworthy evidence, there is also the countervailing interest of fairness to the party against whom the records are admitted, and especially so in a criminal case, where the accused has a constitutional right of confrontation." For a copy of the opinion, please see http://www.courts.state.ny.us/Reporter/3dseries/2011/2011_21022.htm.

Tenth Circuit Holds Credit Reporting Agency Did Not Willfully Violate FCRA. On February 7, the U.S. Court of Appeals for the Tenth Circuit held that a defendant credit reporting agency did not willfully violate the Fair Credit Reporting Act (FCRA) in the course of responding to notices regarding inaccurate information appearing on the plaintiff's credit report, and that the plaintiff was not entitled to amend his complaint to name a new defendant, when he had already been aware of the prospective defendant's identify for at least nine months. *Birmingham v. Experian Information Solutions, Inc.*, 2011 WL 359366, No. 09-4146 (10th Cir. Feb. 7, 2011). In *Birmingham*, the plaintiff sought to hold the three major credit reporting agencies-Experian, Equifax, and TransUnion (Agencies)-and several Verizon entities (Verizon Defendants) liable under the FCRA and Utah law after the Verizon Defendants allegedly submitted incorrect reports to the Agencies that the plaintiff had failed to pay charges owed on his Verizon Wireless accounts. The plaintiff had disputed the reports and was dissatisfied with the Agencies' responses. On appeal, the plaintiff challenged the district court's award of summary judgment to Experian and the dismissal of his claims against the Verizon Defendants without granting him leave to add a defendant.

The court first found that the plaintiff was not entitled to liquidated or punitive damages from Experian under FCRA and upheld the district court's award of summary judgment to Experian because there was no evidence that Experian intentionally or recklessly failed to adequately investigate the plaintiff's dispute with Verizon. Instead, the court determined that Experian's standard procedures for ensuring the accuracy of credit entries appeared reasonable, and that no evidence had been presented demonstrating that those practices or Experian's specific actions with respect to the plaintiff had been reckless. The court also upheld the district court's dismissal of the plaintiff's claims against the Verizon Defendants, after finding that the entity responsible for submitting the contested reports to the Agencies had not been named as a defendant in the case and that the plaintiff was not entitled to amend his complaint to add the appropriate entity as a defendant. The court arrived at this decision after finding, among other things, that the plaintiff had known for at least nine months that the entity responsible for submitting the inaccurate information to the Agencies had not been named as a defendant, but rather waited to move to add the entity as a defendant until just minutes before the final pre-trial conference (during which the district court was to rule if the case could proceed). For a copy of the opinion, please click here.

E-Financial Services

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Privacy/Data Security

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Credit Cards

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