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 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 ----

RESPA

Wenegieme v. Bayview Loan Servicing, No. 14 CIV. 9137 RWS, 2015 WL 2151822, at *1 (S.D.N.Y. May 7, 2015).

In *Wenegieme v. Bayview Loan Servicing,* the U.S. District Court for the Southern District of New York held that the plaintiffs' dual-tracking claim was not ripe pending resolution of the foreclosure proceedings. The Wenegiemes defaulted on their mortgage and Bayview Loan Servicing ("BLS") contacted the Wenegiemes to inform them that unless they agreed to a loan modification, it would bring foreclosure proceedings on their property. Although the Wenegiemes sent in paperwork seeking modification, BLS nevertheless brought an action seeking foreclosure. The Wenegiemes claimed the foreclosure action was barred by Dodd-Frank Act's ban on "dual tracking" pursuant to 12 C.F.R. §1024.41.

According to the CFPB, dual tracking is where a servicer moves forward with foreclosure proceedings while simultaneously working with the borrower to avoid foreclosure. The Wenegiemes argued that § 1024.41's dual-tracking provision prohibits a servicer from beginning a foreclosure proceeding if a borrower has submitted a complete loss mitigation application within 120 days of delinquency. Here, the record included a letter from BLS acknowledging receipt of the loss mitigation application, albeit silent as to completeness. BLS argued that there is no federal cause of against a servicer for dual-tracking under § 1024.41. Although technically correct, the court recognized that a borrower can seek enforcement of such a claim pursuant to section 6(f) of RESPA, which includes a private right of action for damages.

Regardless, the court concluded that such a claim was not yet ripe because foreclosure proceedings were still pending. Simply put, the Wenegiemes' claim for damages was contingent on a negative outcome in the foreclosure proceeding, which was still ongoing. Furthermore, the district court noted that the Wenegiemes were incorrectly seeking an injunction to prevent a sale of the property because the RESPA statute at issue only authorizes a claim for money damages. *See* 12 U.S.C. §2605(f)(1). Accordingly, the district court dismissed the Wenegiemes' dual tracking claim, without prejudice, stating they could re-file in Maryland in the event that they lose the property.

Guccione v. JPMorgan Chase Bank, N.A., No. 3:14-CV-04587 LB, 2015 WL 1968114, at *1 (N.D. Cal. May 1, 2015).

In *Guccione v. JPMorgan Chase Bank,* the plaintiffs sued Chase Bank, N.A. ("Chase") alleging, *inter alia,* that Chase violated 12 C.F.R. § 1024.35(e), which governs responses to a notice of error. Chase sought dismissal of the plaintiffs' complaint. The plaintiffs refinanced their property with Washington Mutual Bank. Chase eventually assumed certain liabilities

of Washington Mutual Bank and became the servicer of plaintiffs' loan. In April 2011, Chase created an escrow account and started to pay the plaintiffs' property taxes and insurance on their behalf and said plaintiffs owed over $11,000 in escrow payments stemming from past tax and insurance payments as well as a new escrow payment to be paid henceforth in order to cover future property taxes and insurance. Plaintiffs alleged this was impossible since Chase had never requested or collected monthly escrow payments in the past, and all property taxes and insurance payments had been paid by the plaintiffs. Plaintiffs sent two qualified written requests ("QWRs") to Chase, and Chase sent the plaintiffs three responses which contained conflicting amounts that were allegedly owed escrow advances. In January and April of 2014, the plaintiffs' sent Chase two notices of error. The first notice inquired as to charges assessed to the plaintiff's escrow account. The second notice stated that Chase erroneously force-placed insurance and requested Chase fix the errors. In response, Chase stated that it had conducted a thorough investigation into the claimed errors and concluded that all account information was correct and no error had occurred.

In support of its motion to dismiss, Chase first argued that the plaintiffs' January 2014 notice was overbroad and that it could not reasonably determine from the notice of error the specific error that the borrowers claimed had occurred. Rather, the plaintiffs' notice of error was more in line with a complaint. The district court dismissed this argument, however, explaining that the plaintiffs' January notice specifically cited the incorrect amount that they were being charged and requested Chase credit them a specific amount. Furthermore, § 1024.35 does not require plaintiffs to provide any factual support for these assertions; it merely requires a plaintiff to identify errors.

Next, Chase argued that even if the notices of error were not overbroad, it conducted a reasonable investigation. The district court disagreed, however, because Chase never explained why the escrow charges were valid. This was especially true considering Chase sent the plaintiffs three documents in April 2013 that stated conflicting amounts due. Finally, Chase argued that the plaintiffs had not alleged that they were damaged by its alleged violation of § 1024.35(e), but the district court also dismissed this argument. Since Chase failed to conduct a reasonable investigation, the plaintiffs were forced to continue paying their attorney fees in an attempt to resolve the problems and, according to the court, "continue dealing with this headache." Thus, the plaintiffs adequately demonstrated damages for purposes of § 1024.35(e). Therefore, the district court found that the plaintiffs sufficiently alleged a claim against Chase for violating 12 C.F.R. § 1024.35(e)(1)(i)(B).

Schmidt v. PennyMac Loan Servs., LLC, No. 14-CV-14728, 2015 WL 2405571, at *6 (E.D. Mich. May 20, 2015)

In May 2010, plaintiff Schmidt obtained a mortgage on her residence, which was eventually assigned to PennyMac following Schmidt's delinquency. Schmidt began working with their loss mitigation department, but PennyMac eventually foreclosed on her property. Schmidt sued Bank of America and PennyMac claiming, *inter alia,* PennyMac violated 12 C.F.R. § 1024.40, which requires servicers to establish policies and procedures that will make personnel available by telephone to assist delinquent borrowers. During her attempts to discuss options with PennyMac, she alleged that she was unable to speak to the same person twice. Instead, PennyMac transferred her from department to department to people who were supposed to help her, but she was never given answers to her very simple questions. PennyMac also never returned calls despite promises that someone would contact her with answers. Schmidt offered two specific examples. First, PennyMac shuffled her between different personnel when she called, none of whom answered her "very simple questions." Second, despite promising to contact her with a person who could answer her questions and help her with loss mitigation efforts, she never received a return phone call.

The Court noted that this regulation took effect on January 10, 2014, in the middle of the period PennyMac was supposedly violating it. Thus, at least some of the alleged conduct could have come under its strictures. The district court explained that the regulation imposes on servicers, such as PennyMac, a duty to implement policies and procedures for communications with delinquent borrowers. Schmidt did not claim that PennyMac failed to enact such policies or that its actions breached those policies. Rather, Schmidt's claim attacked the substantive quality of such policies and procedures. The district court held that this regulation does not "effectuate a privately enforceable statutory right, and consequently" Schmidt cannot rely on it to bring this claim. Therefore, the district court granted PennyMac's motion to dismiss.

FDCPA

In *Kaymark v. Bank of America, et al.*, the U.S. Court of Appeals for the Third Circuit extended its holding in *McLaughlin v. Phelan Hallinan & Schmieg, LLP,* 756 F. 3d 240 (3d Cir. 2014) to foreclosure complaints and held that the plaintiff had sufficiently alleged a potential FDCPA violation arising from itemized costs contained in a foreclosure complaint that had not yet been incurred by the foreclosure firm. In 2006, Kaymark refinanced his home, executing a note and granting Bank of America ("BOA") a mortgage. The mortgage stated, in pertinent part, that the lender could charge Kaymark fees for "services performed" in connection with the borrower's default and for the purpose of protecting the lender's interest in the property. These fees included attorneys' fees, property inspection fees, and valuation fees. Kaymark eventually defaulted and a foreclosure complaint was filed by the Udren law firm ("Udren"), which included an itemized list of the total debt including attorneys' fees, title report fees, and property inspection fees.

Kaymark contested the foreclosure and argued that because these fees were not actually incurred as of the date they were calculated (two months prior to the filing of the foreclosure complaint), it was a violation of §§ 1692e and 1692f of the FDCPA. The district court dismissed Kaymark's complaint on the basis that his FDCPA claim was "hyper-technical."

The Third Circuit referenced *McLaughlin v. Phelan Hallinan & Schmieg, LLP,* where it held that nearly-indistinguishable conduct in a debt collection demand letter, rather than foreclosure complaint, violated the FDCPA. The Third Circuit relied on its analysis in McLaughlin and cited the fact that the itemized list of fees did not state that it was an estimate of the amount owed on the debt or in any way suggest that it was not a precise amount. Rather, Kaymark simply agreed to the collection of certain fee categories, such as "attorneys' fees, property inspection fees, and valuation fees." The contract specified that BOA could only charge for "services performed in connection with" the default and collect "all expenses incurred" in pursuing authorized remedies. The Third Circuit rejected Udren's attempts to distinguish foreclosure complaints from debt collection letters subject to the FDCPA. Given the court's holding in McLaughlin, which was based on nearly indistinguishable facts, the Third Circuit held that because the debt collection activity at issue here involved a foreclosure complaint, rather than a debt collection letter, it did not remove it from the purview of the FDCPA. Therefore, the Third Circuit reversed the district court's order dismissing Kaymark's FDCPA claim against Udren.

TILA

The U.S. District Court for the Southern District Davies v. Green Tree Servicing, LLC, 2015 WL 3795621, at *2 (M.D. Pa. June 18, 2015)

In 2001, the Davies obtained a home loan secured by their property, and Green Tree Servicing, LLC ("Green Tree") serviced the Davies' loan. After failing to maintain adequate insurance coverage on the property, Green Tree obtained lender-placed insurance ("LPI"). The Davies brought this action against defendant Green Tree

alleging, inter alia, that Green Tree's imposition of LPS was a violation of the FDCPA. Pursuant to an arbitration clause contained in the loan's promissory note, Green Tree sought to compel the plaintiffs' claims to arbitration

Green Tree argued that the Davies' claims were subject to mandatory arbitration, since the Davies' promissory note provided that all disputes between the parties were subject to arbitration under the FAA. However, the Davies raised a defense to enforce the arbitration agreement, contending that Dodd-Frank's prohibition on arbitration clauses in home loan agreements renders the clause unenforceable. Specifically, Dodd-Frank states:

> [n]o residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction.

15 U.S.C. § 1639c(e)(1). Although the arbitration provision in this case was clearly part of a residential mortgage loan, Green Tree argued that Dodd-Frank does not apply retroactively to the Davies' residential mortgage loan, and because the Davies' entered into this residential mortgage loan in 2001, several years before Dodd-Frank was effective, this prohibition did not apply. Therefore, the district court addressed the issue of whether the anti-arbitration provision of Dodd-Frank invalidates preexisting agreements requiring arbitration. Recognizing that the Third Circuit had not yet addressed this issue, the district court concurred with the Southern District of Mississippi and held that § 1639c(e) became effective June 1, 2013. Therefore, the anti-arbitration provision would not be applied retroactively to home loan agreements, like the Davies', executed prior to Dodd-Frank's effective date. For a similar recent holding, *see also Beckwith v. Caliber Home Loans, Inc.,* 2015 WL 3767187, at *3 (N.D. Ala. June 17, 2015) (holding § 1639c(e)(1) and (e)(3) do not apply retroactively).

---- IN THE NEWS ----

CFPB Adds Automobile Financers to "Larger Participants"

On June 10, 2015, the CFPB issued a final rule amending the regulation defining "larger participants" of various consumer financial services markets. The agency added a section defining larger participants of a market for "automobile financing," which includes auto loan origination, refinancing of auto loans, auto leasing, and purchase or acquisition of loans or leases. The final rule defines "automobile" as any self-propelled vehicle primarily used for personal, family or household purposes for on-road transportation. Certain vehicles, such as motor homes, RVs, and golf carts, are excluded from this definition.

To read more, visit: http://files.consumerfinance.gov/f/201506_cfpb_defining-larger-participants-of-the-automobile-financing-market-and-defining-certain-automobile-leasing-activity-as-a-financial-product-or-service.pdf

Agencies Issue Final Rule Setting Minimum Requirements for AMCs

On June 9, 2015, several financial regulatory agencies issued a final rule setting minimum requirements for appraisal management companies ("AMCs") that are subsidiaries owned and controlled by an insured depository institution and regulated by a federal financial regulatory agency. While AMCs covered by the rule are subject to the same requirements as state-regulated AMCs, they are not required to register with a state.

To read more, visit: https://www.federalregister.gov/articles/2015/06/09/2015-12719/minimum-requirements-for-appraisal-management-companies

Fed's Tarullo Highlights ABA Proposal for Regulatory Relief

On April 30, 2015, Federal Reserve Governor, Daniel Tarullo, delivered a speech in Washington, D.C., in support of the ABA and state bankers associations' proposal to alleviate compliance burdens with respect to capital rules. A few months ago, the ABA and state bankers association pressured regulation agencies to permit exemption from complex "Basel III calculations" for banks with exceeding capital levels. Supporting the views of the ABA and state bankers associations, Tarullo stressed the importance of being aware of the Collins Amendment's "minimum leverage capital requirements." In his speech, Tarullo advocated for more straightforward capital requirements for banks in smaller communities and "tailored regulation."

To read the speech, visit: http://www.federalreserve.gov/newsevents/speech/tarullo20150430a.htm

Agencies Finalize Standards for State Appraisal Regulations

On April 30, 2015, the federal financial agencies and regulator of Fannie Mae and Freddie Mac finalized a rule issued under the Dodd-Frank Act. The rule comprised the final minimum state supervision requirements for appraisal management companies. States have an option to regulate AMCs. If states choose to regulate, AMCs are required to register within the state, use either "state-certified" or "licensed" appraisers for federally related transactions, and make sure that appraisals are independent. Alternatively, if states choose not to regulate within three years, AMCs cannot service federally related transactions. With the exception of state registration, federally regulated AMCs and state-regulated companies will be governed by the same standard.

To read the final rule, visit: https://www.fdic.gov/news/board/2015/2015-04-21_notice_sum_d_fr.pdf

Fed, CFPB Webinar to Cover TILA-RESPA Integrated Disclosures

On May 26, 2015, the Federal Reserve and Consumer Financial Protection Bureau will hold their final webinar of the TILA-RESPA integrated disclosures series. The webinar will address the process of implementing the new disclosures to assist "creditors, brokers, and other stakeholders."

To register, visit: https://www.webcaster4.com/Webcast/Page/577/8180

FDIC to Offer Teleconference on CFPB Mortgage Rules

On May 21, 2015, the FDIC will conduct a bankers teleconference focusing on the Consumer Financial Protection Bureau's mortgage rules. The FDIC staff will disclose observations and institutional practices that they believe will be beneficial to compliance officers. The deadline to register is May 19, 2015.

To learn more and register, visit: https://www.fdic.gov/news/news/financial/2015/fil15020.html

CFPB Updates Exam Procedures for TILA-RESPA Integration

On May 5, 2015, the Consumer Financial Protection Bureau provided procedure revisions as to how the bureau will conduct compliance exams for the TILA-RESPA integrated disclosures. The disclosures will take effect August 1, 2015.

To read the revised procedures, visit: http://files.consumerfinance.gov/f/201505_cfpb_mortgage-origination-exam-procedures.pdf

CFPB Issues Report on 'Credit Invisible' Individuals

On May 5, 2015, the Consumer Financial Protection Bureau issued a report on 55 million Americans. Of the 55 million Americans, the

CFPB labeled 26 million Americans "credit invisible" because those individuals did not have a history at a "major credit reporting bureau." The remaining 19 million Americans were also linked to being "credit invisible" because of old or spare credit histories that could not be scored correctly. The report shows a relationship between low incomes and being "credit invisible." Specifically, the report illustrates that more than 45% of low income consumers are either "credit invisible" or "unscored." The report also notes that minorities are more likely to be "credit invisible" or "unscored."

To view report, visit: http://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf

CFPB Declines Congressional Appeals for TILA-RESPA Grace Period

On May 7, 2015, a letter from April 22, 2015 was released where Richard Cordray, Director of the Consumer Financial Protection Bureau, rejected appeals regarding a grace period for integrated disclosures of the TILA-RESPA that were to take effect August 1, 2015. Cordray stated to Representative Blaire Luetkemeyer (R) of Missouri, who is in favor of the grace period, that gauging possible "implementation challenges" before the effective date is speculative and uncertain. As an alternative, Cordray decided that the bureau would handle any issues once the rule is in effect. However, the ABA supports the bill introduced last week from representatives Steve Pearce (R) of New Mexico and Brad Sherman (D) of California that protects from civil actions, throughout the end of the year, if lenders make "good faith efforts" to comply with disclosure implementation.

To read letter, visit: http://www.aba.com/Advocacy/Grassroots/WINNDocs/cordray-luetkemeyer-letter-tila-respa.pdf

Gruenberg: Progress on Resolving SIFIs 'Underappreciated'

On May 12, 2015, FDIC Chairman, Martin Gruenberg, delivered a speech in Washington D.C. with respect to the FDIC's and Federal Reserve's regulatory progress. In his speech, Gruenberg described changes of financial institutions in the United States and internationally and possible effects should the FDIC have to use its orderly liquidation authority.

To read this speech, visit: https://www.fdic.gov/news/news/speeches/spmay1215.html

ABA Survey: TILA-RESPA Compliance Systems Not Ready

The implementation of the TILA-RESPA integrated disclosures is set to begin August 1, 2015. On May 13, 2015, an ABA survey was released showing that mortgage bankers are uncertain about if they will be ready for the new disclosure process. The survey also showed that a majority of banks are using "a vendor or consultant to assist" with integrated disclosure implementation. This uncertainty depicted in the survey indicates a likelihood of reduction "in credit availability during a transition period."

To view survey results, visit: http://www.aba.com/Tools/Function/Mortgage/Documents/2015-VendorReadinessSurveyTILArespa.pdf

CFPB Seeks Comment on Student Loan Servicing

The Household Debt and Credit Report show that the student loan delinquency rate is about 11% higher than "consumer delinquency rates for mortgages, credit cards, auto loans, and home equity lines of credit." Thus, on May 14, 2015, the Consumer Financial Protection Bureau requested information on aspects of student loan servicing to find ways to assist people in avoiding "unnecessary defaults." The CFPB also requested information on student loan repayment practices and the process in regards to borrowers in distress.

Furthermore, the CFPB asked for comments on applying consumer protections to loan servicing. Comments are due by July 13, 2015.

To read the request for information, visit: http://files.consumerfinance.gov/f/201505_cfpb-rfi-student-loan-servicing.pdf

Fed Proposes ABA-Advocated Tweak to Liquidity Rule

On May 21, 2015, the Federal Reserve proposed a rule to count "municipal bonds as high-quality liquid assets." The rule would be covered by the Liquidity Coverage Ratio and high-quality liquid asset expansion would be beneficial to all banks. All comments are due by July 24, 2015.

Fed Seeks Comments on NACHA Same-Day Payments Rule

On May 21, 2015, the Federal Reserve requested comments on changes with respect to NACHA's same day ACH rule that would make the same-day provisions mandatory and the "5.2 cent per transaction fee paid to receiving institutions." The deadline for the Federal Reserve to approve the rule is September 23, 2015. Therefore, to give the Federal Reserve enough time to review comments, comments are due by July 2, 2015.

- - ABOUT THE EDITORS - -

David A. Elliott

Partner, Litigation

Ph: (205) 458-5324 ● delliott@burr.com

About David: David serves as chair of the firm's Financial Services Litigation practice group, and has represented banks, finance companies and mortgage companies in all areas of statutory and common law litigation, as well as in asset based recovery actions. David also has extensive experience with enforcing arbitration agreements and with corresponding litigation before various arbitration associations. David was listed in the *Best Lawyers in America* for 2011 in the field of Commercial Litigation, and for 2012 in Business Litigation and Banking & Finance Litigation. David was also recognized by *Alabama Super Lawyers* for 2011 and 2012 in Business Litigation. David is admitted to practice in Alabama, Florida, and South Carolina.

Kristen Peters Watson

Associate, Litigation

Ph: (205) 458-5169 ● kwatson@burr.com

About Kristen: Kristen practices in the firm's Financial Services Litigation practice group. She received her J.D., *magna cum laude*, from the Cumberland School of Law at Samford University, where she served as the Writing Editor of the *Cumberland Law Review*. In addition, she was a Judge Abraham Caruthers Teaching Fellow and a Dean's Merit Scholar. Kristen received her B.A. from the University of Virginia.

E. Jordan Teague

Associate, Litigation

Ph: (205) 458-5488 ● jteague@burr.com

About Jordan: Jordan practices in the firm's Financial Services Litigation practice group. She received her J.D. from Vanderbilt University, where she was the Senior Technology Editor of the *Vanderbilt Journal of Entertainment and Technology Law*. Jordan received her B.A., *magna cum laude,* in Mathematics-Economics from Furman University.

Seth Muse

Associate, Litigation

Ph: (205) 458-5395 ● smuse@burr.com

About Seth: Seth practices in the Financial Services Litigation practice group. Seth received his J.D. from Southern Methodist University Dedman School of Law in Dallas, Texas. While in law school, Seth was the 2012 Negotiations Competition champion, a semifinalist in the 2011 San Diego Defense Lawyer's Mock Trial Competition, best speaker in the 2011 Jackson Walker Competition and a semifinalist in the 1L Closing Argument Competition in 2010. Seth received his B.A.s from Flagler College as well as the Samuel M. Proctor Memorial Scholarship.

BURR FORMAN LLP
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Burr & Forman's Financial Services Litigation Team

NICK AGNELLO	Ft. Lauderdale	(954) 414-6200	nagnello@burr.com
BRIAN BALOGH	Birmingham	(205) 458-5469	bbalogh@burr.com
GENNIFER BRIDGES	Orlando	(407) 540-6687	gbridges@burr.com
JONATHAN BROWN	Ft. Lauderdale	(954) 414-6218	jbrown@burr.com
STEPHEN BUMGARNER	Birmingham	(205) 458-5355	sbumgarner@burr.com
RACHEL CASH	Birmingham	(205) 458-5483	rcash@burr.com
JOHN CHILES	Ft. Lauderdale	(954) 414-6200	jchiles@burr.com
MATT DEVINE	Orlando	(407) 540-6679	mdevine@burr.com
LAUREN EINHORN	Ft. Lauderdale	(954) 414-6220	leinhorn@burr.com
DAVID ELLIOT	Birmingham	(205) 458-5324	delliott@burr.com
RACHEL FRIEDMAN	Birmingham	(205) 458-5267	rfriedman@burr.com
ALEX HADDAD	Tampa	(813) 367-5725	ahaddad@burr.com
JOHN HARRELSON	Birmingham	(205) 458-5463	jharrelson@burr.com
RYAN HEBSON	Birmingham	(205) 458-5144	rhebson@burr.com
BEN KATZ	Nashville	(615) 724-3239	bkatz@burr.com
RICHARD KELLER	Birmingham	(205) 458-5323	rkeller@burr.com
LINDSAY KILEY	Orlando	(407) 540-6614	lkiley@burr.com
ALAN LEETH	Birmingham	(205) 458-5499	aleeth@burr.com
REID MANLEY	Birmingham	(205) 458-5439	rmanley@burr.com
ZACHARY MILLER	Nashville	(615) 724-3216	zmiller@burr.com
MATT MITCHELL	Birmingham	(205) 458-5317	mmitchell@burr.com
SETH MUSE	Birmingham	(205) 458-5395	smuse@burr.com
JOHN NEFFLEN	Nashville	(615) 724-3219	jnefflen@burr.com
COURTNEY OAKES	Ft. Lauderdale	(954) 414-6213	coakes@burr.com
LATASHA SCOTT	Tampa	(813) 367-5747	lscott@burr.com
JACQUELINE SIMMS-PETREDIS	Tampa	(813) 367-5751	jsimms-petredis@burr.com
FRANK SPRINGFIELD	Birmingham	(205) 458-5187	fspringfield@burr.com
DOUG STAMM	Ft. Lauderdale	(954) 414-6586	dstamm@burr.com
MEGAN STEPHENS	Birmingham	(205) 458-5289	mstephens@burr.com
BRENDAN SWEENEY	Ft. Lauderdale	(954) 414-6210	bsweeney@burr.com
JONATHAN SYKES	Orlando	(407) 540-6636	jsykes@burr.com
LAURA TANNER	Tampa	(813) 367-5758	ltanner@burr.com
JORDAN TEAGUE	Birmingham	(205) 458-5488	jteague@burr.com
JOSHUA THREADCRAFT	Birmingham	(205) 458-5132	jthreadcraft@burr.com
RIK TOZZI	Birmingham	(205) 458-5152	rtozzi@burr.com
BRAD VANCE	Jackson	(601) 709-3456	bvance@burr.com
KRISTEN WATSON	Birmingham	(205) 458-5169	kwatson@burr.com
JENNIFER ZIEMANN	Atlanta	(404) 685-4336	jziemann@burr.com

ATLANTA
171 Seventeenth Street, NW
Suite 1100
Atlanta, GA 30363
(404) 815-3000

BIRMINGHAM
420 North 20th Street
Suite 3400, Wachovia Tower
Birmingham, AL 35203
(205) 251-3000

FT. LAUDERDALE
Las Olas Centre II
350 East Las Olas Boulevard
Suite 1420
Ft. Lauderdale, FL 33301
(954) 414-6200

JACKSON
The Heritage Building
401 East Capitol Street
Suite 100 Jackson, MS 39201
(601) 355-3434

MOBILE
RSA Tower
11 North Water Street
Suite 22200
Mobile, AL 36602
(251) 344-5151

MONTGOMERY
201 Monroe Street
Suite 1950, RSA Tower
Montgomery, AL 36104
(334) 241-7000

NASHVILLE
Nashville City Center
511 Union Street
Suite 2300
Nashville, TN 37219
(615) 724-3200

ORLANDO
200 S. Orange Avenue
Suite 800
Orlando, FL 32801
(407) 540-6600

TAMPA
One Tampa City Center
Suite 3200
201 North Franklin Street
Tampa, FL 33602
(813) 221-2626