Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

August 20, 2010

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Federal Issues

Federal Reserve Board Announces Final Rules Implementing New Disclosure Requirement Under the Truth in Lending Act. On August 16, the Federal Reserve Board (Board) announced final rules implementing a new disclosure requirement under a statutory amendment to the Truth in Lending Act (TILA). The new rules require that consumers receive notice when their mortgage loan has been sold or transferred. The requirement became effective in May 2009, upon enactment of the Helping Families Save Their Homes Act. Pursuant to that Act, a purchaser or assignee that acquires a mortgage loan to provide the required disclosures in writing within 30 days. The Board had previously published interim rules in November 2009, which were effective immediately, in order to provide compliance guidance to parties covered under the amendment. Covered parties may continue to follow the interim rules until January 1, 2011, the mandatory compliance date for the final rules. The Board also had provided an online publication for consumers titled, "What You Need to Know: New Rules for Mortgage Transfers," which explains what consumers can expect from their mortgage lenders regarding the new disclosure requirement. For a copy of the press release, please click here.

Federal Reserve Board Announces Final Rules Prohibiting Certain Loan Originator Compensation Practices. On August 16, the Federal Reserve Board (Board) announced final rules prohibiting three loan originator compensation practices in an effort to control and minimize unfair, abusive or deceptive lending practices. First, the new rules prohibit loan originators from receiving compensation based on interest rates or points, thereby preventing originators from increasing their own compensation by raising consumers’ loan costs. Second, loan originators are prohibited from receiving compensation from a lender or another party if the originator already received compensation from the consumer, ensuring that consumers who agree to pay the originator directly do not also pay the originator indirectly through a higher interest rate. Third, the new rules prohibit loan originators from directing or "steering" a consumer to accept a mortgage loan that is not in the consumer’s interest in order to increase the originator’s compensation. Loan originators can continue to receive compensation that is based on a percentage of the loan amount. The final rules apply to mortgage brokers and the companies that employ them, as well as mortgage loan officers employed

by depository institutions and other lenders and are effective April 1, 2011. For a copy of the press release, please click here.

FTC Proposes Revised FCRA Notices. The Federal Trade Commission (FTC) issued proposed revisions to the notices that consumer reporting agencies provide to consumers, as well as to users and furnishers of consumer reports pursuant to the Fair Credit Reporting Act (FCRA). These proposed revisions include changes to the consumer Summary of Rights - which informs consumers about how to obtain a free credit report and dispute inaccurate information in their credit report - such as (i) use of the term "credit report" rather than "consumer report" and (ii) the inclusion of information regarding the consumers right to dispute the accuracy of information in their credit reports directly with the furnisher (the direct-dispute rule) rather than only by filing a dispute with the credit reporting agency (CRA), a rule which took effect July 1, 2010 pursuant to the Fair Accurate Credit Transactions Act of 2003 (FACTA). The proposed changes also include modifications to the User Notice and Furnisher Notice, which inform users and furnishers of their obligation to provide certain consumer protections. The proposed new user notice addresses the upcoming risk-based pricing notice rule (effective January 1, 2011) as well as the existing address discrepancy and medical information rules. The proposed new furnisher notice includes a discussion of certain and FACTA provisions, including the direct-dispute provision and the accuracy and integrity rule. Comments on the proposal are due by September 21, 2010. For a copy of the press release, please see http://www.ftc.gov/opa/2010/08/fcra.shtm.

Federal Reserve Board Issues Interim Rule on Closed-End Mortgage Disclosures. On August 16, the Federal Reserve Board (FRB) issued an interim Regulation Z (Truth in Lending Act) rule requiring lenders to disclose how borrowers' regular mortgage payments can change over time. The rule implements certain provisions of the Mortgage Disclosure Improvement Act of 2008 (MDIA). The rule requires lenders to disclose, in tabular format, (i) the initial interest rate and corresponding monthly payment, (ii) for adjustable-rate or step-rate loans, the maximum interest rate and payment that can occur during the first five years of the mortgage, and (iii) for adjustable-rate and step-rate loans, a "worst case" example showing the maximum rate and payment possible over the life of the loan. The required interest rate and payment summary tables replace the payment schedule previously required as part of the Truth in Lending Act. Lenders must also disclose the fact that consumers may not be able to avoid increased payments by refinancing. The interim rule requires additional special disclosures for loans with negatively-amortizing payment options, introductory interest rates, interest-only payments, and balloon payments. The interim rule is effective 30 days after publication in the *Federal Register*, but compliance is not mandatory until January 30, 2011. Public comments on the rule are due 30 days after publication in the *Federal Register*. For a copy of the press release announcing the interim rule, please click here. For a copy of the interim rule, please click here.

FHFA Releases Notice of Proposed Guidance to Restrict GSEs from Investing in Mortgages with Private Transfer Fee Covenants. On August 12, the Federal Housing Finance Agency (FHFA) announced the release of a Notice of Proposed Guidance, which would restrict government-sponsored enterprises (GSEs) from investing in mortgages or securities containing private transfer fee covenants. Private transfer fee covenants are contractual provisions attached to real property by

private parties and require the payment of a transfer fee to a third-party each time that the property is resold. The FHFA characterizes GSE investment in such properties as an unsafe and unsound practice that runs contrary to their public mission. According to the FHFA, private transfer fee covenants may not be sufficiently disclosed and may have a detrimental effect on the housing markets by impeding the marketability and the valuation of affected properties and stifling the liquidity of mortgage-backed securities. For a copy of the press release, please see http://www.fhfa.gov/webfiles/16480/PrivTransFeeGuidance081210.pdf.

Freddie Mac Announces Intention to Impose Consequences for Non-Compliance with Repurchase Requests. In its second quarter 10-Q filing with the U.S. Securities and Exchange Commission dated August 9, 2010, Freddie Mac warns that it may begin to impose consequences on its single-family seller/servicers that are not able to perform their repurchase obligations or that do not repurchase in a timely manner. Specifically, Freddie Mac stated, "we have begun to require certain seller/servicers to commit to plans for completing repurchases, with financial consequences or with stated remedies for non-compliance, as part of the annual renewals of our contracts with them." Freddie Mac notes that, as of June 30, 2010 and December 31, 2009, it had outstanding repurchase requests of approximately $5.6 billion and $3.8 billion, respectively. As of June 30, 2010 and December 31, 2009, approximately 24% and 20%, respectively, of those outstanding repurchase requests were outstanding more than 120 days. For a copy of Freddie Mac's 10-Q, please see http://1.usa.gov/oy3qp9.

OTS Issues Guidance on Reverse Mortgage Products. On August 16, the Office of Thrift Supervision (OTS), in conjunction with the federal banking agencies and Federal Financial Institutions Examination Council, issued guidance addressing compliance and reputation risks surrounding reverse mortgages. Key policy issues raised by the reverse mortgage guidance include consumer information and understanding, the existence and effectiveness of consumer counseling, conflicts of interest and abusive practices and third-party risk management. Regarding consumer information and understanding, the guidance explains that institutions should take certain steps including: providing consumers with clear and balanced information about the relative benefits and risks of reverse mortgage products, at a time that will help them make informed decisions, and reviewing advertisements and other marketing materials to ensure that important information is disclosed clearly and prominently and that the material do not provide misleading information about product features, loan terms, or product risks, or about the borrower's obligations with respect to taxes, insurance, and home maintenance. To promote effective consumer counseling, the guidance states that institutions should, among other things, require that consumers obtain counseling from a qualified independent counselor, and adopt policies that prohibits steering a consumer to any one particular counseling agency. Finally, with regard to conflicts of interest and abusive practices, the guidance provides that institutions ensure that borrowers are not required to purchase any other financial or other product from the lender or broker in order to obtain a reverse mortgage, and that compensation policies guard against other inappropriate incentives for loan officers and third parties to make a loan or sell a product that may appear to be linked to the granting of a reverse mortgage. In addition, the guidance discusses consumer protection laws and regulations applicable to both Home Equity Conversion Mortgages and proprietary reverse mortgage products including the Federal Trade Commission Act and the Truth in Lending Act. For a copy of the press release, please click here.

Federal Reserve Board Proposes Enhanced Consumer Protections for Home Mortgage Transactions. On August 16, the Federal Reserve Board (Board) announced proposed amendments to Regulation Z, the implementing regulation for the Truth In Lending Act, which would enhance consumer protections and disclosures for home mortgage transactions. The proposal would (i) improve consumer disclosures for reverse mortgages and seek to ensure that reverse mortgage advertising is accurate and balanced, (ii) prohibit certain unfair practices in the sale of reverse mortgages, such as conditioning the sale of a reverse mortgage on the consumer's purchase of other financial or insurance products, (iii) improve disclosures explaining a consumer's right to rescind certain mortgage transactions, and (iv) require new disclosures when parties agree to modify the key terms of an existing closed-end mortgage loan. The proposal would also amend certain rules pertaining to all mortgages by (i) allowing consumers to obtain a refund of fees if they withdraw a loan application within three days of receiving the disclosures and (ii) requiring that, if the consumer requests information about the owner of the loan, the servicer must provide the information within a reasonable time. The proposal is the second phase of the Board's comprehensive review and update of mortgage lending rules, which commenced with the publication of two proposals in August 2009. Comments on the proposal are due 90 days from publication in the *Federal Register*. For a copy of the proposed rule, please click here; for a copy of the related press release, please click here.

State Issues

New Jersey Orders Use of State-Specific Settlement Disclosure Form. On August 2, the Commissioner of the New Jersey Department of Banking and Insurance (the Department), issued Bulletin 10-17, which provides guidance on how mortgage lending entities should comply with both amended federal regulations governing Good Faith Estimate (GFE) and HUD-1/HUD-1A Settlement Statements and New Jersey's settlement disclosure requirements which require broader disclosures than included in the amended federal forms. New Jersey regulations currently permit lenders to rely on U.S. Department of Housing and Urban Development (HUD) disclosure forms to meet New Jersey disclosure requirements provided lenders also disclose whether certain settlement service fees are refundable, and how to receive such a refund. The newly amended HUD forms, however, provide less information regarding broker and banker fees than New Jersey requires, and lenders are forbidden by HUD from modifying the HUD forms to meet state disclosure requirements. According to Bulletin 10-17, until the Department revises its regulations the Department will no longer permit lenders to rely on the HUD disclosure forms to meet New Jersey disclosure requirements. Instead, lenders must create a "New Jersey Disclosures Form" which lists all applicable origination and settlement fees referenced in N.J.A.C. 3:1-16.2, totaled by category and matching the amounts listed on the GFE, and identifying which fees are refundable and the terms and conditions for such refund. Lenders cannot attach the New Jersey form to any HUD form, nor refer to the New Jersey form as a supplement or addendum to a HUD form. New Jersey Disclosure Forms must be signed, dated, and maintained in the licensee's mortgage files. For a copy of the Bulletin, please see http://njintouch.state.nj.us/dobi/bulletins/blt10_17.pdf.

Rhode Island Amends Pre-Foreclosure Notice Regulation. On August 26, amendments to Banking Regulation 5 ("Regulation 5") of Rhode Island will take effect. Regulation 5 governs pre-foreclosure notices to individual consumer mortgagors of residential real estate and describes the

pre-foreclosure procedures to be followed by a mortgagee. By its amendments, the Rhode Island Department of Business Regulation (the "Department") has made the following changes to Regulation 5. First, the Department revised Form 34-27-3.1, which is the Notice provided to consumers to inform them of the protections afforded to them under the Rhode Island Mortgage Foreclosure and Sale Act. Previously a mortgagee had to provide a list of HUD-approved mortgage counseling agencies to the mortgagor. With the amendment, a mortgagee is no longer required to provide the actual list of HUD-approved mortgage counseling agencies, except that upon the consumer's request, the mortgagee contact must provide a "hard copy" of the list within five (5) business days. Second, the mortgagee is no longer required to provide individual contact information to the mortgagee and the mortgagee may use a dedicated customer service group, as long as the consumer may obtain the required information from the contact given. Third, although the mortgagee may use a "substantially similar" form of notice, the mortgagee may only put the notice on its own letterhead or insert a logo, and may add information required by federal law, such as Fair Debt Collection Practices Act or Fair Credit Reporting Acts notices. The wording, font, or information required by the Notice may not be altered by the mortgagee. For a copy of the regulation, please click here.

Courts

California Court Holds Loan Approval is not a Representation that Borrowers Could Afford Monthly Payments. On August 11, the California Court of Appeals affirmed a trial court's dismissal of a fraudulent misrepresentation claim against a lender based on an allegation that the lender misrepresented that the plaintiffs qualified for a loan. *Perlas v. GMAC Mortgage, LLC*, 2010 WL 3155946, No. A125212 (Cal. Ct. App. Aug. 11, 2010). In response to a foreclosure action, the plaintiffs sued their mortgage lender, alleging that their income had been inflated without their knowledge in applications for a refinance loan and a home equity line of credit. The plaintiffs asserted that, among other things, as a result of the inflated income, the defendants fraudulently misrepresented that they could afford their loan payments. The trial court sustained the defendants' demurrer for failure to state a cause of action without leave to amend. The plaintiffs appealed. The appellate court held that the trial court had not erred in dismissing the fraudulent misrepresentation claim without leave to amend because no such amendment could cure the underlying defect in the claim. Specifically, the court rejected the plaintiffs' contention that they could amend the claim to allege that, by approving the loan, the defendants misrepresented that the plaintiffs could afford the loan payments, noting the distinction between a representation that a borrower *qualifies* for a loan and a representation that a borrower can *afford* a loan. According to the court, "[a]ppellants appear to conflate loan qualification and loan affordability. In effect, appellants argue that they were entitled to rely upon [the lender's] determination that they qualified for the loans in order to decide if they could afford the loans. Appellants cite no authority for this proposition, and it ignores the nature of the lender-borrower relationship . . . . A lender is under no duty 'to determine the borrower's ability to repay the loan." For a copy of the opinion, please see http://www.courtinfo.ca.gov/opinions/documents/A125212.PDF.

Seventh Circuit Holds that Email Confirmations do not Constitute Printed Receipts Under FACTA. On August 10, the Seventh Circuit held that a defendant vendor did not violate the truncation provision of the Fair and Accurate Credit Transactions Act of 2003 (FACTA) when it emailed a receipt to the plaintiff with his credit card expiration date on it after he placed an order on the Internet. *Shlahtichman v. 1-800 Contracts, Inc.*, 2010 WL 3122786, No. 09-4073 (7th Cir. Aug. 10, 2010). Under FACTA, a vendor who accepts a credit or debit card as a means of payment is prohibited from "print[ing] more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction." 15 U.S.C. §1681c(g)(1). The prohibition applies only to receipts that are electronically printed - not those in which the account information is handwritten or taken by imprint or photocopy. 15 U.S.C. §1681c(g)(2). The district court granted the defendant's motion to dismiss, concluding that email confirmations are not electronically printed receipts and, therefore, fall outside the scope of the truncation provision. The Seventh Circuit agreed, adopting the majority circuit view that "the term 'electronically printed' reaches only those receipts that are printed on paper, as that understanding of the statute conforms to the ordinary meaning of the term 'print.'" The court went on to explain that "the modifier 'electronically' appears intended to distinguish those receipts that are printed by machine, as opposed to those which are handwritten or created by taking an impression of the card using an imprinter." For a copy of the opinion, please click here.

West Virginia Federal Court Finds that OTS Regulations Preempt Unconscionable Conduct Claim, but not Fraud Claim. On August 4, the U.S. District Court for the Southern District of West Virginia held that preemption applied to a state-law unconscionable conduct claim brought against a thrift that originated a refinancing mortgage loan, but not to a state-law fraud claim. *Coffman v. Bank of America, N.A.*, 2010 WL 3069905, No. 2:09-cv-587 (S.D. W. Va. Aug. 4, 2010). The plaintiff's unconscionable conduct claim alleged that (i) the thrift, which was subsequently acquired by the defendant after the origination of the refinancing loan, induced the plaintiff into a loan that was not to his benefit and that he could not afford; (ii) the thrift induced the plaintiff into a loan on terms favorable to the lender, but unfavorable to the plaintiff; and (iii) the plaintiff was unfairly surprised because the thrift required him to transfer his auto loan into the mortgage loan, the mortgage loan amount exceeded the value of his property, and his loan precluded further refinancing or sale of the property. On the defendant's motion for summary judgment, the court found that each of these allegations is preempted by regulations promulgated by the Office of Thrift Supervision (OTS) under the Home Owners Loan Act of 1933. These regulations provide that a thrift may extend credit as authorized by federal law without regard to state laws that seek to regulate or affect the thrift's credit activities. In issuing its holding, the court rejected the plaintiff's argument that common law claims are never preempted under OTS's regulations, and instead adopted the "as applied" rule used by other courts, which analyzes whether a state-law claim "as applied" would regulate the activities listed in OTS's preemption regulations. The court then explained that the plaintiff's first unconscionable conduct allegation attempts to regulate the processing and origination of mortgage loans by requiring thrifts to make complex determinations of whether a borrower will benefit from the loan or can afford the loan; the second allegation seeks to regulate the terms of credit; and the third allegation would regulate disclosures made with respect to the loan, LTV ratios, and the terms of credit of the loan. The court stated that these areas of credit extension are listed in OTS regulations as preempted, and thus are within the OTS's exclusive authority to regulate. With respect to the plaintiff's fraud claim, the plaintiff

alleged that the thrift engaged in intentional misrepresentation by using a fraudulent appraisal that inflated the value of the plaintiff's property. The court found that this claim was not preempted because the claim does not seek to impose requirements on the appraisal process or on appraisals used by thrifts, but simply seeks to prevent the thrift from intentionally misrepresenting information provided to the borrower. However, the court ultimately dismissed this claim, finding that the plaintiff failed to provide any evidence that the intentional misrepresentation was material or that he reasonably relied on it. The court also dismissed a civil conspiracy claim because such a claim requires that there be at least two parties to commit conspiracy, but the defendant was the only defendant left in the case. For a copy of the opinion, please see here.

Ohio Federal Court Holds State Common Law Claims Preempted by FCRA. On August 2, 2010, the U.S. District Court for the Northern District of Ohio granted the defendant's partial motion to dismiss the plaintiffs' claims for negligent misrepresentation, negligence, defamation, and tortious interference with a contract, holding that such claims were preempted by the Fair Credit Reporting Act (FCRA). Brown v. Sterling Infosystems, Inc., 2010 WL 3057844, No. 3:10cv697 (N.D. Ohio Aug. 2, 2010). The plaintiffs alleged that a report obtained from the defendant, a credit reporting agency, by a prospective employer contained material inaccuracies, including an incorrect criminal history. The court held that Section 1681t of the FCRA applies to state statutory laws, while §1681h(e) applies to common law claims like the ones asserted here. Section 1681h(e) requires an allegation of "malice or willful intent to injure," which was not pled by the plaintiffs. Furthermore, the court held that even if the plaintiffs' negligent misrepresentation claim were not preempted, it would likely still fail because the plaintiffs did not allege a "special relationship" between themselves and the defendant, which is required under Ohio law. For a copy of the opinion, please click here.

Pennsylvania Federal Court Finds Servicer Did Not Violate RESPA's Requirement to Respond to a Qualified Written Request. On August 9, the U.S. District Court for the Eastern District of Pennsylvania found that the defendant servicer's written response to a borrower's inquiry concerning a loan modification did not violate its duties under the Real Estate Settlement Procedures Act (RESPA). Vassalotti v. Wells Fargo Bank, N.A., 2010 WL 3168065, No. 08-5574 (E.D. Pa. Aug. 9, 2010). In this dispute, the plaintiff borrower, behind on her mortgage payments, entered into a loan modification agreement with the servicer whereby the servicer added the unpaid amounts due, including all applicable interest and fees, to the borrowers loan, thereby increasing its overall balance. The loan modification agreement did not cure the deficit in the borrower's escrow account which subsequently increased after the modification. The borrower fell behind on her escrow payments and wrote to the servicer, claiming that the escrow amount should have been wiped out as part of the loan modification agreement, as per her understanding. The servicer responded by letter and stated that the loan modification agreement "did not include your escrow shortage." The borrower, disagreeing with the servicer's interpretation of the modification agreement and brought suit, alleging, among other things, a violation of the RESPA for providing an incorrect, and accordingly, insufficient, response to plaintiffs written request concerning her loan modification. The court granted the servicer's motion to dismiss, holding that section 2605(e)(2)(B) of RESPA only requires that the loan servicer provide "a statement of the reasons for which the servicer believes the accounting is correct." As the court noted, "[a] reasonable explanation of the servicer's belief is sufficient, even if it is later determined that the belief is erroneous." Here, both parties disagreed as to whether the loan

modification covered the escrow amount. However, the servicers response to the borrowers inquiry, while potentially inaccurate, did not violate RESPA's procedural requirements which mandate a servicer responds to a borrower's qualified written request. The borrower also brought claims under (1) the Fair Credit Reporting Act, for providing inaccurate information to the credit reporting agencies, and (2) Pennsylvania's Unfair Trade Practices and Consumer Protection Law for deceptive acts. The court found the borrower sufficiently plead these allegations and denied the servicer's motion to dismiss with respect to those counts. For a copy of the opinion, please click here.

Third Circuit Holds That "OFAC Alerts" on Credit Reports Must be Disclosed to Consumers. On August 13, the U.S. Court of Appeals for the Third Circuit held that where credit reports provided to creditors include an "alert" that the consumer may be on the Specially Designated Persons List compiled by the Office of Foreign Assets Control (OFAC), credit agencies must include the alert in versions of the credit report provided to the consumer as well. Cortez v. Trans Union, LLC, 2010 WL 3190882, No. 08-2465 (3rd Cir. Aug. 13, 2010). OFAC, an office of the U.S. Department of the Treasury that administers and enforces U.S. economic sanctions, has designated certain individuals and entities with whom no U.S. person may engage in business. Credit reporting agencies use privately developed software to determine whether a consumer may have been designated by OFAC. If there is an indication that the consumer may have been designated, an "OFAC alert" appears in the credit report. In this case, the plaintiffbrought suit against the defendant credit reporting agency because, among other things, it had failed to include an OFAC alert in the version of her credit report provided to her, even though the alert was included in copies of the credit report sent to creditors. Under the Fair Credit Reporting Act (FCRA), credit agencies must disclose, upon a consumer's request, "[a]ll information in the consumer's file." 15 U.S.C. § 1681g(a). The defendant argued that the alert was not part of its "file" on the consumer because all information concerning OFAC alerts was maintained by a third-party vendor it had hired. The Third Circuit rejected this argument, reasoning from precedent that the FCRA required credit agencies to disclose to consumers all information that is furnished, or might be furnished, in a report to a creditor. For a copy of the opinion, please click here.

Firm News

James Parkinson will be speaking at the Institute of Continuing Legal Education in Georgia's FCPA seminar "International Business and Crime: An Overview" in Atlanta on September 2, 2010. Mr. Parkinson's session is titled "FCPA Compliance Tools and Techniques" and will focus on detection and compliance.

David Krakoff will be speaking at the ALI-ABA Environmental Crimes Conference on Sept. 23, 2010.

Andrew Sandler will be a chairperson and David Krakoff and Sam Buffone will be speakers at the PLI program Financial Crisis Fallout 2010: Emerging Enforcement Trends on November 4, 2010 in New York City.

Mortgages

Federal Reserve Board Announces Final Rules Implementing New Disclosure Requirement Under the Truth in Lending Act. On August 16, the Federal Reserve Board (Board) announced final rules implementing a new disclosure requirement under a statutory amendment to the Truth in Lending Act (TILA). The new rules require that consumers receive notice when their mortgage loan has been sold or transferred. The requirement became effective in May 2009, upon enactment of the Helping Families Save Their Homes Act. Pursuant to that Act, a purchaser or assignee that acquires a mortgage loan to provide the required disclosures in writing within 30 days. The Board had previously published interim rules in November 2009, which were effective immediately, in order to provide compliance guidance to parties covered under the amendment. Covered parties may continue to follow the interim rules until January 1, 2011, the mandatory compliance date for the final rules. The Board also had provided an online publication for consumers titled, "What You Need to Know: New Rules for Mortgage Transfers," which explains what consumers can expect from their mortgage lenders regarding the new disclosure requirement.For a copy of the press release, please click here.

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consumer protections and disclosures for home mortgage transactions. The proposal would (i) improve consumer disclosures for reverse mortgages and seek to ensure that reverse mortgage advertising is accurate and balanced, (ii) prohibit certain unfair practices in the sale of reverse mortgages, such as conditioning the sale of a reverse mortgage on the consumer's purchase of other financial or insurance products, (iii) improve disclosures explaining a consumer's right to rescind certain mortgage transactions, and (iv) require new disclosures when parties agree to modify the key terms of an existing closed-end mortgage loan. The proposal would also amend certain rules pertaining to all mortgages by (i) allowing consumers to obtain a refund of fees if they withdraw a loan application within three days of receiving the disclosures and (ii) requiring that, if the consumer requests information about the owner of the loan, the servicer must provide the information within a reasonable time. The proposal is the second phase of the Board's comprehensive review and update of mortgage lending rules, which commenced with the publication of two proposals in August 2009. Comments on the proposal are due 90 days from publication in the *Federal Register*. For a copy of the proposed rule, please click here; for a copy of the related press release, please click here.

New Jersey Orders Use of State-Specific Settlement Disclosure Form. On August 2, the Commissioner of the New Jersey Department of Banking and Insurance (the Department), issued Bulletin 10-17, which provides guidance on how mortgage lending entities should comply with both amended federal regulations governing Good Faith Estimate (GFE) and HUD-1/HUD-1A Settlement Statements and New Jersey's settlement disclosure requirements which require broader disclosures than included in the amended federal forms. New Jersey regulations currently permit lenders to rely on U.S. Department of Housing and Urban Development (HUD) disclosure forms to meet New Jersey disclosure requirements provided lenders also disclose whether certain settlement service fees are refundable, and how to receive such a refund. The newly amended HUD forms, however, provide less information regarding broker and banker fees than New Jersey requires, and lenders are forbidden by HUD from modifying the HUD forms to meet state disclosure requirements. According to Bulletin 10-17, until the Department revises its regulations the Department will no longer permit lenders to rely on the HUD disclosure forms to meet New Jersey disclosure requirements. Instead, lenders must create a "New Jersey Disclosures Form" which lists all applicable origination and settlement fees referenced in N.J.A.C. 3:1-16.2, totaled by category and matching the amounts listed on the GFE, and identifying which fees are refundable and the terms and conditions for such refund. Lenders cannot attach the New Jersey form to any HUD form, nor refer to the New Jersey form as a supplement or addendum to a HUD form. New Jersey Disclosure Forms must be signed, dated, and maintained in the licensee's mortgage files. For a copy of the Bulletin, please see http://njintouch.state.nj.us/dobi/bulletins/blt10_17.pdf.

Rhode Island Amends Pre-Foreclosure Notice Regulation. On August 26, amendments to Banking Regulation 5 ("Regulation 5") of Rhode Island will take effect. Regulation 5 governs pre-foreclosure notices to individual consumer mortgagors of residential real estate and describes the pre-foreclosure procedures to be followed by a mortgagee. By its amendments, the Rhode Island Department of Business Regulation (the "Department") has made the following changes to Regulation 5. First, the Department revised Form 34-27-3.1, which is the Notice provided to consumers to inform them of the protections afforded to them under the Rhode Island Mortgage Foreclosure and Sale Act. Previously a mortgagee had to provide a list of HUD-approved mortgage

counseling agencies to the mortgagor. With the amendment, a mortgagee is no longer required to provide the actual list of HUD-approved mortgage counseling agencies, except that upon the consumer's request, the mortgagee contact must provide a "hard copy" of the list within five (5) business days. Second, the mortgagee is no longer required to provide individual contact information to the mortgagee and the mortgagee may use a dedicated customer service group, as long as the consumer may obtain the required information from the contact given. Third, although the mortgagee may use a "substantially similar" form of notice, the mortgagee may only put the notice on its own letterhead or insert a logo, and may add information required by federal law, such as Fair Debt Collection Practices Act or Fair Credit Reporting Acts notices. The wording, font, or information required by the Notice may not be altered by the mortgagee. For a copy of the regulation, please click here.

California Court Holds Loan Approval is not a Representation that Borrowers Could Afford Monthly Payments. On August 11, the California Court of Appeals affirmed a trial court's dismissal of a fraudulent misrepresentation claim against a lender based on an allegation that the lender misrepresented that the plaintiffs qualified for a loan. *Perlas v. GMAC Mortgage, LLC*, 2010 WL 3155946, No. A125212 (Cal. Ct. App. Aug. 11, 2010). In response to a foreclosure action, the plaintiffs sued their mortgage lender, alleging that their income had been inflated without their knowledge in applications for a refinance loan and a home equity line of credit. The plaintiffs asserted that, among other things, as a result of the inflated income, the defendants fraudulently misrepresented that they could afford their loan payments. The trial court sustained the defendants' demurrer for failure to state a cause of action without leave to amend. The plaintiffs appealed. The appellate court held that the trial court had not erred in dismissing the fraudulent misrepresentation claim without leave to amend because no such amendment could cure the underlying defect in the claim. Specifically, the court rejected the plaintiffs' contention that they could amend the claim to allege that, by approving the loan, the defendants misrepresented that the plaintiffs could afford the loan payments, noting the distinction between a representation that a borrower *qualifies* for a loan and a representation that a borrower can *afford* a loan. According to the court, "[a]ppellants appear to conflate loan qualification and loan affordability. In effect, appellants argue that they were entitled to rely upon [the lender's] determination that they qualified for the loans in order to decide if they could afford the loans. Appellants cite no authority for this proposition, and it ignores the nature of the lender-borrower relationship . . . . A lender is under no duty 'to determine the borrower's ability to repay the loan." For a copy of the opinion, please see http://www.courtinfo.ca.gov/opinions/documents/A125212.PDF.

Consumer Finance

Federal Reserve Board Announces Final Rules Prohibiting Certain Loan Originator Compensation Practices. On August 16, the Federal Reserve Board (Board) announced final rules prohibiting three loan originator compensation practices in an effort to control and minimize unfair, abusive or deceptive lending practices. First, the new rules prohibit loan originators from receiving compensation based on interest rates or points, thereby preventing originators from increasing their own compensation by raising consumers' loan costs. Second, loan originators are prohibited from receiving compensation from a lender or another party if the originator already received

compensation from the consumer, ensuring that consumers who agree to pay the originator directly do not also pay the originator indirectly through a higher interest rate. Third, the new rules prohibit loan originators from directing or "steering" a consumer to accept a mortgage loan that is not in the consumer's interest in order to increase the originator's compensation. Loan originators can continue to receive compensation that is based on a percentage of the loan amount. The final rules apply to mortgage brokers and the companies that employ them, as well as mortgage loan officers employed by depository institutions and other lenders and are effective April 1, 2011. For a copy of the press release, please click here.

FTC Proposes Revised FCRA Notices. The Federal Trade Commission (FTC) issued proposed revisions to the notices that consumer reporting agencies provide to consumers, as well as to users and furnishers of consumer reports pursuant to the Fair Credit Reporting Act (FCRA). These proposed revisions include changes to the consumer Summary of Rights - which informs consumers about how to obtain a free credit report and dispute inaccurate information in their credit report - such as (i) use of the term "credit report" rather than "consumer report" and (ii) the inclusion of information regarding the consumers right to dispute the accuracy of information in their credit reports directly with the furnisher (the direct-dispute rule) rather than only by filing a dispute with the credit reporting agency (CRA), a rule which took effect July 1, 2010 pursuant to the Fair Accurate Credit Transactions Act of 2003 (FACTA). The proposed changes also include modifications to the User Notice and Furnisher Notice, which inform users and furnishers of their obligation to provide certain consumer protections. The proposed new user notice addresses the upcoming risk-based pricing notice rule (effective January 1, 2011) as well as the existing address discrepancy and medical information rules. The proposed new furnisher notice includes a discussion of certain and FACTA provisions, including the direct-dispute provision and the accuracy and integrity rule. Comments on the proposal are due by September 21, 2010. For a copy of the press release, please see http://www.ftc.gov/opa/2010/08/fcra.shtm.

Litigation

California Court Holds Loan Approval is not a Representation that Borrowers Could Afford Monthly Payments. On August 11, the California Court of Appeals affirmed a trial court's dismissal of a fraudulent misrepresentation claim against a lender based on an allegation that the lender misrepresented that the plaintiffs qualified for a loan. *Perlas v. GMAC Mortgage, LLC*, 2010 WL 3155946, No. A125212 (Cal. Ct. App. Aug. 11, 2010). In response to a foreclosure action, the plaintiffs sued their mortgage lender, alleging that their income had been inflated without their knowledge in applications for a refinance loan and a home equity line of credit. The plaintiffs asserted that, among other things, as a result of the inflated income, the defendants fraudulently misrepresented that they could afford their loan payments. The trial court sustained the defendants' demurrer for failure to state a cause of action without leave to amend. The plaintiffs appealed. The appellate court held that the trial court had not erred in dismissing the fraudulent misrepresentation claim without leave to amend because no such amendment could cure the underlying defect in the claim. Specifically, the court rejected the plaintiffs' contention that they could amend the claim to allege that, by approving the loan, the defendants misrepresented that the plaintiffs could afford the loan payments, noting the distinction between a representation that a borrower *qualifies* for a loan

and a representation that a borrower can *afford* a loan. According to the court, "[a]ppellants appear to conflate loan qualification and loan affordability. In effect, appellants argue that they were entitled to rely upon [the lender's] determination that they qualified for the loans in order to decide if they could afford the loans. Appellants cite no authority for this proposition, and it ignores the nature of the lender-borrower relationship. A lender is under no duty 'to determine the borrower's ability to repay the loan." For a copy of the opinion, please see http://www.courtinfo.ca.gov/opinions/documents/A125212.PDF.

Seventh Circuit Holds that Email Confirmations do not Constitute Printed Receipts Under FACTA. On August 10, the Seventh Circuit held that a defendant vendor did not violate the truncation provision of the Fair and Accurate Credit Transactions Act of 2003 (FACTA) when it emailed a receipt to the plaintiff with his credit card expiration date on it after he placed an order on the Internet. *Shlahtichman v. 1-800 Contracts, Inc.*, 2010 WL 3122786, No. 09-4073 (7th Cir. Aug. 10, 2010). Under FACTA, a vendor who accepts a credit or debit card as a means of payment is prohibited from "print[ing] more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction." 15 U.S.C. §1681c(g)(1). The prohibition applies only to receipts that are electronically printed - not those in which the account information is handwritten or taken by imprint or photocopy. 15 U.S.C. §1681c(g)(2). The district court granted the defendant's motion to dismiss, concluding that email confirmations are not electronically printed receipts and, therefore, fall outside the scope of the truncation provision. The Seventh Circuit agreed, adopting the majority circuit view that "the term 'electronically printed' reaches only those receipts that are printed on paper, as that understanding of the statute conforms to the ordinary meaning of the term 'print.'" The court went on to explain that "the modifier 'electronically' appears intended to distinguish those receipts that are printed by machine, as opposed to those which are handwritten or created by taking an impression of the card using an imprinter." For a copy of the opinion, please click here.

West Virginia Federal Court Finds that OTS Regulations Preempt Unconscionable Conduct Claim, but not Fraud Claim. On August 4, the U.S. District Court for the Southern District of West Virginia held that preemption applied to a state-law unconscionable conduct claim brought against a thrift that originated a refinancing mortgage loan, but not to a state-law fraud claim. *Coffman v. Bank of America, N.A.*, 2010 WL 3069905, No. 2:09-cv-587 (S.D. W. Va. Aug. 4, 2010). The plaintiff's unconscionable conduct claim alleged that (i) the thrift, which was subsequently acquired by the defendant after the origination of the refinancing loan, induced the plaintiff into a loan that was not to his benefit and that he could not afford; (ii) the thrift induced the plaintiff into a loan on terms favorable to the lender, but unfavorable to the plaintiff; and (iii) the plaintiff was unfairly surprised because the thrift required him to transfer his auto loan into the mortgage loan, the mortgage loan amount exceeded the value of his property, and his loan precluded further refinancing or sale of the property. On the defendant's motion for summary judgment, the court found that each of these allegations is preempted by regulations promulgated by the Office of Thrift Supervision (OTS) under the Home Owners Loan Act of 1933. These regulations provide that a thrift may extend credit as authorized by federal law without regard to state laws that seek to regulate or affect the thrift's credit activities. In issuing its holding, the court rejected the plaintiff's argument that common law claims are never preempted under OTS's regulations, and instead adopted the "as applied" rule used by other courts,

which analyzes whether a state-law claim "as applied" would regulate the activities listed in OTS's preemption regulations. The court then explained that the plaintiff's first unconscionable conduct allegation attempts to regulate the processing and origination of mortgage loans by requiring thrifts to make complex determinations of whether a borrower will benefit from the loan or can afford the loan; the second allegation seeks to regulate the terms of credit; and the third allegation would regulate disclosures made with respect to the loan, LTV ratios, and the terms of credit of the loan. The court stated that these areas of credit extension are listed in OTS regulations as preempted, and thus are within the OTS's exclusive authority to regulate. With respect to the plaintiff's fraud claim, the plaintiff alleged that the thrift engaged in intentional misrepresentation by using a fraudulent appraisal that inflated the value of the plaintiff's property. The court found that this claim was not preempted because the claim does not seek to impose requirements on the appraisal process or on appraisals used by thrifts, but simply seeks to prevent the thrift from intentionally misrepresenting information provided to the borrower. However, the court ultimately dismissed this claim, finding that the plaintiff failed to provide any evidence that the intentional misrepresentation was material or that he reasonably relied on it. The court also dismissed a civil conspiracy claim because such a claim requires that there be at least two parties to commit conspiracy, but the defendant was the only defendant left in the case. For a copy of the opinion, please see here.

Ohio Federal Court Holds State Common Law Claims Preempted by FCRA. On August 2, 2010, the U.S. District Court for the Northern District of Ohio granted the defendant's partial motion to dismiss the plaintiffs' claims for negligent misrepresentation, negligence, defamation, and tortious interference with a contract, holding that such claims were preempted by the Fair Credit Reporting Act (FCRA). Brown v. Sterling Infosystems, Inc., 2010 WL 3057844, No. 3:10cv697 (N.D. Ohio Aug. 2, 2010). The plaintiffs alleged that a report obtained from the defendant, a credit reporting agency, by a prospective employer contained material inaccuracies, including an incorrect criminal history. The court held that Section 1681t of the FCRA applies to state statutory laws, while §1681h(e) applies to common law claims like the ones asserted here. Section 1681h(e) requires an allegation of "malice or willful intent to injure," which was not pled by the plaintiffs. Furthermore, the court held that even if the plaintiffs' negligent misrepresentation claim were not preempted, it would likely still fail because the plaintiffs did not allege a "special relationship" between themselves and the defendant, which is required under Ohio law. For a copy of the opinion, please click here.

Pennsylvania Federal Court Finds Servicer Did Not Violate RESPA's Requirement to Respond to a Qualified Written Request. On August 9, the U.S. District Court for the Eastern District of Pennsylvania found that the defendant servicer's written response to a borrower's inquiry concerning a loan modification did not violate its duties under the Real Estate Settlement Procedures Act (RESPA). Vassalotti v. Wells Fargo Bank, N.A., 2010 WL 3168065, No. 08-5574 (E.D. Pa. Aug. 9, 2010). In this dispute, the plaintiff borrower, behind on her mortgage payments, entered into a loan modification agreement with the servicer whereby the servicer added the unpaid amounts due, including all applicable interest and fees, to the borrowers loan, thereby increasing its overall balance. The loan modification agreement did not cure the deficit in the borrower's escrow account which subsequently increased after the modification. The borrower fell behind on her escrow payments and wrote to the servicer, claiming that the escrow amount should have been wiped out as part of the loan modification agreement, as per her understanding. The servicer responded by letter and stated that

the loan modification agreement "did not include your escrow shortage." The borrower, disagreeing with the servicer's interpretation of the modification agreement and brought suit, alleging, among other things, a violation of the RESPA for providing an incorrect, and accordingly, insufficient, response to plaintiffs written request concerning her loan modification. The court granted the servicer's motion to dismiss, holding that section 2605(e)(2)(B) of RESPA only requires that the loan servicer provide "a statement of the reasons for which the servicer believes the accounting is correct." As the court noted, "[a] reasonable explanation of the servicer's belief is sufficient, even if it is later determined that the belief is erroneous." Here, both parties disagreed as to whether the loan modification covered the escrow amount. However, the servicers response to the borrowers inquiry, while potentially inaccurate, did not violate RESPA's procedural requirements which mandate a servicer responds to a borrower's qualified written request. The borrower also brought claims under (1) the Fair Credit Reporting Act, for providing inaccurate information to the credit reporting agencies, and (2) Pennsylvania's Unfair Trade Practices and Consumer Protection Law for deceptive acts. The court found the borrower sufficiently plead these allegations and denied the servicer's motion to dismiss with respect to those counts. For a copy of the opinion, please click here.

Third Circuit Holds That "OFAC Alerts" on Credit Reports Must be Disclosed to Consumers. On August 13, the U.S. Court of Appeals for the Third Circuit held that where credit reports provided to creditors include an "alert" that the consumer may be on the Specially Designated Persons List compiled by the Office of Foreign Assets Control (OFAC), credit agencies must include the alert in versions of the credit report provided to the consumer as well. Cortez v. Trans Union, LLC, 2010 WL 3190882, No. 08-2465 (3rd Cir. Aug. 13, 2010). OFAC, an office of the U.S. Department of the Treasury that administers and enforces U.S. economic sanctions, has designated certain individuals and entities with whom no U.S. person may engage in business. Credit reporting agencies use privately developed software to determine whether a consumer may have been designated by OFAC. If there is an indication that the consumer may have been designated, an "OFAC alert" appears in the credit report. In this case, the plaintiffbrought suit against the defendant credit reporting agency because, among other things, it had failed to include an OFAC alert in the version of her credit report provided to her, even though the alert was included in copies of the credit report sent to creditors. Under the Fair Credit Reporting Act (FCRA), credit agencies must disclose, upon a consumer's request, "[a]ll information in the consumer's file." 15 U.S.C. § 1681g(a). The defendant argued that the alert was not part of its "file" on the consumer because all information concerning OFAC alerts was maintained by a third-party vendor it had hired. The Third Circuit rejected this argument, reasoning from precedent that the FCRA required credit agencies to disclose to consumers all information that is furnished, or might be furnished, in a report to a creditor. For a copy of the opinion, please click here.

Credit Cards

Seventh Circuit Holds that Email Confirmations do not Constitute Printed Receipts Under FACTA. On August 10, the Seventh Circuit held that a defendant vendor did not violate the truncation provision of the Fair and Accurate Credit Transactions Act of 2003 (FACTA) when it emailed a receipt to the plaintiff with his credit card expiration date on it after he placed an order on the Internet. *Shlahtichman v. 1-800 Contracts, Inc.*, 2010 WL 3122786, No. 09-4073 (7th Cir. Aug. 10, 2010).

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