BURR • FORMAN

DODD-FRANK NEWS

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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 ----

TILA

Jesinoski v. Countrywide Home Loans, Inc., 574 U.S. —, 2015 WL 144681 (2015).

The United States Supreme Court recently held in *Jesinoski v. Countrywide Home Loans, Inc., et al.*, 574 U.S. — (2015), that the Truth in Lending Act's ("TILA") rescission provision, 15 U.S.C. § 1635, does not require a borrower to file a lawsuit within the three-year time period under 15 U.S.C. § 1635(f) in order to rescind.

The *Jesinoski* borrowers had refinanced their mortgage in 2007. Exactly three years later, the borrowers sent their lender and loan servicer a letter purporting to rescind the transaction. The lender and loan servicer refused to acknowledge the rescission. One year and one day after sending their rescission letter, the borrowers filed suit in federal district court against the lender and loan servicer, seeking a declaratory judgment and damages. The defendants moved for judgment on the pleadings, arguing that TILA required the borrowers to file a lawsuit in order to rescind.

The parties' dispute concerned section 1635 of TILA, which governs the means by which a borrower may rescind and the time period during which a borrower may do so. As to the means, section 1635(a) simply provides that a borrower may rescind "by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so." As to timing, section 1635(a) allows a borrower to rescind within the later of two periods: (1) until midnight of the third business day following the consummation of the transaction; or (2) after the lender provides the disclosures required by TILA. However, section 1635(f) places an outer limit on the right to rescind, providing that the "right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first."

The district court granted the defendants' motion for judgment on the pleadings, holding that section 1635(a) requires a borrower to file suit in order to exercise his right of rescission. The Eighth Circuit Court of Appeals affirmed, holding that section 1635(f) extinguishes the right to rescission if the borrower does not file suit within three years.

Reversing the lower courts, the U.S. Supreme Court held that TILA's plain language only requires a borrower to notify the lender of its intention to rescind within the requisite time period. The Court noted that, although section 1635(f) puts an outer limit on when the right to rescind may be exercised, it says nothing about *how* the right must be exercised.

The defendants conceded that written notice would be adequate for a rescission being exercised within three business days following consummation of the transaction. The defendants further conceded that written notice would suffice if the creditor conceded that it provided inadequate disclosures. However, the defendants argued that written notice does not suffice where, as in *Jesinoski*, the creditor disputed the inadequacy of the disclosures. Rejecting this argument, the Court noted that nothing in section 1635(a) distinguishes between undisputed and disputed rescissions, let alone makes a lawsuit a requirement for the latter.

In further support of their position, the defendants pointed to section 1635(g), which provides: "In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind." The defendants argued that, because 1635(g) *allows* courts to rescind a transaction, rescission therefore *must* be obtained through the courts. Rejecting this argument, the Court held that while 1635(g) *allows* a court to award rescission, it has no bearing on whether and how borrower-initiated rescission under section 1635(a) may occur.

The Court also rejected defendants' attempt to invoke common-law rescission principles. While acknowledging that common law generally requires a contracting party to obtain a judgment in order to effectuate a rescission, the Court held that section 1635 of TILA "is simply a case in which statutory law modifies common-law practice."

Robinson v. Carport Sales & Leasing, Inc., No. 6:14-CV-1358-ORL-TBS, 2015 WL 224655 (M.D. Fla. Jan. 15, 2015).

The United States District Court for the Middle District of Florida recently held that a creditor's alleged oral requirement that a consumer obtain GAP insurance as a requirement for obtaining financing for the purchase of an automobile, despite the retail installment sales contract containing a recital stating GAP insurance was optional, could result in a TILA disclosure violation. Plaintiff Melissa Robinson purchased an automobile from Defendant Carport Sales & Leasing, Inc. ("Carport"). When she purchased the vehicle, Plaintiff also executed a Guaranteed Asset Protection ("GAP") Waiver ("GAP Contract"), wherein she agreed to pay $595 for GAP insurance. GAP insurance covers the difference between the consumer's insurance coverage on the vehicle and the amount still owed by the consumer in the event the vehicle is totaled or stolen.

Both the retail installment sales contract and the GAP Contract contained recitals that the GAP Contract was optional. Robinson alleged that during negotiations, however, Carport's salesperson told Robinson that she was required to purchase GAP insurance in order to obtain financing for the vehicle. Robinson complained that under 15 U.S.C. § 1605(a), Carport was required to include the charge for GAP insurance in the "finance charge," rather than in the "amount financed," "because the purchase of GAP insurance was imposed directly or indirectly by Carport as an incident to or a condition of the extension of credit." *Id.* at *1. Specifically, Robnison's causes of action were founded under subsections (2), (3), and (4) of 15 U.S.C. § 1638(a), on the grounds that the retail installment sales contract misstated the amount financed, finance charge, and annual percentage rate.

Carport filed a motion dismiss under Rule 12(b)(6). After outlining the required disclosures a creditor must make to a consumer in a consumer credit transaction pursuant to § 1638(a), including the "amount financed," the "amount of credit of which the consumer has actual use," the "finance charge," and the "annual percentage rate," the court explained that the parties' dispute boiled down to whether the $595 cost for GAP insurance coverage was part of the "finance charge," as Robinson argued, or part of the "amount financed," as Carport argued.

TILA defines "finance charge" as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." 15 U.S.C. § 1605(A). The regulations implementing TILA provide that charges or premiums paid for debt cancellation or debt suspension coverage may be excluded from the "finance charge" only if certain conditions are met. *See* 12 C.F.R. § 226.4(d)(3). The parties agreed as to all but one condition; whether or not GAP insurance coverage was required by the creditor. Despite recitals in the retail installment sales contract and GAP Contract showing conclusively that GAP coverage was *not* required, the court denied Carport's motion to dismiss.

The court held that "as a matter of hornbook contract law, a party in litigation is free to deny a recital of fact in an integrated agreement." According to the court, courts that have held that contractual recitals stating that insurance is optional are not conclusive of whether a creditor requires coverage as a condition of extending credit. Finally, the Federal Reserve Board has opined that a consumer's signature on a contract stating that insurance is not required is not conclusive evidence that insurance is optional. The court noted, however, that the Consumer Financial Protection Bureau was the current entity charged with interpreting and enforcing TILA. Accordingly, the court found that it was plausible to conclude that Robinson has to purchase insurance as a condition to obtain financing, despite the recitals in the retail installment sales contract.

RESPA

Aldana v. Bank of America, N.A., No. CV 14-7489-GHK FFMX, 2014 WL 6750276 (C.D. Cal. Nov. 26, 2014).

Plaintiff Lidia Aldana ("Aldana") and others filed a complaint in California state court asserting nine claims against Bank of America and Everbank Savings Association in connection with the foreclosure sale of a property. Aldana alleged, among other things, violations of RESPA. Upon removing the case to federal court, BANA and Everbank filed motions to dismiss. Plaintiff asserted that Defendants violated section 2605 of RESPA by failing to provide written notice of the transfer of the servicing of her loan. Section 2605(b)(1) provides that "[e]ach servicer of any federally related mortgage loan shall notify the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any person. The Court held that Aldana did not have standing to assert a claim under RESPA because she was not the borrower, did not assume obligations under the loan, and was not a third-party beneficiary of the deed of trust when the obligor signed it.

Defendants' primary argument as to the obligor was that the complaint did not adequately allege actual damages resulted form the purported RESPA violations. RESPA permits recovery only if a violation causes "actual damages." 12 U.S.C. section 2605(f)(1)(A). In opposition, Plaintiffs argued that damages were adequately alleged as to Defendants because both companies, by their failure to provide notice of the loan servicer, caused the loan on the property to be improperly designated as being in default. Plaintiffs claimed that Aldana made all payments on the loan when, suddenly and without notice, Defendants rejected payment, claiming that the loan was in default and that it would need to be paid in full.

In re Patrick, No. 13-61661, 2014 WL 7338929 (Bankr. N.D. Ohio Dec. 22, 2014) (unpublished).

Debtor Annie Patrick ("Patrick") filed an adversary complaint against CitiMortgage, Inc. under, *inter alia*, RESPA, based on CitiMortgage's actions during a mortgage modification. Patrick brought claims under 12 U.S.C. § 2605(e) which seeks to provide a debtor with timely information after making a formal information request to a mortgage servicer, and 12 U.S.C. § 2605(k)(l)(C), which prohibits a mortgage servicer from failing to timely respond or correct payment allocation errors. Both parties filed motions for summary judgment. The evidence showed that Patrick sent at least one QWR to CitiMortgage, but not to the address designated for handling such requests.

With respect to Patrick's RESPA claim under § 2605(e), the court noted that regulation 24 C.F.R. § 3500.21(e) explains that a mortgage servicer "may establish a separate and exclusive office and address for the recipient and handling of qualified written requests." "Courts are split on whether the language adds the additional substantive requirement that a written request be sent to a designated location before qualifying as a QWR." *In re Patrick*, 2014 WL 7338929 at *19. The majority view is that if a mortgage servicer has established a separate and exclusive location for dealing with written borrower information requests, any request must be sent to that address to qualify as a QWR. However, the minority view holds that the regulation allows a mortgage servicer to set up an address for receipt of QWRs, but does not require a borrower to use that address. While Patrick argued that the court should adopt the minority view, CitiMortgage argued that it sufficiently informed Patrick of the "separate and exclusive" QWR mailing address by inserting the following language in Patrick's monthly mortgage statement, in a section titled "Customer Service":

PURSUANT TO § 6 OF RESPA, A "QUALIFIED WRITTEN REQUEST" REGARDING THE SERVICING OF YOUR LOAN MUST BE SENT TO THIS ADDRESS: CITIMORTGAGE, INC. ATTN: CUSTOMER RESEARCH TEAM, PO BOX 10002, HAGERSTOWN, MD 21749–0002. A "qualified written request" is a written correspondence, other than notice on a payment coupon or statement, which includes your name, account number and the reasons for the request.

The court adopted the majority view and held that CitiMortgage established a "separate and exclusive" location where any QWR must be sent. Because Patrick's letter did not comply with the location requirement, it is "nothing more than general correspondence between a borrower and a servicer."

Patrick also argued that CitiMortgage violated § 2605(k)(1)(C) of RESPA, which states that: "A servicer of a federally-related mortgage shall not . . . fail to take timely action to respond to a borrower's requests to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties." Patrick alleged that CitiMortgage's failure to refund payments out of her escrow account for duplicative insurance violates § 2605(k). However, CitiMortgage argued that the statute was not effective until January 10, 2014, after any alleged violations occurred. The court explained that the Dodd-Frank amendment became effective on January 10, 2014, and that this is the majority approach. Given that the debtor filed the adversary proceeding in 2013 and the debtor's complaint lists communications throughout 2013, the actions complained of occurred before the effective date of § 2605(k). Therefore, CitiMortgage was entitled to summary judgment on both of Patrick's RESPA claims.

Unenforceable HAMP Agreement

Romero v. Bank of America, NA, No. 13-4040-DDC, 2015 WL 265057 (D. Kan. Jan. 21, 2015).

In *Romero*, plaintiff obtained a mortgage loan from First Franklin Loan Services ("First Franklin") in March 2006. The loan was secured by plaintiff's residence. Plaintiff experienced difficulty making his mortgage payments so First Franklin offered plaintiff a Home Affordable Modification Trial Period Plan (the "TPP") with an effective date of August 1, 2010. The TPP provided that if the plaintiff fails to make the trial plan payments, the loan documents would not be modified and the plan would terminate. The TPP required plaintiff to make three sequential monthly trial plan payments beginning on August 1, 2010. Plaintiff signed the TPP on July 27, 2010. Thereafter, First Franklin issued a HAMP agreement to plaintiff. The HAMP agreement provided that the loan modification would not take effect if the borrower failed to may any payments as a precondition to the modification under a workout plan or trial period plan. Plaintiff signed and returned the HAMP agreement to First Franklin. Neither First Franklin nor its assignee signed the HAMP agreement. In October 2010, the HAMP agreement was assigned and the assignee received records from First Franklin showing plaintiff had made only two of the three required trial plan payments, thereby not complying with one of the provisions of the HAMP agreement. The assignee refused to honor the modification set for the in the agreement, and instead required plaintiff to pay the monthly payment due under the unmodified mortgage.

Plaintiff argued that the assignee breached the HAMP agreement by ignoring the loan modifications, charging plaintiff the monthly payment due under the unmodified mortgage, and assessing late fees and other charges for plaintiff's violation of the terms of the unmodified mortgage. The assignee argued, however, that plaintiff failed to satisfy the conditions precedent to the loan modification and, therefore, the HAMP agreement was never effective.

The court held that the uncontroverted facts established that plaintiff made only two of the three required trial plan payments before November 1, 2010. Thus, plaintiff failed to satisfy the conditions precedent to the HAMP agreement taking effect. Pursuant to the terms of the HAMP Agreement, plaintiff's failure to satisfy those conditions terminated the HAMP agreement, and the assignee had no obligation to many any modification to the loan. Additionally, the HAMP agreement provided that the lender must sign and return a copy of the agreement to plaintiff. Because the lender never signed and returned the HAMP agreement to plaintiff, the HAMP agreement was not enforceable due to another condition precedent having not been met.

Dodd-Frank Ban on Arbitration Provisions

Richards v. Gibson, No. 1:15CV&-LG-RHW, 2015 WL 926594 (S.D. Miss. Mar. 4, 2015)+

The U.S. District Court for the Southern District of Mississippi recently held that the Dodd-Frank Act's ban on arbitration agreements contained in mortgage loans went into effect after the mortgage loan in question and, therefore, the plaintiff was required to submit her claims to arbitration.

Plaintiff Kimberly Richards filed suit against defendants alleging violations of law arising from a mortgage loan that she obtained in 2012. Defendant Tower Loan of Mississippi, LLC ("Tower") filed a motion to compel arbitration based on the arbitration provision contained in the mortgage loan, and the court denied Tower's motion. Tower moved to alter or amend the court's order arguing that the Dodd-Frank Act's prohibition on arbitration agreements did not go into effect until 2013, after the date of the subject loan. The court granted Tower's motion and ordered Richards to submit her claims to arbitration. Richards filed a motion to reconsider the court's order.

In her motion, Richards first argued that 15 U.S.C. § 1639c(e) went into effect in 2010 when the Dodd-Frank Act was enacted. Section 1639c(e) provides that "[n]o residential mortgage loan . . . secured by the principal dwelling of the consumer may include terms which require arbitration. . . as the method for resolving any controversy or settling any claims arising out of the transaction." *See* § 1639c(e). While the Dodd-Frank Act was enacted in 2010, certain provisions of the Dodd-Frank Act did not take effect until the date on which the final regulations implementing the provision took effect. Richards argued that § 1639c(e) took effect in 2010 because this provision did not require additional regulations in order for it to take effect. Addressing the effective date of § 1639c(e), the court looked to the CFPB's mandate that provided a June 1, 2013 effective date for § 1639c(e). *See* 78 Fed. Reg. 11280,11387. Based on the CFPB's clear instruction, the court found that § 1639c(e) went into effect after the arbitration provision in the subject loan and, therefore, the arbitration provision was enforceable.

Richards also argued that § 1639c(e) should be applied retroactively. The court noted that the Fifth Circuit had not yet addressed the issue, but looked to other courts that had found that § 1639c(e) does not apply retroactively. *See Weller v. HSBC Mortg. Servs., Inc.*, 971 F. Supp. 2d 1072 (D. Colo. 2013); *State ex rel. Ocwen Loan Servicing, LLC v. Webster,* 752 S.E.2d 372 (W. Va. 2013). The court also found that the provision attached legal consequences to events completed before the effective date and, therefore, did not apply retroactively.

Finally, Richards argued that the arbitration agreement was unconscionable. The court first addressed whether the arbitration agreement was procedurally unconscionable. To prove procedural unconscionability, the court said that Richards would have to show lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in bargaining power, or a lack of opportunity to review the contract and ask about its terms. The court reviewed the arbitration provision and found that it was in the same font as the rest of the agreement and that Richards signed below a bold, capitalized statement notifying her that she was agreeing to arbitration. Thus, the court determined that the arbitration provision was conspicuous. Richards also did not dispute that she had the opportunity to review the loan documents. Moreover, the court said that Tower had no obligation to explain the terms of the agreement to her, and there was no evidence that a reasonable person would not sign the document in return for the desired loan. The court also said that any imbalance in sophistication of bargaining power did not result in oppressive terms. The court did not find any evidence that Richards attempted to negotiate the terms of the arbitration provision or that she could not have obtained a loan from a different lender. Accordingly, the court found that Richards failed to show that the arbitration agreement was procedurally unconscionable.

Richards argued that the arbitration agreement was substantively unconscionable because Tower had several alternatives to resolving disputes with her and her only option was arbitration. The court said that to show substantive unconscionability, Richards had to prove that the contract terms are oppressive such that one party is deprived of all the benefits of the agreement or left without a remedy for another party's breach. The court acknowledged that the agreement allowed Tower to repossess or foreclose, but also noted that disputes relating to foreclosure or repossession must be arbitrated, according to the contract terms. Further, Tower's ability to file suit for default was limited by the arbitration agreement, which provided that either party could move to compel the claims to arbitration. Accordingly, the court found that the arbitration agreement was no substantively unconscionable. As such, the court denied Richards's motion to reconsider.

HOLA Preemption

Meyer v. One West Bank, F.S.B., --- F. Supp. 3d ---, 2015 WL 1222402 (C.D. Cal. 2015).

Plaintiff Melodie Meyer filed a class action lawsuit against OneWest Bank, F.S.B. ("OneWest") and American Security Insurance Company ("ASIC") alleging violations of the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c), 1962(d), 1346, and various state law causes of action, including breach of fiduciary duty and breach of contract, arising from force-placing Meyer into insurance. Defendants moved to dismiss.

Defendants first argued that HOLA, 12 U.S.C. § 1461, preempted Meyer's state-law claims. HOLA granted regulatory authority to the Office of Thrift Supervision ("OTS") and, pursuant to 12 C.F.R. § 560.2(a), the OTS occupied the entire field of lending regulation of federal savings associations. In response to Defendants' motion, Meyer argued that the Dodd-Frank Act, 12 U.S.C. § 1465, repealed HOLA on July 21, 2011, and, therefore, HOLA does not preempt her claims. The court acknowledged that the Dodd-Frank Act transferred supervisory authority over federal savings associations from the OTS to the Office of the Comptroller of the Currency and, pursuant to Dodd-Frank, HOLA no longer occupies the field of lending regulations. *See* 12 U.S.C. §§ 5412, 1465. The court, however, found that the Dodd-Frank Act does not apply retroactively. Because Meyer obtained her loan in 2007, before Dodd-Frank's enactment, the court held that the prior HOLA preemption regime applied.

The court also rejected Meyer's argument that her claims were not preempted, even under the prior HOLA preemption regime. The court noted that in applying HOLA preemption to state law claims, the first step is to determine whether the type of law in question is listed in 12 C.F.R. § 560.2(b). If it is, then the law is preempted. Despite Meyer's argument to the contrary, the court found that force-placed insurance claims fell under 12 C.F.R. § 560.2(b) and were preempted.

Turning to Meyer's RICO claims, the court said that to state a violation of § 1962 of RICO, Meyer's complaint must show (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Meyer's allegations were based in part on honest services fraud, which applies where there are bribery or kickback schemes in violation of a fiduciary duty. While the fiduciary relationship required to support an honest services fraud claim need not be formal, the court relied on case law to conclude that the relationship between a borrower and a mortgage servicer does not rise to a fiduciary relationship. Accordingly, the court dismissed Meyer's honest services fraud claim.

To state a claim for mail fraud, Meyer was required to show (1) the formation of a scheme to defraud, (2) the use of the mails in furtherance of that scheme, and (3) the specific intent to defraud. The court noted that a scheme to defraud requires "at least some nondisclosure in violation of an independent duty to disclose or fraudulent omission reasonably calculated to deceive." 2015 WL 1222402, at * 5 (citation omitted). The court found that OneWest sent Meyer correspondence informing her that it may obtain additional insurance and receive compensation for the same, and such communication was incompatible with allegations of a scheme intended to deceive. Accordingly, the court dismissed Meyer's mail fraud claims. Moreover, the court found that amendment would be futile and therefore dismissed Meyer's claims in their entirety, with prejudice.

Dodd-Frank Act's Anti-Retaliation Provision

Murray v. UBS Securities, LLC, No. 14 Civ. 927(KPF), 2015 WL 769586 (S.D.N.Y. Feb. 24, 2015).

Plaintiff Trevor Murray filed suit against UBS Securities, LLC and UBS AG ("Defendants") alleging violations of the anti-retaliation provision of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(a), and the anti-retaliation provision of the Dodd-Frank Act, 12 U.S.C. § 5567(a), also known as the Consumer Financial Protection Act ("CFPA"). Defendants moved to dismiss.

In their motion to dismiss, Defendants argued that Murray's action violated the rule against claim-splitting. Before filing the present action, Murray filed suit in 2012 alleging a violation of the Dodd-Frank Act and simultaneously filed a complaint with the U.S. Department of Labor alleging termination in violation of Sarbanes-Oxley and the CFPA, which require plaintiffs to first file complaints with the Secretary of Labor and then file a federal lawsuit, if the Department of Labor does not reach a decision within 180 and 210 days, respectively. *See* 18 U.S.C. § 1514A(a); 12 U.S.C. § 5567(4). After the Department of Labor failed to act, Murray filed the instant lawsuit. The court acknowledged that the Sarbanes-Oxley and CFPA claims shared a common nucleus of operative fact with the claims in the prior lawsuit, all of which were based on his termination. However, the court found that such claims were subject to dismissal only when they accrued at the same time or within the time period where amendment as a matter of right was still available. Because Murray's claims did not accrue until after the 180-day period had run on his Sarbanes-Oxley claim and the 210-day period had run on his CFPA claim, he could not have brought such claims in the prior lawsuit. Accordingly, the court determined that Murray's claims were not subject to dismissal based on claim-splitting.

Turning to the sufficiency of Murray's allegations in support of his CFPA claim, the court looked to the applicable provision of the CFPA, which provides that:

> No covered person or service provider shall terminate . . . any covered employee by reason of the fact that such employee . . . has objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee . . . reasonably believed to be in violation of any law . . . subject to the jurisdiction of, or enforceable by, the CFPB."

See 12 U.S.C. § 5567(a)(4). The court also noted that the CFPA defines a consumer financial product or service as "any financial product or service" that is "offered or provided for use by consumers primarily for personal, family, or household purposes" and falls within a list of products. *See id.* at § 5481(5). This list includes a catchall provision, which provides that:

> such other financial product or service as may be defined by the CFPB, by regulation, for purposes of this title, if the CFPB finds that such financial product or service is (I) entered into or conducted as a subterfuge or with a purpose to evade any Federal consumer financial law; or (II) permissible for a bank or for a financial holding company to offer or provide under any provision of a Federal law or regulation applicable to a bank or a financial holding company, and has, or likely will have, a material impact on consumers.

12 U.S.C. § 5481(15)(A)(xi). Defendants argued that the phrase "as may be defined by the CFPB, by regulation, for the purposes of this title" defines a consumer financial product or service as the products or services that the CFPB has actually chosen to regulate. Agreeing with this interpretation, the court found that no such regulation existed at the time that Murray filed his complaint and, therefore, Murray's reports were not covered products or services as defined by 12 U.S.C. § 5481. Thus, the court dismissed Murray's CFPA claim.

False Claims Act Statute of Limitations

United States v. Animas Corp., --- F. App'x ---, 2015 WL 1611698 (3rd Cir. 2015).

The Third Circuit recently held that the Dodd-Frank Act amendment providing for a three-year statute of limitations for False Claims Act ("FCA") claims did not apply retroactively.

Appellant Ehab Sefen alleged that Animas Corporation violated section 3730(h) of the FCA. Animas moved to dismiss, and the district court granted its motion. Sefen appealed.

At the outset, the court acknowledged that the Dodd-Frank Act amended the FCA to add a three-year statute of limitations period and, prior to this amendment, the FCA did not contain an explicit limitations period for retaliation claims. Thus, the court was required to apply the most analogous state limitations period pursuant. The court noted that courts within the Third Circuit have looked to two different Pennsylvania borrowing statutes and applied Pennsylvania's whistleblower law, which has a 180-day statute of limitations, and the two-year statute of limitations based on Pennsylvania's catchall personal injury statute. The court determined that Sefen's claims were barred under either borrowing statute. Further, the court found that retroactive application of the three-year statute of limitations "would revive a moribund cause of action, increasing a party's liability for past conduct." 2015 WL 1611698, at *2. Accordingly, the court affirmed the district's court's order dismissing Sefen's retaliation claim as time-barred.

CFPB Involvement in Litigation

Consumer Financial Protection Bureau v. ITT Educational Services, Inc., -- F. Supp. 3d --, 2015 WL 1013508 (S.D. Ind. 2015).

The CFPB filed suit against ITT Educational Services, Inc. ("ITT") alleging violations of the Consumer Financial Protection Act ("CFPA"), 12 U.S.C. §§ 5531(a), 5536(a), 5564(a), and 5565, and TILA, 15 U.S.C. §§ 1601 *et seq.* arising from ITT's alleged practices regarding financial aid. ITT moved to dismiss the CFPB's complaint.

In support of its motion to dismiss, ITT first argued that the CFPB is an unconstitutional entity. ITT argued that the CFPA violates the constitutional separation of powers by unduly restricting the President's authority to remove the CFPB's director and, therefore, the CFPB lacked standing to sue. The court acknowledged that Congress may restrict the President's ability to remove officers by restricting the removal of officers of "quasi-legislative" or "quasi-judicial" independent regulatory agencies as set forth in *Humphrey's Executor v. United States,* 295 U.S. 602 (1935), or by enacting tenure protections for an executive inferior officer, if his or her duties are well-defined and discrete in scope as set forth in *Morrison v. Olson,* 487 U.S. 654 (1988). The court noted, however, that Congress may not shield an inferior officer behind two layers of protection as set forth in *Free Enterprise Fund v. Public Accounting Oversight Board,* 561 U.S. 477 (2010). ITT urged that the CFPA's limitations on removal are more restrictive than a "good cause" provision, and the CFPA violates the principal stating that "the President cannot 'take care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." 2015 WL 1013508, at *9 (quoting *Free Enter. Fund,* 561 U.S. at 484). Rejecting this argument, the court found that the CFPA allows the President to remove the CFPB's director only for "inefficiency, neglect of duty, or malfeasance in office," which is the same grounds for "for cause" removal approved by the Court in *Humphrey's Executor*. The court also determined that because the CFPB's director reports directly to the President, the CFPA does not run afoul of *Free Enterprise Fund's* restriction on shielding an inferior officer behind two layers of protection. While the court acknowledged that the CFPB has quasi-legislative and quasi-judicial functions associated with an independent regulatory agency, it found no basis for concluding that the CFPB's director's powers are "so great that the inability to remove him or her at whim fatally undermines the President's constitutional prerogatives." *Id*. at *10. Accordingly, the court rejected ITT's argument that the "Supreme Court's established removal power jurisprudence forecloses the for-cause removal protections of the Bureau's Director." *Id*.

ITT further argued that the CFPA's prohibition on "unfair" and "abusive" conduct fails to give it fair notice of what is required of educational institutions and, therefore, this vagueness violates the Due Process clause of the Fifth Amendment. The court noted that a statute is void for vagueness if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id*. at *15 (quoting *United States v. Williams*, 553 U.S. 285 (2008)). The court then addressed the level of scrutiny and concluded, despite ITT's argument to the contrary, that because the CFPA's language imposes only civil liability and governs economic activity rather than protected constitutional interests, its language is not subject to heightened scrutiny for vagueness.

Applying a less severe level of scrutiny, the court analyzed the CFPA's language prohibiting "unfair" acts or practices. *See* 12 U.S.C. § 5536(a)(1)(B). The court determined that the language "any unfair or deceptive act or practice" closely mirrored the language set forth in Section 5 of the Federal Trade Commission Act ("FTCA"). Because there has been significant legislative and judicial guidance regarding the interpretation of "unfair" act or practice as used in the FTCA, the court found that a reasonable business entity would not be forced to guess at the term's meaning. Accordingly, the court concluded that the term "unfair" is not unconstitutionally vague.

ITT also argued that the prohibition on "abusive" acts or practices is a novel term in the context of the statute and is unconstitutionally vague. The court first acknowledged that the term "abusive" was added to serve as a more flexible standard and that the "new 'abusive' standard is one of the chief salient features or the CFPA." *See* 2015 WL 1013508, at *18. The court also noted that the term was less-established than the term "unfair," but found that the language of the CFPA listed types of conduct that would be considered abusive. *See* 12 U.S.C. § 5531(d). Additionally, the court noted that the term "abusive" was previously employed in the Fair Debt Collection Practices Act ("FDCPA"). Because the CFPA's language lists types of abusive conduct and because courts have applied the term "abusive" in the context of the FDCPA, the court held that the term "provides at least the minimal level of clarity" and does not violate the Due Process clause.

ITT next argued that the CFPB's complaint must be dismissed because ITT is not a covered entity under the CFPA. The provisions made the basis of the CFPB's complaint apply to a "covered person" or a "service provider." The CFPA defines a "covered person" as "any person that engages in offering or providing a consumer financial product or service." *See* 12 U.S.C. § 5481(6)(A). In turn, a service provider is one who "provides a material service to a covered person in connection with" the covered person's offering of a "consumer financial product." *Id*. at § 5481(26)(A). The court said that ITT may qualify as a covered person (1) as a direct provider of consumer financial products--loans--to its students; (2) as a "broker" or those loans or other credit instruments; or (3) by providing "financial advisory services" to students.

ITT argued that, under the statute, an entity "engages" in the provision of financial products or services only if it does so as a business or profession. As a primarily educational institution that is only tangentially involved in consumer financial products and services, ITT argued that it is a not a "covered person" for the purposes of the CFPA. The court looked to Congress' use of the term elsewhere in the Dodd-Frank Act and concluded that "engages" in means merely to take part in. The court then found that ITT engages in "financial advisory services," which include "providing credit counseling to any consumer" and "providing services to assist a customer with debt management or debt settlement, modifying the terms of any extension of credit, or avoiding foreclosure." 12 U.S.C. § 5481(15)(A)(viii). Accordingly, the court found that ITT is a covered person under the CFPA.

The court then addressed the sufficiency of the CFPB's allegations under the CFPA. The court said that to state a claim for an unfair act or practice, the CFPB was required to show that (1) the act or practice causes or is likely to cause substantial injury to consumers; (2) which is not reasonably avoidable by consumers; and (3) such substantial injury is not outweighed by countervailing benefits to consumers or competition. *See* 12 U.S.C. § 5531(c)(1). The court found that a substantial injury in the context of consumer protection is usually a financial one, and such injury need to be massive. In support of its motion to dismiss, ITT argued that court cannot determine whether a loan is affordable because there is no applicable standard, and pointed to regulations defining the scope of affordability for mortgages. The court rejected this argument and found that the CFPB is not required to plead affordability and, instead, need only plead that ITT's conduct harmed the students' welfare. Because the CFPB alleged that ITT's alleged conduct resulted in thousands of dollars in financial harm to each customer, the allegations sufficiently demonstrated substantial injury.

Addressing whether the consumers' injury was reasonably avoidable, the court analyzed whether the consumers had a free and informed choice. ITT urged that the students were able to obtain financial aid from any source they chose, and thus any alleged injury sustained was reasonably avoidable. In response, the CFPB argued that its pleadings showed that the students lacked a choice because the ITT staff held the students' hands by completing much of the paperwork for the students, and the students were required only to sign the documents. Because public policy favors giving contracting parties the full opportunity to read the subject contract, the court found that the CFPB sufficiently plead that the injury was reasonably avoidable. The court also found that the CFPB's allegations that ITT exercised undue influence over the students raised the question that the students' choice was illusory. Accordingly, the court found that the CFPB sufficiently alleged that the injury was not reasonably avoidable.

The court also found that the CFPB sufficiently alleged that ITT violated 12 U.S.C. § 5531, which prohibits abusive acts or practices and provides that conduct may be abusive if the defendant "takes unreasonable advantage of . . . . the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service." Specifically, the court found that the CFPB sufficiently pleaded that ITT took unreasonable advantage of students because it derived an economic benefit when students obtained private loans. The court concluded that the CFPB's complaint demonstrated that the students were unable to protect their interests because of ITT's allegedly aggressive conduct in connection with "repackaging" loans for the next school year. Accordingly, the court denied ITT's motion to dismiss the CFPA claims.

Although the court denied ITT's motion to dismiss the CFPA claims, it granted its motion with respect to the TILA claim, finding that such claim was time-barred. ITT asserted that the statute of limitations with respect to the CFPB's TILA claim was one year. *See* 15 U.S.C. § 1640(e). The CFPB argued that its claim was governed by 15 U.S.C. § 1607, which grants federal agencies the power to enforce compliance with TILA's provisions and is not subject to the statute of limitations imposed by section 1640(e). Rejecting the CFPB's argument, the court found that the statute of limitations was not limited to private enforcement actions and determined that the powers described in section 1607 are administrative in nature. As such, the court found that the CFPB's TILA claim was barred by the statute of limitations.

Consumer Financial Protection Bureau v. Borders & Borders, PLC, No. 3:13-CV-1047-JGH, 2015 WL 631196 (W.D. Ky. Feb. 12, 2015).

The CFPB filed suit against a law firm, Borders & Borders, PLC ("Borders"), alleging violations of the Real Estate Settlement Procedures Act ("RESPA") for receiving kickbacks for referrals to real estate professionals. Borders moved for judgment on the pleadings.

In support of its motion, Borders alleged that its practices fell within the statutory safe harbor provision of RESPA that protects "affiliated business arrangements" ("ABA"). *See* 12 U.S.C. §2607(c)(4). The safe harbor provision protects referrals to providers of settlement services if the referral is made to an ABA that meets the following criteria: (1) the disclosure of the nature of the ABA at the time of the referral, which conforms to certain procedural requirements; (2) the referred customer may not be required to accept the referral to proceed; and (3) the only thing of value received from the ABA must be return on ownership interest or franchise relationship." *See id.* The CFPB, however, asserted that the ABA disclosures were not consistently made and that the disclosures did not substantially comply with regulatory requirements. The CFPB also alleged that the disclosures were not timely.

Borders relied on the case *Carter v. Welles-Bowles Realty, Inc.,* 736 F.3d 722 (6th Cir. 2013), which involved claims that a certain referral and profit distribution scheme was impermissible under RESPA. While the parties in *Carter* agreed that the statutory safe harbor elements had been met, they disputed whether a HUD policy statement was valid, which effectively added a fourth element to the statutory safe harbor provision. The Sixth Circuit determined that an additional element to the safe harbor provision was invalid. Borders argued that the allegations in the CFPB's complaint were similar to the ten-factor bona fides test set forth in the HUD's Policy Statement 1996-2, 61 Fed. Reg. 29258. As such, Borders argued that the CFPB's theory of liability could not stand in light of the *Carter* decision. Rejecting this argument, the court distinguished *Carter* from the present case and found that Borders and the CFPB disagreed on whether the safe harbor elements had been met. Finding that the CFPB's complaint sufficiently disputed each of the statutory safe harbor elements, the court denied Borders's motion for judgment on the pleadings.

---- IN THE NEWS ----

CFPB Reports on Consumer Complaint Trends

The CFPB recently released its Consumer Response Annual Report. The report discusses complaints handled in 2014 by type, including debt collection, mortgage, credit reporting, banking, credit card, consumer loan, student loan, payday loan, money transfer, prepaid card, and other financial services. The report also discusses how companies have handled complaints.

Overall, complaint volume rose 53% from 2013 to 214, with the greatest increase being in debt collection complaints, which more than doubled in 2014.

To read the report, visit: http://files.consumerfinance.gov/f/201503_cfpb_consumer-response-annual-report-2014.pdf

Agencies Release FAQs on Basel III

The FDIC, OCC, and Federal Reserve Board recently released frequently-asked-questions regarding Basel III 2013 regulatory capital rule. These FAQs are in response to industry confusion regarding the rule. Covered topics include Definition of Capital, High Volatility Commercial Real Estate (HVCRE) Exposures, Other Real Estate and Off-Balance Sheet Exposures, Separate Account and Equity Exposures to Investment Funds, Qualifying Central Counterparty (QCCP), and Credit Valuation Adjustment (CVA).

To read the FAQs, visit: https://www.fdic.gov/regulations/capital/capital/faq.html

OCC Revises Guidance on Subordinated Debt

The OCC recently issued revised guidance for subordinated debt issued by federal savings associations and national banks. The agency also revised its "Sample Subordinated Note," replacing it with a tier 2 sample note and a non-tier 2 sample note.

To read the guidelines and new sample notes, visit: http://occ.gov/news-issuances/bulletins/2015/bulletin-2015-22.html

CFPB Releases TILA-RESPA Integrated Disclosure Rule Exam Procedures

The CFPB recently released examination procedures addressing the TILA/RESPA integrated disclosure rule. This rule, scheduled to take effect on August 1, 2015, will require lenders to provide a single, integrated disclosure to replace the two disclosure forms currently required under Regulation Z.

To read the procedures, visit: http://files.consumerfinance.gov/f/201503_cfpb_truth-in-lending-act.pdf

http://files.consumerfinance.gov/f/201503_cfpb_truth-in-lending-act.pdf

CFPB Issues Customer Toolkit Regarding TILA-RESPA Integrated Disclosure Rule

The CFPB recently released a document entitled "Your Home Loan Toolkit" designed to inform consumers about the new disclosure forms lenders must provide beginning in August. Beginning in August 2015, creditors will be required to provide the toolkit to mortgage applicants.

The toolkit includes step-by-step guides for selecting your mortgage provider, closing your loan, and protecting your investment. According to CFPB Director Richard Cordray, "This toolkit is a great resource for consumers navigating the home-buying process, and will help consumers make well-informed decisions about the biggest financial transaction of their life."

To read the toolkit, visit: http://files.consumerfinance.gov/f/201503_cfpb_your-home-loan-toolkit-web.pdf

CFPB Proposes Payday Lending Regulations

On March 26, 2015, the CFPB announced that it is considering proposing rules applicable to the payday loan industry. According to the CFPB, these rules will address practices that lead consumers into "debt traps." The rules may address topics such as ability-to-repay, cooling-off period between loans and rollover caps.

The rules would cover payday loans, deposit advance products, vehicle title loans, high-cost installment loans, and open-ended lines of credit.

To learn more, visit: http://files.consumerfinance.gov/f/201503_cfpb-proposal-under-consideration.pdf

CFPB To Hold Academic Research Council's Annual Meeting

The CFPB will hold this year's Academic Research Council annual meeting on May 7, 2015 from 9 a.m. to 12 p.m. at the United States Bureau of Engraving and Printing. The meeting will address consumer financial protection trends in other countries, as well as trends in consumer finance research.

RSVP by May 4, 2015 if you wish to attend.

To learn more, visit: http://www.consumerfinance.gov/blog/save-the-date-join-us-for-an-academic-research-council-meeting-in-washington-d-c/

CFPB Announces it Will Publicize Narratives of Consumer Complaints

The CFPB recently announced its plan to include consumer narratives in its publicly available consumer complaint database. Narratives would be published on an opt-in basis, with personally-identifiable information hidden. In contrast to the free-form narrative option provided to consumers, companies responding to complaints would be limited to selecting one of nine structured responses.

ABA President Frank Keating warns that the CFPB's proposal "risks turning the CFPB database into a questionable -- even misleading -- resource and risks tarnishing the reputation of individual companies and the banking industry as a whole without substantiation."

To learn more, visit: http://files.consumerfinance.gov/f/201503_cfpb_disclosure-of-consumer-complaint-narrative-data.pdf

CFPB Requests Comment on Credit Card Market

The CFPB has recently requested public comment on the consumer credit card market. Specifically, the agency has requested comment on the terms of credit card agreements, the practices of credit card issuers, the effectiveness of disclosures regarding credit card fees and features, and the adequacy of consumer protections against deceptive and unfair credit card practices.

To learn more, visit: http://files.consumerfinance.gov/f/201503_cfpb_card-act-report-rfi.pdf

CFPB Releases Supervisory Report

On March 11, 2015, the CFPB released a report regarding legal violations its examiners have discovered. Problem areas identified by CFPB examiners included, among other things, student loan collection practices, mortgage origination, overdraft practices, and mishandling of credit reporting disputes.

CFPB Director Richard Cordray stated that "The CFPB will continue to monitor both bank and nonbank markets to ensure deception is rooted out, deficiencies are corrected, remediation is given to consumers, and violations are stopped in their tracks."

To learn more, visit: http://www.consumerfinance.gov/newsroom/cfpb-report-outlines-legal-violations-uncovered-by-supervision/

CFPB Releases Arbitration Study

The CFPB recently released a study on pre-dispute arbitration agreements, pursuant to Section 1028(a) of the Dodd-Frank Act, which instructs the agency to study the use of such provisions in connection with consumer financial products. The study discusses the prevalence of pre-dispute arbitration clauses, consumer awareness and understanding of such clauses, and statistics regarding arbitration outcomes.

According to the study, consumers are generally unaware of whether their contracts contain pre-dispute arbitration clauses. Therefore, such clauses do not play a big role in a consumer's decision between financial products.

To read the report, visit: http://www.consumerfinance.gov/reports/arbitration-study-report-to-congress-2015/

Federal Reserve Determines Large Banks Are Sufficiently Capitalized

According to the results of the Federal Reserve's stress tests, the largest U.S. banks can collectively withstand a severe economic downturn.

To read more about the results of these stress tests, visit: http://www.federalreserve.gov/newsevents/press/bcreg/20150305a.htm

CFPB Releases Credit Card Account Management Exam Procedures

The CFPB recently released its Credit Card Account Management Examination Procedures, to be used by the agency in examining credit card lending activities. The procedures consist of six modules, covering topics such as marketing, origination, servicing, payment processing, periodic statements, dispute resolution, and add-on products.

To read the exam procedures, visit: http://files.consumerfinance.gov/f/201502_cfpb_credit_card_account_management_examination_guide.pdf

FDIC Releases Video on Mortgage Servicing Rules

The FDIC recently released a video addressing the Mortgage Servicing Rules. This video is the third in a series of videos the agency created in an effort to help bank employees comply with regulations. The previous videos addressed Ability to Pay, Qualified Mortgage, and Loan Officer Compensation Rules.

To watch the videos, visit: https://www.fdic.gov/regulations/resources/director/technical/servicing.html?source=govdelivery&utm_medium=email&utm_source=govdelivery

OCC Releases Updated Handbook on Personal Fiduciary Activities

The OCC recently released an updated version of its handbook entitled "Personal Fiduciary Duties," which is to be used by the agency in examining personal fiduciary activities of banks. Generally, these are activities in which a bank is retained to provide services for an individual's or family's assets, such as trustee or management services.

The handbook discusses the risks associated with personal fiduciary activities, how those risks may be managed, and optional examination procedures to be used by the agency in examining such activities.

To read the handbook, visit: http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/am-pfa.pdf

CFPB Releases Report on Reverse Mortgage Complaints

The CFPB's Office for Older Americans recently released a report on consumer complaints regarding reverse mortgages. Since the CFPB began accepting complaints about reverse mortgages in December 2011, 42% of the approximately 1,200 complaints received by the CFPB were submitted by persons age 62 and older. According to the CFPB, the most common complaints by consumers regarding reverse mortgages are frustrations with servicing and inability to refinance or obtain a loan modification.

To read the report, visit: http://files.consumerfinance.gov/f/201502_cfpb_report_snapshot-reverse-mortgage-complaints-december-2011-2014.pdf

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