Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

May 21, 2010

Topics In This Issue

Federal Issues

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OTS Issues Revised Fraud and Insider Abuse Examination Handbook. On May 18, the Office of Thrift Supervision (OTS) issued a revised bulletin on fraud and insider abuse featuring both new and amended material. *OTS Regulatory Bulletin 37-54, Fraud and Insider Abuse, Examination Handbook Section 360* (May 18, 2010). Particular changes of note include (i) the addition of a section about Suspicious Activity Report (SAR) reporting requirements and attendant safe harbor provisions, (ii) discussion of the FDIC's white paper entitled "Impact of New Activities and Structures on Bank Failures," (iii) updated statistics and identifying factors for various forms of fraud and identity theft, (iv) a section about managing the risk of fraud based on recommendations from the American Institute of Certified Public Accountants, and (v) a streamlined discussion of internal controls and other

safeguards used to prevent fraud and theft. Electronic copies of the new *Regulatory Bulletin* are available at http://www.ots.treas.gov/_files/74874.pdf.

Treasury, HUD Announce Additional HAMP Servicer Reporting Requirements. On May 17, the U.S. Department of the Treasury and the Department of Housing and Urban Development (HUD) released April data for the Home Affordable Modification Program (HAMP) and announced more detailed reporting requirements for participating servicers. New reporting requirements focus on servicer compliance with program guidelines (*e.g.*, the results of loan-file reviews), program execution (*e.g.*, the average time from the start of a trial modification to the start of a permanent modification) and homeowner experience (*e.g.*, the handling of calls from homeowners). The expanded reporting requirements will apply to the eight largest servicers by July 2010. For a copy of the press release, see http://1.usa.gov/bF801L.

State Issues

Wisconsin Enacts Payday Lending Reform; Prohibits Motor Vehicle Title Loans. On May 18, Wisconsin Governor Jim Doyle signed SB 530, a bill that increases the regulation of payday loans and bans motor vehicle title loans. The law tightens existing payday loan restrictions by (i) capping maximum loan amounts, (ii) limiting rollover loans at one-per-customer, (iii) prohibiting the accrual of interest after the maturity date, (iv) establishing a customer rescission period, (v) prohibiting wage garnishments, and (vi) placing a ceiling on the number of lenders permitted in any given area. The law also bans all motor vehicle title loans; in this regard, Governor Doyle exercised a partial veto by striking a provision that would have permitted such loans in limited circumstances. The bill becomes law on January 1, 2011. The bill is available at http://www.legis.state.wi.us/2009/data/acts/09Act405.pdf, and the signing statement is available at http://www.wisgov.state.wi.us/docview.asp?docid=19591.

Courts

New York Federal Court Holds Homeowners Protection Act Preempts State Deceptive Trade Practices Claim. On May 11, the U.S. District Court for the Southern District of New York (SDNY) dismissed a borrower's claim against a service lender upon finding that that the New York Deceptive Trade Practices Act (DTPA) was preempted by the Federal Homeowners Protection Act (HPA). *Fellows v. CitiMortgage, Inc.,* 07 Civ. 2261, 2010 WL 1857243 (S.D.N.Y. May 11, 2010). The lawsuit alleged that the lender wrongfully refused to cancel private mortgage insurance (PMI) and failed to give adequate disclosures about PMI cancellation rights, each in violation of the DTPA. In dismissing this claim, the SDNY ruled that the DTPA was expressly preempted by the HPA and characterized the lawsuit as an attempt to "use the New York DTPA to impose requirements for PMI cancellation and disclosure that are not required by the HPA." The court also dismissed a related contract claim that proceeded on the theory that the lender's conduct violated terms of the Fannie Mae Servicing Guide (which the borrower had claimed was incorporated by reference into the mortgage) after failing to see any mention of the guide within the "four corners" of the mortgage at issue. For a copy of the opinion, please see here.

California Court of Appeal Reverses Trial Court Decision Holding That State Law Requiring Disclosures on Convenience Checks is Preempted. On May 12, the California Court of Appeal reversed a trial court decision that had found that a state law requiring certain disclosures when offering convenience checks was preempted by the National Bank Act (NBA) and regulations promulgated by the Office of the Comptroller of the Currency (OCC). *Parks v. MBNA America Bank, N.A.,* G040798, 2010 WL 1885983 (Cal. Ct. App. May 12, 2010). In *Parks*, the plaintiff brought a putative class action alleging that the defendant bank failed to affix certain disclosures to its convenience checks in violation of California law. Based on the Ninth Circuit's decision in*Rose v. Chase Bank USA, NA*, 513 F.3d 1032 (9th Cir. 2008) (reported in *InfoBytes*, Jan. 25, 2008), the trial court found that the NBA and OCC regulations preempt state laws requiring such disclosures and dismissed the case. Taking a narrower view of preemption and rejecting the Ninth Circuit's analysis in *Rose*, the California Court of Appeal reversed. It found that the NBA precluded only those laws that *forbid* or significantly impair the exercise of power by national banks. The court concluded that the California law did not forbid the use of convenience checks and that, on the limited factual record, it was unclear whether the law significantly impaired the practice, thus necessitating remand. On remand, it instructed the trial court that the California law could only be considered preempted if the bank could establish that it significantly impaired its use of free checks. Likewise, the court held that OCC regulations interpreting the NBA did not preempt the California law. Although the regulations expressly preempted state laws such as the one at issue, the court found that they were invalid because they represented an overbroad interpretation of the NBA. For a copy of the opinion, please see here.

Ninth Circuit Rejects Use of California UCL to Interpret FTC Act. On May 14, the U.S. Court of Appeals for the Ninth Circuit held that the California Unfair Competition Law (UCL) was not necessary to interpret a claim brought by the Federal Trade Commission (FTC) under the FTC Act. *F.T.C. v. Neovi, Inc.,* No. 09-55093, 2010 WL 1930229 (9th Cir. May 14, 2010). In this case, the FTC brought an action under section 5(a) of the FTC Act against defendants that managed a website that created and delivered unverified checks at the direction of registered users. On appeal, the court considered whether the FTC had made the requisite showing of harm, *i.e.*, that the website caused consumers a substantial injury that was not avoidable or outweighed by countervailing benefits. Agreeing with the district court, the Ninth Circuit found that the FTC met its burden and that the website was responsible for the injury at issue, reasoning that it "created and controlled a system that facilitated fraud and that the company was on notice as to the high fraud rate." In reaching this decision, the court refused to consider case law interpreting the California UCL (Cal. Business & Professions Code § 17200) to determine whether the FTC's showing of causation was sufficient. Although it acknowledged that the "common practice for states with consumer protection statutes modeled on the FTC Act [is] to rely on federal authority when interpreting those statutes," it found that "the reverse is not the case[,]" because doing so would "create a sea of inconsistent rulings." Thus, the court found that the FTC Act permits a finding of direct harm based on the theory that the harm was a "predictable consequence of those actions." For a copy of the opinion, please see here.

Alabama Federal Court Holds Invasion of Privacy, Defamation Claims Preempted by FCRA. On May 10, the U.S. District Court for the Middle District of Alabama dismissed state law claims for invasion of privacy and defamation against a "furnisher of information" because the claims were

preempted by the Fair Credit Reporting Act (FCRA). *Sigler v. RBC Bank (USA),* No. 3:09-CV-615, 2010 WL 1904332 (M.D. Ala. May 10, 2010). In *Sigler*, the plaintiff consumer alleged violation of federal law and numerous Alabama state laws, including defamation and invasion of privacy, after the defendant bank allegedly furnished inaccurate information to credit reporting agencies (CRAs) about a loan obtained in the consumer's name without his permission. The bank moved to dismiss the state invasion of privacy and defamation counts on the basis of FCRA preemption. In rejecting the consumer's argument that the claims fell within an exception to FCRA preemption, the court held that the exceptions at issue (codified at 15 U.S.C. § 1681h(e)) apply only to claims brought against CRAs and to users of information that take adverse action against a consumer. Because the consumer's claims did not come within this exception, the court ruled that FCRA preempted them and dismissed the claims. For a copy of the opinion, please see here.

New Jersey Federal Court Holds Public Records Report Used for Collection Activities Could Constitute a Consumer Report under FCRA. On May 12, the U.S. District Court for the District of New Jersey held that a LexisNexis Accurint public records report may qualify as a "consumer report" under the Fair Credit Reporting Act (FCRA). *Adams v. LexisNexis Risk & Info. Analytics Group, Inc.,* Civil No. 08-4708, 2010 WL 1931135 (D. N.J. May 12, 2010). In Adams, the plaintiff consumer claimed that debt collectors wrongfully sued her after relying on information about her from a LexisNexis Accurint report, which is commonly used by debt collectors for collection activities. In denying the defendants' motion for judgment on the pleadings, the court held that the Accurint report may qualify as a consumer report if the consumer data included in the report is used (or is expected to be used) by debt collectors in establishing consumers' eligibility for the collection of an account. Similarly, the court held that the consumer successfully pleaded that the defendants act as CRAs because they act in exchange for money, regularly assemble information about consumers for the purpose of providing a consumer report (*i.e.*, Accurint) to third parties, and use interstate commerce to furnish the report. Accordingly, the court denied the defendants' motion to dismiss. For a copy of the opinion, please see here.

Virginia Federal Court Dismisses Note-Splitting Claims in Foreclosure Case. On May 13, the U.S. District Court for the Eastern District of Virginia rejected "splitting the note" and "illegal gambling" claims regarding credit default swaps on, and the securitization of, a mortgage loan. *Ruggia v. Wash. Mutual*, No. 1:09-cv-1067, 2010 WL 1957218 (E.D. Va. May 13, 2010). In*Ruggia*, the plaintiff borrower obtained a mortgage and the note was subsequently transferred several times over. When the plaintiff eventually defaulted on the note, the substitute trustee moved to foreclose. The plaintiff responded by filing a suit alleging that the foreclosing entity lacked power to enforce the deed securing the note because the various transfers that followed the original mortgage had effectively split the note from the underlying deed. Relying on state law regarding negotiable instruments, the court ruled that the security instruments run with the note upon assignment and, as such, the subsequent transferees could foreclose. In this regard, the court added that the securitization did not split the note from the security instrument. The court also dismissed as frivolous the plaintiff's claims that the purchase of credit default swaps on his note violated state law prohibiting illegal gambling. For a copy of the opinion, please see here.

Ohio Court of Appeals Holds E-Signature on Judgment Was a Valid Signature. On May 13, the Ohio Court of Appeals held that a judge's electronic signature on a judgment of conviction was a valid signature under Ohio Crim. R. 32(C). *State v. Anderson*, No. 92576, 2010 WL 1910071 (Ohio Ct. App. May 13, 2010). In *Anderson*, the defendant challenged the use of an electronic signature on his judgment of conviction on the grounds that it ran afoul of the rule prohibiting "rubber stamps," as expressed in*State ex rel. Drucker v. Reichle*, 81 N.E.2d 735 (1948). The court rejected this claim by reference to State v. Pinkney, No. 91861, 2010 WL 320485 (Ohio Ct. App. Jan. 28, 2010), in which the court distinguished electronic signatures from rubber stamps for the purposes of Ohio Crim. R. 32(c). The court also noted that the applicable local rules expressly permit the use of such signatures. For a copy of the opinion, please see here.

Firm News

Christopher Witeck will speak on the "Reverse Mortgage Secondary Market Panel" at the MBA's Secondary Market/Government Housing Conference in New York on May 24.

Kirk Jensen will speak on "Overcoming Problem Areas in Issuance and Utilization of Gift Cards" at the American Conference Institute's 4th National Advanced Forum on Financial Services Marketing Compliance in New York on May 26.

Margo Tank will be speaking on a panel titled "Preventing and Managing Litigation Associated with the Complex Array of State Breach Notification Laws" at the ACI Data Privacy & Information Security Conference, June 3-4 in Dallas, TX.

Andrew Sandler will be speaking on June 6-7 at CBA Live, the Consumer Banker Association Conference being held in Hollywood, Florida. Andrew will present a Fair Lending Industry Overview on Fair Lending on June 6 and will be speak on Auto Fair Lending on June 7.

Christopher Witeck will be speaking on the "Securitization and Secondary Market" panel at ACI's Reverse Mortgage Conference in New York on July 23.

Andrew Sandler was quoted in the Wall Street Journal regarding the SEC's recent securities fraud charges against Goldman Sachs.

Andrew Sandler and Jerry Buckley spoke at the recent National CRA, HMDA & Fair Lending Forum held in Dallas, Texas. Andrew also hosted a welcome reception and presented a Fair Lending Risk Update on April 27. Jerry spoke on the topic "The Changing Regulatory Environment" on April 28.

Margo Tank was the featured speaker in a webinar on May 4 entitled "New Disclosure Regulations: How Consumer Lenders can Reduce Risk and Cost with E-Disclosures."

Andrew Sandler, Jeff Naimon, Christopher Witeck and Margo Tank participated in the Mortgage Bankers Association Legal and Regulatory Compliance Conference on May 3-5 in Coronado, CA. Chris spoke on "Hot Secondary Market Issues" on May 3. Andrew spoke on a panel and roundtable

session on the topic “Fair Lending” on May 4; Jeff discussed servicing issues on May 4; Margo spoke on the topic "Update on Legal Issues in Mortgage Technology and eMortgages" on May 5.

Mortgages

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Consumer Finance

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California Court of Appeal Reverses Trial Court Decision Holding That State Law Requiring Disclosures on Convenience Checks is Preempted. On May 12, the California Court of Appeal reversed a trial court decision that had found that a state law requiring certain disclosures when offering convenience checks was preempted by the National Bank Act (NBA) and regulations promulgated by the Office of the Comptroller of the Currency (OCC). *Parks v. MBNA America Bank, N.A.,* G040798, 2010 WL 1885983 (Cal. Ct. App. May 12, 2010). In *Parks*, the plaintiff brought a

putative class action alleging that the defendant bank failed to affix certain disclosures to its convenience checks in violation of California law. Based on the Ninth Circuit's decision in*Rose v. Chase Bank USA, NA*, 513 F.3d 1032 (9th Cir. 2008) (reported in *InfoBytes*, Jan. 25, 2008), the trial court found that the NBA and OCC regulations preempt state laws requiring such disclosures and dismissed the case. Taking a narrower view of preemption and rejecting the Ninth Circuit's analysis in *Rose*, the California Court of Appeal reversed. It found that the NBA precluded only those laws that *forbid* or significantly impair the exercise of power by national banks. The court concluded that the California law did not forbid the use of convenience checks and that, on the limited factual record, it was unclear whether the law significantly impaired the practice, thus necessitating remand. On remand, it instructed the trial court that the California law could only be considered preempted if the bank could establish that it significantly impaired its use of free checks. Likewise, the court held that OCC regulations interpreting the NBA did not preempt the California law. Although the regulations expressly preempted state laws such as the one at issue, the court found that they were invalid because they represented an overbroad interpretation of the NBA. For a copy of the opinion, please see here.

Ninth Circuit Rejects Use of California UCL to Interpret FTC Act. On May 14, the U.S. Court of Appeals for the Ninth Circuit held that the California Unfair Competition Law (UCL) was not necessary to interpret a claim brought by the Federal Trade Commission (FTC) under the FTC Act. *F.T.C. v. Neovi, Inc.,* No. 09-55093, 2010 WL 1930229 (9th Cir. May 14, 2010). In this case, the FTC brought an action under section 5(a) of the FTC Act against defendants that managed a website that created and delivered unverified checks at the direction of registered users. On appeal, the court considered whether the FTC had made the requisite showing of harm, *i.e.*, that the website caused consumers a substantial injury that was not avoidable or outweighed by countervailing benefits. Agreeing with the district court, the Ninth Circuit found that the FTC met its burden and that the website was responsible for the injury at issue, reasoning that it "created and controlled a system that facilitated fraud and that the company was on notice as to the high fraud rate." In reaching this decision, the court refused to consider case law interpreting the California UCL (Cal. Business & Professions Code § 17200) to determine whether the FTC's showing of causation was sufficient. Although it acknowledged that the "common practice for states with consumer protection statutes modeled on the FTC Act [is] to rely on federal authority when interpreting those statutes," it found that "the reverse is not the case[,]" because doing so would "create a sea of inconsistent rulings." Thus, the court found that the FTC Act permits a finding of direct harm based on the theory that the harm was a "predictable consequence of those actions." For a copy of the opinion, please see here.

Alabama Federal Court Holds Invasion of Privacy, Defamation Claims Preempted by FCRA. On May 10, the U.S. District Court for the Middle District of Alabama dismissed state law claims for invasion of privacy and defamation against a "furnisher of information" because the claims were preempted by the Fair Credit Reporting Act (FCRA). *Sigler v. RBC Bank (USA),* No. 3:09-CV-615, 2010 WL 1904332 (M.D. Ala. May 10, 2010). In *Sigler*, the plaintiff consumer alleged violation of federal law and numerous Alabama state laws, including defamation and invasion of privacy, after the defendant bank allegedly furnished inaccurate information to credit reporting agencies (CRAs) about a loan obtained in the consumer's name without his permission. The bank moved to dismiss the state invasion of privacy and defamation counts on the basis of FCRA preemption. In rejecting the

consumer's argument that the claims fell within an exception to FCRA preemption, the court held that the exceptions at issue (codified at 15 U.S.C. § 1681h(e)) apply only to claims brought against CRAs and to users of information that take adverse action against a consumer. Because the consumer's claims did not come within this exception, the court ruled that FCRA preempted them and dismissed the claims. For a copy of the opinion, please see here.

New Jersey Federal Court Holds Public Records Report Used for Collection Activities Could Constitute a Consumer Report under FCRA. On May 12, the U.S. District Court for the District of New Jersey held that a LexisNexis Accurint public records report may qualify as a "consumer report" under the Fair Credit Reporting Act (FCRA). *Adams v. LexisNexis Risk & Info. Analytics Group, Inc.,* Civil No. 08-4708, 2010 WL 1931135 (D. N.J. May 12, 2010). In Adams, the plaintiff consumer claimed that debt collectors wrongfully sued her after relying on information about her from a LexisNexis Accurint report, which is commonly used by debt collectors for collection activities. In denying the defendants' motion for judgment on the pleadings, the court held that the Accurint report may qualify as a consumer report if the consumer data included in the report is used (or is expected to be used) by debt collectors in establishing consumers' eligibility for the collection of an account. Similarly, the court held that the consumer successfully pleaded that the defendants act as CRAs because they act in exchange for money, regularly assemble information about consumers for the purpose of providing a consumer report (*i.e.*, Accurint) to third parties, and use interstate commerce to furnish the report. Accordingly, the court denied the defendants' motion to dismiss. For a copy of the opinion, please see here.

Virginia Federal Court Dismisses Note-Splitting Claims in Foreclosure Case. On May 13, the U.S. District Court for the Eastern District of Virginia rejected "splitting the note" and "illegal gambling" claims regarding credit default swaps on, and the securitization of, a mortgage loan. *Ruggia v. Wash. Mutual*, No. 1:09-cv-1067, 2010 WL 1957218 (E.D. Va. May 13, 2010). In*Ruggia*, the plaintiff borrower obtained a mortgage and the note was subsequently transferred several times over. When the plaintiff eventually defaulted on the note, the substitute trustee moved to foreclose. The plaintiff responded by filing a suit alleging that the foreclosing entity lacked power to enforce the deed securing the note because the various transfers that followed the original mortgage had effectively split the note from the underlying deed. Relying on state law regarding negotiable instruments, the court ruled that the security instruments run with the note upon assignment and, as such, the subsequent transferees could foreclose. In this regard, the court added that the securitization did not split the note from the security instrument. The court also dismissed as frivolous the plaintiff's claims that the purchase of credit default swaps on his note violated state law prohibiting illegal gambling. For a copy of the opinion, please see here.

Ohio Court of Appeals Holds E-Signature on Judgment Was a Valid Signature. On May 13, the Ohio Court of Appeals held that a judge's electronic signature on a judgment of conviction was a valid signature under Ohio Crim. R. 32(C). *State v. Anderson*, No. 92576, 2010 WL 1910071 (Ohio Ct. App. May 13, 2010). In *Anderson*, the defendant challenged the use of an electronic signature on his judgment of conviction on the grounds that it ran afoul of the rule prohibiting "rubber stamps," as expressed in*State ex rel. Drucker v. Reichle*, 81 N.E.2d 735 (1948). The court rejected this claim by reference to State v. Pinkney, No. 91861, 2010 WL 320485 (Ohio Ct. App. Jan. 28, 2010), in which

the court distinguished electronic signatures from rubber stamps for the purposes of Ohio Crim. R. 32(c). The court also noted that the applicable local rules expressly permit the use of such signatures. For a copy of the opinion, please see here.

E-Financial Services

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Privacy/Data Security

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Credit Cards

Senate Passes Financial Regulatory Reform Legislation. On May 20, by a vote of 59-39, the U.S. Senate passed the "Restoring American Financial Stability Act of 2010," a comprehensive financial services reform bill. Among other things, the final bill (H.R. 4173) would create the Bureau of Consumer Financial Protection (BCFP) as a unit within the Federal Reserve Board to regulate consumer financial products and activities. Although the language of the final bill is based in large part upon a version shepherded through the Senate Banking Committee by Senator Christopher Dodd (D-CT), several key changes were made following debate on the Senate floor. Among these changes were provisions that would (i) prohibit any payments to loan originators that vary based on the terms of the loan other than the loan amount (*e.g.*, yield spread premiums) (this amendment was reported in *InfoBytes*, May 14, 2010), (ii) create a subset of "qualified mortgage loans" for which an issuer or securitizer would not have to retain the credit risk upon sale, (iii) scale back the authority of state attorneys general to enforce consumer protection laws (under the purview of the new BCFP) against financial institutions outside of their state, and (iv) restrict the interchange fee a card issuer or payment card network can charge merchants for debit card transactions. A full summary on the legislation is forthcoming in an *InfoBytes Regulatory Restructuring Report*. For a copy of the bill, please see http://1.usa.gov/daJTBJ.