WEINER BRODSKY KIDER PC

Financial Services Update

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FinCEN Assesses $1 Million Penalty and Finds Individual Liability for Money Transmitter's BSA/AML Violations

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Federal Regulatory Developments

FinCEN Assesses $1 Million Penalty and Finds Individual Liability for Money Transmitter's BSA/AML Violations

On December 18, 2014, FinCEN issued a $1 million civil money penalty against the Chief Compliance Officer (CCO) of a company that operates a money transfer service for failing to ensure that the company abided by the anti-money laundering (AML) provisions of the Bank Secrecy Act (BSA). Concurrently, FinCEN's representative, the U.S. Attorney's Office of the Southern District of New York, filed a complaint in U.S. District Court seeking to enforce the penalty and to enjoin the CCO from employment in the financial industry. The action demonstrates the potential for individual accountability with willful violations of AML obligations.

The CCO oversaw the company's fraud department and AML compliance department from 2003 to 2008 and allegedly failed to take the actions clearly required of him under the law, allowing criminals to use the company to defraud innocent consumers and launder the proceeds of their fraudulent schemes. The CCO also allegedly failed in his responsibility to ensure the filing of suspicious activity reports (SARs) on agents he knew or had reason to suspect were engaged in fraud, money laundering, or other criminal activity. This denied critical information to law enforcement, which could have been used to combat the fraud and dismantle the criminal networks.

The action demonstrates FinCEN's commitment to enforcing the requirements of the BSA and holding appropriate individuals accountable. A copy of the press release regarding this action is available at: http://www.fincen.gov/news_room/nr/pdf/20141218.pdf.

HUD Issues Revised Model Documents and Forms

HUD recently issued revised model FHA fixed- and adjustable-rate notes, a model disclosure, and a form to align the language in these documents with two final rules that were previously issued by HUD and that go into effect in January 2015. In these final rules, HUD eliminated post-payment interest charges and revised ARM notification requirements for FHA loans. The revised model documents include the following: the Model Forward Fixed Rate Mortgage Note, the Model Forward Adjustable Rate Mortgage Note, and the Informed Consumer Choice Disclosure. HUD also issued an updated Important Notice to Homebuyers (Form HUD-92900-B).

HUD's first final rule prohibited the practice of imposing interest charges on consumers for the balance of the month in which the consumer prepays the loan in full. This final rule becomes effective on January 21, 2015. HUD's second final rule required that an interest rate adjustment resulting in a corresponding change to the mortgagor's monthly payment for an ARM be based on the most recent index value available 45 days before the date of the rate adjustment. This final rule goes into effect January 10, 2015.

FHA mortgagees must begin using the language in the revised model notes and the disclosure no later than the effective date of the appropriate final rule. With respect to the Important Notice to Homebuyers (Form HUD-92900-B), mortgagees may begin using this new form immediately, but must use this form for all FHA mortgages closed on or after the effective date of the final rule that addressed handling prepayments, which is January 21, 2015.

The revised model notes and the Informed Consumer Choice Disclosure are available at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/model_documents.

The Important Notice to Homebuyers (Form HUD-92900-B) is available at http://portal.hud.gov/hudportal/documents/huddoc?id=92900-b.pdf.

Litigation Developments

Seventh Circuit Shifts Class Action Settlement Approval Considerations

In some recent opinions, the Seventh Circuit Court of Appeals addressed the standards for approving class action settlements. One is *Redman v. Radioshack Corporation*, where the Court explains that the actual value of the settlement to class members must be the primary consideration in determining the reasonableness of a settlement. This is not new, but the language and logic of the *Redman* opinion may have unintended consequences.

In *Redman*, the trial court approved a settlement purportedly worth $4.1 million. The value was based on: $2.2 million for administrative expenses; $830,000 for coupons to the class; and $1 million as the attorney fee award. The coupon value of $830,000 was calculated by multiplying the nominal value of each coupon ($10 for the purchase of goods at any Radioshack) times each of the 83,000 class members who responded to the class action notice. Objectors appealed.

The *Redman* opinion took issue with each component of the settlement, but focused on what the class actually received. The Court found that $830,000 of coupons was worth far less to class members than the equivalent amount in cash. The opinion explains that the settlement restricted the total number of coupons usable at the same purchase and provided a short six-month window for the coupon to be used. Although claimants could sell the coupon, it would be unlikely that the secondary market would place much value on purchasing a coupon of such small amount. Further, a claimant purchasing an item less than $10 would not receive the different in change. Given these considerations, the court held that the class award was worth less than $830,000.

The Court further opined that the attorney fee award was unreasonable in light of the limited value of the class award. Ultimately, the Seventh Circuit rejected an argument other courts frequently adopt in approving class action settlements, potentially to the detriment of the settlement process. That is, in many class action settlements, parties often rely on the total potential value of claims or payments, in this case the face value of the coupon, to show reasonableness of the settlement award and attorney fee award.

The Court's holding will likely require either the plaintiff's counsel to accept a lower award, or the defendant to increase the benefit to the class. In either case, the Court has forced the parties to re-negotiate the settlement or abandon it, at least for the near term.

If the settlement is redone with a greater benefit to the class, that may be the desired outcome of *Redman*. If, however, the defendant is unwilling to increase the benefit to the class, the class may lose the opportunity to get any benefit.

The question becomes whether the plaintiff's attorneys will accept a lower award, or feel that their investment in the litigation is so great that there is no marginal benefit from accepting a lower award of attorneys' fee. That is, the risk of litigation, no matter how high, is preferable to an amount sufficiently low to get the settlement approved. In that circumstance, the class will not benefit from the Redman opinion, but will be deprived of an opportunity to settle a difficult case.

It is understandable that a court will want to ensure the value to the class is the focus of the settlement. Coupon settlements should receive greater scrutiny in class actions. However, the Court's opinion, which focused on the benefit to the class, may have been so heavy-handed as to work to the class's detriment, at least in some cases. The opinion will also make it more difficult for defendants to settle class actions where the plaintiffs face high burdens of proof and/or low amounts of potential damages. For now the litigation continues, which will contribute to the burden on the limited resources of the trial court.

Weiner Brodsky Kider PC has extensive experience defending clients in class action litigation nationwide.