Financial Services Update

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WBK News

Alexandra Karram will participate on the Truth in Lending/RESPA Integrated Disclosure Rule panel at the 24th Annual Rocky Mountain Mortgage Lenders Expo on April 9 in Denver, CO. For more information contact Alex at karram@thewbkfirm.com.

Weiner Brodsky Kider PC recently held exclusive TRID Workshops for clients which provided an overview and understanding of the key elements of TRID, and how the rule will affect the policies, procedures and training implemented by mortgage lenders. The firm now has made available the WBK TRID Workbook, which covers integrated disclosure readiness as the workshops did, from pre-application to post-closing under TRID. **Click here to purchase a copy for $250**.

SUMMARIES

Federal Regulatory Developments

New York AG Settlement with Top Three Credit Reporting Agencies Requires Monitoring of Credit Data Providers

The landmark settlement negotiated by the New York Attorney General and the top three credit reporting agencies (CRAs)—Experian, Equifax and TransUnion—will enhance dispute resolution for consumers and improve credit report accuracy, perhaps leading to increased access to credit. At the same time, the settlement will result in more burdens on the furnishers of credit data, such as mortgage lenders and servicers.

The settlement, which will be implemented nationwide, requires the CRAs to institute a number of reforms, including improving the procedures and review process for addressing credit report inaccuracies identified by consumers, and requiring the CRAs to monitor the reporting performance of the furnishers of consumer data and to take corrective action if furnishers “fail to comply with their obligations.”

New York Attorney General Eric Schneiderman on March 9, 2015 announced the agreement with the CRAs, which resulted from an investigation by Schneiderman’s office of the business practices of the CRAs triggered by complaints of New York residents.

In the settlement, the three CRAs denied any wrongdoing and voluntarily agreed to the reforms listed, which must be implemented over the next three years. They also fully cooperated in the attorney general’s investigation.

The settlement noted that a 2012 study by the FTC found that 26% of the participants identified at least one potentially material error in their credit reports. A significant

finding in the study was that 13% of the participants saw a change in their credit score due to their credit report being modified after a dispute.

The CFPB at the federal level supervises the larger CRAs, those with more than $7 million in annual receipts. In 2012, the CFPB began accepting consumer complaints about credit reporting and, in 2011, issued a report about the practices of CRAs.

“Credit report errors generally arise due to incomplete or incorrect information provided by furnishers or consumers; fraud and identity theft; and, in some cases, through the CRAs’ processes of matching information provided by furnishers to an individual consumer’s credit files,” according to the settlement agreement.

The settlement requires the CRAs to establish a National Credit Reporting Working Group to oversee furnishers by developing best practices and policies to improve the monitoring and data accuracy of furnishers’ information. The new working group must develop metrics for analyzing furnisher data, including the number of disputes involving individual furnishers, their rate of response to consumer disputes and the outcome of disputes.

The settlement also requires that the agencies announce the full retirement of the Metro 1 data reporting format within 90 days. The CRAs must assist furnishers in migrating to the Metro 2 data reporting format and stop accepting Metro 1 data reports after 3 years.

The CRAs also are required to identify collection furnishers who misreport or misuse Creditor Collection Codes on a recurring basis. They must take corrective action against such furnishers, which includes remediating the problem with the furnisher, suppressing certain elements of the furnisher’s data and refusing to accept certain data from the collection furnisher.

Under the settlement, the CRAs will require collection furnishers “to regularly reconcile data relating to accounts in collection that have not been paid in full.” As part of this process CRAs must revise training materials, and educate new and existing collection furnishers on accurately reporting consumer information and “deleting accounts that are sold, transferred, or no longer managed by the reporting entity.”

The settlement requires furnishers to provide additional information to the CRAs. The date of birth of authorized users now must be reported on new accounts. And furnishers are required to verify information that a consumer is deceased before reporting that to the CRAs. The agencies also agree to ensure that the name of the original creditor be included in the reporting of debts.

To improve the process of correcting errors on consumer credit reports, the CRAs must have specially-trained employees to review all supporting documents that consumers

submit for disputes involving mixed files, fraud or identity theft. CRAs also cannot automatically reject a consumer's dispute if a creditor only verifies a disputed credit item through the automated dispute resolution system.

"A CRA employee with discretion to resolve the dispute must review the supporting documentation," according to the attorney general's office. Furnishers also will have to affirm that they reviewed and considered any images of documentation provided by the CRA in connection with a consumer dispute.

The agreement between the New York Attorney General and CRAs also institutes a 180-day waiting period before delinquent medical debt can be reported on a consumer credit report. This allows consumers time to resolve any insurance disputes. Once paid in full, medical debt must be removed from a consumer's credit report.

The CRAs must increase the visibility of AnnualCreditReport.com, which allows consumers to obtain one free credit report every 12 months, by including a prominently labeled hyperlink to the site on the CRAs' homepages. Also, consumers who receive a change to their credit report as a result of a dispute are entitled to a second free credit report within a year to make sure the corrections were properly done.

The settlement also prohibits the CRAs from reporting payday loan debt from any lender that has been identified by the attorney general as violating New York lending laws.

The press release, which includes a link to the settlement agreement, is available here: http://www.ag.ny.gov/press-release/ag-schneiderman-announces-groundbreaking-consumer-protection-settlement-three-national.

Proposed Data Security Legislation Sets New Standards for Mortgage Lenders and Servicers

Data security legislation recently proposed in the House Energy & Commerce Committee would create new data protection standards for companies under the FTC's jurisdiction, including non-bank mortgage lenders and servicers.

A bipartisan draft of The Data Security and Breach Notification Act of 2015 would require FTC-regulated companies to secure the personal information of consumers collected in the course of business. The bill also requires companies to notify individuals affected by a breach of data security involving personal information.

For the first time, a national standard would be established for companies to implement and maintain reasonable security measures and practices to protect and secure personal information. Most states have data security laws for notification of personal

information breaches, but a strong and consistent national standard could simplify business compliance while protecting consumers.

Data security is of the upmost importance to the mortgage industry due to the vast quantities of sensitive consumer information that is collected, retained and shared throughout the origination and servicing process.

The committee in a statement noted, “The draft [bill’s] Security and Notification standards are designed to create a uniform national policy—the scope of which [committee] members continue to discuss—replacing the patchwork of state and territory laws.”

The standard would be technology and process neutral, and flexible enough not to hinder innovation and new technologies.

Under the proposed legislation, a violation of the data security and breach notification requirements is considered an unfair and deceptive act or practice under the FTC Act. The FTC or state attorneys general are given the power to obtain civil penalties for violations of the security and breach requirements.

On March 18, 2015, at a hearing of the Energy & Commerce Subcommittee on Commerce, Manufacturing and Trade which reviewed the draft bill, the FTC lent its general support of the security and notification goals of the bill, and offered some suggestions to improve the reach and enforcement of the legislation.

The legislation is in the early stages of working its way through the House. Next, a completed draft of the bill likely would be subject to another hearing and then a mark-up by the subcommittee and the full House Energy & Commerce Committee before being considered in a floor vote by the House of Representatives.

The commission in previous appearances before Congress has consistently called for the strengthening of its existing authority over company data security standards and for notifications to consumers of security breaches.

“The need for companies to implement strong data security measures is clear,” testified Jessica Rich, director of the Bureau of Consumer Protection at the FTC, at the hearing, “If sensitive information falls into the wrong hands, the results can be devastating. Consumers face the risk of fraud, identity theft and other harm.”

Rich pointed out the business and commercial ramifications of data breaches. These breaches can harm the financial interests and reputation of companies, and possibly affect consumer confidence in the marketplace as well.

The FTC currently enforces statutes and rules covering data security requirements of non-bank financial institutions, including the Fair Credit Reporting Act (FCRA) and the FTC's Safeguards Rule implementing the Gramm-Leach-Bliley Act.

Rich noted the bill's notification requirements will enable consumers to take steps to protect themselves, such as requesting that fraud alerts or security freezes be placed in their credit files as well as scrutinizing their monthly account statements.

The act requires companies after discovering a security breach to conduct a good faith investigation that would determine if there is a reasonable risk of identity theft, economic loss or harm, or financial fraud. However, the FTC believes this standard is too narrow and will prevent consumers from being notified in all significant security breaches.

The FTC is concerned that the does not cover certain types of personal information that if subject to a security breach could result in real physical and economic harm, such precise geolocation and health data.

The bill requires companies to notify consumers of a data breach as expeditiously as possible, and not later than 30 days after the covered business has taken the necessary measures to determine the scope of the breach as well as restoring the reasonable integrity, security and confidentiality of the data system.

Rich also applauded that the proposed bill gives the FTC the ability to seek civil penalties, which she described as an important tool to deter unlawful conduct. Currently the FTC has the authority to seek civil penalties for violations of data security for children's online information under COPPA and credit report information under FCRA.

Among other concerns with the draft bill, the FTC believes the bill does not address every vital aspect of the data ecosystem, including Internet-enabled devices. Rich said, "Security breaches of such devices could lead to the compromise of personal information, but also raise broader safety concerns."

The FTC also laments that the bill does not include rulemaking authority under the Administration Procedures Act, which would allow the FTC to ensure that companies appropriately protect data as technology and the risks from the use of certain types of information evolve. Thus the law could adapt to innovations in technology and business models, and to the protection of different types of personal information that may result.

The FTC press release on the hearing is available here: https://www.ftc.gov/news-events/press-releases/2015/03/ftc-testifies-proposed-data-security-legislation-house-energy.

The hearing testimony of the FTC's Jessica Rich is available at: http://docs.house.gov/meetings/IF/IF17/20150318/103175/HHRG-114-IF17-Wstate-RichJ-20150318.pdf

The Energy & Commerce Committee's fact sheet on The Data Security and Breach Notification Act can be found here: https://energycommerce.house.gov/fact-sheet/data-security-and-breach-notification-act-2015.

FHA Issues New Single Family Housing Policy Handbook

Continuing its efforts to provide a single, comprehensive source of Single Family Housing policy for mortgagees and other participants with which it does business, FHA released additional sections of its Single Family Housing Policy Handbook (HUD Handbook 4000.1) on March 18, 2015.

The new handbook sections are as follows:

- Doing Business with FHA - Lenders and Mortgagees
- Doing Business with FHA - Other Participants - Appraiser
- Origination through Post-Closing/Endorsement for Title II Forward Mortgages
- Origination through Post-Closing/Endorsement for Title II Forward Mortgages - 203(k) Rehabilitation Mortgage Insurance Program
- Origination through Post-Closing/Endorsement for Title II Forward Mortgages - 203(k) Consultant Requirements
- Origination through Post-Closing/Endorsement - Appraiser and Property Requirements for Title II Forward and Reverse Mortgages
- Quality Control, Oversight and Compliance - Lenders and Mortgagees
- Quality Control, Oversight and Compliance - Other Participants - Appraiser

The sections that address doing business with FHA become effective on June 15, 2015, as does the quality control section for lenders and mortgagees. Note that one subsection of the quality control section, Section V.A.3.c.i – Origination and Underwriting Loan File Compliance Review – Minimum Requirements, and all the remaining sections listed above are effective for case numbers assigned on or after June 15, 2015.

Certain HUD Handbooks, Mortgagee Letters and Housing Notices are superseded in their entirety by Handbook 4000.1, and others are partially superseded. A complete list of materials that are superseded in whole or in part can be found in HUD's transmittal letter to Handbook 4000.1.

Handbook 4000.1, including the transmittal letter, can be found at: http://portal.hud.gov/hudportal/documents/huddoc?id=40001HSGH.pdf

HUD's announcement can be found at:
http://portal.hud.gov/hudportal/documents/huddoc?id=SFH_HB_MORE_APPR.PDF

HUD's Single Family Handbook page can be found at:
http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/handbook_4000-1

CFPB Updates Regulatory Implementation Materials Due to Recent Amendments to Final TILA-RESPA Integrated Disclosure Rule

The CFPB recently announced that it updated certain regulatory implementation guidance materials to account for a recent final rule that modified the TILA-RESPA Integrated Disclosure Rule (TRID), effective August 1, 2015.

The final rule for which the CFPB updated the materials made three key changes. First, the rule extends the timing requirement for creditors to provide a revised Loan Estimate when a consumer locks in a rate, to be within three business days after the rate lock.

Second, the rule permits adding to the Loan Estimate particular language regarding redisclosure for certain new construction loans. Third, it expressly includes the Loan Estimate and Closing Disclosure among the loan documents that must include the NMLSR ID. The final rule also made certain clarifying, non-substantive changes to TRID.

It is important that lenders and any other industry participants ensure that they are using the most up-to-date regulatory materials. When the CFPB publishes new final rules, make sure to look out for updates to any related guidance documents and update your files and reference guides accordingly.

The guidance materials updated as a result of this recent change include the TRID Small Entity Compliance Guide, the TRID Guide to the Loan Estimate and Closing Disclosure Forms, the TRID Timeline Example, and the Loan Originator Rule Small Entity Compliance Guide.

Litigation Developments

Court Again Holds Lender Could be Subject to TILA Violation for Failure to Disclose Lender Placed Insurance Costs

In *Almanzar v. Select Portfolio Servicing, Inc.*, the District Court for the Southern District of Florida recently held again that a lender/servicer may be liable under the Truth in Lending Act (TILA) for failure to disclose the amounts charged for lender placed insurance, which are incurred after the closing of the loan.

Weiner Brodsky Kider recently wrote about a similar case, *Wilson v. Everbank,* in a January 2015 newsletter.

The recent decision in *Almanzar* demonstrates a concerning trend with courts' interpretations of disclosure requirements of finance charges under TILA.

The Court upheld the TILA claims, largely relying on the logic of another case decided in 2014, *Jackson v. U.S. Bank, N.A.* Specifically, the Court held that the plaintiffs' allegations do not relate to insurance premiums, which are an exception to TILA disclosures.

Instead, the court construed the allegations as relating to purportedly unlawful charges, rendering them subject to liability under TILA. The one-year statute of limitations further did not apply under the doctrine of equitable tolling because of the allegedly deceptive nature of the imposition of charges.

The case is a putative nationwide class action related to the purchase of lender placed insurance (LPI), which is purchased on behalf of borrowers who fail to maintain insurance coverage on their properties. The plaintiffs allege that the lender overcharged borrowers for costs not associated with the lender placed insurance, including commissions, which they characterize as unlawful kickbacks.

The complaint included purported violations of TILA, among other claims. The defendants moved to dismiss the complaint, which the Court denied with respect to the TILA claim, among others.

The Court's holding is problematic for several reasons. First, as with *Wilson v. Everbank*, the plaintiffs' claims cite a provision of TILA that requires disclosures before consummation of the loan transaction. However, LPI is purchased after the loan has closed, and the price of the LPI cannot be known until the lender purchases each policy.

Thus, regardless of whether the LPI charges qualify as a finance charge, which is explained as improper below, the lender cannot be subject to TILA under plaintiffs' theory because the charges were incurred after the loan closed. The Court nevertheless held that the lender could be liable for failing to disclose charges after the closing of a loan.

Second, setting aside the timing requirements of TILA disclosures, the Court improperly analyzed whether the LPI premium is a finance charge. In a motion to dismiss, the court assumes as true the factual allegations, but need not accept the truth of legal conclusions. Generally, determining whether particular law applies (or does not apply by virtue of an exception) is a legal conclusion.

In this case, TILA requires that certain finance charges be disclosed to a borrower. "Finance charge" is defined with certain express exceptions, including some property insurance payments. Therefore, the holding that the LPI charge is not an exception to the finance charge is a legal conclusion. The Supreme Court has held that a motion to dismiss requires a court to apply closer scrutiny in such cases.

Third, this is now one of many cases interpreting TILA as requiring disclosure of finance charges after the consummation of the loan. This decision, together with many others, creates a problematic body of case law that could potentially create exposure to lenders for TILA violations not intended by the express statute language. Although the lender ultimately should prevail, the decisions are now available and could be cited by plaintiffs to survive motions to dismiss.

Weiner Brodsky Kider PC has experience defending against lender placed insurance class action and TILA claims.

Supreme Court Clarifies Liability for Statements of Opinion in Securities Registration Statements, Sends RMBS Case Back to Second Circuit

The U.S. Court of Appeals for the Second Circuit has been directed to reconsider its affirmance of the dismissal of a putative class action concerning an allegedly misleading statement of opinion about the quality of the assets underlying residential mortgage-backed securities (RMBS).

In a summary disposition on Monday, the Supreme Court granted certiorari and vacated the Second Circuit's order affirming the dismissal. In reconsidering the dismissal, the Court of Appeals is to consider the effect of *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, a recent decision by the Supreme Court. *Omnicare* explains when statements of opinion may be actionable under the Securities Act of 1933.

In *Freidus v. ING Groep, N.V.*, the trial court held that claims relating to a June 2007 offering were barred by the applicable statute of limitations. The trial court also held that claims based on statements of opinion in connection with a September 2007 offering were not actionable, unless the company making the statement did not, in fact, hold the opinion stated. The Second Circuit affirmed in a short, summary order. The statute of limitations was not raised in the Supreme Court and is no longer at issue.

In *Omnicare*, decided last week, the Supreme Court held that a statement of opinion may be an "untrue statement of . . . material fact" for purposes of Section 11 of the Securities Act under two scenarios: (1) where the speaker does not actually hold the stated opinion; and (2) where a factual statement is "embedded" within the opinion.

The Court also held that a statement of opinion may give rise to liability for omission "to state a material fact . . . necessary to make the statement" of opinion "not misleading." The Court explained, "a reasonable investor may . . . understand an opinion statement to convey facts about how the speaker has formed the opinion."

Thus, a statement of opinion may imply that certain investigation or diligence was performed in arriving at the opinion. And in that context, the failure to disclose the lack of investigation or diligence may make a statement of opinion misleading.

The WBK Firm routinely represents mortgage lenders and servicers in connection with litigation and other disputes over mortgage-backed securities, throughout the United States.

Federal District Court Lets LPI Case Proceed Despite Reservations

A federal trial court in Miami has largely denied motions to dismiss filed by a mortgage lender and insurer, in a putative class action based upon the lender and insurer's alleged collusion and exchange of kickbacks with respect to lender-placed insurance (LPI).

Of particular interest are the alleged Racketeer Influenced and Corrupt Organizations Act (RICO) claims, because there is a small but significant trend of some courts permitting consumer protection claims to proceed as RICO claims, even where the theories appear weak. Here the court observed that "Plaintiffs' allegations *barely* nudge their . . . claims past the plausibility standard."

In *Montoya v. PNC Bank, N.A.*, the third amended complaint (TAC) asserted nine counts, including, violations of RICO, and breach of the duty of good faith and fair dealing.

The more important allegations are: (1) the insurer monitored the lender's mortgage servicing portfolio for insurance lapses, and folded the cost of monitoring the entire portfolio into the premiums for lender-placed insurance, which effectively shifted part of the servicing costs to those borrowers who received LPI; (2) the lender received commissions on LPI, but did not perform any services in exchange for those commissions; (3) misleading LPI disclosure forms were mailed to the borrowers; and (4) the insurer purchased "essentially riskless" reinsurance from the lender's affiliates, which amounted to an additional kickback.

The court dismissed a count alleging violation of the duty of good faith and fair dealing under Ohio law (brought by a borrower who lives in Ohio), since Ohio law requires a breach of an express contractual provision in order to maintain such a claim. In otherwise denying dismissal, the court made three key rulings:

- The fact that plaintiffs' allegations were "problematic and not intuitively logical" did not mean that they were not "plausible," which is the standard to survive a motion to dismiss under the Supreme Court's *Twombly* and *Iqbal* decisions.

- A plaintiff alleging mail fraud as a predicate to a RICO claim need not allege that any person relied upon the fraud. Rather, establishing reliance (by someone—not necessarily plaintiffs) may be necessary for the plaintiffs to prove causation, but that issue would be addressed on summary judgment or at trial, and not on a motion to dismiss.

- Plaintiffs' insistence that they were not challenging "pricing determinations or . . . rates" for insurance meant that the defendants' reliance on the McCarran-Ferguson Act did not preclude the RICO claims, at this stage of the case. McCarran-Ferguson prohibits any federal statute from being "construed to invalidate, impair or supersede any" state law regulating insurance, unless the federal statute "specifically relates to the business of insurance."

Even though the court acknowledged other cases where judges had dismissed RICO claims in the LPI context, and expressed skepticism that these plaintiffs would ultimately be able to support their claims, the court allowed the RICO claims to proceed. Using a football metaphor, the court explained it is not unusual for different judges to measure a close call differently.

The WBK Firm routinely defends mortgage lenders and servicers in lawsuits relating to LPI and other insurance and reinsurance issues, throughout the United States.