Financial Services Update
April 29, 2015

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WBK News

Weiner Brodsky Kider PC will have several speakers at MBA's Legal Issues and Regulatory Compliance Conference next week in Chicago, IL. On May 3 **Jason McElroy** will discuss "The Essentials of Fair Housing, ECOA, HMDA" and **Alex Karram** will speak about "The Essentials of QM and LO Comp". On May 4 **Jim Milano** will serve on the panel "Government and Government Sponsored Enterprises Housing Program Update". On May 5 **Leslie Sowers** will join the panel "Other Mortgage Regulatory Initiatives"; **Jack Konyk** will participate on "National

Mortgage Licensing System — State Regulatory Update"; and **Mitch Kider** will discuss "RESPA Compliance — MSAs & JVs." For more information go to http://events.mortgagebankers.org/LIRC2015/default.html.

Mitch Kider has been recognized as a Washington, DC Super Lawyer by the 2015 edition of Super Lawyers Magazine. **Sebastian Forgues, Alex Karram, Michael Kieval, Jason McElroy, Tessa Somers**, and **Leslie Sowers** have been recognized as Rising Stars in the same publication.

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. Purchase a copy for $250.

SUMMARIES

Federal Regulatory Developments

CFPB, FTC Charge Servicer with Illegal Practices, Settle for $63 Million

In a joint consent order, the CFPB and Federal Trade Commission (FTC) alleged that Green Tree Servicing LLC engaged in illegal servicing and debt collection practices which harmed borrowers in financial difficulty. As part of the settlement agreement, Green Tree must pay $48 million in restitution to borrowers and a $15 million civil penalty.

The CFPB and FTC alleged that the nationwide servicer violated UDAAP, the Federal Debt Collection Practices Act (FDCPA), the Fair Credit Reporting Act (FCRA) and RESPA. Among the alleged violations cited by the agencies in the consent order, the servicer misrepresented the amount of money borrowers owed and failed to honor loan modification agreements between borrowers and previous servicers.

The consent order is noteworthy in that it also emphasizes that practices prohibited by FDCPA may be considered UDAAP violations. This is important because many creditors and lenders may not be subject to FDCPA for a variety of reasons. But the CFPB's and FTC's consideration of actions prohibited by FDCPA as UDAAP violations effectively broadens the scope of FDCPA.

In violation of FDCPA, Green Tree allegedly made abusive debt collection calls, sometimes calling borrowers up to 20 times a day if they fell two weeks or more past

due. Representatives of the servicer also allegedly threatened borrowers with the seizure or garnishment of wages, despite no intention to do so.

The consent order prohibits the servicer from engaging in the following activities, which are considered to be material misrepresentations or unfair acts:

- Misrepresenting to consumers that loans have certain unpaid balances, payment due dates, interest rates, monthly payment amounts, delinquency status, or unpaid fees or other amounts due;
- Requiring consumers to make normal payments required by the note while in the process of loss mitigation or loan modification;
- Requiring consumers to make a loan payment to be considered for loss mitigation options;
- Misrepresenting the existence of a grace period for making loan payments;
- Stating that a payment method charging a convenience fee is the only way available to make timely payments;
- Failing to disclose truthfully, clearly and prominently that convenience fees apply to certain payment methods; and
- Taking payments from consumer bank accounts without obtaining consent for all such payments.

Among other stipulations in the proposed settlement order, Green Tree must establish a comprehensive data integrity program to ensure the accuracy and completeness of data in servicing rights it acquires. The servicer also must honor loss mitigation agreements reached with a borrower by the previous servicer and continue to process pending loss mitigation agreements received in servicing transfers.

The CFPB press release on the consent order and settlement is available here: http://www.consumerfinance.gov/newsroom/cfpb-and-federal-trade-commission-take-action-against-green-tree-servicing-for-mistreating-borrowers-trying-to-save-their-homes/.

The FTC press release on the consent order and settlement is available here: https://www.ftc.gov/news-events/press-releases/2015/04/national-mortgage-servicing-company-will-pay-63-million-settle.

A copy of the CFPB and FTC consent order can be found here: http://files.consumerfinance.gov/f/201504_cfpb_proposed-consent-order-green-tree.pdf

CFPB Sues Debt Collectors, Payment Processors in Phantom Debt Scam

The CFPB recently filed a complaint in federal district court in Atlanta against participants in a phantom debt collection scheme that allegedly made millions of automated phone calls to consumers, harassing them to pay debt that in most cases they did not owe. Among the participants sued were service providers to the debt collectors, including a telemarketing firm that placed the calls and payment processors.

The lawsuit, filed by the CFPB on March 26, 2015, charges the debt collection companies, individual participants and service providers with numerous violations of UDAAP, the Consumer Financial Protection Act (CFPA) and the Fair Debt Collection Practices Act (FDCPA). The bureau is seeking injunctive relief, restitution, disgorgement for unjust enrichment and civil money penalties, among other relief.

A preliminary injunction was entered on April 7, 2015, halting the misconduct and freezing the assets of the individual defendants and their businesses.

The complaint alleges the debt collectors purchased consumers' personal information, including social security numbers, dates of birth and employment information, from lead generators and debt brokers. By presenting this information to consumers, the debt collectors were able to come off as legitimate. They then allegedly used threats and intimidation to collect millions of dollars in phantom debt – debts that were not owned, or, at least, were not owed to the debt collectors themselves.

Violations of FDCPA, the complaint stated, included the debt collectors threatening consumers and family members with false allegations of check fraud and the amount of debt owed, as well as threats from the collectors that they would notify consumers' employers about garnishing their wages or have the consumer arrested. The CFPB alleges that the collectors had no intent nor ability to do so.

The complaint alleges that the payment processors helped to facilitate the large-scale fraud by enabling the debt collectors "to accept payment by consumers' bank cards when the Payment Processors knew, or should have known, that the Debt Collectors where engaged in unlawful conduct."

The inclusion of such related service providers in the action highlights the CFPB's broad enforcement authority over third parties that provide a material service in connection with the offering or provision of a consumer financial product or service.

The assistance provided by the payment processors gave the alleged unlawful conduct by the collectors an air of legitimacy, according to the complaint, and made payments easy and possible for consumers who did not have sufficient cash. The CFPB alleges

that the payment processors ignored warnings from the industry and consumers of instances of fraud when they approved the merchant applications of the debt collectors.

The CFPB press release on the debt collection complaint is available here: http://www.consumerfinance.gov/newsroom/cfpb-sues-participants-in-robo-call-phantom-debt-collection-operation/.

The text of the complaint filed by the CFPB can be found here: http://files.consumerfinance.gov/f/201504_cfpb_complaint-universal-debt.pdf.

CFPB Says Class Action Lawsuits Offer Better Relief than Arbitration

The CFPB in its recent study on arbitration agreements in financial services found that such agreements significantly limit the potential monetary relief consumers could achieve from class action lawsuits. That's because most arbitration agreements can block class action litigation.

In 1,060 arbitration cases filed with the American Arbitration Association the CFPB studied in 2010 and 2011, the bureau found that 341 resulted in arbitrator decisions awarding consumers a combined total of less than $175,000 in damages and less than $190,000 in debt forbearance.

In comparison, CFPB research in the arbitration study estimated that roughly 32 million consumers each year were eligible for relief through class action settlements in federal courts. The overall settlement amount paid to consumers each year averaged $220 million. The CFPB determined that around 18% of the settlement amounts received went for attorneys' fees and expenses.

The arbitration study, mandated by the Dodd-Frank Act, covered pre-dispute arbitration agreements in six different areas of consumer financial services: credit cards, checking accounts, prepaid cards, private student loans, payday loans and mobile wireless contracts. Except for checking accounts, the majority of contracts in each of the other consumer financial markets required the arbitration of future disputes.

However, the mortgage market was not listed in the study, because TILA, as amended by Dodd-Frank, prohibits mandatory arbitration provisions in mortgage contracts for closed-end loans secured by a dwelling and open-end loans secured by the borrower's principal residence. This prohibition took effect on June 1, 2013.

Moreover, the ban on arbitration provisions in mortgage contracts did not significantly affect the industry, since Fannie Mae and Freddie Mac already prohibited such provisions in the loans they acquired.

The CFPB study pointed out that companies can use arbitration provisions to prevent class action lawsuits. While the study found that it is rare for companies "to try to force an individual lawsuit into arbitration," they frequently will invoke arbitration clauses to block class actions.

One of the arguments for arbitration clauses in financial services contracts is that they can lower litigation costs, which helps keep prices lower for consumers. But the CFPB study found no statistically significant evidence that this is the case after analyzing the total cost of credit paid by consumers to credit card companies that had eliminated arbitration clauses and other credit card companies that kept them in place.

To initiate the process of gathering information for the study, the CFPB launched a public inquiry on arbitration clauses in April 2012 and then released preliminary research in December 2013.

The press release on the CFPB Arbitration Study is available here: http://www.consumerfinance.gov/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/.

The full CFPB Arbitration Study can be found here: http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

HUD Makes HECM Due and Payable, Loss Mitigation Changes

HUD announced updates for FHA Home Equity Conversion Mortgage (HECM) servicers on Due and Payable policies and loss mitigation guidance for unpaid property charge defaults in Mortgagee Letter 2015-10 (ML 15-10) and Mortgagee Letter 2015-11 (ML 15-11), both issued on April 23, 2015.

ML 15-10 revises and consolidates existing FHA policy and timing requirements for all HECMs becoming Due and Payable on or after July 1, 2015. The letter offers servicers guidance on when HECMs are eligible to be Due and Payable, and on the required notices that must be sent to HUD and borrowers. ML 15-10 also spells out what a servicer must do, and in what timeframes, when a HECM becomes eligible to be Due and Payable.

In addition, ML 15-10 goes over the proper procedures for the sale of properties that secure defaulted or performing HECM loans, and how Due and Payable extensions work when marketing for sale a property securing a HECM, or participating in the Hardest Hit Funds program.

Meanwhile, Mortgage Letter 2015-11 offers servicers guidance on HECMs that are in default because of unpaid property charges. The letter rescinds and supersedes in its entirety Mortgagee Letter 2011-01. ML 15-11 goes into effect immediately for all HECMs in property charge default occurring on or after the April 23, 2015 publication date.

ML 15-11 expands on the permissible loss mitigation options servicers may offer when a HECM borrower is in default due to unpaid taxes, hazard insurance premiums or other unpaid property charges. For instance, the letter covers the conditions that determine default for HECMs with set-aside accounts to pay property charges.

In the letter HUD outlines different loss mitigation options, such as how to determine if the borrower is eligible for a Corporate Advance repayment plan. Also provided is information on calculating a repayment plan based on different scenarios, such as financial hardship or a reduction in surplus income.

The text of Mortgagee Letter 2015-10 is available here:
http://portal.hud.gov/hudportal/documents/huddoc?id=15-10ml.pdf.

The text of Mortgagee Letter 2015-11 is available here:
http://portal.hud.gov/hudportal/documents/huddoc?id=15-11ml.pdf.

State Regulatory Developments

Financial Regulators Issue Final Rule on State Registered AMCs

Federal financial and banking regulators have jointly issued the final rule on minimum requirements for state registration and supervision of appraisal management companies (AMCs) as mandated by the Dodd-Frank law. The final rule also implements the reporting requirements of the AMC National Registry.

The state agency registration requirements of the final rule do not apply to federally-regulated AMCs owned and controlled by insured depository institutions. But these AMCs still must comply with the minimum standards. The final rule was jointly issued by the FDIC, the Office of the Comptroller of the Currency (OCC), the Federal Reserve Board, the NCUA, the CFPB and the Federal Housing Finance Agency (FHFA). The agencies first issued a proposed rule on April 9, 2014.

The minimum requirements for AMC registration and supervision set forth in the final rule must be imposed by a state agency on AMCs registered and doing business in the state. However, the rule does not require states to establish the minimum AMC

standards. If they choose not to participate, then state-regulated AMCs will not be allowed to offer services in federal mortgage transactions in the state.

States that do participate have 36 months after the final rule goes into effect 60 days after it has been published in the Federal Register to establish their registration and supervision system that meets the minimum requirements. States also must be prepared to have a system in place for AMCs to report information required by the AMC National Registry directly to the states. The registry is administered by the Appraisal Subcommittee of the Federal Financial Institutions Examination Council (FFIEC).

The final rule defines an AMC as a third-party entity overseeing a panel of more than 15 certified or licensed appraisers in a given state, or 25 or more appraisers altogether in two or more states in a given year, while also providing appraisal management services. Appraisers working with AMCs are usually independent contractors.

The rule differentiates between AMCs and appraisal firms composed of appraisers who are employees or partners in the firm. They are not treated as AMCs in the rule, "because of the differences of business models of AMCs and appraisal firms," the rule noted.

Under the final rule, states must set up an AMC licensing program with the legal authority to examine the books and records of an AMC and to ensure that the AMC is complying with the customary and reasonable compensation requirements under the Truth in Lending Act, among other requirements, besides reviewing and approving (or denying) AMC applications for registration.

Additionally, the final rule places ownership restrictions on state-regulated and federally-regulated AMCs, such as a restriction that no person may own an AMC in whole or in part if that person has had an appraiser license or certificate refused, denied, cancelled, surrendered or revoked for any substantive cause.

States also must ensure that AMCs meet the requirement that appraisals are in line with the Uniform Standards of Professional Appraisal Practice (USPAP) and have the processes and controls in place to ensure that the AMC selects appraisers who are independent of the appraisal transaction.

The final rule on AMCs is available here: https://www.fdic.gov/news/board/2015/2015-04-21_notice_sum_d_fr.pdf.

Litigation Developments

District Court Concludes Economic Loss Doctrine Does Not Bar Statutory Fraud Claim

The U.S. District Court for the Eastern District of Pennsylvania recently concluded that a statutory fraud claim may be pursued in conjunction with a breach of contract claim, thereby rejecting the long-held position that the economic loss doctrine bars recovery under Pennsylvania's unfair trade practices law when a plaintiff is only seeking economic damages.

In *Kantor v. Hiko Energy,* a putative class action, plaintiff asserts the defendant electricity provider enticed him and others to switch providers by falsely promising competitive rates and savings on monthly energy bills. In addition to breach of contract, the complaint alleges violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL") on the basis of fraud.

The defendant moved to dismiss the complaint, arguing the economic loss doctrine bars the UTPCPL claim. Under the economic loss doctrine, a plaintiff may not pursue a tort claim for losses that are purely economic in nature and do not involve any physical injury or property damage.

The defendant relied on the case of *Werwinski v. Ford Motor Co.*, where the Third Circuit predicted in 2002 that the Pennsylvania Supreme Court would hold that the economic loss doctrine bars both common law intentional and statutory fraud claims, including UTPCPL claims.

The District Court rejected the defendant's position, explaining that "*Werwinski* no longer has any vitality." At the time *Werwinski* was decided there was no guidance from the Pennsylvania courts on the issue, but in 2013, the Pennsylvania Superior Court, an intermediate appellate court, addressed the issue. In *Knight v. Springfield Hyundai*, the Superior Court held that the economic loss doctrine does not apply to UTPCPL claims based on statutory fraud.

As explained by the District Court: "A predictive ruling by the Third Circuit is generally binding on the district court. However, when the Pennsylvania intermediate appellate courts have ruled to the contrary and their decisions have not been overruled by the state's highest court, we are no longer compelled to follow the Third Circuit's prediction. It is state law, not federal law, we must follow."

The attorneys at Weiner Brodsky Kider PC regularly handle cases alleging violation of unfair or deceptive acts or practices (UDAP) laws at the federal and state level.

circumstances. No person or entity ("Person") should act or refrain from acting upon this information without seeking professional advice. No Person may rely on this information or its applicability to any specific circumstances. The information in this Financial Services Update is in no instance to be taken as an indication of completeness, applicability to a particular situation, or an indication of future developments or results.