Financial Services Update

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WBK News

Weiner Brodsky Kider PC conducted 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 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

FHA Publishes Servicing Section of Handbook 4000.1 and FAQ Preview

In June 2015, FHA published the Servicing section of its Single Family Housing Policy Handbook (Handbook 4000.1). It also published a preview of Frequently Asked Questions (FAQs) that will apply to the sections of Handbook 4000.1 that go into effect on September 14, 2015.

On June 24, 2015, FHA published the Servicing and Loss Mitigation section of Handbook 4000.1 applicable to Title II Forward Mortgages. It also published the Servicer Tier Ranking System II, which is part of the Quality Control, Oversight, and Compliance—Mortgagee Monitoring section of Handbook 4000.1. For use in connection with the new Servicing section, FHA also published servicing model documents. These new sections of HUD Handbook 4000.1 become effective on March 14, 2016, except for the Default Servicing policies in section III.A.2, which become effective for mortgages in default on or after March 14, 2016.

On June 17, 2015, FHA issued FAQs that primarily address the published sections of HUD Handbook 4000.1 that are scheduled to go into effect on September 14, 2015. HUD then announced additional, supplemental FAQs on June 30 that cover the Doing Business with FHA—Mortgagees and the Quality Control, Oversight, and Compliance—Mortgagees sections of Handbook 4000.1. In announcing the FAQs, HUD emphasized that these FAQs are not FHA policy, and should only be used as a guide for reviewing the policy contained in Handbook 4000.1. HUD also noted that mortgagees should not apply the policies in Handbook 4000.1 to their current FHA mortgage business until the September 14, 2015 effective date. All existing FHA policy remains effective until the effective date of Handbook 4000.1.

Handbook 4000.1, including the new Servicing section, is available at: http://portal.hud.gov/hudportal/documents/huddoc?id=40001HSGH.pdf

The Model Documents are available at:
http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/model_documents

The FAQ preview is available at:
http://portal.hud.gov/hudportal/documents/huddoc?id=SFH_FAQ_Preview.pdf

CFPB Takes Action Against Medical Debt Collector for FCRA and FDCPA Violations

The CFPB recently announced an enforcement action against a medical debt collection company for mishandling consumer credit reporting disputes and preventing consumers from exercising important debt collection rights. The CFPB is ordering the company to, among other things, provide over $5 million in relief to harmed consumers, correct its business practices, and pay a $500,000 penalty.

The medical debt collection company allegedly violated the FDCPA by failing to provide debt validation notices within five days of its initial communication with the consumer in connection with the collection of a debt. According to the CFPB, failing to provide the notices prevented consumers from exercising important debt collection rights and denied consumers the opportunity to assess whether the debt was valid and whether the amount or source was correct. The consent order requires, among other things, that consumers who were never sent a debt validation notice and who made payments to the company receive a full refund and have remaining account balances forgiven.

The CFPB also found the company violated the FCRA requirement that furnishers of information to consumer reporting agencies respond to credit report disputes within 30 days of receiving notice of the dispute. The company allegedly failed to respond to more than 13,000 consumer credit report disputes within the required 30-day timeframe, and did not have policies and procedures specifically tailored to the handling or tracking of credit report disputes in compliance with FCRA. Instead, on average the company took more than 90 days to respond to consumer's disputes and, in some cases, took over a year. As a result, consumers spent time and money attempting to follow up on unresolved disputes and experienced distress and confusion due to delays.

The CFPB's press release and consent order are available at:
http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-medical-debt-collector/.

CFPB Sues Auto Lender for Aggressive Debt Collection in Violation of UDAAP

On June 17, 2015, the CFPB filed a complaint against an auto loan company, which primarily lends to current and retired members of the military, for using aggressive collection tactics that took advantage of servicemembers' special obligations to remain

current on debts. According to the complaint, the company routinely made misleading statements regarding the potential impacts of remaining delinquent on servicemembers' military careers and tax liability, as well as its intention to take legal action and its ability to obtain involuntary allotments and garnishments.

The company also would contact or threaten to contact commanding officers to pressure servicemembers into repayment. Servicemembers who obtained financing were required to sign a contract addendum purporting to authorize the company to contact the borrower's employer or commanding officer when collecting debt. However, the CFPB found that even if servicemembers were aware of the provision, they had no opportunity to bargain for its removal and could not have reasonably anticipated the nature and frequency of the threatened and actual contacts to which they could be subject upon default.

Accordingly, the CFPB invoked its authority under the Dodd-Frank Act to find that the company's actions were unfair, deceptive, and abusive acts and practices. The complaint requests that the court, among other things, permanently enjoin the company from committing future violations, impose civil money penalties against the company for its conduct, require compensation be paid to harmed consumers, order disgorgement of ill-gotten revenue, and pay the CFPB's costs incurred in connection with prosecuting the action.

The press release, which includes a link to the complaint, can be found at: http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-servicemember-auto-lender-for-aggressive-debt-collection-tactics/.

State Regulatory Developments

South Carolina Adopts Revised Lending and Broker Regulations

Effective immediately, South Carolina has revised its regulations regarding mortgage lending (S.C. Code Ann. Regs. 15-64) and licensing of mortgage brokers (S.C. Code Ann. Regs. 28-400).

With respect to the mortgage lending regulation, South Carolina now requires that the Nationwide Mortgage Licensing System and Registry (NMLS&R) unique identifier of the mortgage lender or servicer and the unique identifier of the mortgage loan originator must be placed on the promissory note or loan contract and the security agreement as well as any other documents required by Regulation Z at 12 C.F.R. § 1026.36(g). Additionally, the annual report required to be submitted by mortgage lenders pursuant to S.C. Code Ann. § 37-22-220(B) must include an Expanded Mortgage Call Report. However the Commissioner has the discretion to require or accept an Expanded Mortgage Call Report filed through the NMLS&R or similar filing in lieu of the annual report. Finally, the amended regulation notes that the NMLS&R may be used to store the list required by S.C. Code Ann. § 37-22-210(A) and the roster required by S.C.

Code Ann. § 37-22-210(B) in lieu of the Commissioner's office so long as the information may be provided in a reasonable time frame upon request.

With respect to the mortgage broker licensing regulation, South Carolina has replaced the old regulation with this new version to conform to changes in both state and federal law. First, the regulation now refers to definitions contained in the SAFE Act (12 U.S.C. § 5101 *et seq.*) and its implementing regulation (12 C.F.R. Part 1008) as well as the Licensing of Mortgage Brokers Act (S.C. Code Ann. § 40-58-10 *et seq.*), and includes additional definitions for "day," "employee for purposes of compliance with the federal income tax laws," "loan correspondent," and "loss mitigation."

Second, the regulation states that independent contractor processors or underwriters, including those currently licensed as mortgage lenders/servicers pursuant to S.C. Code Ann. § 37-22-110 *et seq*., must comply with the Licensing of Mortgage Brokers Act, except for the following provisions:

- Maintaining a mortgage log (S.C. Code Ann. § 40-58-65(A);
- Maintaining an in-state office (S.C. Code Ann. § 40-58-65(B);
- Completing a mortgage broker fee agreement (S.C. Code Ann. § 40-58-75)
- Putting additional disclosures on the mortgage broker fee agreement (S.C. Code Ann. § 40-58-78); and
- Providing an annual report for loans originated (although an annual report for gross revenue is still required) (S.C. Code Ann. § 40-58-120(A) through (C)).

The regulation further clarifies that independent contract processors or underwriters may not originate mortgage loans.

Third, the regulation clarifies that all South Carolina mortgage loans are subject to the provisions of all South Carolina and federal laws regulated to mortgage loans, including but not limited to RESPA.

Fourth, the regulation notes that the mortgage log required pursuant to S.C. Code Ann. § 40-58-65(A) must be completed electronically as required by the Department, with the licensee bearing the responsibility for all costs associated with the electronic filing, and must include all mortgage loans or applications where a credit report is requested, regardless of whether a mortgage loan is originated or modified.

Fifth, the regulation notes that the annual report required by S.C. Code Ann. § 40-58-120 must be completed as a mortgage call report as defined in the SAFE Act, and submitted electronically on a quarterly basis as required by the NMLS&R by the mortgage broker for all locations and loan originators. The regulation further states that the Department at its discretion may require or accept an Expanded Mortgage Call Report filed through the NMLS&R or similar filing in lieu of an annual report.

Sixth, the regulation requires persons providing or offering loss mitigation to comply with the Licensing of Mortgage Brokers Act unless the Department has determined that the person is exempt by virtue of being a bona fide nonprofit organization, or a South

Carolina-licensed mortgage lender/servicer when acting for mortgage loans it owns or services.

Finally, the regulation defines what constitutes a bona fide nonprofit organization for purposes of exemption from the loss mitigation requirement described above. The Department may consider an organization to be a bona fide nonprofit organization based on, but not limited to, the following criteria:

- It is a 501(c)(3) tax-exempt organization under the Internal Revenue Code;
- It promotes affordable housing or provides homeownership education, or similar services;
- It conducts its activities in a manner that serves public or charitable purposes, instead of commercial purposes;
- It receives funding and revenue and charges fees in a manner that does not incentivize it or its employees to act other than in their clients' best interests;
- It compensates its employees in a manner that does not incentivize them to act other than in the best interest of the clients; and
- It provides or identifies for the borrower mortgage loans with terms favorable to the borrower and comparable to mortgage loans and housing assistance provided under government housing assistance programs.

Such bona fide nonprofit organizations must file for an initial determination and annually for renewal of this determination by the Department. Annual renewals must be filed by December 31st of each year using forms and procedures as required by the Department. However, bona fide nonprofit organizations may use the NMLS&R for initial and renewal filings, although they will be required to pay any associated processing fees.

Litigation Developments

Sixth Circuit Rejects Due Process Claims Based on Wrongful Foreclosure Allegations

On July 6, 2015, the Sixth Circuit Court of Appeals affirmed a district court decision to dismiss claims alleging violations of Michigan state foreclosure law and the due process clause of the Fifth Amendment.

The Plaintiffs brought state law claims alleging Bank of America lacked standing because it could not show full chain of title, that Freddie Mac acted negligently by failing to evaluate them for the Home Affordable Modification Program, and that the eviction was wrongful based on their allegations of improper foreclosure. Finally, the Plaintiffs made allegations of due process violations against Freddie Mac, also based on their allegations of improper foreclosure.

The circuit court ruled the plaintiff's standing argument without merit because there was, in fact, a clear chain of title both published in the newspaper and posted on the property

prior to the sale. The court rejected their linked argument that there must be a record of who owns the underlying note, finding that Michigan law had no requirement and only required the record for the chain of title. Even if there was a defect, the court held the plaintiffs had not "alleged any facts demonstrating the necessary prejudice to make the foreclosure voidable." According to the court, the plaintiffs were incorrect in arguing Michigan law required Bank of America to be the assignee of both the mortgage and the promissory note.

Similarly, the negligence and due process claims against Freddie Mac failed. Plaintiffs failed to show any duty owed by Freddie Mac to the plaintiffs and there is no Michigan case law or statute imposing a legal duty on a lender sufficient to support a claim for common-law negligence. On the due process claim, the court held that the compliance with Michigan's foreclosure-by-advertisement procedure satisfied the requirements of the Due Process Clause.

A link to the Sixth Circuit's opinion may be found here:
http://www.ca6.uscourts.gov/opinions.pdf/15a0137p-06.pdf

Fourth Circuit Finds District Courts Have Concurrent Jurisdiction Over Certain Foreclosure-Related Bankruptcy Claims

On July 1, 2015, the Fourth Circuit Court of Appeals found a federal district court has concurrent jurisdiction to hear claims regarding violations of the automatic stay under 11 U.S.C. § 362(k). The order reversed the decision of the district court, which had dismissed the case for lack of subject matter jurisdiction.

Defendant LifeStore Financial Services notified Plaintiff of foreclosure proceedings in July 2011. In response, Plaintiff filed a pro se Chapter 13 bankruptcy petition in September and notified LifeStore of the filing. The bankruptcy court dismissed the petition for not meeting various statutory filing requirements, but did not sanction her with a filing ban, which is only used as extraordinary remedy for perceived abuses of the Bankruptcy Code. Although Plaintiff refiled and notified LifeStore of her refiled Chapter 13 petition in December, her foreclosed homestead was sold while it was pending. Plaintiff brought an action in federal district court against LifeStore for a violation of the automatic stay under 11 U.S.C. §362(k).

Defendants argued the district court did not have subject matter jurisdiction because 11 U.S.C. §362(k) does not give rise to a private right of action outside of bankruptcy court. Granting the motion to dismiss, the district court pointed to 28 U.S.C. §157(a), which allows for referral of bankruptcy questions to bankruptcy court, and a standing North Carolina Order that automatically refers all bankruptcy matters to a bankruptcy judge.

The circuit court found that, while §157(a) and the North Carolina order were procedural "traffic regulator(s)," neither restricted the subject matter jurisdiction carried by the district court under 28 U.S.C. §1334(a). Importantly, the circuit court held that while

§157(a) may allow a bankruptcy court to adjudicate a claim to final judgment, it does not deprive the district court of its original jurisdiction. It is merely a "procedural mechanism" that authorizes bankruptcy courts to 1) hear certain cases, subject to appeal to the district court, and 2) recommend findings of fact and conclusions of law to a district court for de novo review and final judgment in other cases. The court was very explicit in holding §157(a) does not implicate subject matter jurisdiction.

On the merits, the district court held Houck had not alleged a well-pled complaint, applying the following standard, "If after taking the complaint's well-pleaded factual allegations as true, a lawful alternative explanation appears a more likely cause of the complained of behavior, the claim for relief is not plausible." The circuit court rejected this formulation of the well-pleaded complaint rule and instead reiterated the standard formulated in *Twombly/Iqbal*. Using this standard, the court held that it was "difficult to imagine" what more a court could demand from Houck outside of her initial allegations.

A link to the Fourth Circuit's opinion may be found here:
http://www.ca4.uscourts.gov/Opinions/Published/132326.P.pdf

MERS Not Required To Record Transfers of Mortgage Notes Under Texas Law

The Fifth Circuit Court of Appeals recently held that MERS did not violate Texas law by recording only an initial deed of trust as the beneficiary and nominee for those who owned the corresponding mortgage promissory notes, rather than recording a new deed of trust for each assignment of the mortgage note. In reaching this holding the Court explained there is: (a) no independent cause of action for a declaratory judgment under federal law; (b) no private right of action under the Texas recording statute; and (c) no cognizable injury for a fraudulent lien, or unjust enrichment, because there is no obligation to record a deed of trust.

Three Texas counties sued MERS and Bank of America, ostensibly because MERS privately tracked subsequent transfers of the mortgage notes, leaving the counties without records of the transfers and corresponding recording fees. After soundly losing in the trial court, the counties appealed, arguing: (1) they had a viable independent cause of action under the federal Declaratory Judgment Act; (2) they had a private right of action under the Texas recording statute; (3) the recordings by MERS constituted a misrepresentation or a fraudulent lien, within the meaning of the Texas Civil Practice and Remedies Code; and (4) MERS and the lenders were unjustly enriched by not paying recording fees. According to the Fifth Circuit, none of these arguments had merit.

Addressing the claim that the counties had an independent cause of action under the federal Declaratory Judgment Act, the Court explained that a declaratory judgment is a type of relief for a viable claim, not an independent claim. Consequently, the counties had no separate cause of action for a declaratory judgment.

As for a private right of action under the Texas recording statute, the Court explained that no such right existed. The recording statute only addresses the nature or form of the instrument, if an instrument is filed. More fundamentally, a deed of trust does not need to be filed under Texas law. Consequently, there is no requirement that new deeds of trust be filed when the underlying mortgage notes are transferred.

More particularly about misrepresentations and a fraudulent lien, one country argued MERS had no real interest in the debts or promissory notes secured by deeds of trust, and was not a true beneficiary because it was nothing more than a designated "nominee." Consequently, by being designated on the deeds of trust as a beneficiary, MERS was misrepresenting its status in the land records. Further, by transferring the mortgage note without recording a new deed of trust, the county implied that MERS was "splitting" the note from the security instrument. The Court was not persuaded by any of these arguments. Under Texas law, the security interest is tied to the mortgage note. A transfer of the note carries the right to enforce the corresponding security instrument. This means MERS made no misrepresentations about its interests, and MERS could simultaneously serve as both a nominee and beneficiary. MERS could also remain a beneficiary, when subsequent transfers of interests in the mortgage notes were made without subsequent recordings of new deeds of trust.

As for the unjust enrichment claim, it was also meritless. Since there was no requirement to file deeds of trust, the defendants were not unjustly enriched by avoiding filing fees. The fact that defendants did record and pay the fees for original deeds of trust, gave them first lien priority over other non-recorded interests, which is not an unjust enrichment.

Weiner Brodsky Kider represents clients for mortgage loan related issues in state and federal courts throughout the United States.

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