WEINER BRODSKY KIDER PC

Financial Services Update

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HIGHLIGHTS

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WBK News

Jack Konyk spoke on Developments and Trends in Mortgage Enforcement Actions at the New York MBA's Annual Convention on September 1 in Syracuse, NY. **MORE INFO**

Jim Milano will address state and federal regulatory compliance issues facing reverse mortgage originators at the 15th Annual Reverse Mortgage Day on September 9 in Austin, TX. **MORE INFO**

Jack Konyk will address regulatory compliance components at the Pennsylvania Bankers Association's Consumer Lending School on September 10 in Harrisburg, PA. **MORE INFO**

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 Additional Sections of its Single Family Policy Handbook and New Model Document for 203(k) Consultants

On August 26, 2015, FHA announced that it published additional sections of its Single Family Housing Policy Handbook (HUD Handbook 4000.1). The new sections include:

- Doing Business with FHA—Other Participants in FHA Transactions.
- HUD Real Estate Owned (REO) purchasing.

FHA also announced a new model document for 203(k) consultants and a revised Land Use Restriction Addendum for use by nonprofits and government entities in REO sales.

Doing Business with FHA—Other Participants in FHA Transactions

These new sections cover the eligibility, approval, and recertification requirements, as well as quality control, monitoring, and enforcement policies for the following participants in FHA transactions:

- 203(k) consultants.
- Direct Endorsement (DE) underwriters.
- Nonprofits and Government Entities.

Effective Date: March 14, 2016.

HUD Real Estate Owned (REO) Purchasing

This new section contains policies for lenders originating a new mortgage for the purchase of a HUD REO property. In addition, all of the updates and additions contained in this Handbook section can also be found in Mortgagee Letter 15-17, which details the new changes to FHA's current policy, including:

- REO Appraisal.
- Ordering a new appraisal.
- Responsibility for determining compliance of the property with Minimum Property requirements.
- Loan-to-Value ratio for investment properties.
- Maximum mortgage amounts.
- Financing Upfront Mortgage Insurance Premiums on $100 down loans.

In addition, Mortgagee Letter 15-17 rescinds the changes to the calculation of the maximum mortgage amount for the purchase of HUD REO property previously established in Mortgagee Letter 2013-44.

Model Document for 203(k) Consultants/ Non-profits/ Government Entities

FHA implemented a new 203(k) Consultant Roster Certification form which Consultants may begin using immediately. However, the certification must be used by the effective date of the new Single Family Housing Policy Handbook's Doing Business with FHA—Other Participants—203(k) consultant's section.

FHA also implemented a revised version of the Land Use Restriction Addendum (LURA) for use by Nonprofits and Government Entities in connection with the HUD REO sales contract.

Effective Date: March 14, 2016.

The new and revised 203(k) recertification form and Addendum documents are available on HUD's Single Family Mortgages Model Documents web page at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/model_documents

The Single Family Housing Policy Handbook including the new sections is available on HUD's website at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/handbook_4000-1

CFPB Issues Second Monthly Complaint Report

The CFPB released its August 2015 complaint report which is the second in its series of monthly complaint reports.

According to the August 2015 complaint report (Vol. 2), consumer loan complaints showed the greatest percentage increase from May - July 2014 (718 complaints) to May - July 2015 (1,154 complaints), representing about a 61 percent increase. Bank account or services complaints showed the greatest percentage decrease from May - July 2014 (1,976 complaints) to May - July 2015 (1,895 complaints), representing about a 4 percent decline.

Credit reporting complaints showed the greatest month-over-month percentage increase while mortgage complaints showed the greatest month-over-month percentage decrease. For the 23rd consecutive month, the CFPB handled more complaints about debt collection than any other type of complaint. Debt collection complaints represented about 31 percent of complaints submitted in July 2015. Debt collection, credit reporting, and mortgage complaints continue to be the top three most-complained-about consumer financial products and services, collectively representing about 73 percent of complaints submitted in July 2015.

For the August 2015 complaint report, Los Angeles, California was the geographical spotlight.

CFPB, FDIC, and OCC Issue Consent Order For Allegedly Deceptive Deposit Account Practices

On August 12, 2015, the CFPB, FDIC, and OCC announced a consent order against RBS Citizens Financial Group, Inc., RBS Citizens, N.A., and Citizens Bank of Pennsylvania for alleged violations of Unfair, Deceptive, and Abusive Acts and Practices (UDAAP) regarding certain deposit account practices. The Consent Order requires the companies to pay $11 million in refunds to consumers, and $7.5 million in civil penalties.

The Consent Order alleges the companies processed deposits in a manner so that certain customers did not receive credit for the full amount of the deposited funds, and that their disclosures related to the deposit process were deceptive and failed to rectify the issue.

Specifically, the Consent Order alleges that the companies utilized a centralized compliance system, and that all checks and deposit slips were reviewed centrally for accuracy through an automated review process. Where the automated review process indicated that there was a discrepancy between the deposit slip and the check amount higher than $50, the actual documents were reviewed. However, if the automated review process indicated a discrepancy of less than $50, the documents were not

manually reviewed and instead the customer was credited with the amount listed in the deposit slip. The Consent Order alleges that this was the case even though the companies knew the items deposited indicated a different amount.

According to the Consent Order, this process resulted in some consumers receiving credit for less than they actually deposited. Further, the Consent Order alleges that this process was inconsistent with the companies' written policy, and indicated a weakness in the compliance management and oversight functions of the companies.

The Consent Order further found the disclosures regarding this practice to be deceptive, because they stated that all consumer deposits were subject to verification and correction, but the companies did not actually verify and correct deposit discrepancies as disclosed.

The Consent Order may be found here:
http://files.consumerfinance.gov/f/201408_cfpb_consent-order-rbs-citizens.pdf

The CFPB's Press Release may be found here:
http://www.consumerfinance.gov/newsroom/cfpb-orders-citizens-bank-to-pay-18-5-million-for-failing-to-credit-full-deposit-amounts/

CFPB Consent Order for Deceptive Health-Care Credit Enrollment Tactics

The CFPB recently announced a consent order with Springstone Financial, LLC, a wholly-owned subsidiary of a large peer-to-peer lending company, for alleged deceptive credit enrollment tactics. Relying on its UDAAP authority, the CFPB ordered the company to pay $700,000 in consumer relief to approximately 3,200 consumers, and conveniently reimburse consumers affected by the alleged deceptive practices.

From January 2009 through December 2014, the company marketed two loan products, an installment loan and a deferred-interest loan, at dental offices as part of its health-care services financing program. According to the CFPB, health-care providers that were trained and monitored by the company to market the deferred-interest loan product misled consumers about the terms and conditions of the product during the application process. The CFPB found, in some instances, that dental office staff told consumers the deferred-interest product was a "no-interest" loan and did not mention that the consumer would have to pay 22.98% interest on the loan if it was not paid off in full by the end of a promotional period.

While the deferred-interest product was terminated by the company in December 2014, the CFPB found more than 3,200 consumers may have been affected by the deceptive practices, and used its UDAAP authority to take action.

A copy of the CFPB's consent order is available at: http://files.consumerfinance.gov/f/201508_cfpb_consent-order-springstone-financial-llc.pdf.

State Regulatory Developments

North Carolina Amends Provisions Regarding Debt Collector Statutes

North Carolina recently amended its debt collector statutes in order to conform more to the Federal Fair Debt Collection Practices Act. The amendments, in part, allow debt collectors to seek written permission from debtors to communicate with third parties at any time, before or after default. These changes became effective August 5, 2015.

North Carolina Senate Bill 678 (SB 678), enacted on August 5, 2015, amends the state's debt collector statutes to more nearly conform to the Federal Fair Debt Collection Practices Act. These provisions apply to debt collectors who are not collection agencies. Under North Carolina law, a "debt collector" means any person engaging, directly or indirectly, in debt collection from a consumer except for collection agencies. N.C. Gen. Stat. § 75-50. "Collection agencies" means a person directly or indirectly engaged in soliciting, from more than one person delinquent claims of any kind owed or due or asserted to be owed or due the solicited person and all persons directly or indirectly engaged in the asserting, enforcing or prosecuting of those claims, and does not include entities such as banks and mortgage companies. N.C. Gen. Stat. § 58-70-15.

Of particular note, SB 678 expands the statutory exceptions under which debt collectors may communicate with any person other than the debtor or his attorney. First, the bill permits communications by debt collectors made both before and after default to third parties with the written permission of the debtor or his attorney. In addition, the bill permits a communication made by a debt collector in the good faith belief that the communication was to the spouse or one who stands in the place of the spouse of the debtor or to the parents or guardian of a minor debtor who lives with such parents. Finally, the bill permits communications for the sole purpose of obtaining "location information" about the debtor, and requires a bill collector making such a communication to: (1) identify himself or herself, state that he or she is attempting to confirm or correct location information about the debtor, and, only if expressly requested, identify his or her employer; (2) not state that the debtor owes a debt; and (3) not communicate with any particular person more than once a week or three times in total during any 30 day period unless requested to do so by that person.

Moreover, SB 678 provides that a debt collector making a communication to a third-party for the purpose of obtaining "location information" about the debtor is no longer required to notify the third-party that the purpose of the communication is to collect a debt.

The bill amends the definition of "location information" to mean "information about a consumer's place of abode, any telephone numbers used by the consumer, and information about the consumer's place of employment."

Finally, SB 678 authorizes a debt collector to collect filing fees, service of process fees, or other court costs actually incurred, regardless of whether the action is completed and has resulted in a judgment awarding court costs, provides that collection of such fees is not a violation of the North Carolina Consumer Finance Act.

The full text of the bill is available at the following link:
http://www.ncleg.net/Sessions/2015/Bills/Senate/PDF/S678v4.pdf

Litigation Developments

Appellate Courts Reject Class Action "Pick-off" Attempts Under Rule 68 in Advance of Supreme Court's Consideration of the Issue

Three separate U.S. Courts of Appeals issued opinions last month on whether an unaccepted offer of judgment made to a named plaintiff in a class action moots the plaintiff's individual claims as well as those of the putative class. These opinions come in advance of the Supreme Court's consideration of these same issues in *Campbell-Ewald v. Gomez*, which is slated for argument in the Court's upcoming term.

Under Rule 68 of the Federal Rules of Civil Procedure, a defendant can make a settlement offer or "offer of judgment" to a plaintiff who then has 14 days to decide whether to accept the offer. If the plaintiff rejects the offer of judgment (or does nothing), but then later obtains a judgment which is less favorable than the unaccepted offer, the plaintiff is liable for paying the court costs incurred after the date the offer was made, which can sometimes include the opposing party's attorneys' fees. Rule 68 is aimed at encouraging settlements in civil litigation by essentially penalizing plaintiffs who do not accept reasonable settlement offers.

In *Chapman v. First Index, Inc.*, a putative class action brought under the Telephone Consumer Protection Act (TCPA), the Seventh Circuit held that a defendant's offer of complete relief to the named plaintiff did not render his individual claim moot. In so holding, the Seventh Circuit expressly overruled its prior decisions on the issue and stated that it wanted to "clean up the law of this circuit promptly," in advance of the Supreme Court's decision in *Gomez*.

Specifically, the Seventh Circuit cited to a dissent by Justice Kagan in a prior Supreme Court case*, Genesis Healthcare Corp. v. Symczyk*, wherein the majority assumed the mootness of the individual plaintiff's claim following a rejected Rule 68 offer, but did not directly decide the issue. In her dissent, Justice Kagan concluded that "an unaccepted offer of judgment cannot moot a case[,] . . . however good the terms." Justice Kagan explained that "[a]n unaccepted settlement offer – like any unaccepted contract offer –

is a legal nullity, with no operative effect" and further noted that Rule 68 "specifies that 'an unaccepted offer is considered withdrawn.'" Justice Kagan cautioned: "So a friendly suggestion to the Third Circuit: "Rethink your mootness-by-unaccepted-offer theory. And a note to all other courts of appeals: Don't try this at home."

In *Hooks v. Landmark Industries, Inc.*, a putative class case brought under the Electronic Funds Transfer Act, the trial court had dismissed as moot the plaintiff's individual claim, as well as the class claims, following a rejected offer of judgment. The Fifth Circuit reversed and concluded that neither the individual nor class claims were mooted by the unaccepted offer of judgment. In doing so, the Court sided with decisions from the Ninth and Eleventh Circuits which had found Justice Kagan's dissent in *Genesis* persuasive.

In *Bais Yaakov of Spring Valley v. ACT, Inc.*, another TCPA case, the First Circuit held that an unaccepted offer of judgment did not moot the plaintiff's individual claim. The Court explained that in order to determine whether an unaccepted Rule 68 offer triggers mootness, it needed to determine whether the plaintiff had "received complete relief." As the Court noted, an unaccepted Rule 68 offer is deemed "withdrawn." Therefore, an unaccepted Rule 68 offer is a "red herring" because "it does not, in itself, provide any relief." In so holding, the First Circuit acknowledged that it was joining the growing number of Circuits reaching this same conclusion in the wake of the *Genesis* dissent.

It remains to be seen how the Supreme Court will rule when it takes up this issue in the *Gomez* case which is scheduled for argument on October 14, 2015.

Weiner Brodsky Kider PC regularly defends consumer class action cases on behalf of clients around the country.