MORRISON | FOERSTER

Financial Services Report

Staying Ahead of the Summons

Award Winning Newsletter

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Inside

Editor's Note

These are things we learned this summer: That it is much harder it is to play BrickBreaker with the new RIM trackball than the old trackwheel. That salmonella was an heirloom variety of jalapeño pepper. And that photos of the Jolie-Pitt twins were worth $14 million. By our reckoning, that makes their nail clippings worth about $1 million per Little Piggy. We're putting our baby pics on eBay.

Sorry, it's hard to believe that summer is over. Our palm tree fingernail decals are already starting to fade.

It's fall now, and Congress is back in session. Also, it's election season, so look to the right and to the left before proceeding. Legislators on both sides of the aisle will be trying to perfect the indoor hammer throw. It's true that the Democrats are divided, but not how you think. It's between the fist bumpers and the chest thumpers. Based on what we saw in Denver, they look like they were getting ready to invade Georgia. Meanwhile, the Republicans look like they're wondering where the peloton went.

The Olympics changed not only fashion but also the vernacular. "Wind-aided" briefs have always been part of a lawyer's armory, but how long before someone invents a Speedo LZR Racer business suit? And what about the 4-by-4 fifty-state survey, mixed "due diligence," and the rare triple entendre dismount? We plan to try out for rhythmic linguistics.

Returning to topic, Fannie and Freddie teetered and may soon totter. Credit cards and mortgages continue to take center stage as Congress and the regulators do the hokey-pokey. And it's finally prime time for subprime, with scores of race-based discrimination and "Option ARM" cases proceeding. Hundreds of subprime-related suits have been filed already. According to one study, 448 subprime-related cases had been filed just in federal court since January 2007; by comparison, the RTC handled all of 559 lawsuits in six years between 1989 and 1995. Some new preemption and arbitration decisions are reported in these pages too, plus the Seventh and Eighth Circuits write a requiem and a coda to "Firm Offer" litigation.

Until next time, to ALCON (all concerned), 4COL (for crying out loud) please forgive our MUAH (multiple unsuccessful attempts at humor) because @TEOTD (at the end of the day) I am LQTM (laughing quietly to myself). TTFN (ta-ta for now). ■

William L. Stern, Editor

MoFo Metrics

304	Pounds lifted by China's gold medal–winning female weightlifter
64	Hot dogs consumed in 12 minutes by 2008 world champion
10	Calories consumed each day by Michael Phelps, in thousands
6	Percentage of American men who wear ties to work every day
455	U.S. debt per household, in thousands of dollars
40	U.S.'s percentage of total global spending on research
3	Number of physicists in the House of Representatives

Beltway Report

SOBRIETY CHECKPOINT

As we reported last time, in May 2008 the Federal Reserve Board, OTS, and National Credit Union Administration proposed new unfair and deceptive acts and practices rules that would establish a new "standard of fairness" for credit cards. Comment period closed August 4. Over 50,000 letters were filed, enough to make your Inbox explode. The agencies have said that a final rule will be published by the end of this year.

Specifically, the proposed UDAP rules would prohibit issuers from: (a) Treating a payment as late unless the issuer mails a statement 21 days before the payment due date; (b) Applying payments to lower-rate or promotional balances before applying payments to higher-rate balances (as almost all issuers currently do); (c) Charging a fee for exceeding the credit limit due to an authorization hold for transactions, like those at gas stations and hotels, that exceed the actual charge (this element also could have implications for other transactions, such as transactions that are settled but not authorized); (d) Using double-cycle billing methods; and (e) Increasing rates on the outstanding balance of an account, unless the increase is based on limited narrow exceptions.

The rules could have a dramatic impact on the credit card industry. Even the OCC agrees in its August 18 comment letter that the proposed rules raise "safety and soundness" concerns, are not necessary for the fair treatment of consumers, "could result in a significant reduction of credit availability," and mark a "major shift away from the Board's longstanding reliance on disclosure rules as the primary form of consumer protection regulation."

Some parts of the rules make about as much sense as do-it-yourself surgery. Consider: Prohibiting increases in the rate on the outstanding balance of an account would eliminate the much-criticized practice of "universal default" but also would limit risk-based pricing—requiring the industry to restructure credit card portfolios as well as contractual agreements. And, by the way, limiting risk-based pricing likely will reduce the amount of credit available to consumers because issuers would be forced to raise prices for better customers and curtail services to those who pose higher credit risks. The proposed UDAP rules would affect every aspect of credit card operations, including pricing, disclosures, programming, billing, billing error policies, and advertising practices. In addition, issuers would need to change all of their current documentation, their solicitations, and in some cases, their billing statement procedures.

But wait, there's more: On July 31, the House Financial Services Committee approved a bill (H.R. 5244) that targets a range of common credit card practices. Even though the Senate is not expected to act on the issue this year, lawmakers sent a clear message to the Fed on the regulatory proposal for unfair and deceptive card practices.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

HIS AND HERA'S

Congress overwhelmingly passed the Housing and Economic Recovery Act of 2008 ("HERA"), an omnibus housing bill combining regulatory reform of the government-sponsored enterprises ("GSEs"), modernization of the FHA, and provisions to help troubled borrowers, which President Bush signed into law on July 30. The law creates a new combined regulator for Fannie Mae, Freddie Mac, and the Federal Home Loan Banks, and includes the Treasury Department's proposal to increase Fannie and Freddie's lines of credit, among other financial levers. Mortgage relief comes in several flavors: authorization for FHA to insure billions of refinanced mortgages; higher caps for loans Fannie and Freddie may buy up in high-cost areas; and good ol' fashioned election-year tax breaks.

For more information, contact Ollie Ireland at oireland@mofo.com.

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Although businesses might be able to adapt their existing anti-fraud systems to combat identity theft, entities subject to the Red Flags Rule still need to confirm that they have adopted the required written programs.

OCC SETS RECORD FOR INDOOR DASH

The OCC made Usain Bolt look like a slacker when it published an interim final rule in eleven days (final time, in a slight headwind: 11.03 days) implementing the provisions of the HERA that modify permissible public welfare investments for banks. The OCC's public welfare investments rule (12 C.F.R. part 24) replaces the rule adopted less than four months ago, and restores the provisions that, in relevant part, allow national banks to make investments in targeted redevelopment areas and in "qualified investments" for CRA purposes. Shrugging off the new Olympic record, Comptroller John Dugan focused on the intended benefits of the OCC's rule: "This has the potential to generate additional private investments that will go toward strengthening and stabilizing our communities, and we greatly appreciate the leadership in Congress for restoring this valuable authority."

COMING TO THEATERS THIS FALL

Last fall, the federal banking agencies and the FTC issued a new requirement called the "Red Flags Rule" for "creditors" and "financial institutions" to develop and implement an "Identity Theft Prevention Program" to detect, prevent, and mitigate identity theft with respect to certain consumer and commercial accounts. In addition, a new rule from the federal bank agencies and the FTC requires all users of credit reports to confirm a consumer's identity when they receive an address discrepancy notice from a credit reporting agency. This new rule also would require users to furnish corrected address information to credit reporting agencies under certain circumstances. Although businesses might be able to adapt their existing anti-fraud systems to combat identity theft, entities subject to the Red Flags Rule still need to confirm that they have adopted the required written programs. The deadline for compliance with these new rules is November 1—only weeks away.

For more information, contact Andrew Smith at asmith@mofo.com.

AFFILIATE-MARKETING EXAMINATION PROCEDURES

Do you know where your compliance procedures are? Just around the corner is the mandatory compliance date—October 1, 2008—for the affiliate-marketing rules under the Fair Credit Reporting Act. As financial institutions and other covered entities continue to hone their compliance measures for the new rules, the federal banking agencies, acting through the FFIEC Task Force on Consumer Compliance, recently approved interagency examination procedures for assessing compliance, including evaluating an institution's policies, procedures, and internal controls for providing an appropriate notice to consumers. The interagency examination standards can be found at http://www.federalreserve.gov/boarddocs/caletters/2008/0806/08-06_attachment.pdf.

For more information, contact Andrew Smith at asmith@mofo.com.

HOW DO MSBS SPELL RELIEF?

On July 22, the House passed a bill (H.R. 4049) designed to provide regulatory relief for banks that provide accounts with funds held by money-services businesses ("MSBs"). The bill is designed to clarify that a bank would not have to ensure that an MSB is complying with the Bank Secrecy Act and other regulations; instead, MSBs would be required to self-certify that they have sufficient anti-money-laundering controls. ■

Operations Report

GRAND THEFT AUTO IV

This summer, New York State hurled a javelin at credit card issuers. New York joined several other states in asserting the ability to impose taxes on banks that have credit card holders or contracts with merchants in that state regardless of whether the banks have a physical presence in New York. For tax years beginning on or after January 1, 2008, a bank is "doing business" and thus subject to tax in New York if it: (a) issues credit cards to 1,000 or more customers with New York mailing addresses; (b) contracts with merchants in 1,000 or more New York State locations; (c) has receipts during the tax year totaling $1 million or more from covered New York credit card customers or merchant contracts; or (d) meets certain aggregate thresholds for credit card customers and merchants or receipts from credit card customers and merchants.

MIDSUMMER NIGHT'S DREAM

In late July, the Treasury Department announced publication of a Best Practices guide for U.S. covered bonds, intended to promote covered bond issuances. The Best Practices are intended as a complement to the FDIC's Final Covered Bond Policy Statement issued on July 15, 2008. In connection with the announcement, four financial institutions (Bank of America, Citigroup, JP Morgan, and Wells Fargo) announced plans to issue covered bonds. The Best Practices establish a template for U.S. covered bond issuances and outline additional standards for covered bonds that will bolster investor confidence in these instruments.

For more information, contact Ollie Ireland at oireland@mofo.com.

MARK YOUR CALENDARS

With credit and liquidity concerns at historic levels, and widespread investor rejection of "securitizations," the covered bond market may prove to be an important alternative means of financing mortgage originations by depositary institutions in the U.S. and Canada. The covered bond market has flourished in Europe for centuries, but is new to U.S. and Canadian depositary institutions and institutional investors. Over the last several months, various officials have expressed strong interest in seeing a U.S. covered bond market develop.

The Firm will be hosting a seminar on covered bonds at its New York offices on September 11, 2008, from 8:30-11:00 a.m. Topics that will be covered include the background of the covered bonds market; covered bond structures in the U.S., UK, and Canada; the bank regulatory and insolvency issues relating to covered bonds; the recent FDIC Policy Statement; the Treasury Best Practices; beyond Best Practices; accounting and tax issues; and more.

For more information, contact Ollie Ireland at oireland@mofo.com or Anna Pinedo at apinedo@mofo.com.

CREDIT RATING AGENCY REFORM

On July 1, the SEC issued three rule proposals aimed at responding to ongoing concerns regarding the role and importance of credit ratings issued by nationally recognized statistical rating organizations ("NRSROs"). The Proposed Rules are intended to address the SEC's concern that the inclusion of credit ratings throughout its rules and regulations may have acted as a regulatory "seal of approval" for the ratings such that market participants may have placed "undue reliance" upon them. The proposed amendments would eliminate references to these ratings in numerous SEC rules and forms.

The proposed rules follow, and are a companion to, the issuance on June 16, 2008, of proposed rules to increase the transparency of and avoid conflicts of interest in the credit rating process (the "NRSRO Proposals" and, together with the Proposed Rules, the "Proposals"). As drafted, the Proposals would have a significant impact on how market participants use credit ratings during the new issuance process, in determining investment suitability, for computing net capital re-

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quirements, and in complying with other SEC rules and regulations. They also would impact the NRSRO regulatory regime and how NRSROs interact with market participants and other credit rating agencies. For a review as to how the Proposals would impact the asset-backed market, see http://www.mofo.com/news/updates/files/080805AgencyReform.pdf.

For more information, contact Anna Pinedo at apinedo@mofo.com.

SIXTH TIME NO CHARM FOR PLAINTIFFS' TILA CLAIMS

Yet another court has held that it is OK to raise the interest rate on a credit card without notice when a customer defaults. (*Shaner v. Chase Bank USA, N.A.*, 07-11766, 2008 Westlaw 3198678 (D. Mass. Aug. 8, 2008).) Plaintiff contended that Chase's default interest rate practice violated the TILA and the Massachusetts UDAP statute and that it constituted an "illegal penalty." Following decisions from several other federal district courts and the Ninth Circuit, a district court in Boston dismissed the case with prejudice. The court rejected the TILA claim, finding that Regulation Z did not require contemporaneous notice of the default interest rate increase because the customer agreement provided sufficient notice that the customer's interest rate could increase if she defaulted. The court found that the UDAP claim was based on the alleged TILA claim, so it failed for lack of a predicate violation. The court also concluded that plaintiff could not assert an "illegal penalty" claim because Chase's practice complied with Delaware banking law.

So far, every court that has considered the issue has upheld the practice of raising the interest rate on a credit card without additional notice when a cardholder defaults. The Federal Reserve Board's proposal to amend Regulation Z has more to say on these issues, but the Fed has not yet adopted the final rules.

For more information contact Bob Stern or Nancy Thomas, who represent Chase in these cases, at rstern@mofo.com or nthomas@mofo.com.

Several statutory and regulatory provisions impose AML obligations on mutual funds, and the SEC guidance breaks them out in a series of toolkits, including materials for due diligence programs for correspondent accounts and private banking accounts, suspicious activity reporting, and information-sharing with other financial institutions.

BUSY HANDS ARE HAPPY HANDS

On August 7, 2008, the SEC issued guidance for mutual funds on compliance with the Bank Secrecy Act ("BSA") and key anti-money laundering ("AML") controls. Like the guidance issued for broker-dealers earlier this year, the BSA/AML guidance for mutual funds, labeled a "source tool," is designed as a compilation of key AML laws, rules, and guidance. Several statutory and regulatory provisions impose AML obligations on mutual funds, and the SEC guidance breaks them out in a series of toolkits, including materials for due diligence programs for correspondent accounts and private banking accounts, suspicious activity reporting, and information-sharing with other financial institutions. The SEC source tool for mutual funds is available at http://www.sec.gov/about/offices/ocie/amlmfsourcetool.htm. ■

For more information, contact Tom Scanlon at tscanlon@mofo.com.

Firm Offer Update

THE FAT LADY SINGS, AND THEN AN ENCORE

In an opinion issued June 19, the Eighth Circuit joined a growing chorus of circuits holding that a "firm offer of credit" is simply an offer that the creditor will honor if the consumer meets the creditor's pre-selected criteria. The offer need not set forth the material terms of the loan, such as interest rates, loan duration, or costs and fees. Nor must the offer be "valuable"—it must simply be "firm." *See Poehl v. Countrywide Home Loans, Inc.,* 528 F.3d 1093 (8th Cir. 2008).

Two weeks later, the Seventh Circuit performed an encore. In *Cavin v. Home Loan Center, Inc.*, 531 F.3d 526 (7th Cir. 2008), it exonerated a mortgage lender from charges that its mailer, sent to thousands of Illinois residents, violated the Fair Credit Reporting Act. The letters stated that the recipient had been "pre-approved to receive HomeLoanCenter.com's exclusive SmartLoan program," contained a box with the figures of 1.00%/4.27% adjacent to two columns that listed various monthly payments for various loan amounts, and stated that defendant could "prequalify [the recipient] right over the phone in minutes and provide [the recipient] with a customized loan program that suits [the recipient's] needs." However, the letters also stated that not all applicants would be approved. The district court sided with the defense, and the Seventh Circuit affirmed.

The plaintiffs argued that defendant accessed their credit information "without a permissible purpose" in that the mailers did not constitute a firm offer of credit because material terms of the loan program were not disclosed or were not adequately explained. The Seventh Circuit disagreed: "The mailer identified the basis for calculating interest, the length of the loan, the possibility of a rate change after thirty days, the minimum payment option with accompanying deferred interest, and the information needed to obtain the loan." Requiring a financial institution to disclose all material terms would result in the mailer being more difficult for the consumer to understand. "[T]he proper inquiry in ascertaining whether a letter is a firm offer is whether the offer will be honored, not whether all of the material terms are listed." ■

For more information, contact Michael Agoglia at magoglia@mofo.com.

Mortgage Report

FED ADOPTS FINAL MORTGAGE-LENDING RULE

On Bastille Day, the Fed adopted a final rule aimed at protecting consumers from irresponsible lending. The rule amends Regulation Z and adds new requirements for subprime mortgage loans, such as requiring lenders to assess a borrower's ability to repay a loan, and verify a borrower's income and assets; banning certain prepayment penalties; and requiring creditors to establish escrow accounts for property taxes and homeowners' insurance. For all loans, the rule prohibits certain servicing practices and bars a creditor or broker from encouraging an appraiser to misrepresent the value of a home. It also requires advertising to contain additional information about rates, monthly payments, and other loan features, and it bans seven deceptive or misleading advertising practices, including representing that a rate or payment is "fixed" when it can change.

For more information, contact Michael Agoglia at magoglia@mofo.com.

PRIME TIME FOR SUBPRIME

In past issues, we reported on the *NAACP* action, the case that started the conga line of filings against lenders alleging race-based discrimination. That case awaits a hearing on the first round of motions to dismiss.

Elsewhere, of the 30+ private party actions filed, most are pending in California. A core group of plaintiffs' firms has formed an "Executive Committee" to jointly prosecute these

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Mortgage Report

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cases. They attempt to challenge "discretionary pricing policies" as having a disparate impact on minority borrowers. Disparate impact liability arises where a facially neutral practice disproportionately affects minorities and the defendant is unable to articulate a "legitimate business necessity" for that practice. While the complaints are deliberately unclear about what constitutes the targeted discretionary pricing policies, the named plaintiffs typically allege that allowing their brokers to use yield spread premiums ("YSPs") qualifies. Given the problems inherent in trying to certify YSP class actions, plaintiffs' theories are expected to remain a moving target.

Defendants in about two dozen cases have moved to dismiss these claims based on insufficient facts, and on Supreme Court authority from the employment context rejecting disparate impact claims and, instead, holding that a plaintiff has to prove intentional discrimination. Given the current environment, few courts have been willing thus far to dismiss these cases at the outset. Courts have not accepted the arguments that disparate impact liability is unavailable under the Equal Credit Opportunity Act and the Fair Housing Act, often because Circuit Court decisions (issued largely before the Supreme Court decisions in the employment world) have allowed disparate impact claims under ECOA and the FHA. Trial courts have, however, thrown out claims of intentional discrimination as lacking the minimum factual basis to survive even a threshold pleading challenge. But more recently, a district judge in Boston rejected a motion to dismiss, holding that the continuing violations doctrine tolls the statute of limitations. S*ee Miller v. Countrywide Bank, N.A., et al.*, No. 07cv11275-NG.

Many have seen these suits as political acts. Plaintiffs don't really have any specific facts to say that YSPs result in discriminatory impacts. But that's why enterprising statisticians exist—plaintiffs' counsel have publicly declared their goal to get the underlying loan data, and then turn it over to their rent-an-expert. Never having seen that data, they're still certain that a statistical model will be built to reach their desired conclusion. They are counting on adverse publicity from their "findings" to bring the mortgage industry to the settlement table. Stay tuned.

For more information, contact Michael Agoglia at magoglia@mofo.com.

OPTION ARMS

Of the 40 or so putative Option ARM class actions filed nationwide, most are Left Coast affairs, pending in Southern and Northern California, and primarily run by West Coast plaintiffs' firms. This has not stopped two cases from sprouting up in South Carolina and Virginia. Most remain at the pleadings stage, with decisions on motions to dismiss yielding mixed results.

Plaintiffs bring numerous untutored TILA theories, suggesting confusion between an APR and a contract interest rate. These cases seek classwide rescission. They also challenge the product as essentially too complicated for any consumer to understand. Trial judges are still sorting out whether viable contract, UDAP, and fraud claims exist.

Meanwhile, plaintiffs' lawyers keep busy by issuing subpoenas to third party Mortgage Electronic Registration System ("MERS") in the hopes of getting loan assignee information. In order to avoid joining this party as a subsequently named defendant on the rescission claim, watch out for those subpoenas. We have been coordinating appropriate objections.

For more information, contact Michael Agoglia at magoglia@mofo.com.

TSUNAMI TSENTRAL

Before, it was borrowers and primarily institutional investors prosecuting mortgage-related lawsuits. Now, five state Attorneys General (California, Florida, Illinois, Massachusetts, and Washington) and several City Attorneys (e.g., San Diego) are joining the polka slam. Subprime litigation is skyrocketing, with 448 subprime-related cases filed in federal court from January 1, 2007, to March 31, 2008, according to a new study by Navigant Consulting Inc. Navigant found that most of the subprime lawsuits have been consumer class actions. One quarter are subprime securities cases, a majority of which are securities fraud class actions. ■

Preemption Report

INDEPENDENT AGENT STILL AN AGENT

In *State Farm Bank, FSB v. Reardon*, No. 07-4260 (Aug. 22, 2008), the Sixth Circuit found that State Farm Bank, a federal savings association and a wholly-owned subsidiary of State Farm Mutual Automobile Insurance Co., is exempt from the licensing requirements of the Ohio Mortgage Broker Act when its exclusive agents solicit and market the bank's mortgage products and banking services. Relying on the Supreme Court's decision in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007), and the First Circuit's preemption finding in *SPGGC, LLC v. Ayotte*, 488 F.3d 525 (1st Cir. 2007), regarding the powers of national banks under federal law, the Sixth Circuit reversed the District Court's decision that State Farm's insurance agents were subject to the Ohio law when selling mortgage products. While the Ohio law directly regulated State Farm Bank's exclusive agents (rather than the thrift itself), federal law and the rules adopted by the OTS granted State Farm Bank the power to solicit and originate mortgages directly or through its agents, notwithstanding the state's law.

PREEMPTION INTOLERANCE

The state Attorneys General don't like preemption, and neither do a lot of state courts. In late June, New York's highest court held that the Attorney General's challenge to a state-chartered bank's credit card solicitations was not preempted by TILA. *In re People of New York v. Applied Card Systems, Inc.*, 2008 N.Y. LEXIS 1829 (N.Y. June 26, 2008). The NY AG alleged that Cross Country Bank's solicitations for credit cards aimed at subprime borrowers violated the New York consumer protection statute by, among other things, failing to adequately disclose the impact of high fees on low credit limits and making promises in large text that were contradicted in smaller text. The majority read the TILA preemption provision narrowly, holding that only state-law challenges to "the format, content, manner, or substance of the TILA-required disclosures" are preempted. Because the challenged disclosures were not specifically addressed in TILA or Regulation Z, the high court held that TILA preemption did not apply.

For further information, contact Nancy Thomas at nthomas@mofo.com.

The West Virginia Attorney General received a much different reception from a federal district court in a case handled by the Firm when the AG attempted to investigate consumer complaints filed against Capital One, which converted its charter to a national bank earlier this year.

ON THE OTHER HAND

The West Virginia Attorney General received a much different reception from a federal district court when the AG attempted to investigate consumer complaints filed against Capital One, which converted its charter to a national bank earlier this year. The Attorney General issued subpoenas seeking voluminous documents from Capital One Bank, a state-chartered bank, and its affiliate Capital One Services, Inc., in order to investigate allegedly unfair credit card practices. Capital One fought the subpoenas for years in state court.

While the state court case was on appeal, Capital One Bank converted from a state bank to a national bank and then sued in federal court to enjoin the Attorney General's investigation as barred under the visitorial powers provisions of

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Preemption Report

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the National Bank Act, which provide for exclusive federal oversight of national banks. The AG claimed that those provisions did not apply to him because he began his investigation prior to Capital One Bank's conversion to a national bank. On June 26, the district court ruled in favor of Capital One, and enjoined the Attorney General from investigating the national bank, allowing the investigation to continue only as to one of the national bank's non-bank affiliates. *Capital One Bank (USA), N.A. v. McGraw*, __ F. Supp. 2d __, 2008 WL 2554962 (S.D. W. Va. June 26, 2008).

For further information, contact James McGuire at jmcguire@mofo.com.

SUBSTANCE OVER FORM

The OCC's express preemption of state laws concerning national banks' real estate lending carried the day in two recent cases filed against Wells Fargo. *Watkins v. Wells Fargo Home Mortg.*, No. 3:08:-0132, 2008 WL 2490306 (S.D. W. Va. June 19, 2008); *Weiss v. Wells Fargo Bank, N.A.*, No. 07-5037, 2008 WL 2620886 (W.D. Mo. July 1, 2008). In *Watkins*, the court disagreed with plaintiff's argument that national banks are subject to the "contract principle of unconscionability." The court explained that because plaintiff challenged loan-to-value ratio, terms of credit, and loan origination—all areas identified as expressly preempted in 12 C.F.R. § 34.4(a)—her claims were preempted and did not fall within the exception for state laws that only incidentally affect the bank's real estate lending powers. Similarly, in *Weiss*, the court rejected plaintiff's state-law challenge to Wells Fargo's advertising of its Accelerated Ownership Plan, which provided for early withdrawal of a portion of plaintiff's mortgage payment to increase equity at a faster rate and to decrease the amount of interest accrued. The court held that advertising and disclosures are areas expressly preempted by 12 C.F.R. § 34.4(a).

For further information, contact Nancy Thomas at nthomas@mofo.com.

WHEN MORE IS LESS

Is a tort claim a state-law claim? Not in the Eastern District of Kentucky. The FCRA includes two preemption provisions relating to persons that "furnish" information to consumer reporting agencies. Section 610(e) of the FCRA (15 U.S.C. § 1681h(e)) permits state tort claims against furnishers, but imposes a higher burden of proof. Congress later amended the FCRA to add section 625(b)(1)(F) (15 U.S.C. § 1681t(b)(1)-(F)), which provides that "[n]o requirement or prohibition" may be imposed under state law concerning the responsibilities of information furnishers. In *Marcum v. G.L.A. Collection Co., Inc.*, 07-370, 2008 WL 2338068 (E.D. Ky. June 4, 2008), the court attempted to harmonize the two provisions by holding that only state statutory claims are preempted, denying defendant's argument that plaintiff's defamation claim was preempted. ■

For further information, contact Nancy Thomas at nthomas@mofo.com.

The OCC's express preemption of state laws concerning national banks' real estate lending carried the day in two recent cases filed against Wells Fargo.

Privacy Report

THIRD CIRCUIT DECISION FOR ISSUERS

In July, the Third Circuit became the first circuit court of appeals to wade into the thicket of mass data compromise and, in particular, responsibility for losses. In *Sovereign Bank v. BJ's Wholesale Club Inc.*, 533 F.3d 162 (3d Cir. 2008), the Third Circuit held that an issuing bank could recover against a merchant as a third-party beneficiary of the Visa rules banning the storage and retention of cardholder data. The *Sovereign Bank* decision, coupled with the new Minnesota law that became effective August 1, means that card-issuing banks may have recourse against merchants that violate network data-protection requirements.

For more information, contact Will Stern at wstern@mofo.com.

AUTODIALER LIABILITY

Don't you just hate those prerecorded messages on your cell phone without your express consent? Congress does, too. Creditors considering the use of automatic dialing mechanisms or prerecorded messages to contact their customers on their cell phones should be mindful of restrictions under the Telecommunications Consumer Protection Act ("TCPA"). A district court recently granted summary judgment for a plaintiff-customer in an action against a lender that used "autodialed" calls to the customer's cell phone without her express prior consent, even though the customer had provided the cell phone number on her account application. The district court rejected the defendant's reliance on a declaratory ruling issued by the FCC that had found that autodialed calls "to wireless numbers provided by the called party in connection with an existing debt" fall within the "prior express consent" exception of the TCPA, concluding that the FCC ruling was plainly contrary to the language of the statutory restriction. *Leckler v. CashCall, Inc.*, 2008 WL 2123307 (N.D. Cal. May 20, 2008).

For more information, contact Joe Gabai at jgabai@mofo.com.

The law requires any person who collects SSNs to create a publicly displayed privacy policy.

RING, RING, RING, RING

Better answer that—the FTC just called with a final rule implementing amendments to the Telemarketing Sales Rule ("TSR"). To recap a final rule that emerged from a multi-year rulemaking process: Effective September 1, 2009, the TSR will prohibit placing calls that deliver "prerecorded messages" without the prior express agreement, in writing, of the recipient to receive such calls (and subject to certain conditions pertaining to the person's consent); but, as of December 1 of this year, the TSR prerecorded-message rule requires sellers and telemarketers to provide a "keypress or voice-activated opt-out mechanism promptly at the outset of any prerecorded message that could be answered by a consumer." In addition, effective October 1, 2008, a new standard will apply for determining the maximum rate of call "abandonment," which can occur when telemarketers use "predictive dialers" to more efficiently call consumers.

For more information, contact Charlie Kennedy at ckennedy@mofo.com.

NEW CONNECTICUT SSN LAW REQUIRES PRIVACY POLICY

Connecticut has sewn another patch on the amazing technicolor quilt of state laws regulating the public display of Social Security number data. The law requires any person who collects SSNs to create a publicly displayed privacy policy. Notably, the Act is not expressly limited to businesses located in Connecticut or the personal information of Connecticut residents. And, like several other state SSN disclosure laws, the Act is not limited to computerized data but may cover personal information maintained in any form. ■

For more information, contact Joyita Basu at jbasu@mofo.com.

Arbitration Report

MAKING ARBITRATION APPEALING

The California Supreme Court determined in late August that parties may include a provision in their arbitration agreements to have an arbitrator's decision reviewed on the merits. *Cable Connection, Inc. v. DIRECTV, Inc.*, Case No. S147767, 2008 Cal. LEXIS 10354 (Cal. Aug. 25, 2008). This is in contrast to the Federal Arbitration Act, which narrowly limits the grounds for appealing an arbitration award. The court explained that "[i]f the parties constrain the arbitrators' authority by requiring a dispute to be decided according to the rule of law, and make plain their intention that the award is reviewable for legal error, the general rule of limited review has been displaced by the parties' agreement. Their expectation is not that the result of the arbitration will be final and conclusive, but rather that it will be reviewed on the merits at the request of either party."

For more information, contact Rebekah Kaufman at rkaufman@mofo.com.

CLASS ACTION WAIVERS

Time to add New Mexico to the list of states disapproving class action waivers. In *Fisher v. Dell Computer Corp.*, 144 N.M. 464 (2008), the New Mexico Supreme Court refused to enforce Dell's class action waiver: "We hold that, in the context of small consumer claims that would be prohibitively costly to bring on an individual basis, contractual prohibitions on class relief are contrary to New Mexico's fundamental public policy of encouraging the resolution of small consumer claims and are therefore unenforceable in this state."

For more information, contact Rebekah Kaufman at rkaufman@mofo.com.

EXCEPTION THAT PROVES THE RULE

Just when you gave up hope, a federal district judge in Philadelphia held that a classwide arbitration waiver was "valid, enforceable and not unconscionable," compelled individual arbitration, and dismissed a class action filed against Chase Bank USA, N.A. *Puleo v. Chase Bank USA, N.A.*, 07-4800, slip op. at 2 n.1 (E.D. Pa. Aug. 13, 2008). The court rejected plaintiffs' argument that the arbitrator should decide whether the class action waiver was enforceable,

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Upcoming Speaking Engagements

The following is a list of financial services events through October 2008, in which Morrison & Foerster attorneys will be participating.

OLIVER IRELAND
September 9, 2008
Final FACTA Affiliate Marketing Rules Issued
Knowledge Congress Teleconference and Webinar

ANDREW SMITH
September 15, 2008
Compliance in Key Areas Including Data Security, Privacy and Identity, FCRA, FACTA, and Mortgage Fraud
MBA's Regulatory Compliance Conference 2008

September 16, 2008
FCRA/FACTA and Other Hot Topics
MBA's Regulatory Compliance Conference 2008

LARRY ENGEL
September 25, 2008
Working Out Complex Credits
26th Annual IBAC Fall Conference

HENRY FIELDS
September 25, 2008
Strategic and Capital Issues Facing the Banking Industry
26th Annual IBAC Fall Conference

ANDREW SMITH AND NATHAN TAYLOR
September 29, 2008
The New Rules Under FACTA: Red Flags for Identity Theft and Affiliate Marketing Compliance
Lorman Education Services Teleconference

ANDREW SMITH
October 7, 2008
E-Commerce
Association of Insurance Compliance Professionals Annual Conference

OLIVER IRELAND
October 21, 2008
Covered Bonds – The Americas
IMN Conference

ROLAND BRANDEL
October 22–24, 2008
Consumer Law Issues
National Institute on Banking Law, sponsored by the American Bar Association and Boston University School of Law

WILLIAM STERN
October 27, 2008
Vigorously Challenging and Defeating Class Certification: Strategies for Showing that Plaintiffs Have Not Met Their Burden
Annual Defense Counsel Summit

BARBARA MENDELSON
October 29–30, 2008
Financial Markets Association's 2008 Treasury and Capital Markets Legal and Legislative Issues Conference IMN

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Arbitration Report

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finding that the validity of an express provision is a "gateway dispute" for the court to decide. *Id.*

For more information, contact Bob Stern or Nancy Thomas, who represented Chase in this case, at rstern@mofo.com or nthomas@mofo.com.

LEGISLATION CURBING ARBITRATION MAKING PROGRESS

The Democrat-led battle against mandatory arbitration clauses is gaining momentum in Congress. In July, the House Judiciary Committee approved the Arbitration Fairness Act, which would make any pre-dispute arbitration clause in a consumer, employment, or franchise agreement unenforceable. The House Judiciary Committee also reported out the Fairness in Nursing Home Arbitration Act, which would vitiate pre-dispute arbitration provisions in nursing home contracts. Bills banning arbitration clauses in various other types of agreements, including livestock and poultry contracts, auto sales and lease contracts, and home building contracts, have also been introduced. The consensus is that these laws aren't likely to pass both the Senate and the House this year. The real test will be with the new Congress and the new President. Depending on how things shake out in the upcoming election, Democrats may have the votes to end consumer arbitration.

For more information, contact Rebekah Kaufman at rkaufman@mofo.com.

WILL COURTS ENFORCE YOUR CHOICE OF LAW?

Several courts have refused to enforce a choice-of-law provision where a class action waiver is at issue. Those courts have held that application of the chosen law would violate the public policy of the forum state when the chosen law would render the waiver enforceable, but the laws of the forum state would not. *See, e.g.*, *Fisher v. Dell Computer Corp.*, 2008 N.M. LEXIS 419 (N.M. June 27, 2008); *Klussman v. Cross Country Bank*, 134 Cal. App. 4th 1283 (2005). Choice-of-law provisions are thus unlikely to save class action waivers from extinction. ■

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