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HOLA Remains Effective Preemption Defense for Mortgage Servicers

Issue: Preemption under the Home Owners Loan Act (HOLA) remains an effective defense against state law claims brought by plaintiffs attacking the mortgage servicing conduct of federal savings associations. In three recent cases, district courts applied HOLA preemption to dismiss state law claims arising in the context of loan modifications, adjustable rate mortgage rate resetting, and lender placement of insurance.

In *Gonzalez v. Wells Fargo Bank, et al.,* the Northern District of California dismissed as preempted claims premised on the allegation that defendant Wachovia induced plaintiff to default on her mortgage loan ostensibly to qualify her for a loan modification and then proceeded to foreclose on plaintiff's property following the default. No. 12-cv-03842, 2012 U.S. Dist. LEXIS 154851 (N.D. Cal. Oct. 29, 2012) (Davila, J). In granting the defendant's motion to dismiss, the court explained that plaintiff's theory of liability would "impose an affirmative duty on Wachovia to provide a loan modification review and postpone all foreclosure proceedings while doing so." Thus, each of plaintiff's claims--including claims for fraud, breach of contract, and violation of California's Unfair Competition law--implicated the "processing, origination, [and] servicing" of mortgages, and were thus preempted by HOLA and implementing regulations.

Similarly, in *Haggarty v. Wells Fargo Bank, N.A.,* the Northern District of California granted summary judgment in favor of Wells Fargo, finding plaintiff's state law claims preempted because they were premised on the theory that Wells Fargo was required to abandon the index to which plaintiffs' mortgage rates were tied after an unprecedented rate jump in the index. No. 10-cv-02416, 2012 U.S. Dist. LEXIS 143405 (N.D. Cal. Oct. 3, 2012) (Breyer, J). Plaintiff's mortgage note, originated by World Savings Bank, FSB, included a provision that permitted--but did not require--the lender to choose a new index for use in calculating the interest rate of the note when the existing interest rate is determined to be substantially recalculated. The court held that plaintiff's insistence on the substitution of a new index would effectively write new terms into the mortgage contract -- "precisely [the] transformation that HOLA preempts." The court explained that its holding was consistent with "the purpose of HOLA field preemption: avoiding inconsistent obligations for lenders regarding interest rate adjustments."

Finally, in *Silverstein v. ING Bank,* the District of Massachusetts dismissed claims based upon the allegation that defendant ING Bank (ING), a federal savings association, required mortgagors to maintain casualty insurance in excess of coverage required by state statutory and common law. No. 12-10015-GAO, 2012 U.S. Dist. LEXIS 135105 (D. Mass. Sept. 21, 2012) (O'Toole, J). In granting ING's motion to dismiss, the court explained that allowing plaintiff's claims to proceed would amount to a state law imposition of requirements regarding "[t]he ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements," and that laws that impose such requirements are "definitively" preempted by HOLA. Importantly, even though the court did not expressly address the parties' arguments regarding the applicability of the Dodd-Frank Act's preemption standard to mortgage contracts entered into before that statute's effective date, the court applied the HOLA preemption analytical framework operative prior to the Act as described in *Dixon v. Wells Fargo Bank, N.A.,* 798 F. Supp. 2d 336 (D. Mass. 2011). Plaintiff has filed a notice of appeal.

Why You Should Care: The examples above show that HOLA remains effective in defeating popular theories advanced by plaintiffs to challenge conduct by mortgage lenders and servicers.

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The CFPB's Evolving Consumer Complaints Program

Issue: On October 10, 2012, the Consumer Financial Protection Bureau (CFPB) released an update to its periodic report concerning complaints it receives from consumers . The report, *Consumer Response: A Snapshot of Complaints Received,* covers the period from the CFPB's inception on July 21, 2011 through September 30, 2012.

The CFPB currently accepts complaints on credit cards, mortgages, bank accounts, private student loans, and other consumer loans. Consistent with previous installments of the *Snapshot,* the most common credit card complaints were related to billing complaints, particularly with respect to the process and time limits for challenging unauthorized charges and billing errors on monthly statements. Less common were complaints about annual percentage rates or interest rates, identity theft, and fraud. On the mortgage front, loss mitigation and foreclosure avoidance efforts were the predominant concern, with consumers asking for clarity, simplification, and the expedition of the loan modification processes. With regard to bank accounts, consumers' primary complaints related to fees and other issues arising when the consumer has insufficient funds, such as overdraft charges. The most common complaints about private student loans were about debt collection practices and deferment options. The *Snapshot* includes statistics on the number of complaints received as well as a breakdown of the percentage vetted and referred to companies for response, referred to other agencies, deemed incomplete, or pending with the CFPB or the consumer. It also includes the percentage of complaints to which companies have directly responded, with the response rate being quite high (in all categories companies have responded to 93% or more of the complaints referred to them).

In a press release issued concurrently with the October *Snapshot,* the CFPB also signaled the end of the trial phase of its consumer complaints database from which the *Snapshot* data is compiled, by announcing the removal of the database's "beta" tag. The CFPB noted that the online database "perform[ed] for three months as designed and without incident." The Federal Reserve's Office of Inspector General (OIG) published an evaluation of the CFPB's consumer complaint activities in September 2012. While the OIG's report recommended improved quality control, it concluded that the CFPB "has a reasonable process to receive, respond to, and track consumer complaints. In addition, the CFPB's consumer response process generally complies with Dodd-Frank Act requirements, the Privacy Act, and industry best practices."

Why You Should Care: Despite industry concerns about the accuracy of complaints submitted, and despite questions about the efficacy of allowing "squeaky wheels" to drive regulation, the CFPB has strongly embraced the use of consumer complaints as a means of spotting widespread issues as well as addressing individual consumers' concerns. Director Cordray has praised the program as a way to achieve the CFPB's mission of identifying risk to consumers and resolving disputes. While complaints are currently limited to certain products, over the next year the CFPB "expects to handle consumer complaints on all products and services under its authority."

The consumer complaints database provides little detail on individual complaints, using only two or three word descriptions to categorize them, but it does identify the company name associated with each complaint as well as the billing zip code of the consumer. As such, it is a potential source of information for class action litigants. Given that the CFPB is aggregating the data it receives to identify the most prevalent concerns raised by consumers, it is likely that the complaints database will influence future CFPB regulations and enforcement actions.

Companies can benefit from establishing a compliance framework to respond to CFPB-referred complaints to reduce enforcement and regulatory risks, as well as from monitoring industry complaint trends to anticipate future issues. O'Melveny & Myers attorneys would be pleased to discuss these issues with you further.

If You Want Further Information: The CFPB's October *Snapshot of Consumer Complaints Received* can be found **here.** The OIG's evaluation of the CFPB's consumer complaints program can be found **here.** The CFPB's consumer complaints database can be found **here.** A link to our prior alert articulating a three-step process by which O'Melveny & Myers analyzes complaints and creates effective procedures, checklists, and scripts can be found **here.**

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CFPB Supervision of Debt Collectors

Issue: On October 31, 2012, the Consumer Financial Protection Bureau (CFPB) published a final rule that would, effective January 2, 2013, allow the agency to supervise and conduct periodic examinations of any debt collector that has more than US$10 million in annual receipts from consumer debt collection activities. The CFPB defines "consumer debt collection" as collection by a "debt collector" of debts incurred by consumers primarily for personal, family or household purposes related to consumer financial products or services. The rule largely adopts the FDCPA definition of "debt collector."

Examinations will focus on some combination of the following seven modules: 1. Entity Business Model; 2. Communication in Connection with Debt Collection; 3. Information Sharing, Privacy, and Interactions with Consumer Reporting Agencies; 4. Consumer Complaints, Dispute Resolution, and Debt Validation; 5. Payment Processing and Account Maintenance; 6. Equal Credit Opportunity Act; and 7. Litigation Practices, Repossession, and Time-Barred Debt. In a related speech, CFPB Director Cordray said the CFPB's key areas of focus will include (a) whether debt collectors are pursuing debts that are not owed, (b) whether debt collectors are providing information requested by the debtor, e.g. the name of the creditor, and (c) harassment by debt collectors.

Notably, the CFPB refused to categorically exclude from supervision attorneys who engage in debt collection activities. The CFPB acknowledged that "not every occasion on which an attorney seeks money from a consumer constitutes debt collection and that not all attorneys are fairly considered debt collectors." The CFPB asserted, however, that if an attorney or law firm "regularly" engages in debt collection or if its principal business activity is debt collection, then even litigation activities, such as filing a counter-claim against a consumer, could qualify as a "consumer debt collection" subject to CFPB supervision. The CFPB also acknowledged the concern that including attorneys within the scope of the rule could force attorneys to reveal privileged information, and responded by noting that most of the information it seeks is not privileged and that, regardless, the CFPB "has general authority to require supervised entities to provide it with privileged information."

Why You Should Care: The contention that the CFPB can regulate attorneys and that examinations may entail revealing privileged communications is controversial. The text and legislative history of the Dodd-Frank Act both contemplate that the CFPB would have limited authority to regulate the practice of law, since doing so "could materially interfere with and jeopardize sensitive aspects of the attorney-client relationship, including the attorney-client privilege and work product protection." Speech of Hon. John Conyers, Jr. 156 Cong. Rec. 1347, 1349 (July 15, 2010); 12 U.S.C. § 5517(e).

If You Want Further Information: The text of the final rule, Defining Larger Participants of the Consumer Debt Collection Market , 77 FR 65,775 (Oct. 31, 2012), is available **here.** The CFPB's Debt Collection Examination Procedures are available **here.** Director Cordray's October 25 speech is available **here.**

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The CFPB Implements a Supervisory Appeals Process and Issues a Report on Supervisory Findings

Issue: On October 31, 2012, the Consumer Financial Protection Bureau (CFPB) issued a bulletin introducing its process for appealing "less than satisfactory" compliance ratings and adverse findings conveyed in a supervisory letter. In order to appeal a finding, the supervised entity must submit a written appeals request within 30 business days of receipt of the disputed rating or finding, accompanied by supporting documentation. The appeals request will be reviewed by a committee comprised of at least one CFPB manager from the bureau's headquarters and at least two regional representatives who were not previously involved in the matter under review. After the committee completes its initial review, the Associate Director for Supervision, Enforcement, and Fair Lending performs a final review and issues a decision, after which no further appeals will be accepted. The CFPB expects to complete this process and provide a decision within 45 business days. The CFPB plans to maintain the confidentiality of submissions made during the appeals process. However, during the appeals process, the appellate committee may send a copy of the appeal request to the prudential regulator of the appealing entity in order to solicit its views on the matter. It may also communicate its final decision to the provider's state regulator or prudential regulator. During the appeals process, the CFPB may pursue enforcement actions relating to the disputed finding or refer the matter to another agency.

Like the Office of Comptroller of the Currency (OCC), Federal Reserve Board (FRB) and Federal Deposit Insurance Corporation (FDIC), the CFPB uses a supervisory appeals process consisting of review by agency employees who are thought to be independent because they did not work on the particular matter under review. Unlike the FRB's process, which allows for additional levels of appeal to a Reserve Bank President and a Board Governor, the CFPB provides only one opportunity to appeal. The timelines for appeals are roughly similar between the agencies, with each step generally taking about 30 to 60 days. Unlike the FDIC, whose appeal process requires the FDIC's Supervision Appeals Review Committee to publish a redacted version of its decisions and affords such published decisions precedential value, the CFPB intends to keep its final decisions confidential, and will publish only summaries of issues raised in appeals and the outcomes of such appeals. This approach will likely prevent regulated entities from relying on the CFPB's prior supervisory appeal rulings when attempting to constrain the CFPB's exercise of discretion.

On the same day that the CFPB released its supervisory appeals policy, the CFPB also released its *Supervisory Highlights: Fall 2012* report, which summarizes problems in the mortgage lending, credit card, and credit