

TILA, Preemption and Securities Litigation Developments

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TILA: There's Still A Split Over Rescission Class Actions

- Whether class actions are allowed for rescission (v. damages) claims depends on where the case is brought:
 - NO in the First Circuit (MA, ME, NH, RI, PR) based on *McKenna v. First Horizon (2007)*
 - NO in the Fifth Circuit (TX, LA, MI) based on *James v. Home Constr. Co. (1980)*
 - NO in California State Courts based on *LaLiberte v. Pacific Mercantile Bank (2007)*, but U.S. S. Ct. cert. petition pending
 - YES in ED Wisc. based on *Andrews v. Chevy Chase (2007)*, but appeal pending before the 7th Circuit, and ND IL based on *In re Ameriquest Mortgage Lending Practices Litigation (2007)*

TILA: Biggest Implications of Class Action Question

- Could turn what were previously considered inherently individualized issues into potential class actions
- Rescission class actions are not covered by the \$500K cap on class actions under Section 1640

TILA: This Case Could Prove Useful

- A valuable recent case to be aware of is the Fourth Circuit's decision in *American Mortgage Network v. Shelton*, 486 F.3d 815 (4th Cir. May 18, 2007)
 - Affirms “majority view” that borrower must actually “tender back” to affect a rescission demand
- Keep in mind, though, that the lender had to file an action for declaratory relief to establish that the rescission demand was ineffective

TILA: The Cases Are Increasing

- All federal court filings classified as “Truth in Lending” suits appear to have increased sharply (by > 45%) between 2005 and 2006*:

Year	No. of Federal Filings
2004	419
2005	481
2006	701
2007 (annualized based on filings through 8/31/07)	712

* Source: Justia.com

TILA: What You Need To Do

- Now is a good time to assure you've covered the basics:
 - Monitor and have a process in place for addressing rescission notices promptly
 - Time is of the essence
 - Have written policies & procedures
 - Train as necessary in handling practices
 - Coordinate among Compliance, Legal and business units in analyzing and responding
 - Make sure your disclosures are up-to-date

Preemption: *Wachovia v. Watters* Has Been the Biggest, But Not the Only News

- The Supreme Court decided that federal preemption from state regulatory oversight applies to subsidiaries of OCC-regulated national banks to the same extent as the bank itself
- Preemption appears to be the order of the day.
- But, be aware of *Munoz v. Pipestone Financial*, 2007 U.S. Dist. LEXIS 64314 (D. Minn. Aug. 30, 2007), following 8th Cir.'s precedent "courts must look at the originating entity . . . in determining whether the NBA applies."
 - In that case, the assignee of an NA could look to the NBA and apply the interest rate under the state law where the bank was located without violating FDCPA by collecting interest at a rate considered usurious under state law where the borrower resided
 - NAs (and other federally chartered institutions) must follow state law when a loan is purchased from a state-regulated entity

Securities Litigation: The Floodgates Are Open

- Because what goes up, can also go down
- Suits, including numerous class actions, have been filed by:
- Shareholders
 - Countrywide - at least two actions pending, plus three regarding 401Ks
 - AHM – at least twelve actions pending
 - Thornburg
 - Impac – at least two actions pending
 - Luminent – at least four actions pending
 - New Century – at least 25 actions pending
 - Accredited – at least six actions pending

Securities Litigation: But It Doesn't Stop There

- Bondholders:
 - Against Credit Suisse –
 - at least three pending cases
 - allege that risk of MBS misrepresented
- SEC
 - Enforcement action against First Bancorp
 - misrepresented \$ billion in mortgage-related transactions
 - avoided a restatement by backdating documents
 - Consent judgment for \$8.5 million in civil penalties
- Borrowers Against Issuers?
 - *Ricci v. Lehman Commercial Paper, Inc. and Lehman Bros. Inc.*, (filed D. Minn. Sept. 19, 2007)

Thanks!

Questions?

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