



Regulatory Compliance Update 2008

New Cases and Pending Litigation

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MBA Quality Assurance Conference 2008 – “Driving Change”

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- Fair Housing Act (FHA)
 - Equal Credit Opportunity Act (ECOA)
 - Truth In Lending Act (TILA)
 - Real Estate Settlement Procedures Act (RESPA)
 - Home Ownership & Equity Protection Act (HOEPA)
 - State Fraud and Predatory Lending Statutes
 - Unfair and Deceptive Acts and Practices Statutes
 - State Contract and Title Laws
 - Fair Debt Collection Practices Act (FDCPA)
 - Fair Credit Reporting Act (FCRA)

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- FHA, ECOA, Fair Lending

- National Community Reinvestment Coalition v. Accredited Home Lenders Holding Company (8/8/08) 2008 WL 3974310 (D.D.C.)
- Tribett v BNC Mortgage, Inc.(01-17-08) 2008 WL 162755 (N.D. Ill)
- M&T Mortgage Corp. v. Foy (5-01-2008) 20 Misc.3d 274 (N.Y. Sup.)
- Lindsay v. Owens Loan (7-18-08) 2008 WL 2795944 (E.D. Mich.)
- Ware v IndyMac Bank (2-14-08) 534 F.Supp.2d 835 (N.D. Ill)

National Community Reinvestment Coalition v. Accredited Home Lenders Holding Company (8/8/08) 2008 WL 3974310 (D.D.C.)

Facts: NCRC alleged violation of Fair Housing Act (46 USC § 3604) by Accredited and subsidiaries through pattern and practice of mortgage lending that had a disparate impact on African American and Latino neighborhoods in District of Columbia

Holding: (1) Accredited's lending practices alone can be basis for Fair Housing claim; (2) NCRC had standing to sue because alleged injury "frustrated its mission by causing it to devote scarce resources to education and outreach programs to counteract Accredited's policies." (3) S.Ct. case of Smith v. City of Jackson 544 U.S. 228 (2005) did not preclude "disparate impact" claims pursuant to the FHA; (4) NCRC has sufficiently stated an FHA claim even though fails to allege facts regarding the "total impact of Accredited's lending policies" but only focuses on limited geographical area.

Tribett v BNC Mortgage, Inc.(01-17-08) 2008 WL 162755 (N.D. III)

Facts: African-American couple sued broker (Pan American Mortgage) and BNC for violation of FHA, ECOA, and Ill. Consumer Fraud Act based on fact that they were given 2 loans, not one as promised, and closing costs in excess of 1%. BNC moved to dismiss.

Holding: (1) Allegations that BNC's broker compensation plan encouraged discriminatory pricing were too vague and conclusory to support valid FHA or ECOA claim against BNC, but Plaintiffs could have leave to amend; (2) BNC's payment of a YSP to broker was insufficient to create inference of agency relationship with broker, who is alleged to have directly committed the alleged misrepresentations.

M&T Mortgage Corp. v. Foy (5-01-2008) 20 Misc.3d 274 (N.Y. Sup.)

Facts: Holder of a mortgage brought foreclosure action on 30 year mortgage with a 9% interest rate from a minority buyer for the purchase of property in a minority area.

Holding: Under the circumstances, the high interest rate created a rebuttable presumption of discriminatory practice which, unless rebutted by a “fair preponderance of the evidence” that the mortgage was not the product of unlawful discrimination, would constitute “unclean hands” by the lender precluding equitable relief of foreclosure and leaving the lender to its remedies at law (i.e., loss of a security interest in the property and suit against the borrower on the note).

Lindsay v. Owens Loan (7-18-08) 2008 WL 2795944 (E.D. Mich.)

Facts: Resident of Detroit filed suit *in pro per* seeking to invalidate adjustable rate mortgage loan. In response to an Order to Show Cause why his complaint should not be dismissed for lack of jurisdiction and failure to state a claim, Plaintiff filed 2 ½ page narrative asserting: (1) he was a victim of “subprime lending practices”; (2) was “targeted by defendants through a pattern of practices typical of subprime lending abuses”; (3) as an African-American living in a low income area he “it the profile of a target of a predatory lender”; (4) all of the practices described in a 1998 FTC statement about home lending equity abuses (a copy of which was attached to the response) were perpetrated on him; and (5) defendants knew or should have known that issuing an adjustable rate mortgage to him would “proximately cause [him] to default...as the payments increased.”

Holding: Complaint dismissed for lack of jurisdiction and failure to state a claim.

Ware v IndyMac Bank (2-14-08) 534 F.Supp.2d 835 (N.D. Ill)

Facts: Mortgagors, an African-American husband and wife who entered into 2 loans for \$280,000 and \$49,000, brought action on behalf of themselves and various putative classes against mortgage broker and mortgagee alleging that they had paid and received higher yield spread premiums with respect to loans made to minority borrowers, which disproportionately impacted them in the form of higher expenses and less favorable terms.

Holding: Allegations stated discrimination claims under FHA, ECOA, and fraud claims under Illinois Consumer Fraud and Deceptive Business Practices Act, and breach of fiduciary duty claims against broker

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- TILA, RESPA, HOEPA

- Parker v. Long Beach Mortgage (1-03-08) 534 F. Supp.2d 528 (E.D. Pa.)
- Vincent v. Ameriquest Mortgage Company (1-8-08) (381 B. R. 564) (Bnkrtcy. D. Mass)
- Jefferies v. Ameriquest Mortgage Co. (2-11-08) 543 F.Supp.2d 368 (E.D. Pa.)
- White v Homefield Financial, Inc. (2-22-08)55 F.Supp.2d 159 (W.D. Wash.)
- Cetto, II v. LaSalle Bank National Association (2-29-08) 518 F.3d 263 (C.A.4-Va.)
- Gordon v. Hendricks-Patton Company, Inc. (4-16-08) 389 B.R. 243 (Bkrtcy.N.D.Ala.)
- Ferrell v. Checks-N-Advance, Inc.(8-22-08) ---F.3d. --- 2008 WL 3876602 (CA.9)

Parker v. Long Beach Mortgage (1-03-08) 534 F. Supp.2d 528 (E.D. Pa.

Facts: Parkers assumed 4 mortgage loans in 2005, two on a townhouse and two refinancing their principal residence. They are college educated business owners who have bought, financed, and sold two prior homes. Sally Parker had completed studies for RE Broker's Exam. Borrowers claimed that they did not remember receiving required TILA disclosures, although they signed 4 TILA documents acknowledging receipt. They also knew one month before closing that loan would be structured as 2 loans and that they would be paying for luxury of a loan without income verification.

Holding: Borrower's testimony that TILA disclosures were not provided, without more, is insufficient to rebut presumption that disclosure occurred where there was written acknowledgment of receipt.

Vincent v. Ameriquest Mortgage Company (1-8-08) (381 B. R. 564) (Bnkrptcy. D. Mass)

Facts: Chapter 13 debtor brought adversary proceeding to recover for lender's alleged misconduct in connection with pre-petition residential mortgage re-finance transaction, including preparation of a loan application stating that she was self-employed as a "Research Assistant" with monthly income of \$4,800, when in fact she was unemployed with income of less than \$2,800/mo.; property value also inflated.

Holding: (1) Allegations were insufficient to state claim for HOEPA violation and were untimely (one yr statute); (2) interest paid as a settlement charge could not be included in calculation of "points and fees" to purpose of determining whether loan was "high cost" Mass. law; (3) allegations were sufficient to state claim for fraud under MA. unfair and deceptive trade practices law.

Jefferies v. Ameriquest Mortgage Co. (2-11-08) 543 F.Supp.2d 368 (E.D. Pa.)

Facts: Borrower sued in state court asserting claims for negligence, violation of TILA, HOEPA, and RESPA, fraud, breach of contract, punitive damages and violation of PA.'s Fair Credit Extension Uniformity Act (FCEUA) and Unfair Trade Practices and Consumer Protection Law in connection with stated-income refinance loan, based on inaccurate and altered application materials, and at rate and terms significantly higher than represented; After removing action to Federal Court, Lender moved for summary judgment.

Holding: (1) Factual issues precluded summary judgment for lender on fraud and negligence claims based on statute of limitations; (2) Factual issues precluded summary judgment for lender on TILA and HOEPA rescission claims, fraud claim, contract claim, and FCEUA claim; (3) lender had no duty to provide information to borrower under RESPA.

White v Homefield Financial, Inc. (2-22-08)55 F.Supp.2d 159 (W.D. Wash.)

Facts: Mortgagors brought action against mortgagee Homefield and its assignee, Countrywide, alleging violations of Washington Consumer Protection Act, breach of fiduciary duty, and TILA. After mortgagors settled with Homefield, Countrywide moved for summary judgment.

Holding: (1) Mortgagors' settlement of their TILA damages claims with mortgagee barred damages claims against assignee because liability is joint and several; (2) no summary judgment on rescission claim because there are material issues of fact as to whether mortgagor or mortgagee caused inflated income levels to appear in the loan documents, and whether Countrywide was on notice of defects in the right to cancel form because the closing date had been altered by hand.

Cetto, II v. LaSalle Bank National Association (2-29-08) 518 F.3d 263 (C.A.4-Va.)

Facts: Borrowers brought action against assignee of lender seeking rescission of their refinance mortgage and damages based on allegation that total points and fees charged entitled them to more specific disclosures and terms under HOEPA that they were not afforded.

Holding: (1) Fees for title search and binder paid to broker's affiliate could not be included in calculation of total points and fees for purpose of determining whether loan was "high cost" under HOEPA because broker, who did not extend credit, was not a "creditor" within definition of HOEPA; hence loan was not a HOEPA loan and enhanced disclosure obligations not applicable.

Gordon v. Hendricks-Patton Company, Inc. (4-16-08) 389 B.R. 243 **(Bkrtcy.N.D.Ala.)**

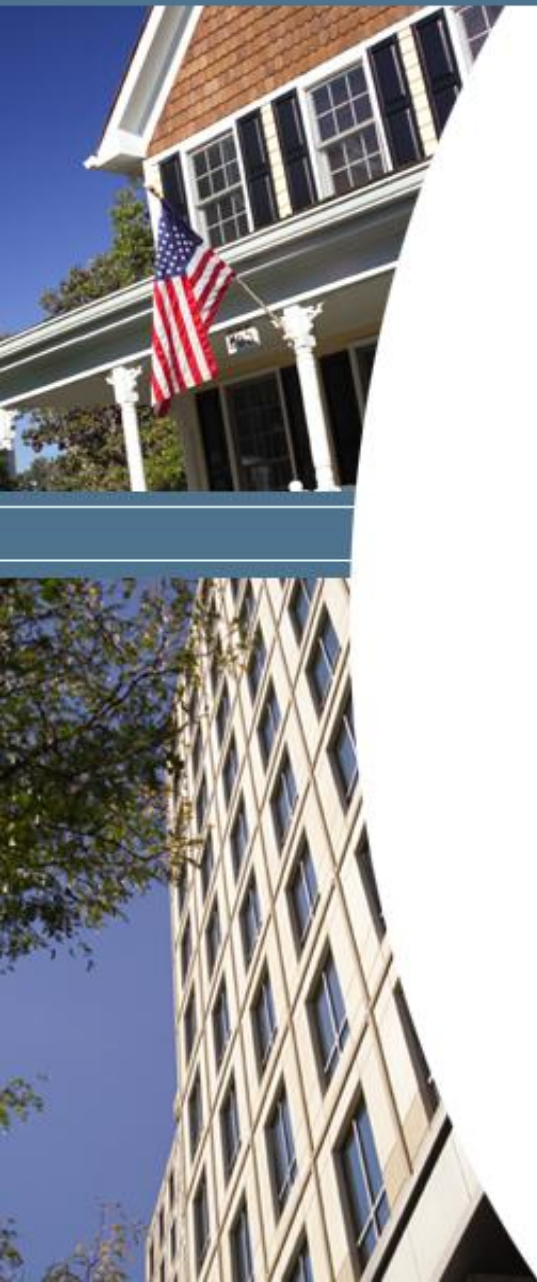
Facts: Debtor brought adversary proceeding against creditor alleging violation of TILA based on creditor's failure to disclose annual percentage rate on retail sales contract. Both parties moved for summary judgment

Holding: (1) Creditor did not satisfy TILA requirements when it orally informed borrower of annual percentage rate for credit purchase of furniture; but, (2) Creditor's procedures were reasonably adapted to avoid erroneous omissions of APR rate from retail sales contracts; and so, (3) bona fide effort defense applied to preclude creditor's TILA liability.

Ferrell v. Checks-N-Advance, Inc.(8-22-08) ---F.3d. --- 2008 WL 3876602 (CA.9)

Facts: Bankruptcy trustee filed adversary proceeding to disallow creditor's claim (which she had filed on behalf of the creditor) based on allegations that pay-day loan agreement (1) failed to provide TILA-required disclosures prior to consummation of the transaction in violation of 15 USC § 1638(b) and (2) failed to properly and conspicuously disclose the finance charge and annual percentage rate in violation of 15 USC § 1632(a)

Holding: Statutory damages are not available in the 9th Circuit for violations of 15 USC § 1632(a) and § 1638(b). Trustee's claim for actual damages and attorneys fees is also denied.

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- Predatory Lending,
Fraud, UDAP

- Commonwealth of Massachusetts v. Fremont Investment & Loan (5-2-08) 2008 WL 2312648 (Mass.App.Ct.)
- Mathurin v Lost & Found Recovery, LLC (2-18-08) 9 Misc.3d 756 (N.Y. Sup. 2008)

Commonwealth of Massachusetts v. Fremont Investment & Loan (5-2-08) 2008 WL 2312648 (Mass.App.Ct.)

Facts: Massachusetts Attorney General sued Fremont, alleging that it had engaged in unfair and deceptive acts and practices in origination and servicing of subprime loans in Massachusetts and obtained preliminary injunction against Fremont's foreclosure on any loan in Mass. w/o A.G.'s written consent. Court found that A.G. likely to prevail on claim that loans having each of the following 4 characteristics are "unfair": (1) adjustable rate mortgage w/ introductory period of 3 years or less; (2) intro or "teaser" rate for initial period that is at least 3% lower than fully indexed rate; (3) borrower's debt to income ratio is 50% if measured under fully indexed rate; and (4) LTV is 100% *OR* there is "substantial" prepayment penalty, *OR* prepayment penalty extends beyond introductory penalty. Fremont petitioned the Appeals Ct. for interlocutory relief.

Holding: Petition denied

Mathurin v Lost & Found Recovery, LLC (2-18-08) 9 Misc.3d 756 (N.Y. Sup. 2008)

Facts: “Vendor” (seller) sued lender for fraud and gross negligence in connection with “foreclosure rescue” scheme whereby vendor was stripped of equity in her property by promises that buyer would make payments for a year then deed the property back, alleging that lender (Greenpoint Mortgage): (1) failed to take measures to verify that mortgagor/buyer could remain current on subject loan; (2) failed to conduct reasonable background investigation on mortgagor, broker, or its principal; (3) failed to discover multiple mortgage loans with mortgagor as “straw buyer”; (4) failed to take measures to verify that broker and principal were licensed; (5) failed to prevent the subject transaction.

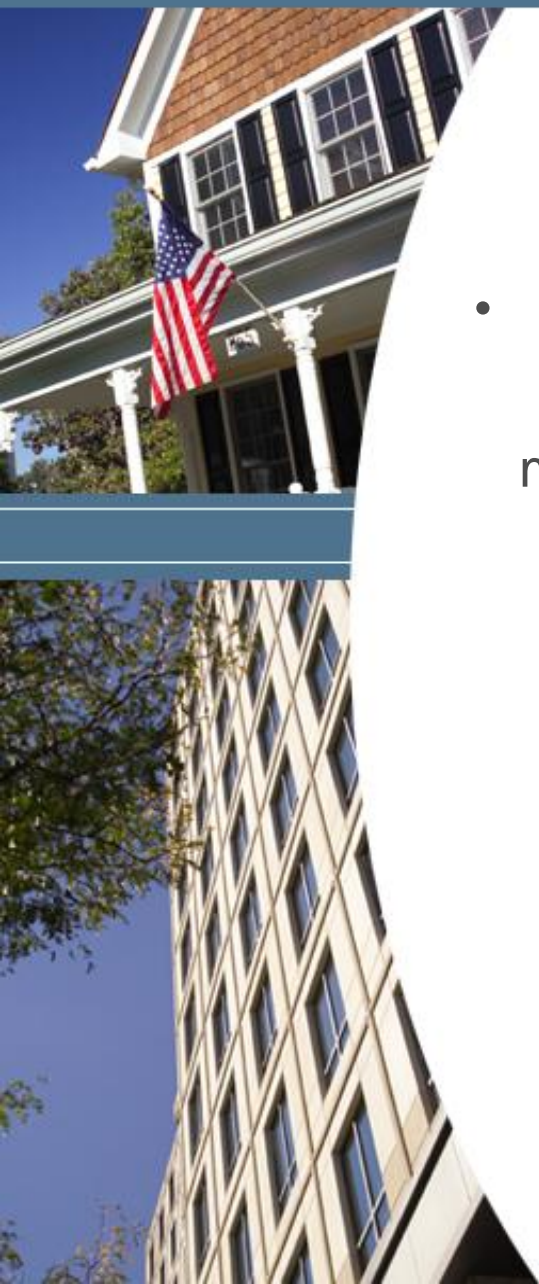
Holding: Greenpoint’s motion to dismiss denied.

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- State Contract and
 - Title Laws

- Wells Fargo Bank, N.A. v. Farmer (6-5-08) 19 Misc.3d. 1141(A)
2008 WL 2309006 (N.Y. Sup.)
- HSBC Bank USA, N.A. v. Yeasmin (5-2-08) 19 Misc.3d 1127(A)
2008 WL 1915130 (N.Y. Sup.)

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