Banking Docket

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OFFICE OF THE GENERAL COUNSEL
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WHAT'S NEW THIS MONTH

- **ANTI-TERRORISM ACT:** *Linde et al. v. Arab Bank PLC* -- A jury in the Eastern District of New York finds Arab Bank, Plc (Arab Bank) liable for knowingly supporting terrorism by providing financial services to Hamas.

- **TARGET DATA BREACH LITIGATION:** *In re Target Corp. Customer Data Security Breach Litigation* -- Target Corp. (Target) files a motion to dismiss the class-action complaint arguing that it owed no duty of care to banks seeking to negate the negligence claims, there is no special relationship between banks and merchants under Minnesota tort law, and the information lost because of the data breach does not establish liability under Minnesota's Plastic Card Security Act.

- **FAIR HOUSING ACT:** *New York v. Evans Bancorp., Inc. et al.* -- New York Attorney General Eric T. Schneiderman files a complaint in the Western District of New York against Evans Bank, N.A. and Evans Bancorp, Inc. (Evans Bank) involving allegations that Evans Bank engaged in discriminatory mortgage lending in violation of the Fair Housing Act.

- **CORPORATE GOVERNANCE :** *FDIC v. Willetts* -- U.S. District Court Judge Terrance W. Boyle dismisses a $40 million lawsuit filed by the FDIC against the former bank directors and officers of Cooperative Bank (D&Os) in the Eastern District of North Carolina ruling that the D&O's had a rational business purpose and acted in good faith under the business judgment rule when they approved allegedly risky loans.

- **MORTGAGE FRAUD :** *Commonwealth of Virginia ex rel. Integra REC LLC v. Barclay Capital Inc. et al.* -- Virginia Attorney General Mark R. Herring unseals a $1.15 billion lawsuit against thirteen of the nation's largest banks (defendants) involving defendants' alleged fraudulent packaging and selling of toxic residential mortgage-backed securities (RMBS) to the Virginia Retirement System.

- **PREDATORY STUDENT LENDING :** *Consumer Financial Protection Bureau v. Corinthian Colleges, Inc.* -- The Consumer Financial Protection Bureau (CFPB) files a lawsuit against for-profit chain Corinthian Colleges, Inc. (Corinthian) alleging that Corinthian engaged in an illegal predatory lending scheme by misleading students on potential job prospects and career assistance, manipulating students into taking expensive student loans, and aggressively collecting on the student's debt.

- **FIRREA'S EXTENDER STATUTE :** *National Credit Union Administration v. Nomura Home Equity Loan, Inc.* -- The U.S. Court of Appeals for the Tenth Circuit rules that the Financial Institutions Reform, Recovery, and Enforcement Act of 1989's (FIRREA) Extender Statute permits the National Credit Union Administration (NCUA) to bring an otherwise time-barred Residential Mortgage-Backed Securities (RMBS) lawsuit.

Linde et al. v. Arab Bank PLC
ARAB BANK FOUND LIABLE FOR KNOWINGLY SUPPORTING TERRORISM AIDING HAMAS

TERRORISTS
Date: September 22, 2014

Issue: Whether Arab Bank Plc (Arab Bank) is liable under the U.S. Anti-Terrorism Act for knowingly supporting terrorism by processing transactions used by Hamas to finance terror attacks.

Case Summary: In a landmark ruling as the first civil trial to be brought under the Anti-Terrorism Act, a New York jury in federal district court found Arab Bank liable for knowingly supporting terrorism by providing financial services to the Palestinian Islamist group Hamas.

The lawsuit was filed by thousands of victims and family members of victims injured or killed in terrorist attacks in Israel and the Palestinian Territories between 1995 and 2004. Plaintiffs alleged that Arab Bank knowingly maintained accounts and transferred funds for individuals and charities that were "fronts" for terrorist organizations. Plaintiffs also alleged that Arab Bank administered payments from a Saudi-Arabian charity to family members of suicide bombers and their families as compensation for their losses. Arab Bank contended that it provided routine financial transactions routed through the United States within the applicable laws and regulations, including the disputed transactions being screened against the government's Office of Foreign Asset control (OFAC) list.

In July 2010, U.S. District Court Judge Nina Gershon imposed sanctions on Arab Bank for failing to disclose documents plaintiffs claimed would link Arab Bank to terrorist findings. Judge Gershon rejected Arab Bank's argument that providing certain relevant customer records and documents violated foreign bank secrecy laws. The sanctions included instructions to jurors that they could infer from Arab Bank's refusal to comply with discovery requests that the bank willfully provided financial services to foreign terrorist organizations.

Arab Bank filed a petition for writ of mandamus to the U.S. Court of Appeals for the Second Circuit arguing that (1) the sanctions were impermissible in light of its obedience to the criminal non-disclosure laws of the countries where the documents are located; and (2) the sanctions violated principles of international comity and due process. The Second Circuit affirmed the district court's sanctions order, holding that the Second Circuit does not have jurisdiction to review a decision that raises questions to pretrial discovery in which the district court has not entered a final judgment. The Second Circuit also rejected Arab Bank's argument that the disputed documents are covered by foreign bank secrecy laws such that their disclosure would subject the Bank to criminal prosecution and other penalties in several foreign jurisdictions. The U.S. Supreme Court denied Arab Bank's petition for writ of certiorari to overturn the sanctions before trial. The sanctions order permitted the jury to infer that Arab Bank provided financial services to terrorists and excluded bank experts from arguing that the Saudi-Arabian charity was in fact a legitimate charity.

Following more than a five-week trial in Brooklyn, the jury found Arab Bank liable for 24 separate attacks purportedly committed by Hamas during a roughly four-year Palestinian uprising in the early 2000s against the Israeli occupation of the West Bank and Gaza. The attacks included suicide bombings on buses, restaurants and elsewhere that killed scores of civilians.

Bottom Line: A separate proceeding will begin to determine the amount of damages in which plaintiffs are seeking more than $1 billion. The bank was in a "Catch-22" because releasing the requested information would subject the bank to sanctions for violating its country's privacy laws, but refusing to release the information resulted in the ruling that the jury could draw a negative inference based on the bank's actions. Arab Bank has already announced that it will appeal the decision.

Documents:
Verdict

In re Target Corp. Customer Data Security Breach Litigation
TARGET FILES MOTION TO DISMISS DATA BREACH LAWSUIT
Date: September 2, 2014

Issue: Whether Target Corp. (Target) owed banks a duty of care that was violated under Minnesota law when Target allegedly failed to adequately safeguard customers' personal identifying information (PII).

Case Summary: Target filed a motion to dismiss the class-action complaint filed by groups of banks arising from last year's massive data breach.

Plaintiffs alleged in its complaint that (1) Target negligently misrepresented to the public that its computer systems and security practices were adequate to safeguard customers' financial account and PII against theft; and (2) Target violated the Minnesota Plastic Card Security Act by storing sensitive consumer financial information after the transactions were completed. Target contended in its memorandum that when customers swipe their cards at its store, Target receives authorization and payment from a payment processor or merchant bank (acquiring bank) contracted with Target to handle the transaction and not the bank that issued the card. The acquiring bank then obtains authorization and payment under its separate contract with a payment card company, such as Visa or MasterCard. Target explained that it does not have direct dealings with the banks that issued the card in the payment card transaction process.

Target also argued that it owed no duty of care to banks seeking to negate the negligence claims, and that there is no special relationship between banks and merchants under Minnesota tort law. Target claimed there is no duty established because banks and merchants are sophisticated commercial actors subject to contractual obligations concerning loss sharing arrangements and that a tort action cannot be used to renegotiate those agreements under Minnesota law. Target also argued that Minnesota courts have held that commercial transactions do not give rise to a special relationship because commercial actors are not the types of parties deemed to be vulnerable that would require protection. In addition, Target argued that the information lost because of the breach does not establish liability under Minnesota's Plastic Card Security Act (PCSA) because Target did not store any of the data. Target explained that the hackers deployed a point-of-sale malware to Target's registers which collected the financial information "in real time" when customers swiped their cards.

Bottom Line: The district court's handling of Target's motion to dismiss will be closely watched to determine how the court's ruling affects the rights and potential liabilities of merchants and payment-card-issuing institutions.

Documents:
Motion to Dismiss

New York v. Evans Bancorp., Inc. et al.
NEW YORK ATTORNEY GENERAL SUES EVANS BANK OVER ALLEGED DISCRIMINATORY MORTGAGE LENDING
Date: September 2, 2014

Issue: Whether Evans Bank, N.A. and Evans Bancorp, Inc. (Evans Bank) engaged in discriminatory mortgage lending that violated the Fair Housing Act (FHA).

Case Summary: New York Attorney General Eric T. Schneiderman filed a complaint in the Western District of New York against Evans Bank involving allegations that Evans Bank engaged in discriminatory

mortgage lending in violation of the FHA.

According to the complaint, Evans Bank engaged in intentional discrimination by "redlining," or denying access to mortgage loans to predominantly African-American neighborhoods in the City of Buffalo because of the racial composition of those neighborhoods. The complaint alleges that Evans Bank created a map defining its lending area that excluded the predominantly African-American neighborhoods in Buffalo's Eastside. Evans Bank allegedly developed mortgage lending products that it made unavailable to applicants in the Eastside neighborhoods despite the creditworthiness of the applicants and refused to solicit customers or market loan products in these neighborhoods. Evans Bank allegedly received 1,114 residential mortgage applications in those predominantly African-American neighborhoods in from 2009 to 2012, only four of which were reported as from African-American applicants.

The complaint further alleges that Evans Bank made an intentional effort to avoid locating its branches and other facilities in the Eastside neighborhoods, but rather created a network of branches and other facilities to form a "ring" around the Eastside neighborhoods. According to the complaint, Evans Bank did not have a branch office or branded ATM in any of the predominantly African-American neighborhoods in the Buffalo metro area.

Bottom Line: This lawsuit is part of a broader investigation into mortgage redlining by banks operating in New York that was prompted by concerns that banks had significantly curtailed lending to minority communities after the 2008 financial crisis.

Documents:
Complaint

FDIC v. Willetts
FDIC LOSES $40 MILLION LAWSUIT AGAINST COMMUNITY BANK EXECUTIVES
Date: September 10, 2014

Issue: Whether the bank executives at Cooperative Bank had a rational business purpose and acted in good faith under the business judgment rule when they approved 86 loans in 2007-2008 that resulted in a $40 million loss to the bank.

Case Summary: U.S. District Court Judge Terrance W. Boyle ruled in favor of the former bank directors and officers of Cooperative Bank (D&Os) in the Federal Deposit Insurance Corporation's (FDIC) $40 million lawsuit in the Eastern District of North Carolina involving allegations that the D&O's recklessly approved risky loans.

The FDIC brought this lawsuit seeking damages of at least $40 million in connection with the D&Os approval of 86 loans between January 2007 and April 2008 following the closure of the bank in June 2009. The FDIC alleged that (1) Cooperative's loan policy deviated from established banking practices and regulatory guidelines involving the failure of the D&Os to verify the borrowers' financial information or require maximum debt-to-income ratios; and (2) the D&Os ignored prior warnings from regulators in regards to their imprudent underwriting practices.

Judge Boyle ruled in favor of the D&Os, holding that under the business judgment rule, the D&Os had a rational business purpose and acted in good faith when they approved the disputed loans. Judge Boyle determined that the FDIC's own Reports of Examination, in which the FDIC reviewed the bank's policies and processes and gave Cooperative Bank a passing grade, demonstrated that D&Os decision-making processes regarding its loans was rational. Judge Boyle wrote "to argue that the process behind the loans is irrational is absurd . . . each of the loans at issue was subject to substantial due diligence and an

approval process that defies a finding of irrationality." In dismissing the FDIC's gross negligence claims, Judge Boyle determined that the FDIC failed to show that the D&Os engaged in "wanton conduct" or "consciously disregarded Cooperative's well-being."

Bottom Line: Judge Boyle's ruling is the first to address the business judgment rule as part of the FDIC's litigation following the financial crisis of 2008.

Documents:
Order

Commonwealth of Virginia ex rel. Integra REC LLC v. Barclay Capital Inc. et al.
VIRGINIA ATTORNEY GENERAL SUES MAJOR BANKS FOR $1.15 BILLION OVER ALLEGED MORTGAGE FRAUD
Date: September 16, 2014

Issue: Whether defendants are liable for fraudulently misrepresenting the quality of residential mortgage-backed securities (RMBS) to the Virginia Retirement System.

Case Summary: Virginia Attorney General Mark R. Herring (AG) unsealed a $1.15 billion lawsuit against thirteen of the nation's largest banks (defendants) involving defendants' fraudulent packaging and selling of toxic RMBS to the Virginia Retirement System.

Integra REC LLC (Relator), a financial modeling and analysis firm, brought this action under the qui tam provision of the Virginia Fraud Against Taxpayers Act on behalf of the Commonwealth of Virginia when it discovered the alleged fraud using sophisticated proprietary methods to verify the RMBS purchased by the Virginia Retirement System with the actual mortgages and properties they contained. According to the complaint, defendants misrepresented to investors the underlying quality of the individual mortgages in its offering documents, which included (1) the percentage of mortgaged properties with simultaneous second liens; (2) the owner occupancy rate of properties within a given mortgage pool; and (3) the combined loan-to-value ratio. The complaint also alleges that defendants disregarded warnings raised by their due diligence firms over the quality of the underlying loans and waived the disqualified loans into the RMBS pool.

The AG alleges that from the 220 certificates the Virginia Retirement System purchased from defendants, which contained a total of 785,245 loans backed by RMBS, 38 percent of the loans were misrepresented with an estimated $383 million in losses. The AG seeks $1.15 billion in damages as compensation for the alleged fraud and to deter future misconduct.

Bottom Line: The lawsuit is the largest financial fraud action brought by the Commonwealth of Virginia under the Virginia Fraud Against Taxpayers Act.

Documents:
Complaint

CFPB v. Corinthian Colleges, Inc.
CFPB SUES CORINTHIAN COLLEGES FOR ALLEGED PREDATORY LENDING
Date: September 16, 2014

Issue: Whether Corinthian Colleges, Inc. (Corinthian) knowingly falsified its job statistics and graduates' career opportunities to advertise prospective students in taking out predatory loans.

Case Summary: The Consumer Financial Protection Bureau (CFPB) filed a lawsuit against for-profit chain Corinthian, which includes Everest, Heald, and WyoTech schools, alleging Corinthian engaged in an illegal predatory lending scheme.

According to the complaint, Corinthian inflated the cost of its tuition, which was five times the cost of similar programs at public colleges, and attracted thousands of students to take out high-cost private loans, known as "Genesis loans," through false and misleading representations about its graduates' career opportunities, including representations suggesting Corinthian would provide assistance in helping students find a job; and that students were likely to obtain a permanent job upon graduation. CFPB alleges that Corinthian representatives deceptively inflated the job placement statistics at its schools, including creating fictitious employers; misrepresenting students' future career prospects by defining a career as a job lasting only a single day; and paying employers to temporarily hire graduates. CFPB alleges that Corinthian aggressively recruited prospective students referred internally as having "minimal to non-existent understanding of basic financial concepts" and "stuck [and] unable to plan well for the future."

In order to comply with the "90/10 rule" under Title IV, which prohibits a for-profit college to receive more than 90% of its net revenue from Title IV aid, Corinthian allegedly created an artificial "funding gap" to increase students' need for private loans. According to the complaint, to cover the gap between its high tuition and available federal loans, Corinthian marketed the Genesis loans to its students, claiming they were provided by an independent third party. Corinthian allegedly stood behind much of the debt under agreements that obligated it to purchase the loans after origination or when payments were 90 days past due.

Bottom Line: The Corinthian lawsuit parallels the CFPB's lawsuit against ITT Educational Services, Inc. filed in February 2014.

Documents:
Complaint

NCUA v. Nomura Home Equity Loan, Inc.
TENTH CIRCUIT RULES THAT FIRREA'S EXTENDER STATUTE PERMITS NCUA TO BRING AN OTHERWISE TIME-BARRED RMBS LAWSUIT
Date: August 19, 2014

Issue: Whether the Financial Institutions Reform, Recovery, and Enforcement Act of 1989's (FIRREA) Extender Statute permits the National Credit Union Administration (NCUA) to bring an otherwise time-barred Residential Mortgage-Backed Securities (RMBS) suits.

Case Summary: The U.S. Court of Appeals for the Tenth Circuit reissued its original opinion affirming a district court's holding that FIRREA's Extender Statute (Extender Statute) preempts the three-year repose period under Section 13 of the Securities Exchange Act (Act).

NCUA sued multiple RMBS issuers (defendants) on behalf of U.S. Central and WesCorp involving allegations that defendants misled and falsely misrepresented its underlying RMBS in violation of the Act. The defendants filed a motion to dismiss arguing that the lawsuit was untimely under the three-year statute of repose under Section 13 of the Act, which begins when the security was offered or sold, rather than when NCUA placed the credit unions into conservatorship under the Extender Statute. The district court

ruled in favor of NCUA and held the lawsuit was timely pursuant to FIRREA's Extender Statute.

On appeal, the Tenth Circuit affirmed the district court's decision, holding that FIRREA established a "universal time frame" governing any action the NCUA may bring. The Tenth Circuit concluded that the language of FIRREA and its legislative history clearly demonstrate Congress intended the law to have its own statute of limitations and not be bound by other statutes of repose.

On June 16, 2014, the U.S. Supreme Court granted defendant's petition for writ of certiorari and vacated the Tenth Circuit's opinion. The Court remanded the case for further consideration based on the recently issued opinion in *CTS Corp. v. Waldburger*, which held that North Carolina's statute of repose was not preempted by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), which instead only preempts state statutes of limitations on bringing state-law environmental tort cases.

In reviewing the case in light of *CTS*, the Tenth Circuit distinguished *CTS* by determining that the Extender Statute was "fundamentally different" from the statute of repose under CERLA because the Extender Statute "plainly establishes a universal time frame for all actions brought by [the] NCUA." The Tenth Circuit rejected the argument that placed a distinction between statutes of limitations and statutes of repose by determining that that extender statutes "displace all preexisting limits on the time to bring suit, whatever they are called." The Tenth Circuit held that the Extender Statute's surrounding language, statutory context, and statutory purpose supported its original decision that the NCUA's lawsuit was timely."

Bottom Line: Although the ruling applies only to the extender statute applicable to the NCUA, the extender statute applicable to the Federal Deposit Insurance Corporation uses identical language. The Tenth Circuit notes that other courts have held that materially similar extender statutes cover federal and state statutory claims.

Documents:
Opinion
