JANUARY 2006

WBSK

MORTGAGE FINANCE NEWSLETTER

A PUBLICATION OF WEINER BRODSKY SIDMAN KIDER PC

Supreme Court Resolves Conflict Among the Circuits Regarding When a Party Must Pay for an Improper Removal

In a December 2005 decision, the United States Supreme Court held that, upon remand, following an improper removal to federal court, district courts should apply neither a presumption in favor of nor a strong bias against the award of attorney's fees. In *Martin v. Franklin Capital Corporation*, the Court held that 28 U.S.C. § 1447(c), which provides that remand following improper removal "may require payment of just costs and any actual expenses, including attorney's fees, incurred as result of the removal," vests limited discretion in courts regarding whether the imposition of fees is proper. Specifically, the Court determined that, "[a]bsent unusual circumstances," courts may award attorney's fees pursuant to the removal statute "only where the removing party lacked an objectively reasonable basis for seeking removal." Similarly, the Court held that district courts should deny fees where an objectively reasonable ba-

continued on page 6

Rules Restricting Use of Medical Information by Creditors Are Finalized

The federal financial institution regulators (the "Agencies") published final rules to implement amendments to the Fair Credit Reporting Act ("FCRA") regarding the obtaining and use of medical information by creditors. The final rules replace interim final rules that were adopted in June 2005 and were scheduled to become effective on March 1, 2006. The Agencies both delayed the effective date of the interim final rules until April 1, 2006, and made the final rules effective on that date, thus making the final rules the only rules that will apply.

The amendments to the FCRA were added by Section 411 of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), which was adopted on December 4, 2003. As amended, the FCRA restricts the ability of a consumer reporting agency to provide a consumer report (commonly referred to as a "credit report") containing medical information to a party. The amended FCRA also restricts the ability of creditors to obtain and use medical information regarding consumers. The restrictions on creditors are not limited to information obtained from consumer reporting agencies, but the restrictions are subject to certain exceptions. The FCRA directs the Agencies to adopt regulations in connection with the restrictions on creditors. The final rules were adopted by the Agencies pursuant to this directive. The final rules do not address the restrictions on consumer reporting agencies.

Scope.

The Agencies that adopted the final rules are the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Office of the Comptroller of the Currency, the Office of Thrift Supervision and the National Credit Union Administration. Each of the Agencies adopted rules that apply to the respective financial institutions that they supervise. Additionally, the Federal Reserve Board adopted separate rules, designated as Regulation FF, that apply to all other creditors, including independent mortgage companies. However, Regulation FF does not contain provisions regarding the redisclosure of medical information and the sharing of medical information with affiliates that are contained in the Agencies' joint rules. Except as otherwise noted, the discussion of the final rules in this article addresses both the Agencies' joint rules and Regulation FF.

Examples.

The final rules contain examples designed to illustrate various aspects of the rules. While the examples are not exclusive, compliance with an example, to the extent applicable to a particular situation, constitutes compliance with the final rules. The examples illustrate only the particular issue that is described, and do not illustrate any other issue that may arise under the rules.

Medical Information.

For purposes of the final rules, "medical information" is defined as information

or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer that relates to (1) the past, present, or future physical, mental, or behavioral health or condition of an individual, (2) the provision of health care to an individual or (3) the payment for the provision of health care to an individual. The following does not constitute medical information (1) the age or gender of a consumer, (2) demographic information about the consumer, including a consumer's residence address or email address, (3) any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy or (4) information that does not identify a specific consumer.

General Prohibition.

Pursuant to the final rules, a creditor may not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, except as provided by the rules. A consumer's "eligibility, or continued eligibility, for credit," is defined as the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered. However, the term does not include (1) any determination of the consumer's qualification or fitness for employment, insurance (other than a credit insurance product), or other non-credit products or services, (2) authorizing, processing or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit or (3) maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

Unsolicited Medical Information.

The final rules contain a rule of construction, rather than an exception, regarding unsolicited medical information. The final rules provide that that a creditor does not violate the general prohibition against obtaining medical information if it receives such information in connection with any determination of a consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information. If a creditor receives medical information in such a situation, it may use the information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit to the extent that the creditor can rely on at least one of the exceptions contained in the final rule, which are addressed below.

Examples illustrating the rule of construction provide that a creditor does not obtain medical information in violation of the general prohibition if (1) in response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer owes a debt to a hospital, (2) in a conversation with a loan officer, a consumer informs the creditor that the consumer has a particular medical condition or (3) in connection with a consumer's credit application, a creditor requests a credit report from a consumer reporting agency and receives medical information in the report even though the creditor did not specifically request medical information.

Financial Information and Specific Exceptions.

The final rules contain a general financial information exception designed to address credit-related aspects of medical information, and also a number of specific exceptions designed for particular purposes.

Financial Information Exception.

The financial information exception permits a creditor to obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, subject to three conditions. The conditions are that (1) the information is the type of information routinely used in making credit eligibility determinations, such as information relating to debts, expenses, income, benefits, assets, collateral, or the purpose of the loan, including the use of proceeds, (2) the creditor uses the medical information in a manner and to an extent that is no less favorable than it would use comparable information that is not medical information in a credit transaction and (3) the creditor does not take the consumer's physical, mental or behavioral health, condition or history, type of treatment, or prognosis into account as part of any such determination.

With regard to the first condition, the following are examples of types of information routinely used in making credit eligibility determinations:

1. The dollar amount, repayment terms, repayment history, and similar information regarding medical debts to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit.
2. The value, condition, and lien status of a medical device that may serve as collateral to secure a loan.
3. The dollar amount and continued eligibility for disability income, workers' compensation income, or other benefits related to health or a medical condition that is relied on as a source of repayment.
4. The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to, a transaction involving the consolidation of medical debts.

Additionally, there are examples that demonstrate the use of medical information in a manner that is consistent with the exception, and in a manner that is not consistent with the exception. One example of the use of medical information in a manner consistent with the exception provides as follows: A consumer includes on an application for a $10,000 home equity loan that he has a $50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current. The applicant meets the income and other requirements of the creditor's underwriting guidelines. The creditor grants the application.

One example of the use of medical information in a manner that is not consistent with the exception provides as follows: A consumer meets with a loan officer to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has the disease. The credit committee follows the loan officer's recommendation and denies the application because the consumer has a potentially terminal disease.

Specific Exceptions.

There are nine specific exceptions that permit a creditor to obtain and use medical information as follows:

1. To determine whether the use of a power of attorney or legal representative that is triggered by a medical condition or event is necessary and appropriate or whether the consumer has the legal capac-

ity to contract when a person seeks to exercise a power of attorney or act as a legal representative for a consumer based on an asserted medical condition or event.

No examples of this exception are provided. In the supplementary information to the final rules, the Agencies note that they declined to adopt a broader exception to permit a creditor to investigate the mental capacity of a consumer based on a suspicion that the consumer lacks the capacity to contract. To support this determination, the Agencies stated that they believe creditors are qualified to determine whether a power of attorney or legal representative status has been properly invoked based on an asserted medical condition or event, but are generally not qualified to determine the mental capacity of a consumer. However, if a power of attorney or legal representative status is triggered by a lack of mental capacity that is not tied to an objective event, such as a determination by an appropriate medical professional that a party lacks sufficient mental capacity to tend to his or her affairs, then it appears creditors may be presented with the issue of whether the consumer indeed lacks mental capacity. The Agencies also stated that permitting creditors to inquire about mental capacity based only on a reasonable suspicion could result in discrimination against certain consumers and circumvention of the general prohibition. This concern may have been a greater factor in the decision of the Agencies not to adopt a broader exception regarding mental capacity.

2. To comply with applicable requirements of local, state or federal laws. No examples of this exception are provided. The Agencies declined to provide, as requested by a commenter, that the exception expressly permit a creditor to consider the mental capacity of a consumer to comply with the borrower interest provisions under the Home Ownership Equity Protection Act and state laws.

3. To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is (a) designed to meet the special needs of consumers with medical conditions and (b) established and administered pursuant to a written plan that (i) identifies the class of persons that the program is designed to benefit and (ii) sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program. The Agencies explain in the supplementary information that this exception is based on the provisions relating to special purpose credit programs under the Equal Credit Opportunity Act and Regulation B.

The following example of this exception is provided: A non-profit organization establishes a credit assistance program pursuant to a written plan that is designed to assist disabled veterans by subsidizing the down payment for home purchase mortgage loans. The organization works through mortgage lenders and requires that the lenders obtain medical information about the disability of a veteran that seeks to qualify for the program, and forward the information to the organization. A veteran applies for a loan, and the lender advises the veteran of the program. The veteran seeks to qualify for the program. Assuming that the program complies with all applicable law, including applicable fair lending laws, the creditor may obtain and use medical information about the medical condition and disability, if any, of the veteran to determine whether the veteran qualifies for the program.

4. To the extent necessary for fraud prevention or detection.

No examples of this exception are provided. In the supplementary information, the Agencies advise that creditors may not rely on blanket assertions of a fraud prevention or detection purpose, and must demonstrate the necessity for, and actual use of, medical information to prevent or detect fraud. In response to a comment that the exception is overly broad and unnecessary, the Agencies state they believe there may be limited circumstances where the use of medical information is necessary for fraud prevention or detection purposes. The Agencies note that, given the broad definition of "medical information" and the development of increasingly sophisticated anti-fraud technologies, such as various biometric tools, the Agencies believe it is important to retain the exception so as not to hinder the development of new anti-fraud technologies.

5. In the case of credit for the purpose of financing medical products or services, to determine and verify the medical purpose of a loan and the use of proceeds.

The examples of this exception include the following: A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting $10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

Independent mortgage companies may not rely on the exception that addresses the sharing of medical information with affiliates.

6. Consistent with safe and sound practices, if the consumer or the consumer's legal representative specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances, and such request is documented by the creditor.

One of the examples addresses the use in a credit application of boilerplate language that routinely requests medical information from the consumer or that indicates that by applying for credit the consumer authorizes or consents to the creditor obtaining and using medical information in connection with the determination of the consumer's eligibility, or continued eligibility, for credit. The example provides that if a consumer is not seeking credit for a medical purpose, the mere fact that the consumer completes and signs a credit application that contains such boilerplate language does not constitute a request by the consumer that the creditor obtain and use medical information to accommodate the consumer's particular circumstances. The Agencies emphasize in the supplementary information that this exception is not triggered until the consumer makes a specific request for an accommodation. Other examples reflect that if a consumer provides medical information for consideration by a creditor pursuant to the conditions of the exception, the creditor may, but is not required to, consider the information.

7. Consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that

is triggered by a medical condition or event apply to a consumer.

The following example of this exception is provided: After an appropriate safety and soundness review, a creditor institutes a program that allows consumers who are or will be hospitalized to defer payments as needed for up to three months, without penalty, if the credit account has been open for more than one year and has not previously been in default, and the consumer provides confirming documentation at an appropriate time. A consumer is hospitalized and does not pay her bill for a particular month. This consumer has had a credit account with the creditor for more than one year and has not previously been in default. The creditor attempts to contact the consumer and speaks with the consumer's adult child, who is not the consumer's legal representative. The adult child informs the creditor that the consumer is hospitalized and is unable to pay the bill at that time. The creditor defers payments for up to three months, without penalty, for the hospitalized consumer and sends the consumer a letter confirming this practice and the date on which the next payment will be due. The creditor has obtained and used medical information to determine whether the provisions of a medically-triggered forbearance practice or program apply to a consumer.

The Agencies advise in the supplementary information that the exception is flexible enough to cover both formal and informal forbearance practices and programs.

8. To determine the consumer's eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement, if a medical condition or event is a triggering event for the provision of benefits under the contract or agreement.

No examples of this exception are provided. The Agencies advise in the supplementary information that a creditor may not use medical information, such as the fact that the consumer uses a wheelchair, to determine whether the consumer will be required to obtain a debt cancellation contract or debt suspension agreement.

9. To determine the consumer's eligibility for, the triggering of, or the reactivation of a credit insurance product, if a medical condition or event is a triggering event for the provision of benefits under the product.

No examples of this exception are provided. As with the exception for debt cancellation contracts and debt suspension agreements, the Agencies advise in the supplementary information that a creditor may not use medical information, such as the fact that the consumer uses a wheelchair, to determine whether the consumer will be required to obtain a credit insurance product.

Affiliate Exception.

The Agencies' joint rules contain an exception that addresses the sharing of medical information with affiliates. Because the exception is contained only in the Agencies' joint rules, the scope of the exception is limited to the financial institutions that are regulated by the Agencies. Thus, independent mortgage companies may not rely on the exception. While the Federal Trade Commission (FTC) has authority to adopt rules regarding this matter, it has not proposed any rules.

The FCRA contains a general exception from the definition of "consumer report" that permits a party to share consumer report information on a consumer with an affiliate, if the party first notifies the consumer of the desire to do so, provides the consumer with the opportunity to opt out of the disclosure and the consumer does not opt out. The FACT Act carved out from this general exception medical information, subject to certain statutory exceptions and any exceptions adopted by the Agencies (or the FTC) with respect to the respective entities that they regulate. The Agencies' joint rules reflect the statutory provisions, and add an exception.

The Agencies' joint rules carve out the following information from the general exception that, subject to the conditions noted above, permits parties to share consumer report information with an affiliate (1) medical information, (2) an individualized list or description based on the payment transactions of the consumer for medical products or services and (3) an aggregate list of identified consumers based on payment transactions for medical products or services. Thus, even if a party has complied with the FCRA notice and opt-out procedure and a consumer did not opt out, the party cannot share this type of information regarding the consumer with an affiliate except in certain circumstances that are specified in the Agencies' joint rules. The circumstances are as follows:

1. In connection with the business of insurance or annuities. The Agencies' joint rules specify that such business includes any of the activities specified in Section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003. Among the numerous activities set forth in Section 18B are underwriting, policy placement or issuance, claims administration, ratemaking and guaranty fund functions, and policyholder service functions.

2. For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPPA").

3. For any purpose referred to in Section 1179 of HIPPA. Section 1179 of HIPPA addresses payment billing, processing and related activities.

4. For any purpose described in Section 502(e) of the Gramm-Leach-Bliley Act ("GLBA"). Section 502(e) contains the exceptions that permit financial institutions to share nonpublic personal information on consumers or customers without providing the consumers or customers with a notice of the institution's privacy practices and an opportunity to opt out from certain sharing of such information.

5. In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with the final rules. This exception is not contained in the FACT Act and was added by the Agencies.

6. As otherwise permitted by the Agencies.

Redisclosure Limitations.

The Agencies' joint rules contain a provision that incorporates an FCRA section limiting the redisclosure of medical information. Because the provision is contained only in the Agencies' joint rules, it is limited to the financial institutions that are regulated by the Agencies. However, because the FCRA contains a redisclosure limitation, the statutory limitation applies to other financial institutions, including independent mortgage companies.

Pursuant to the provision of the Agencies' joint rules, which closely follows the FCRA, if a financial institution receives medical information about a consumer from a consumer reporting agency or its affiliate, the institution may not disclose the information to any other party, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation or order. ■

Court Says No to Unauthorized Practice of Law Claim

In a series of challenges by plaintiffs' counsel contending that lenders violate New York's statutory prohibition against the unauthorized practice of law by charging borrowers a document preparation fee, Judge Austin of the Supreme Court for the State of New York, Nassau County, met one of those challenges with a resounding "No." Concluding that plaintiff's claim was both legally unsupportable, as well as preempted by the National Bank Act, Judge Austin granted the defendant bank's motion to dismiss.

In *Fuchs v. Wachovia Mortgage Corp.*, plaintiff refinanced his residential mortgage loan with Wachovia Mortgage Corporation ("Wachovia"), a subsidiary of Wachovia National Bank, N.A., a federally chartered bank. Wachovia charged plaintiffs a $100 document preparation fee in connection with the refinance. Wachovia charged and collected from plaintiff a separate legal fee for legal services performed by Wachovia's attorneys. Plaintiff brought a putative class action lawsuit against Wachovia under New York Judiciary Law §§ 478, 484 and 495(3), contending, *inter alia*, that Wachovia's imposition of a document preparation fee constituted the unauthorized practice of law and violated the state consumer fraud act, General Business Law ("GBL") § 349.

New York's Judiciary Law § 495(3) prohibits a corporation or voluntary association from charging a fee for the preparation of " … deeds, mortgages, assignments, discharges, leases, or any other instruments affecting real estate." Noting that the purpose of the statute is to protect the public from non-lawyers engaging in the practice of law, Judge Austin focused on whether Wachovia had rendered any legal advise to plaintiff or had exercised any independent judgment regarding the preparation of plaintiff's note or mortgage. Because plaintiff did not allege any facts from which the court could infer that Wachovia had provided plaintiff with specific legal advise relating to their mortgage loan, and finding that merely filling in the blanks on the standard New York Fannie Mae/ Freddie Mac form loan documents involved no negotiation or independent judgment by Wachovia personnel, Judge Austin concluded that Wachovia had not engaged in the unauthorized practice of law.

The court similarly had little difficulty dispensing with plaintiff's contention that charging a document preparation fee violates GBL § 349. Noting that the statute only prohibits deceptive practices or acts, but that plaintiff's Complaint contained no allegation that the charging of a document preparation fee is a deceptive practice, the court dismissed that claim as a matter of law. Specifically, the court rejected plaintiff's claim that he and others in the purported class had been "deceived" or "misled" by Wachovia's failure to advise them that the charging of a document preparation fee violated New York's unauthorized practice of law statute. In so doing, the court first observed that the fee had been clearly identified on plaintiff's HUD-1 Settlement Statement. The court then stated that Wachovia had no duty to disclose the existence of New York's prohibition on the unauthorized practice of law, in part because a person is chargeable with knowledge of the law. In dismissing the claim, Judge Austin held that "no claim can be made pursuant to GBL § 349 when the allegedly deceptive activity is fully disclosed."

Finally, Wachovia argued that, to the extent the New York statutes purported to limit its ability to charge and collect a document preparation fee, the National Bank Act and its implementing regulations preempt those statutes. See 12 U.S.C. § 24 (Seventh); 12 C.F.R. §7.4002; § 5.34(3)(e). The court agreed, concluding that charging a document preparation fee is permitted under federal law and regulations as a "safe and sound" banking practice, and that to the extent the New York statutes purported to prevent Wachovia from collecting such a fee, those statutes were preempted.

Whether the imposition of a document preparation fee constitutes the unauthorized practice of law is currently being litigated in at least two other New York state courts. ■

States: Licensing Update

CALIFORNIA – Finance Lender Branch Licensing

Effective January 1, 2006, the California Finance Lenders Law has been amended to provide for new branch licensing requirements. Specifically, California Finance Lender Licensees seeking to license additional branch locations must submit a license application with the requisite fee to the Commissioner of Corporations at least 10 days prior to engaging in business at the new location. The amendment expressly permits a California Finance Lender Licensee that files a branch license application with the requisite fee to commence business at its new location 10 days after the date it mails the branch license application. Currently, Finance Lender Licensees are required to submit a Short-Form Branch License Application in order to conduct business at a new branch location and licensees may not conduct business at that location until the application is approved.

Under the revised provisions of the California Finance Lenders Law, the Commissioner of Corporations shall approve or deny the branch manager responsible for the lending operations at the branch within 90 days of receipt of the branch license application. In the event that the branch manager is not acceptable and the application is denied, the Finance Lender Licensee shall file a new application designating a different branch manager responsible for the lending operations at the branch within 10 days of receipt of the denial of the application.

LOUISIANA – **Reinstatement Procedure for Expired RML Licenses**

The Louisiana Office of Financial Institutions has issued a regulation that provides for a reinstatement procedure for Residential Mortgage Lending Licensees whose licenses automatically expire as of January 1 (as a result of a licensee's failure to timely file a license renewal application). A Residential Mortgage Lending Licensee whose license automatically expired is eligible for reinstatement of such license if, on or before January 15 of that year, such licensee: (1) requests, in writing, the reinstatement of its license; (2) provides good cause to the Commissioner of the Office of Financial Institutions ("Commissioner") that its request for reinstatement is worthy of approval; and (3) pays a reinstatement penalty subject to the Commissioner's discretion, that shall not exceed $1,000.

Improper Removal *continued from page 1*

sis for removal exists. In so holding, the Supreme Court resolved a conflict among the Federal Circuits, which have imposed standards varying from requiring an objectively reasonable legal basis for removal to the presumptive imposition of fees when a removal is held improper.

The *Martin* Court emphasized that a court's discretion in applying the statute must be limited by a legal standard that "promotes the basic principle of justice that like cases should be decided alike." In adopting the "objectively reasonable basis for removal" test, the Court determined that the idea that Congress intended to confer a right to remove through the removal statute but simultaneously discouraged removal in all but "obvious cases" is insupportable. Noting that improper removals cause considerable costs and delays in litigation, the Court reasoned that the "objectively reasonable" test recognizes the desire to deter removals sought only to protract the litigation, without undermining the statutory right to removal.

For parties seeking to remove their cases to federal court, *Martin* ensures that they will not be subjected to differing standards based on the jurisdiction in which they remove. Importantly, *Martin* enables parties up to assess more accurately the risk of imposition of fees where the basis for removal is not obvious. The freedom to make the decision whether to remove on a basis that is "objectively reasonable" – although perhaps not clear cut – may increase the likelihood that parties will remove to federal courts that they perceive as more favorable than state jurisdictions. ■

Seventh Circuit Issues Ruling Affecting Class Action Fairness Act; Telephone Consumer Protection Act

In a ruling that challenges the prevailing legal wisdom, the United States Circuit Court of Appeals for the Seventh Circuit recently held that the burden of proving federal jurisdiction under the federal Class Action Fairness Act remains on the removing party and, further, that the federal Telephone Consumer Protection Act does not foreclose removal to the federal courts. The Seventh Circuit's ruling may signal the end of a trend of cases that had held to the contrary on both issues.

In *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005), the defendant was sued in Illinois state court for alleged violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. The TCPA generally prohibits the transmission of unsolicited advertisements through the use of telephone facsimile machines. The plaintiff sought to represent a class of persons who had received unsolicited facsimile advertisements from the defendant. The defendant subsequently removed the action from state court to the United States District Court for the Northern District of Illinois. This removal was premised upon the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), which permits the removal of interstate class actions in which: (1) the aggregate amount in controversy exceeds $5 million; (2) any member of a putative class of plaintiffs is a citizen of a state different from any defendant; (3) the primary defendants are not states, state officials, or other government entities against whom the district court may be foreclosed from ordering relief; and (4) the members of the putative plaintiff class number 100 or more.

In its removal papers, the defendant noted that the TCPA provides an award of $500 per violation, which can be trebled for a total award of $1500 upon a showing that the TCPA was violated either willfully or knowingly. Furthermore, the defendant conceded that it had sent at least 3,800 advertising facsimiles. The defendant argued that the aggregate amount in controversy therefore exceeded $5.7 million. Nonetheless, the district court remanded the case, ruling that the defendant had not carried its burden under CAFA of showing that the amount in controversy exceeded $5 million because the plaintiff might not be able to prove "willfulness" and, moreover, that actions under the TCPA are not removable because that Act provides for exclusive state jurisdiction. The defendant filed a petition for interlocutory appellate review of the district court's remand order. The Seventh Circuit granted the petition and accepted the appeal. It issued its opinion on October 20, 2005.

Writing for the court, Circuit Judge Frank Easterbrook first addressed the defendant's argument that the district court erred by placing the burden of proving the propriety of removal on the removing party. The defendant argued that although the federal courts had previously placed this burden on the removing party, CAFA's legislative history demonstrates a clear intent to shift the burden to the party seeking remand. The defendant principally relied upon the report of the Senate Judiciary Committee concerning the bill that ultimately became CAFA. That report states in relevant part that "[i]f a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (*i.e.*, that the applicable jurisdictional provisions are not satisfied)."

The *Brill* court recognized that "a dozen or so district judges have treated this passage as equivalent to a statute and reassigned the risk of non-persuasion accordingly," and cited *Berry v. American Express Publishing Corp.*, 381 F. Supp. 2d 1118 (C.D. Cal. 2005), and *Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161 (D. Mass. 2005), as examples of this judicial trend. Unimpressed, however, the Seventh Circuit determined that "when the legislative history stands by itself, as a naked expression of 'intent' unconnected to any enacted text, is has no more force than an opinion poll of legislators – less, really, as it speaks for fewer. Thirteen Senators signed this report and five voted not to send the proposal to the floor. Another 82 Senators did not express themselves of the question; likewise 435 Members of the House and one President kept their silence." Accordingly, the court held that the burden of proving federal jurisdiction remains on the removing party. Nonetheless, the court further found that the defendant had met this burden because it had shown that the amount in controversy exceeds $5 million, based upon the plaintiff's actual demands. Specifically, the defendant conceded that it had sent at least 3,800 facsimile advertisements, and the plaintiff's complaint had not renounced the treble damages available to the class members under the TCPA. Thus, the court found that "a recovery exceeding $5 million for the class as a whole is not 'legally impossible.'"

Next, the *Brill* court addressed the district court's ruling that TCPA actions may never be removed because state jurisdiction is exclusive. The district court had relied on a provision of that Act which states that a plaintiff "may, if otherwise permitted by the laws or rules of court of a State, bring [an action] in an appropriate court of that State." From this language, the district court had inferred that state jurisdiction was exclusive. The Seventh Circuit noted that six other federal courts of appeal had arrived at similar conclusions. However, the court further noted that subsequent to these other circuit courts' rulings, the United States Supreme Court had held that statutory permission to litigate a federal claim in a state court does not foreclose removal to the federal courts. Seizing on the Supreme Court's ruling, the *Brill* court held that the TCPA provision in question "does not declare state jurisdiction to be exclusive. Thus it does not expressly override a defendant's removal rights under both [the removal statute] (because a claim that a business violated the Telephone Consumer Protection Act arises under federal law) and the Class Action Fairness Act." Because federal jurisdiction was found to be proper, the Seventh Circuit reversed the judgment of the district court and remanded the case to the district court with instructions to decide the suit on the merits.

The Seventh Circuit encompasses the states of Illinois, Indiana and Wisconsin.■

Montgomery County Adds Anti-Predatory Lending Measures to County Code

With the enactment of Bill 36-04, the Montgomery County Council recently amended the anti-discrimination provisions contained within the Montgomery County Code by adding anti-predatory lending measures. The county executive signed the measure (the "Ordinance"), and the Ordinance becomes effective on March 7, 2006. The Ordinance amends the consumer protection provisions of the Montgomery County Code to establish procedures to identify and assist consumers with respect to discriminatory, predatory or abusive lending practices. The Ordinance also amends the anti-discrimination provisions of the Montgomery County Code to prohibit discrimination in connection with certain predatory practices. Unlike other anti-predatory lending ordinances passed by localities in other states, the Ordinance combats predatory lending by expanding the categories of discriminatory practices in the anti-discrimination provisions of the Montgomery County Code to include certain predatory practices.

Montgomery County is located in Maryland just outside of Washington, D.C., and is part of the fourth largest metropolitan statistical area in the country. According to the United States Census Bureau, Montgomery County is the 11th wealthiest county in the country with a median income of $76,546. The Mortgage Bankers Association estimates that lenders originated more than $17.1 billion in mortgages to Montgomery County borrowers during 2004. Montgomery County is important to mortgage lenders, and the manner in which the Ordinance combats predatory lending practices could serve as a model for other local and county governments.

The Ordinance provides that a person must refrain from discriminating on the basis of the race, color, religious creed, ancestry, national origin, sex, martial status, disability, presence of children, family responsibilities, source of income, sexual orientation, or age of the borrower (hereinafter referred to in this article as a "Prohibited Basis"). The term "person" includes, among others, an organization regularly engaged in the business of lending money, brokering money or guaranteeing loans. Based on this definition, the Ordinance applies to mortgage lenders and mortgage brokers.

Mortgage lenders and mortgage brokers must not discriminate on a Prohibited Basis in connection with: (i) lending or brokering money; (ii) guaranteeing, servicing, or purchasing loans; (iii) accepting a deed of trust or mortgage; (iv) making funds available for the purchase, acquisition, construction, alteration, rehabilitation, repair or maintenance of any housing; (v) fixing the rates, terms, conditions, or provisions of any financial assistance; or, (vi) extending any other service in connection with housing finance.

In addition to these general prohibitions, the Ordinance bans discrimination on a Prohibited Basis by mortgage lenders and mortgage brokers in two specific instances in connection with a mortgage loan. The Ordinance defines "mortgage loan" to mean the making of a loan or providing other financial assistance to purchase, refinance, construct, improve, repair or maintain a dwelling that is secured by real property or any other type of loan that is secured by a dwelling.

First, mortgage lenders and mortgage brokers must not discriminate on a Prohibited Basis by engaging in steering. The Ordinance deems "steering" to be any of the following: (i) restricting or attempting to restrict the choices of the borrower because of factors other than the income or credit level of the borrower; (ii) discouraging a borrower from a particular mortgage loan with more favorable terms when the borrower qualifies for that particular mortgage loan; (iii) directing a borrower away from a housing or mortgage loan product, program, or service with more favorable terms when the borrower qualifies for that particular product, program or service; or, (iv) offering less favorable mortgage loan terms than would otherwise be offered.

Second, mortgage lenders and mortgage brokers must not discriminate on a Prohibited Basis by making a mortgage loan available that: (i) includes the financing of single premium credit life insurance; (ii) provides for excessive upfront points, fees or prepayment penalties; or, (iii) provides compensation paid directly or indirectly to a person from any source.

Mortgage lenders and mortgage brokers who violate the Ordinance are subject to monetary damages other than punitive damages. Such damages include compensation for the following: (i) reasonable fees for legal representation; (ii) property damage; (iii) personal injury; (iv) damages not exceeding $500,000 for humiliation and embarrassment, based on the nature of the humiliation and embarrassment, including its severity, duration, frequency, and breadth of observation by others; (v) financial losses resulting from the discriminatory act; and, (vi) interest on any damages from the date of the discriminatory act. Additionally, the injured party may recover equitable relief to prevent discrimination. The injured party may further recover consequential damages for up to two years after the discrimination, and any other relief necessary to eliminate the effects of any prohibited discrimination.

The Ordinance also requires the Office of Human Rights in Montgomery County to educate residents about discriminatory lending practices through the use of literature, counseling, educational workshops and public forums. The Office of Human Rights must also compile a written report each year detailing the number and type of housing discrimination complaints received during the past year in addition to identifying the overall lending patterns in Montgomery County. This report must incorporate HMDA data.

In addition to amending the anti-discrimination provisions of the Montgomery County Code, Bill 36-04 also amends the consumer protection provisions in the Montgomery County Code. The relevant amendments provide that consumers may file a written request for assistance with a potential violation with the Office of Consumer Protection. Within 20 days of receiving a written request with all of the supporting documents, the Office of

MORTGAGE FINANCE NEWSLETTER

is a publication of the law firm of

WEINER BRODSKY SIDMAN KIDER PC

1300 19th Street, N.W., Floor 5, Washington, D.C. 20036-1609

This Newsletter is intended to provide a concise and timely review of judicial developments, federal and state legislative, regulatory and other legal matters affecting the mortgage finance industry. It is not intended to be relied upon as a substitute for legal advice. © Copyright 2006 by Weiner Brodsky Sidman Kider PC. All rights reserved

Bruce E. Alexander
Richard J. Andreano, Jr.
James A. Brodsky
Donald C. Brown, Jr.
Jo A. DeRoche
Troy W. Garris
Cynthia L. Gilman
Don J. Halpern
Nancy W. Hunt
Heather Cain Hutchings
Fedor Kamensky
Mitchel H. Kider
Thomas Lawrence III
Aldys A. London
James M. Milano
Tobias P. Moon
Rose-Michele Nardi
Brian P. Perryman
Haydn J. Richards, Jr.
Christine Y. Rim
Leah Schmulewitz Getlan
Mark H. Sidman
John D. Socknat
David M. Souders
Cynthia G. Swann
Sandra B. Vipond
Harvey E. Weiner

Ann B. Shearer, Government Relations Specialist
Andrew E. Zirneklis, Compliance Specialist
Emmanuel P. Cruz, Licensing Specialist
Dawn R. Gould, Licensing Specialist
Melissa M. Jewett, Licensing Specialist
Michael H. Jones, Licensing Specialist

(202) 628-2000

www.wbsk.com
info@wbsk.com

Consumer Protection must review the claim and either: (i) advise the consumer to file a complaint if a potential violation exists; (ii) assist the consumer in filing a complaint with the appropriate government office or agency; or, (iii) provide the consumer with information, education, counseling or a referral to an appropriate outside agency, group or organization.

In the past, courts in other states have ruled that local ordinances were either completely or partially preempted by state law (e.g., Dayton and Toledo, Ohio, and Los Angeles and Oakland, California). At least one other local ordinance was, after its effective date, preempted by subsequently enacted state legislation (e.g., Philadelphia, Pennsylvania).

Importantly, the Maryland legislature enacted a law in 2002 that provides that only the state may enact a law that regulates extensions of credit. However, this prohibition does not restrict or otherwise affect the ability of local governments to enact laws or adopt regulations relating to fair housing or other civil rights. While the Maryland state law prohibits certain practices and limits points and fees in connection with "covered loans," it remains to be seen whether the Montgomery County Ordinance will be viewed as regulating extensions of credit as opposed to constituting a law or regulation relating to fair housing and civil rights. ■