

WBSK MORTGAGE FINANCE NEWSLETTER

A PUBLICATION OF WEINER BRODSKY SIDMAN KIDER PC

Offer of Home Loan Found to Be "Firm Offer" Under FCRA

In a recent decision out of the Middle District of Florida, *Soroka v. Homeowners Loan Corp.*, a district court concluded -- on a motion to dismiss -- that a lender's offer of a \$55,000 home loan constituted a "firm offer of credit" under the federal Fair Credit Reporting Act ("FCRA"), despite the fact that the offer did not identify either the interest rate or the term of the home loan.

In so ruling, the court analyzed the Seventh Circuit's rulings in both *Cole v. U.S. Capital, Inc.*, and *Murray v. GMAC Mortgage Corp.*

As to those decisions, the Soroka Court first noted (1) that both *Cole* and *Murray* required an examination of the entire offer, including its context, to determine whether a legitimate credit product was being offered -- that is, whether the offer has "value;" and (2) the *Cole* case involved "a limited amount of credit" that "could only be used to purchase a vehicle." The Soroka Court then noted that, unlike *Cole*, the offer before it was actually an offer for a home loan in the amount of \$55,000, rather than merely an enticement to purchase a car. Further, the Soroka Court found that "the omission of the interest rate and terms from the face of the offer does not mean that the offer is without value; it means only that more information must be provided before a consumer can evaluate with certainty how much value the offer has."

Recognizing that there is a mutual understanding between lenders and borrowers as to how home mortgage loans are made, including that changing interest rates and property values are taken into account and impact the terms of a home mortgage loan, the Court concluded that the omission of material terms such as interest rate, method of computing interest and the term of the loan is not fatal if the material terms are ascertainable with minimal effort -- that is, will be provided when the borrower contacts the lender to determine these missing terms. Because the conditions for obtaining the offered loan were stated in the offer, those conditions paralleled the statutory conditions, and the material terms were "ascertainable with minimal effort," the Soroka Court found that the offer constituted a "firm offer."

In so concluding, the Soroka Court expressly rejected the Seventh Circuit's position that an initial offer must contain, within its "four corners," all of the material terms and conditions of the offer to comply with the FCRA.

\$75 CREDIT CARD OFFER OK UNDER FCRA, *see page 7*

Fannie Mae Amends Selling Guide to Further Address Predatory Lending

Fannie Mae recently issued Announcement 06-04 that expanded its policy prohibitions regarding certain mortgage purchase eligibility requirements based on housing goals regulations issued by the U.S. Department of Housing and Urban Development (HUD) to which Fannie Mae is subject. Importantly, the announcement applies to all mortgages or loans (including manufactured housing loans) delivered to Fannie Mae on or after June 1, 2006.

Over the past several years, Fan-
Continued on page 2

Montgomery County Ordinance Enjoined Until Further Notice

On July 6, 2006, a hearing on the merits of the suit brought by the American Financial Services Association (AFSA) to permanently enjoin the enforcement of the Montgomery County Bill No. 36-04 (Ordinance) was held in the Montgomery County Circuit Court. Judge Mason indicated that, while he would not issue a ruling from the bench on whether to permanently enjoin the enforcement of the Ordinance, the preliminary injunction issued on March 7, 2006 would remain in effect until the court issues a

Continued on page 7

States Licensing Update

FLORIDA -- Effective October 1, 2006

Florida law will be amended to change licensing requirements for mortgage broker, correspondent lender, and mortgage lender licensees. Among others, the new law changes requirements for the designated principal representative of Florida licensees. Designated principal representative applicants will be required to provide fingerprint cards to the Office of Financial Regulation. In addition, individuals who have continuously served as a designated principal representative for one year and have not had a lapse in such capacity for more than two years prior to the filing of an application are deemed to qualify as a designated principal representative.

NEW HAMPSHIRE -- Effective August 18, 2006

New Hampshire law will require that each mortgage banker and each mortgage broker post a surety bond in the amount of \$20,000. Presently, licensed New Hampshire Mortgage Bankers are not required to file a surety bond with the New Hampshire Banking Department if they maintain a net worth equal to or in excess of \$100,000.

NEW JERSEY -- Effective July 1, 2006

The New Jersey Department of Banking and Insurance is moving to a new assessment program, which will allow the Department of Banking and Insurance to recoup its actual expenses from Licensed Lenders and other regulated institutions. Licensed Lenders will be billed annually on or about September 30 for expenses incurred during the previous fiscal year. In connection with the new assessment system, known as "Dedicated Funding," all regulated institutions now must file annual reports to the Department of Banking and Insurance.

OHIO -- Effective January 1, 2007

Certain provisions of the Ohio Mortgage Broker Act are amended to change licensing obligations for Mortgage Broker License Applicants. Mortgage Broker License Applicants that file their license application on or after January 1, 2007 will be required to provide evidence that their proposed Operations Manager has completed at least twenty-four (24) hours of live, classroom education. In addition, loan officer applicants who apply for licensure on or after January 1, 2007 must provide evidence that they have completed twenty-four (24) hours of live, classroom education.

FANNIE MAE GUIDE
Continued from page 1

nie Mae and its lender partners have worked together to expand affordable homeownership, promote responsible lending practices and combat predatory lending. Fannie Mae first issued its standards to guard against the purchase of mortgages with abusive or predatory lending practices in Lender Letter 03-00 issued on April 11, 2000. The requirements found in this letter were later codified in the Selling Guide in 2002. Since that time, Fannie Mae has issued numerous Announcements to its lender partners to further promote responsible lending practices, and to define additional lending practices that are unacceptable in connection with mortgages to be sold to Fannie Mae.

Points and Fees

With regard to points and fees, Fannie Mae will not purchase or securitize a mortgage if the total points and fees charged to the borrower exceed the greater of five (5%) percent of the mortgage amount or a maximum dollar amount of \$1,000. The current provision found in the Selling Guide detailing the costs that are included, or excluded, from the points and fees calculation remain unchanged, and are not affected by the amendment in Announcement 06-04.

High Cost/High Risk Mortgages

Currently, a mortgage subject to the requirements of the Home Ownership and Equity Protection Act of 1994 (HOEPA) is not eligible for purchase by Fannie Mae. With regard to HOEPA, Announcement 06-04 amends the Selling Guide to provide that Fannie Mae will not purchase or securitize a mortgage if the "annual percentage rate" or "points and fees payable by the borrower" (as each such term is calculated under HOEPA) exceeds the maximum thresholds described under HOEPA. This prohibition applies to all types of mortgages (including purchase money mortgages and refinance transaction mortgages), but does not include reverse mortgages. ■

Rhode Island Enacts Anti-Predatory Lending Law

Rhode Island recently enacted the “Rhode Island Home Loan Protection Act” (the “Act”). Similar to the federal Home Ownership and Equity Protection Act (“HOEPA”), the Act creates a class of consumer mortgage loans based on meeting or exceeding an annual percentage rate (“APR”) and/or “points and fees” thresholds. If a loan is classified as a “high-cost home loan” under the Act, certain additional limitations and prohibitions apply. Similar to other state anti-predatory lending laws, the “points and fees” threshold under the Act is lower for some loans than under the federal HOEPA. Also, the Act places limitations not only on “high-cost home loans” but also on “home loans” in a manner similar to other state anti-predatory lending laws. Thus, some of the prohibitions and limitations found in the Act apply to all consumer mortgage loans (or “home loans”), and not merely those classified as “high-cost home loans.” The Act becomes effective December 31, 2006.

The Act is similar to the onerous anti-predatory lending laws initially enacted in Georgia, New Jersey and New Mexico. The legislatures in these states subsequently amended their laws due to reactions from the secondary market and rating agencies. Rating agencies typically will not rate loans under a high-cost home loan act until or near its effective date. Thus, while it is not clear at this time how the secondary market will react to the Act, based on past responses to the initial Georgia, New Jersey and New Mexico anti-predatory lending laws, it seems that a less than enthusiastic reception from the secondary market is in store for the Act.

The Act defines a “high-cost home loan” as a “home loan” that meets or exceeds the APR and/or points and

fees thresholds specified in the Act. A “home loan” means a loan secured by real property in Rhode Island upon which there is located a 1-4 family structure designed to be occupied, and that is or will be occupied, by the borrower. A “home loan” includes an open-end line of credit, but excludes reverse mortgages. If the APR and/or “points and fees” thresholds are exceeded in connection with a “home loan” then the loan is classified as a “high-cost home loan” under the Act. The Act applies both to refinance and purchase money transactions.

The APR thresholds under the Act are similar to the thresholds found in the federal HOEPA for first lien loans. The APR threshold for first lien loans is equal to an interest rate equal to eight (8) percentage points over the yield on comparable U.S. treasury securities on the fifteenth (15th) day of the month prior to which the application is taken. The Act differs with regard to the APR threshold for subordinate lien loans. Unlike HOEPA, the APR threshold for subordinate lien loans is an interest rate equal to nine (9) percentage points over the yield on comparable U.S. treasury securities on the fifteenth (15th) day of the month immediately preceding the month in which the loan application was received by the lender.

The “total points and fees” threshold is: (i) for loans in which the “total loan amount” is fifty thousand dollars (\$50,000) or more, the total points and fees payable in connection with the home loan (less any excluded points and fees) that exceed five percent (5%) of the total loan amount, and (ii) for loans in which the total loan amount is less than fifty thousand dollars (\$50,000) the total points and fees payable in connection with the home loan (less any excluded points and fees) that exceed eight percent (8%) of the total loan amount.

“Points and fees” is defined in a manner similar to how that term is defined under the federal HOEPA, except that “points and fees” also includes all compensation paid indirectly to a loan broker from any source

other than the borrower in excess of one percentage (1%) point of the total loan amount (including a loan broker that originates a loan in its own name in a table-funded transaction) under the Act. “Points and fees” also include the maximum prepayment fees that may be charged or collected under the terms of the loan, and all prepayment fees incurred by the borrower if the loan refinances a previous loan originated or currently held by the same creditor or an affiliate of the lender. “Points and fees” further include credit insurance premiums, debt cancellation agreements, debt suspension agreements directly or indirectly financed by the lender, except that insurance premiums, debt cancellation or suspension fees calculated and paid in full on a monthly basis must not be considered financed by the lender.

For open-end credit, the points and fees are calculated by adding the total points and fees known at or before closing, including the maximum prepayment penalties that may be charged or collected under the terms of the loan, plus the minimum additional fees the borrower would be required to pay to draw down an amount equal to the total credit line.

The definition of “total loan amount” under the Act is slightly different than the definition of this term under the high-cost home loan laws of many other states and the federal HOEPA. Under the Act, “total loan amount” is defined as the total amount the consumer will borrow, as reflected by the face amount of the note. For open-end lines of credit, the total loan amount is calculated using the total line of credit allowed under the credit plan at closing.

Points and fees do not include: (i) points and fees up to and including one percent (1%) of the total loan amount attributable to bona fide fees paid to a federal or state government agency that insures the payment of some portion of a home loan plus an amount not to exceed two percent (2%) of the total loan amount attributable to a bona fide discount points or a conventional prepayment penalty (in

no case will the total excluded points and fees in connection with a home loan exceed three percent (3%) of the total loan amount).

“Bona fide discount points” means an amount knowingly paid by the borrower for the express purpose of reducing, and which in fact does result in a bona fide reduction of, the interest rate applicable to the home loan. However, the undiscounted interest rate for the home loan may not exceed the conventional mortgage rate by two percentage (2%) points for a home loan secured by a first lien, or by three and one-half percentage (3.5%) points for a home loan secured by a subordinate lien.

“Conventional mortgage rate” means the most recently published annual yield on conventional mortgages published by the Board of Governors of the Federal Reserve System, as published in statistical release H.15 or any publication that may supersede it, as of the 15th day of the month preceding the date of application.

“Conventional prepayment penalty” means any prepayment penalty or fee that may be collected or charged in a home loan, and that is authorized by any law, provided the home loan: (i) does not have an annual percentage rate that exceeds the conventional mortgage rate by more than two percentage (2%) points, and (ii) does not permit any prepayment fees or penalties that exceed two percent (2%) of the amount prepaid.

“Points and fees” also do not include: (i) taxes, filing fees, recording and other charges and fees paid or to be paid to public officials for determining the existence of or for perfecting, releasing or satisfying a security interest, or (ii) bona fide and reasonable fees paid to a person other than the lender or an affiliate of the creditor for the following: (a) fees for tax payment services; (b) fees for flood certification; (c) fees for pest infestation and flood determination; (d) appraisal fees; (e) fees for inspections performed prior to closing; (f) credit reports; (g) surveys; (h) attorneys’ fees; (i) notary fees; (j)

escrow charges, so long as not otherwise included as points and fees; (k) title insurance premiums; and (l) fire and hazard insurance and flood insurance premiums, provided that such fees are properly disclosed to the consumer pursuant to Regulation Z and the consumer has the choice of the provider.

Prohibitions, Limitations and Requirements in Connection with “High-Cost Home Loans”

In connection with a high-cost home loan, a lender may not directly or indirectly finance any points or fees which total is greater than five percent (5%) of the total loan amount or eight hundred dollars (\$800) whichever is greater.

Further, the following are prohibited in connection with “high-cost home loans”: (i) prepayment fees or penalties, (ii) scheduled payment more than twice as large as the average of earlier scheduled payments (this limitation does not apply when the payment schedule is adjusted to the seasonal or irregular income of the borrower), (iii) negative amortization, (iv) increasing the interest rate after default (this provision does not apply to interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan documents provided the change in the interest rate is not triggered by the event of default or the acceleration of the indebtedness), (v) more than two (2) periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the borrower, (vi) making a loan without first receiving certification from a counselor with a third-party non-profit organization approved by U.S. Department of Housing and Urban Development (“HUD”) that the borrower has received counseling on the advisability of the loan transaction, (vi) making a loan unless a reasonable creditor would believe at the time the loan is closed that one or more of the borrowers will be able to make the scheduled payments associated with the loan based upon a consideration

of his or her current and expected income, current obligations, employment status, and other financial resources, other than the borrower’s equity in the collateral that secures the repayment of the loan (there is a rebuttable presumption that the borrower is able to make the scheduled payments to repay the obligation if, at the time the loan is closed, the borrower’s total monthly debts, including amounts under the loan, do not exceed fifty percent (50%) of the monthly gross income of the borrower as verified by tax returns, payroll receipts, and other third-party income verification), or (vii) payment to a contractor under a home-improvement contract from the proceeds of a high-cost home loan, unless: (a) the lender is presented with a signed and dated completion certificate showing that the home improvements have been completed; and (b) the instrument is payable to the borrower or jointly to the borrower and the contractor, or, at the election of the borrower, through a third-party escrow agent in accordance with terms established in a written agreement signed by the borrower, the lender, and the contractor prior to the disbursement.

A lender may not charge a borrower any fees or other charges to modify, renew, extend, or amend a high-cost home loan or to defer any payment due under the terms of a high-cost home loan.

A lender may not make a high-cost home loan that provides for a late payment fee except as follows: (i) the late payment fee must not be in excess of three percent (3%) of the amount of the payment past due, (2) the late payment fee must be assessed only for a payment past due for fifteen (15) days or more or ten (10) days or more in cases of bi-weekly mortgage payment arrangement, and (iii) the late payment fee may not be imposed more than once with respect to a single late payment. If a late payment fee is deducted from a payment made on the loan, and the deduction causes a subsequent default on a subsequent payment, no late payment fee may

be imposed for the default. A lender must treat each payment as posted on the same business day as it was received.

All high-cost home loan documents must contain the following notice on the first page in a conspicuous manner:

“Notice: This a high-cost home loan subject to special rules under state law. Purchasers or assignees of this high-cost home loan may be liable for all claims and defenses by the borrower with respect to the home loan.”

Assignee Liability in Connection with “High-Cost Home Loans”

An entity that purchases or takes assignment of a “high-cost home loan” is subject to all affirmative claims and any defenses that the borrower could assert against the original lender. The purchaser or assignee may avoid liability if it: (i) has a policy in place that it does not purchase or take assignment of high-cost home loans, (ii) requires its sellers or assignors to represent and warrant that they do not sell or purchase such loans, or that the seller or assignee has obtained a similar warranty from its seller; and, (iii) exercises reasonable due diligence at the time of purchase or assignment of high-cost home loans, or within a reasonable period thereafter, intended to prevent the purchase or taking assignment of any high-cost home loans. Reasonable due diligence must provide for sampling, but does not require loan-by-loan review.

Assignee liability is limited to amounts required to reduce or extinguish the liability incurred by the borrower under the high-cost home loan, plus amounts required to recover costs, including reasonable attorneys’ fees.

A borrower acting only in an individual capacity may assert claims that the borrower could assert against a creditor of the high-cost home loan against any subsequent holder or assignee of the high-cost home loan as follows: (i) within five (5) years of

the closing of a high-cost home loan, a violation of this Act in connection with the loan as an original action, and (ii) at any time during the term of a high-cost home loan, after an action to collect on the high-cost home loan or foreclose on the collateral securing the high-cost home loan has been initiated or the debt arising from the high-cost home loan has been accelerated or the high-cost home loan has become sixty (60) days in default, any defense, claim or counterclaim, or action to enjoin foreclosure or preserve or obtain possession of the home that secures the loan.

Prohibitions in Connection with “Home Loans”

In addition to the prohibitions on “high-cost home loans,” the Act also places limitations on “home loans.” In connection with “home loans” lenders may not engage in “flipping” in connection with a “home loan.” “Flipping” is defined under the Act as making of a home loan to a borrower that refinances an existing home loan that was consummated within the prior sixty (60) months when the new loan does not have reasonable, “tangible net benefit” to the borrower considering all of the circumstances, including, but not limited to, the terms of both the new and refinanced loans, the cost of the new loan, and the borrower’s circumstances.

“Tangible net benefit” means, at the time of refinancing of a home loan, the new home loan meet, at a minimum, one of the following: (i) the borrower’s new monthly payment is lower than the total of all monthly obligations being financed, taking into account the costs and fees as disclosed on the HUD-1 settlement statement, (ii) there is a beneficial change in the amortization period of the new loan(s), (iii) the borrower receives cash in excess of the costs and fees, as disclosed on the HUD-1 settlement statement, as part of the refinancing, (iv) the borrower’s current note rate of interest is reduced, or in the event more than one loan in being refinanced, the weighted aver-

age note rate of the current loans is reduced, (v) there is a change from an adjusted rate loan to a fixed rate loan, or (vi) the refinancing is necessary to respond to a bona fide personal need or an order of a court of competent jurisdiction.

A lender may not recommend or encourage default on an existing loan or other debt prior to and in connection the closing of a “home loan” that refinances all or any portion of such existing loan or debt. No “home loan” may contain a provision that permits the lender, in its sole discretion, to accelerate the debt. This provision does not prohibit acceleration of the loan in good faith due to the borrower’s failure to abide by the material terms of the loan. A “home loan” may not contain a provision that allows a party to require a borrower to assert any claim or defense in a forum that is less convenient or more costly for the resolution of a dispute, or that causes delays, than a judicial forum established in Rhode Island where the borrower may otherwise properly bring a claim or defense. A “home loan” also may not contain a provision that limits in any way claim or defense the borrower may have.

Further, in connection with “home loans” the financing of most types of credit insurance, debt cancellation agreements or debt suspension agreements are prohibited, except that insurance premiums, debt cancellation or debt suspension fees calculated and paid in full on a monthly basis must not be considered financed by the creditor.

Civil Liability

An aggrieved borrower may bring a civil action for injunctive relief or damages for any violation of the Act. Additionally, the court may: (i) issue an order or injunction rescinding a home mortgage loan contract that violates the Act, or barring the lender from collecting under any home mortgage loan that violates the Act, (ii) issue an order or injunction barring foreclosure or other lender action under the mortgage securing

a home mortgage loan that violates the Act, (iii) issue an order or injunction reforming the terms of the home mortgage loan to conform to the Act, (iv) issue an order or injunction enjoining a lender from engaging in any prohibited conduct, or (v) impose such other relief, including injunctive relief, as the court may consider just and equitable.

A lender in a home loan who, when acting in good faith, fails to comply with the provisions of this Act, will not be deemed to have violated the Act if the creditor establishes that, within thirty (30) days of the loan closing and prior to the institution of any action under the Act, the lender notifies the borrower of the compliance failure and makes appropriate restitution and whatever adjustments are necessary are made to the loan, at the choice of the borrower, to either: (a) make the high-cost home, (b) make the high-cost home mortgage loan satisfy the requirements of the Act, or (c) change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a high-cost home mortgage loan.

A lender also will not be deemed to have violated the Act if the compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance procedures reasonably adapted to avoid the errors, and within sixty (60) days after the discovery of the compliance failure and before the institution of any action under the Act or the receipt of written notice of the compliance failure, the borrower is notified of the compliance failure, appropriate restitution is made and whatever adjustments are necessary are made to the loan, at the choice of the borrower, to either: (a) make the high-cost home mortgage loan satisfy the requirements of the Act, or (b) change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a high-cost home mortgage loan. Examples of a bona fide error may include clerical errors, errors in calculation, computer malfunction and programming, and printing errors. An

Rhode Island Laws Chapter 636 (2006), which enacted Rhode Island Senate Bill 2231, adds a new provision to Rhode Island's Financial Institutions Title, requiring that all monthly billings by mortgagees to mortgagors must show the allocation of the mortgagor's prior monthly payment to principal, interest and escrow, if applicable. This measure was enacted on July 14, 2006, and became effective upon passage

error in legal judgment with respect to any obligations arising under the Act will not be considered a bona fide error.

Notwithstanding any provision to the contrary contained in the Act regarding costs and attorneys' fees in any action instituted by a borrower who alleges that the defendant violated the provisions on "flipping," the borrower will not be entitled to costs and attorneys' fees if the presiding judge, in the judge's discretion, finds that, before the institution of the action by the borrower, the lender made a reasonable offer to cure and that offer was rejected by the borrower.

The provisions of the Act do not apply to: (i) any national bank, federal savings bank, or financial institution, or their wholly-owned subsidiary, such as banks, trust companies, savings banks, loan and investment banks and savings and loan associations, other than a credit union, organized under the laws of Rhode Island, or (ii) the Federal Housing Administration, the Department of Veterans Affairs, or other state or federal housing finance agencies.

The Act authorizes the Director of the Department of Business Regulation to promulgate rules and regulations to implement the provisions of the Act. Rules and regulations promulgated for the "tangible net benefit" and anti-flipping provisions may contain such factors, classifications, differentiations or other provisions, and may provide for such adjustments and exceptions for any class of transactions as, in the judgment of the director, are necessary or proper to carry out those sections, to prevent circumvention or evasion thereof or to facilitate compliance therewith. ■

Colorado Passes Affiliated Business Arrangement Law

On March 31, 2006, the State of Colorado passed a law that will provide greater regulation of affiliated business arrangements ("AfBAs") involving title agents or title insurers. Effective July 1, 2006, HB1141 requires title insurance agents and insurers making referrals to affiliated settlement service businesses to provide consumers with the same disclosures required under the federal Real Estate Settlement Procedures Act ("RESPA"). Also like RESPA, the new AfBA law prohibits the required use of an affiliated business' settlement services as a condition for obtaining title insurance services. Furthermore, the law requires real estate licensees and title insurance agents and companies to disclose their AfBAs to their respective regulators as part of a new or renewal application.

Importantly, the law adds to the Colorado Unfair and Deceptive Trade Practices Act willful and repeated violations of the AfBA restrictions.

The new law places regulatory authority with the Colorado Real Estate Commission and Colorado Insurance Commission (the "Commissions"). The Commissions are required to work together in adopting rules defining what constitutes a "sham" AfBA and must adopt the federal rules, policies or guidelines issued by the U.S. Department of Housing and Urban Development under RESPA related to AfBAs. The Colorado rules must be at least as stringent as those adopted under RESPA. The law gives the Commissions the same enforcement

authority as HUD has under RESPA. The Commissions may share information uncovered during an investigation of an AfBA with each other.

The Insurance Commission may assess a penalty for violation of the AfBA law or a rule promulgated under it of the amount of remuneration improperly paid. The money must be paid to the person aggrieved by the violation or apportioned among multiple aggrieved parties, as determined by the Insurance Commissioner. The Real Estate Commission has the authority to assess a fine of \$2,500 per violation, in addition to a penalty of remuneration improperly paid, which will be paid into the State's general fund. ■

Court finds offer of \$75 limit credit card did not violate FCRA

A bank's offer of preapproved credit cards was not a sham offer of credit and did not violate the Fair Credit Reporting Act ("FCRA") even though the initial available credit limit was only \$75, according to a federal district court in Indiana.

In *Bonner v. Cortrust Bank*, the U.S. District Court for the Northern District of Indiana also decided that plaintiffs' claims that the defendant bank had failed to provide disclosures required by 15 U.S.C. § 1681 failed because there was no longer a private right of action under that statute.

In *Bonner*, the plaintiffs complained about mailings that they received from the defendant offering them credit cards based upon "prescreening" of their credit reports. The solicitation offered an initial credit line of \$250 with an interest rate of 18.9 percent. The offer was subject to a number of fees, which were disclosed in the solicitation. The fees included an "acceptance fee" of \$119, an annual membership fee of \$50 and a "participation fee" of \$72, which was billed at a rate of \$6 a month. The solicitation also included a \$9 processing fee. All of these fees

were charged against the credit line of the customer's first bill. Additionally, the solicitation invited recipients to join the "Premium Club," which offers discounts on hotels and rental cars. The "Premium Club" membership costs \$4.95 a month and is billed to the customer's credit card account.

Plaintiffs contended that the credit card solicitation was not an actual firm offer of credit, but instead a sham offer designed to promote membership in the Premium Club. The court disagreed.

The court said that in the Seventh Circuit the test for a firm offer of credit is whether (1) the offer was useful to the normal consumer as an offer of credit and (2) whether the terms are honored when the consumer accepts.

In this instance the court decided both conditions were met. The court noted that plaintiffs did not allege that the bank would not have honored the offer had plaintiffs accepted. The court further determined that even through the initial credit available after the fees were deducted was only \$75 that still had a value to the consumer.

The court refused to find that as a matter of law that \$75 was not sufficient value to support a firm offer of credit. As the court put it: "In other words, we

As the court put it: 'In other words, we need not determine whether the offer is a good one, only whether it is an offer with some value to a consumer as an extension of credit.'

need not determine whether the offer is a good one, only whether it is an offer with some value to a consumer as an extension of credit."

The court found that the invitation to enroll in the Premium Club did not invalidate the solicitation as a firm offer of credit because the consumer could obtain the credit without joining the Premium Club. The court distinguished this case from *Cole v. U.S. Capital* on the grounds that in *Cole* the consumer was offered a \$250 line of credit that could only be used toward the purchase of an automobile. ■

MONTGOMERY ENJOINMENT
Continued from page 1

ruling on the permanent injunction. Judge Mason did not provide a time within which he would rule on the permanent injunction.

As previously reported in the January and March 2006 WBSK Mortgage Finance Newsletters, through the Ordinance, the Montgomery County Council amended the anti-discrimination provisions contained within the Montgomery County Code by adding anti-predatory lending measures. The county executive signed the measure, and the Ordinance was scheduled to become effective on March 8, 2006. The Ordinance was drafted broadly and would adversely impact mortgage companies and secondary market investors.

On February 10, 2006, AFSA and seven local mortgage brokers and lenders filed suit seeking to enjoin the enforcement of the Ordinance on the grounds that state law preempted it. AFSA asked the court to issue a preliminary and a permanent injunction restricting the ability of Montgomery County to enforce the Ordinance. On March 7, 2006, after

a hearing on the motion for a preliminary injunction, Montgomery County Circuit Court Judge Michael Mason signed an order preliminarily enjoining Montgomery County from enforcing the provisions of the Ordinance until a trial on the merits could be held. That trial was held on July 6, 2006, and, while the preliminary injunction issued on March 7, 2006 remains in effect, the trial court judge did not provide a time within which he would rule on the permanent injunction. ■

WBSK

MORTGAGE FINANCE NEWSLETTER

is a publication of the law firm of

WEINER BRODSKY SIDMAN KIDER PC

1300 Nineteenth 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.
Leah Schmulewitz Getlan
Ron G. Schonberger
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
James C. Clarke, Jr., Licensing Specialist
Emmanuel P. Cruz, Licensing Specialist
Melissa M. Jewett, Licensing Specialist

(202) 628-2000

w w w . w b s k . c o m

i n f o @ w b s k . c o m