

Introduction

The Dodd-Frank Wall Street Reform and Consumer Protection Act was enacted as a measure to promote financial stability and protection for consumers through increased regulation of nearly every aspect of the consumer finance industry. Since its enactment, the Dodd-Frank Act has already had significant impact; yet, the great weight of this sprawling legislation is yet to be seen. Given the infancy of the Dodd-Frank's provisions, as well as the recent transfer of authority over administration of a number of federal financial laws to the newly created Bureau of Consumer Financial Protection, increased litigation seeking to clarify this new legislation is inevitable.

In an effort to stay apprised of these significant industry changes, Burr & Forman's Dodd-Frank Newsletter will serve as a monthly update of recent case law, news, and developments related to the Dodd-Frank Act.

- - RECENT CASES - -

Preemption

In re Checking Account Overdraft Litigation, No. 09-MD-02036-JLK, MDL No. 2036, 2011 WL 2746171 (S.D. Fla. July 13, 2011).

After the Court entered an omnibus order denying the defendants' motion to dismiss on grounds of preemption, the defendants filed a motion for reconsideration. In support, the defendants cited the recent Eleventh Circuit decision in *Baptista v. JP Morgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2011), which held that, based on the preemption amendment added to the National

Bank Act ("NBA") by the Dodd-Frank Act, the NBA preempted an action based upon a state consumer protection law directed at limiting the ability of a bank to charge fees for certain services. Based on this decision, the defendants argued that the plaintiffs' claims must be dismissed as preempted by the NBA.

Addressing the defendants' argument, the Court distinguished its MDL case from *Baptista* "because it is not predicated upon a bank's authority to charge fees." *Id.* at *7. None of the MDL plaintiffs claimed that banks were unable to charge fees to their customers. Rather, the plaintiffs sought recovery for the manner in which the banks *manipulated* their debit and checking charges. Expounding upon this point, the Court stated:

A desire to limit a bank's authority to charge a fee is not synonymous with a desire to hold a bank liable for the bad-faith manner in which an account is reorganized to justify a large number of overdraft charges. *Baptista* holds that the former cannot be permitted in light of the NBA's preemptive reach. But neither this Court nor the Eleventh Circuit can prevent a lawsuit by an individual under the latter, since the NBA has not foreclosed such claims.

Id. Moreover, the Court noted that 12 C.F.R. § 7.4007(c) specifically excludes from preemption state laws addressing contracts, as such laws are not inconsistent with the deposit-taking powers of national banks and, indeed, apply to national banks to the extent that they only *incidentally effect* the exercise of a national bank's deposit-taking powers. See 12 C.F.R. § 7.4007(c). Because the MDL plaintiffs' claims were "based upon state contract principles expressly untouched by the NBA, the application of which has only

an ‘incidental impact’ on the exercise of a bank’s deposit taking powers, *Baptista* has not mandated the preemption of those claims.” Thus, the Court denied the defendants’ motion for reconsideration.

Copeland-Turner v. Wells Fargo Bank, N.A., No. CV-11-37-HZ, 2011 WL 2650853 (D. Or. July 6, 2011).

Plaintiff Tobin Copeland-Turner filed a claim for conversion against defendant Wells Fargo Bank, N.A., after Wells Fargo foreclosed on his home in October 2010 despite allegedly informing Turner that no sale would take place until March 2011. Wells Fargo moved to dismiss Turner’s conversion claim as preempted by the Home Owners’ Loan Act of 1933, 12 U.S.C. §§ 1461-68 (“HOLA”). Specifically, Wells Fargo pointed out that 12 C.F.R. § 560.2(a) lists specific types of state laws which are preempted by HOLA, and argued that Turner’s conversion claim would be included in such laws.

In response, Turner argued that the Dodd-Frank Act amended 12 U.S.C. § 1465(b) to provide that HOLA does not occupy the field in any area of state law. *See* 12 U.S.C. § 1465(b). Moreover, the Act created a new statutory section, 12 U.S.C. § 5136C, which prescribes a specific analysis for preemption of state consumer financial laws based on the U.S. Supreme Court decision in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996). Thus, Turner contended that, as a result of the Act, preemption arguments based on 12 C.F.R. § 560.2 no longer applied.

Disagreeing, the Court noted that Section 1043 of the Dodd-Frank Act “makes clear that that the Act does not apply to contracts entered into before the Act’s enactment.” *Id.* at *4. As the Act was effective July 21, 2010, any contracts entered into on or before that date would not be subject to the new legislation. Because Plaintiff executed his Note and Deed of Trust in October 2005, the Court held that the new provisions of the Dodd-Frank Act did not apply. Accordingly, Well Fargo’s motion to dismiss was granted.

Pre-Dispute Arbitration Agreements

Carrell v. L & S Plumbing Partnership, Ltd., No. H-10-2523, 2011 WL 3300067 (S.D. Tex. Aug. 1, 2011).

In an action brought by employees of defendant L&S Plumbing alleging that they were not paid for overtime hours as required by the FLSA, L&S moved to compel arbitration pursuant to arbitration clauses contained in the plaintiffs’ employment contracts. The plaintiffs argued, among other things, that the arbitration clauses were unenforceable under Section 922 of the Dodd-Frank Act, 18 U.S.C. 1514A(e).

In response, L&S argued that Section 922 of the Dodd-Frank Act, which amended the Sarbanes-Oxley Act, addresses protection for whistleblowers, and that plaintiffs were not whistleblowers. L&S further argued that it was not a publicly traded company or otherwise covered by the whistleblower statute. *See* 18 U.S.C. § 1514A(a). Noting that the plaintiffs submitted no response to contravene L&S’s argument, the Court held that the Dodd-Frank Act did not provide a basis to find the arbitration agreements unenforceable. *Id.* at *5.

Henderson v. Masco Framing Corp., No. 3:11-cv-00088-LRH, 2011 WL 3022535 (D. Nev. July 22, 2011).

Plaintiff Timothy Henderson brought claims against his employer, Masco Framing Corp., for violations of the whistleblower protection provisions of the Sarbanes-Oxley Act, as well as breach of contract, breach of the covenant of good faith and fair dealing, and tortious discharge.

Henderson then filed a motion to compel arbitration of each of these claims pursuant to an arbitration agreement contained in Masco’s dispute resolution policy. Finding the arbitration agreement valid, the Court turned to the issue of whether Henderson’s claim for the alleged Sarbanes-Oxley violations fell within the provisions of the arbitration agreement.

The Dodd-Frank Act recently amended Section 1514A to prohibit arbitration of Sarbanes-Oxley claims. See 18 U.S.C. § 1514A(e)(2). Because Henderson sought to enforce an arbitration agreement for a Sarbanes-Oxley claim which arose prior to the Dodd-Frank Act, however, the Court was posed with the question of whether the Dodd-Frank applies retroactively to nullify arbitration agreements which existed prior to July 2010.

In making its determination, the Court noted cases cited by each of the parties providing different outcomes. First, Henderson relied on *Riddle v. DynCorp International, Inc.*, 733 F. Supp. 2d 743 (N.D. Tex. 2010). In *Riddle*, the district court examined the Dodd-Frank Act's alteration of the statute of limitations for False Claims Act claims. Taking the "Effective Date" provision in Section 4 of the Dodd-Frank Act at face value, the district court concluded that by the "plain language of the Act," it was *not* retroactive. *Id.* at 748. Thus, Henderson argued that because the Dodd-Frank provides an explicit date on which Section 922 would become effective, the Act's amendments to Sarbanes-Oxley arbitration provisions could not apply retroactively.

Conversely, Masco relied on *Pezza v. Investors Capital Corp.*, 2011 WL 767982 (D. Mass. Mar. 1, 2011). In *Pezza*, the district court examined the practical consequences of allowing Section 922 to apply retroactively, and ultimately determined that a retroactive application would merely affect the conferral of jurisdiction rather than the substantive rights of the parties. As such, the court held that Section 922 qualifies as the type of quasi-retroactive statutory provision that can be applied retroactively. *Id.* at *8.

Considering these contradicting authorities, the Court engaged in its own analysis of Section 922, and ultimately held that the Dodd-Frank's Sarbanes-Oxley provisions are not retroactive. *Henderson*, 2011 WL 3022535, at *4. Specifically, the Court disagreed with the reasoning in *Pezza* and found that "[a]t the time Henderson and Masco agreed to the dispute resolution policy in 2007, they had the right to contract for the arbitration of SOX claims" and this right was reflected in their agreement. *Id.* Thus, the Court could not see "how a retroactive revocation of the parties' right to

arbitrate SOX claims would not 'impair rights [the parties] possessed when [they] acted.'" *Id.* (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)). In other words,

A retroactive application of Dodd-Frank's SOX provisions would not merely affect the jurisdictional location in which such claims could be brought; it would fundamentally impair with the parties' contractual rights and would impair the "predictability and stability" of their earlier agreement.

Id. Thus, the Court concluded that Henderson's right to arbitrate his Sarbanes-Oxley claim was not retroactively barred by Section 922.

Real Estate Settlement Practices Act

Patton v. Ocwen Loan Servicing, LLC, No. 6:11-cv-445-Orl-19DAB, 2011 WL 3236026 (M.D. Fla. July 28, 2011).

Plaintiff Robert Patton alleged that Defendant Ocwen Loan Servicing failed to timely acknowledge or respond to his written request for validation of the debt owed on his mortgage and unlawfully failed to provide all of the information requested. Patton filed claims against Ocwen for violations of the Real Estate Settlement Practices Act ("RESPA"), Florida Consumer Collection Practices Act ("FCCPA"), and Truth in Lending Act ("TILA"). In response, Ocwen filed a motion to dismiss Patton's RESPA claim, claiming that its response to Patton's qualified written request was both legally sufficient and timely under RESPA.

In support of his claim that Ocwen's response was untimely, Patton alleged that the amendments to RESPA under the Dodd-Frank Act took effect on July 22, 2010, and governed his written request sent July 21, 2010. The Court noted, however, that the RESPA amendments found in Title XIV of the Dodd-Frank Act did not take effect on July 22, 2010. Rather, applicability of the amendments is governed by Section 1400(c) of the Dodd-Frank, which provides that the amendments shall take effect upon the happening of certain events

after the “designated transfer date” of July 21, 2011. Further, the Court noted that it found no authority indicating that any amendments to RESPA had taken effect on July 22, 2010, or at any point prior to the Court’s decision on July 28, 2011. Thus, those amendments did not govern Ocwen’s response to Patton, and the response was timely. *Id.* at *4.

CFPB Testifies Regarding Impact on Small Business Credit.

Dan Sokolov, Deputy Associate Director for the Division of Research, Market & Regulations with the CFPB, testified before the House Small Business Committee on July 28, 2011, regarding the impact the CFPB will have on small business credit.

Sokolov began by noting the CFPB’s limited jurisdiction over small business credit. He also reviewed the Bureau’s efforts since its official opening on July 21, 2011, as well as its focus on financial products meant for consumers.

Nonetheless, Sokolov continued by describing efforts the CFPB plans to take in order to help both small business owners and lenders. With respect to small business owners, Sokolov explained that the CFPB hopes to do three things: (1) take efforts to prevent unlawful discrimination and promote a fairer marketplace; (2) provide the market with better data on small business lending; and (3) help consumers who rely on their personal credit histories to obtain a business loan.

With respect to small business lenders, Sokolov testified that the CFPB is working to reduce existing regulatory burdens where feasible and to avoid imposing unwarranted new regulatory burdens. For example, the CFPB has already undertaken efforts to simplify federal mortgage disclosures required by TILA and RESPA.

In sum, Sokolov expressed that, despite its limited statutory role in the small business market, the CFPB intends to work within its power to strengthen the small business credit market along with the market for consumer financial services.

For the full text of Sokolov’s testimony, visit the following link: <http://www.consumerfinance.gov/speech/testimony-of-dan-sokolov-before-the-house-subcommittee-on-investigations-oversight-and-regulations/>.

- - NEWS & DEVELOPMENTS - -

CFPB Issues Interim Rule Implementing Amendments to the Alternative Mortgage Transaction Parity Act (AMTPA)

On July 22, 2011, the CFPB issued an interim rule implementing amendments made to the AMTPA by the Dodd-Frank Act. Specifically, the Dodd-Frank Act provides that, after July 21, 2011, state housing creditors may only make alternative mortgage transactions under AMTPA if they comply with rules issued by the CFPB. However, the Act did not vest the CFPB with authority to issue such rules prior to July 21, 2011. As such, the CFPB issued an interim rule to avoid a suspension in the operation of the AMTPA.

Under the interim rule, applications for alternative mortgage transactions received by a creditor prior to July 22, 2011, are generally grandfathered and remain subject to the AMTPA provisions and regulations in effect at the time of application. For applications received after July 22, the interim rule implements the Dodd-Frank Act amendments to the AMTPA as well as the scope of preemption under the AMTPA. The rule further provides standards governing alternative mortgage transactions made by state housing creditors under the AMTPA. The CFPB has requested public comment on the interim rule by September 22, 2011.

For the full text of the interim rule, visit the following link: <http://www.gpo.gov/fdsys/pkg/FR-2011-07-22/pdf/2011-18676.pdf>

CFPB Issues Report Analyzing Differences Between Credit Scores Consumers and Lenders Receive.

As required by the Dodd-Frank Act, the CFPB recently issued a report analyzing the differences between credit scores received by consumers and those received by lenders. The report discusses, among other things, the process of developing credit scoring models, why different scoring models may produce different scores for the same consumer, how different scoring models are used by creditors in the marketplace, what credit scores are available to consumers for purchase, and ways that differences between the scores provided to creditors and those provided to consumers may disadvantage consumers.

The Treasury Department Press Release, as well as the full report, can be found at the following link: <http://www.treasury.gov/press-center/press-releases/Pages/tg1248.aspx>.

CFPB Personnel Changes

1. Raj Date to Replace Elizabeth Warren as Special Advisor.

On July 26, 2011, the U.S. Department of Treasury announced that Raj Date will replace Professor Elizabeth Warren as Special Advisor to the Secretary of the Treasury on the Consumer Financial Protection Bureau. This transfer became effective August 1, 2011.

Raj Date previously served as Associate Director of Research, Markets, and Regulations with the CFPB. Before joining the CFPB, Date was a Senior Vice President at Capital One Financial and a Managing Director at Deutsche Bank.

For the entire press release, visit the following link: <http://www.treasury.gov/press-center/press-releases/Pages/tg1258.aspx>.

2. Bart Shapiro hired as Senior Advisor for the Office of Community Banks and Credit Unions.

Bart Shapiro, former Deputy Director for the Department of Housing and Urban Development in charge of administering RESPA, has joined the CFPB as the Senior Advisor for the Office of Community Banks and Credit Unions.

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