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DODD-FRANK NEWS

July 2016

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. In the years since its enactment, the Dodd-Frank Act has led to significant industry reforms and the promulgation of numerous new laws and regulations. In an effort to stay apprised of these significant industry changes, Burr & Forman's Dodd-Frank Newsletter will serve as a periodic update of recent case law, news, and developments related to the Dodd-Frank Act.

---- RECENT CASES ----

Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016), as revised (May 24, 2016).

In this highly-anticipated decision, the Supreme Court of the United States held that alleging a "bare procedural violation" of the Fair Credit Reporting Act (FCRA) is insufficient to establish Article III standing.

In 2011, Thomas Robins filed a proposed class action against the website Spokeo in the U.S. District Court for the Central District of California. Robins claimed that the website, which aggregates and discloses publicly identifiable information upon request, violated the FCRA when it provided inaccurate information about him. The false information included reports that Robins was in his 50s, that he held a professional degree, that he worked in a professional or technical field, that he was married with children, and that he was wealthy. Robins stated that the information harmed his employment prospects because employers could believe, for instance, that he was overqualified for the job. The District Court dismissed the lawsuit with prejudice saying that Robins had failed to plead an injury-in-fact that was traceable to Spokeo's alleged conduct. For the court, claiming a possible future injury was not enough to meet the standing requirements of Article III.

The Ninth Circuit, however, reversed and held that when Congress creates a private right of action, alleged violations of these statutory rights are enough to satisfy the injury-in-fact requirement of Article III. The Ninth Circuit further held that when a plaintiff brings a lawsuit on willful violation grounds, the FCRA does not require a showing of actual harm.

Writing for the majority, Justice Samuel Alito explained that the Ninth Circuit's analysis was incomplete because it did not include both aspects of the injury-in-fact requirement. Article III requires an injury that is both "concrete" and "particularized." Even though the Ninth Circuit made the finding that the injury was "particular," the court failed to determine whether the injury was "concrete." The Supreme Court provided guidance on the meaning of "concreteness," including that while an injury could be intangible, an alleged bare procedural violation is not a "concrete" injury and does not satisfy the standing requirement of Article III. A "concrete" injury must be de facto, i.e., it must actually exist. The risk of real harm could satisfy this requirement, and legislative history and the judgment of Congress are instructive in the determination of whether "an intangible harm constitutes injury in fact."

For this reason, the Court vacated and remanded the case to the Ninth Circuit for further determination of whether Robins's alleged claims are enough to meet the concreteness standard.

Beacom v. Oracle Am., Inc., Fed. Sec. L. Rep. P 99110 (8th Cir. 2016).

Despite adopting a lower standard for determining whether a plaintiff may proceed with a retaliation claim brought under the Sarbanes-Oxley Act (SOX), the Eighth Circuit affirmed summary judgment entered against a plaintiff who filed a retaliation suit, under Dodd-Frank and SOX, alleging that Oracle terminated his employment as relation for his complaints about Oracle's revenue projections.

In determining whether a whistleblower has engaged in a protected activity, SOX requires that the whistleblower hold a "reasonable belief" that his or her corporate employer's conduct constitutes fraud. This reasonable belief standard carries both a subjective and an objective element. The employee must subjectively believe that the employer has engaged in prohibited conduct and this belief must be objectively reasonable.

In *Platone v. FLYI, Inc.*, the objective component of the reasonable belief standard received strict application by the Administrative Review Board (ARB) of the Department of Labor, which adjudicates SOX whistleblower claims. ARB No. 04–154, 2006 WL 3246910 (ARB Sept. 29, 2006). In *Platone*, the ARB held that, in order to succeed, an employee's claim must "definitively and specifically" relate to prohibited conducted listed in SOX's whistleblower statute.

The ARB later rejected *Platone's* "definite and specific" standard. *Sylvester v. Parexel Int'l LLC*, ARB No. 07–123, 2011 WL 2165854, at *12 (ARB May 25, 2011) (en banc). In Sylvester, the ARB held that the objective component of the reasonable belief standard is satisfied by an employee who proves that "a reasonable person in the same factual circumstances with the same training and experience would believe that the employer violated securities laws." The Eight Circuit concluded that this less-stringent standard would allow a mistaken belief to qualify as objectively reasonable. In rejecting the stricter *Platone* standard and adopting the new *Sylvester* standard, the Eighth Circuit joins the Second, Third, and Sixth Circuits.

Since the plaintiff's claim was found to be objectively unreasonable, even under the lower *Sylvester* standard, the court held that the plaintiff had not made any disclosure protected by SOX. Since Dodd-Frank protects employees who have made disclosures protected by SOX, the court concluded that Dodd-Frank's retaliation protections do not extend to the plaintiff.

Chu v. U.S. Commodity Futures Trading Comm'n, 16 Cal. Daily Op. Serv. 5379 (9th Cir. 2016).

On May 25, 2016, the Ninth Circuit held that because the Dodd-Frank Amendment to the Commodity Futures Trading Commission Act of 1974 does not specify how a court should review the Commodity Futures Trading Commission's (CFTC's) findings, courts need to follow the Administrative Procedure Act (APA), which establishes that the standard of review of an agency's factual findings is substantial evidence.

In this case, a trading investor with significant experience, Chen Li Chu, claimed that her long-time trading advisor, Jennifer Huang, along with her futures commission merchant, James Kelly, disregarded her instructions and conducted unauthorized trading in her account. Despite the fact that the ALJ found for Chu, the CFTC reversed because Huang and Kelly presented enough evidence that Chu had given Huang actual and apparent authority to carry the contested trades with the funds that Chu had deposited in the account.

On appeal, the Ninth Circuit denied Chu's petition to revise the CFTC's findings. First, the court found that although the Dodd-Frank Amendment to the CFTC Act granted courts of appeal power to "affirm, set aside or modify [an] order of the Commission," the Dodd-Frank Amendment does not specify a standard of review. Looking at legislative history, Judge Margaret Mckeown found that the Amendment's deletion of the "weight of evidence" standard was not accidental but purposeful. The Judge further noted that although Dodd-Frank's legislative history did not provide much guidance, it was clear from the history that Congress deleted the standard of review during the reconciliation process.

Because Congress did not specify a standard of review, the Ninth Circuit held that courts must follow the APA's substantial evidence standard. The court then proceeded to hold that, in this case, there was substantial evidence that Chu had given Huang actual and apparent authority to trade on her account and for this reason, the evidence supported CFTC's conclusion that no violation had occurred.

U.S. ex rel. O'Donnell v. Countrywide Home Loans, Inc., 822 F.3d 650, 653 (2d Cir. 2016).

The Second Circuit overturned a penalty of $1.27 billion dollars against Bank of America and Countrywide, and a $1 million judgment against former Countrywide executive Rebecca Mairone, in a fraud case involving faulty mortgages that Countrywide sold to Fannie Mae and Freddie Mac.

In 2013, a federal jury sided with the Government and found that Bank of America and Mairone were liable for defrauding Fannie Mae and Freddie Mac when the bank sold thousands of toxic mortgage loans to the government-sponsored entities. The Government presented evidence at trial that Countrywide had communicated that the mortgages sold to the entities were "Acceptable Investments" as to the day of transfer. Freddie Mac's selling guide also contained a provision that stated that "all Mortgages sold to Freddie Mac have the characteristics of an investment quality mortgage." The jury returned the verdict based on the theory that the Defendants acted fraudulently when they convinced the agencies to purchase mortgages that were of lower quality than the quality they had represented them to be. After the jury issued the verdict, U.S. District Judge Jed Rakoff imposed a $1.27 billion penalty on Bank of America and a $1 million penalty on Mairone.

The Second Circuit, however, overturned the ruling and held that a mere breach of a contractual promise was insufficient evidence to support a claim that Countrywide committed mail and wire fraud. Writing for a unanimous court, Judge Richard C. Wesley held that claiming breach of contract is not enough to support a claim for fraud, since a plaintiff must also prove that there was fraudulent intent at the time that the parties executed the contract. In this case, the court concluded, the evidence that that parties presented at trial did not show "a scheme to defraud through contractual promises," i.e., did not rise to the level necessary to establish this fraudulent intent. The Government not only failed to show this intent, but the Government also did not even attempt to prove that there was fraudulent intent at the time Countrywide executed these contracts. The Government did not attempt to show, for instance, that Countrywide had no intention of meeting the quality standard it had promised in its contracts, nor that Countrywide made false representations after the execution of such contracts.

As reported by the opinion, this was the first time that a court of appeals considered the application of a federal mail or wire fraud statute against a financial institution in the context of lawsuits asserting "self-affecting conduct."

RESPA

Hernandez v. J.P. Morgan Chase Bank, N.A., 2016 WL 2889037 (S.D. Florida 2016).

After Chase, the servicer of Plaintiff Hernandez's mortgage, imposed force-placed flood insurance on the property at issue, Hernandez refused to pay the portion of his monthly mortgage payments attributed to the force-placed insurance. Hernandez argued that the force-placed insurance was unnecessary, as an existing insurance policy provided coverage to satisfy his entire mortgage obligation. Hernandez also argued that Chase improperly charged the cost of the force-placed insurance to his mortgage account. After Hernandez began refusing to pay the entire amount demanded each month, Chase filed a foreclosure action against Hernandez. Hernandez then sent Chase a Notice of Error (NOE), alleging several errors in Chase's servicing of the loan and requesting a written response. Chase sent a response detailing its investigation results (Response) and explaining that it had only found error in one of the many years that force-placed insurance was imposed on the property.

Hernandez sued Chase for RESPA violations, attaching the NOE and the Response as exhibits to the Second Amended Complaint. Chase filed a motion to dismiss, asserting that Hernandez's exhibits actually *proved* that Chase met its RESPA obligations. The court issued an Order to Dismiss, finding that the exhibits attached to the complaint disproved the asserted causes of action. The court did, however, grant Hernandez's request to file a Third Amended Complaint.

Hernandez's Third Amended Complaint asserted additional causes of action for tortious interference with a business relationship and violation of a fiduciary duty. Notably, Hernandez did not attach the NOE and Response as supporting exhibits. The court found that, on its face, Hernandez's Third Amended Complaint sufficiently stated a claim for a violation of the error resolution procedures of RESPA and Regulation X. Pursuant to RESPA and Regulation X, Chase had two options in responding to Hernandez's NOE: (1) correct its errors and provide written notification of doing so; or (2) conduct a reasonable investigation and provide a written response containing certain types of information and disclosures. 12 C.F.R. § 1024.35(e).

The court found that, accepting Hernandez's allegations as true, Chase's investigation would be insufficient and unreasonable under RESPA, as Chase was alleged to have only looked at the NOE itself, rather than investigate whether the existing flood insurance coverage ever lapsed. Chase again relied on the NOE and Response, which it had attached to the motion to dismiss, claiming these documents showed Chase's compliance with RESPA.

The court held that, although the NOE and response could be considered on a summary judgment motion, the correspondence was extrinsic evidence for purposes of a motion to dismiss. Chase argued that the NOE and response should be considered without converting the motion to dismiss into a summary judgment motion. The court rejected this argument, noting that a document attached to a motion to dismiss may only be considered where it is central to Hernandez's claim. Horsley v. Feldt, 304 F.3d 1125, 1134 (11th Cir. 2002). The court distinguished Horsley, finding that the documents in this case were not central to Hernandez's claim, but rather to Chase's defense.

Essentially, as Hernandez did not attach the NOE and Response to the Third Amended Complaint, Chase could no longer rely upon them to dismiss Hernandez's allegations. The court noted that "when Hernandez filed the Third Amended Complaint, the Second Amended Complaint (and its attached exhibits) became a legal nullity."

CFPB

Robert D. Boystun, IV, v. U.S. Bank National ND, dba Elan Fin. Services; Trans Union, LLC, No. 3:11-CV-00429-HZ, 2016 WL 2736104 (D. Or. May 11, 2016).

On May 11, 2016, a district court declined to follow the Federal Trade Commission's (FTC) interpretation of the Fair Credit Reporting Act (FCRA). It based this decision, in part, by reasoning that the FTC no longer bears the duty to interpret the FCRA; the Consumer Financial Protection Bureau (CFPB) assumed the duty in 2010.

The pretrial dispute in this case involved the admissibility of an expert's testimony addressing the damages flowing from a credit report issued for a business or commercial transaction. In or around 2009, U.S. Bank reported Plaintiff's outstanding business card balance after Plaintiff insisted that he had not agreed to be personally liable for the card. Thereafter, in 2010, a lender refused to extend credit to Plaintiff's business due to the allegedly "derogatory information" on Plaintiff's report. As a result, Plaintiff was not able to follow his plans for growing the business through the use of his own personal finances until the firm was able to borrow on its own. Plaintiff then started to apply only for loans, as he believed that other credit applications would have a similar fate. By 2014, the business was no longer operating.

Plaintiff sued and as part of the pretrial disclosures, Plaintiff moved to introduce an expert's testimony that sought to address and explain the damages that the credit report caused. In response, Defendants jointly moved to exclude the testimony as "irrelevant and unreliable."

In its Opinion & Order granting Defendants' joint motion to dismiss expert testimony as irrelevant, the district court agreed with Defendants that individuals cannot recover, under the FCRA, damages resulting from the use of a "credit report for a business or commercial transaction." In deciding whether the FCRA covered such damages, the court looked at the opinions of other courts that examined the statutory text in addition to the legislative history of the FCRA. According to the court, these opinions reached the conclusion that the FCRA does not provide for such damages.

Moreover, the court also rejected Plaintiff's argument that these cases were no longer persuasive since the FTC has withdrawn the opinion that the FCRA does not provide damages resulting from the use of a "credit report for a business or commercial transaction." First, the court stated, these cases had not relied only on the FTC's original interpretation, but they also relied on the text of the statute and on its legislative history. Second, although the FTC was the agency in charge of interpreting the FCRA, this is no longer the case. In 2010, this duty passed to the CFPB, and as a result, FTC's interpretation of the statute is no longer binding.

The case is currently on appeal before the Ninth Circuit.

---- IN THE NEWS ----

Proposed Amendments to "Higher-Risk Mortgage" Appraisal Exemption Thresholds

On July 22, 2016, the CFPB issued a proposed rule regarding the exemption thresholds for the Truth in Lending Act's "higher-risk mortgage" appraisal requirements. The rule exempts transactions of $25,000 or less, and requires an annual adjustment of this threshold based upon changes in the CPI-W index. The proposed rule would memorialize the calculation methodology used by financial regulatory agencies in adjusting the exemption threshold.

To read the proposed rule, visit: http://www.consumerfinance.gov/documents/715/Appraisal_Exemption_Adjustment_FR_Notice.pdf

CFPB Proposes Amendment to Regulation P

On July 1, 2016, the CFPB issued a proposed rule that would amend Regulation P, which requires financial institutions to issue annual notices to customers describing their privacy policies and practices. The proposed rule would implement a recent amendment to the Gramm-Leach-Bliley Act, which provides an exemption to financial institutions that meet certain conditions.

To read the proposed rule, visit: http://www.consumerfinance.gov/documents/533/Reg_P_NPRM_-_FINAL_Release.pdf

CFPB Updates Mortgage Servicing Exam Procedures

On June 22, 2016, the CFPB updated its mortgage servicing examination procedures to reflect changes in regulations and in supervisory priorities.

To read the updated procedures, visit: http://www.consumerfinance.gov/documents/657/11.5_Mortgage_Servicing_Exam_Procedures_June_2016.pdf

CFPB Issues Final Rule Adjusting Reg Z Thresholds

On June 17, 2016, the CFPB issued a final rule amending the text and official interpretations of the Truth in Lending Act's Regulation Z. The final rule adjusts the dollar amount thresholds for several provisions of Regulation Z, as required annually by the Dodd-Frank Act.

To read more, visit: https://www.federalregister.gov/articles/2016/06/27/2016-14782/truth-in-lending-regulation-z-annual-threshold-adjustments-card-act-hoepa-and-atrqm

CFPB Releases Special Edition of Supervisory Highlights

In June of 2016, the CFPB released a special edition of its Supervisory Highlights publication regarding mortgage servicing.

In this edition, the agency discusses several observations it has made in the course of its supervisory activities regarding: loss mitigation acknowledgement notices; loss mitigation offer letters and related communications; loan modification denial notices; servicing policies, procedures, and requirements; and servicing transfers.

To read this edition, visit: http://www.consumerfinance.gov/documents/509/Mortgage_Servicing_Supervisory_Highlights_11_Final_web_.pdf

Proposed Regulation on Payday, Vehicle Title, and High-Cost Installment Loans

On June 2, 2016, the CFPB announced that it intends to establish regulations covering three types of consumer financial products: loans with a term of 45 days or less; loans that have an all-in annual percentage rate greater than 36 percent and are repaid directly from the consumer's account or income; and loans that have an all-in annual percentage rate greater than 36 percent and are secured by the consumer's vehicle.

The agency's proposed regulations would require creditors to make an ability-to-repay determination for covered loans. It would also prohibit certain practices for covered loans, such as attempting to withdraw payment from a consumer's account after two consecutive payment attempts have failed unless the lender obtains new and specific authorization from the consumer.

Public comment closes on October 7, 2016.

To read the proposed rule, visit: https://www.regulations.gov/document?D=CFPB-2016-0025-0001

Financial Agencies Issue Guidance on Deposit Reconciliation

On May 18, 2016, several financial regulatory agencies issued joint guidance regarding deposit reconciliation practices. Specifically, the guidance addresses the situation where a customer deposits an amount of funds, but notes a different amount on the deposit slip.

The guidance notes that failure to credit a customer's account with the correct deposit amount may result in a violation of Dodd-Frank regulations or the FTC act. The agencies urge financial institutions to avoid such violations by adopting appropriate deposit reconciliation practices.

To read the guidance, visit: http://files.consumerfinance.gov/f/documents/201605_cfpb_interagency-guidance-regarding-deposit-reconciliation-practices.pdf

CFPB Proposes Regulation on Consumer Arbitration Agreements

On May 5, 2016, the CFPB issued a proposed rule governing consumer finance dispute resolution. Specifically, the proposed rule would prohibit covered financial institutions from including arbitration agreements in covered financial transactions. Second, the proposed rule would require covered financial institutions involved in an arbitration with a consumer under a pre-existing arbitration agreement to submit certain arbitral records to the agency.

Public comment closes on August 22, 2016.

To read the proposed rule, visit: http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf

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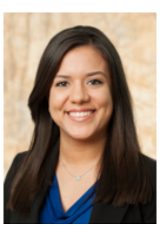

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