NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

A newsletter covering bank legal and compliance information.

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Alleged Discount Point Deception Costs Bank $2.8M

A Lawrence, KS, bank has consented to paying $2.8 million to the Federal Reserve to resolve allegations that the bank tricked borrowers into paying for discount points that may have not reduced the mortgage interest rates they were charged. According to the Fed, from 2011 through March 2015, bank loan officers regularly gave prospective mortgage borrowers the option to purchase discount points to lower their interest rate. The consent order states the bank's disclosures gave an accurate quantitative picture of the loans' costs, but the bank mischaracterized these costs because borrowers did not receive a lower interest rate.

Based on the disclosures, the Fed alleged borrowers reasonably believed the discount points would reduce their interest rate, as compared to interest rate the bank would otherwise make available. According to the Fed, the bank did not have a written policy for buying/paying down an interest rate.

Under the terms of the settlement, the bank will pay approximately $2.8 million in restitution to the borrowers and end its national mortgage business. Post regulatory proceedings, the bank is being acquired.

Marijuana Credit Union Keeps on Pushing

Fourth Corner Credit Union is a Colorado state-chartered credit union chartered in 2014 to serve state marijuana businesses. It applied to obtain a master account with the Kansas City Federal Reserve in order to connect to the national payments system. The Kansas City Fed denied the application in 2015 on the grounds that the credit union's business plan to serve marijuana businesses would be a direct violation of federal law.

Fourth Corner then sued. In 2017, the U.S. Court of Appeals for the Tenth Circuit decided the credit union could serve supporters of marijuana legalization but not the licensed marijuana businesses themselves. With that, the credit union reapplied for a master account, stating it would have a limited mission to serve marijuana advocacy organizations only. After the Kansas City Fed delayed its decision and asked for more information on the traditionally one-page account application, the credit union sued again on the ground of discrimination.

The new case will address some important questions for banking marijuana-related businesses and the power of the Federal Reserve to deny a master account to a chartered financial institution. For those desiring to capitalize on state-legalized marijuana, the court case may be guidance about how far from "plant-touching" a business must be before its proceeds are legal under federal law and may help financial institutions to serve customers who, because of state legalization, now have clients, tenants, or other income streams that can be traced back to marijuana activity.

The matter of the Federal Reserve authority to deny a chartered depository institution access to the national payment system also has implications for the resurgent state-owned bank debate. Federal Reserve reluctance to grant a master account to a state-run depository institution is a huge impediment to the implementation of those proposals.

CFPB Successfully Claims Jurisdiction Over Reservation-Based Lenders

The Otoe-Missouria Tribe of Indians and the Chippewa Cree Tribe of the Rocky Boy's Reservation established two for-profit lending companies, Great Plains Lending, LLC, and Plain Green LLC. In June 2012, the CFPB issued a civil investigative demand (CID)

directing these tribal entities to provide information to be used by CFPB to determine whether they violated consumer financial laws. The tribes directed their tribal entities not to respond and informed CFPB it lacked jurisdiction to investigate lending entities created and operated by the tribes.

CFPB rejected the tribes' offer to cooperate as co-regulators of consumer lending services. With that, the tribes petitioned CFPB to set aside the CIDs. CFPB denied the petition and sought enforcement of the CIDs in federal court. The district court decided in favor of the CFPB, holding the Consumer Financial Protection Act (CFPA) applies to the tribal lending entities.

The tribal entities argued the CFPA limits CFPB authority to "persons," which excludes sovereign entities. Additionally, they asserted Congress did not intend for the definition of "person" to encompass tribal entities because the act explicitly includes tribes in the definition of "state."

On appeal, a panel of the Ninth Circuit disagreed and affirmed the district court decision. The appeals court said the CFPA definition of "state" to include Native American tribes falls "far short" of meaning CFPB does not have jurisdiction to issue CIDs to the tribal entities, or that Congress intended to exclude tribes from the CFPA's enforcement provisions. The Supreme Court's refusal to review the case means the lower court ruling will govern the CFPB's authority over tribes at least within the Ninth Circuit. North Dakota is in the Eighth Circuit where the issue remains open.

Supreme Court Denies Review of FDCPA for Trustees

The U.S. Supreme Court is also refusing to hear a case in which the lower courts decided entities conducting foreclosure-related activities, including notifying borrowers that their homes would be sold unless payment is made, are not subject to Fair Debt Collection Practices Act (FDCPA) general restrictions on debt collectors. Specifically, the Court declined to review a decision that a trustee is not considered a debt collector under the FDCPA.

The case is Ho, Vien-Phuong T v. ReconTrust Co, et al., Case No 17-278. The borrower purchased property with a loan from Countrywide Bank. After default, trustee, ReconTrust Company (ReconTrust), started nonjudicial foreclosure proceedings against the borrower. ReconTrust recorded a notice of default and mailed the notice to the borrower. The borrower then sued ReconTrust, Countrywide and Bank of America (BofA), alleging ReconTrust violated the FDCPA when it sent her notices that misrepresented the amount of debt that she owed. The borrower also sought rescission under the Truth in Lending Act (TILA). The district court dismissed the TILA claim without prejudice and granted ReconTrust's motion to dismiss the FDCPA claim.

On appeal, the borrower argued that ReconTrust was a debt collector under the FDCPA because the notice of default and sale were attempts to collect debt. In a 2-1 decision, the Ninth Circuit affirmed the dismissal of the FDCPA claim, finding that ReconTrust's activities were an "enforcement of a security interest."

In the petition for review by the U.S. Supreme Court, the borrower argued the case involved an important and recurring question on statutory construction, and one upon which lower courts have been divided. ReconTrust argued the petition should be denied because the case implicates a very narrow question that involves state law and which no other court of appeals has addressed. ReconTrust also argued that, even if it fell within the FDCPA's definition of debt collector, its activities are excluded from liability under the FDCPA.

Website Compliance with ADA is a Continuing Issue

Because the Justice Department continues to refuse to issue guidance about how banks and others can comply with ADA requirements for equal access for the disabled, banks and other businesses continue to be at risk of being sued for alleged ADA violations. And there is ongoing litigation on the topic, even though one law firm appears to have agreed with ICBA not to sue community banks that are making good faith efforts to update websites and make them compliant with the most recent WCAG standards.

On the litigation front, ABA and thirteen business trade groups have filed an amicus brief urging the Eleventh Circuit Court of Appeals to dismiss *Haynes v. Outback Steakhouse of Florida, LLC*, a lawsuit alleging Outback Steakhouse's website to be not fully accessible and in violation of the ADA. The core issue in Haynes is whether a substantive business remediation plan moots subsequent lawsuits from plaintiffs alleging identical claims under Title III of the ADA.

On September 13, 2016, Outback Steakhouse entered into a settlement agreement in New York federal district court to bring its website into compliance with the Web Content Accessibility Guidelines (WCAG). Subsequent to the New York settlement, plaintiff Dennis Haynes filed a complaint in Florida federal district court, alleging Outback violated the ADA by failing to make its website compatible with screen reading software utilized by the visually impaired.

The Florida district court dismissed the case, holding that Outback is already subject to an order in New York that provides Haynes with complete relief. The court explained that Outback is legally bound to make the desired changes to its website, making it unclear what else Haynes hopes to accomplish, other than obtain attorney's fees for his counsel.

ABA has filed an amicus brief urging the Eleventh Circuit to affirm the district court's ruling. The brief argues allowing "copy-cat" plaintiffs to levy identical lawsuits against businesses who are already committed to improving website accessibility runs counter to the purpose of the ADA and provides no meaningful benefit or protection to disabled individuals. The amicus also contends threats of continued litigation are a disincentive for companies to take proactive measures to improve website accessibility and that Outback's plan to improve the accessibility of its website effectively moots the plaintiff's claims by providing the same relief the plaintiff sought.

Thank You ABA Office of the General Counsel

Marilyn wants to thank ABA Office of the General Counsel for providing the information and analysis about the cases reported in this issue of the *Legal Update*.

Marilyn Foss
NDBA General Counsel

Role of the General Counsel

North Dakota Bankers Association is extremely fortunate to have the expertise of Marilyn Foss on staff. Marilyn has been with the association for over 19 years as general counsel and has served our members and staff with great professionalism.

NDBA's general counsel serves as the attorney for the association. Although she is pleased to be able to serve as a resource for NDBA members in responding to their questions, she is providing general information, not legal advice. Banks must obtain legal advice from counsel who has been retained by the bank to represent the bank's interests in a specific matter.

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