We are pleased to provide members of the Consumer Financial Services Committee with our Winter 2008 eNewsletter. Our thanks to eNewsletter Editor Rick Eckman for this hard work on this edition. We are now distributing eNewsletters after each of our Committee meetings, with coverage including highlights of our last CFSC meeting. We also thank the Young Lawyers Subcommittee, whose members are assisting with preparation of content for our eNewsletters.

Donald C. Lampe
dlampe@wcar.com
Womble Carlyle

Upcoming Events

Section Spring 2008 Meeting in Dallas (April 10-12, 2008)

Please join fellow CFSC members and other business lawyers at the Spring Meeting of the Business Law Section at the Hilton Anatole Hotel in Dallas. The CFSC's meetings begin on Thursday, April 10 at 8:00 a.m. with the Welcome session and end on Saturday, April 12 at 11:30 am. Our meeting schedule may be found here. Meeting registration materials are available on the Section website. We have an outstanding set of subcommittee meetings and Programs, including Programs and presentations on key topics such as subprime lending and the "mortgage meltdown," consumer privacy and information security and cross-border transactions in consumer financial services.

CLE credit will be available for Programs and Forums. In addition to cutting-edge substantive presentations, we will see you at our special social events, including our Welcome Reception beginning at 5:00 to 7:00 pm on Wednesday, April 9, graciously sponsored by McGlnchey Stafford. Our Committee Dinner is a Texas-style dinner with other events at a nearby dude ranch, the Double D Ranch in Mesquite, Texas, on Thursday April 10. Click here for the Dinner Registration Form.

ABA Annual Meeting in New York City (August 7-12, 2008)

The CFSC will hold its meetings in connection with the ABA's Annual Meeting in New York City, August 7-12, 2008. Our actual meeting days and times will be established in the near future, but please make a note of the dates now. The last time we met in the Big Apple, we had a great time, including dinners, shows and just walking the busy streets, all with that big city feel. Not to mention the great programs and learning opportunities that will be in store...

CFSC Winter Meeting, January 10-14, 2009
For those who plan WAY far ahead, we are pleased to inform you that our standalone Winter Meeting in 2009 is scheduled for Scottsdale, Arizona, January 10-14, 2009. The venue is the Hyatt Regency Gainey Ranch Resort and Spa. Stay tuned for more details.

Summary of Winter Committee Meeting (January 5 - 8, 2008)

Young Lawyers Subcommittee
Suzanne Haley, Franzen and Salzano, PC and Emily Miller, Hudson Cook, LLP, Co-Chairs

The Young Lawyers Subcommittee held their first ever "Basics and Beer" at the Winter Meeting. The session featured a roundtable of seasoned practitioners who provided background information on some of the topics that were covered in the other scheduled programs at the Winter Meeting and participated in an informal Q&A with members of the Young Lawyers Subcommittee. The panelists were Jean Noonan of Hudson Cook, LLP, Tom Eck of CapitalOne, Jim Milano of Weiner Brodsky Sidman Kider PC, and Lois Woodward of Balch & Bingham LLP.

Ms. Noonan opened the session by providing background information on the Home Mortgage Disclosure Act (HMDA) and an overview of the changing approaches to the use and analysis of HMDA data since its inception. The presentation also included an explanation of the differences between intentional discrimination, disparate treatment, and disparate impact. The presentation included examples using each type of analysis to show how certain loan data can be used to identify possible discriminatory lending patterns and concluded with an overview of what creditors can do to protect themselves from discrimination claims.

Mr. Eck discussed the FTC Act which established the Federal Trade Commission and prohibits unfair methods of competition and unfair and deceptive practices. The FTC is charged with enforcing the Act with respect to most businesses, although banks and many other types of financial institutions are not subject to the FTC's oversight. Banks and certain other types of financial institutions are subject to the supervisory authority of their respective regulatory agencies. While these regulatory agencies cannot issue regulations implementing the FTC Act, they can take actions to enforce it.

Mr. Milano discussed reverse mortgages. Reverse mortgages are non-recourse consumer credit loans secured by the consumer's principal residence. There are no monthly payments and the loan becomes payable when the consumer either sells the property or dies. Between 80% and 90% of reverse mortgages made today are FHA insured. TILA disclosures must be given in connection with reverse mortgages and there are additional specific reverse mortgage disclosures that are required. Section 8 of RESPA also applies to reverse mortgages. Most states have not adopted laws that specifically regulate reverse mortgages, although some states have addressed these products in their high-cost loan laws or in future advance statutes.

For most reverse mortgage products, the borrower must be at least 62. The amount of the loan depends on several factors including: the age of the borrower, the value of the home, the interest rates, and the HUD property value limits. One of the big
difference between reverse mortgages and traditional “forward mortgages” is that the origination fee is based on the property value and not the loan amount. Currently the fee is approximately 2% of the property value. Under the federal program, a borrower can expect up to $14,000-$16,000 in closing costs. Borrowers must get counseling before obtaining a reverse mortgage and having a reverse mortgage may adversely affect some Medicaid benefits.

Currently foreclosure rates for reverse mortgages are low, but lenders are seeing high property tax and insurance defaults.

Ms. Woodward provided a very brief overview of certain federal laws that preempt state laws. She discussed the preemption provisions of the National Bank Act and the Home Owners Loan Act. She also discussed DIDMCA, AMPTA, the Riegel-Neal Interstate Banking Act and GLBA.

Ms. Woodward also discussed how industrial loan companies (ILCs) functioned. She explained that these entities are creatures of state law, can be operated by a non-financial business, and have the right to export interest rates on a nationwide basis to the same extent as other depositary institutions.

Fair Access to Service - Program on Equity Products and the REX Agreement
Jeremy Sauss, Hudson Cook, LLP

The Fair Access to Services Subcommittee session at the Winter Meeting introduced a new home equity option financing product offered by REX & Co. Barry Abbott, Chief Legal Officer and Director of Government Relations for REX & Co., introduced the REX Agreement as an equity finance product that allows homeowners to take equity out of their homes without selling the home and without incurring any debt. Mr. Abbott explained that the product is not a loan, but instead is an option agreement between the homeowner and REX & Co. that allows REX & Co. to share in the future appreciation (or depreciation) of the home value in exchange for an up front option payment to the homeowner. The value of the home is determined at consummation of the REX Agreement and the amount of appreciation or depreciation is determined upon the sale of the home, or at the time the agreement otherwise terminates (typically 50 years, unless the homeowner decides to buy out REX & Co’s interest or breaches the REX Agreement). If the home does not appreciate or depreciate, upon the sale of the home, REX & Co. effectively gets back the amount of money it advanced to the homeowner on the option, and the homeowner gets the balance of the sales proceeds. REX & Co. and the homeowner share in any loss in value, with REX & Co.’s capped at the amount paid as an advance on the option. Mr. Abbott also explained that the product is geared towards homeowners in their late 30’s to mid-60’s, with FICO scores over 680 and who own single-family detached homes (although condos and townhouses will be accepted shortly). Mr. Abbott addressed the legal aspects of the four documents comprising the REX Agreement, two of which are recorded in the real property records. Mr. Abbott also provided an article on "The Nuts & Bolts of a REX™ Agreement" that appeared in the Summer, 2007 Consumer Finance Law Quarterly Report.

Nina Simon, of the AARP Foundation, addressed consumer concerns regarding the REX Agreement. She noted that the
product is only available to homeowners with homes valued at $200,000-$5,000,000. Ms. Simon also noted that in an appreciation scenario, if a homeowner wanted to buy out REX & Co., the homeowner may need to acquire a large mortgage to terminate the REX Agreement. She stressed concern that in such a scenario, the homeowner may not be able to afford the cost of a larger mortgage and therefore the homeowner could be forced to sell the home. Ms. Simon also stated that it appeared that the most a homeowner would be advanced in the REX Agreement is 10% to 15% of the home's value. She also noted that REX & Co's loss is capped in a depreciation scenario, but that REX & Co's profit in an appreciation scenario is not capped.

Preemption and Federalism - Program on Utah Industrial Loan Companies
Scott Johnson

The Preemption and Federalism Subcommittee presented a panel discussion on three topics.

Nina Simon of AARP discussed her organization's involvement in Seventh Circuit litigation related to loan servicing practices by Ocwen Loan Servicing and the application of OTS preemption to those practices.

Charles Gall of Dreher, Langer & Tomkies, LLP, discussed the "valid when made" doctrine which was recently analyzed in Munoz v. Pipestone Financial, LLC, 2007 WL 2509755 (D. Minn. Aug. 20, 2007). The Munoz court held that a debt buyer was able to assert the federal preemption of state usury law initially relied upon by the originating creditor when the debt buyer attempted to enforce the underlying contractual agreement. Essentially, because the applicable interest rate was "valid when [the contract was] made," the court held that the rate continued to remain valid and enforceable despite the transfer of the loan to a third party who otherwise is not able to preempt state usury limits.

Tom Billings of Van Cott, Bagley, Cornwall & McCarthy, and Jeff Langer of Dreher, Janger and Tomkies, LLP, and Ashby Hilman of Advanta Bank Corp., discussed industrial loan companies ("ILCs"). ILCs are regulated by the state in which they are formed and also by the FDIC. Currently there are seven states that provide ILC charters. ILCs operate similarly to state-chartered banks, except that ILCs may not maintain demand deposit accounts. ILCs recently garnered media coverage when Wal-Mart attempted to obtain an ILC charter. The increased scrutiny that arose as a result of Wal-Mart's interest led the FDIC to declare a moratorium on ILC applications until January 31, 2008. Mr. Billings advised that it appeared that that moratorium would not be extended.

The panel discussed the qualities of ILCs that often generated interest. As a state-chartered FDIC insured bank, an ILC is able to export interest rates to other states. The panel noted that Utah was a popular location for ILC charters because of the lack of a usury limit. The deposits of ILCs are FDIC insured. The panel opined that with the anticipated lifting of the moratorium, more institutions would investigate the merits of obtaining an ILC charter in one of the seven states.
Jeffrey Naimon moderated the TILA subcommittee panel featuring Jeremy Rosenblum (Ballard Spahr, Philadelphia, PA), Nina Simon (AARP Foundation, Washington, D.C.), and Tom Heffron (Goodwin Proctor, Washington, D.C.). The panel focused on two topics: (1) actions seeking class-wide rescission of mortgage loans; and (2) the question of whether a loan can be rescinded after it has been paid off or otherwise refinanced.

**McKenna v. First Horizon Loan Corp., 475 F.3d 418 (1st Cir. 2007).**

Tom Heffron presented the background and holding of **McKenna**, a case in which he successfully won denial of class certification. The First Circuit, as a matter of first impression, held that a class action could not be maintained under the rescission provisions of TILA. The Court based its holding on an analysis of 15 U.S.C. §§ 1635 and 1640. Notably, § 1635 (giving the rescission right) does not specifically provide for class certification for rescission claims, direct or declaratory, and caps damages at $500,000. First Horizon successfully argued to the First Circuit that this indicates that Congress did not intend to permit class actions under § 1635 (as opposed to § 1640, which specifically discusses class actions).

**Andrews v. Chevy Chase Bank FSB, 05-C-0454 (E.D. Wis. 2007).**

Nina Simon discussed the **Andrews** case, which is currently pending before the Seventh Circuit. **Andrews** also addresses the validity of rescission class actions. The District Court granted class certification in **Andrews**. The amicus brief submitted by AARP takes the position that because TILA does not specifically forbid rescission class actions, the availability of the remedy ought to be determined under Rule 23 of the Federal Rules of Civil Procedure.

**Rescission After Pay Off**

Approximately 65% of the loans in the **McKenna** putative class had been refinanced. TILA does not address whether rescission can occur after the loan has been paid off or refinanced. The courts are currently split on this issue. The Sixth and Seventh Circuits have found that a discharged loan may be rescinded. The Ninth Circuit and the Supreme Judicial Court of Massachusetts have held that a discharged loan may not be rescinded. The panelists believe that in light of the subprime meltdown, there will be more cases addressing this issue.

Mr. Rosenblum presented his new theory on how creditors should handle rescission cases. He recently published an article in **Consumer Financial Services Law Journal** discussing this topic. He believes that when faced with rescission actions, creditors should ask the court for an equitable remedy. For example, if a borrower sought to rescind a loan that had already been refinanced at a lower rate than the original loan, then arguably the borrower suffered no damage. In addition, the borrower had the benefit of using this money over time. Mr. Rosenblum argued that the court should take this into consideration when making damages determinations.

For further information on this topic, the panelists suggest review of the **McKenna** and **Andrews** briefs. The panelists also recommend a 1974 Duke Law Journal article discussing the TILA right of rescission. **Note, Truth-in-Lending: Judicial Modification of the Right of Rescission, 1974 DUKE L.J. 1227, 1234 (1974).**
Litigation and Arbitration and Housing Finance and RESPA - Program on HMDA Data and Litigation
Julie Rystad, Greenberg Traurig, LLP

The subcommittee of Litigation and Arbitration and the subcommittee of Housing Finance and RESPA jointly presented a program at the Winter Meeting regarding HMDA data and recent related litigation. Joshua Davidson, Varga, Berger, Ledsky, Hayes & Casey PC moderated the discussion by Brad Blower, Relman & Dane, Washington DC; C. Terrence Ireland, Hudson Cook, LLP, Washington DC; and Paul F. Hancock, K&L Gates, Miami, Florida.

HMDA was amended in 2002 to require new data fields among the information reported to the FRB. Those new categories of data were first submitted to federal regulators in 2004 and became available in the public reports in 2005. Subsequently, litigation relying on the data commenced shortly thereafter. Notwithstanding the FRB's cautions that HMDA data does not include a variety of borrower-specific information and cannot therefore establish discrimination by itself, these cases rely all, or in part, on HMDA data.

Mr. Blower questioned what factors have led to recent increases in HMDA litigation. The subprime market "meltdown" has resulted in very disparate effects when analyzed in relation to the socio-economic characteristics of the borrowers. Using statistical examples from several United States cities, Mr. Blower noted that high cost loans are often concentrated in minority neighborhoods. As part of this market downturn, foreclosures in these areas have increased dramatically. In Detroit, for example, foreclosure rates have doubled in the past two years. In one case involving high-priced loans, the plaintiff's experts found significant price discrepancies between African American and white borrowers. HMDA data have also been used to reveal redlining of certain areas (such as neighborhoods with rowhouses) within cities. See, for example, National Community Reinvestment Coalition v. Accredit Home Lenders Holding Company, filed in the District of Columbia (the plaintiff's brief included in the meeting materials).

More...

Debt Collection Practices and Bankruptcy
Clay Swears, Hudson Cook

The Debt Elimination Scams session at the Winter Meeting addressed fraudulent debt elimination products that are marketed through the internet. Gregg D. Stevens, a member of McGlinchey Stafford PLLC, discussed who the scams target, what the scams claim to offer, and what they actually end up doing.

These scams often are targeted at individuals who are unable to discern their fraudulent nature, including individuals who are uneducated, newly divorced, or facing bankruptcy. These debt elimination products often require the consumer to sign contracts in which he or she agrees to indemnify the scammers for any damages, pay large liquidated damages, and (perhaps the most obvious sign that something is not right) certify that the consumer is not an undercover agent.
The numbers of scams vary, but often involve a consumer paying large fees for a product that claims to let them stop making monthly payments on the amounts they owe while still allowing them to eliminate their debt. One such product encourages consumers to unilaterally change the arbitration forum contained in their credit card agreement. The scammers claim that national banks may not extend credit and therefore the cardholder agreement is not valid and may be changed by the consumer. The new arbitration forum that is chosen is one suggested by the scammer (which actually owns the company offering it), who then gives the consumer a large award through a bogus arbitration proceeding. When the consumer tries to confirm the eventual arbitration award in court, he or she finds out that it is essentially worthless. Another fraud involves consumers paying for a product that contains form "billing error" letters that can be sent to the consumer's credit card company. The letters claim that (usually an amount of time long enough in the past where records may not be readily available) the credit card company failed to give required notices in its billing statements, and therefore, unlawfully collected finance charges on the account. The consumer is encouraged to make demands for detailed information regarding all billing statements and to possibly bring suit. If a consumer does bring a suit, usually with nothing more than these internet-generated allegations, he or she often faces a lack of sufficient evidence, 60 day billing dispute limitations, and statutes of limitations.

Many of the consumers who purchase these products were current on their accounts before taking the advice to stop making payments. As a result, consumers actually incur more debt and damage their relationships with creditors. The session noted that there are legitimate debt elimination companies on the market which makes it more difficult to stop the scammers.

Deposit Products and Payment Systems
Clint Heyworth, Chambliss, Bahner & Stophel, P.C.


Paul Ayres described a "decoupled debit product" as a debit card offered by one particular service provider that is attached to a separate demand deposit account (DDA). Banks often use this product to expand consumers' use of checking accounts while decreasing the bank costs of processing checks.

With a decoupled debit card, the card service providers fund debits through a single ACH debit under a PPD code to the underlying deposit account at the end of each day. Accounts are limited to pre set limits per day. The cards are entitled to full Regulation E protection, have virtually no fees, and can be used at over 25,000 ATMs. Currently, the card does not offer on-time verification and has no overdraft fee, although consumers' banks may charge such a fee.

Nessa Feddis then summarized the proposed internet gambling rules that apply to credit card issuers. Law enforcement faces a number of problems regulating internet gambling products. According to Ms. Feddis, the rules were developed out of an
ineffective system that used designated payment systems to block internet gambling and merchant codes to filter out unlawful Internet gambling.

The current attempt to regulate internet gambling initially had a July 2007 effective date but was delayed because of concerns regarding traditional industries such as horse racing and the inability to block certain unlawful transactions without blocking legal transactions. The proposals require payment system participants to design reasonable procedures to block unlawful internet gambling transactions, but exempt certain industries (i.e. horse racing). The proposed Department of Treasury rules can be found at 31 CFR Part 132.

Some of the issues presented were whether unlawful gambling should be defined and what activities would then constitute it (intrastate, inter-travel and horse racing). Another key issue is determining how to enforce regulations against institutions in jurisdictions where internet gambling is legal. Countries may protest such rules and assert the U.S. is not allowed to prohibit the actions of an industry that is legal in that country. "Over blocking" is another significant concern, particularly in the horse racing industry. Further, banks are concerned about blocking legitimate transactions.

One proposal suggests developing a list modeled on the OFAC list that identifies internet gambling companies. From a bank's perspective this proposal is easier to implement. However, this proposal still poses difficulties in execution and inherent problems with keeping the list current.

Many industry leaders believe the proposed regulations will be ineffective since they provide many loopholes. Regulators face the obstacle of regulating telephone cards or internet payment systems located outside the U.S. Further, regulators face challenges with regulating dog tracks and state lotteries without completing shutting down industries that have become an integral part of certain economies.

The Internet Delivery/Electronic Banking and Federal and State Trade Practices - Program on Old Schools, New Rules: Bank Agency Rulemaking under the FTC Act and HOEPA

Justin Hosie, Chambliss, Bahner & Stophel, P.C.

The Internet Delivery/Electronic Banking Subcommittee, along with the Federal and State Trade Practices, sponsored a joint session at the Winter Meeting on the bank agency rulemaking under the Federal Trade Commission ("FTC") Act, the Federal Truth in Lending Act ("TILA") and the Home Ownership and Equity Protection Act ("HOEPA"). Andrew Smith of Morrison & Foerster led the discussion. The panelists included Suzanne McQueen of the Office of Thrift Supervision ("OTS"), Kathleen Ryan of the Federal Reserve Board's Division of Consumer and Community Affairs ("FRB"), Roberta Carney of Advanta Bank, Russell Schrader of Visa, Inc., and Jim Brown of the University of Wisconsin-Milwaukee.

UDAP

Mr. Smith began the presentation by noting the OTS published a request for comment on an unfair and deceptive practices rule ("UDAP") in August of 2007. He noted the FRB also proposed a rule to prohibit certain mortgage practices under TILA and HOEPA. Mr. Smith commented that while the TILA authority to regulate advertising is well-established, the banking agencies do not typically make rules addressing unfair and deceptive acts and practices ("UDAP") unless
prompted by the Federal Trade Commission.

More...

**Personal Property Financing**  
*Catherine Stark, Hudson Cook*

The Personal Property Financing Subcommittee sponsored a discussion of recent legislative developments and significant court decisions that have impacted different aspects of personal property financing. Thomas Buiteweg of GMAC Financial Services, Mark Edelman of McGlinchey Stafford, and Robert Aitken of Ford Motor Credit Company led the discussion.

The discussion focused on the following subjects: (1) an amendment to California's Car Buyer's Bill of Rights for off-lease vehicle sales; (2) a Seventh Circuit decision that requires Chapter 13 debtors to remain liable for any deficiency balance after the surrender of vehicles; (3) recent developments under the Graves Amendment (federal preemption of lessor liability); and (4) a California appellate court decision that requires specific disclosures to appear in post-repossession notices of intent to sell under the Rees-Levering Act in California.

More...

**Compliance Management**  
*Emily Miller, Hudson Cook*

The Compliance Management Subcommittee's session at the Winter Meeting covered updates on the Bank Secrecy Act/Anti-Money Laundering (BSA/AML) issues and upcoming challenges for 2008. The speakers were Sara Satten, CAMS/SVP/Deputy BSA Officer and Interim OFAC Officer, Wells Fargo & Co. and Nina Nichols, Attorney, Federal Reserve Board.

Ms. Satten discussed the challenges faced by compliance officers in large decentralized organizations. She touched on issues including the importance of ensuring there are internal controls, adequate training, testing, risk assessment, and oversight. Ms. Satten explained that without effective oversight, any BSA compliance programs will not be effective. She also opined that one key difference between being an outside counsel and an internal compliance officer is you cannot just give advice. A compliance officer must be able to implement compliance programs and be able to make things happen. She recommended that compliance officers have strong relationships with regulators and audit partners. Ms. Satten suggested that compliance officers should inquire about their outside counsel's relationship with regulators and know what experience the outside counsel have had with regulators. Clients want to know the risks and benefits, not just what the law says.

Ms. Nichols also discussed topics she believes are going to be challenges for the industry in 2008. She talked about issues involving international operations and correspondent banking and opined that businesses want to know how much due diligence is enough. She highlighted the areas of trade finance, OFAC compliance, and international ACH as other places that business
will face AML challenges in 2008. Ms. Nichols also touched on the process challenges businesses face, such as not having the oversight to deal with the amount of growth of the institution. Ms. Satten noted that prepaid cards could be another challenging AML issue for 2008.

Program - Ethical Issues in Consumer Financial Services Practice
Carter Berkeley, Hudson Cook

The Consumer Financial Services Committee sponsored a session on ethical issues faced in the consumer financial services practice. The speakers were Therese G. Franzen, Franzen and Salzano, P.C., and J. Douglas Cuthbertson, Miles & Stockbridge, P.C. The speakers led a lively discussion of the ethical issues commonly faced by attorneys in the areas of conflicts of interest, expenses in litigation, discovery and confidentiality. The speakers engaged the members of the audience by presenting factual scenarios that raised ethical questions and analyzed those scenarios under the Rules of Professional Conduct. Specifically, Mr. Cuthbertson kicked off the session with a discussion of the potential conflict of interest that arises when a senior associate attorney is approached by a competing law firm to leave her current firm and the firms involved represent conflicting interests in pending litigation matters. Ms. Franzen ended the session by discussing a recent Georgia case regarding the ability of a third-party recipient of attorney-client information to sue the attorney who prepared the information when the third-party relies on the information to his or her detriment. Members of the audience posed questions about the factual scenarios presented by the speakers and participated in the analysis of those scenarios.
Litigation and Arbitration and Housing Finance and RESPA – Program on HMDA Data and Litigation

The subcommittee of Litigation and Arbitration and the subcommittee of Housing Finance and RESPA jointly presented a program at the Winter Meeting regarding HMDA data and recent related litigation. Joshua Davidson, Varga, Berger, Ledsky, Hayes & Casey PC moderated the discussion by Brad Blower, Relman & Dane, Washington DC; C. Terrence Ireland, Hudson Cook, LLP, Washington DC; and Paul F. Hancock, K&L Gates, Miami, Florida.

HMDA was amended in 2002 to require new data fields among the information reported to the FRB. Those new categories of data were first submitted to federal regulators in 2004 and became available in the public reports in 2005. Subsequently, litigation relying on the data commenced shortly thereafter. Notwithstanding the FRB’s cautions that HMDA data does not include a variety of borrower-specific information and cannot therefore establish discrimination by itself, these cases rely all, or in part, on HMDA data.

Mr. Blower questioned what factors have led to recent increases in HMDA litigation. The subprime market “meltdown” has resulted in very disparate effects when analyzed in relation to the socio-economic characteristics of the borrowers. Using statistical examples from several United States cities, Mr. Blower noted that high cost loans are often concentrated in minority neighborhoods. As part of this market downturn, foreclosures in these areas have increased dramatically. In Detroit, for example, foreclosure rates have doubled in the past two years. In one case involving high-priced loans, the plaintiff’s experts found significant price discrepancies between African American and white borrowers. HMDA data have also been used to reveal redlining of certain areas (such as neighborhoods with rowhouses) within cities. See, for example, National Community Reinvestment Coalition v. Accredit Home Lenders Holding Company, filed in the District of Columbia (the plaintiff’s brief included in the meeting materials).

Mr. Blower identified briefly a number of recent cases where the plaintiffs’ claims of disparate impact or disparate treatments relied at least in part on HMDA data as the “smoke to indicate fire”. Mr. Blower predicted that 2008 will see an expansion in the types of plaintiffs, as cases will be brought not only by borrowers but by investors and municipalities, alleging discrimination based at least in part on HMDA data.

Mr. Hancock commented that HMDA data is being more frequently used to demonstrate disparate impact than disparate treatment. In Mr. Hancock’s opinion, HMDA data alone is insufficient to support a claim because such data omits a variety of borrower-specific information such as credit score and borrower experience which are
relevant to the analysis of which loan and pricing are offered and accepted. Mr. Hancock also pointed out that the issue of whether HMDA data alone is sufficient to justify discovery and investigation into a lender’s confidential files and records is still unresolved.

Mr. Hancock also discussed the status and history and development of the disparate impact theory. Currently, there remains a dispute whether disparate impact can be supported as a cause of action under the Fair Housing Act. While most Circuits have allowed disparate impact claims under the Fair Housing Act, the U.S. Supreme Court has not yet decided the issue. Rather than simply showing that one or more racially neutral policies has resulted in a disparate impact, certain courts have required that the plaintiff demonstrate that a specific lender policy caused the disparate impact. The plaintiffs’ bar argues that specific policies cannot be proven without access to lender’s internal records. Accordingly, plaintiffs are often offered little choice but to rely on HMDA data as it may be one of the only means of unearthing such policies. Lenders argue that HMDA data is often inappropriately used as the basis to justify “fishing expeditions” into their records.

In another disparate impact case, the court required that the plaintiff must allege not only disparate impact, but specific facts upon which such claim was based. Not surprisingly, advocates for plaintiffs argue that without access to the confidential lender file data, allegations cannot be made with such specificity. Accordingly, publicly available data, such as HMDA data, must be allowed to form the initial basis for an investigation into the policies of a lender.

Many of the cases initiated on the basis of recent HMDA data remain in the initial phases, so it is difficult to ascertain whether and what additional trends may result.

Finally, Mr. Ireland, a statistician, spoke about statistics and the statistician’s role as a neutral party analyzing HMDA data. HMDA data is a compilation of variables which require interpretation to determine the meaning, including the legal basis for using such variables.

- Julie Rystad, Greenberg Traurig, LLP
The Internet Delivery/Electronic Banking Subcommittee, along with the Federal and State Trade Practices, sponsored a joint session at the Winter Meeting on the bank agency rulemaking under the Federal Trade Commission ("FTC") Act, the Federal Truth in Lending Act ("TILA") and the Home Ownership and Equity Protection Act ("HOEPA"). Andrew Smith of Morrison & Foerster led the discussion. The panelists included Suzanne McQueen of the Office of Thrift Supervision ("OTS"), Kathleen Ryan of the Federal Reserve Board’s Division of Consumer and Community Affairs ("FRB"), Roberta Carney of Advanta Bank, Russell Schrader of Visa, Inc., and Jim Brown of the University of Wisconsin-Milwaukee.

**UDAP**

Mr. Smith began the presentation by noting the OTS published a request for comment on an unfair and deceptive practices rule ("UDAP") in August of 2007. He noted the FRB also proposed a rule to prohibit certain mortgage practices under TILA and HOEPA. Mr. Smith commented that while the TILA authority to regulate advertising is well-established, the banking agencies do not typically make rules addressing unfair and deceptive acts and practices ("UDAP") unless prompted by the Federal Trade Commission.

Ms. McQueen spoke next, addressing the August OTS request for public comment concerning a potential UDAP expansion. According to Ms. McQueen, the OTS request served simply as an information-gathering step, not a proposed rule. Ms. McQueen pointed out the OTS has held meetings with the FTC and other agencies concerning UDAP. According to Ms. McQueen, the FTC Act and HOLA serve as two distinct sources of authority for the OTS to write UDAP regulations. Ms. McQueen also explained the OTS regulations can either regulate by broad principle or regulate by addressing specific practices.

The discussion then prompted several questions about the possible preemptive effect of the potential OTS UDAP rules. Ms. McQueen provided clarification, noting that HOLA does not provide consumers a private right of action. However, she suggested state laws may provide private rights of action. She also stated legal precedent is not entirely clear regarding whether such state laws would be preempted.

**Federal HOEPA Proposal**

Next, Ms. Ryan discussed the FRB's proposal under HOEPA and TILA. She advised that the proposal announced on December 18, 2007, would be published in the
Federal Register on January 9, 2008, and would be open for comments for 90 days. Under HOEPA, the FRB could prohibit refinancing activity found abusive and not in the borrower’s interest. The FRB looked to the Federal Trade Commission's UDAP standards for guidance, as well as a wide variety of state laws.

The proposal is divided into two parts. The first part addresses high priced mortgages and the second part addresses all mortgage loans secured by the consumer's principal dwelling. The proposal excludes home equity lines of credit. Ms. Ryan clarified that the rule would define the phrase “higher-priced mortgage loan” to capture practices related to loans in the subprime market but generally exclude loans in the prime market. The proposal includes four key protections for “higher-priced mortgage loans” secured by a consumer’s principal dwelling.

The first protection for higher priced mortgage loans would prohibit creditors from engaging in a "pattern or practice" of extending credit without considering the borrowers’ ability to repay. Creditors would be required to verify the income and assets relied upon when making the loan. Next, prepayment penalties would only be permitted if certain conditions are met, including the condition that no penalty will apply for at least sixty days prior to any possible payment increase. Finally, creditors would be required to establish escrow accounts for taxes and insurance.

Many of the preliminary comments addressed rights under TILA and HOEPA to allow for private rights of action. Ms. Ryan explained the FRB does not want to chill the availability of subprime credit, as this would greatly limit the ability of individual consumers to access credit. Accordingly, the FRB proposal does not prohibit making an individual loan without regard to repayment ability, either for HOEPA loans or for higher-priced mortgage loans. Instead, the prohibition addresses a pattern or practice. The "pattern or practice” element of the prohibition is intended to balance the rule’s potential costs and benefits. Creating civil liability for an originator who failed to assess repayment ability on any individual loan could inadvertently cause an unwarranted reduction in the availability of mortgage credit to consumers. The “pattern or practice” element is intended to reduce such risk while helping to prevent originators from making unaffordable loans.

The proposal's second protection for higher priced loans requires verifying income. The proposal would prohibit (in covered transactions) relying on stated assets or income, unless the creditor verifies such amounts. Creditors failing to verify in advance still have a safe harbor if they can show that the information relied upon was not materially different than what the creditor could have received upon consummation of the loan.

The third protection for higher priced mortgage loans would restrict prepayment penalties for high priced mortgages. Under the proposal, the FRB proposes to apply the TILA Section 129(c) restrictions to higher-priced mortgage loans. Under the proposal, prepayment penalties would typically be prohibited for a HOEPA loan, except in four circumstances: (1) the borrower's debt-to-income (DTI) ratio at consummation does not
exceed 50 percent (and debt and income are verified); (2) prepayment is not made using funds from a refinancing by the same creditor or its affiliate; (3) the penalty term does not exceed five years from loan consummation; and (4) the penalty is not prohibited under other applicable law.

Concerning the higher priced mortgage loan limitations, the fourth protection would require an escrow account for taxes and fees, and would allow the consumer to opt out of the escrow requirements after 12 months. The FRB presumed that if the opt-out were allowed at loan consummation, lenders could circumvent the requirement. This restriction would only apply to the first lien loan, not subordinate loans.

Several additional rules were also proposed that would be applicable for all mortgages. The proposal addresses fees paid by lenders to brokers for higher-rate loans, known as yield-spread premiums (“YSPs”). YSPs would not be prohibited if the broker previously entered into a written agreement with the consumer disclosing the broker’s total compensation and other facts. Under the proposal, the consumer’s written agreement with the broker must occur before the consumer applies for the loan or pays any fees.

Mr. Brown, commenting on the proposal, contended, "finite limitations on disclosures exist" and deemed the proposal “fanciful.” Ms. Ryan responded by noting that if the disclosures were inaccurate, the inaccuracy would lead to TILA liability, which demonstrates that the proposal does have serious teeth. Further, she noted that the model provision proposed has been subjected to consumer testing to maximize consumer understanding.

The next proposal would require mortgage servicers to properly credit payments that they receive. Currently, concerns exist about pyramiding of late fees, in which servicers first apply the amount of a consumer’s scheduled payment outstanding late fees, thus rendering the current payment amount insufficient, thereby triggering a recurring late fee.

Concerning advertising, Ms. Ryan indicated the proposal addresses seven potentially misleading practices in advertising. One example includes stating a mortgage is "fixed" when it is actually an adjustable rate mortgage. Another example of misleading advertisements are advertisements printed in Spanish or other language, with the footnoted TILA disclosures printed in English. Other misleading advertisements use a hypothetical loan debt to compare a standard monthly payment with a potential new monthly payment. However, the potential new payment is based on an expiring teaser rate. Under the proposal, the advertisement will now be required to show the "post teaser costs."

The proposal also addresses improving the timing for TILA disclosures. Typically, consumers receive the disclosures within three days of applying. For refinancing and home equity, the disclosure is not received until consummation. Under the proposal, the FRB intends to move up the timing so that the consumer would get
disclosures before paying any fees (except credit report fees) rather than within the “three day” window following application.

- Justin Hosie, Chambliss, Bahner & Stophel, P.C.
Personal Property Financing

The Personal Property Financing Subcommittee sponsored a discussion of recent legislative developments and significant court decisions that have impacted different aspects of personal property financing. Thomas Buiteweg of GMAC Financial Services, Mark Edelman of McGlinchey Stafford, and Robert Aitken of Ford Motor Credit Company led the discussion.

The discussion focused on the following subjects: (1) an amendment to California’s Car Buyer’s Bill of Rights for off-lease vehicle sales; (2) a Seventh Circuit decision that requires Chapter 13 debtors to remain liable for any deficiency balance after the surrender of vehicles; (3) recent developments under the Graves Amendment (federal preemption of lessor liability); and (4) a California appellate court decision that requires specific disclosures to appear in post-repossession notices of intent to sell under the Rees-Levering Act in California.

I. California amends Car Buyer’s Bill of Rights for Off-Lease Vehicle Sales

Effective January 1, 2008, California AB 305 increased the amount of the restocking fee that a used car dealer may charge when a buyer, who was the prior lessee of the vehicle, exercises a contract cancellation option. Mr. Aitken commented that the amendment closed the perceived loophole that was created by the 2006 amendment to California Vehicle Code section 11713.21(a)(5). Under the 2006 amendment, the restocking fee, in some instances, was less than the amount charged for excess mileage, damage, and excess wear and tear. Under new section 11713.21(a)(5), when the buyer who exercises the cancellation option was the previous lessee, the dealer is permitted to charge an increased restocking fee in the amount the buyer would have been obligated to pay the lessor, at the time of the termination of the lease, for excess mileage, damage, and excess wear and tear.

II. Seventh Circuit Requires Chapter 13 Debtors to Remain Liable for Deficiency Balance after Surrender of Vehicles

In In re Wright, 492 F.3d 829, 2007 WL 1892502 (7th Cir. (Ill.) July 3, 2007), the Seventh Circuit, construing Sections 1325(a) and 506 of the Bankruptcy Code, held that any shortfall between the value of a vehicle and the balance on the loan that remained after the debtors surrendered their vehicle must be treated as an unsecured debt owed by the debtors under their Chapter 13 bankruptcy plan. See 11 U.S.C. §§ 1325(a) and 506. Mr. Buiteweg noted the Seventh Circuit’s recognition that a secured party may pursue its rights under contracts and state law, rather than exclusively pursuing remedies available under the Bankruptcy Code.
III. Recent Developments under the Graves Amendment

The Graves Amendment, part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act, 49 U.S.C. § 30106 (2006), effectively preempts state application of vicarious liability ascribed to automobile lessors as the titled owners of automobiles for damages relating to the negligent and even criminal acts of the drivers of leased automobiles. Mr. Edelman discussed constitutional challenges to the Graves Amendment, the interplay of the Amendment with state minimum financial responsibility requirements, limitations on the Amendment’s preemption based on the lessor’s negligence, and issues concerning the timing of actions for vicarious liability.

Constitutionality. In *Dupuis v. Vanguard Car Rental USA, Inc.*, 510 F.Supp.2d 980, 2007 WL 2788609 (M.D. Fla. Sept. 24, 2007), the court rejected the plaintiff’s argument that the Graves Amendment was unconstitutional as an invalid exercise of Congress’ powers under the Commerce Clause. The court held that the Graves Amendment was a valid economic regulation because it regulates the conditions under which motor vehicles are operated. Thus, the court reasoned, the Graves Amendment preempted Florida’s vicarious liability scheme. Mr. Edelman commented that courts have generally held that the Amendment is constitutional. See, e.g., *Vanguard Car Rental USA, Inc. v. Drouin*, 2007 WL 2915903 (S.D. Fla. Oct. 5, 2007).

State minimum financial responsibility requirements. In *Kumarsingh v. PV Holding Corp.*, 2007 WL 2847956 (Fla. App. 3 Dist. Oct. 3, 2007), a Florida appellate court held that while the Graves Amendment superseded and abolished all state vicarious liability laws as they apply to lessors of motor vehicles, liability under the state’s financial responsibility provision still applied.

Exception for lessor’s negligence. Courts have considered a lessor’s negligence to be an exception to the Graves Amendment’s preemption. In *Colon v. Bernabe*, slip op., 2007 WL 2068093 (S.D.N.Y. July 19, 2007), the court permitted the plaintiff’s pleading of negligence to be heard because the Graves Amendment only excludes a vehicle’s lessor from liability if there is no negligence on the part of the owner. Mr. Edelman commented that the result was based on a combination of two factors: (1) that the plaintiffs alleged that the owner was negligent in the maintenance of the vehicle; and (2) that the owner had contracted to maintain the vehicle. For this reason, Mr. Edelman noted that the number of cases in which plaintiffs look to distinguish what lessors have agreed to do and what those lessors actually have done as a basis for the claim will have to increase.

Timing of actions. The Graves Amendment applies to cases commenced after its effective date. In *Merchants v. Mitsubishi Motor Credit Company*, slip op., 2007 WL 2815744 (E.D.N.Y. Sept. 25, 2007), despite acknowledging that the accident underlying the claim occurred prior to the amendment’s effective date because the claim was not justiciable until after the effective date.

IV. Disclosure Requirements for California Post-Repossession Notices of Intent to Sell under Rees-Levering
In *Juarez v. Arcadia Financial, Ltd.*, 152 Cal.App.4th (June 26, 2007), a California appellate court interpreted the Rees-Levering Act as requiring that a post-repossession notice of intent to sell a vehicle must disclose the specific amount required for the customer to pay for reinstatement. Noting that the Act expressly requires only the “conditions precedent” to reinstatement to be identified in a notice of intent to sell, Mr. Buiteweg pointed out that prior to the *Juarez* case, no one interpreted the Act to require the disclosure of the specific dollar amount for reinstatement. The panel indicated that the *Juarez* decision has spawned a number of class actions regarding allegedly insufficient post-repossession notices of sale.

- Catherine Stark, Hudson Cook