A Canadian Perspective on Personal Property Financing

On April 10, 2008, Paula Rietta from Ford Credit gave a presentation entitled "A Canadian Perspective on Personal Property Financing". She explained that the Canadian provinces have each adopted a Personal Property Security Act ("PPSA"). A PPSA is a statute relationship between secured parties and debtors where a security interest has been granted or taken in the personal property of the debtor. The PPSAs are Article 9 UCC based systems (not Revised Article 9).

While each Canadian province adopted a PPSA, differences can be seen not only across individual province lines but across geographical regions as well. Ms. Rietta pointed out three major geographical areas with notable difference between them are Ontario, the Western provinces, and Quebec. Despite the differences between these regions, PPSAs have seven common objectives: (1) comprehensiveness (PPSAs govern perfection of security instruments); (2) flexibility (targeted to accommodate financial filings across jurisdictions); (3) fair and efficient enforcement; (4) protection of information of third party requests (notice filing system); (5) efficient registration system (each province has the same filing system); (6) certainty and predictability (based on the filings); and (7) cross jurisdictional financing (ensure that across the provinces, a secured party may find out if the debtor has granted a security interest to other parties).

Additionally, each PPSA typically shares several common features including: (i) scope; (ii) security agreements that allow a secured party to take an interest in the debtor's present and after-acquired personal property; (iii) perfection standards; (iv) enforcement provisions; and (v) right to take possession and dispose of the collateral. Ms. Rietta also explained that each jurisdiction has a central filing system in which the secured party must file its security instrument in the province where the collateral is located. Through such a filing system, a party may search by debtor's name or by some other identifier such as a serial number or vehicle identification number in order to determine if any other party has an interest in a debtor's personal property. Although each registry is essentially the same, it is still necessary to conduct such a search in each individual province to ensure that no filing is overlooked. In addition, each PPSA provides specific debtor notice requirements before taking possession. Ms. Rietta noted, however, the notices required and the steps for repossession may vary between provinces. In summation, each province has adopted a PPSA with common goals and features, but there are provincial differences between the PPSAs.
Karen H. Cornell, Lehman Brothers, Jay A. Dubow, Pepper Hamilton LLP, and Andrew Sandler, Skadden, Arps, Slate, Meagher & Flom LLP each presented for The Committee on Financial Services: Subcommittees on Litigation and Arbitration.

**Chevy Chase v. Andrews** (Option Arm Case). Karen Cornell described an option arm (2003-2005) as a loan that features a very low interest rate during a short initial term (typically 4-6 weeks) but which converts to a index-based floating rate at the end of the initial term. Ms. Cornell pointed out that the minimum payments for these types of loans were amortized using various methods. Ms. Cornell also believed that the Truth in Lending Act (TILA) disclosures were correct. In her presentation, Karen highlighted: (i) the interest rate; (ii) the interest rate change dates; (iii) the interest rate limit; (iv) the index; and (v) minimum payments. She also noted that the agreement contained the CHARM booklet. The plaintiffs filed a class action suit and the court certified the class on January 16, 2007. The plaintiffs asserted the TILA disclosures were not clear and conspicuous. The court found that the plaintiff’s only available right was rescission and held that the plaintiffs had a three-year right of rescission. However, the court found the statute of limitations of three years had been tolled during the suit. On appeal, the Court of Appeals will need to determine if the right of rescission is an appropriate remedy for a class.

**Massachusetts v. Fremont Bank.** (Subprime Lending) Karen Cornell also summarized the Fremont case. Fremont entered into a cease and desist order based on the interagency guidelines. However, after entering into the order, Fremont still continued to service certain loans. In July, Fremont agreed to a "Term Sheet" letter agreement with the Attorney General of Massachusetts. The Attorney General objected to all of Fremont’s foreclosure requests. Consequently, Fremont rejected the "Term Sheet" agreement. Most of the mortgages serviced by Fremont contained two or three low interest introductory rates that adjusted to an index. The loans often had a loan to value ratio of 100%. While Massachusetts had no laws limiting the Fremont loans, the court found a penumbral of unfairness. The court held that any loan with a "teaser" rate, QDTI (Qualified DTI more than 50%), or LTV more than 100% needed court approval for foreclosure. The court ruled that loans such as the Fremont loans were "presumptively unfair." On March 31, 2008, the court also limited Fremont from selling servicing rights.

**Fannie Mae and Freddie Mac "Code of Conduct".** The New York Attorney General investigated and reached an agreement with Fannie Mae and Freddie Mac to purchase only from lenders who meet a new Code of Conduct regarding appraisals. The Code of Conduct limits broker involvement in the appraisal process. The Code of Conduct also limits the involvement of loan officers or those with a financial interest in the outcome in the appraisal process in the appraisal process.

**Securities and Subprime.** Jay Dubow discussed the impact of the subprime market on securities. Mr. Dubow stated that in 2007, 287 cases were filed in relation to the subprime market. Of those cases, sixty-one were securities cases, and half of those were security fraud cases. Mr. Dubow noted that directors were named in 80% of the cases that allowed for action against insurance policies. He went on to cite a recently issued Price Waterhouse Cooper report that found that Securities Class Actions were up 50% from 2006.
Mr. Dubow then cited a lengthy list of plaintiff actions including suits against: (i) Morgan Stanley for not disclosing its interest in subprime investments that resulted in significant write downs; (ii) PMI Group for not disclosing some exposure on defaults; (iii) Sallie Mae for not disclosing risks from student loans; and (iv) UBS for failure to disclose debt write down. Mr. Dubow also mentioned that several shareholder derivative suits were also filed claiming individual directors or officers breached their duties and noted that whether plaintiffs sue in derivative suits or class actions depends on whether the plaintiff seeks action in federal court or state court. Mr. Dubow also pointed out that this decision depends on differing discovery rules available under each. Mr. Dubow also noted that plaintiffs have also brought claims that companies did not properly disclose the risk involved in a particular write down or investment. Outside counsel has also been criticized for meeting with officers during internal investigations since outside counsel does not represent the officers.

Because plaintiffs must overcome sciente and loss causation burdens, Mr. Dubow suggested that judges are often willing to dismiss claims where the facts pleaded do not demonstrate sufficient sciente or loss causation to proceed. The SEC formed a Subprime Mortgage Taskforce to bring cases at all levels of the intersection between securities and the subprime market. These cases have concerned accounting and insider trading, class actions and how to determine value of a portfolio. FINRA has also stepped up the investigation of individuals over which they have jurisdiction. This has presented a unique challenge to the subject of these investigations because even claiming Fifth Amendment rights can be reason for FINRA to pull a license.

Finally, Andrew Sandler spoke on the true impact of the subprime crisis. He suggested that the estimated $900 billion dollar impact of the subprime meltdown affects an entirely different subset than did the banking crisis or the savings and loan crisis of the past. Often the potential litigation issues are further complicated because the sections of each company that originates loans bears a different liability from the collections or servicing sections of that company. Mr. Sandler suggested a three to five year litigation outlook and a tripling of the number of current class action suits pending.

Mr. Sandler closed the session with comments on the following cases:

- The City of Cleveland sued 21 defendants on a public nuisance doctrine, claiming a revenue loss from foreclosures and the processes behind those practices. A minister filed a coordinating claim and several large lenders sought a stay based on preemption.
- The City of Buffalo filed a similar case based on the city housing code and nuisance. The City also filed a much more fact specific case than the City of Cleveland.
- The NAACP filed a price discrimination complaint, but the complaint was not served on many of the complainants. The NAACP filed an amended complaint based on discriminatory data provided by consumer groups. A motion to dismiss has been filed for failure to state a specific claim and disparate impact cases cannot be based on the Fair Housing Act.
- The City Of Baltimore also filed suit against lenders based on foreclosure and the filing of liens. The alternative
pleadings suggest the City also engaged in the tactics to which they object in their tax lien filings.

Program: Fisher Memorial
Who Benefits from Risk-Based Pricing and at What Costs?
Suzanne R. Haley, Franzén & Salzano, P.C.

The Committee on Consumer Financial Services and The Conference on Consumer Finance Law jointly presented a program which featured a panel discussing risk-based pricing. The panelists addressed and engaged in debate over the following questions: (1) Has risk-based pricing achieved the goal of promoting consumer access to financial services; (2) Has the application of risk-based pricing resulted in inequities; and (3) Are there viable alternatives to risk-based pricing that would increase availability of affordable consumer credit?

Lawrence A. Young of Hughes Watter Askanese, Houston, TX moderated the discussion. The panelists included Bradley H. Blower of Relman & Dane, PLLC, Washington, DC, Anne P. Fortney of Hudson Cook, LLP, Washington, DC, Kathleen Keest of the Center for Responsible Lending, Durham, NC, and Arthur J. Rotaltori of McGlinchey Stafford PLLC, Cleveland, OH. David Berenbaum, Executive Vice President, National Community Reinvestment Coalition, Washington, D.C., and Stuart Pratt, President, Consumer Data Industry Association, Washington, DC, assisted in putting the materials together although were unable to attend the live discussion.

Anne Fortney opened the discussion with a historical overview of risk-based pricing and how it has evolved over the past few decades. Risk-based pricing involves the practice of lenders charging each borrower a specific interest rate based on perceived credit risk rather than charging one single rate for all borrowers. While credit decisions have always required creditors to assess the risk of nonpayment and ascertain the level of risk a particular borrower will pose, up until the 1970’s, creditors relied primarily upon “judgmental systems” in evaluating credit risk. Credit scoring was later extended to risk-based pricing. Although the specific factors vary depending on the type of credit or creditor, Ms. Fortney explained that in its current form, risk-based pricing commonly relies upon factors such as credit history, collateral, and intended purpose of the loan in ascertaining the level of risk a particular borrower will pose and pricing according to that risk.

One of the issues the panelists addressed was whether the adoption of risk-based pricing has contributed to expanding access to various forms of consumer credit. Some members of the panel were skeptical of risk-based pricing’s ability to contribute to improved credit availability and affordability and expressed concerns as to its implementation, pointing out that there is evidence to suggest its design is flawed, and that discriminatory practices or other less than sound principles have become imbedded in the models that create these scores.

The panelists also debated the level of individual discretion that creditors should be able to employ and offered opposing views as to the need for discretionary over-rides. From one perspective, individual discretion is necessary for sound underwriting. For instance, in certain situations, a credit score might prevent someone from receiving credit, but after conducting a risk analysis and looking at the applicant overall, a creditor may
Some of the other issues discussed included how to develop risk assessment proxies when traditional risk tools are unavailable. Certain populations may have lower credit scores and pay higher prices than their performance would warrant. For example, the panelists pointed to the FRB 2007 Report to Congress on Credit Scoring, which found that recent immigrants may have lower scores because their credit history profiles resemble those of younger individuals, even though they perform better. The presentation concluded with a brief discussion of possible barriers and limitations to the development and implementation of the alternative data models.

Deposit Products and Payment Systems
Carter Berkeley, Hudson Cook, LLP

Deposited Check Truncation – Check or Electronic Payment?

The Deposit Products and Payment Systems Subcommittee sponsored a session at the Spring ABA Meeting in Dallas discussing the proposed Deposited Check Truncation ("DCT") pilot program. The speakers were Oliver I. Ireland, Morrison & Foerster, LLP, Fred Miller, University of Oklahoma College of Law, and Gail Hillebrand, Consumers Union.

Mr. Ireland started off the discussion by providing an overview of the history of the check presentation process and the development of the Automated Clearing House Network ("ACH"). Mr. Ireland provided an overview of the DCT pilot program. Mr. Ireland stated that DCT would enable an Originating Depository Financial Institution ("ODFI"), acting in the capacity of a collecting bank, to use ACH to electronically collect checks in amounts of $25 or less deposited by consumers. Mr. Ireland discussed the purposes of DCT, such as the reduction in paper check presentation costs. Mr. Ireland stated that the Uniform Commercial Code Articles 3 and 4, and Regulation CC would govern DCT, not the Electronic Funds Transfer Act and Regulation E. Mr. Ireland explained that, from a legal standpoint, DCT would be structured as the collection, (and under some circumstances, the return) of paper checks pursuant to the NACHA Operating Rules and would be supplemented by pilot agreements which would function as check clearing house rules. Mr. Ireland also provided a detailed overview of the DCT process. Mr. Miller discussed the application of the UCC to DCT and the inherent problems with that application, including the extent to which rules that are outside the UCC, such as the NACHA Operating Rules, may supplement the UCC. Ms. Hillebrand discussed the impact DCT would have on consumers.

Compliance Management/Privacy
Jeff Pilgrim, Aronstein & Lehr LLP

The Compliance Management Subcommittee presented a discussion of the affiliate marketing restrictions under the new
Mr. Rau and Mr. Fischer began by explaining that, in general, the new affiliate marketing rule (the "Rule") gives consumers an opportunity to "opt out" before an entity can use information provided by an affiliated company to market its products and services. The Rule implements Section 214 of the Fair and Accurate Credit Transaction Act of 2003, which is the basis for new FCRA Section 624. The Rule became effective on January 1, 2008, and all covered entities are required to comply no later than October 1, 2008.

Under the Rule, a company that receives "Eligibility Information" — defined as transaction and experience information, as well as credit reports and application information — may not use the Eligibility Information to make a "Solicitation" unless the consumer has first been provided with a written notice and a reasonable opportunity to opt out, and has not opted out. Mr. Rau and Mr. Fischer noted that it is important to keep in mind that the new Rule operates in addition to the existing FCRA Rules covering the sharing of information among affiliates.

Mr. Rau and Mr. Fischer further explained that, under the rule, the required notice must be clear, conspicuous, concise and disclose:

1. the names of affiliates providing the notice;
2. a list of affiliates who will be using the Eligibility Information;
3. a general description of the types of Eligibility Information that may be used;
4. the fact that the consumer can opt out of the use of the Eligibility Information;
5. the fact that the opt out may be for a certain period of time and that the consumer may renew the opt out; and
6. a reasonable and simple method to opt out. The FTC has provided model forms of the notice. The notice must be provided by the affiliate with the "Pre-existing Business Relationship," and it can be coordinated and consolidated with other notices or disclosures.

Mr. Rau and Mr. Fischer also summarized the requirements for the opt out, including the opportunity to opt out, the method to opt out, and the delivery of the opt out to the consumer. Finally, Mr. Rau and Mr. Fischer noted the exceptions to the notice and opt out requirement under the new Rule. For example, a notice and opt out are not required:

1. to make a Solicitation if there is a Pre-existing Business Relationship;
2. in response to a communication about products or services initiated by the consumer; or
3. if compliance with the rule would prevent compliance with state insurance laws related to discrimination.
have access to their choice of credit products.

The Federal Reserve's proposal would add a number of new features to Regulation Z. The amendments would prohibit lenders from engaging in a pattern or practice of lending without regard to the borrower's ability to repay the debt. To implement that prohibition, lenders would be required to verify a borrower's income or assets if those items would be considered in granting a loan. The proposed rules would mandate escrows on first-lien loans. The rules would also limit prepayment penalties. Lenders and brokers would be prohibited from coercing appraisers and servicers would be prohibited from imposing unwarranted charges. Yield spread premiums would be restricted, in that creditors would be prohibited from paying brokers more than the amount a consumer agreed the broker would receive. Additionally, the proposed rules would require advertisements to be accurate and complete. The rules would also require the disclosure of material terms within a set time-frame.

Jeffrey Naimon, with Buckley Kolar, discussed the rules from an industry perspective. Mr. Naimon noted that the threshold for application of the proposed rules may be set too low. As a result, too many prime loans would be captured, especially with current interest rates as high as they are. Further, he commented on the proposed remedies and penalties that the rule would allow, including damages in amounts equal to all the finance charges on a loan. He stated that such substantial penalties could end up dampening the subprime credit market.

Kathleen Keest, with the Center for Responsible Lending, discussed the proposed rules from a consumer perspective. She noted that amendments to the rules have been necessary for several years. However, she was concerned consumer protection issues would remain even with passage of the proposed changes. Specifically, she felt the ability to repay requirements, prepayment limitations and broker fee limitations left room for continuing problems in high-cost loans. In order to protect consumers and provide stability in the credit market, she felt that stricter repayment ability standards were required. Further, Ms. Keest expressed that, in her opinion, prepayment penalties and yield spread premiums should be eliminated.

Preemption and Federalism

Emily Miller, Hudson Cook, LLP

The Preemption and Federalism subcommittee gave a presentation that discussed attempts by states to regulate service providers, gift card litigation, and debt cancellation contracts.

Ralph Wutscher from Roberts Wutscher, LLP discussed the issue of plaintiffs targeting federally chartered institutions under state UDAP laws. He noted that while Eliot Spitzer blamed the federal government and preemption litigation as an attempt to circumvent state consumer protection laws, the states themselves have not been putting blame on the federal government.

Chuck Gall from Dreher Langer & Tomkies, LLP discussed recent gift card litigation. In SPGCC, LLC v. Blumenthal, Simon Property Group marketed, sold, and services prepaid store value cards issued by Bank of America. All of Simon’s revenue was generated by card fees, including a $2.50 monthly maintenance fee. The cards had a one year expiration date. Bank of America was the
At the session, Randal Mays, President of Junior Achievement of

Consumer Financial Services Committee Forum:

CFSC Young Lawyers - Financial Literacy Training with Jr. Achievement
Jeremy Sausser, Hudson Cook, LLP

Financial Literacy

The Consumer Financial Services Subcommittee of the Young Lawyers Section sponsored a financial literacy training session.

the Chisholm Trail, Inc., explained the goals and techniques sponsored by Junior Achievement ("JA"). Mr. Mays explained that JA is an international program that sponsors programs for grades K-12. The programs typically run from 5-8 weeks. Each program is conducted by a JA volunteer, as opposed to the teacher of the classroom. Volunteers serve as positive adult role models and with the goal to inspire and motivate the children. JA programs expand and grow as the children progress through school. For instance, the theme of the Kindergarten course is "ourselves," the theme of the third grade is "our city" and the program continues to a course called "JA BizTown," which teaches high school children entrepreneurial skills. JA provides volunteers with training, support and a kit of material to use in the classroom. For more information on JA please visit their website at: www.ja.org.

Federal and State Trade Practices

Emily Miller, Hudson Cook, LLP

The Federal and State Trade Practices subcommittee presented an overview of the FTC’s Hispanic Initiative. James Kohm, Associate Director of Enforcement, Bureau of Consumer Protect of the FTC, discussed what the FTC has found through its research and what can be learned through its enforcement actions.

Kohm explained that Hispanics make up 14% of American population and represent a huge and rapidly growing market. That market is expected to be reach a trillion dollars a year by 2010 bringing with it the inevitable by-product of fraud.

In 2005, the FTC conducted several broad surveys focusing on fraud. The results of those surveys suggested that Hispanics were 50-100% more likely than whites to be victims of fraud.

The deceptive practices used to target Hispanic consumers include:

- Questionable health claims
- Deceptive weight loss products
- Fraudulent credit offers and repair schemes
- Fraudulent business opportunities/work at home
- Deceptive advertisements for pre-paid calling cards

Kohm discussed examples of each of these types of fraud. One example was advertisements for a medical supplement that claimed to be a cure for cancer. The FTC evaluates the various advertisements to determine if the claims in the ad can be substantiated or not. Kohm stated that, not surprisingly, many of the weight loss claims are unable to be substantiated.

The FTC sent warning letters to 166 business and 77 media outlets that were using or advertising deceptive ads. The letter to the media outlets said that the outlets were airing deceptive ads and gave the reasons why the FTC thought they were deceptive. In 2007, the FTC conducted the Hispanic Work-at-Home Surf. It looked reviewed print publications and internet ads and found that deceptive “work at home” ads were prevalent. The FTC concluded that 68% of these ads were facially deceptive. The print media had a slightly higher percentage than the internet ads.

Kohm then discussed what the FTC is doing to try and curb these types of deceptive advertisements. The FTC takes a 3 prong approach:
The FTC also works with media outlets to screen advertising and conducts training with these organizations. Kohn stated that the FTC understands that their efforts are not going to solve the problem, but it hopes to curb the problem significantly. Unfortunately, there still is, and will be, financial incentive for outlets to accept deceptive ads.

The FTC also put a lot of effort into a consumer education campaign. There are numerous materials on its website in Spanish regarding these types of fraud and other instructional materials such as how to apply for credit.

Debt Collection Practices and Bankruptcy
Emily Miller, Hudson Cook, LLP

The Debt Collection Practices and Bankruptcy subcommittee presented a panel that discussed: (i) what happens to HELOCs when the lender files for bankruptcy; (ii) the FCC declaratory ruling regarding autodialers; and (iii) litigation addressing debt collection communications with a debtor's counsel.

Bankruptcy of HELOC Lender

Barbara Mishkin of Reed Smith, LLP, discussed a bankruptcy motion brought by GMAC for an entry of an order compelling American Home Mortgage Acceptance and American Home Mortgage Servicing to send notice to its borrowers regarding the status of their HELOCs. Barbara asked that question: what happens to HELOCs when the HELOC lender files for bankruptcy? HELOCs sold by American Home had been securitized and were insured by various insurers. GMAC Mortgage entered into servicing agreements with the trust, under which American Home would service the HELOCs but GMACM would provide back up servicing in the event servicing termination occurred.

American Home planned to sell its servicing rights to closed end loans, but the purchaser did not want to buy the HELOCs over worries that it would also pick up the responsibility to fund advance request by borrowers. The lender may use trust funds to fund future advance requests, but in the event the trust funds are unavailable, the lender is required to fund the advance requests itself. The back up servicer does not have an obligation to step into the shoes of the lender.

GMACM did not want to be sued by credit guarantors if it used borrowers' payments to fund advancements and did not want to take the risk that a court would require it to pay HELOC borrowers. American Home's bankruptcy would prohibit it to fund future requests. GMACM wanted notice to be sent to the borrowers that GMACM would take over servicing, but that American Home would still be the lender and that the HELOCs may be unable to obtain additional future advances.

Autodialers

Charles Gall and Margaret Stolar of Dreher Langer & Tomkies gave a presentation on the FCC Declaratory ruling regarding prohibitions on using autodialers to call cell phones. Prior express consent or emergency purposes are exceptions to this prohibition.
Providing a cell phone number to the creditor reasonably evidences prior express consent.

Charles first discussed the Costa v. National Action Fin. Servs. case. In Costa, the debt collector failed to properly disclose its identity. The defendant called the debtor and stated who the message was for, the name of caller, phone number and availability. There was no indication as to the purpose of the call or who the caller's employer was. The debtor sued for violations of FDCPA. The debtor claimed that the caller failed to disclose his identity in the message and failed to give a mini Miranda notice.

The District court indicated that there were no circuit court decisions as to what it means to meaningfully disclose identity. The Costa court determined that in order to meaningfully disclose the caller's identity the caller must disclose the name and capacity of the caller and enough information not to mislead the consumer about the purpose of the call. In the Costa case the caller failed because she did not give enough information and only gave her name. The court also found that the debt collector failed to give mini Miranda disclosure requirement in the message. The debt collector argued that this communication was not subject to mini Miranda because it was not a communication under FDCPA. The Court disagreed.

Next, Charles talked about the Joseph v. J.J. MacIntyre case. The Joseph court indicated that if the collector provides meaningful disclosure he can do so without violating the prohibition on third party contact even if third party overhears the message accidently.

The panel cautioned that there are risks associated with leaving messages on answering machines, specifically failing to leave proper disclosures. They also opined that creditors collecting their own debt need to be cautious as well. While the FDCPA may not apply, state laws may. For example, Connecticut has rules that apply similarly to the federal rules. Creditors must also be aware of other federal laws when using autodialers, such as the TCPA. The TCPA requires callers to disclose their name and phone number. Twenty three state statutes potentially cover creditors using autodialers.

Don Maurice from Maurice and Needleman presented various cases regarding communications with debtors' counsel and what constitutes a violation the FDCPA. Don noted that the courts are split on this issue and discussed the following cases:

Ignatowski v. GC Servs. This case involved a situation where a creditor's attorney did not state that his firm was a debt collector when speaking to the debtor's attorney. The court did not find the cause of action persuasive and held that attorneys were sophisticated enough to know if it was a debt collection communication. The debtor's attorney was there to protect the consumer. The court held that communications with the debtor's attorney are not actionable under the FDCPA.

Tromba v. M.R.S. Associates Counsel relayed information about a claim to debtor's attorney without disclosures. The court found that the communication was a communication under FDCPA, but not actionable. An actionable communication has to be a threat to contact the debtor.

Ahmed v. I.C. System Inc. The debt collector told the debtor's counsel that it would contact the debtor if it did not receive a response from the attorney. The court held that the FDCPA allows...
the debt collector to communicate.

Koch v. Computcredit Corp. ♦ The debtor's attorney was her husband. The court held that the communications were actionable because communications to a spouse are actionable.

Sayyed v. Wolpoff and Abramson ♦ The court found that any communication to the debtor's attorney would be actionable. Communications with debtors' counsel will be considered in same light as if it is a communication with the debtor. The debtor is treated as an unsophisticated consumer. Don opined that the Sayyad court implied that both the debtor and the attorney are unsophisticated. We would have to assume that the attorney needs protection.

Guerrero v. RJM Acquisitions ♦ The court held that attorneys are not unsophisticated.

Evory v. RJM Acquisitions ♦ The court held that a representation by a debt collector that would be unlikely to deceive a competent lawyer, even if he is not a specialist in consumer debt law, should not be actionable.

Riley v. Giguiere ♦ The court applied Guerrero.

Massa v. I.C. Systems ♦ The court applied Evory. In this case a letter sent by a creditor misstated that the debt was actionable when, in actuality, the debt was not actionable.

Don discussed that the split among the courts creates a state of confusion within the industry regarding communications. Certain communications are not actionable unless they contain a direct threat to communicate with the debtor. In other circuits, creditors are required to make some sort of determination as to whether their communications would deceive a competent attorney. Still in other circuits, courts have found that all communications are actionable.

Housing Finance and RESPA

Clay Swears, Hudson Cook, LLP

The Real Estate Settlement Procedures Act presentation discussed the recently proposed RESPA amendments. Michael Flynn, General Deputy General Counsel with the U.S. Department of Housing & Urban Development ("HUD"), gave background into the process of writing the proposed rules. He also provided insight into the intended goals of the amendments, including the main goal of allowing consumers to shop more effectively for credit. Specifically, the amended rules would provide for greater disclosure of costs and loan terms, allowing borrowers to engage in a more informed decision making process.

Mr. Flynn also discussed the basic components of the revised rule. Under the proposed revisions, the good faith estimate ("GFE") would be standardized to improve the disclosure of loan terms and settlement costs. To implement the increased disclosure, HUD would increase the GFE to four pages, with key disclosures appearing on the first page.

Donald Lampe, with Womble Carlyle Sandridge & Rice, followed up on Mr. Flynn's discussion by indicating that revisions to the rules have been a long time in coming. He noted that some of the proposed changes are similar to amendments that HUD proposed in 2002. Because the revisions have been years in coming, Mr. Lampe felt that the most constructive comments would be those geared towards operational issues with the rules.
The Section of Business Law of the American Bar Association
321 N. Clark Street - Chicago, IL 60654 - 312.988.5588
Section Staff - businesslaw@abanet.org - www.abanet.org/buslaw
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