Dear CFSC Members:

Please allow me to introduce myself. My name is Nikki Munro and I serve as Chair of the ABA Business Law Section's Consumer Financial Services Committee (CFSC). Together with my Vice Chairs Jim Brown, Tom Buiteweg, and Andrew Smith, I welcome you to participate in committee activities. The CFSC has a lot to offer, and by actively participating and encouraging your colleagues to participate, you can get the most out of your CFSC membership.

There are many opportunities to help you get the most out of your CFSC experience, but we think the best way to get involved is to join the over 130 committee members at one or more of the three CFSC off-site meetings a year.

Each January, we have a stand-alone meeting of just the CFSC. From Saturday evening through Tuesday afternoon, we provide over 12 hours of substantive CLE accredited programming lead by the country's brightest and most accomplished consumer financial services lawyers. The lawyers represent consumers, the industry, the government, the bench, and academia. We foster lively discussions on the most relevant topics in today's fast paced and constantly evolving world of consumer financial services law.

The winter meeting typically alternates between a ski venue and a golf venue. This year our CFSC stand-alone meeting will be at the LaPlaya Beach and Golf Resort in Naples, Florida from January 5th through January 8th.

During the Spring, we meet with theABA's Business Law Section. In addition to the substantive consumer financial services CLE programming, and the collegiality of the Winter Meeting, at this meeting, we often partner with other Business Law Section Committees, such as Banking Law and Cyberspace, to expand the educational and networking opportunities for CFSC lawyers. The Spring Meeting includes both substantive subcommittee meetings and three to four consumer financial services focused CLE programs. These CLE programs are supplemented by the many CLE programs offered by other committees within the Business Law Section.

Our third meeting occurs in late summer when we meet with the entire American Bar Association. In 2014, we'll transition to a late summer early fall meeting with just the members of the Business Law Section within the

Naples in January - The Best Way to Start the New Year

Please join us at the beautiful La Playa Beach & Golf Resort in Naples, Florida from January 5-8, 2013 for the CFSC Winter Meeting. We start with the "Beer and Basics" program on Saturday, January 5, at 4:00 pm. Our Welcome Reception will follow at 6:30 pm.

Sunday, we start bright and early at 7:30 am, kicking off 3 very full mornings of excellent programming, packed with CLE credit, and all focused on current consumer financial services issues.

Don't miss out on the highly anticipated Committee Reception and Dinner Sunday evening at Roy's Hawaiian Fusion, starting at 7:00 pm.

Excellent timely programs, a beautiful setting, the opportunity to network with friends and colleagues, meet new people, and discuss important topics of the day. What better way is there to start a bright new year?

See you in Naples!

Sweet Home Chicago - The CFSC Gets the Blues!

By David Melcer, Bass & Associates P.C.

The ABA had the wisdom to host its annual meeting in Chicago this summer, which gave us the opportunity to enjoy a unique music form, Chicago Blues. While the blues grew up in the south, it wasn't until the blues musicians moved north and electrified it, that it became the music that we know today, and the music form that gave birth to rock and roll. That transformation took place largely in Chicago, and the musicians that pioneered it are the household names that people think about when they think about the blues. Luckily for us, the musical descendants of Muddy Waters, Howlin' Wolf, and Sonny Boy Williamson (I and II) are alive and well in the windy city, and on August 2, those members of the committee with enough foresight to have bought tickets were treated to some of that original product at clubs that are definitely non-tourist, and the most representative of the kinds of places that spawned the blues.
ABA. By transitioning out of the ABA Annual meeting and conducting another Business Law Section meeting, we will be able to retain the more focused spring meeting atmosphere.

At all of our meetings, we strive to create panels made up of diverse lawyers with diverse practices and perspectives. We welcome new lawyers into our committee through participation in our young lawyer’s subcommittee activities and panels, mentoring programs, and as young lawyer liaisons to subcommittee leadership. Our goal is to provide educational and participation opportunities to lawyers who have been practicing for many years and those just entering the practice.

In addition to the tremendous educational opportunities, the meetings also provide client and colleague development time, and fun activities. Whether you attend a committee dinner, golf with your colleagues and friends, or ski with your clients, you are sure to enjoy the time outside the conference room as much as your time inside of it.

To get the most out of your CFSC membership, come join us for a great education and good times with good friends. You will not regret it.

If you have any questions about the upcoming meetings, or would like to participate more in the committee, please feel free to call or email me.

Nikki Munro
Chair
Consumer Financial Services Committee
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Boarding the bus after an open bar reception for a warm-up, our pub crawlers soon pulled up at The Water Hole Lounge, located in a vintage building on Chicago’s west side. At The Water Hole, we were treated to an up and coming blues band touring from the south, which had definite Chicago chops. Featuring a lead guitarist who reeled off classic blues riffs, we were rocked with some traditional and new blues tunes. The club itself is definitely representative of the traditional Chicago blues club, and the atmosphere provided a great environment for the music. Unfortunately, far too soon, our host gathered us up for our trip to our second, and best, blues club.

Rosa’s Lounge in Chicago (the weekend hangout for many years of yours truly) has a fascinating story. Many years ago, an aspiring blues drummer in Italy by the name of Tony Mangiullo met the blues legend Junior Wells who was on an international tour. Junior liked the young fellow and told him that if he ever came to Chicago, he should look him up. Tony got on the next plane after Junior and was soon at his door. Working odd jobs, Tony saved up enough money to buy an old building with a bar in it, sent for his mother (Mama Rosa) to help him out, and Rosa’s was born (your author was at opening night). Since then, Rosa’s has been named as Chicago’s best blues club by such notable publications as the New York Times and Rolling Stone.

When we arrived at Rosa’s, we were treated to one of the remaining old time Chicago blues musicians, James Wheeler. Having played with such notables as Billy Boy Arnold, Otis Rush, and Magic Slim, James treated us to traditional Chicago Blues at its finest. Additionally, we were able to soak up the ambiance of Rosa’s. Those who had the opportunity to talk with Tony or to meet Mama (still tending bar at an indeterminate advanced age) were able to understand why Rosa’s bills itself as Chicago’s friendliest blues lounge. Unfortunately, that time also ended too soon and we had to board the bus back to the hotel.

Hopefully everybody that attended was able to get a flavor of the real Chicago Blues. I would like to thank our host Steve “MrBIG” Pasek of BIG Productions in Chicago, who has been organizing successful blues tours and club crawls for many years. For those of you who were not lucky enough to snag a ticket, Steve does do private tours on a small and even individual scale, so if you are ever in Chicago and have an evening free, I would commend you to his care. He can be reached at http://www.chicagobluestour.com/index.html.

Thanks to everyone who had the opportunity to experience the authentic Chicago.
CFSC Pro Bono/Community Service

“JA in a Day”
By John DiNome, ReedSmith

In May 2012, a team of volunteers from Reed Smith’s Philadelphia office visited John L. Kinsey Elementary School, a pre-K through 8th grade elementary school located in the West Oak Lane section of Philadelphia, to participate in the “JA in a Day” program through Junior Achievement of Delaware Valley. Junior Achievement is a nationwide nonprofit organization that provides business, economic and life-skills programs to enhance the education of young people. “JA Day” is a one-day presentation of Junior Achievement's programs to various grade levels, and gives volunteers the opportunity to spend the majority of the school day interacting with students.

The Reed Smith team, consisting of partners Len Bernstein and John DiNome, associates Valerie Eifert, Georgee Theverveil, Maria Guen, Cassandra Matos, Melissa Wojylak, and Sonia Shariff, and marketing coordinator Julie Maher, spent the day at the school teaching lessons ranging from financial literacy to the global marketplace to students in 3rd through 8th grades. The day was a great success and the team looks forward to future partnership opportunities with the school.

CFSC Constituents

CFSC Welcomes New Ambassadors and Fellows
By Soyong Cho, K&L Gates LLP

The Fellows, Ambassadors and Diplomats (“FAD”) program promotes diversity within the Business Law Section by actively recruiting young lawyers (Fellows), lawyers of color (Ambassadors), and lawyers with disabilities (Diplomats). The program offers meaningful opportunities to actively participate in the substantive work of the Section and the Committee to which a FAD is assigned by contributing financial assistance to attend ABA, Section, and Committee meetings and by assigning Committee and FAD mentors. Each year, the Section selects up to five Fellows and up to five Ambassadors. Every other year, the Section selects one Diplomat. Each FAD class serves a two-year term.

To date, the Business Law Section has sponsored 67 Fellows, 61 Ambassadors, and 5 Diplomats. The program has proven to be successful in retaining and developing diverse attorneys, as 75% of former FADs are active Section members and 40% currently hold leadership positions. Read More...

Roland Brandel: Join the Navy, See the World—and then Advise the Inventors of Mastercard!
By Rachel F. Marin, Maurice & Needleman, P.C.

You might be surprised to know that Roland E. Brandel, a former chair of the ABA Consumer Financial Services Committee, achieved few leadership positions in his early years of high school and college. Today he is a prominent figure in the world of consumer financial services, serving as Senior Counsel at Morrison & Foerster and the first chair of its financial services group. But, Brandel remained in the shadows until his life-changing service in the United States Navy. Join the Navy, see the world—and then advise the inventors of MasterCard!

During his formative years, Brandel had minimal time and inclination to pursue school activities, or even academics, seriously. He worked an after-school job all the way through high school, preventing him from playing a very active role in school clubs. Of note, he was the first member of his family to finish high school much less
Privacy Subcommittee
By Adam Maarec, McIntyre & Lemon, PLLC

The Privacy Subcommittee, led by Chair Obrea Poindexter of Morrison & Foerster and Vice Chair Peter Gilbert of Capital One, focuses on the most challenging information privacy issues facing consumer financial service companies. Following the Consumer Financial Protection Bureau's issuance of its final rule identifying "larger participant" credit bureaus, we discussed the agency's impact on various compliance issues, including interpretations of the Fair Credit Reporting Act, at the ABA Annual Meeting in Chicago this Summer. The consumer privacy regulatory landscape is rapidly developing as consumer finance companies adjust to new rules, federal supervision for the first time, and enforcement by a new regulator.

Join us this January at the winter meeting in Naples, Florida for privacy updates from Andrew Smith of Morrison & Foerster and Doug Smith, Assistant General Counsel of Capital One. They will focus on the FCC's revised Telephone Consumer Protection Act (TCPA) regulations requiring prior express written consent to make autodialed and prerecorded telephone calls, the TCPA's application to SMS and text messages, and recent TCPA developments in litigation.

Internet Delivery/Electronic Banking Subcommittee
By Crystal Gray, Hudson Cook, LLP

The Internet Delivery/Electronic Banking Subcommittee is chaired by Veronica Kristine McGregor of Jones Day, with vice chairs Eric Johnson of Phillips Murrah and Mark Furletti of Ballard Spahr, LLP, and young lawyer liaisons Tara Potashnik of Venable, LLP and Crystal Gray of Hudson Cook, LLP. The subcommittee is focused on regulatory and legal developments related to electronic banking.

In the past, the subcommittee has presented panels on developments in mobile wallets and stored value cards, two areas that have seen substantial growth as the consumer shifts from brick and mortar shopping and banking to online and mobile options. With the changes in the market, the importance and convenience of electronic banking is gaining momentum and many of the leaders in the consumer

Fair Lending Enforcement a Top Priority for Regulators
By Alexis A. Amezcu and Thomas J. Noto, Morrison & Foerster LLP

Recently, the DOJ and federal regulators have placed a renewed emphasis on fair lending enforcement and have taken an expansive view of what the fair lending laws require. The Supreme Court is poised to weigh in on whether a preferred theory of liability-disparate impact-remains a viable option. In the meantime, the trend continues to be an increase in the level of enforcement, and, increasingly, enforcement based on a disparate impact theory of liability.

Two federal statutes govern fair lending in the mortgage context: (1) the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691, et seq.; and (2) the Fair Housing Act (FHA), 42 U.S.C. §§ 3601, et seq. Both ECOA and FHA prohibit discrimination on the basis of race, color, religion, sex, marital status, or national origin. 15 U.S.C. § 1691(a)(1); 42 U.S.C. § 3605. Read More...

Pennington Decision Provides Support for Mortgage Companies in HAMP Cases
By Harry N. Arger and Brett J. Natarelli, Dykema

The Fifth Circuit's recent decision in Pennington v. HSBC Bank, 2012 WL 4513333 (5th Cir. Oct. 3, 2012) perhaps signals what will become the dominant trend in the next generation of cases alleging mortgage servicers failed to provide loan modifications under the Home Affordable Modification Program's ("HAMP") Trial Period Plans ("TPPs"). The Fifth Circuit joins the Eleventh Circuit (and arguably the Seventh Circuit) in rejecting the argument, often advanced by borrowers' counsel, that TPPs promise a permanent modification regardless of eligibility for HAMP. The
mum and many of the leaders in the consumer financial services industry, from credit card companies to banks, have capitalized on electronic banking in hopes of gaining an edge on the competition and staying ahead of the curve.

We look forward to the Winter Committee Meeting and providing CFSC members with a glimpse into the electronic banking world and the regulatory and legal developments it has to offer with a panel on The Latest Developments in Mobile Banking and Commerce and Tips for Handling the Mobile Banking and Commerce Applications Your Clients are Starting to Use.

Seventh Circuit's decision in Wigod v. Wells Fargo, 673 F.3d 547 (7th Cir. 2012), was the first Circuit decision to address the issue and is believed by borrowers' counsel to open the door to HAMP TPP claims. However, Wigod left unanswered what the TPP actually promises. The Fifth Circuit's decision in Pennington now answers those questions.

The Typical HAMP TPP case

The HAMP TPP case has become, like TCPA or FACTA cases, something of its own genre. In the typical case, a borrower in default (or close to it) on his mortgage loan applies for a loan modification through his mortgage servicer. Then the mortgage servicer evaluates the borrower for qualification under the federal HAMP program. If the borrower meets some threshold requirements, the servicer issues a TPP. Prior to June 2010, the federal HAMP program guidelines allowed servicers to issue TPPs to borrowers based on stated income or other non-verified eligibility criteria. The purpose of the TPP was to ensure the borrower could make the modified payments for a temporary period of time before receiving a permanent modification. In addition, the guidelines called for the borrowers' eligibility to be evaluated and verified during the TPP. Predictably, many borrowers provided stated income that could not be verified, sometimes due to borrower falsification, sometimes due to borrower mistake, and sometimes due to income that was not ultimately verifiable under the standards set by the HAMP program. Borrowers then file suit against their mortgage servicers alleging they made the monthly payments required by the TPP, and as to the additional eligibility requirements, borrowers argue either the TPP did not clearly spell them out or the servicer erroneously applied them. Read More...
CFSC Welcomes New Ambassador and Fellows
By Soyong Cho, K&L Gates LLP

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To date, the Business Law Section has sponsored 67 Fellows, 61 Ambassadors, and 5 Diplomats. The program has proven to be successful in retaining and developing diverse attorneys, as 75% of former FADs are active Section members and 40% currently hold leadership positions.

This year, the Consumer Financial Services Committee is fortunate to have four new FADs join its ranks: Fellow Julia Bahner and Ambassadors Anthony Sharrett, Juan Sempertegui, and Yuna Peng.

Julia Bahner has a long professional history in the consumer financial services industry. She is currently an associate at the law firm of Pite Duncan in Mercer Island, Washington, where she represents financial institutions in litigation, mediation and government investigations. She has handled matters involving a number of consumer financial protection laws, such as RESPA, TILA, and FDCPA. Before joining Pite Duncan, Julia worked as Claims Counsel at Fidelity National Title, where she managed an active insurance claims caseload and litigation in eight states and Guam. She was also responsible for ensuring the company’s compliance with state insurance laws. Prior to that, Julia was a litigation associate at Lane Powell P.C., where her practice concentrated on creditors’ rights. Julia has also authored a chapter on marketable title for the Washington Real Property Deskbook Series and earlier this year was a presenter at a CLE on Washington’s foreclosure mediation process. She was also named a “Rising Star” by Washington Law and Politics in 2006 and 2007.

Julia has been very active in her state bar association and the ABA. She was the President of the Washington State Bar Association’s Young Lawyers’ Division during the 2010-2011 term and served as the trustee for King County from 2003-2006. For the ABA’s YLD, she has served as its national liaison to the Business Law Section (2009-2011), was Committee Director (2008-2009), and was a District Representative for Washington and Oregon (2006-2008). She was also the Associate Editor of the YLD’s monthly newsletter from 2007-2008. In addition to the Business Law Section, Julia is also active in the Real Property Trust and Estate Law Section and the Tort Trial and Insurance Practice Section (“TIPS”). She is a member of the current class of the TIPS’ Leadership Academy and served on the TIPS Long Range Planning Committee for 2011-2012.
Julia is excited to apply her seemingly boundless energy to the CFSC as a Fellow. She was drawn to the FAD program because of its strong mentoring program and looks forward to a greater role in the CFSC.

**Anthony Sharrett** also has extensive experience in the consumer financial services industry. He is currently a Senior Associate with Bricker & Eckler LLP in Columbus, Ohio and co-chair of the firm’s Class Action practice group. His practice includes financial services litigation and regulation. Anthony also spent two years in the Ohio Department of Commerce as Counsel for Savings and Loan Associations, Credit Union Section, and Office of Consumer Affairs, where he was involved in the licensure of state chartered financial institutions, served as a liaison to the financial services community, and drafted administrative rules governing credit unions. Anthony has written articles and presented on numerous consumer financial services issues, such as predatory lending, payday lending, and the Consumer Financial Protection Bureau. Anthony has also been recognized as an “Ohio Rising Star” by Ohio Super Lawyers in 2009, 2010, and 2011.

Anthony is very active in local, state, and national bar associations. He was on the Board of Governors of the Columbus Bar Association from 2007 to 2011, and has held numerous other leadership positions with the Columbus Bar Association since 2006. He is currently a member of the Ohio Bar Association’s Counsel of Delegates and has been a member of the Administrative Law Committee since 2006. He also served as President of the John Mercer Langston Bar Association from 2009 to 2011, and has been a member of the National Bar Association since 2003. Anthony has been active in the Young Lawyers’ Division of the ABA, and in 2011, presented a segment on diversity within the legal profession at the YLD’s Fall Conference. In addition to his many professional commitments, Anthony also devotes significant time and energy to charitable organizations and is a strong proponent of public service.

Anthony learned about the FAD program through his mentor. He is looking forward to learning more about the substantive work of the CFSC and to contribute in a leadership role in the future.

**Juan Sempertegui** has practiced in Washington, DC at the law firm of Carr and Maloney P.C. since 2008, and defends attorneys in legal malpractice claims involving the FDCPA and RESPA. Before entering private practice, Juan was a Law Clerk for the Honorable Maurice Ross of the Superior Court for the District of Columbia. Before law school, Juan was a Corporal and served in the United States Marine Corps Reserves for 12 years. Between the Marine Corps and law school, Juan held financial analyst positions in the private sector and at the Federal Reserve Board.

In addition to his involvement with the ABA, Juan is currently serving as Region V President of the Hispanic National Bar Association and was recognized as Region President of the Year for the 2011-2012 term. Juan recently organized a workshop in coordination with numerous bar associations and the Consumer Financial Protection Bureau on applying for jobs at the CFPB and other government agencies.
Juan learned about the FAD program through another Ambassador and was drawn to the CFSC because of his work in the industry. He looks forward to gaining additional substantive knowledge about the consumer financial services sector and to valuable networking and learning opportunities with experts in the field through the FAD program.

**Yuna Peng** currently works for Capital One Financial Corporation as Assistant General Counsel and Director of Federal Regulatory Policy, where she is responsible for analyzing federal regulatory developments related to capital and financial markets. She will be transitioning to a new position within Capital One, where she will be responsible for auto financing matters.

Prior to joining Capital One, Yuna was a Senior Attorney within the Chief Counsel’s Office of the Office of the Comptroller of the Currency. In that role, she counseled the agency and national banks on finance and capital market issues, including securitizations, derivatives, and investment permissibility. Yuna also was awarded the Comptroller’s Special Award. Prior to the OCC, Yuna spent more than six years at the Securities and Exchange Commission in its Division of Investment Management and Division of Corporation Finance. At the SEC, Yuna worked on a broad range of issues, from insurance company compliance with the Investment Company Act of 1940 to analyzing asset-backed and structured finance transactions for compliance with Regulation AB. She was also selected for a special assignment amending proxy rules requiring registrants to furnish reports on internal controls on financial reporting.

Yuna first learned about the FAD program through a former FAD. She is grateful for the warm welcome she has received and for the Section’s commitment to fostering a diverse membership. As she moves into a more consumer finance focused role at Capital One, Yuna looks forward to developing a deeper understanding of consumer financial services issues through the FAD program and her work on the Committee.

**Information on Applying to FAD Program**

Applications for the 2013-2015 class of FADs are due on April 12, 2013. You may download applications on the Fellows, Ambassadors and Diplomat websites:

Fellows: http://apps.americanbar.org/buslaw/committees/CL715000pub/fellows.shtml

Ambassadors: http://apps.americanbar.org/buslaw/committees/CL715000pub/ambassadors.shtml

Diplomat: http://apps.americanbar.org/buslaw/committees/CL715000pub/diplomat.shtml
Roland Brandel: Join the Navy, See the World—and then Advise the Inventors of Mastercard!

By Rachel F. Marin, Maurice & Needleman, P.C.

You might be surprised to know that Roland E. Brandel, a former chair of the ABA Consumer Financial Services Committee, achieved few leadership positions in his early years of high school and college. Today he is a prominent figure in the world of consumer financial services, serving as Senior Counsel at Morrison & Foerster and the first chair of its financial services group. But, Brandel remained in the shadows until his life-changing service in the United States Navy. Join the Navy, see the world—and then advise the inventors of MasterCard!

During his formative years, Brandel had minimal time and inclination to pursue school activities, or even academics, seriously. He worked an after-school job all the way through high school, preventing him from playing a very active role in school clubs. Of note, he was the first member of his family to finish high school, much less college. After undergraduate school, during which he also worked, Brandel was commissioned as an active duty naval officer. His leadership skills began to be inculcated, emerge and evolve. As an officer, he was repeatedly expected to develop and exercise those leadership skills. During one deployment what he refers to as a “serendipitous occurrence” took place. Brandel was a line officer (a designation for those who exercise general command authority) and assigned to the then newest attack aircraft carrier in the Navy, the USS KITTY HAWK, which was being built in Camden, New Jersey.

An aircraft carrier is like a small city, with several thousand ‘citizen/sailors’ on board. Brandel noted that it comes with a host of legal and criminal law issues needing resolution. The Kitty Hawk’s commissioning (first) crew had a legal officer assigned to it. However, the officer was involved in a collision in the Mediterranean and faced court martial. The Kitty Hawk had to sail with a new “legal o” : that was Brandel. The Navy shipped him off to Naval Justice School in Newport, Rhode Island, to prepare for the assignment. The Naval Justice School mostly taught young lawyers, but some students had no legal training, like Brandel. Nothing, he says, came to him more naturally. “I took to the law like a duck to water,” he remembers. For example, Brandel had to compete in a mock trial against law school graduates. He prepared so thoroughly that the instructor stopped the exercise midway in the trial because his lawyer opponents were unprepared for the onslaught. Brandel went on to graduate number one in his class, ahead of the actual lawyers.

Aboard the Kitty Hawk, Brandel, with six weeks of instruction in any kind of law, was tasked with creating and running a legal office and a mini-judicial system to try violators of military law. It was an office of one officer, in contrast to the typical assignment today of three fully-qualified, more senior, lawyers. Brandel also completed qualifications to function as an Officer of the Deck, and stand regular day and night watches on the bridge while operating the legal office (today known as multi-tasking). Thus began his legal career, and he never looked back.

Brandel learned a lot of key leadership lessons in the Navy. The first and foremost lesson was to care about the people you are leading and to “put yourself in a secondary
position.” The next lesson was that you “work for the advancement of the people around you and the institution you work for, and by doing so you will gain a sense of confidence.” Brandel gratefully believes he received a “new life” from the Navy.

Brandel applied to law school while in the Navy. At the end of his military service, Brandel headed to the University of Chicago School of Law. There, applying himself academically for the first time, he graduated third in his class. Upon law school graduation, Brandel became clerk for the Chief Justice of California’s Supreme Court. A year later he joined Morrison & Foerster, LLP, in the firm’s San Francisco office. His initial ambition was to become an international lawyer, and he worked on projects related to that goal. However, a big project was brewing that would change Brandel’s career path. At Morrison & Foerster Brandel worked on a new project to create the foundation for what would later become MasterCard.

The bank card systems that were being formed at the time became governed by ‘operating rules,’ a very detailed body of internal law created essentially by multi-lateral agreements among the hundreds of banks that participated. The banks issuing credit cards and banks that signed up the merchants who accept the cards for payment are bound by such rules. No such rules were in existence before Brandel and others started working on creating this basic law. As he did with his daunting mock trial at Naval Justice School, Brandel excelled on the MasterCard project. Within a few months the senior partner turned leadership of the project over to him. Brandel worked daily with bank executives framing and drafting this law, which is the credit card equivalent of UCC Articles 3 and 4 for checks. The rest is history, MasterCard being a household word today and something few leave home without. Brandel continued to do more work related to consumer financial services law and in addition to advising many financial institutions, provided primary legal services in the formation of Star System (shared ATM system) and Interlink (a Pin based debit card system that was later bought by Visa).

By this time, Brandel seemed like a natural-born leader. He was also dedicating more and more of his time to professional and community organizations. He became chair of the American Bar Association’s Consumer Financial Services Committee (“CFSC”). At that time the CFSC had about thirty members. During meetings only about eight lawyers would sit around the table. Brandel was usually one of them, although he had no conscious aspirations of leadership at that point. Bill O’Connor, the chair who preceded him, unexpectedly announced that Brandel would succeed him as CFSC chair. Brandel proved to be a leader who transformed the character of the committee by creating a sub-committee structure, to reflect the field’s subspecialties, and by actively seeking the participation of consumer advocates, academics, and regulators. The latter change became a huge part of the CFSC’s success. Brandel also sought a change in the name and mission of the committee. It was originally named the “Regulation of Consumer Credit Committee.” Brandel saw that name as representing only “a slice” of financial services, namely lending services. “Consumer Financial Services” sounded more like it, re-conceptualizing the field to embrace much more than the credit aspect of financial services and to include the interrelated deposit and fund transfer products.

Brandel served as the third President of the American College of Consumer Financial Services Lawyers. His goal was to give the College more substance and organization.
He also encouraged the College’s “maturity,” by formalizing its committee structure and pushing along some programs that were just in their infancy, such as the Lifetime Achievement Award. Brandel believed in the College’s ability to broadly benefit, albeit indirectly, the practice of law. Honoring attorneys by inviting them to become Fellows and through the Lifetime Achievement Award, the College tried to create an “aspirational attitude” among CFS practitioners. People could look up to their honored fellow practitioners, strive to be like them, and be motivated to go home at the end of the day and write an article or work on a program or project.

Brandel served as the ABA Advisor to the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) efforts to rewrite UCC Articles 3 and 4 and to create a new Article 4(a). Brandel found this to be a great experience. He created an infrastructure to support those legislative efforts within the ABA’s Business Law section with the formation of a new committee called the New Payments Systems Committee. He chaired this committee, at the same time that he advised the UCC drafting committee. He selected the best people from the Section’s Banking Law Committee, Credit Unions Committee, and the CFSC to build a team of about 100 to 125 lawyers that met and worked on development of that law for several years by evaluating and commenting on the work of the formal drafting committee.

Brandel was appointed by the Federal Reserve Board as a charter member of its Consumer Advisory Council and served two terms. This experience was an “eye opener” for him. Every single meeting was fascinating. The people were “terrific” and included both consumer advocates and industry representatives. One of the highlights of serving on the Council was the regular dinners Brandel had with members of the Board of Governors, Board staff and other Council members. This was at a time when the country was experiencing double digit inflation, and the Chairman of the Federal Reserve participated in an in-depth dinner discussion at their small table regarding that problem. The Chairman remarked, ‘If I can’t get inflation under control, and soon, we are going to lose the economy of this country.’ This was not a man given to dramatic statements, and Brandel felt the weight of the danger to the country in a way not possible from media coverage alone.

In addition to serving his colleagues in professional organizations, Brandel enjoyed his experience as a law professor. He always thought he might want to teach, but he first wanted to gain experience practicing law. He gave lectures at UCLA and the University of California at Berkeley, gave scores of lectures for many organizations in venues all over the U.S., and for some years was the lawyer covering all legal topics at the ABA School of Bank Card Management. Once he became an experienced attorney, he took a year off from his firm and taught full time at University of California at Berkeley. He taught contracts and commercial law courses. However, during his year as a professor, Brandel missed the “collegiality” of collaborating on cutting issues with his colleagues who practiced his specialty, and returned to practice.

In addition to teaching, Brandel also appreciated the opportunities he had to write. Brandel modestly joked that he is not sure if anyone has read anything he has written. He employed two different approaches to writing. One approach was to write books and articles directed at explaining the intricacies of new legislation or regulations. Some
topics included the Truth in Lending Act, the Equal Credit Opportunity Act, Electronic Fund Transfer Act, financial privacy and all laws regarding electronic fund transfers. Brandel sought to provide real world applications to help those “reading complex, confusing regulations.”

In a second approach, Brandel has written about significant developments in the law and was motivated to influence the thoughts of other people about policy ramifications. One passionate piece was about the power of the Federal Trade Commission to regulate under the Unfairness Doctrine. Brandel thought it was misused, and also testified before Congress to that effect. An early piece on the law of the sea also focused on major policy choices. Other such pieces focused on the creation of ‘business courts’ and, by request, an analysis of what the practice of law would be twenty-five years in the future.

He also co-authored a book on the Community Reinvestment Act, which was a hybrid. It was partly a guide to practitioners, but also had a heavy dose of analysis of the societal implications of the CRA. He explained that he had a ‘burr under my saddle’ and he wanted to do something more than complain about the CRA to people around the office.

Brandel has received Lifetime Achievement Awards from the American College of Financial Services Lawyers, the Business Law Section of the State Bar of California, and the California Bankers Association. It was “emotional” to have his peers recognize his hard work and tell him that his accomplishments were above the ordinary.

For fun, Brandel enjoys traveling and has explored the world throughout his career. He once took a month off from work and went trekking in the Himalayas, has traveled through Europe, the former Soviet bloc countries, Cuba, east and south Africa and has biked, hiked and boated through France and Spain. In addition to traveling, Brandel loves sports, backpacking, tennis, and handball, which he plays twice a week. He also volunteered with and chaired or was president of numerous community and professional groups. He was involved with and chaired the San Francisco Committee on Foreign Relations for several years and has chaired other groups related to international affairs. He lives in Berkeley, California on a sprawling, wooded hillside and spends time, but not enough, attending to his plants and trees.
Fair Lending Enforcement a Top Priority for Regulators
Alexis A. Amezcua and Thomas J. Noto, Morrison & Foerster LLP

Recently, the DOJ and federal regulators have placed a renewed emphasis on fair lending enforcement and have taken an expansive view of what the fair lending laws require. The Supreme Court is poised to weigh in on whether a preferred theory of liability—disparate impact—remains a viable option. In the meantime, the trend continues to be an increase in the level of enforcement, and, increasingly, enforcement based on a disparate impact theory of liability.


Federal bank regulators have long asserted that ECOA and FHA prohibit both disparate treatment and disparate impact discrimination. The fact that ECOA and FHA prohibit disparate treatment—an intentional decision to treat members of protected class differently—is uncontroversial. However, in 1994, the Department of Justice, the Department of Housing and Urban Development, the Federal Reserve Board, and the Office of Thrift Supervision, among other federal regulatory agencies opined that lending policies that create a disparate impact—the unintentional, adverse impact on a protected class resulting from a facially neutral policy—may be as violative of fair lending laws as disparate treatment, despite the lack of any express prohibition against disparate impact in the statutes. Interagency Policy Statement on Discrimination in Lending, April 15, 1994, available at http://www.occ.treas.gov/news-issuances/federal-register/94fr9214.pdf. The agencies reiterated that view in their 2009 Interagency Fair Lending Examination Procedures. See Interagency Fair Lending Examination Procedures, August 2009, available at http://www.ffiec.gov/pdf/fairlend.pdf.

Fair lending enforcement, with a focus on disparate impact theory, has increased significantly. The Department of Justice established a Fair Lending Unit in its Civil Rights Division in 2010, and touts fair lending enforcement as a “top priority.” The Attorney General’s 2010 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976, April 5, 2011, available at http://www.justice.gov/crt/about/hce/documents/ecoa_report_2010_bw.pdf. In 2010, the DOJ received 49 fair lending referrals from bank regulators, the most referrals in any year in the last twenty years, and that trend continues. Id. Recent settlements confirm the regulators’ focus on disparate impact issues. For example, just this year, the DOJ challenged Luther Burbank Savings’ $400,000 minimum loan amount in its wholesale channel. The matter was referred by the Office of Thrift Supervision to the DOJ. The DOJ pursued the matter on the theory that the loan minimum, though facially neutral, resulted in the extension of fewer loans to minorities. Id. The parties ultimately agreed to a $2 million consent settlement.
However, not everyone agrees that disparate impact is a viable theory of liability under the fair lending laws. Disparate impact suits are not expressly authorized under the ECOA or FHA. Nor do these statutes contain language prohibiting discriminatory “effects,” which the Supreme Court has required to find disparate impact liability in the context of analogous anti-discrimination statutes. See Smith v. City of Jackson, 544 U.S. 228 (2005) (Because it contains the requisite “effects” language, the ADEA permits disparate impact claims.); Alexander v. Sandoval, 532 U.S. 275 (2001) (Title VI does not permit disparate impact claims because authorizing language is absent from the statute.). Indeed, the disparate impact theory has not gone unchallenged. The Supreme Court was recently poised to consider this very issue in Magner v. City of St. Paul, when it accepted a writ of certiorari in 2012. In February 2012, the City of St. Paul withdrew its petition for certiorari, perhaps under pressure to do so from the DOJ. Issa, Grassley, Smith and McHenry Probe Justice Dept on Lawsuit Quid Pro Quo Arrangement, Sept. 27, 2012, available at http://oversight.house.gov/release/issa-grassley-smith-and-mchenry-probe-justice-dept-on-lawsuit-quiet-pro-quo-arrangement/. In June 2012, a petition for writ of certiorari was filed in the matter of Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., No. 11-1507, which again raises the availability of disparate impact in the fair lending context. On October 29, 2012, the Supreme Court invited the Solicitor General to file a brief in Mt. Holly, expressing the views of the United States.

In the meantime, bank regulators continue to pursue disparate impact theories. In November 2011, HUD proposed rules to enforce ECOA, which not only expressly permit a finding of discrimination for disparate impact, but also shift the burden onto the defendant to prove that there is a “necessary and manifest relationship to one or more legitimate, nondiscriminatory interests.” 76 Fed. Reg. 70,921. Under HUD’s rule, the complainant may still prevail if he demonstrates that the “legitimate, nondiscriminatory interests supporting the challenged practice can be served by another practice that has a less discriminatory effect.” Id. The burden-shifting in the proposed rules is significant, since Supreme Court precedence related to other anti-discrimination statutes requires only a “business justification” for the alleged disparate impact, and places the burden of persuasion on the plaintiff. See Ward’s Cove Packing v. Antonio, 490 U.S. 642, 644 (1989). More recently, the Consumer Financial Protection Bureau “reaffirm[ed] that the legal doctrine of disparate impact remains applicable as the Bureau exercises its supervision and enforcement authority to enforce compliance with the ECOA.” CFPB Bulletin 2012-04 (Fair Lending), April 18, 2012, available at http://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf.

Bank regulators have increased their efforts to police fair lending, and that trend continues. Regulators have not only added fair lending resources, and declared fair lending a priority, but also actively pursued expansive disparate impact theories. The banking community will be well served to keep its eye on Mt. Holly for guidance on just how far regulators can go.
**Pennington Decision Provides Support for Mortgage Companies in HAMP Cases**
By Harry N. Arger and Brett J. Natarelli, Dykema

The Fifth Circuit’s recent decision in *Pennington v. HSBC Bank*, 2012 WL 4513333 (5th Cir. Oct. 3, 2012) perhaps signals what will become the dominant trend in the next generation of cases alleging mortgage servicers failed to provide loan modifications under the Home Affordable Modification Program’s (“HAMP”)*1 Trial Period Plans (“TPP”). The Fifth Circuit joins the Eleventh Circuit (and arguably the Seventh Circuit) in rejecting the argument, often advanced by borrowers’ counsel, that TPPs promise a permanent modification regardless of eligibility for HAMP. The Seventh Circuit’s decision in *Wigod v. Wells Fargo*, 673 F.3d 547 (7th Cir. 2012), was the first Circuit decision to address the issue and is believed by borrowers’ counsel to open the door to HAMP TPP claims. However, *Wigod* left unanswered what the TPP actually promises. The Fifth Circuit’s decision in *Pennington* now answers those questions.

**The Typical HAMP TPP case**

The HAMP TPP case has become, like TCPA or FACTA cases, something of its own genre. In the typical case, a borrower in default (or close to it) on his mortgage loan applies for a loan modification through his mortgage servicer. Then the mortgage servicer evaluates the borrower for qualification under the federal HAMP program. If the borrower meets some threshold requirements, the servicer issues a TPP. Prior to June 2010, the federal HAMP program guidelines allowed servicers to issue TPPs to borrowers based on stated income or other non-verified eligibility criteria. The purpose of the TPP was to ensure the borrower could make the modified payments for a temporary period of time before receiving a permanent modification. In addition, the guidelines called for the borrowers’ eligibility to be evaluated and verified during the TPP. Predictably, many borrowers provided stated income that could not be verified, sometimes due to borrower falsification, sometimes due to borrower mistake, and sometimes due to income that was not ultimately verifiable under the standards set by the HAMP program. Borrowers then file suit against their mortgage

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*1* What is HAMP? In early 2009, the Department of the Treasury announced a nationwide loan modification program intended to help homeowners avoid defaulting on their mortgage loans by temporarily reducing their monthly payments. Guidelines published by the Department of the Treasury delineated the scope of the program and loan servicer obligations thereunder. HAMP Guidelines provide that servicer participation in HAMP is voluntary and servicers can opt-in by signing a Servicer Participation Agreement (“SPA”) with “the federal government” and enforced by the Treasury, Fannie Mae, or Freddie Mac.

*2* Because of perceived borrower confusion with the two-step verification process, and many borrowers receiving TPPs but not qualifying for a permanent modification, Treasury changed the HAMP guidelines effective June 2010. For applications after that date, servicers must fully verify a borrower’s eligibility before offering a TPP. Borrowers can still fail to receive a permanent modification, but only if their circumstances materially change, e.g., their income is reduced during the TPP or they stop occupying the property. Virtually all HAMP TPP cases arise from the pre-June 2010 period, though *Wigod* is a notable exception (*Wigod* was prior to June 2010, but some servicers were already fully verifying income prior to it being required, and the *Wigod* plaintiff alleged that is how the servicer in her case was operating at the time of her application).
servicers alleging they made the monthly payments required by the TPP, and as to the additional eligibility requirements, borrowers argue either the TPP did not clearly spell them out or the servicer erroneously applied them.

The State of the Law on HAMP TPP Cases Prior to Pennington

Initially, most courts dismissed lawsuits following the general fact pattern above because HAMP does not allow borrowers to sue for a private right of action. Eventually, however, while many courts outside of the Seventh Circuit continue to dismiss such suits on that basis, a minority of courts have now recognized exceptions to the doctrine where the borrower could otherwise state the elements for a state law cause of action (such as breach of contract, promissory estoppel, or fraud) without relying on an alleged violation of HAMP itself (i.e., just on the TPP alone without reference to the HAMP guidelines). See Wigod, 673 F.3d at 559 n.4 (summarizing state of the law in district courts as of March 2011).

So far, only three cases have reached the Circuit level. The first was the Seventh Circuit’s decision in Wigod, which held borrowers may sue under state law theories regardless of whether their claims relate to HAMP. The Wigod court also rejected most of the arguments servicers typically made in HAMP TPP cases to argue the TPP was invalid or unenforceable (as a mere preliminary agreement, as lacking in consideration, as lacking the final loan modification terms, etc.) The Seventh Circuit also appeared to hold that the borrower must qualify for HAMP to be entitled to a permanent loan modification, though the unusual facts in the case make it difficult to tell (the borrower alleged the servicer had her financial documentation and fully evaluated her eligibility prior to issuing the TPP).

Pennington Supports Dismissal of HAMP TPP Cases on Three Important Grounds.

The most recent circuit decision, Pennington v. HSBC Bank, 2012 WL 4513333 (5th Cir. Oct. 3, 2012), lends Circuit-level support for three important propositions that should lead to dismissal of most HAMP TPP claims if its reasoning is followed by other courts.

Borrowers Who Would Have Been Current But-For Servicer Malfeasance Do Not Qualify for HAMP by its Own Terms.

First, Pennington held borrowers who were current when they applied for HAMP and allege they would not have defaulted but-for a botched TPP process are not entitled to any relief because the TPP presupposes either actual or imminent default on the loan. Pennington at *3. This is an important development because, generally speaking, courts have been more sympathetic to borrowers who were current prior to attempting to modify their loan through HAMP than to borrowers already in default who, for whatever reason, the program failed to help. In the relatively small number of HAMP TPP cases that survived dismissal at the district level, many featured an allegation that the borrower was current and defrauded into defaulting by the servicer’s promise of a modification, or the servicer’s representation that the borrower would not qualify for any relief until he first defaulted.
Borrowers Who Did Not Receive Signed Modification Agreements are not Entitled to Any Relief.

Second, the *Pennington* court refused to enforce the TPP against the servicer because there was no evidence it had ever signed the TPP. Borrowers have sometimes been able to circumvent statute of frauds defenses by alleging they made the TPP payments and thus partially performed. But the Fifth Circuit rejected that reasoning because borrowers “already owed regular payments. Although the fact that they paid under the TPP indicates that they hoped to be bound, the question is whether the bank expressed a similar intent despite the fact that conditions in the TPP remained unfulfilled. The bank deposited the payments, but the [borrowers] owed more than that. Even if the bank intended to refuse to accept the TPP, it would still take the money in partial satisfaction of the amount owed while interest accrued.” *Pennington* at *4*. Borrowers, then, will need to have received a signed TPP from their servicer to advance claims.

The Fifth Circuit applied the same reasoning to the lack of a signed permanent modification agreement. The TPP forms clearly provide that no modification will result until the servicer sends a servicer-signed permanent modification agreement to the borrower. The Fifth Circuit gave effect to that language, as many district courts have.\(^3\)

*What are the Damages?*

Finally, the *Pennington* court questioned what damages the borrower could potentially show even if he had a legal right to relief. In other HAMP TPP cases, borrowers typically allege they suffered accrued interest, late penalties, negative credit reporting, and other default-associated fees during and/or after the TPP. That these claims ever survive dismissal should raise eyebrows; all of those things happen to borrowers who receive a TPP and are immediately approved for a permanent HAMP modification, *i.e.*, the HAMP guidelines quite clearly specify that interest will continue to accrue, and negative credit reports will be given.\(^4\)

Put another way, all of those “damages” occur even when everything about HAMP goes right. If a permanent modification results, the charges get capitalized into the modified loan balance, and the borrower repays them. These are not “damages” – the HAMP program was deliberately designed this way by the government.

The Fifth Circuit focused less on the design of HAMP, however, but reached the same result by looking to the natural consequences of defaulting on a mortgage loan, regardless of whether in or out of HAMP: “[I]nterest and fees that accrued while the plaintiffs were following the TPP did not arise because of the TPP. As a prerequisite of entering the TPP, plaintiffs certified that they were unable to continue making their monthly payments. If they truly were unable to make the payments, they still would have fallen behind, accrued interest,

\(^3\) *Wigod* did not give effect to that language, but only because of the unusual facts of the case wherein the borrower alleged she provided financial documentation before receiving a TPP, and thus the *Wigod* court reasoned providing the TPP was a promise to a permanent modification assuming all other conditions, like making payments, were met. *Wigod* at 563.

\(^4\) Late fees, however, are waived in any permanent HAMP modification.
suffered late charges, and owed addition payments on that interest. If the plaintiffs were able to make all their payments as they came due, they would have been ineligible for the HAMP program for lacking the requisite hardship and would have been rejected from Step Two landing them in the same predicament they face now. Accrual of unpaid interest was a foregone conclusion, not a result of negligent misrepresentation.” Pennington at *5.

Conclusion

Pennington provides assistance to attorneys representing mortgage servicers to successfully argue for dismissal of HAMP TPP claims even if the court recognizes a private right of action through state law. Simply arguing that HAMP “lacks a private right of action” allowed for early dismissal (and still might be viable in most courts), but even if courts agree with Wigod that plaintiffs can use state law claims to plead around the private right of action bar, servicers may still argue that even if borrowers may sue under HAMP, and even if the TPP is a fully enforceable contract, its terms do not provide for what borrowers argue it promises. This is similar to the result reached in the only other circuit level HAMP decision, Miller v. Chase Home Finance, 677 F.3d 1113, 1117 (11th Cir. 2012) (TPP promised “only that it would temporarily modify the terms of his loan,” not that any permanent modification would result).

Pennington and Miller, coupled with the unusual “verified-first” facts in Wigod, should lead to most HAMP TPP cases being dismissed at early stages. Expect borrowers to then move toward non-contract causes of action such as state law fraud or breach of a duty of care in handling the modification process. Yet, those theories may also likely fail because (a) they have not been previously successful; and (b) because they are more fact-intensive as to the relationship between the borrower and the bank, and therefore far less amenable to class treatment than the contract cases (though query whether a HAMP TPP class action could ever be certified under a straight contract theory in the first place).