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WHAT'S INSIDE

NATIONAL BANK ACT

Supreme Court lets debt collection class-action suit proceed

Reuters – The U.S. Supreme Court on June 27 allowed a class-action lawsuit against debt collector Encore Capital Group Inc. to move forward, declining to hear its claim that such companies should be protected from state "usury" laws barring money-lending at unreasonably high interest rates.

Midland Funding et al. v. Madden, No. 15-610, cert. denied (U.S. June 27, 2016).

The court left in place a May 2015 ruling by the 2nd U.S. Circuit Court of Appeals in New York that found that Encore's Midland Funding and Midland Credit Management units were not national banks with legal protection against state usury laws. *Madden v. Midland Funding et al.*, 786 F.3d 246 (2d Cir. 2015).

The class-action lawsuit was brought by a New York borrower named Saliha Madden who objected to the 27 percent annual interest rate she was being charged.

Debt collection companies typically buy debt from banks and other creditors for pennies on the dollar, then try to collect higher amounts from people who owe the debt.

Supreme Court building REUTERS/Joshua Roberts

Madden took issue with the interest rate that Midland sought to impose on roughly $5,000 in debt it had bought that she had incurred on a credit card account opened years earlier at Bank of America, court papers showed.

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Are arbitration clauses in financial contracts going 'bye, bye, bye'?

By Dana C. Lumsden, Esq., and Edward S. Sledge IV, Esq.
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The Consumer Financial Protection Bureau is a large, forceful organization that can influence the entire financial services industry simply by passing a rule. One regulation from this agency could crumble the foundation of the industry's certainty and custom. Like the coach who sketches out a play before practicing, critiquing and executing it in a game, the CFPB conducts studies before it promulgates rules.

A recent agency study, which focused on the effects of arbitration clauses in consumer financial services contracts, culminated in a lengthy report issued March 10, 2015. In accordance with this report and its underlying data, the CFPB authored a plan to declare war on arbitration clauses.

Articulating its desire to ban consumer financial companies from using "free pass" arbitration clauses to avoid class action litigation, the agency is proposing regulations that further restrict the use of arbitration clauses in the financial services industry.

These proposed rules, however, are currently in "sketch" form only. They can be undone, altered or amended. But without critique and constructive feedback from those potentially affected, the proposed rules will be finalized — and they could alter the landscape of dispute resolution for the financial services industry.

This analysis illuminates several flaws in the CFPB's arbitration study and encourages the bureau to examine these issues before promulgating a new resolution that could hurt consumers.

While the rules are in sketch form, there is still time for a necessary dialogue on the potential ramifications of eliminating or fundamentally altering arbitration clauses. Before the sketch turns into game-time play, the CFPB should strongly consider the need for additional studies that compare apples to apples instead of apples to oranges.

> The Consumer Financial Protection Bureau is a large, forceful organization that can influence the entire financial services industry simply by passing a rule.

ARBITRATION CLAUSES

Arbitration clauses serve as a dispute resolution mechanism that is an alternative to traditional litigation, and they affect tens of millions of consumers. These clauses provide for a privately appointed arbitrator to resolve disputes rather than a state or federal court judge.

Arbitration clauses permit either party to the contract to block lawsuits from proceeding in court, and they may also bar consumers from bringing class-action claims.

In the credit card and checking account markets, financial institutions routinely include arbitration clauses in consumer contracts. The inclusion of these clauses reflects the strong public policy in favor of private dispute resolution outside of the court system.

From the viewpoint of the financial services industry, arbitration clauses serve a beneficial purpose: They are a cost-effective means of resolving disagreements. Arbitration precludes attorneys from engaging in expensive litigation that can take years to resolve. In fact, arbitration does not even require the parties to hire an attorney.

Because arbitration does not include the burdensome practices of discovery and trial preparation, studies show that consumer arbitration is up to 12 times faster than litigation.

Consumer advocates and plaintiffs' attorneys, however, perceive arbitration clauses as unfairly restricting consumer rights and depriving consumers of their day in court. This backlash against arbitration clauses is propelled, in part, by an unfounded contention that arbitrators are beholden to large corporations and represent a privatization of justice.

Additionally, opponents of arbitration clauses argue that corporations can skirt consumer protection laws and further insulate themselves from responsibility by avoiding class action lawsuits altogether. Consumer advocates maintain that arbitration clauses must be eliminated to ensure that corporations remain accountable.


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THE CFPB STUDY

Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress authorized the CFPB to study arbitration clauses in consumer financial markets and to issue regulations consistent with the study's findings.

In December 2013, the CFPB published its preliminary results, and it supplemented this data in March 2015. The March 2015 report enhanced the CFPB's initial analysis by collecting data on the kinds of mortgage transaction claims that consumers can bring as class actions and on the settlement amounts in those cases.

Additionally, the CFPB analyzed arbitration clauses in six consumer finance markets: credit cards, checking accounts/debit cards, prepaid cards, private student loans, payday loans and automobile loans.

From this data, the CFPB estimated that consumers and companies file, on average, 600 arbitration cases and 1,200 federal lawsuits each year in the six markets studied. Most arbitration filings involved a debt dispute, and only eight cases per year involved a debt claim of less than $1,000 (25 disputes a year involved consumer claims of $1,000 or less).

In the 1,060 arbitration cases the CFPB examined between 2010 and 2011, arbitrators afforded consumers relief in only 32 cases and these resulted in arbitral awards totaling $172,433. In contrast, between 2008 and 2012, more than 11 million class action members received $1.1 billion in compensation.[1]

After analyzing this data, the CFPB concluded that arbitration clauses deny consumers their day in court and allow corporations to remain unaccountable for harmful low-dollar errors. As a result, the CFPB recommended that all financial services contracts containing arbitration clauses include explicit language permitting class actions.

Additionally, the CFPB's proposal would require companies that use arbitration clauses to submit all arbitration data to the agency, including a list of the claims filed and the awards issued.

CONCERNS WITH THE STUDY

While the CFPB's arbitration data appears at first blush to support the notion that arbitration clauses harm consumers, numerous flaws in the agency's data collection discredit this conclusion.

As a preliminary matter, there is little systemic empirical evidence comparing consumer welfare in arbitration and class actions. In fact, the CFPB's data is premised on just eight primary class action lawsuits.[2]

Similarly, arbitration results are confidential, and there is no federal reporting requirement. It is undeniable that the CFPB's conclusions regarding the effectiveness of arbitration and class actions are extrapolated from a remarkably small and inconclusive data sample.

Given these limitations, it is important that the CFPB and independent organizations conduct additional studies on arbitration and class action success to verify and supplement the data pool before that data is used as a basis for long-term regulations.

The CFPB should strongly consider the need for additional studies that compare apples to apples instead of apples to oranges.

Furthermore, the CFPB failed to articulate whether the class-action settlements studied for its report were supported by meritorious claims. A settlement in and of itself is not an adjudication of fault.

When faced with massive discovery costs and prolonged trials, businesses often settle cases — including frivolous lawsuits — rather than spend thousands or millions of dollars in legal defense fees. The class-action data that the CFPB references may have included settlements of meritless claims.

The CFPB also failed to consider the economic and reputational costs businesses incur as a result of frivolous class-action lawsuits. If the bureau bans or alters arbitration clauses and forces businesses to litigate their disputes, the costs that businesses incur may inevitably be passed on to consumers (for example, in the form of higher prices or increased interest rates).

The CFPB, however, contends that no significant cost differential arose when credit card issuers placed a temporary moratorium on the use of arbitration clauses.

Despite the CFPB's assertions to the contrary, this experiment only demonstrates that credit card issuers do not pass on temporary cost increases to consumers. The bureau never undertook a historical cost analysis to compare long-term pricing differentials between companies that use arbitration clauses and those that do not. Such a study is needed before the agency can credibly claim that consumers will not be harmed by an increase in litigation.

Moreover, the CFPB's claim that almost no American Arbitration Association filings concerning the financial product markets involved $1,000 or less is misleading. The CFPB asserts that the low incidence of small-dollar claims in arbitration can be directly traced to the inclusion of arbitration clauses.

In other words, it says that because few arbitration claims of $1,000 or less are brought in the financial services industry, arbitration is not a feasible dispute resolution mechanism for consumers. The CFPB, however, offers no rationale for this asserted causal connection.[3]

In fact, the agency's conclusion purposefully ignores alternative explanations for the low incidence of small-dollar arbitration disputes. In particular, financial services disputes are often resolved in house without arbitration or litigation. Financial institutions routinely provide refunds and fee adjustments to consumers to maintain amicable relationships.

A study by the Mercatus Center at George Mason University noted that at least one banking institution provided refunds to consumers 68 percent of the time without referring the dispute to arbitration or litigation.[4]

There is a strong likelihood that financial services companies refund or adjust charges incurred by consumers internally rather than involving a judge or arbitrator. The CFPB's findings fail to account for this possibility.

In addition, arbitrations are routinely conducted for low-value claims outside the financial services industry. Approximately 3.5 percent of all general arbitration claims are for $1,000 or less, and 7 percent of all claims are less than or equal to $2,000.

In contrast, low-dollar financial services arbitrations (claims less than $1,000) comprise only 2 percent of all AAA consumer arbitration filings. This means that consumers initiate 75 percent more small-dollar claims for non-financial services products.

The fact that small-dollar claims can account for between 3.5 and 7 percent of all arbitration filings suggests that low-dollar arbitrations are feasible and routinely used. This realization undermines the CFPB's stance that consumers will not pursue arbitration to resolve low-dollar disputes.[5]

The question thus becomes: Why do consumers pursue small-dollar disputes less frequently in the financial services context? It is a question that the CFPB has failed to consider.

The answer, however, cannot be the economic infeasibility of arbitration. It is more likely that the financial services industry has adopted internal dispute resolution mechanisms that benefit consumers without the hassle or exposure of arbitration and litigation.

Until the discrepancy in small-dollar arbitration filings can be explained, the CFPB cannot credibly contend that consumers lack an avenue to seek relief for small-dollar disagreements.

Additionally, the bureau's proposal to ban or alter arbitration clauses in financial services contracts contravenes public policy. The U.S. Supreme Court has repeatedly ruled that the right to use arbitration as an alternative dispute mechanism is protected by the Federal Arbitration Act.

The CFPB has failed to explain why arbitration clauses pose such a formidable threat in financial services contracts while they are favored by strong public policy and Supreme Court precedent.

Similarly, the CFPB has offered no support for its proposition that financial institutions are presently able to avoid accountability. To the contrary, financial institutions are subject to unprecedented regulation, and consumers may even file complaints against finance companies with the CFPB.

The agency's own statistics state that financial services institutions have responded to more than 463,840 consumer complaints and have provided prompt responses 98 percent of the time.[6] It is difficult to understand exactly how financial institutions are avoiding accountability — especially given the unparalleled number of regulations controlling financial services activity.

Finally, the claims rate, meaning the rate of actual collections by consumers from the settlement pool, for class-action lawsuits suggests that consumers rarely collect their small-dollar proceeds after a settlement.

Kurtzman Carson Consultants analyzed claims rates in consumer class-action settlements and found the median claims rate to be 0.23 percent (as Forbes magazine notes, the probability of getting a straight flush in a seven-card poker hand is 0.0279 percent). This percentage translates into approximately one claim recovery per 4,350 class members.[7]

The CFPB offers no explanation for the low claims rate success, which seems to support the conclusion that the cost-benefit analysis of filing a claim for a low-dollar dispute is not worth most consumers' time — regardless of whether the dispute is resolved via arbitration or litigation. Rather, the CFPB calculated its own claims rate at 21 percent.[8]

This stark contrast in numbers is likely due to the fact that the CFPB's calculation was an un-weighted aggregate average of class actions.

In other words, the CFPB estimated the total number of class members receiving a payment — no matter how small — and divided it by an estimate of the total number of class members in that same sample.

Furthermore, the CFPB inconsistently applied its own selection criteria in determining which data sets to include in its sample. The wide discrepancy between the Kurtzman Carson claims rate and the CFPB claims rate must be closely examined and reconciled before any conclusions can be drawn about the effectiveness of class actions.

> Arbitration precludes attorneys from engaging in lengthy and expensive litigation that can take years to resolve.

CONCLUSION

The CFPB should resolve the flaws in its data analysis before finalizing its regulations. Once the agency leaves its permanent mark, the landscape of consumer financial contracts will be fundamentally altered. Without considering the drawbacks and limitations of its own study, the CFPB could inadvertently harm consumers instead of advancing their rights.

While the study is a good start at analyzing arbitration and class-action data, it is simply one piece of the play — a sketch of which has barely been started. Requiring pre-dispute arbitration clauses to contain an exception for class actions is premature and could result in negative consequences to the very consumers the CFPB seeks to protect. WJ

NOTES

1 *See* Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a) 10-12 (2015).

2 *See* Jason S. Johnston & Todd Zywicki, The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique (2015), http://bit.ly/1M7UaAP; *see also* Alison Frankel, *A Smoking Gun in Debate over Consumer Class Actions?*, Reuters, May 9, 2014, http://reut.rs/29DcXhb.

3 *See* Johnston & Zywicki, *supra* note 2, at 36.

4 *Id.* at 38.

5 *See id.* at 52-53.

6 Rob Berger, *The CFPB Declares War on Arbitration,* Forbes (Oct. 18, 2015, 10:27 AM), http://bit.ly/29l0Pg1.

7 Frankel, *supra* note 2; *see also* Daniel Fisher, *Odds of a Payoff in Consumer Class Action? Less than a Straight Flush,* Forbes (May 8, 2014, 4:49 PM), http://bit.ly/29qkA8K.

8 *See* Johnston & Zywicki, *supra* note 2, at 41.

What is crowdfunding?

By Allen Shayanfekr, Esq.
Sharestates.com

Over the last few years, public awareness of certain "new" financial concepts has become increasingly widespread. Despite the recent growth, most people are still unfamiliar with the term "crowdfunding." The question, therefore, arises — what is crowdfunding, both generally and more technically?

The general concept of crowdfunding has existed for centuries. It is the practice of funding a project or venture by raising small amounts of money from a large number of people. In fact, some of the world's best known monuments are the product of crowdfunding — the Statue of Liberty being one example.

President Barack Obama passed the Jumpstart Our Business Startups Act in 2012. The JOBS Act was revolutionary in many respects, and it loosened up some prior restrictions around the broader concept of crowdfunding.

Today, there are three primary types of crowdfunding: Donation-based, rewards-based and financial incentive.

DONATION-BASED CROWDFUNDING

Donation-based crowdfunding is perhaps the most common form of this money-raising method. A group of people come together for a good cause to help a person, a group of people or an establishment in need.

Donation-based crowdfunding is used by religious establishments and schools, for example. Recently this form of crowdfunding has become available through online platforms, and there are no regulations governing it.

REWARDS-BASED CROWDFUNDING

Rewards-based crowdfunding is a common albeit newer form of crowdfunding. It is typically conducted through an online platform.

Examples of popular platforms that provide these services include Kickstarter and Indiegogo. These platforms serve as a portal where an entrepreneur can register for an account and create a campaign to fund an idea or an existing business.

With this form of crowdfunding, the entrepreneur cannot provide a financial incentive for the investor's contribution. If the entrepreneur offered a financial incentive, the campaign would be deemed a securities offering and regulations would apply.

Instead, many entrepreneurs create tiered reward campaigns that provide investors with things like coffee mugs, T-shirts, posters, art and other items the individual's company may manufacture.

FINANCIAL INCENTIVE CROWDFUNDING

Financial incentive crowdfunding is the least-known form of crowdfunding. It involves an ownership interest or some other form of financial reward for an investment.

Platforms that conduct these offerings will typically provide information on a prospective business or concept with forward-looking statements about the company's growth or projected performance. The investor is incentivized to participate by some form of potential return on investment.

To protect consumers, financial incentive crowdfunding is heavily regulated by state and federal authorities. With respect to donation-based and rewards-based crowdfunding, investors participate with the knowledge that their principal investment will not be returned. Investors understand that the investment is essentially a donation or the purchase of a consumer item.

However, in a financial campaign investors participate to improve their financial position.

> Some of the world's best known monuments are the product of crowdfunding — the Statue of Liberty being one example.

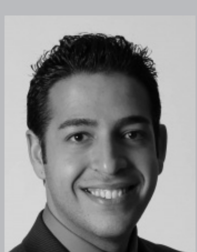
They expect to receive a return of principal and some other return on investment. For that reason, regulators such as the Securities and Exchange Commission have promulgated a very complicated set of rules that govern the sale of securities.

JOBS ACT

The term crowdfunding is used more and more on a daily basis, in whatever form it may take. As used in the JOBS Act, it specifically refers to one set of rules within the statute. And the JOBS Act contains multiple provisions, some of which expand on older SEC rules and some of which are new.

Specifically, Title III of the JOBS Act defines "crowdfunding" and its parameters. Technically speaking, any other form of online capital formation is not crowdfunding as defined by the SEC.

Title III allows non-accredited investors to participate in crowdfunding campaigns that are offered through registered crowdfunding portals. In other words, if



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you are a non-accredited investor, you need to look for a platform that is a registered crowdfunding portal. Many platforms permit only accredited investors to participate.

Title III of the JOBS Act has made it increasingly difficult for non-accredited investors to participate.

First, a registered crowdfunding portal must submit an application and be approved by the Financial Industry Regulatory Authority. Registering with FINRA is no simple task. The process can be extremely expensive, time consuming and immensely stressful.

With registration come additional compliance expenses and more restrictions on company behavior. For that reason, the number of platforms that can legally provide Title III opportunities will be limited.

Second, Title III limits the amount of capital any single investor can contribute in any 12-month period. That limitation applies across all crowdfunded offerings as follows:

- If either their annual income or net worth is less than $100,000, the limit is the greater of $2,000 or 5 percent of the lesser of their annual income or net worth.
- If both their annual income and net worth are equal to or more than $100,000, the limit is 10 percent (of the lesser of their annual income or net worth).
- During the 12-month period, the aggregate amount of securities sold to an investor through all crowdfunding offerings may not exceed $100,000.

For the reasons above, many platforms have opted to use exemptions in the securities regulations to achieve a similar goal.

Another popular change promulgated by the JOBS Act is contained in Title II. This title added to a pre-existing set of rules often referred to as Regulation D. The old Regulation D rules allowed a company to raise capital from accredited investors only, and the company was not permitted to use public solicitation or advertisement in procuring those investments. Instead, the company had to have a pre-existing relationship with its investors. Essentially, if you were not part of an elite or private group of investors, you could miss out on some of the best opportunities for building wealth.

Title II lifted the ban on public solicitation and advertisement, allowing online companies to publicly advertise investment opportunities to investors for the first time since 1934. This change fueled enormous growth in the crowdfunding industry. It led to the hundreds, if not thousands, of crowdfunding platforms that now exist throughout the country.

However, this rule also came with additional requirements. Companies using it must take affirmative steps to confirm each investor's accreditation status. That confirmation can take various forms, such as the collection and review of tax returns or the completion of an accredited investor verification form by the investor's attorney, broker-dealer or certified public accountant.

Financial incentive crowdfunding has taken root in many different markets and asset classes, including consumer debt finance, auto finance, student debt finance, business finance and real estate finance.

REAL ESTATE CROWDFUNDING

Many platforms in the real estate crowdfunding market pick a niche product on which to focus. These real estate investments can be broken down in many different ways.

Mezzanine (second lien) debt is debt that places its holders second in line in the case of bankruptcy or default. Second lien debt holders receive compensation from property or other collateral after first lien debt is covered, making this type of loan a riskier investment.

Mezzanine debt also typically carries a current interest return, delivering cash flow to investors almost immediately and on a monthly basis. Mezzanine debt takes priority over other types of unrecorded debts or participations, such as preferred equity.

Preferred equity is a type of participation that may include any combination of features not possessed by common equity, including properties of both an equity instrument and a debt instrument. It is generally considered a hybrid instrument.

Preferred equity can vary widely, but generally it carries an annual coupon similar to an annual interest rate in a debt offering. The coupon may be paid current and on a monthly basis, or it may accrue and be paid when a project is complete.

Preferred equity can also have a common equity component that allows the holder to

> The JOBS Act lifted the ban on public solicitation and advertisement, allowing online companies to publicly advertise investment opportunities to investors for the first time.

The first question to ask — and arguably the most important — is whether the opportunity is a debt offering or equity offering. Like any other type of investment, real estate investment can have both an equity and a debt component. Within the capital stack, there are usually up to four financing layers.

One layer involves senior (first lien) debt. Senior debt, frequently issued in the form of senior notes or referred to as senior loans (mortgages), is debt that takes priority over other unsecured or otherwise more "junior" debt owed by the issuer. It has greater seniority in the issuer's capital structure than subordinated debt.

When a project is liquidated, senior-debt dollars are the first to be returned. This is typically the most secure investment position because it has the most downside protection. Senior debt also typically carries a current interest return, delivering a monthly cash flow to investors almost immediately.

participate in the upside of an investment opportunity after that opportunity has paid all of its other obligations. Generally, the upside participation amount will be smaller than that of a common equity holder because of the preferred nature within its annual coupon.

A preferred equity investment's coupon takes priority over a common equity holder's right to profits, but it is subordinate to recorded debt.

Common equity is the amount that all common shareholders have invested in a company or project. Common equity holders are the last investors to receive a return of their principal and any potential return on investment. Common equity is inherently the riskiest position in the capital stack, but it also has the potential for the highest rewards.

Common equity holders do not necessarily see immediate cash flow. While other investors within the capital stack may be collecting interest or coupon payments, a common equity investor may have to wait for the completion of the project before realizing any benefits.

The next consideration is the asset class of the underlying real estate investment. Regardless of whether you invest in a debt opportunity or equity opportunity, the asset class can sometimes be just as important. An asset can be broken down in multiple ways. Here are a few examples:.

- Residential property: A residential asset is a one-to-four unit property and it can include single-family homes, two-family homes, three-family homes, four-family homes, townhouses and condominiums.
- Multi-family property: A multi-family asset is a residential structure with five or more units, such as a standard apartment building.
- Mixed-use property: A mixed-use asset is a structure with both residential and commercial units. These are typically seen in urban areas, where you have a restaurant or other retail space on the ground floor and apartments above.
- Retail property: Retail assets are typically consumer-facing assets such as clothing stores, restaurants, electronics stores and other businesses .
- Office property: Office assets are similar to retail assets, but rather than selling to consumers, the tenants in these spaces are generally running service-based operations.
- Hospitality: Hospitality assets include hotels, motels and related operations.

The asset class is important when making an investment decision because of the relative risk associated with each opportunity. Arguably, residentially oriented opportunities are safer investments because of the housing demand. But commercial opportunities like retail centers and office complexes can provide a higher return on investment. In any case, it's important to fully understand the risks associated with each asset class before making an investment.

When choosing a crowdfunding platform, investors face a myriad of considerations. Each platform will likely perform in a different way. Those differences may relate to debt/equity, asset type, geographic preference, underwriting processes, financing and even the management of the platform — the team behind it.

A few of the most important things to consider when reviewing a platform are the team behind the operations, whether larger institutions participate and the platform's underwriting processes.

A platform is only as good as the team running its day-to-day activities. The team should be a well-rounded, well-connected group of individuals with experience in various industries. Those industries should include finance, marketing, technology and, most importantly, real estate.

Many of today's platforms are operated by great technology and finance teams but lack what is arguably the most important piece of the puzzle — real estate management/underwriting experience.

When reviewing a platform's team, it's also important to consider whether the platform has been picked by an institution or venture capital firm. As an individual investor it can be difficult to access 100 percent of the information you need to make an informed decision. Larger institutions usually have access to this information and a wealth of knowledge/experience in gauging the legitimacy of a platform.

Lastly, the most important consideration when making any investment is the quality of the opportunity. Underwriting is a key component in assessing the quality of a prospective deal. That is why it's important that your platform have a strong background in real estate.

While the underwriting process can vary widely based on asset type and finance structure, here are a few of the most important factors to consider when making an investment.

LOAN-TO-VALUE RATIO

Each asset will have multiple values associated with it. These values can be expressed as the property's current "as is" value or "after repair" value.

Moreover, different valuation techniques can used in determining each of these values. Those techniques include the comparable approach, the income approach and the cost approach.

The loan-to-value ratio of a property is extremely important in determining the size of an investor's equity cushion. These values will gauge the likelihood of a recovery if a project does not go according to plan. If an asset is sold for a loss, both the loan-to-value ratio and your position in the capital stack will be key indicators of your ability to recover an investment.

A real estate crowdfunding platform will typically use the following terms when discussing loan to value ratios:

Loan-to-cost ratio

The loan-to-cost ratio is a measure of the project's total cost and how much of that cost the lender provides. Typically, the total cost includes the acquisition cost plus rehab or construction costs.

It should not include things like closing or carrying costs for the loan. Those items should be borne by the borrower and be paid in addition to the borrower's equity contribution. To be conservative, the loan-to-cost ratio should be the highest figure between the three measures.

As-is loan-to-value ratio

The as-is loan-to-value ratio is a measure of the loan amount in relating to the property's value at the time of acquisition. Skilled borrowers with the right connections and experience should be acquiring investments at below-market value, sometimes for as little as 30 to 40 cents on the dollar.

In other words, even if a lender is financing 80 percent of a project's costs, the lender can still be protected because the true loan-to-value ratio at closing can be significantly lower.

Investors should note that it's always important for a borrower to have "skin in the game." Even if the effective loan to value ratio of a loan is extremely low (10 to 20 percent), a good underwriting practice is to make sure your borrower is vested in a deal. Otherwise, he can simply walk away if something more attractive comes along.

After-repair-value ratio

The after-repair-value ratio is a measure of the loan amount in relation to what the property will be worth assuming the proposed renovations are completed. Theoretically, a property that undergoes renovations should increase in value. Therefore, many lenders will incorporate an ARV value into their lending parameters. That is, the lender will lend up to 80 percent of the borrower's cost, not to exceed 70 percent of the as-is LTV or 60 percent of the ARV.

Tactics like this help ensure that the lender is protected with a sufficient equity cushion in the event of a market downturn or poor performance from their borrower.

CAPITAL STACK POSITION

An investor's position in the capital stack is just as important as the loans LTV, LTC and ARV measures.

MARKET LOCATION

Market locations can be broken down in many different ways. They are usually classified in metropolitan statistical areas, which are areas with relatively high population densities.

Another way to break this down, more simply, is by classifying markets as core urban markets, secondary urban markets, suburban markets, rural markets or emerging markets. Markets with higher MSAs will generally be safer markets because there's a stronger buyer, rental and consumer purchaser base.

OCCUPANCY

A property's occupancy is a huge factor in traditional lending, but it is less of a factor in real estate crowdfunding.

With traditional lending, a bank will not lend on a commercial asset that lacks seasoned tenants because the bank needs to ensure the borrower can cover their debt service ratio.

Real estate crowdfunding loans tend to be short-term bridge or rehab loans where occupancy is less important because the lender anticipates the property will be leased after construction is complete. Nonetheless, the higher a property's occupancy, the safer the project.

DEVELOPMENT PHASE

A project's development phase can usually be broken down into three categories. Stabilized properties are characterized as cash-flowing assets that are close to 100 percent occupied and have been for some period of time. Stabilized assets are typically the least risky because they generate cash flow and can support operations.

Next, there are value-add properties, which are typically existing structures in need of repair or repositioning. These properties tend to shine in the real estate crowdfunding space because they have a relatively quick turnaround time and a huge potential upside.

Lastly, there are ground-up construction projects, which are the riskiest types of deals and the hardest to finance. There are a myriad of things that can go wrong if a ground-up construction project is mismanaged. In fact, a city or town may require the complete knockdown of a project if correct protocols were not followed.

Ground-up construction projects will usually have the most upside because the developer is literally creating the value — but they also tend to have a lengthy timeline and many roadblocks.

DEVELOPER EXPERIENCE

One of the most important factors when deciding whether to participate in a real estate investment is the experience of the developer or borrower.

Important factors to consider are the developer's experience in terms of the number of projects completed, experience in the particular market where the new proposed project is located, experience in the particular development phase and experience in the particular asset type. It's imperative that a developer have experience in all these areas.

A borrower may have a tremendous amount of experience with value add assets but could lack experience with ground-up development — which is a completely different process.

CREDITWORTHINESS

It's always important to know that the developer or borrower with whom you're considering investing is financially responsible. After all, if a borrower doesn't pay his other bills there is a good chance he won't pay yours! It is a good idea to make sure borrowers do not have any recent delinquencies (within two years). If they do, you should obtain a letter of explanation.

PERSONAL GUARANTY

Lastly, and perhaps most importantly, the personal guaranty is an additional security measure against a borrower.

If a borrower defaults, the first course of action is usually to pursue foreclosure and take the asset away. However, the asset may not make you whole. This is usually referred to as a deficiency.

A personal guaranty would allow the lender to potentially target the borrower's other assets with a deficiency judgment.

Keep in mind a personal guaranty is only as good as the borrower's financial condition. A borrower's refusal to sign a personal guaranty is a red flag. If a borrower is not confident in his project, why should the lender be?

CONCLUSION

Both technically and more generally, crowdfunding is a tremendous advancement in the financial technology space. Like with many new emerging markets, we're at a point where there is tremendous room for growth. However we must remain cognizant of the risks associated with these investments.

While crowdfunding is opening up investments to a broader audience, the potential for bad actor behavior has never been greater. Investors should ensure they're working with a top-notch platform before taking the deep dive into what will hopefully be the next frontier in financial technology. WJ

Ex-bank exec loses bid for $405,000 after job ends

The 8th U.S. Circuit Court of Appeals has ruled that a bank cannot legally pay its former chief executive $405,000 in compensation and benefits after his termination because the payment would violate federal law.

Von Rohr v. Reliance Bank et al., No. 15-2392, 2016 WL 3407710 (8th Cir. June 21, 2016).

The three-judge appellate panel unanimously affirmed summary judgment in favor of defendant Reliance Bank, saying such a payment constituted an unlawful golden parachute.

The Federal Deposit Insurance Act, 12 U.S.C.A. § 1828(k), and its implementing regulations prohibit troubled banks from draining their resources with payments to terminated executives who may have been responsible for the bank's poor condition.

THE CONTRACT

According to the appeal court's opinion, Jerry Von Rohr served as Missouri-based Reliance's chairman, president and CEO for 13 years. The bank's board notified him that his employment contract would not be renewed when it ended Sept. 1, 2011, after determining that his leadership caused the bank's poor financial health.

Von Rohr argued that his contract did not end for another year and he was owed $405,000 in compensation and benefits for that year.

The bank refused to pay after the Federal Deposit Insurance Corp. determined that any payment to Von Rohr would constitute a prohibited golden parachute under the FDIA.

The act defines a golden parachute as a troubled bank's payment of compensation that is contingent on the termination of the party seeking payment.

THE SUIT

Von Rohr sued Reliance and the FDIC for breach of his employment contract in the U.S. District Court for the Eastern District of Missouri in February 2013. He also sought a declaration that any payment compensating him for the termination was not prohibited by the FDIA.

The District Court stayed the case while Von Rohr sought a final determination from the FDIC regarding whether the sought-after payment was a golden parachute. The FDIC said that once Von Rohr was terminated, any monies he sought were for services not rendered and thus were prohibited golden parachute payments, according to the appellate opinion.

In May 2014 The District Court upheld the FDIC's determination and granted summary judgment to the bank, which had argued it could not pay without violating the law.

The bank did not breach Von Rohr's employment contract because any payment to the former CEO would have violated the FDIA, the District Court said.

REUTERS/Jim Young

THE APPEAL

On appeal to the 8th Circuit, Von Rohr challenged the FDIC's decision as arbitrary and capricious. He also contended the lower court erred in ruling in the bank's favor on summary judgment.

According to Von Rohr, the FDIC found that he requested a payment that was contingent on his termination, thus meeting the statute's definition of a golden parachute. He argued that the payment was not contingent on his termination because he would have received it if he worked the remaining year under his contract.

The appeals court said that even though the contract could be viewed as providing two ways in which Von Rohr could become entitled to the payment, the FDIC's decision was not arbitrary.

The payment can reasonably be characterized as contingent on termination or continued employment, but Von Rohr argued that Reliance owed the payment because he was terminated, not for services rendered, the panel said.

Therefore, the FDIC concluded the payment was contingent on termination, and this decision was not arbitrary or capricious, the appeals court said.

Turning to the lower court's ruling in favor of the bank, the panel noted that Missouri law applied to the breach claim. Under state law, a party to a contract must perform the obligation unless performance is rendered impossible by an act of God, the law or the other party, the appellate panel explained.

Reliance's contractual responsibility to pay Von Rohr became impossible when the FDIC found the payment constituted an unlawful golden parachute, the panel ruled. WJ

Related Court Document:
Opinion: 2016 WL 3407710

See Document Section B (P. 27) for the opinion.

Ohio bankruptcy panel reverses sua sponte ruling on airplane ownership

By Aaron Rolloff

An Ohio bankruptcy court abused its discretion by granting summary judgment sua sponte to a Chapter 7 trustee in a dispute with two creditors over ownership of aircraft sold by the trustee, a bankruptcy appeals panel has ruled.

Nelson v. Fifth Third Bank et al. (In re Brunsman), Nos. 15-8014 and 15-8015, 2016 WL 3194191 (B.A.P. 6th Cir. June 1, 2016).

Without proper notice to the creditors that the judge might find ownership in the aircraft to rest not with them but with the bankruptcy estate, the creditors did not have the opportunity to provide evidence opposing a finding of estate ownership, the 6th U.S. Circuit Bankruptcy Appellate Panel said.

Richard Brunsman Jr. filed for Chapter 11 bankruptcy in March 2010 in the U.S. Bankruptcy Court for the Southern District of Ohio. A month later, Brunsman's case was converted to Chapter 7 and Richard D. Nelson was appointed trustee.

The following year, with the court's approval, Nelson sold several aircraft and related equipment by public auction and held $373,000 from the sale for the estate, according to the BAP's opinion.

Nelson then filed adversary complaints against creditors Fifth Third Bank and Conrad Capital Co., seeking to avoid any security interests they held in the aircraft and to disallow their claims against the estate.

Conrad moved for summary judgment, saying it had a perfected security interest in the aircraft that took priority over Fifth Third and the trustee based on a purported 2007 sale of the planes to an aviation company.

Fifth Third objected to Conrad's motion and filed its own cross-motion for summary judgment against Conrad, asserting its own security interest based on a 2007 agreement with Con Air Charter LLC, which owned the aircraft at one time, the opinion said.

The trustee objected to both motions.

The Bankruptcy Court denied both creditors' summary judgment motions.

Conrad failed to attach vital documents to the motion identifying the aircraft and their ownership and therefore failed to meet its burden of showing no issue of material fact as to its interest in the planes, the Bankruptcy Court's opinion explained.

Fifth Third's motion also failed because it did not show that Con Air owned an interest in the planes when it made its agreement with Fifth Third, the Bankruptcy Court said.

In addition to denying the creditors' motions, the Bankruptcy Court granted the trustee summary judgment sua sponte, saying there was "no question that the estate owns the aircraft and the [creditors] do not have valid claims."

Conrad and Fifth Third appealed.

SUA SPONTE

The BAP considered whether the Bankruptcy Court erred in granting summary judgment sua sponte to the trustee.

The panel said there is "no per se prohibition on entering summary judgment sua sponte," but doing so is discouraged in the 6th Circuit.

In this case, the panel said it was concerned about whether the losing parties were on notice they had to come forward with all of their evidence and whether they had a reasonable opportunity to respond to all the issues the court was considering.

"The sounder approach would have been for the Bankruptcy Court to notify the parties that it was considering granting summary judgment to the trustee," the BAP wrote.

It concluded that the Bankruptcy Court abused its discretion in granting summary judgment sua sponte since the court relied on a lack of documentation rather than undisputed material facts.

"The record does not answer the questions regarding ownership, security interests or the priority of any security interests," the panel said.

Regarding the merits of the grant of summary judgment to the trustee, the BAP said the Bankruptcy Court failed to point to any evidence supporting its decision that the estate owns the aircraft. Consequently, the court's decision had to be reversed and remanded, the panel concluded.

Because of the reversal, the panel said it did not need to review the merits of the denial of Conrad's and Fifth Third's summary judgment motions.

Related Court Document:
Opinion: 2016 WL 3194191

See Document Section C (P. 32) for the opinion.

Goldman settles $1 billion case over Timberwolf CDO

(Reuters) – Goldman Sachs Group Inc. has settled a $1 billion lawsuit filed by a defunct hedge fund accusing the bank of selling risky securities that it expected to lose value ahead of the global financial crisis.

Basis Yield Alpha Fund (Master) v. Goldman Sachs Group Inc. et al., No. 652996/2011, stipulation of dismissal filed (N.Y. Sup. Ct., N.Y. Cty. June 10, 2016).

The parties voluntarily discontinued the case with prejudice, according to a June 10 filing in New York state court. Terms of the settlement were not revealed. A notice of readiness for trial had been filed in April.

The lawsuit, filed in 2011 by the Australian hedge fund Basis Yield Alpha Fund, claimed Goldman made misleading statements in connection with a collateralized debt obligation it began selling in known as Timberwolf 2007-1 and another investment known as Point Pleasant 2007-1.

Timberwolf was cited in a U.S. Senate panel report in April 2011 that faulted Goldman and other banks for hawking debt they expected to perform poorly.

The report said Goldman kept marketing Timberwolf even after Thomas Montag, an executive who is now chief operating officer at Bank of America Corp, notoriously called Timberwolf "one shitty deal" in an email to a colleague.

The complaint claimed Goldman sold the securities as a way to offload subprime mortgages it knew were toxic and that it also profited by shorting the securities.

The fund brought the lawsuit seeking to recoup more than $67 million in losses that contributed to its insolvency in 2007. Basis also sought $1 billion in punitive damages.

Eric Lewis of Lewis Baach, a lawyer for Basis, declined to comment. Michael DuVally, a Goldman spokesman, also declined to comment.

In 2014 a New York state appeals court refused to dismiss the fund's fraud claims, saying if the allegations were true, there was "a 'vast gap' between the speculative picture Goldman presented to investors and the events Goldman knew had already occurred." *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group et al.*, No. 10150, 115 A.D.3d 128 (N.Y. App. Div., 1st Dep't June 10, 2016). WJ

(Reporting by Karen Freifeld)

REUTERS/Lucas Jackson

Appeals court rejects bank's attempt to foreclose with lost promissory note

By Daniel Rice

A Florida appeals court has dismissed a bank's residential foreclosure lawsuit for failure to prove that the bank held the promissory note at the time it filed the suit.

Cruz et al. v. JPMorgan Chase Bank, No. 4D14-3799, 2016 WL 3342651 (Fla. 4th Dist. Ct. App. June 15, 2016).

In its June 15 opinion, the 4th District Court of Appeal held that JPMorgan Chase Bank lacked standing to foreclose on the property owned by Ottoniel and Luz Cruz because it failed to prove it owned the note.

The loan had been transferred several times prior to JPMorgan's foreclosure lawsuit, and the bank lost the original document prior to trial, the opinion said.

JPMorgan argued it had held the note's enforcement rights at the time of the suit.

The trial court agreed with the bank and entered a judgment of foreclosure after a bench trial, but the appellate court reversed and ordered JPMorgan's case dismissed.

MULTIPLE LOAN TRANSFERS

According to the appellate court's opinion, the original borrowers signed a promissory note and mortgage with Washington Mutual Bank.

The borrowers then signed a quit-claim deed in March 2008, transferring the property to the Cruzes, the opinion said.

In September 2008 the Federal Deposit Insurance Corp., which had taken over Washington Mutual as its receiver, transferred most of the bank's assets and liabilities to JPMorgan.

JPMorgan filed a foreclosure lawsuit in April 2009 in the Broward County 17th Judicial Circuit Court, after the Cruzes failed to make monthly mortgage payments, the opinion said.

The case did not go to trial until August 2014, and in the interim JPMorgan transferred the loan rights to a third entity, PennyMac Corp.

JPMorgan had sought in February 2014 to substitute PennyMac as the successor real party in interest, but the motion was never heard, according to the appellate opinion.

INSUFFICIENT PROOF OF OWNERSHIP

PennyMac, as the purported successor owner of the loan rights, discovered a week before trial that the original note was lost, the opinion said.

REUTERS/Lucy Nicholson

JPMorgan filed a foreclosure lawsuit after the couple failed to make monthly mortgage payments on the residential property.

JPMorgan nevertheless attempted to prove ownership of the loan rights through a copy of the note, the agreement regarding the transfer of Washington Mutual's assets to JPMorgan and the testimony of a PennyMac representative regarding the transfer of the loan rights.

After trial, the Cruzes moved to dismiss the suit, saying the bank failed to prove it owned the enforcement rights.

The trial court denied the motion and granted final judgment to JPMorgan. The owners appealed.

NO STANDING

The evidence JPMorgan presented was insufficient to satisfy its burden of showing it owned the note both at the time it filed the lawsuit and at trial, the appellate court found.

Accordingly, the appellate court concluded JPMorgan lacked standing to seek foreclosure.

It remanded the case to the trial court with instructions to enter an involuntary dismissal. WJ

Related Court Document:
Opinion: 2016 WL 3342651

See Document Section D (P. 39) for the opinion.

Trustee can seek attorney fees in MBS put-back suits, New York appeals court says

By Peter H. Hamner, Esq.

The trustee of two mortgage-backed securities offerings worth about $2 billion can continue seeking reimbursement of attorney fees in its lawsuits accusing the offerings' sponsor of failing to repurchase defective mortgage loans underlying the securities, a New York appellate court has ruled.

U.S. Bank National Association v. DLJ Mortgage Capital Inc. et al., Nos. 1465 and 1466, 2016 WL 3341118 (N.Y. App. Div., 1st Dep't June 16, 2016).

The New York Supreme Court, Appellate Division, 1st Department, reversed a trial judge's decision to dismiss trustee U.S. Bank's claim for attorney fees in the two cases, finding agreements between the sponsor and the trustee intended that the sponsor cover the trust's legal costs.

"The unmistakable intent of the parties … is that enforcement expenses to be reimbursed include attorney fees incurred in bringing these actions," the appellate opinion said.

THE SECURITIES

According to U.S. Bank's complaints, its claims center on mortgage-backed securities — financial instruments backed by pools of mortgage loans — issued by the Home Equity Asset Trust 2006-8 in December 2006 and the Home Equity Asset Trust 2007-2 in April 2007.

The HEAT 2006-8 trust securitized 5,863 residential mortgage loans into securities worth an aggregate amount of $1 billion, and the HEAT 2007-2 trust securitized 6,326 residential mortgage loans into securities worth an aggregate amount of $1.2 billion, the suits say.

DLJ Mortgage Capital Inc., as the offerings' sponsor, bought mortgage loans from several nonparty originators for the transaction and pooled the loans together, putting them into the trusts hold and issue securities to investors, the complaints claim.

U.S. Bank was appointed trustee and entered into pooling and servicing agreements with DLJ.

According to the suits, DLJ made representations and warranties in the PSAs concerning the underlying loans, including promises that the mortgage loans met certain underwriting guidelines and characteristics.

U.S. Bank alleges that its independent consultants reviewed a sample of the underlying loan files and found the vast majority did not comply with defendant's representations.

For example, a forensic review of 1,664 loans underlying the HEAT 2006-8 transaction found that about 98 percent of the loans breached the representations and warranties in the PSA, the complaint says.

U.S. Bank says it asked DLJ to buy back the defective loans, but DLJ refused.

The trustee sued the sponsor in separate suits in May and July 2013 in the New York County Supreme Court. U.S. Bank alleges breach of contract and seeks damages of $207 million in the HEAT 2006-8 suit and $495 million in the HEAT 2007-2 complaint.

MOTION TO DISMISS AND ATTORNEY FEES

DLJ moved to dismiss the complaints, arguing the loans were not in breach of the agreements.

Justice Marcy Friedman disagreed in nearly identical decisions and orders. *Home Equity Asset Trust 2007-2 by U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital*, No. 651174/2013, 2014 WL 4966127 (N.Y. Sup. Ct., N.Y. Cty. Oct. 1, 2014); and *Home Equity Asset Trust 2006-8 by U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital*, No. 654157/2012, 2014 WL 4966133 (N.Y. Sup. Ct., N.Y. Cty. Oct. 1, 2014).

"Plaintiff's allegations are sufficient to support a reasonable inference that defendant discovered widespread breaches of loans that gave rise to its repurchase obligation," she wrote in both opinions.

Justice Friedman did rule that U.S. Bank's remedies are limited to those laid out in the agreement: repurchase of the breaching loans at the price set in the agreement.

She also dismissed the trustee's claim for reimbursement of attorney fees.

"The agreement does not expressly include attorney fees among the covered expenses," the judge said.

U.S. Bank appealed and won reversal of the orders dismissing the attorney-fee-reimbursement claims.

"Section 2.03(d) of the PSAs requires defendant, as seller, to 'promptly reimburse … the trustee for any actual out-of-pocket expenses reasonably incurred by … the trustee *in respect of enforcing the remedies for such breach*,'" the appellate panel's opinion said, quoting and emphasizing the PSA. WJ

Related Court Document:
Opinion: 2016 WL 3341118

Loans for foreign school not student debt for discharge purposes

By Aaron Rolloff

A student loan servicer violated bankruptcy's discharge injunction by trying to collect on a woman's foreign-school loans after she received a Chapter 7 discharge, an Ohio bankruptcy judge has ruled.

In re Meyer et al., No. 15-13193, 2016 WL 3251622 (Bankr. N.D. Ohio June 6, 2016).

U.S. Bankruptcy Judge Arthur I. Harris of the Northern District of Ohio said the debtor's loans fell outside the protection afforded most student loans and therefore were discharged in her bankruptcy.

The ruling comes on the heels of a bankruptcy court opinion in New York that found loans for a foreign, unaccredited school dischargeable.

According to Judge Harris' opinion, Arshia Meyer and her husband Carl filed for Chapter 7 bankruptcy in June 2015. They received a discharge three months later.

In March 2016 Arshia Meyer filed motions for contempt and sanctions against student loan servicers Xerox Education Services LLC, which does business as ACS Education Services, and the Pennsylvania Higher Education Assistance Agency.

She alleged that the servicers violated the discharge injunction of Section 524(a)(2) of the Bankruptcy Code, 11 U.S.C.A. § 524(a)(2), by mailing her bills and notices seeking collection of about $171,000 in loans that she said had been discharged in her bankruptcy.

The servicers did not respond to the motions, the opinion said.

Meyer argued that her loans to attend the foreign, unaccredited American University of Antigua from 2008 to 2010 fell outside the definition of loans excepted from discharge by Section 523(a)(8) of the Bankruptcy Code, 11 U.S.C.A. § 523(a)(8).

She cited *In re Decena,* 549 B.R. 11 (Bankr. E.D.N.Y. 2016), which held that loans to attend a foreign, unaccredited medical school did not fall within Section 523(a)(8) and were therefore dischargeable.

Judge Harris said the *Decena* decision was persuasive.

DECENA

Bankruptcy Judge Robert E. Grossman said in *Decena* that Section 523(a)(8)(A)(ii) precludes discharge of "an obligation to repay funds received as an educational benefit, scholarship or stipend."

Section 523(a)(8)(A)(i) excludes from discharge loans and other payments that originate with the government or are partially funded by the government, the court noted.

By specifically mentioning loans in subsection 523(a)(8)(A)(i) but not in subsection 523(a)(8)(A)(ii), Congress intended to refer in the latter only to conditional stipends, veterans' benefits and other cash-benefit programs that are distinct from traditional student loans, Judge Grossman said.

Judge Grossman reasoned therefore that Section 523(a)(8) was not intended to be a catchall that covered any type of loan for any type of educational benefit.

He then turned to Section 523(a)(8)(B), which excepts from discharge "any other educational loan that is a qualified education loan" as defined by the Internal Revenue Code, 26 U.S.C.A. § 221(d)(1). The Tax Code provision in turn specifies that the loan must be for an "eligible educational institution" as defined in Section 25A(f)(2) of the Internal Revenue Code.

These sections together provide that for loans to be excepted from discharge under Section 523(a)(8)(B), the institution attended must be identified on the federal school codes list, and the foreign unaccredited school in that case was not on the list, the *Decena* court said.

"The court finds Judge Grossman's decision in *Decena* … to be persuasive," Judge Harris said. "For the reasons stated in the debtor's motions and the *Decena* decision, the court finds that the debtor's student loans were discharged on Sept. 16, 2015, because they do not fall within 11 U.S.C.A. § 523(a)(8)," he wrote.

He concluded that the servicers of Meyer's loans violated the discharge injunction by attempting to collect on her student loans after the discharge.

The judge declined to award attorney fees, as Meyer appeared pro se. He also declined to award punitive damages under a contempt theory but warned the servicers that he would revisit the issue if they continued collection attempts. WJ

Related Court Document:
Opinion: 2016 WL 3251622

See Document Section E (P. 44) for the opinion.

Supreme Court
CONTINUED FROM PAGE 1

The appeals court said debt-collection companies did not deserve protections of the federal National Bank Act, including against claims that they violated the federal Fair Debt Collection Practices Act.

"Extending those protections to third parties would create an end-run around usury laws for non-national bank entities that are not acting on behalf of a national bank," the court ruled.

The appeals court decision reversed a September 2013 decision by U.S. District Judge Cathy Seibel in White Plains, New York.

The Supreme Court action came at a time of heightened concern over interest rates that borrowers are forced to pay by some lenders. For example, the U.S. agency charged with protecting consumers from financial abuse announced a proposal June 2 to limit short-term borrowings known as "payday" loans, which can carry annual interest rates as high as 390 percent. WJ

(Reporting by Lawrence Hurley; additional reporting by Jonathan Stempel; editing by Will Dunham)

Related Court Document:
Circuit Court opinion: 786 F.3d 246

See Document Section A (P. 19) for the Circuit Court opinion.

NEWS IN BRIEF

FDIC SURVEYS BANKS ON SMALL-BUSINESS LENDING

The U.S. Census Bureau is conducting a survey of 2,000 banks on behalf of the Federal Deposit Insurance Corp. so the regulatory agency can learn about its insured institutions' small-business lending activities. Senior loan officers at the randomly chosen institutions will complete an online survey on small-company borrowers and the kinds of credit offered to them, the FDIC said in a June 28 statement. The study will also collect information on banks' small-business-lending market areas and perceived competition, and it aims to determine how institutions of varying size and type value commercial lending, the statement said. The FDIC said it plans to release the survey results in late 2017. More information on the survey is available at https://www.fdic.gov/consumers/banking/businesslending/index.html.

EX-ATTORNEY ADMITS ROLE IN $6 MILLION LOAN MODIFICATION SCAM

Former lawyer Ronald Rodis, 51, pleaded guilty to wire fraud in the U.S. District Court for the Central District of California, U.S. Attorney Eileen Decker said in a June 27 statement. Prosecutors said Rodis and others defrauded more than 1,500 homeowners out of $6 million between October 2008 and June 2009 by falsely promising they could save homes from foreclosure. Rodis and his co-conspirators represented that the Rodis Law Group had successfully obtained loan modifications from lenders, and consumers paid between $3,500 and $5,500 for these services, prosecutors said. In reality, Rodis was RLG's only attorney, the firm provided no services, and many victims ended up in foreclosure, Decker said. Rodis, who faces up to 20 years in prison and a fine of up to $250,000, will be sentenced Feb. 27, 2017. As part of his plea Rodis consented to pay full restitution to defrauded consumers. The District Court suspended Rodis from the practice of law in December 2011.

United States v. Rodis, No. 13-cr-208, plea entered (C.D. Cal. June 23, 2016).

FED RESERVE ALLOWS 2 OHIO BANKS TO MERGE

The Federal Reserve Board said in a June 28 statement that it has approved the merger of two Ohio holding companies and their respective subsidiary banks. Ohio Valley Banc Corp., of Gallipolis, Ohio, will merge with Milton Bancorp Inc., of Wellston, Ohio, and as part of the transaction Ohio Valley Bank will merge with Milton Bank. Following completion of the deal, Ohio Valley Bank, as the surviving institution, will operate at Milton's current branches, the board said. The holding companies announced their plan to merge Jan. 7 in a transaction involving an exchange of Milton shares for OVBC shares and cash. The companies expect to complete the transaction in the third quarter of this year.

CASE AND DOCUMENT INDEX