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Subject: 2009 Update No. 1 to *The Law of Lender Liability*

Dear Valued Subscriber:

Financial institutions are always concerned about protecting themselves from liability, and in the current economy this concern is paramount. *The Law of Lender Liability* helps you keep up to date on developments in this important area. This update contains the following new information:

- *Class action waiver in arbitration agreement violates New Jersey public policy.* Based on a recent state Supreme Court decision, the Third Circuit predicted that New Jersey courts would refuse to uphold a class action waiver, and rejected a prior case suggesting that the FAA preempted state law invalidating class action bans. See ¶ 2.01[4][i][i].
- *The duty of good faith arises only if a bank exercises discretion.* Where a bank terminated a swap agreement pursuant to a provision in the agreement calling for termination if certain financial conditions occurred, the bank's action was not an exercise of discretion and no duty arose. See ¶ 4.03[1][c].
- *Consumer class action alleging bank violated good faith duty by posting transactions in order to maximize overdraft fee survives motion to dismiss.* Consumers alleged bank posts largest checks first, even if they are presented days after smaller checks for which there were sufficient funds. See ¶ 4.03[1][c].
- *State of West Virginia challenges company that partnered with out of state bank to avoid usury laws.* The court denied the company's motion to dismiss and instructed the trial court to determine whether the company or the bank was the true lender. See ¶ 5.02[2].
- *Doctrine of litigation privilege saves credit union from liability for invasion of privacy.* Credit union produced financial records of all the parties in interest instead of only those subject to the subpoena, but the statute establishing the privilege did not provide the plaintiffs with a private right of action. See ¶ 5.13.
- *Massachusetts Attorney General successfully challenged mortgage lender's practices as unfair and deceptive.* The lender contended that in granting a preliminary injunction, the trial court applied new rules retroactively, but on appeal the court rejected that claim in light of various state and federal regulatory pronouncements on the types of practices the lender engaged in. See ¶ 5.14.

- *Even if each of a lender's practices are legal individually, in combination they may be unfair and deceptive.* The court ruled that the mortgage lender must show that the law affirmatively permitted the lender to combine all of its challenged practices. See ¶ 5.14.
- *Courts may consider both FTC complaints and consent decrees when deciding if practices are unfair or deceptive.* The First Circuit overruled the district court, which found it improper to consider FTC consent decrees. See ¶ 5.14.
- *Bank may commit unfair or deceptive practice when it posts checks.* The bank's policy allegedly is to post checks in an order designed to maximize overdraft fees. The court found that if the plaintiff proves this, it is plausibly an unfair or deceptive act or practice. See ¶ 5.14.
- *No RICO violation if bank's conduct can be characterized as merely conducting its own affairs.* The plaintiff must show the defendant exercised some control over the management or operation of the business. Commingling funds, honoring overdrafts, transferring funds between accounts, and requiring a new deed of trust did not prove an exercise of control. See ¶ 6.04[4].
- *The in pari delicto defense is available in civil RICO actions.* The Fifth Circuit follows the Eleventh Circuit in allowing the defense, in order to avoid rewarding plaintiffs who were co-conspirators. See ¶ 6.05[17].
- *Equitable subordination will not be applied unless there was harm to other creditors.* A court refuses to equitably subordinate a claim even if there was inequitable conduct where the only creditor arguably harmed did not object. See ¶ 7.02.
- *Guaranty agencies guaranteeing and collecting student loans are not debt collectors.* The agencies owe a fiduciary obligation to the Department of Education, and debt collection is incidental to their primary function, qualifying them for an exemption under the Fair Debt Collection Practices Act. See ¶ 10.08.
- *Working with payment processors for telemarketers transferring money from consumer accounts may be an unsound and unfair banking practice.* The OCC and a bank entered into a consent order that states the bank made the payments despite allegations of consumer fraud. The OCC also issued a bulletin providing guidelines on relationships between national banks and payment processors. See ¶ 10.16.
- *Obama has changed preemption policy.* In a memorandum to the heads of executive departments and agencies, the president announced a new policy intended to restore federalism and limit preemption. See ¶ 10.17.
- *New Jersey's law imposing criminal penalties for violating cap on the annual percentage rate charged on tax refund anticipation loans was preempted by the National Bank Act.* The state argued that only civil penalties were preempted, but the court rejected that argument and even held penalties could not be applied to third-party tax preparers. See ¶ 10.17.

- *Consumer class action based on contract and tort theories is not preempted by National Bank Act.* The consumers allege the bank manipulated the order in which it paid checks in order to increase overdraft charges. See ¶ 10.17.
- *State laws of general application are not preempted.* The plaintiffs alleged violations of laws such as breach of contract and fraud in the inducement that did not specifically regulate lending activity. See ¶10.17.

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Sincerely,

Catherine Dillon

Editor