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Mortgage Banking & Consumer Credit

Highlight of 2008 Activities

K&L Gates LLP

K&L Gates maintains one of the most prominent financial services practices in the United States—with more than 150 U.S.-based lawyers representing diversified financial services institutions and their affiliated service providers. In 2008, *"Chambers USA"* ranked K&L Gates as having one of the leading financial services practices in the country. Our practice is at once regional, national, and international in scope, cutting edge, complex, and dynamic. Amidst the constant stream of negotiating transactions, providing regulatory counseling, defending clients in litigation or government enforcement actions or advocating on the policy side, our lawyers try to find time to educate and train clients on the major industry issues of the day. We do it through webinars, seminars, client alerts, and we remain available to do on-site training. Below is a sample of the types of educational endeavors the Mortgage Banking & Consumer Credit lawyers have undertaken in 2008.

Webinars:

FACT Act Update – Affiliate Sharing Rules and More, presented via webinar, by Melanie Brody, Jon Jaffe, and Erin Murphy. January 29, 2008

Not So Fast: U.S. Constitution and Government Sponsored Foreclosure Relief, presented via webinar, by Laurence E. Platt, Nanci L. Weissgold, David R. Overstreet, and David L. Beam. February 20, 2008.

Declining Markets – The Next Fair Lending Issue?, presented via webinar, by Paul F. Hancock, Melanie H. Brody, and Elena Grigera. March 6, 2008.

RESPA Reform: Déjà vu All Over Again, presented via webinar, by Phillip L. Schulman and Holly Spencer Bunting. March 18, 2008.

FHA Webinar: You'll Need a Scorecard to Keep Up with the Changes, presented via webinar, by Phillip L. Schulman and Krista Cooley. July 1, 2008.

Intersections: Federal Preemption of New State and Local Mortgage Servicing Laws, presented via webinar, by Steven M. Kaplan, Nanci L. Weissgold, and David L. Beam. November 6, 2008.

Finally a Final RESPA Rule, presented via webinar, by Phillip L. Schulman and Holly Spencer Bunting. November 25, 2008.

Alerts:

Remember [the] Maine!, by Nanci L.Weissgold, Kristie D. Kully, and Stephanie C. Robinson. K&L Gates Mortgage Banking & Consumer Credit Client Alert. January 3, 2008.

With all the recent attempts in Washington to respond to the subprime mortgage crisis, one should not forget that new subprime mortgage restrictions took effect in Maine on January 1, 2008. Maine has enacted new ability-to-repay and tangible net benefit restrictions for certain mortgage loans, along with other new requirements for high-rate, high-fee, and other residential mortgage loans. A violation of these requirements could result in significant liability, including assignee liability.

Policy Watch: Reverse Mortgages in 2008 by Steven M. Kaplan, Nanci L. Weissgold, and Lorna M. Neill. K&L Gates Mortgage Banking & Consumer Credit Client Alert. January 10, 2008.

As millions of baby boomers reach retirement age, reverse mortgages and similar financing products that enable seniors to tap into their home equity are gaining tremendous popularity. State and federal legislators and regulators are taking note and proposing numerous measures to regulate reverse mortgages. This Client Alert discusses several important legislative developments on reverse mortgages in 2007 and previews reverse mortgage policymaking in 2008.

In the last weeks of 2007, the U.S. Congress took several significant steps toward changing the rules governing the booming market for reverse mortgages. The U.S. Senate Special Committee on Aging held a hearing to consider the potential benefits and perils to consumers of reverse mortgages. Senators Claire McCaskill and Herb Kohl filed the Reverse Mortgage Proceeds Protection Act, legislation to address concerns about predatory lending practices in the rapidly growing reverse mortgage industry. Finally, the U.S. Senate passed the FHA Modernization Act, which proposes a number of changes to HUD's reverse mortgage program, the Home Equity Conversion Mortgage ("HECM") program. The House of Representatives passed companion FHA reform legislation in September, which also proposes new rules for HECMs.

Regulating Wrongful Lending: Protecting Borrowers From Themselves by Kristie D. Kully and Laurence E. Platt. K&L Gates Mortgage Banking & Consumer Credit Client Alert. January 23, 2008.

Since the beginning of the modern consumer lending era, the government has promoted the empowerment of borrowers to make smart choices. However, public policy has shifted dramatically. Recent federal proposals and state requirements have moved away from expecting consumers to make their own reasonable choices to requiring brokers and lenders to make good choices on the borrower's behalf—not just for the most vulnerable borrowers (through regulation of the highest cost loans), but for all subprime and even prime borrowers.

Should a lender be required to determine the borrower's ability to repay a loan, or whether a loan provides some mandated benefit to the borrower? Should the government protect borrowers from making bad choices, and how would such a policy affect mortgage loan innovation and availability? This client alert addresses recent federal proposals and state law provisions imposing those requirements, and analyzes the important differences that will have a huge impact on the way brokers and lenders are able to provide residential mortgage loans in the future.

Consumers Clog Courts with Codified Care Claims by Laurence E. Platt, R. B. Allensworth, Phoebe Gallagher Winder, Andrew C. Glass, and David D. Christensen. K&L Gates Mortgage Banking & Consumer Credit Client Alert. January 30, 2008.

The title of this Alert—"Consumers Clog Courts with Codified Care Claims"—is a prediction of what might come to pass if Congress enacts recently proposed legislation that seeks to expand and codify the common-law concepts of negligence and duty of care and apply them to mortgage lenders and mortgage brokers. Imagine a world where borrowers could seek to rescind a loan and obtain substantial money damages merely because in retrospect they thought they deserved a better deal or felt they were disrespected in the loan-origination process. That is the very real fear of lenders and the capital markets who have read closely the proposed federal legislation and regulations.

This Alert is the second in our series on themes underlying proposed mortgage-reform legislation and regulations.

Massachusetts Gives Lenders No Time to Prepare: Opt-In Rule for Subprime Variable Rate Loans to First-Time Borrowers by Nanci L. Weissgold and Kerri M. Smith. K&L Gates Mortgage Banking & Consumer Credit Client Alert. January 30, 2008.

This article addresses Massachusetts Division of Bank Regulatory Bulletin 1.3-104 issued Jan. 30, 2008 which was required by Chapter 206 of the Acts of 2007 to implement General Laws Chapter 184, Section 17B1/2 (effective Jan. 31, 2008). The Bulletin provides guidance concerning the determination of whether a variable or adjustable rate mortgage loan to a first-time borrower qualifies as "subprime" and the implementation of the consumer counseling and affirmative opt-in provision relative to this requirement.

Somethin' for Nothin' Brings Judicial Scrutiny by Phillip L. Schulman and Holly Spencer Bunting. K&L Gates Mortgage Banking & Consumer Credit Client Alert. January 30, 2008.

In August 2007, the Second Circuit Court of Appeals held, in *Cohen v. JP Morgan Chase,* that Section 8(b) of RESPA prohibits settlement service charges for which no services are provided. Now, the Eleventh Circuit has issued an opinion that appears to bolster the Second Circuit's reasoning and HUD's interpretation of Section 8(b) of RESPA. This email briefly summarizes the Eleventh Circuit's recent decision and the implications for administrative and internal fees charged by settlement service providers.

Tennessee Appeals Court Finds Commencement of Foreclosure Proceedings to Constitute an Increase in Risk Requiring Notice Under Standard Mortgage Clause by Philip H. Hecht, Jonathan D. Jaffe, and Amanda B. Kostner. K&L Gates Mortgage Banking & Consumer Credit Client Alert. February 5, 2008.

A recent decision by the Court of Appeals of Tennessee held that an insurer is not responsible for covering a fire loss suffered by a bank's borrower where the bank failed to notify the insurer of its commencement of a foreclosure proceeding against the borrower. This Alert discusses the recent decision and its potential impact on mortgage bankers that are commencing foreclosure proceedings with greater frequency as the subprime mortgage crisis deepens.

Was Chicken Little Right? by Laurence E. Platt, Kristie D. Kully, and Kerri M. Smith. K&L Gates Mortgage Banking & Consumer Credit Client Alert. February 15, 2008.

So what is the proper remedy for a violation of the new mortgage reform laws, and to what extent, if at all, should parties other than the wrongdoer be legally responsible for such violations? The U.S. House of Representatives and the U.S. Senate have taken extraordinarily different approaches to these fundamental policy questions in their respective mortgage reform bills. While the mortgage industry generally believes that the more tempered approach taken by the House still goes too far, they fear even more the Senate's proposed approach. Either way, the Bills raise serious questions, the most important of which is whether the capital markets will continue to buy and securitize residential mortgage loans if the broad assignee liability in the Senate Bill were to become law. The third in our series on themes underlying the proposed mortgage reform legislation, this K&L Gates Alert analyzes the remedy provisions in these proposals, and asks who should be held accountable, for how long and for how much?

Looking Back to the Future: "Presumptively Unfair" Mortgage Loans in the Case of Commonwealth of Massachusetts v. Fremont Investment & Loan, et al. by R. B. Allensworth, Irene C. Freidel, Brian M. Forbes, and Ryan M. Tosi. K&L Gates Mortgage Banking & Consumer Credit Client Alert. March 6, 2008.

A Superior Court judge in Massachusetts recently barred a mortgage lender from foreclosing—without prior consent of the Attorney General and/or the Court—certain sub-prime loans that it originated between 2004 and 2007. Although these loans have characteristics that were once standard in the industry, the court's ruling establishes, on a retroactive basis, that loans with low short-term introductory rates, prepayment penalties, high debt-to-value ratios, and high loan-to-value ratios are now, in the context of the recent economic downturn, presumptively unfair in violation of the Massachusetts' consumer protection statute. The novel ruling could have far reaching effects on not only other lenders seeking to foreclose on sub-prime loans in Massachusetts, but also on how other courts, states attorneys' general, and other federal and state lending regulators across the country view the "fairness" of similar sub-prime mortgage loans.

NYAG Leapfrogs Feds in Targeting Appraisals by Laurence E. Platt and Lorna M. Neill. K&L Gates Mortgage Banking & Consumer Credit Client Alert. March 10, 2008.

Rather than waiting around for Congress or the Federal Reserve Board to complete their consideration of appraisal reform, the New York Attorney General announced the execution of cooperation agreements with the GSEs that will require significant changes in appraisals for residential mortgage loans on a nationwide basis. The result is the codification of an appraiser code of conduct by contract, if arguably under duress, rather than by law or regulation. This alert compares the new Code of Conduct to somewhat comparable Congressional and FRB proposals. The fear of lenders is that the government effectively will empower each of the appraisers to cry "wolf" every time a lender questions the quality of their work and consumers to sue lenders every time an appraisal proves to be inaccurate. Will a scheme designed to promote quality institutionalize mediocrity instead?

RESPA Reform: Déjà Vu All Over by Phillip L. Schulman and Holly Spencer Bunting. K&L Gates Mortgage Banking & Consumer Credit Client Alert. March 24, 2008.

Well, it's here. Two and a half years after the U.S. Department of Housing and Urban Development ("HUD" or "Department") conducted its RESPA roundtables, the Department published, on March 14, 2008, its proposed regulations to reform the Real Estate Settlement Procedures Act ("RESPA"). HUD partially titles its rule a "Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages;" however, the rule appears to be far from simple. In addition to modifications to the Good Faith Estimate, HUD proposes to introduce tolerances for settlement charges, require a new format for disclosure of yield spread premiums, modify the HUD-1 Settlement Statement, introduce a new closing script, and amend certain established RESPA definitions, to name a few. In the process, HUD appears to have created a complicated and controversial rule that likely will affect every settlement service provider.

This client alert summarizes the most important changes proposed by the rule, as well as provides our initial observations as to how the rule may be received by the settlement service industries.

Latest FHA Changes by Phillip L. Schulman and Krista Cooley. K&L Gates Mortgage Banking & Consumer Credit Client Alert. April 10, 2008.

Recently, the U.S. Department of Housing and Urban Development ("HUD" or "Department") issued two updates to its requirements that will affect Federal Housing Administration ("FHA") approved lenders that we want to bring to your attention. First, on March 28, 2008, HUD published a proposed rule that would amend the Department's Mortgagee Review Board ("MRB" or "Board") regulations. Second, on April 1, 2008, HUD issued Mortgagee Letter 2008-09, which sets forth additional requirements for certain "high-balance" FHA-approved loans. This Alert summarizes each of the Department's recent updates.

Imposing Material Liabilities on Servicers and Investors for Immaterial Mistakes by Jonathan D. Jaffe and Kerri M. Smith. K&L Gates Mortgage Banking & Consumer Credit Client Alert. April 14, 2008.

While much attention has been focused on the efforts of Congress to forestall foreclosures of subprime loans, it also has proposed various measures to regulate the general method of servicing residential mortgage loans. Congress' proposed legislation to impose new duties on servicers would result in increasing servicers' costs and administrative burdens, as well creating new federal causes of action in common consumer complaints that historically have been the subject of state unfair and deceptive claims. Indeed, the Senate's proposal would impute uncapped direct liability to loan holders for the acts, errors, or omissions of loan servicers. The proposed federal legislation and proposed regulatory amendments signal a marked shift in the expected relationship between mortgage servicers and borrowers. Loan servicers will face new duties, and new legal liabilities, all of which means new litigation.

This Alert is the fifth in our series on themes underlying proposed mortgage-reform legislation and regulations.

The Seventh Circuit Breathes New Life Into "Firm Offers of Credit;" The First Circuit Tells Consumers to "Opt Out" and Stop Complaining by R. B. Allensworth, Irene C. Freidel, Brian M. Forbes, and Gregory N. Blase. K&L Gates Mortgage Banking & Consumer Credit Client Alert. April 28, 2008.

Two federal appeals courts have recently taken up the issue of firm offers of credit under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, *et seq.* ("FCRA"), and in each case the result has been a victory for the consumer credit industry, and for consumers who are afforded greater access to credit through the receipt of firm offers of credit. In *Murray v. New Cingular Wireless,* the Seventh Circuit issued a landmark decision that should mark the demise of much of the FCRA firm offer litigation that has sprung up around the country since 2004 when the Seventh Circuit decided *Cole v. U.S. Capital, Inc.* Also, in *Sullivan v. Greenwood Credit Union,* and *Dixon v. Shamrock Financial Corp.*, the First Circuit rejected plaintiffs' now-discredited interpretations of *Cole and Murray v. GMAC Mortgage Corp.,* and became the first federal appellate court outside of the Seventh Circuit to address the *Cole* "value" test head-on.

Cook County Database Redux, with an Anti-Predatory Lending Kicker - New Statewide Anti-Predatory Lending Requirements by Laurence E. Platt and Nanci L. Weissgold. K&L Gates Mortgage Banking & Consumer Credit Client Alert. June 2, 2008.

Illinois HB 4050 (Public Act 94-2080) established an anti-predatory lending database, a pilot program for residential mortgage loans in Cook County, Illinois that was in effect for only four short months in 2006 before the controversial law was shelved. Well, it's back—in slightly revised form but with new anti-predatory lending standards. Will it cause the havoc of its earlier, short-lived iteration that was suspended amidst fair lending concerns? SB 1167 (Public Act 95-0691), the revived version of the Cook County anti-predatory lending database law, was signed by Governor Rod Blagojevich on November 2, 2007 and is scheduled to take effect on July 1, 2008.

The Cook County redux program is strikingly similar to HB 4050 and raises many of the same questions we raised in our August 2006 Mortgage Banking/Consumer Finance Commentary. Will this cause delays in closing loans in Cook County? Will title companies issue clean title policies without exception for Cook County loans? Will investors purchase loans in the program area? Do the credit counselors know what they are doing? What happens if a credit counselor issues a negative recommendation? These issues along with SB 1167's statewide anti-predatory lending standards under the Residential Mortgage License Act and amendments to the Illinois Interest Act's prepayment penalty provisions also are addressed in this alert. The new statewide standards are effective June 1, 2008.

FHA: Need a Scorecard to Keep Up With the Changes by Phillip L. Schulman and Krista Cooley. K&L Gates Mortgage Banking & Consumer Credit Client Alert. June 23, 2008.

Over the past few months, the U.S. Department of Housing and Urban Development ("HUD" or "Department") has been busy modifying certain Federal Housing Administration ("FHA") requirements to both strengthen the FHA loan program and provide additional opportunities for qualified borrowers to obtain FHA financing in the midst of the current housing crisis. The Department's recent initiatives demonstrate HUD's attempt to balance its increased role in providing homeownership possibilities to those affected by the mortgage crisis and housing downturn with its efforts to maintain a solvent and stable Insurance Fund that will withstand the increase in FHA borrowers.

This Client Alert summarizes several FHA changes designed to expand FHA lending opportunities, including: a temporary waiver of HUD's "anti-flipping" regulations for foreclosed properties; implementation of a risk-based premium structure; and proposed regulations to eliminate seller-funded downpayment assistance and increase documentation requirements for late case endorsement submissions of FHA loan packages, to name a few.

No Equity Home Equity Lines? The FDIC Offers Guidance on Reducing Credit Risk Without Legal Risk by Steven M. Kaplan and Jonathan D. Jaffe. K&L Gates Mortgage Banking & Consumer Credit Client Alert. July 10, 2008.

The Federal Deposit Insurance Corporation ("FDIC") recently issued guidance for lenders and servicers who are contemplating reducing credit limits on home equity lines of credit ("HELOCs") or suspending borrowers' ability to make draws on HELOCs. The supervisory guidance, titled *Home Equity Lines of Credit: Consumer Protection and Risk Management Considerations When Changing Credit Limits and Suggested Best Practices,* was issued June 26, 2008 as Financial Institution Letter 58-2008. This alert summarizes the Guidance.

The FDIC acknowledges in the Guidance that freezing or suspending HELOCs may be a prudent and appropriate way to manage credit risk. At the same time, the FDIC reminds its institutions of the legal requirements they must follow, including requirements under the Truth in Lending Act ("TILA"), the Equal Credit Opportunity Act ("ECOA"), and Section 5 of the Federal Trade Commission ("FTC") Act. The FDIC noted that violations of these laws will result in enforcement actions, may have a negative effect on an institution's Community Reinvestment Act ("CRA") evaluations, and could lead to civil liability. While the Guidance applies only to FDIC-supervised institutions, it offers a good legal primer for all holders and servicers of HELOCs.

California's New Foreclosure Legislation — Will Other States Play "Follow the Leader"? by Jonathan D. Jaffe and Nanci L. Weissgold. K&L Gates Mortgage Banking & Consumer Credit Client Alert. July 22, 2008.

Borrowers who try to avoid letters and notices from lenders informing the borrowers of default and foreclosure will have to try really hard to hide in light of California's revisions to its foreclosure law. Statistics continue to show that a substantial number of borrowers have no direct contact with their lenders prior to the completion of a foreclosure—not because the lenders do not try to communicate with the borrowers, but because borrowers often try to avoid contact with their lenders. California's answer, reflected in recently enacted SB Bill 1137, is to require lenders to send more letters and expend more effort to notify borrowers of the possibility of foreclosure and the options that may be available to avoid foreclosure. The net result for lenders is an extended timeframe for nonjudicial foreclosures, increased lender's costs to effectuate the foreclosure, and lower bids from third parties at the foreclosure sale. SB 1137 was signed into law on July 8, 2008 as an emergency measure, which means it takes effect immediately.

As discussed in more detail in the alert, SB 1137: (i) requires lenders to contact borrowers before initiating foreclosures, (ii) sets forth due diligence efforts the lender must take to make contact with the borrower, (iii) requires the existing statutory form of notice of default and the form of notice of sale to include declarations that the borrower has been contacted or that the due diligence has been completed and the attempts made to contact the borrower, (iv) requires that a notice be mailed to residents of the security property notifying them (in five different languages) of the pending foreclosure, and (v) requires the purchaser at the foreclosure sale to give renters 60 days prior to commencing an eviction. Additionally, there is "intent language" stating that mortgage servicers have a duty to all parties under a loan servicing agreement to maximize the net present value of loans and to offer modification and workout plans to mitigate losses.

Satisficing Subprime: New HOEPA Rules Might Just Be Good Enough by Kristie D. Kully and Laurence E. Platt. K&L Gates Mortgage Banking & Consumer Credit Client Alert. August 5, 2008.

The Federal Reserve Board's newly issued HOEPA regulations are just strong enough and just weak enough to achieve adequate, if not optimal, results. While no one is likely to cheer—neither consumer advocates, mortgage brokers, lenders, servicers, nor investors—the Board may at least have calmed some of their critics (particularly those in the U.S. Senate and House of Representatives) by attempting to address the weaknesses in underwriting and servicing that some blame for initiating and exacerbating the subprime mortgage crisis. The regulations establish a set of subprime, or "higher-priced mortgage loans," to which several HOEPA-like requirements and remedies will apply. They also address certain servicing, appraisal, disclosure, and advertising issues. The Board repeatedly stated that it is authorized to correct unfair practices in connection with mortgage loans, and it went to great lengths to justify or explain each of its rulemaking decisions. In the end, the regulations may "satisfice" (a combination of "satisfy" and "suffice"), so that lawmakers and the mortgage industry can return to work fixing other issues in the home financing mess.

Minding the Gap - Servicers Subject to Regulatory Scrutiny by Kristie D. Kully and Kerri M. Smith. K&L Gates Mortgage Banking & Consumer Credit Client Alert. August 26, 2008.

Federal and state regulators heavily scrutinize mortgage lending activities, but mortgage loan servicing activities have historically fallen into a regulatory gap. Within the last month, however, New York and North Carolina legislators have empowered their regulators with jurisdictional authority over mortgage loan servicers, and regulators in Illinois and Maryland are flexing their muscles in this area as well. This alert addresses this new trend among states to shrink this "regulatory gap" by instituting licensing or registration regimes and pervasive practice requirements on mortgage loan servicers.

Must HOPE for Homeowners Mean Losses for Lien Holders? by Laurence E. Platt. K&L Gates Mortgage Banking & Consumer Credit Client Alert. September 2, 2008.

Thirty days and counting! By law, the new HOPE for Homeowners Program should be ready to go on October 1, 2008. Congress has authorized HUD to insure eligible 30-year, fixed-rate residential mortgage loans with aggregate original principal balances of $300 billion. The purpose is to refinance existing loans made before January 1, 2008 to distressed, owner-occupant borrowers in order to avoid foreclosure and support long-term sustainable homeownership. The goal is to convince existing lien holders that they are better off accepting a short payoff rather than foreclosing on the home. Despite its laudatory goals, many industry questions remain, such as:

- Will existing lien holders accept short payoffs?
- Is the HOPE Program really voluntary?
- Will subordinate lien holders cooperate?
- Will loan holders sue servicers that accept short payoffs?
- Will borrowers "game the system" to obtain a write down?
- Is the October 1st effective date realistic?
- Will FHA reallocate the risk of loss to refinancing lenders and their investors?

The answers to these questions likely will determine the ultimate success of the HOPE Program.

Congressional Effort to Enhance Fair Lending Enforcement: A Flawed Approach That Will Burden Lenders by Paul F. Hancock. K&L Gates Mortgage Banking & Consumer Credit Client Alert. September 10, 2008.

The director of the newly-established Federal Housing Finance Agency has been given the authority to monitor the loan portfolios of Fannie Mae and Freddie Mac for possible discrimination in pricing by individual lenders. The director will operate under a mandate to refer even preliminary findings of discrimination to federal regulators or enforcement agencies. This likely will lead to false positives and impose significant burdens on lenders to justify their pricing policies.

California Privacy – SB 1, 2, and 3. Was It A Strikeout Or Will The Umpires Review The Tape? by Melanie H. Brody and Jonathan D. Jaffe. K&L Gates Mortgage Banking & Consumer Credit Client Alert. September 16, 2008.

This Client Alert summarizes the Ninth Circuit's most recent decision regarding the extent to which the affiliate information sharing provisions in California's SB 1 are preempted by the federal Fair Credit Reporting Act.

Class or No Class? The Waning Debate, Part II: The Seventh Circuit Court of Appeals Rejects Classwide Rescission Under TILA by R. B. Allensworth, Irene C. Freidel, Brian M. Forbes, and Gregory N. Blase. K&L Gates Mortgage Banking & Consumer Credit Client Alert. September 26, 2008.

In its recent decision in *Andrews v. Chevy Chase Bank,* the Seventh Circuit Court of Appeals joined the First and Fifth Circuits and the California Court of Appeals in rejecting plaintiffs' attempts to obtain classwide rescission under Section 1635 of the Truth in Lending Act, 15 U.S.C. §§ 1601, et seq. ("TILA"). In the Client Alert we issued in February 2007, we took note of the trial court's decision in *Andrews* certifying a TILA rescission class - a decision that flamed the debate as to whether classwide loan rescission is compatible with class actions under Rule 23 of the Federal Rules of Civil Procedure (and other state analogs to Rule 23). That debate appears to have subsided to some degree with the Seventh Circuit's clear instruction that "as a matter of law … a class action for the rescission remedy under TILA may not be maintained." To that end, the *Andrews* decision is expected to have an immediate impact on pending cases seeking classwide TILA rescission against creditors and loan assignees both in the Seventh Circuit and in other jurisdictions, including California where more than forty TILA Option ARM class actions are pending.

The 2007 HMDA Data: Market Turmoil But Little Change in Racial and Ethnic Disparities by Paul F. Hancock, Melanie H. Brody and Elena Grigera. K&L Gates Mortgage Banking & Consumer Credit Client Alert. October 10, 2008.

In many respects the 2007 HMDA data is unremarkable. Racial and ethnic disparities in higher-priced lending remain pretty much the same. Denial rates crept up a bit, but not as much as many had expected. The crisis in the housing market caused a dramatic decline in loan applications and originations, and minorities experienced the greatest decline. The data confirms the demise of a significant number of independent mortgage companies during the year and these now defunct companies disproportionately served racial and ethnic minorities in the higher-priced segment of the market. The actual decline in higher-priced lending may be overstated.

No Fault Loan Modifications After EESA: Charity Begins at Home? by Laurence E. Platt. K&L Gates Mortgage Banking & Consumer Credit Client Alert. October 17, 2008.

Much has been written about the many provisions of the Emergency Economic Stabilization Act of 2008 ("EESA"); from a mortgage banking perspective, however, the most important issue is the way in which the federal government as owner of distressed residential mortgage loans and the related mortgage backed securities will treat defaulting borrowers. Loan servicers are stuck in the middle of a government "holy war" to keep defaulting borrowers in their homes, without regard to the reasons underlying the defaults. It is hard to fight a war when you agree with the other side. Both loan holders and loan servicers generally support the government's strategic objective of home retention. Yet this objective begs the questions of eligibility and cost. Under what circumstances should a borrower be eligible for a loan modification, and who should bear the cost of a loan modification that exceeds the cost of foreclosure? This Alert describes the requirements for loan modifications under EESA and compares and contrasts these requirements with the pronouncement of the FDIC and the actions of the state attorneys general.

Make My Day: States Dare Servicers to Foreclose by Nanci L. Weissgold and Morey E. Barnes. K&L Gates Mortgage Banking & Consumer Credit Client Alert. November 4, 2008.

States are not waiting around for the federal government to bail out Main Street. Congress has enacted an ambitious agenda for both the U.S. Department of Treasury to purchase distressed mortgage loans under the Troubled Asset Relief Program (TARP) and the Federal Housing Administration to refinance distressed mortgage loans with insured loans under the HOPE for Homeowners Program. To date, Treasury has not purchased a single loan under TARP, and HUD has not insured many, if any, loans under the HOPE Program. Yet approximately 7.3 million American homeowners are expected to default on their mortgages between 2008 and 2010, with 4.3 million of those expected to lose their homes.

States are doing what they can to stop foreclosures in their tracks or make it so burdensome to foreclose that generous loan modifications look better and better. Of course, the Constitution sharply limits states' ability to enact laws that retroactively modify existing contracts between private parties, but that has not stopped states from getting as close to the line as possible. In this client alert, we provide a brief overview of recent types of measures that jurisdictions have enacted to demonstrate how each may impact the residential mortgage servicing business.

EESA: No Guarantee of Federal Loan Guarantees by Laurence E. Platt. K&L Gates Mortgage Banking & Consumer Credit Client Alert. November 4, 2008.

Press reports claim that the FDIC and Treasury are close to announcing a plan pursuant to which the federal government will guarantee the repayment of modified eligible residential mortgage loans held by private parties pursuant to the Emergency Economic Stabilization Act of 2008 ("EESA"). We are not convinced that the proposal will morph into a real program. As events unfold, we want to take the opportunity to highlight certain issues for which you should watch if a home loan guarantee program actually is promulgated by Treasury.

Final Regulation C Amendments Conform to New Regulation Z Test by Melanie H. Brody and Stephanie C. Robinson. K&L Gates Mortgage Banking & Consumer Credit Client Alert. November 7, 2008.

On October 20, 2008, the Board of Governors of the Federal Reserve System (the "Board") amended Regulation C to revise the Home Mortgage Disclosure Act ("HMDA") rate spread reporting threshold to correspond with Regulation Z's recently adopted definition of "higher priced mortgage loans." The new rule is designed to achieve more effective and consistent reporting of subprime lending activity by comparing a loan's annual percentage rate ("APR") to the applicable "average prime offer rate," a calculated annual percentage rate derived from market surveys that is intended to reflect the total cost of a "prime" mortgage loan.

Eleventh Circuit Rejects Challenge to Optional Discounts under RESPA by Phillip L. Schulman, R. B. Allensworth, Andrew C. Glass, and David D. Christensen. K&L Gates Mortgage Banking & Consumer Credit Client Alert. November 17, 2008.

Through a spate of lawsuits, the plaintiffs' class action bar has sought to articulate a novel theory of RESPA "required use" liability against home builders. Specifically, the plaintiffs' bar has brought RESPA Section 8 claims against home builders and their affiliates who offer optional discounts on settlement costs if home buyers choose to use the affiliates' services. In conflict with RESPA's goal of lowering settlement costs, plaintiffs' lawsuits challenge the ability of home builders, as well as of affiliated mortgage lenders, title insurance companies, and other settlement service providers, to offer meaningful discounts to consumers. Becoming the first federal appellate court to consider the issue, the United States Court of Appeals for the Eleventh Circuit recently rejected plaintiffs' theory.

Finally a Final RESPA Rule by Phillip L. Schulman and Holly Spencer Bunting. K&L Gates Mortgage Banking & Consumer Credit Client Alert. November 21, 2008.

After five months and 12,000 public comments on the proposed rule to reform the Real Estate Settlement Procedures Act ("RESPA"), the U.S. Department of Housing and Urban Development ("HUD" or "Department") published its final RESPA rule on Monday, November 17, 2008. While the lion's share of comments from trade associations, settlement service providers, and even some consumers and federal agencies were negative, ultimately HUD held firm to the core principles it espoused in the proposed rule. For example, the Good Faith Estimate ("GFE"), reduced from four pages to three, still contains those pesky tolerances. And, the HUD-1 Settlement Statement ("HUD-1"), though minimally modified, now includes a third page to accommodate an explanation of the loan terms that HUD holds so dear. It is clear that the Department believes its forms will assure a more transparent settlement transaction. Accordingly, this client alert summarizes the most significant provisions of the final rule, compares those provisions to HUD's proposals, and provides our initial observations as to how the settlement service industries are likely to view the new RESPA rule.

North Carolina Announces a Loan Modification Protocol that Twists Servicers' ARMs by Nanci L. Weissgold and Morey E. Barnes. K&L Gates Mortgage Banking & Consumer Credit Client Alert. December 15, 2008.

With virtually no statutory authority to support its actions, on November 14, 2008, the North Carolina Office of the Commissioner of Banks ("NCCOB" or the "Commissioner") announced a new loan modification protocol for "subprime loans" ("Protocol") pursuant to the recently created State Home Foreclosure Prevention Project ("Project"). Giving servicers little lead time, the Protocol took effect on December 1, 2008. The intent underlying the Protocol is to facilitate communication between mortgage lenders and servicers and the housing counselors working with homeowners to avoid foreclosure. Its effect is to pressure servicers to undertake streamlined modifications on terms proposed by the State of North Carolina. The more likely result is that the Protocol will further exacerbate the tension between and among mortgagors, loan servicers, mortgage investors, and government agencies regarding the extent to which a loan servicer should feel obligated to alter the terms of existing mortgage loan documents in order to achieve the laudable public policy goal of keeping delinquent borrowers in their homes.

The NCCOB promulgated the Protocol pursuant to the Emergency Program to Reduce Home Foreclosure Act, H. 2623 ("Foreclosure Act"). The most significant aspect of the Protocol is the apparent requirement imposed on a servicer either to agree to the state's specific recommendation regarding a proposed loan modification or to prove to the state why the servicer rejects this recommendation. This type of loan-level scrutiny by a government agency of a servicer's response to an individual borrower's default is unprecedented; in fact, the Foreclosure Act contains only scant traces of this concept. It raises two obvious questions. First, did the NCCOB overreach its statutory delegation of authority in designing the scope of the Protocol, particularly with respect to the various disguised or explicit mandates or directives imposed on the servicer? Second, what is the legal consequence of a servicer choosing not to provide to the state what the Foreclosure Act calls "optional" information? In this client alert, we provide an overview of the Protocol and H. 2623, the statute that created the Project, and discuss an apparent disconnect between the two.

HOPE for HUD: Skittish Agency Allocates Legal Risk of Loss to Lenders by Laurence E. Platt. K&L Gates Mortgage Banking & Consumer Credit Client Alert. December 16, 2008.

In an odd twist to the concept of federal mortgage insurance, the Department of Housing and Urban Development ("HUD") is requiring originating lenders to insure the Federal Housing Administration ("FHA") against the risk of loss if the shared equity and shared appreciation documents that FHA prepared pursuant to the HOPE for Homeowners Program (the "Program") are unenforceable under applicable state law. By seeking to shift the legal risk of loss from FHA to private lenders for FHA's own form documents, HUD is unwittingly discouraging lender participation in the Program. Perhaps those in Congress who are exhorting lenders to make Program loans to refinance troubled assets will chat with HUD/FHA about its approach to risk management.

Articles:

New Century Financial: Lessons Learned, by Michael J. Missal and Lisa M. Richman.

Originally published in the Mortgage Banking Association's *Mortgage Banking* magazine. October 2008.

Mike Missal and Lisa Richman focus on some of the corporate governance failures of New Century Financial Corporation that contributed to the subprime market meltdown.

FHA By the Book, by Phillip L. Schulman and Emily J. Booth.

Originally published in the Mortgage Banking Association's *Mortgage Banking* magazine. October 2008.

Phil Schulman and Emily Booth look at recent changes to FHA's single-family programs, summarizes the types of enforcement mechanisms HUD has at its disposal, and highlight the top-10 pitfalls that tend to trip up lenders and result in sanctions.

Striking the Right Balance, by Laurence E. Platt.

Originally published in the Mortgage Banking Association's *Mortgage Banking* magazine. October 2008.

Larry Platt discusses the newly passed TILA/HOPEA regulations as Congress seeks to enact tougher restrictions on originators in the wake of the foreclosure crisis.

Press:

ActiveRain.com

American Banker

Arizona Daily Star

Baltimore Sun (MD)

Bond Buyer

Boston Business Journal

Boston Herald

Broker

Business Journal of Milwaukee

Charlotte Observer

Chicago Tribune

Contra Costa Times

Corporate Counsel

Daily Journal

East Bay Business Times

Financial Deals Tracker

FinancialPlanning.com

Grand Junction Real Estate Blog

Inman News Blog

Inside Mortgage News

Hattiesburg American (Miss.)

HousingWire.com

MergerStat Review

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Mortgage Banking

Mortgage Line

MortgagePress.com

Mortgage Servicing News

Mortgage Technology Magazine

Naples Daily News (Fla.)

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Real Estate Finance

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Reuters

San Francisco Chronicle

Sarasota Herald-Tribune

SeekingAlpha.com

South Florida Business Journal

St. Petersburg Times

The Advocate (Stamford, Conn.)

The American Lawyer

The Daily Herald

The Deal Newsweekly

The Herald Tribune (Fla.)

The Ledger (Lakeland, Fla.)

The Morning Call (Allentown, Pa.)

The New York Law Journal

The News Hour with Jim Lehrer

The Press of Atlantic City

The Seattle Times

The Washington Post

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