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FREEDOM OF INFORMATION ACT

DOJ won't turn over docs on 'Operation Choke Point,' watchdog group says

By Catherine A. Tomasko, Editor, Westlaw Journal

A conservative-leaning government watchdog group has asked a Washington federal court to order the Justice Department to turn over documents relating to a regulatory initiative targeting financial institutions that facilitate transactions for companies allegedly perpetrating consumer fraud.

Judicial Watch Inc. v. Department of Justice, No. 14-CV-1510, complaint filed (D.D.C. Sept. 4, 2014).

Judicial Watch Inc., a not-for-profit organization that identifies its mission as promoting transparency in government, says the Justice Department acknowledged receipt of its Freedom of Information Act request for the documents but has taken no action in violation of the statute.

In a complaint filed in the U.S. District Court for the District of Columbia, the group says it is being irreparably harmed by the agency's failure to turn over the records, which concern Operation Choke Point.

The initiative, which the government first announced in March 2013, involves federal investigations into financial institutions' possible role in mass-marketed fraud schemes that cause significant consumer losses. These schemes include deceptive short-term, or "payday," loans offered online, phony promises of debt relief, fraudulent health care discount cards and fake government grants, according to President Barack

REUTERS/Carlo Allegri

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Banking scandals: Might plaintiffs be better off suing in England?

Richard Pike of Constantine Cannon LLP considers whether it might be better to sue members of the banking industry in the world's other big banking center: London.

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Banking scandals: Might plaintiffs be better off suing in England?

By Richard Pike, Esq.
Constantine Cannon LLP

The various misdeeds, or alleged misdeeds, of the banks involved in the Libor scandal, foreign exchange contracts, credit default swaps and other contexts have naturally given rise to claims for compensation in the United States, typically alleging antitrust violations in order to seek treble damages and payment of attorney fees. There are, however, challenges with bringing such claims in the U.S.

CHALLENGES IN THE U.S.

Plaintiffs pursuing antitrust claims in the U.S. have to show antitrust injury.[1] This requirement has proved an obstacle for Libor plaintiffs, who have seen the majority of their claims, including all antitrust claims, summarily rejected at the early motion-to-dismiss stage of litigation.[2]

The position adopted by the court in *In re Libor-Based Financial Instruments Antitrust Litigation* was that setting Libor was never intended to be competitive, so collusion could not give rise to an antitrust injury.[3] The court also rejected the plaintiffs' argument that an impact in markets where the banks did compete would be sufficient to state a claim.

It has not yet been possible for the plaintiffs to appeal the dismissal because it was technically an interlocutory ruling, some of the claims having survived, and there is ordinarily a prohibition on appealing interlocutory rulings. The U.S. Supreme Court recently granted *certiorari* to allow argument on whether there should be an exception to allow an appeal in *Gelboim v. Bank of America Corp.*, No. 13-1174, *cert. granted* (U.S. June 30, 2014).

There are still likely to be other significant challenges for U.S. plaintiffs even if antitrust injury is not a problem.

For example, intervention by Congress and the courts has greatly restricted the extraterritorial reach of U.S. antitrust laws. This was illustrated most recently in the 7th U.S. Circuit Court of Appeal's decision in *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14–8003, 746 F.3d 842 (7th Cir. July 1, 2014).

> Plaintiffs pursuing antitrust claims in the U.S. have to show antitrust injury.

The plaintiff, Motorola, is a U.S.-based cellphone manufacturer seeking damages for a cartel that increased the cost of LCD screens incorporated in its phones sold in the U.S. The trial court granted the defendants partial summary judgment, finding that Motorola's foreign subsidiaries purchased the LCD screens, so the only impact in the U.S. was "indirect" — and insufficient to meet the requirements of the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a.

The 7th Circuit recently granted a rehearing of Motorola's appeal but if the decision stands, it is likely to represent a significant restriction even for ostensibly U.S.-domiciled plaintiffs. There are, of course, many multinational organizations that conduct large parts of their core business through overseas subsidiaries. Indeed, it would hardly be surprising in the context of the banking scandals if U.S.-based businesses chose to transact with U.K. banks through local subsidiaries rather than directly with the head office.

Other issues for plaintiffs include the tightening of the pleading standard for antitrust claims in the wake of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), as well as the ever-growing cost of e-discovery.

SITUATION IN ENGLAND

Antitrust damages claims are still a relatively new phenomenon in England and, indeed, in Europe more broadly. Claims only began to emerge within the last 10 to 15 years, but they are now becoming a much more common feature of the legal landscape.

Antitrust injury

EU law requires that plaintiffs[3] have an effective opportunity to recover losses suffered when there is a breach of European competition law (articles 101 and 102 TFEU). In England, a breach of EU competition law can give rise to a claim in tort for the breach of statutory duty.

It is held in other contexts that breach of statutory duty requires the plaintiff to show that the duty was owed to him and that it was in respect of the kind of loss he suffered — an argument seemingly similar in effect to the U.S. requirement of antitrust injury. The requirement was misapplied, however, by the England Court of Appeal in the case of *Crehan v. Inntrepreneur Pub Co.*,[4] barring the plaintiff's right to sue for a remedy because the wrong kind of loss was inconsistent with a decision of the European Court of Justice earlier in the same case[5] that required the availability of a remedy.

The House of Lords later reversed the Court of Appeal's decision without discussing the merits of the antitrust injury issue.[6] The result is that there remains scope for debate,

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but the better view would seem to be that if someone in plaintiff Bernard Crehan's position can ever sue — and that was the fundamental requirement of the European Court of Justice decision in Crehan's case — then it should never be necessary to show that the specific injury was one that antitrust law was intended to prevent.

The objective of the relevant antitrust law in Crehan's case was clearly not the protection of the people in Crehan's position.

It is consequently unlikely that the U.S. Libor decision would be replicated in England. In any event, however, where antitrust fines are imposed in Europe there is no scope at all to contest liability in a subsequent damages action — the finding of liability is irrefutably binding unless the fine is overturned on appeal.

This will already be the case for yen Libor, where the European Commission has made an infringement finding, and other commission investigations into the banking scandals remain ongoing.

Jurisdiction and applicable law

One advantage of bringing actions in England is the flexibility with which the jurisdiction of English courts may be established.

Under the provisions of the Brussels Regulation,[7] a plaintiff may sue in England for all losses caused by the cartel anywhere in Europe, even if the cartel did not affect the English market. As long as at least one relevant cartelist corporate entity is domiciled in England, the action may proceed in England.[8]

Needless to say, there would be no difficulty in establishing jurisdiction to claim all European losses in the case of the banking scandals given the number of U.K. banks involved.

A plaintiff can probably also sue in England for losses caused by the cartel outside of Europe.

Further, where the claim relates to events after Jan. 11, 2009, as will generally be the case with the banking scandals, there is an option for antitrust plaintiffs to choose that English law alone be applied for all the European claims regardless of what laws might otherwise apply as a matter of private international law.[9]

This may considerably simplify matters where the defendants might otherwise seek to fragment the litigation by claiming the applicability of numerous different national laws.

Discovery/disclosure

There is far less opportunity for discovery, known in England as "disclosure," than there is in U.S. litigation. There is, for example, almost no scope for the taking of depositions and very little scope for obtaining disclosure from third parties.

The test for document disclosure is also more restricted — not all "relevant" documents, but only those that more directly support or adversely affect the case of any party.

In some cases this may be a significant disadvantage compared with litigating in the U.S. Where, however, there is already an infringement finding, disclosure is likely to be less important and the restrictions can be seen as an advantage in that they reduce the cost of litigation and allow it to be completed quickly.

> Antitrust damages claims are still a relatively new phenomenon in England and, indeed, in Europe more broadly.

This may be a particularly relevant consideration when litigating with well-resourced defendants such as banks, which may be inclined to use disclosure as a way of fighting a war of attrition designed to wear down plaintiffs.

Other European jurisdictions typically provide even less disclosure — nothing at all or just very specifically identified documents. This tends to reduce the cost even further but may be considered just too limited by plaintiffs used to litigation in the U.S.

Collective actions

Long common in the U.S. and Canada, class actions have been much rarer in Europe. In recent years there have been some moves to increase the availability of collective redress mechanisms but, so far, they have all been of the opt-in variety, requiring plaintiffs affirmatively to join a group.

Opt-in mechanisms are fine for plaintiffs with relatively large claims, but plaintiffs with smaller claims typically will not bother joining a group. Apart from costing those plaintiffs the compensation to which they would be entitled, their non-involvement also reduces the overall amount at stake and thus some of the leverage otherwise available in settlement negotiations.

It may consequently be considered an advantage, at least over other European jurisdictions if not over the U.S., that legislation is about to be passed in England to introduce U.S.-style opt-out actions for antitrust claims. The Consumer Rights Bill has already passed through the House of Commons and is expected to complete its passage in the House of Lords and receive royal assent before the end of 2014.

Specialist tribunal

Unusually, England offers a choice of two different venues for antitrust damages claims: the regular courts or a specialist body, the Competition Appeals Tribunal. Until now, the CAT has only been permitted to handle damages actions that occur after infringement decisions and has suffered from various procedural disadvantages.

This, however, is about to change. The same new legislation that is to introduce opt-out class actions will also cure many of the deficiencies of the CAT and make it available for all types of antitrust actions. This is significant because the CAT has a number of potential advantages over the regular courts.

First, as one would expect from the name, it has specialist antitrust expertise. It already handles all appeals of antitrust infringement decisions and appeals from specialist economic regulators. Cases are heard by a panel of three members, typically including one High Court judge but also one economist.

Second, it has modern facilities and procedures. CAT members are supported by legally qualified referendaires (similar to law clerks), all orders and judgments are posted online, and submissions are often made in writing over email.

A docketing system is applied so that all decisions in the case involve at least the same legally qualified panel chairman. The CAT sits year round, and hearings are often easily arranged at short notice.

Compensation available

There are both advantages and disadvantages as regards the value of the compensation that may be obtained.

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There are no treble damages in England, and punitive damages are both exceptionally rare and nominal in amount. Further, there is no equivalent to the *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), decision in England. *Illinois Brick* held that only direct purchasers can recover damages for price-fixing conduct by suppliers.

> One advantage of bringing actions in England is the flexibility with which the jurisdiction of English courts may be established.

Without an *Illinois Brick* equivalent, indirect purchasers can sue for damages but the compensation received by direct purchasers may be reduced to the extent that the defendant shows the loss was passed on to others.

There are also no juries in antitrust cases so there is no possibility of a "runaway jury" award.

On the other hand, though, prejudgment interest is available and can be very significant. The European Union Court of Justice also recently mandated the availability of "umbrella damages."[10] The court established that victims of cartels must be permitted in principle to claim compensation from cartelists for the inflated prices of non-cartelist suppliers whose prices would not have been otherwise inflated but for the activities of the cartel.

Successful plaintiffs are also entitled to payment by the defendants for their costs of the action. As a quid pro quo, plaintiffs have to pay defendants their costs if the case or part of it fails, but this tends to be less of an issue where there is a prior infringement finding and plaintiffs can also insure against it.

Alternative causes of action

Insofar as issues in the U.S. are specific to antitrust claims, there are sometimes opportunities to pursue alternative claims. This can be seen in the Libor cases where some Commodity Exchange Act and breach-of-contract claims have survived.

Sometimes, though, there are problems with these actions as well because of short limitations periods or the lack of a direct contractual relationship with the banks. In any event, there are no treble damages in England.

There are also alternative causes of action in England. It is notable that there have been some Libor cases in England brought on a theory of fraudulent misrepresentation,[11] at least one of which has settled on seemingly favorable terms.

Alternative causes of action may be preferred to antitrust claims in England because they offer similar limitations periods and sometimes additional remedies, such as the setting aside of unprofitable transactions, or more favorable measures of damages.

CONCLUSION

Despite the issues in the banking cases in the U.S., and in the wider field of antitrust claims, plaintiffs will still undoubtedly prefer to bring claims in the U.S. because the rewards are likely to be greater. Where claims are barred, though, or are difficult, England offers a potentially attractive alternative forum. WJ

NOTES

[1] *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977); Atl. Richfield v. U.S.A. Petrol., 495 U.S. 328 (1990).

[2] *In re Libor-Based Fin. Instruments Antitrust Litig.,* No. 11-MD-2262, 935 F. Supp. 2d 666 (S.D.N.Y. Mar. 29, 2013).

[3] *Id*.

[4] *Crehan v. Inntrepreneur Pub Co.* (2004) EWCA Civ 637, para. 158.

[5] Case C-453/99, *Courage Ltd. v. Crehan* [2001] ECR I-6297, [2001] 5 CMLR 1058.

[6] *Crehan v. Inntrepreneur Pub Co.* (2006) UKHL 38.

[7] Council Regulation (EC) No 44/2001 of December 2000.

[8] Articles 2 and 6(1), Brussels Regulation. *See* also *Cooper Tire & Rubber Company Europe Ltd. v. Dow Deutschland Inc.* [2010] EWCA Civ 864.

[9] As a result of Council Regulation (EC) No 864/2007 of July 11, 2007, Article 6(3)(b). The regulation only takes effect in relation to causes of action accruing after Jan. 11, 2009: Article 32.

[10] *Kone AG v. ÖBB-Infrastruktur AG* (Case C-557/12).

[11] *E.g., Graisley Properties v. Barclays Bank plc; Deutsche Bank AG v. Unitech Global Ltd.; Deutsche Bank AG v. Unitech Ltd.* (2013) EWCA Civ 1372.

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Credit reporting agencies wrongly list man as deceased, suit says

A Maryland man is suing credit reporting agencies TransUnion and Equifax Information Services for allegedly identifying him as deceased on credit reports and continuing to sell the information to third parties.

Edwards v. TransUnion LLC et al., No. 2:14-cv-04825, complaint filed (E.D. Pa. Aug. 18, 2014).

Francis Raymond Edwards alleges the companies have negligently and erroneously marked him as deceased since at least sometime this year, causing him injury in the form of lost credit opportunities, credit defamation and emotional stress.

Credit companies do not calculate scores for the dead, making it practically impossible for those wrongly marked as "deceased" to obtain credit, according to the complaint filed in the U.S. District Court for the Eastern District of Pennsylvania, where TransUnion has its principal place of business.

Reporting agencies must follow procedures under the Fair Credit Reporting Act, 15 U.S.C. § 1681, to ensure they provide the "maximum possible accuracy" in credit reports and that the data is sold only for legitimate "permissible purposes," the complaint says. No legitimate, permissible purpose exists for the sale of a decedent's credit report, Edwards says.

Consumer credit report files are marked with an "X" to indicate a person has died when the agencies receive that information from their many data furnishing sources, the suit says.

But Edwards claims Trans Union and Equifax do nothing to independently verify the information and do not check the names against a "Death Master" file maintained by the Social Security Administration before marking a consumer as deceased.

Despite being on notice about this problem for years through consumer disputes and lawsuits, the complaint says, neither agency has done anything to institute new verification procedures.

Even in cases where consumers directly communicate with the agencies to inform them of the mistake, TransUnion and Equifax refuse to change the designation until the furnishing source that originally provided the "X" code changes that designation, according to the complaint.

Edwards says the agencies meanwhile continue to turn a profit for years by selling credit reports for supposedly deceased consumers to third parties. The complaint says the files are removed from the database only when they cease to be profitable because of a lack of requests.

Credit reporting agencies continue this practice despite knowing dead people do not apply for credit and that such information is commonly used by criminals to commit identity theft or credit fraud, according to the complaint.

> The plaintiff says credit reporting agencies continue to sell reports for supposedly deceased consumers despite knowing dead people do not apply for credit.

The Fair Credit Reporting Act, 15 U.S.C. § 1681: Congressional findings and statement of purpose

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to ensure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality and a respect for the consumer's right to privacy.

(b) Reasonable procedures

It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy and proper utilization of such information in accordance with the requirements of this subchapter.

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Edwards also alleges the companies communicate the possibility of fraud to relatives of the "truly" deceased and require them to provide death certificates or executorship papers before allowing them to access a decedent's credit report, but no such procedure exists for third parties looking to buy that information.

"There is no good-faith rationale to explain the defendants' practice other than the generation of revenue," the complaint says. "If the defendants actually believed Mr. Edwards was deceased, they had no permissible basis to sell his report. If the defendants believed Mr. Edwards was alive, they knowingly sold his report with a gross inaccuracy."

Edwards is seeking unspecified damages, attorney fees and costs. WJ

Attorneys:
Plaintiff: Mark Mailman, Francis & Mailman, Philadelphia

Related Court Document:
Complaint: 2014 WL 4253966

Document Section B (P. 21) for the complaint.

TELEPHONE CONSUMER PROTECTION ACT

Suit over mortgage debt cellphone calls can continue, judge says

A lawsuit accusing a mortgage loan company of calling a cellphone using an auto-dialer system without a consumer's permission in violation of federal law will move forward, an Ohio federal judge has ruled.

Hill v. Homeward Residential Inc., No. 13-CV-388, 2014 WL 4105580 (S.D. Ohio, E. Div. Aug. 19, 2014).

U.S. District Judge Gregory L. Frost of the Southern District of Ohio denied summary judgment motions from both defendant Homeward Residential Inc. and plaintiff Stephen M. Hill, noting the evidence presented did not show how Homeward received Hill's cellphone number.

According to the opinion, Hill took out a mortgage loan and note in 2006, and the servicing rights to the loan and note were transferred to Homeward.

After Hill fell behind in his payments, Homeward began making auto-dialer debt collection calls to his work and beginning in 2010 to his cellphone. Eventually, Hill told Homeward to only call his cell phone regarding the past-due payments, the opinion says. No date is given for when Hill gave this permission.

Hill sued Homeward in April 2013, alleging its calls to his cellphone prior to his giving permission violated the Telephone Consumer Protection Act, 47 U.S.C. § 227.

The TCPA prohibits making auto-dialer phone calls to a cellphone number without consent.

and although Hill gave permission to use his cellphone number, some calls from Homeward predate that request, the judge said.

Hill did provide his cellphone number in loan modification forms, but they restricted the use of the number to loan modification and not include debt collection, according to the opinion.

> Because it is unknown how the creditor obtained the plaintiff's cellphone number and that the defendant company made phone calls to it before given consent, the judge declined to grant summary judgment to either side.

According to the opinion, Hill argued he did not provide his cell phone number to Homeward and did not agree to the mortgage company calling his cellphone to collect on overdue payments before giving his express consent.

Homeward moved for summary judgment, and Hill cross-moved for summary judgment, but Judge Frost denied both motions.

Homeward did not present enough evidence that Hill knowingly provided his cell phone to the mortgage loan servicing company

Given that it is unknown how Homeward obtained Hill's cellphone number and that the company made phone calls to it before he expressly gave consent, Judge Frost ruled it was too early to grant summary judgment to either side. WJ

Attorneys:
Plaintiff: Bridget M. Wasson and Troy J. Doucet, Doucet & Associates Co., Dublin, Ohio

Defendant: Kimberly S. Rivera and James S. Wertheim, McGlinchey Stafford PLC, Cleveland

Related Court Document:
Opinion: 2014 WL 4105580

See Document Section C (P. 26) for the opinion.

Judge: Plaintiff gave debt collector consent to autodial his cellphone

A Minneapolis federal judge has tossed a proposed class-action suit against a debt collector that left pre-recorded messages on a man's cellphone, finding that the plaintiff never limited the use of that number.

Ranwick v. Texas Gila LLC, No. 13-cv-2792, 2014 WL 3891663 (D. Minn. Aug. 7, 2014).

U.S. District Judge Richard H. Kyle of the District of Minnesota found Texas Gila LLC did not violate the Telephone Consumer Protection Act as Brian Ranwick had claimed. The TCPA, 47 U.S.C. § 227, prohibits using an automatic dialer or pre-recorded voice messages to make any non-emergency call to a cellphone number without the prior express consent of the called party.

The judge said the company, as an agent of the Minnesota Department of Revenue, had "prior express consent" to contact Ranwick.

> The judge found that the debt collection company, as an agent of the state Department of Revenue, had "prior express consent" to contact the plaintiff.

According to the judge's opinion, the city of Minneapolis issued two parking tickets to Ranwick's vehicle sometime prior to March 2012, while his sister was driving the car. Ranwick's sister did not pay the citations, and the Department of Revenue hired Texas Gila to recover the fines.

The company allegedly called Ranwick's cellphone 12 times between May and July 2012, leaving pre-recorded messages regarding the debt. Ranwick filed suit in January, claiming the calls violated the TCPA.

In defense Texas Gila said Ranwick consented to the calls, according to the opinion. The company pointed to at least three occasions when Ranwick had called the Department of Revenue and confirmed his contact information, including his cellphone number. Two of those calls involved the tickets at issue in the suit.

Ranwick also provided his cell number on state and federal tax returns in 2011 and 2012, according to the opinion.

Judge Kyle considered two administrative rulings from the Federal Communications Commission, which is charged with implementing the TCPA, to clarify the meaning of "prior express consent." He said the first FCC ruling, issued in 1992, indicated that people who knowingly release their phone numbers have, in effect, given their permission to be called absent any instructions to the contrary.

The second FCC ruling, which was issued in 2008, further clarified that autodialed and pre-recorded message calls to a wireless number that was provided by the called party and made in an attempt to collect on a debt are permissible under the TCPA, he said.

Judge Kyle also said that Ranwick admitted in deposition testimony that he never told the Department of Revenue that it could not contact him on his cellphone or at any other number. He also never told Texas Gila to refrain from contacting him that number, according to the opinion.

Judge Kyle said Ranwick provided his cell phone number to the Department of Revenue in connection with the debt for which Texas Gila made the calls and he never attempted to revoke consent or limit the use of that number. Texas Gila did not violate the TCPA, the judge ruled. WJ

Attorneys:
Plaintiff: Nicholas R. Nowicki, McDonough & Nowicki, Minneapolis

Defendant: Issa K. Moe, Moss & Barnett, Minneapolis

Related Court Document:
Opinion 2014 WL 3891663

See Document Section D (P. 31) for the opinion.

FDCPA

Debt collection agency sends illegal letters to consumers, suit says

A New York debt collection agency sent letters to consumers, including a Pennsylvania resident, falsely stating that it could reduce their debt without their having to pay attorney fees, a class-action lawsuit says.

Burke v. Sunrise Credit Services Inc., No. 140802736, complaint filed (Pa. Ct. Com. Pl., Phila. County Aug. 21, 2014).

The complaint, filed in the Philadelphia County Court of Common Pleas, says Sunrise Credit Services made the false representations regarding attorney fees in violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, and Pennsylvania law.

According to the suit, Sunrise sent plaintiff Adele N. Burke a dunning letter — a notice sent to customers demanding payment on a delinquent account — in March 2013.

Burke says the letter told her to "save money and avoid paying fees to an attorney or debt consolidator today!"

The prospect of paying attorney fees is a "veiled threat" that Sunrise will file suit against Burke and other proposed members of the class, the complaint says.

Threatening legal action and implying that Sunrise is an attorney or that its letter is a communication from an attorney violates the FDCPA, the suit says.

Burke is seeking to represent all Pennsylvania residents who received a letter with the offending language from Sunrise in the last four years.

The complaint asks for statutory damages, attorney fees and litigation costs. WJ

Attorney:
Plaintiff: Thomas M. McGlaughlin Jr., McGlaughlin Law Group, Philadelphia

Related Court Document:
Complaint: 2014 WL 4146624

See Document Section E (P. 35) for the complaint.

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BankAtlantic CEO fights SEC charges he misled investors about loans

(Reuters Legal) – In continued fallout from the 2007-2008 mortgage crisis, lawyers for the chief executive officer of BankAtlantic Bancorp have asked a judge to vacate a court ruling that found the CEO made false statements to analysts about the bank's real estate loans.

Securities and Exchange Commission v. BankAtlantic Bancorp et al., No. 12-60082, motion for reconsideration filed (S.D. Fla. Aug. 21, 2014).

Arguing that the ruling was a legal error that must be corrected before trial, CEO Alan Levan and BankAtlantic are fighting a Securities and Exchange Commission civil suit in a Florida federal court.

Levan and the bank are accused of misleading investors in 2007 about the effect of a deteriorating Florida real estate market on the bank's loans.

In a motion Aug. 21, Levan's lawyers said the court overlooked evidence when it ruled that Levan disguised the true state of affairs in the bank's loan portfolios.

Based in Fort Lauderdale, Fla., BankAtlantic changed its name to BBX Capital after being acquired by regional lender BB&T Corp in 2012. Levan and a spokesman for BBX could not immediately be reached for comment.

In an emailed statement, SEC lawyer James Carlson said the defendants are using the reassignment of the case to a new judge as an opportunity to undo a previous ruling.

"We firmly believe there are no grounds to revisit the court's previous rulings, and we will respond accordingly," Carlson said.

Eugene Stearns, who represents Levan and BankAtlantic, said the SEC should never have brought its case, and evidence shows that Levan's statements about the loans "were categorically true."

Filed in 2012, the SEC complaint said BankAtlantic and Levan defrauded investors by downplaying the riskiness of loans the bank made on large tracts of land meant for residential housing. When BankAtlantic disclosed large losses on the loans in October 2007, its shares dropped 37 percent, the SEC complaint said.

In an interview Aug. 22, Stearns said Levan had warned about possible loan problems in July, saying there were no buyers or sellers in the real estate market. Levan was one of the first U.S. executives to warn of problems that led to the real estate market crash a few months later, he said.

REUTERS/Jonathan Ernst

In its complaint, the SEC said that despite having concerns about the real estate market, Levan assured analysts on a July 2007 earnings call that the bank's commercial real estate loans overall were performing "extremely well."

In the motion, Levan's lawyers said the loans were performing well at the time, meaning borrowers were current on interest and principal payments and the bank had excess collateral backing the loans.

Levan also shared his concerns with shareholders about how the loans might be affected by Florida's worsening real estate market, his lawyers said.

The case is set for trial in November.

Levan and the bank were dealt a setback last October, when a judge denied their motion for a judgment in their favor and granted a partial judgment to the SEC, finding that Levan had made false statements during the conference call. *SEC v. BankAtlantic Bancorp et al.*, No. 12-60082, 2013 WL 5588139 (S.D. Fla. Oct. 10, 2013).

This is Levan's second attempt to have that finding overturned. U.S. District Judge Robert Scola denied Levan's first motion to reconsider the finding before the case was reassigned to U.S. District Judge Darrin Gayles in June. WJ

(*Reporting by Dena Aubin*)

Related Court Document:
Motion for Reconsideration: 2014 WL 4146830

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CMO purchaser not liable for payment, 5th Circuit says

The purchaser of a collateralized mortgage obligation did not breach its contract with its seller when it refused to pay for the CMO after the financial product was not transferred to the right bank account, the 5th U.S. Circuit Court of Appeals has ruled.

Collective Asset Partners LLC v. VTraderPro LLC et al., No. 13-20619, 2014 WL 3974580 (5th Cir. Aug. 15, 2014).

Interpreting the contract language between purchaser VTraderPro and seller Collective Asset Partners, the appeals panel said VTraderPro was not obligated to pay for the CMO because it did not make it to the designated bank account in San Marino.

VTraderPro refused to buy the CMO after it was not transferred to the San Marino bank account and Collective Asset was forced to sell the financial product at a loss, according to the opinion.

Collective Asset sued VTraderPro in the U.S. District for the Southern District of Texas for breach of contract, claiming that the transfer of the CMO to the clearinghouse triggered VTraderPro's obligation to pay.

> On appeal, plaintiff Collective Asset Partners argued that the trial court judge wrongly determined that the contract required the CMO to reach the San Marino account.

A CMO is a financial instrument backed by pools of mortgage loans and other debt securities.

According to the 5th Circuit's opinion, VTraderPro offered Collective Asset $400,000 for a CMO that Collective owned.

VTraderPro allegedly told Collective Asset that it would pay the purchase price when the CMO was transferred to the investor's bank in San Marino.

Collective Asset hired a broker to handle the transaction but the broker failed to fill out the required paperwork completely and as a result, the instrument only got as far as a designated clearinghouse before being returned to Collective Asset, the opinion says.

U.S. District Judge Lee H. Rosenthal disagreed, saying the contract required Collective Asset to transfer the security to the San Marino bank account, which would trigger VTraderPro's duty to pay. The CMO never arrived in the account, and VTraderPro was not required to pay, the judge held.

On appeal, Collective Asset argued that Judge Rosenthal wrongly determined that the contract required the CMO to reach the San Marino account.

The 5th Circuit rejected the argument, affirming the lower court's decision.

"[T]he only reasonable interpretation is that … [VTraderPro] was not required to pay until the CMO was transferred to the San Marino bank account," the panel said. WJ

The contract between VTraderPro and Collective Asset

This letter will serve as an agreement between Vtrader PRO, LLC (VPRO) and Collective Asset Partners for the purchase of JPMCC 2007—LDP11 Cusip #US46631BAH87 with a face value of U.S.$500,000,000. The purchase price is $400,000 and this amount is to be paid to you within 10 business days from the date of transfer of the CMO's [t]o:

CITIBANK NY

DTC 908

Account 089154 CSC73464

Further Credit to:

Collective Asset Partners, LLC

Beneficiary Deposit Account NR. 840

BSI SPA San Marino

—*Collective Asset Partners LLC v. VTraderPro LLC et al.*, No. 13-20619, 2014 WL 3974580 (5th Cir. Aug. 15, 2014).

Attorneys:
Appellant: Paul B. Kerlin, Vorys, Sater, Seymour & Pease, Houston

Appellee: Charles Sturm, Howard L. Steele Jr. and Kevin Kennedy, Steele Sturm PLLC, Houston

Related Court Document:
Opinion: 2014 WL 3974580

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MERS allowed to seek appeal in Pa. counties' land record suit

(Reuters) – A Pennsylvania federal judge has ruled that MERS, an electronic mortgage registry used by the nation's largest banks, can seek an immediate appeal of a ruling that it violated state law by not recording mortgage transfers in county land offices.

Montgomery County, Pa. v. Merscorp Inc. et al., No. 11-CV-6968, 2014 WL 4452971 (E.D. Pa. Sept. 8, 2014)

In a decision Sept. 8, U.S. District Judge J. Curtis Joyner amended his June 30 ruling against MERS to state that his decision involves controlling questions of law that courts have differed over and that an appeal now could bring about an end to the case.

The 3rd Circuit Court of Appeals must still agree to hear any appeal.

An appeal would be a setback for Montgomery County, Pa., which scored a rare legal win against MERS in June. That was when Judge Joyner ruled that MERS' failure to record the transfer of mortgage loans in county land offices violated a 1925 state law governing real estate recording.

The county's lawsuit accuses MERS of corrupting the state's land record system and costing Pennsylvania $100 million in lost recording fees. It is seeking damages for the state's 67 counties.

"We are pleased that Judge Joyner granted MERS' request to seek immediate appellate review of the court's decision," said MERS spokeswoman Janis Smith. The ruling involves important legal issues with a significant impact on the mortgage industry, she said.

Lawyers for Montgomery County did not immediately respond to requests for comment.

Created in the 1990s, MERS was set up to ease the process of reselling mortgage loans for the creation of mortgage-backed bonds. Instead of documenting transfers with county land offices, banks register MERS as the mortgage holder and record loan transfers in the MERS system.

The county's lawsuit accuses MERS of corrupting the state's land record system and costing Pennsylvania $100 million in lost recording fees.

The registry came under attack during the 2007-2009 housing crisis, when it was accused of clouding the chain of title on mortgages and causing the filing of improper foreclosures.

Montgomery County is one of numerous local governments across the country to sue MERS for bypassing county land records. Several of those suits, including cases in Texas, Louisiana, Illinois and Florida, have ended in dismissal.

In its lawsuit, Montgomery County said MERS' practices have created confusion among property owners by systematically circumventing the state's recording law. In addition to violations of the state's recording law, the lawsuit alleges unjust enrichment and seeks the return of lost recording fees.

In his June ruling, Judge Joyner ruled that MERS had violated the state's recording law but left the unjust enrichment claim and damages to be determined at trial.

In July, lawyers for MERS had asked the court to amend that nonfinal order and certify it for an immediate appeal. An appeal now, before the District Court concludes the case, could end the litigation and the need for costly trial proceedings, the lawyers said.

The lawyers said there is substantial ground for a difference of opinion about whether the transfer of mortgage loans, as well as mortgages, must be recorded. Courts have also differed over whether counties have a right to sue under state recording laws, they said. WJ

(*Reporting by Dena Aubin*)

Attorneys:
Plaintiff: Joseph Kohn and Craig Hillwig, Kohn, Swift & Graf, Philadelphia; William Lamb, Lamb McErlane, West Chester, Pa.; Gary Mason, Whitfield Bryson & Mason, Washington; Jonathan Cuneo, Cuneo Gilbert & LaDuca, Washington

Defendants: Robert Brochin and Brian Ercole, Morgan Lewis & Bockius, Miami; Kristofor Henning, Morgan Lewis & Bockius, Philadelphia

Related Court Documents:
Complaint: 2011 WL 5367320
Order: 2014 WL 4452971

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BNY Mellon cost MBS investors over $1 billion, lawsuit says

By Peter H. Hamner, Esq., Senior Legal Writer, Westlaw Journal

The Bank of New York Mellon's failure to sue issuers of mortgage-backed securities for their inclusion of faulty loans in the financial products cost investors more than $1 billion, a federal class action claims.

Royal Park Investments SA/NV v. Bank of New York Mellon, No. 14-CV-6502, complaint filed (S.D.N.Y. Aug. 14, 2014).

The suit, filed Aug. 14 in the U.S. District Court for the Southern District of New York, accuses BNY Mellon, as trustee for the securities, of breaching contracts with investors of mortgage-backed securities by favoring the securities' issuers.

Royal Park Investments, a financial management firm created by the Belgian government, Dutch insurance company Ageas and French bank BNP Paribas, filed the suit alleging the breaches violated the Trust Indenture Act of 1939, 15 U.S.C. § 77.

Kevin Heine, a spokesman for **Bank of New York Mellon**, said the company will "vigorously" defend against the lawsuit.

REUTERS/Sebastien Pirlet

> Bank of New York Mellon was the "pet" or "pocket" trustee for the securities' issuers, putting their interest over the investors' to ensure future business, the suit says.

"The allegations are without merit and misconstrue the limited role of the trustee in these deals," he said.

Royal Park brought the complaint on behalf of itself and other investors in mortgage-backed securities for which BNY Mellon acted as the trustee. A mortgage-backed security is a financial instrument, tied to mortgage loans, that distributes payments drawn from the underlying loans to investors.

According to the suit, the issuers agreed to fill the securities with mortgage loans that met certain guidelines and loan qualities.

As trustee for the securities, BNY Mellon had a duty to ensure that the securities' issuers kept those promises, and it agreed to sue on behalf of investors if the issuers broke the promises, the suit says.

After a large portion of the underlying loans defaulted in 2008, the bank failed to protect investor interests by suing the issuers to cure the breaching loans, constituting a violation of the Trust Indenture Act and a breach of duty, the suit says.

The bank prioritized its business relationships with the securities issuers over its duties as trustee, according to the suit. It was the "pet" or "pocket" trustee for the securities' issuers, putting their interest over the investors' to ensure future business, the suit says.

"BNY Mellon's failures to act … caused plaintiff, the class and the covered trusts to suffer over $1 billion in damages, caused failures and shortages in the payment of principal and interest to plaintiff and the class, and caused steep declines in the value of plaintiff's and the class's RMBS," the complaint says.

Royal Park is seeking unspecified damages, class certification, litigation costs and attorney fees. WJ

Attorneys:

Plaintiff: Samuel H. Rudman, Robbins Geller Rudman & Dowd, Melville, N.Y.; Arthur C. Leahy and Steven W. Pepich, Robbins Geller Rudman & Dowd, San Diego

Related Court Document:
Complaint: 2014 WL 3965567

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FDIC, other federal banking agencies approve final liquidity/leverage ratio rules

By Cory Hester, Attorney Editor, Westlaw Capital Markets Daily Briefing

The Federal Reserve Board, the Federal Deposit Insurance Corp. and the Office of the Comptroller of the Currency adopted final rules requiring large banking institutions to maintain certain liquidity coverage and supplementary leverage ratios.

The rules, which were required pursuant to the Dodd-Frank Act and the Basel Committee on Banking Supervision, are intended to address concerns from the 2008 financial crisis regarding the strength of large financial institutions' liquidity positions.

The rules were issued pursuant to two separate releases jointly issued Sept. 3 by the federal banking agencies.

LIQUIDITY COVERAGE RATIO RULE

The liquidity coverage ratio rule will create for the first time a standardized minimum liquidity requirement for large and internationally active banking organizations. These institutions are now required to hold high quality, liquid assets, or HQLA, such as central-bank reserves and government and corporate debt.

> U.S. firms will be required to be fully compliant with the final liquidity coverage ratio rule by Jan. 1, 2017.

The agencies noted that a certain level of HQLA is required because these assets can be quickly and easily converted into cash "in an amount equal to or greater than its projected cash outflows minus its projected cash inflows during a 30-day stress period."

The ratio of these institutions' HQLA compared to their projected net cash outflow is known as the liquidity coverage ratio. This ratio will apply to all banking organizations with $250 billion or more in total consolidated assets, or $10 billion or more in on-balance sheet foreign exposure. The rules also apply to banking organizations' subsidiary depository institutions that have assets of $10 billion or more.

Additionally, the rule will apply a less stringent liquidity coverage ratio to bank holding companies and savings and loan holding companies that do not meet the above thresholds, but have $50 billion or more in total assets. The final rule does not apply to non-bank financial companies designated by the Financial Stability Oversight Council for enhanced supervision.

U.S. firms will be required to be fully compliant with the final liquidity coverage ratio rule by Jan. 1, 2017.

SUPPLEMENTARY LEVERAGE RATIO RULE

In addition to the final liquidity coverage ratio rule, these federal banking agencies separately adopted a final rule modifying the methodology that banking organizations should use to calculate their supplementary leverage ratio. The final rule reflects recent changes agreed to by the Basel Committee on Banking Supervision.

The supplemental leverage ratio compares a banking organization's capital levels to the amount of total leverage exposure. The final rule modifies the methodology for including off-balance sheet items, including credit derivatives, repo-style transactions and lines of credit, in the denominator of the supplementary leverage ratio.

The final rule also requires institutions to calculate total leverage exposure using daily averages for on-balance sheet items and the average of three month-end calculations for off-balance sheet items.

Companies will be required to make certain public disclosures under the final rule beginning in the first quarter of 2015. These organizations are not required to meet the minimum supplementary leverage ratio, however, until Jan. 1, 2018. WJ

REUTERS/Jim Young

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Watchdog group

CONTINUED FROM PAGE 1

Obama's Financial Fraud Enforcement Task Force.

Regulators are targeting financial institutions and third-party payment processors, which act as intermediaries to give merchants access to the national banking system. These entities are the "choke points" where fraud can be curtailed by blocking unscrupulous merchants' access to the financial system.

Under the "Choke Point" program, the Justice Department issued subpoenas in spring 2013 to more than 50 banks and third-party payment processors and began civil and criminal investigations into 15 banks and payment processors as of May this year.

Despite of the goal of consumer protection, Operation Choke Point has generated controversy. In a May 29 staff report, the U.S. House of Representatives' Committee on Oversight and Government Reform expressed concern that the Justice Department was using the program to target companies that are seen by the government as "high-risk" or objectionable even though they are legal businesses.

In the report, the committee says legitimate companies in the businesses of firearms and ammunition sales, adult entertainment, check cashing and payday lending are finding that banks, under pressure from the Justice Department, will not do business with them, and their accounts are being closed.

Attorney **Dylan Howard**, a shareholder in the Atlanta office of **Baker Donelson**, confirms the initiative has been subject to debate.

"Operation Choke Point is controversial because critics contend it is an effort … to majorly curtail both fraudulent activity and legal financial services like payday lending," Howard said. He is not involved in the case.

Judicial Watch says it has asked the Justice Department to turn over all records concerning the legal basis for the alleged targeting of legitimate business entities under Operation Choke Point. The group also seeks documents identifying the criteria for selecting which businesses are subject to scrutiny, as well as records listing the business types and industries being targeted.

The organization submitted the document request under the Freedom of Information Act, 5 U.S.C. § 552, which aims to ensure an informed populace by requiring federal agencies to make various types of information available to the public, albeit with certain statutory exceptions.

Danielle Blevins, an attorney and crisis public relations professional at **Media & Communications Strategies** in Washington, who is not involved in the suit, says the FOIA plays an important role in the relationship between the public and its government.

"[The] FOIA is one of the greatest tools for government transparency. When the government refuses to divulge its activities, the general public will become hesitant to trust it and believe the government has something to hide. Public officials often view the information they are entrusted with as their personal property when in fact, that information belongs to the public. Under the First Amendment, sunshine laws like FOIA shed light on government activities and reinforce the premise our government officials are faithfully executing their duties on behalf of the people. To have an open, transparent society allows for trust and collaboration between the government and our citizenry," Blevins said.

Despite of the goal of consumer protection, "Operation Choke Point" has generated controversy.

Judicial Watch says it asked the Justice Department for the information May 1 and the agency responded by letter May 15, indicating the request had been given a tracking number.

The group says the FOIA requires a federal agency to decide within 20 days of receiving a request whether to comply and to provide notice of its decision, the reasons therefore and to notify the requestor of the right to appeal any adverse determination regarding disclosure.

The Justice Department did none of these things by the deadline, the organization says.

Judicial Watch alleges the Justice Department is unlawfully withholding the documents. The group is seeking an order compelling production of the documents. It also seeks attorney fees and costs.

Neither the Justice Department nor Judicial Watch responded to requests for comment on the suit. As of press, time the agency has not filed a responsive pleading. WJ

Attorneys:
Plaintiff: Paul J. Orfanedes, Judicial Watch, Washington

Related Court Document:
Complaint: 2014 WL 4447198

See Document Section A (P. 19) for the complaint.

The Freedom of Information Act, 5 U.S.C. § 552, exemptions from disclosure

- Specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy.
- Related solely to an agency's internal personnel rules and practices.
- Specifically exempted from disclosure by a statute.
- Trade secrets and commercial or financial information obtained from a person and which is privileged or confidential.
- Inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency.
- Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
- Records or information compiled for law enforcement purposes in certain circumstances.
- Contained in or related to reports prepared by, on behalf of, or for the use of an agency responsible for the supervision of financial institutions.
- Geological and geophysical information and data, including maps, concerning wells.

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MONEY SERVICES FIRM PAYS $125,000 TO END BSA VIOLATIONS CASE

BPI Inc., a now-defunct New Jersey-based money services business, agreed to pay a $125,000 civil penalty after regulators accused the company of having lax anti-money laundering controls. The Financial Crimes Enforcement Network said in an Aug. 28 statement that the business, owned by Portuguese bank Banco BPI, was penalized after regulators found repeated violations of the Bank Secrecy Act, which mandates that financial institutions keep records so law enforcement has a paper trail to aid in the investigation of crime. FinCEN said a 2011 examination by regulators revealed the company did not address previous warnings issued in 2005 and 2006 about deficiencies in its anti-money laundering program. BPI did not report suspicious financial transactions to regulators and allowed customers to use expired identification documents when transferring funds, according to the agency. BPI stopped operating as a money services business in March 2014 after Banco BPI set up an office in New Jersey.

REGULATORS SEEK INPUT ON CRA GUIDANCE REVISIONS

Three federal financial agencies are seeking public comment on proposed revisions to guidance on regulations interpreting the Community Reinvestment Act, which mandates that banks serve the credit needs of low- and moderate-income customers in their neighborhoods. In a joint Sept. 8 statement the Federal Reserve Board, the Federal Deposit Insurance Corp. and the Office of the Comptroller of the Currency said the changes cover topics suggested by members of the financial industry and are intended to help bankers better understand the CRA's regulations and how examiners evaluate compliance with the statute. The proposed revisions discuss alternative methods to deliver retail financial services, such as ATMs and online banking, as well as innovative lending programs, including small-dollar loans offered with financial literacy and savings components. The suggested revisions, which will be published in the Federal Register, are available at http://www.occ.gov/news-issuances/news-releases/2014/nr-ia-2014-121a.pdf.

FDIC LAUDS 7 BANKS ON LOCAL LENDING EFFORTS

The Federal Deposit Insurance Corp. has given seven banks ratings of "outstanding" for their local lending efforts. The banks are Kansas-based First Heritage Bank, Louisiana-based Business First Bank, Massachusetts-based Rockland Trust Co., Minnesota-based Venture Bank, Montana-based First Security Bank, New York-based Tompkins Trust Co. and Utah-based Bank of American Fork. The ratings appear in the agency's Sept. 4 report on compliance with the Community Reinvestment Act. The statute mandates that financial institutions do business with low- and moderate-income customers in their local areas, and regulators must periodically assess how each bank is complying with these goals. The agency's latest CRA evaluations are available at https://www.fdic.gov/regulations/community/monthly/2014/crasep14.html.

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