December 2013 Legal Bulletin

2014 LBA Bank Counsel Conference Held Earlier this Month

The 2014 LBA Bank Counsel Conference was held earlier this month in New Orleans. I believe that this was the 30th year that the LBA has held a banking law conference. While I have not been around for all thirty, I have attended many of them. A few things remain constant about the conferences over the years. We have been fortunate to continue to have quality speakers and a first class venue. Another thing that is notable is that there is a large group of folks that return each year and their presence adds a unique camaraderie. At the same time the conference is welcoming and friendly to newcomers. Each year the attendance numbers keep increasing, yet the number of banks is contracting due to consolidation. There is certainly no shortage of new regulations to keep up with.

The lineup of speakers this year was outstanding. David Cromwell returned to update the group on secured lending, Russell Primeaux and Chad Grand spoke on the growing problem of patent trolls. Jay Gulotta and Lisa Traina spoke on e-discovery and document retention. Judge Dodd returned to speak to the group on bankruptcy developments and Ron Wood spoke on title agency best practices.

This was the first year that we offered a breakout session allowing attendees to choose between two presentations. Professor Keith Hall spoke on property and oil and gas law, while at the same time Ted Kitada gave a bank operations update. I think this went well, and we may try to offer a breakout next year. One of the memorable presentations for me this year was a presentation by Bubba Henry on professionalism. During the presentation, Mr. Henry reflected on his life, shared stories and memories, and was very candid with the group about his views on how to handle the pressures of life and to conduct oneself as a true professional.

Friday started earlier then we traditionally do, which was by design. This was in response to feedback from some attendees that we finish on Friday earlier so that those that travel may get on the road a bit sooner to avoid some of the traffic. The day started with a panel discussion on handling third party contracts and vendor management issues. Panelists were Trudy Bennette , Julia Terry and Denise Brown. Nationally recognized UCC expert Barkley Clark followed with a presentation on UCC recent developments. One of the hot topics this year is the new CFPB regulation on ability-to-repay and qualified mortgages. Joe Gendron and Chad McClung did an excellent job of boiling down a complicated set of regulations into a well-organized presentation. Marie Moore gave a thorough overview of advanced property insurance issues for lenders.

Ashton Ryan, CEO of First NBC Bank, was our featured luncheon speaker. He shared with us the story of how his bank in a short period of time has grown from a de novo start-up to a multi-billion dollar financial institution, which is now publicly traded. He also shared with us his views on the future of community banking and that there is a place for community banks in the marketplace.

The second half of the day continued with an attorney from Atlanta, Walt Moeling who shared with the group lessons learned from his experience in representing failed banks and their directors against FDIC lawsuits. The day finished with a customized ethics presentation by Rick Stanley. His presentation addressed conflicts of interest issues and other ethics requirements that banking and transactional lawyers may face.

Bob Thibeaux with Sher, Garner, Cahill, Richter, Klein, Hilbert, LLC in New Orleans is serving as this

year's Bank Counsel Committee chairman. One of his primary duties is to help plan the conference agenda. Bob is also the reason that the conference was able to stay on schedule. Many thanks Bob for your help and support!

Appreciation and gratitude should also be expressed to all of the conference sponsors. Without their support we would not be able to continue to offer such a quality conference while keeping registration fees reasonable. Many thanks to our cocktail reception sponsor, Adams and Reese, LLP. Many thanks to our Friday luncheon sponsor, Sher, Garner, Cahill, Richter, Klein, Hilbert, LLC. Many thanks also to all of our general sponsors: Baker Donelson, Bearman, Caldwell & Berkowitz, PC; Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, LLC; Chaffe McCall, LLP; Favret, Demarest, Russo, Lutkewitte, APLC; Fishman, Haygood, Phelps, Walmsley, Willis & Swanson, LLP; Gordon, Arata, McCollam, Duplantis & Eagan, LLC; Jones Walker, LLP; Kean Miller, LLP; King, Krebs & Jurgens, PLLC; Louisiana Bankers Service Corp.; McGlinchey Stafford, PLLC; Newman, Mathis, Brady & Spedale, PLC; Phelps Dunbar, LLP; and Stone, Pigman, Walther Wittmann, LLC.

In closing, I would also like to thank LBA staffers Taylor LaHaye and Janet Holmes for their work on the conference. They are the reason everything ran so smoothly.

Click here to see conference photos.

Legislative Study Committee Studies Land Title Search Periods

HCR 18 by Representative Neil Abramson authored HCR 18 during the 2013 state legislative session. The study resolution establishes a Title Insurance Committee to study land title search periods provided by La. R.S. 22:512(17)(b)(vi)(gg), relative to the required search periods of mortgage and conveyance records for the issuance of policies of title insurance in the state of Louisiana. Section 512 requires that if the transaction being insured is a sale, the minimum search period shall be thirty years, or longer, if necessary, in order to reach an arms-length sale between unrelated, third parties. If only a mortgage is being insured, then the search shall be for a minimum of ten years or two links in the chain of title, whichever is greater. However, such minimum search periods for a sale or mortgage shall not apply to any transaction made prior to and on January 1, 2013, by the Road Home Corporation, The Louisiana Land Trust, or any political subdivision, of property originally acquired in connection with the Road Home Program.

The study committee is also charged to develop recommendations to facilitate adequate safeguards for the issuance of polices of title insurance, while ensuring that the process is efficient and does not cause unnecessary expense or delay; and to report its findings to the legislature no later than February 1, 2014. The LBA participates on the committee through its representative, LBA General Counsel, David Boneno. The LBA Bank Counsel Committee as well as in-house bank attorneys have been a helpful resource for feedback on issues raised during the study.

This HCR is a follow up to Act 1028 of the 2010 Regular Session that amended state law in order to increase the minimum title search periods for a sale or mortgage. Since then some practitioners have expressed concern that the increased minimum search period may result in increased costs, duplication of efforts, and unnecessary delays in loan closings.

The study committee has begun its work and has held three meetings. There has been much discussion during the meetings on whether current statutory search periods should be altered. One area where there appears to be some interest in considering some changes involves the former practice of relying on an existing owners title policy and only searching the title records from the date of the policy forward. This was a practice used by some title attorneys in some circumstances prior to the 2010 legislative enactment. Some have argued that this should be allowed in commercial transactions in order to save the borrower or purchaser money, thousands of dollars in some large commercial transactions. There are questions as to whether this practice should be allowed at all or whether it should be limited to commercial transactions. It is expected that this issue will be discussed at future meetings.

Remotely Created Checks and Warranty Rights

I recently received another call from a banker asking about their rights involving a remotely created check that was reported in a customer's monthly statement. The customer received their bank statement and notified the bank that the item (remotely created check) was unauthorized. The check did not contain a traditional handwritten signature; instead it contained language that the check was authorized by the drawer, which was a remotely created check. Sometimes, remotely created checks will contain the printed or typed name of the drawer on the signature line. Remotely created checks are increasingly being used for payment for telephone and internet based purchases or payments.

Regulation CC was amended by the Federal Reserve Board in 2006 to provide a definition for "remotely created check", which means a check that is not created by the paying bank and that does not bear a signature applied, or purported to be applied, by the person on whose account the check is drawn. (12 CFR 229.2(fff)). Barkley Clark comments on remotely created checks in his treatise, The Law of Bank Deposits, Collections and Credit Cards. He observes that checks that are created remotely are big business for depositary banks and their merchant depositors and that telemarketers and credit card companies are well-known users. Although remotely created checks are associated with telephone transactions, they are also being used in Internet transactions and by credit card companies as a way to get quick payment. Further, promoters of the use of remotely created checks believe that these instruments can be processed more quickly and cheaply than other types of payment methods. According to Mr. Clark, checks created by the payee are known by a variety of names – phone checks, telechecks, preauthorized drafts, and paper drafts. Clark, The Law of Bank Deposits, Collections and Credit Cards, Section 10.02[2].

Remotely created checks involve transactions where A is essentially writing a check to itself using B's checking MICR information. In a typical transaction, Business A uses information obtained from Customer B over the phone or the Internet to create the check and fill in the terms. Typically, the check does not bear Customer B's signature – just a notation that Business A is authorized to debit the account on Customer B's behalf. The form of notation is not standardized, nor does the MICR line of the check contain anything that would alert the paying bank that the item is not an ordinary check. Clark, The Law of Bank Deposits, Collections and Credit Cards, Section 10.02[2].

A customer who receives a statement containing a remotely created check that was not authorized, may demand that his deposit account be recredited by his or her bank on the basis that the check is not properly payable. (UCC 4-401). In a traditional check transaction, once the payor bank recredits the customer's account, the payor bank looks to shift the loss to the upstream bank that presented the instrument for payment, but this is difficult to accomplish since the presenting bank and any transferring banks (collecting banks) make no warranty to the paying bank that the check is authorized. Recognizing the unique concerns involving an increased risk of fraud with remotely created checks and the need for a uniform rule to apply throughout the country, the Federal Reserve sought to address the issue by amending Regulation CC.

The Federal Reserve issued a final rule, effective July 1, 2006, amending Regulation CC to create transfer and presentment warranties. Under the Fed's transfer and presentment warranties, a bank that transfers or presents a remotely created check and receives a settlement or other consideration warrants to the transferee bank, to any subsequent collecting bank, and to the paying bank that the person on whose account the remotely created check is drawn, authorized the issuance of the check in the amount stated on the check and to the payee stated on the check. (12 CFR 229.34(d)(1)). The final rule applies to remotely created checks drawn on both consumer and business accounts. The warranty applies only to banks and ultimately shifts liability for losses attributable to an unauthorized remotely created check to the depositary bank if it could not push it back to the merchant depositor. (See Reg. CC, Section 229.34(d)(1)). The theory, according to Barkley Clark, is that the depositary bank is in the best position to police telemarketers and other merchant depositors to prevent fraudulent collection of remotely created checks.

It is important that any claim for warranty is asserted promptly because there is a defense available to the warranting bank. Section 229.34(d)(2) provides that if a paying bank asserts a claim for breach of warranty under paragraph (d)(1) of this section (for remotely created checks), the warranting bank may defend by proving that the customer of the paying bank is precluded under

UCC 4-406, as applicable, from asserting against the paying bank the unauthorized issuance of the check. (See Reg. CC, Section 229.34(d)(2)).

Under amended Reg CC provisions, a bank that pays a remotely created check and is timely notified, in accordance with 4-406 requirements, will be able to seek recovery from the collecting bank or bank of first deposit under a breach of warranty claim.

There is interplay between state UCC laws and federal regulations relative to remotely created checks. While each state has adopted into its law a version of the U.C.C., Regulation CC is a federal regulation that applies nationwide. Commentary to the Reg. CC revisions points out that Section 608(b) of the Expedited Funds Availability Act provides that Board rules prescribed under that Act shall supersede any provision of state law, including the UCC as in effect in such state, that is inconsistent with the Board rules. It further provides that to the extent that state law is inconsistent with the Board's rules on remotely created checks, the Board's rules would supersede such state law.

2014 Judicial Interest Rate Set at 4%

Pursuant to the authority granted by La. R.S. 13:4202(B)(1), Louisiana Commissioner of Financial Institutions Commissioner, John Ducrest, has determined that the judicial interest rate for the for calendar year 2014 will be four (4.0%) percent per annum. This rate is unchanged from the previous three years.

ABA and ICBA, Coalition Back Efforts to Stop Patent Trolls

Earlier this month the ABA, ICBA and a coalition of other trade groups advocated patent-reform legislation to address problems with patent trolls, otherwise known as patent-assertion entities (PAEs).

In a joint letter to Sen. Charles Schumer (D-N.Y.), the coalition expressed support for his legislation to improve the post-grant review process for covered business methods established under the America Invents Act. The Patent Quality Improvement Act of 2013 (S. 866) would make the program permanent to ensure that that full spectrum of low-quality business-method patents will be subject to review if asserted under the threat of litigation.

The coalition also expressed its support for legislation introduced by Sen. Orrin Hatch (R-Utah) to enable fee shifting in unsuccessful patent-infringement lawsuits, or allowing the court to award the prevailing party reasonable fees and other expenses. By allowing fee shifting, the Patent Litigation Integrity Act of 2013 (S. 1612) would help discourage PAEs from filing frivolous lawsuits, the coalition wrote.

In related news, ABA, ICBA and a coalition of other trade groups also recently urged Congress to direct the Federal Trade Commission to go after PAEs' unfair and deceptive demand letters. The coalition letter notes that demand letters often allege that the mere use of everyday technology violates the patent holders' rights. They also use the threat of litigation to extract a "licensing fee" from recipient business that often settle the claims rather than run the risk of litigation.

LBA supports efforts being made at the national level on this issue, and likely will pursue state legislation on this topic as well.

Recent Court Decision Involving Tax Sales

The Louisiana Fourth Circuit Court of Appeal recently issued a decision on affirming the grant of an exception of a no right of action involving the challenge of a tax sale. The underlying facts involved two individuals who were purchasing a property through a recorded bond for deed contract. Taxes on the property were not paid and it was subsequently sold at tax sale to a Ms. Mott in 2007. According to the opinion, the titled owner, Easy Money, had proper notice of the tax sale, while the bond for deed purchasers, Ms. Poche and Mr. Stewart had no notice. Ms. Mott sued Easy Money to quiet tax title, and the trial court entered judgment in favor of Mr. Mott on July 27, 2012. Ms. Mott subsequently filed a petition to enjoin Ms. Poche and Mr. Stewart from using the property.

On December 27, 2012, Mr. Poche and Mr. Stewart brought suit against Ms. Mott and Easy Money to annul the tax sale. The two cases were consolidated and Ms. Mott filed an exception of no right of action on the grounds that Poche and Stewart were not entitled to notice of tax sale. The trial court granted the exception in favor of Ms. Mott on April 25, 2013, and the matter was appealed to the Fourth Circuit. The Court noted in its opinion that Poche and Stewart presented no evidence to establish their right to notice. In particular, they presented no evidence of any installment payments or that they had paid taxes on the property. The Court noted that the evidence showed that title to the property never transferred from Easy Money to Porche and Stewart.

The Court also addressed an issue that Porche and Stewart asserted that they had a recorded mortgage and therefore had a legally protected interest in the property. The Court observed that the “special mortgage” contained in the bond for deed contract does not trigger the notice requirement provided for in *Mennonite*. Although the contract includes the word mortgage, the Court explained that it is not a traditional mortgage, but instead is conditional. The Court further clarified that the “special mortgage” is a form of security to guarantee that the title of the property will be transferred once certain conditions have been met, and since it is conditional the mortgage may never come into being.

An argument that La. R.S. 47:2180 entitles them to receive notice was also addressed by the Court. The Court disagreed explaining that the statute did not create an affirmative duty to search the mortgage and conveyance records prior to tax sale, but instead to provide notice to each person to whom taxes have been assessed and to the record title owner.

NOTE: Louisiana R.S. 47:2180 was repealed in 2009 by Acts 2008, No. 819, §2, eff. Jan. 1, 2009. In 2012 by Acts 2012 No. 836, current La. R.S. 47:2153(A)(2)(b) was enacted, which requires a tax collector to send a pre-tax sale notice to all tax sale parties, including mortgage holder, by certified mail return receipt requested.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISIONS OR WITHDRAWAL. Mott v. Easy Money, Inc., ---So.3d---, 2013-1017 (La.App. 4 Cir. 12/4/13).

Note: The information contained in this LBA Legal Bulletin is not intended to constitute, and should not be received as, legal advice. Please consult with your counsel for more detailed information applicable to your institution.

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