



## Introduction

The Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law by President Obama on July 21, 2010, was enacted as a measure to promote financial stability and protection for consumers through increased regulation of nearly every aspect of the consumer finance industry. In the year since its enactment, the Dodd-Frank Act has already had significant impact; yet, the great weight of this sprawling legislation is yet to be seen. Beginning July 21, 2011, the newly created Bureau of Consumer Financial Protection (“CFPB”), created by Title X of the Dodd-Frank Act, is scheduled to take over the administration of a number of federal financial laws previously administered by various other agencies. In connection with this transfer of authority, the CFPB is required to promulgate a number of rules, regulations, and orders addressing numerous industry practices. Moreover, given the infancy of the Dodd-Frank’s provisions, increased litigation seeking to clarify this new legislation is inevitable.

In an effort to stay apprised of these significant industry changes, Burr & Forman’s Dodd-Frank Newsletter will serve as a monthly update of recent case law, news, and developments related to the Dodd-Frank Act.

## - - RECENT CASES - -

### Preemption

*Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2011).

Plaintiff Vida Baptista filed a two-count class action complaint against JP Morgan Chase Bank (“Chase”) alleging that Chase violated Florida’s par value statute, Fla. Stat. § 655.85, by charging

a check cashing service fee. In response, Chase filed a motion to dismiss arguing that Baptista’s claims were preempted by the OCC’s regulations promulgated pursuant to the National Bank Act, 12 U.S.C. § 21, *et seq.* The United States District Court for the Middle District of Florida granted Chase’s motion, dismissing Baptista’s complaint for failure to state a claim upon which relief can be granted.

On appeal, the Eleventh Circuit Court of Appeals affirmed dismissal of Baptista’s claims, finding them preempted pursuant to the newly codified *Barnett Bank* standard. Specifically, the Court noted that Section 5136(b)(1)(B) of the Dodd-Frank Act amended the National Bank Act’s preemption provisions to mandate that state consumer financial laws are preempted by the National Bank Act if the state law “prevents or significantly interferes with the exercise by the national bank of its powers” in accordance with the standard set forth in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996). Thus, the Court found that “it is clear under the Dodd-Frank Act, the proper preemption test asks whether there is a significant conflict between the state and federal statutes - that is, the test for conflict preemption.” *Id.* at 1197.

Applying this conflict preemption standard, the Court held that there was a clear conflict between OCC regulations and the Florida statute at issue, as “the OCC specifically authorizes banks to charge fees to non-account holders presenting checks for payment” and “[t]he state’s prohibition on charging fees to non-account holders . . . is in substantial conflict with federal authorization to charge such fees.” *Id.* at 1198. Accordingly, the Court affirmed dismissal of Baptista’s complaint as preempted by the National Bank Act.

*Epps v. JPMorgan Chase Bank*, No. WMN-10-1504, 2010 WL 4809130 (D. Md. Nov. 19, 2010), *appeal docketed* No. 10-2444 (4th Cir. Dec. 30, 2010)

Plaintiff Donna Epps filed suit against JPMorgan Chase Bank (“Chase”) alleging that Chase violated certain provisions of Maryland’s Credit Grantor Closed End Credit statute (“CLEC”). Specifically, Epps alleged that Chase failed to give her the pre-sale notice required by the CLEC after it repossessed her vehicle for failure to make timely payments. In response, Chase filed a motion to dismiss arguing that all of Epps’ claims were preempted under the National Bank Act, 12 U.S.C. § 21 *et seq.*, and certain OCC regulations.

Noting that Epps did not seek a common law remedy, but “specific statutory remedies under a state statute,” the United States District Court for the District of Maryland agreed with Chase that “[e]nforcing those remedies would interfere with federal regulation of national banks.” *Id.* at \*6. The Court further noted a number of cases in which other courts similarly held that claims under state statutes analogous to Maryland’s CLEC were preempted by federal banking law. Accordingly, the Court held that all of Epps’ claims were preempted and granted Chase’s motion to dismiss.

On December 30, 2010, Epps appealed the District Court’s decision to the Fourth Circuit Court of Appeals. Notably, the American Bankers Association, the Consumer Bankers Association, and the Financial Services Roundtable collectively filed a Brief of the Amici Curiae in support of the District Court’s decision on May 31, 2011. In their brief, the *amici* bring three arguments to the Court’s attention, including one regarding the status of federal preemption post-enactment of the Dodd-Frank Act. In this regard, the *amici* argue for the Court to conclude that the amendments to the National Bank Act created by the Dodd-Frank do not fundamentally change the longstanding analysis regarding the preemptive effect of the National Bank Act and the OCC’s regulations. Specifically, the *amici* point out that once the new provisions of the Dodd-Frank Act become effective, they will essentially do nothing more than codify “the pre-existing, well-understood analysis as set forth in *Barnett* and its progeny.” Thus, the *amici* urge

the Court to conclude that judicial decisions and OCC preemption rules which are consistent with or based upon the *Barnett* standard for conflict preemption remain good law post-enactment of the Dodd-Frank, and, therefore, the Dodd-Frank Act would not affect the Court’s decision regarding the outcome of the case.

To date, the Fourth Circuit Court of Appeals has not issued a decision regarding Epps’ claims.

## Pre-Dispute Arbitration Agreements

*Pezza v. Investors Capital Corporation*, 767 F. Supp. 2d 225 (D. Mass. 2011).

The United States District Court for the District of Massachusetts was recently faced with the issue of whether Section 922 of the Dodd-Frank Act, which amends the whistleblower protection set forth in the Sarbanes-Oxley Act, 18 U.S.C. §1514A, and contains a prohibition on pre-dispute arbitration agreements, applies retroactively to conduct which arose prior to enactment of the Dodd-Frank Act. In addressing this issue, the Court looked to other provisions of the Act containing similar prohibitions in an effort to determine congressional intent regarding retroactivity. The Court concluded that the various sections of the Dodd-Frank Act restricting pre-dispute arbitration agreements fall into three distinct categories: “(i) sections applying to future disputes only, or (ii) sections applying to future disputes and arbitration agreements entered into after a certain time period, and (iii) sections for which Congress has not expressed any intent with respect to retroactivity.” *Id.* at 229.

In the first category - sections applying to future disputes only - the Court discussed two subsections of Section 921 of the Dodd-Frank Act. Subsection (a) of Section 921 amended Section 15 of the Securities Exchange Act of 1934, 15 U.S.C. § 78o, by granting the Securities Exchange Commission the authority to restrict mandatory pre-dispute arbitration for customers or clients of any broker, dealer, or municipal securities lender. *See* 15 U.S.C. § 78o.

Subsection (b) of Section 921 similarly amended Section 205 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-5, by providing the Securities Exchange Commission the authority to restrict mandatory pre-dispute arbitration for customers or clients of any investment advisor. See 15 U.S.C. § 80b-5(f). Both of these provisions provide authority to the Commission to condition or limit the use of arbitration agreements with respect to “any future dispute” arising between the concerned parties. Thus, the Court held that “Congress clearly limited the Commission’s authority to restrict pre-dispute arbitration to *future* disputes arising under Section 921 of the Act.” *Id.*

In the second category - sections applying to future disputes and arbitration agreements entered into after a certain period of time - the Court discussed Section 1028(b) of the Dodd-Frank Act, which amended 12 U.S.C. § 5518 by granting to the newly created Bureau of Consumer Financial Protection the authority to restrict mandatory pre-dispute arbitration agreements between a consumer and a “covered person” as defined in the Act. See 12 U.S.C. § 5518(b). Like Section 921, Section 1028 grants the Bureau this authority with respect to “any future dispute.” *Id.* However, subsection (d) of Section 1028 further provides that that “any regulation prescribed by the Bureau under subsection (b) shall apply . . . to any agreement between a consumer and a covered person entered into *after the end of the 180-day period beginning on the effective date of the regulation*, as established by the Bureau.” *Id.* (emphasis added). Thus, the Court held that this provision applied not only to future disputes alone, but also only to those disputes and agreements arising after the time period specified by the Act.

Finally, the Court addressed the third category - sections for which Congress expressed no intent regarding retroactivity. In addition to Section 922 at issue before the Court, the Court placed three sections in this category: (i) Section 748, which amends the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, to void arbitration agreements regarding disputes which would result in the payment by the Commission of awards to whistleblowers; (ii) Section 1057, which restricts pre-dispute arbitration for certain “covered employees” as defined in the Act; and (iii) Section 1414, which amends the Section

129C of the Truth in Lending Act, 15 U.S.C. §1601 *et seq.*, to restrict the use of pre-dispute arbitration provisions for certain residential mortgage loans and extensions of credit. For each of these sections, the Court found no expression of congressional intent regarding the temporal reach of the prohibition on pre-dispute arbitration.

With congressional intent unclear, the Court then looked specifically to whether Section 922 of the Act would produce any “retroactive consequence.” While noting that a number of courts have refused to apply retroactively state statutes voiding certain arbitration provisions, on the basis that such statutes affect contractual rights, the Court found that Section 922 principally concerns a type of jurisdictional, rather than contractual, statute. Thus, the Court adopted the reasoning of the U.S. Supreme Court that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” *Id.* at 233. The Court concluded that, given its procedural - as opposed to substantive - character, Section 922 should apply to conduct that arose *prior* to its enactment. *Id.* at 234.

## Interchange Fees

*TCF National Bank v. Bernanke*, No. 11-1805, 2011 WL 2555696 (8th Cir. June 29, 2011).

TCF National Bank sought to enjoin Section 1075 of the Dodd-Frank Act, known as the “Durbin Amendment,” which will limit the rate some financial institutions may charge for processing debit card transactions. The Durbin Amendment added several new provisions to the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.*, permitting the Board of Governors of the Federal Reserve System to limit the amount of any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction. TCF moved for a preliminary injunction, alleging that §§ 1693o-2(a)(2), (a)(4), and (a)(6), are facially unconstitutional because they would require the Board to set an interchange rate below the cost of providing debit card services. TCF

also alleged that the provisions arbitrarily exempt small issuers, thereby violating TCF's due-process and equal protection rights.

The United States District Court for the District of South Dakota denied TCF's motion for a preliminary injunction. On appeal, the 8th Circuit Court of Appeals affirmed the denial, finding that TCF was unlikely to succeed on the merits of the case. Specifically, the Court held:

Setting aside the confiscatory-rate analysis, we conclude that the challenged provisions of the Durbin Amendment survive rational basis review for the reasons stated by the district court, namely that "Congress's decision to link interchange fees to issuing banks' actual costs bears a reasonable relationship to two proper legislative purposes: (1) to ensure that such fees are reasonable and (2) to prevent retailers and consumers from having to bear a disproportionate amount of costs of the debit card system." Accordingly, based upon the current state of the record (which may change in the future), we do not believe that TCF is likely to prevail on its due-process claim.

*Id.* at \*4. The Court further agreed with the District Court's conclusion that that "the Durbin Amendment's distinction between larger and smaller issuers of debit-cards is rationally related to the government's legitimate interests in protecting smaller banks, which do not enjoy the competitive advantage of their larger counterparts and which provide valuable diversity in the financial industry, and in ensuring consumer access to debit cards." *Id.* Accordingly, the Court found that TCF was not likely to succeed on the merits of its claims and affirmed denial of TCF's motion for a preliminary injunction.

## Whistleblower Protections

*Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 1672066 (S.D. N.Y. May 4, 2011)

Plaintiff Patrick Egan filed suit against Defendants pursuant to certain retaliatory discharge provisions found in the Dodd-Frank

Act. Specifically, Egan sought to invoke 15 U.S.C. § 78u-6(h)(1)(B)(i), which creates a private right of action for whistleblowers alleging retaliatory discharge or other discrimination. Defendants, however, claimed that Egan was not covered by the Dodd-Frank provisions because he never personally contacted the SEC to report any misconduct. Thus, Egan's claims raised three questions: (1) whether any disclosure to the SEC is required as a predicate to an action under the whistleblower and anti-retaliation provisions of the Dodd-Frank Act; (2) if such disclosure is required, whether the party invoking the Act must have personally and directly reported to the SEC; and (3) whether Egan adequately alleged that the information he provided to attorneys investigating the misconduct was ultimately reported to the SEC.

In answering these questions, the United States District Court for the Southern District of New York first looked to whether the Dodd-Frank Act requires disclosure to the SEC as a predicate to any action under the whistleblower protection provisions. The Court noted Egan's argument that while the anti-retaliation provisions of the Dodd-Frank Act explicitly prohibit retaliation against whistleblowers who provide information and testimony *to the SEC*, they also protect whistleblowers who make disclosures falling into one of four additional categories. See 15 U.S.C. § 78u-6(h)(1)(A)(i) - (iii). Egan argued that this contradiction requires an interpretation of the Act which would not require reporting to the SEC. Disagreeing with Egan's contentions, the Court stated:

The contradictory provisions of the Dodd-Frank Act are best harmonized by reading 15 U.S.C. § 78u-6(h)(1)(A)(iii)'s protection of certain whistleblower disclosures not requiring reporting to the SEC as a narrow exception to 15 U.S.C. § 78u-6(a) (6)'s definition of a whistleblower as one who reports to the SEC. Therefore, Plaintiff must either allege that his information was reported to the SEC, or that his disclosures fell under the four categories of disclosures delineated by 15 U.S.C. § 78u-6(h)(1)(A) (iii) that do not require such reporting:

those under the Sarbanes–Oxley Act, the Securities Exchange Act, 18 U.S.C. § 1513(e), or other laws and regulations subject to the jurisdiction of the SEC.

*Id.* at \*5.

Notably, the Court also compared the Act’s protections for whistleblowers alleging securities law violations with broader whistleblower anti-retaliation provisions under the purview of the newly-created Bureau of Consumer Financial Protection. Those provisions protect persons providing disclosures “to the employer, the Bureau, or any other State, local, or Federal, government authority or law enforcement agency” of violations of law or regulations under the Bureau’s jurisdiction. See 12 U.S.C. § 5567(a)(1). In making its comparison, the Court noted that “the absence of similarly broad protections for whistleblowers alleging securities law violations indicates that Congress intended to encourage whistleblowers reporting such violations to report to the SEC.” *Id.* at \*4.

After deciding that disclosure to the SEC is a required predicate to any action for whistleblower protection, the Court then considered whether such disclosure must be made by the plaintiff personally and directly to the SEC, or whether joint action is sufficient. Specifically, the Court addressed the following question: “is a prospective whistleblower covered by the Dodd-Frank Act if he gave information to attorneys who he alleges on information and belief reported it to the SEC?” Finding in the affirmative, the Court noted Egan’s complaint alleged that his disclosures were the basis for the attorneys’ investigations. As such, Egan adequately pleaded that he acted jointly with the attorneys in an effort to provide information to the SEC regarding the alleged misconduct.

Finally, the Court addressed whether information obtained through investigation must actually be reported to the SEC. Egan’s complaint alleged only “on information and belief” that the attorneys passed his information on to the SEC. At oral argument, Egan conceded that he could not offer direct knowledge or evidence that such reporting occurred, but made additional claims which the

Court held supported his allegation that the information was reported. Nonetheless, such allegations were not part of the pleadings for purposes of the Defendants’ Rule 12(b) motion to dismiss. Thus, the Court granted Egan leave to amend his cause of action under the Dodd-Frank to plead facts supporting his knowledge of such disclosure, implicitly indicating that if such disclosure did not take place, Egan’s cause of action would fail.

## Federal False Claims Act

*Saunders v. District of Columbia*, No. 02-01803, 2011 WL 2176900 (D. D.C. June 6, 2011)

The United States District Court for the District of Columbia was faced with deciding, as a matter of first impression, the proper limitations period applicable to Plaintiff Theresa Weston Saunders’ Federal False Claims Act (“F-FCA”) retaliation claim. Previously, Congress had never specified the limitations period applicable to F-FCA retaliation claims, thereby requiring courts to “borrow” statute of limitations applicable to the closest analogous state law. With the enactment of the Dodd-Frank Act, however, Congress amended the F-FCA to supply an express statute of limitations for retaliation claims of no more than three years after the date on which the retaliation occurred. See 31 U.S.C. § 3730(h)(3).

Because Saunders’ claims arose prior to the enactment of the Dodd-Frank, however, the Court was faced with determining whether the three-year limitations period supplied in the Act should apply retroactively. While finding some basis for suggesting that the limitations period supplied by the Act should apply retroactively, the Court ultimately found it unnecessary to reach a final determination on the issue. Rather, because the most analogous state law, the District of Columbia False Claims Act, is nearly identical to the F-FCA and contains a three-year statute of limitations, the Court concluded, without deciding the retroactivity question, that Saunders’ claims were subject to a three-year limitations period and were, therefore, timely.

## - - NEWS & DEVELOPMENTS - -

### ***President Obama Nominates Richard Cordray as Director of the CFPB***

On July 18, 2011 President Obama announced his nomination of former Ohio Attorney General Richard Cordray as Director of the CFPB. Recruited by Elizabeth Warren, Cordray has served as the Bureau's Chief Enforcement Officer over the past six months, playing a large role in getting the Bureau's enforcement division up and running.

To see President Obama's full announcement, visit the following link: <http://www.whitehouse.gov/the-press-office/2011/07/18/remarks-president-nominating-richard-cordray-director-consumer-financial>.

### ***CFPB Issues Progress Report***

On July 18, 2011 the CFPB issued a progress report entitled "Building the CFPB." The 32-page report outlines the purpose, goals, and duties of the Bureau, as well as various programs that are either pending or already underway. Notably, the report further identifies the Bureau's leadership teams and how it intends to coordinate with other federal entities to achieve its goal of bringing "clarity" into the consumer marketplace.

A link to the full report is available on the CFPB's blog: <http://www.consumerfinance.gov/blog/>.

### ***CFPB to Begin Supervision Program of Large Depository Institutions on July 21.***

The CFPB recently outlined its approach to supervising large depository institutions to ensure compliance with federal consumer financial protection laws. Beginning July 21, the CFPB will "be a cop on the beat - examining banks and protecting consumers," Special Advisor to the Secretary of the Treasury Elizabeth Warren stated.

The supervision process will begin remotely with a review of information, data analysis and regular communications with regulated entities, and will continue with periodic on-site examinations and follow-up. The CFPB plans to provide additional information regarding the supervision process to the 111 depository institutions with total assets over \$10 billion early this August.

For the entire press release, visit the following link: <http://www.treasury.gov/press-center/press-releases/Pages/tg1236.aspx>.

### ***CFPB to Make Mortgage Servicing a Priority.***

On July 21, 2011, the Consumer Financial Protection Bureau will officially "open for business." Raj Date, Associate Director for Research, Markets, & Regulation for the Bureau, testified before the Subcommittee on Financial Institutions and Consumer Credit and the Subcommittee on Oversight and Investigations on July 7, 2011, that "on that day, mortgage servicing will be one of the CFPB's priorities." Date focused his testimony on two "structural features" of the mortgage servicing industry which make it especially prone to consumer harm: (1) consumers do not choose their mortgage servicers, and (2) the current structure of servicing fees creates a strong incentive to underinvest in adequate technology, people, and processes to handle cyclical spikes in delinquencies.

In response to these current issues, the CFPB will promulgate consumer protection standards for the entire mortgage servicing industry, and will "use its authorities to help ensure that all mortgage servicers have adequate systems and procedures to ensure compliance with federal law." Additionally, Date noted that CFPB has joined with the federal prudential regulators, HUD, the Treasury Department, and the FHFA in forming an interagency working group to collaborate on the creation of national mortgage servicing standards.

To see Date's full testimony, visit the following link: <http://financialservices.house.gov/UploadedFiles/070711date.pdf>.

## **CFPB Seeking Input on Key Element of Nonbank Supervision Program.**

On June 29, 2011, the CFPB issued a Notice and Request for Comment seeking public comment on the development of an initial “larger participant” rule to be issued no later than July 21, 2012.

Pursuant to Section 1024 of the Dodd-Frank Act, the CFPB has nondepository supervisory authority over any covered person that is “a larger participant of a market for other consumer financial products or services” as defined by a rule to be issued by the CFPB. To develop such a rule, the CFPB issued on June 29, 2011 a Notice and Request for Comment seeking public comment on issues arising in connection with determining how to identify a larger market participant, including: (i) the criteria and thresholds to define a larger participant; (ii) the data to be used in measuring such criteria; and (iii) measurement dates and supervision timelines. Additionally, the CFPB’s Notice seeks comment regarding which markets for consumer financial products and services should be addressed in the initial rule. Specifically, the CFPB seeks comment regarding the following markets: (i) debt collection; (ii) consumer reporting; (iii) consumer credit and related activities; (iv) money transmitting, check cashing, and related activities; (v) prepaid cards; and (vi) debt relief services.

For the full-text of the CFPB’s Notice and Request for Comment, see *Defining Larger Participants in Certain Consumer Financial Products and Services Markets*, 76 Fed. Reg. 38059 (June 29, 2011).



*No representation is made that the quality of services to be performed is greater than the quality of legal services performed by other lawyers.*

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