CHAPMAN AND CUTLER LLP

To the Point!

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Advertising Rewards

Financial institutions that offer reward programs to their customers should be aware of three recent actions taken by the National Advertising Division ("*NAD*") of the advertising self-regulatory system administered by the Council of Better Business Bureaus. The NAD recommended that certain cash-back rewards program advertisements be withdrawn and that claims be modified to clearly and conspicuously disclose within the advertisement itself that material qualifications to earn the rewards exist, in a manner easy for consumers to notice, read and understand. The NAD stated that general statements contained in the advertisement that "limitations apply" were insufficient and rejected the advertisers' claims that it was adequate for consumers to receive the required clarifying information at a later time and not in the advertisement. Financial institutions should not rely on general disclosures in their advertising that "limitations apply," and should review their reward program advertising to ensure that each advertisement contains an adequate disclosure of the material conditions to qualify for the reward.

In re Crane: An Update

In re Crane (Case 11-90592, U.S. Dist. Ct., C.D. Il., February 29, 2012) ("*Crane*") involved two mortgages on real estate owned by the debtors. The bankruptcy trustee contended that both mortgages were defective and subject to avoidance pursuant to 11 U.S.C. § 544 because they failed to state the interest rate and the maturity date in violation of the requirements of a land mortgage set forth in Section 11 of the Conveyances Act. 765 ILCS 5/11. The bankruptcy trustee asserted that, while the mortgages were effective as between the debtors and the lender, they failed to give constructive notice to subsequent bona fide purchasers and that the bankruptcy trustee had the power to avoid the mortgages. The lender admitted that neither mortgage contained the interest rate or the maturity date, but contended that both mortgages were sufficient under Illinois law to constitute constructive notice, thereby barring avoidance of the mortgages by the bankruptcy trustee.

The Bankruptcy Court concluded that a mortgage that describes all of the elements found in 765 ILCS 5/11, including the amount of the debt, its maturity date and the underlying interest rate, is free from avoidance challenges from bona fide purchasers and bankruptcy trustees. According to the Bankruptcy Court, the same cannot be said when a mortgage does not contain all of those elements. Thus, under the Bankruptcy Court's decision the elements enumerated in the statute are mandatory, rather than permissive, and must be included within a mortgage in order to protect it against avoidance challenges. Following the Bankruptcy Court's decision, the lender appealed to the United States District Court.

The Illinois legislature has responded to the *Crane* decision and legislation has been passed by both houses to state that the requirements set forth in 765 ILCS 5/11 are permissive and not mandatory. Accordingly, the failure to state the interest rate or the maturity date, or both, shall not affect the validity or priority of the mortgage, nor shall its recordation be ineffective for notice purposes regardless of when the mortgage was recorded. The amendment was sent to the Governor for signature on December 11, 2012.

Although the enactment of the amendment into law would be favorable to Illinois mortgage lenders, it should be noted that the bill has not yet been signed by the Governor. Further, if enacted, the effective date of the amendment is June 1, 2013. Accordingly, Illinois mortgage lenders will want to comply fully with 765 ILCS 5/11, including the use of an interest rate rider and inclusion of an express maturity date in mortgages and mortgage amendments, at least until the amendment takes effect.

FTC Revises the Children's Online Privacy Protection Rule

The FTC's Children's Online Privacy Protection Rule (the "*Rule*") implementing the Children Online Privacy Protection Act of 1998 ("COPPA") became effective in 2000. The FTC determined that revisions to its Rule were necessary to address technological changes to the online environment that have occurred since 2000, including mobile devices and social networking. The amended Rule will become effective on July 1, 2013.

The Rule made the following notable amendments:

- Changes to the definition of "personal information" that cannot be collected without parental notice and consent to now include (i) geolocation information, (ii) photographs, audio files and videos that contain a child' image or voice, and (iii) persistent identifiers that can recognize users over time and across different websites or online services, such as IP addresses and mobile device IDs (with exceptions for those used solely to support the internal operations of the site or service);

- Identifies new ways of getting parental consent and provides a streamlined process for approval of other methods in the future;

- Revises the parental notice to make it shorter, easier to understand and timely;

- Clarifies that a website "operator" subject to the Rule includes an operator of a child-directed site that permits third parties to collect personal information from children through plug-ins or advertising networks;

- Replaces the "100% deletion standard" that currently applies to an operator that enables children to publicly post personal information (e.g., on social networking sites, chats, bulletin boards or blogs) with a "reasonable measures standard" so that an operator would not be deemed to have collected personal information if it takes reasonable measures to delete such information before being made public;

- Strengthens data security protections by requiring that covered website operators and online service providers take reasonable steps to release children's personal information only to companies that are capable of keeping it secure and confidential;

- Requires that covered website operators adopt reasonable procedures for data retention and deletion measures; and

- Strengthens the FTC's oversight of self-regulatory safe harbor programs, requiring such programs to conduct annual audits and report audit information to the FTC.

All businesses, including financial institutions, that make the business decision to operate websites or provide online services directed at children or that have actual knowledge that they are collecting personal information from children under 13 must comply with COPPA and the Rule. The FTC has adopted significant changes in this Rule which will require review of data security protections, adoption of policies related to data retention and deletion and modification of the parental consent notice used.

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Marc Franson • 312.845.2988
Scott Fryzel • 312.845.3784
Heather Hansche • 312.845.3714
Doug Hoffman • 312.845.3794
John Martin • 312.845.3474
David Worsley • 312.845.3896

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Chapman and Cutler LLP | 312.845.3000 | 111 West Monroe Street | Chicago | IL | 60603