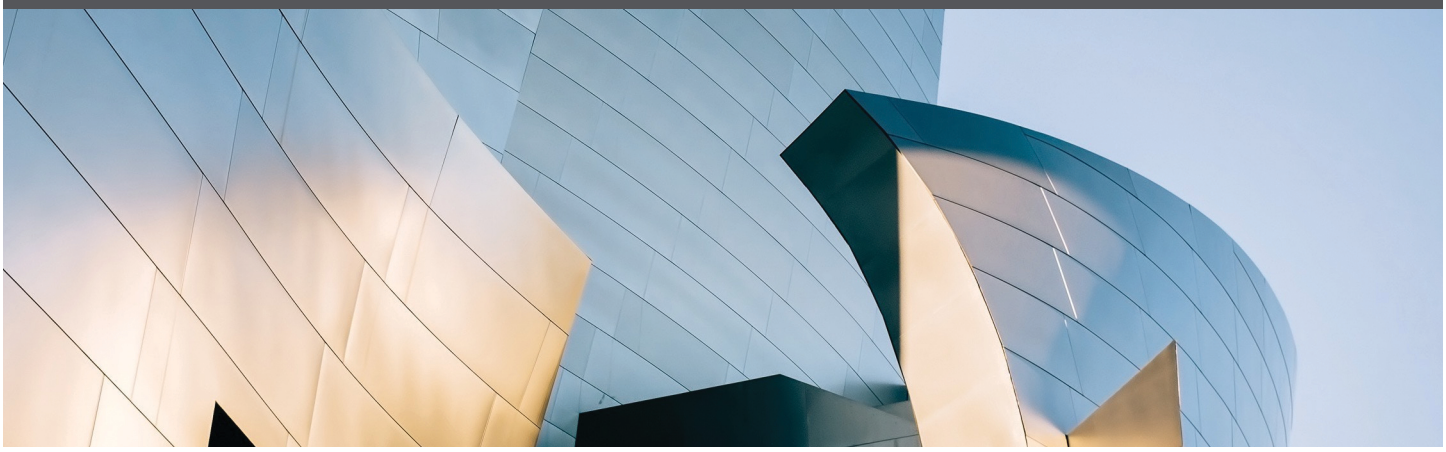
BLANKROME

Consumer Finance Litigation



JANUARY 2019 • NO. 1

Ninth Circuit Holds That Fannie Mae Is Not a Consumer Reporting Agency under FCRA

The United States Court of Appeals for the Ninth Circuit held that Fannie Mae is not a "consumer reporting agency" under the Fair Credit Reporting Act ("FCRA"). Accordingly, Fannie Mae was not liable to borrowers for alleged violations of the FCRA based on inaccurate information obtained by lenders in Fannie Mae's proprietary software.

On January 9, 2019, a divided Ninth Circuit panel ruled that the Federal National Mortgage Association, or Fannie Mae, was not a "consumer reporting agency" within the meaning of the Fair Credit Reporting Act ("FCRA"). In *Zabriskie v. Federal National Mortgage Association*, the Ninth Circuit reversed the Arizona District Court's holding that Fannie Mae acts as a consumer reporting agency when it licenses its proprietary software, Desktop Underwriter ("DU"), to lenders and that it is therefore subject to the FCRA. *Zabriskie v. Fed. Nat'l Mortgage Ass'n*, Nos. 17-15807, 17-16000, 2019 WL 137931 (9th Cir. Jan. 9, 2019).

The FCRA defines a "consumer reporting agency" as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of preparing or furnishing consumer reports." 15 U.S.C. § 1681a(f). In reaching its conclusion, the Ninth Circuit specifically examined whether Fannie Mae's licensing of its DU software constituted: (1) regularly engaging in the practice of assembling or evaluating consumer credit information (2) for the purpose of preparing or furnishing consumer reports.

SUMMARY OF FACTS AND DISTRICT COURT'S DECISION

From 2012 through 2013, Plaintiffs/Appellants Richard and Kristin Zabriskie ("Plaintiffs" or "Zabriskie") worked with multiple lenders in an effort to refinance their home. During this period, Plaintiffs' potential lenders obtained eight DU Findings, which were reports generated by Fannie Mae's DU software after lenders enter information about the borrowers and property that is the subject of the loan. Three of the eight DU Findings incorrectly identified the presence of a foreclosure and resulted in a "Refer with Caution" recommendation.

Zabriskie filed suit in the United States District Court for the District of Arizona alleging that the inaccurate DU Findings establish that Fannie Mae violated the FCRA because it "failed to follow reasonable procedures to assure maximum possible accuracy of the consumer reports it prepared[.]" *Id.* at *2; 15 U.S.C. § 1681(e). Following the filing of cross-motions on summary judgment, the district court ruled that Fannie Mae was a "consumer reporting agency." Subsequently at trial, the district court instructed the jury that Fannie Mae is a "consumer reporting agency" and that DU Findings are "consumer reports," and the jury returned a verdict for Plaintiffs awarding $30,000 in damages. *Id.* Fannie Mae appealed.

NINTH CIRCUIT'S DECISION

The Ninth Circuit reviewed the district court's summary judgment ruling *de novo* and provided a two-part plain language analysis of the statute. Analyzing the first element of the statutory definition for a "consumer reporting agency" under 15 U.S.C. § 1681a(f), the panel found that Fannie Mae did not regularly engage in the practice of assembling or evaluating consumer information. It explained that in creating, licensing and updating software that lenders used to assemble or evaluate consumer credit information, Fannie Mae was simply providing a tool for lenders. The lenders assembled the consumer information by inputting it into the DU software or importing reports from credit bureaus. The lenders, not Fannie Mae, contracted with and paid the credit bureaus for the consumer credit reports. The panel opined that "when a person uses a tool to perform an act, the person is engaging in the act, the tool's maker is not." *Id.* at *3.

Moving onto the second element, the Ninth Circuit again agreed with Fannie Mae and found that even if Fannie Mae were assembling or evaluating consumer information through DU, "it did not do so for the purpose of furnishing consumer reports to third parties." *Id.* at *4. "Fannie Mae provides DU for the same reason it provides the Selling Guide: to help lenders determine whether Fannie Mae will purchase the loans they originate. […] DU contains no evaluation or new information regarding the borrower's creditworthiness that wasn't already provided by the lender or credit bureau." *Id.* at *5. In fact, the panel notes that the inaccurate foreclosure indication on the DU Findings originated from a certain code on Plaintiffs' credit report provided by the credit bureaus. *Id.* at n.1.

To further bolster its opinion, the Ninth Circuit found that "aspects of the FCRA's statutory scheme suggest that Congress intended to exclude Fannie Mae from the definition of consumer reporting agency." *Id.* Specifically, it noted that the FCRA imposes several duties on consumer reporting agencies, including the duty to follow reasonable procedures to assure maximum possible accuracy of consumer information and the duty to provide a variety of disclosures to consumers. However, requiring Fannie Mae to adhere to consumer disclosure duties would run contrary to congressional intent that Fannie Mae operate only in the secondary mortgage market "to deal directly with lenders, and not to deal with borrowers themselves." *Id.* at *6.

CONCLUSION

This decision does not expand lender liability for inaccurate information in proprietary underwriting software. While the majority's opinion states that "[l]enders assemble the consumer information by inputting it into DU" and "[l]enders decide if and when to evaluate the information to create DU Findings," there is no discussion of lenders assembling or evaluating the DU Findings for the purpose of furnishing consumer reports to third parties. *Id.* at *3. The Ninth Circuit found that the purpose of the DU Findings was "to determine a loan's eligibility for subsequent purchase by Fannie Mae." *Id.* at *5. Therefore, the application of this decision remains relatively narrow in scope. Moreover, the dissenting justice noted that "if Fannie Mae is not held liable, the Zabriskies are left with no recourse." *Id.* at *9, n. 8.

Mr. Streibich would like to thank Cheryl S. Chang, Diana M. Eng, and Christine Lee for their assistance in developing this Alert.

For more information, please contact:

Wayne Streibich
215.569.5776 | wstreibich@blankrome.com

Cheryl S. Chang
424.239.3472 | chang@blankrome.com

Diana M. Eng
212.885.5572 | deng@blankrome.com

Christine Lee
424.239.3835 | clee@blankrome.com