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Credit Union Legal Hurdles for 2013

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Credit Union Times recently asked the attorneys on the Credit Union Team at Kaufman & Canoles for their predictions for the top 10 major legal challenges for credit unions in 2013.

Since Kaufman & Canoles believes that legal fees for credit unions need to be better managed, controlled and hopefully even reduced, we have elected to highlight only seven predictions, rather than 10. They are as follows:

1. Mergers. Andy Keeney predicts that there will be as many as 200 "friendly" mergers in 2013. The NCUA reportedly has "pre-selected" merger partners or merger candidates. They are pushing some healthy credit unions to merge. Unfortunately, there is little published legal guidance on mergers. The NCUA recently conducted a 1 1/2 hour webinar on how to do a merger. In 2013, the agency may "burden" credit unions who want to merge with potential time delays and regulatory objections. We predict that the regulatory issues and legal issues will be overcome and mergers of credit unions will continue to increase.

2. Legal Opinions. Ran Randolph predicts that legal opinions will return as a customary part of member business loans in 2013. Before the recession, some credit unions decided to forego requiring borrower's counsel to render legal opinions on transaction fundamentals such as good standing and enforceability of loan documents. However, because of recent problems in MBLs, more and more credit unions likely will insist upon legal opinions to gain the comfort factor on those issues a legal opinion can provide.

3. Loan Participations. Dustin DeVore predicts that loan participations will increase in importance in 2013. Credit unions will continue to attempt to increase their loan portfolios. The NCUA has stated that in evaluating loan participations the same

principles of evaluation and analysis apply as when the credit union is considering a third-party loan. These principles include underwriting, interest rate risk, and other factors. Some reported delinquencies have occurred in participations, therefore we predict that loan participations will definitely be on NCUA's watch list in 2013.

4. Confessed Judgments. Erin Deal predicts that the use of confessed judgments will continue to increase given the recent economic environment. A confessed judgment is where the borrower to an MBL agrees upfront to a judgment if there is a default in the loan. It is a state-by-state issue, but we predict that credit unions and the NCUA will encourage the drafting of documents, especially when amending loans, to ensure that a judgment is enforceable and a confessed judgment may become a standard requirement.

5. Class Action Litigation. Marc Darnell predicts that the current trend of consumer-related class action litigation will increase in 2013 as credit unions increase their loan portfolios with competitive interest rates, as credit becomes more available in general, and as real estate and vehicle sales continue to improve. Specifically, Marc predicts that TILA, RESPA, FCRA, and state-specific consumer protection act litigation will increase, and the plaintiffs' bar will try to find common issues of fact and law upon which to premise class action allegations.

6. Litigation With Military Personnel. Brian Dolan predicts that recent successes in Department of Justice lawsuits against mortgage servicers for violating the Servicemembers Civil Relief Act will encourage service members threatened with foreclosure, or charged interest above 6% for pre-service debt, to file complaints with the DOJ. As a result, expect additional federal lawsuits against servicers, as well as lenders, including credit unions. We also expect to see a rise in the number of SCRA lawsuits filed by individual service members against their lenders, including credit unions, demanding damages plus all attorneys' fees and costs.

7. Mortgages. Meagan Thomasson predicts that new mortgage regulations will present the greatest legal and compliance challenge for credit unions in 2013. Thousands of dollars in training, forms and even legal fees might be incurred by credit unions who must address the multitude of regulations relating to mortgage lending and servicing. Some new rules will take effect in early 2013. With pages numbering in the thousands, credit unions will need to understand the implications of these regulatory changes, and prepare to strengthen their compliance programs. We expect mortgage regulations to be the number one hot challenge for credit unions in 2013.

Andy Keeney is a frequent contributor to Credit Union Times and more than 35 years of experience as a credit union attorney. He is co-chair of the Kaufman & Canoles Credit Union Team in Norfolk, Va.

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