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BANKING ALERT

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New Jersey Federal Court Denies Motion for Appointment of Receiver

In *U.S. Bank National Association v. FPG Bridgewater Owner One, LLC,* Civil Action No. 3:17-5454 (D.N.J. May 17, 2018), the court declined to appoint a receiver requested by the mortgagee to manage and operate a commercial office building.

In *FPG Bridgewater Owner One, LLC*, the borrower defaulted on a $37.95 million loan secured by a three-story office building with over 224,000 square feet of rentable space. Notably, one tenant had leased the entire space, with a lease set to expire in February 2021. Additionally, the borrower defaulted on mezzanine financing from a third-party, Frontier Acquisition, LLC ("Frontier"), which was secured by ownership interests in the borrower.

The mortgagee filed suit after accelerating the debt, and Frontier successfully intervened in the action to protect its interest. The mortgagee sought the appointment of a receiver, claiming that the mortgage stated that upon default of the borrower, the mortgagee could "in its sole discretion…apply for the appointment of a receiver[.]" Additionally, the mortgagee contended that due to the upcoming expiring lease of the single tenant, there was considerable concern that the borrower was unmotivated to secure a continuing lease obligation from the tenant, leaving the property without any continuing rental income. In opposition, the borrower noted that it was paying all gross rent directly to the mortgagee for over a year while managing and operating the property, and that there was a reserve balance of rent payments, after paying expenses, in the amount of $1.5 million. The borrower further argued that a receiver was inappropriate because the appointment would disrupt the relationship between the borrower and the single tenant. Frontier, too, opposed the request, for essentially the same reasons asserted by the borrower.

The court agreed with the borrower that the appointment of a receiver, a "drastic remedy" under the law, was not appropriate at the time. There was no indication of waste, misuse or other circumstance that would warrant the appointment of a receiver. Moreover, the language in the

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mortgage was not a self-executing consent to an appointment but, rather, permitted the mortgagee to apply for a receiver upon default under the loan documents.

New Jersey Appellate Division Upholds Final Judgment of Foreclosure Where Mortgage and Note Were Originally Held by Two Different Entities

In *Capital One, N.A. v. Peck*, Docket A-0582-16T4 (N.J. App. Div. Jun. 18, 2018), the Appellate Division addressed the unusual foreclosure situation in which one entity owned the note and another held the mortgage, and set forth a new rule regarding standing under such circumstances. The lender who made the mortgage loan sold the note to the Federal Home Loan Mortgage Corporation ("Freddie Mac") but retained the mortgage. The original lender later merged with Capital One. After defendant defaulted on the mortgage, Capital One initiated foreclosure proceedings. Defendant appealed from the entry of final judgment, arguing that because Freddie Mac owned the note, it was the only entity with the right to enforce the mortgage.

The Appellate Division started from the baseline that a foreclosure plaintiff "may establish standing either through possession of the note or as an assignee under N.J.S.A. 46:9-9 'if it presented an authenticated assignment indicating that it was assigned the note before it filed the original complaint'" (quoting *Deutsche Bank Nat'l Trust Co. v. Mitchell*, 422 N.J. Super. 214, 224 (App. Div. 2011). That rule, however, was developed in the ordinary situation in which one entity owns both the mortgage and the note. Although it was "difficult to imagine circumstances where one would want to hold a mortgage without having the right to act on the underlying debt," (quoting *Bank of N.Y. v. Raftogianis*, 418 N.J. Super. 323, 332 (Ch. Div. 2010), that was the case before the panel: Freddie Mac owned the note and Capital One retained the mortgage. To avoid the possibility of one entity foreclosing on the home while another entity enforces the note, the panel held that "when the note is separated from the mortgage, the plaintiff in a foreclosure action must demonstrate both possession of the note and a valid mortgage assignment prior to filing the complaint."

Although Capital One did not possess the note at the time it instituted the foreclosure litigation, the Appellate Division considered the equities and determined that it was not unfair to allow the judgment to stand. The panel looked to several factors, including: 1) that the defendant received "more than sufficient" notice that Capital One was the servicer for Freddie Mac; (2) that Freddie Mac publicly declared its policy to foreclose through its servicers; and (3) that Capital One in fact possessed the note at an earlier foreclosure proceeding. Thus, the panel did not "find sufficient irregularities . . . sufficient to reverse the foreclosure judgment." Still, the panel instructed that "[w]e do not intend by this decision to approve the way this foreclosure was prosecuted. The note should have been in [Capital One's] possession at the time it filed this foreclosure complaint."

Update: CFPB Dismisses Case against PHH; U.S. District Court Holds CFPB Structure is Unconstitutional

In the SWSS February 2018 Banking Alert, we summarized the D.C. Circuit Court of Appeals' January 31, 2018 *en banc* ruling in *PHH Corporation v. Consumer Financial Protection Bureau*, in which the court reversed the prior holding of a three-judge panel and held that the leadership structure of the Consumer Financial Protection Bureau ("CFPB") does not violate constitutional separation of powers and is, therefore, constitutional. However, the D.C. Circuit Court of Appeals reinstated the decision of the three-judge panel relating to the interpretation of RESPA and its application to PHH, which invalidated the $109 million disgorgement that the CFPB had ordered against PHH. On June 7, 2018, Acting CFPB Director Mick Mulvaney dismissed the proceedings against PHH, ending the action and leaving in place the court's rulings.

On June 21, 2018, the United States District Court for the Southern District of New York in *Consumer Financial Protection Bureau, et al. v. RD Legal Funding, LLC, et al.,* C.A. No. 17-cv-890, rejected the D.C. Circuit Court of Appeals' holding in *PHH Corporation* and ruled that the structure of the CFPB is unconstitutional. In *RD Legal Funding, LLC*, the CFPB and New York Attorney General claimed that the defendants violated the Consumer Financial Protection Act and New York state law by offering "cash advances to consumers waiting on payouts from settlement agreements or judgments entered in their favor." The defendants moved to dismiss the complaint on the grounds, among other things, that the "CFPB is unconstitutionally structured and therefore lacks the authority to bring claims under the [Consumer Financial Protection Act]." The Southern District of New York agreed, finding that the "decision [of the D.C. Circuit Court of Appeals in *PHH Corporation*] is not binding on this Court" and adopting the position expressed by the dissent in *PHH Corporation* that the CFPB "is unconstitutionally structured because it is an independent agency that exercises substantial executive power and is headed by a single Director." Based on this reasoning, the Southern District of New York terminated the CFPB as a party to the case (but denied the motion to dismiss with respect to the claims brought by the New York Attorney General, holding that the New York Attorney General has independent authority to bring claims under the Consumer Financial Protection Act).

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