

BANKING ALERT

December 2015

[Appellate Division Upholds Dismissal of Claim of Unauthorized Transactions Based on Deposit Agreement](#)

In *Estate of Michael Yahatz v. Bank of America, N.A.* (N.J. App. Div. Dec. 14, 2015), the New Jersey Appellate Division upheld the dismissal of a claim against Bank of America, N.A. (the “Bank”) based on the Bank’s alleged negligence negotiating checks pursuant to a power of attorney.

In 2003, Michael Yahatz opened a checking account with Fleet Bank, which was later acquired by the Bank. Thereafter, in 2005, Mr. Yahatz signed a new signature card with the Bank acknowledging that his checking account was subject to the terms and conditions set forth in the Bank’s deposit agreement (the “Deposit Agreement”). Among other things, the Deposit Agreement stated that the Bank would not be liable for unauthorized transactions that were not reported by the account holder within sixty days of a statement identifying the unauthorized transactions was made available to the depositor.

In 2012, Mr. Yahatz was placed in a nursing home. One of Mr. Yahatz’s caretakers, Ms. Davila, was designated by Mr. Yahatz as his attorney-in-fact in a power of attorney executed by Mr. Yahatz in November 2012 (the “POA”). The POA was provided to the Bank and permitted Ms. Davila to deposit and withdraw funds from Mr. Yahatz’s account. During the month of December 2012, Ms. Davila withdrew over \$80,000 from Mr. Yahatz’s account at the Bank pursuant to the POA. Mr. Yahatz passed away on January 2, 2013. In January 2013, the Bank sent a copy of a monthly statement to Mr. Yahatz’s address. However, Mr. Yahatz’s estate (the “Estate”) did not notify the Bank regarding the unauthorized transactions until filing suit in July 2013.

After the close of discovery, the trial court granted summary judgment in favor of the Bank and dismissed the Estate’s claims against the Bank with prejudice. On appeal, the Appellate Division agreed with the trial court’s assessment of the governing provisions of the Uniform Commercial Code (the “UCC”), which provide that a bank may vary the terms of the UCC by way of agreement, including an agreement to impose a specific deadline

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on a customer to report account discrepancies. The Appellate Division also noted that a customer has a statutory obligation under the UCC to dutifully review his statements and report errors to the bank promptly. The Appellate Division also rejected the Estate's argument that the Bank could be liable for the transactions because the POA was "invalid on its face." Specifically, the Appellate Division found that the Bank was not under an obligation to investigate whether the POA did not strictly comply with N.J.S.A. 46:14-2.1 because discovery confirmed that Mr. Yahatz did sign the POA.

Appellate Division Dismisses Consumer Fraud Claim in Contested Foreclosure Action

In *U.S. Bank, NA v. Polly Green, et al.* (N.J. App. Div. Nov. 24, 2015), the Appellate Division upheld the trial court's Order granting summary judgment in favor of plaintiff U.S. Bank N.A., not in its individual capacity but solely as Legal Title Trustee for LVS Title Trust I ("Plaintiff"). In 2006, defendants Polly and Thurston Green ("Defendants") executed and delivered to First NCL Financial Services, LLC ("First NCL") a note, which was secured by a mortgage in favor of Mortgage Electronic Systems, as nominee for First NLC ("MERS"). In 2009, defendants executed a loan modification with CitiMortgage, Inc. ("Citi"), which amended and supplemented the note and designated Citi as "Lender," and provided among other things that the borrowers released all claims arising out of the origination or servicing of the note or security instrument. Defendants defaulted on the loan in 2010 and Plaintiff filed a foreclosure action against Defendants. Defendants filed a contesting answer and various counterclaims, including a claim under New Jersey's Consumer Fraud Act (the "CFA").

In support of its motion for summary judgment, Plaintiff attached a certification of a vice president of Plaintiff's servicing agent, which attached copies of the note, recorded mortgage and assignments of the mortgage from MERS to Citi and from Citi to Plaintiff. In opposition, Defendants submitted a certification in which they alleged that the 2006 loan was predatory, that the mortgage broker falsely represented that the loan would be fixed and the meaning of the documents were not properly explained to Defendants at closing. Defendants conceded that they executed the loan documents and did not challenge Plaintiff's claimed ownership of the mortgage or Defendants' failure to make payments. The trial court granted summary judgment in favor of Plaintiff, finding its proofs sufficient to establish possession of the mortgage and the note and, additionally, dismissed Defendants' counterclaim without prejudice.

On appeal, the Appellate Division found that Plaintiff's servicing agent had sufficient knowledge of the "mortgage loan servicer's business records kept in the regular course of business and certified as to the validity of the note and assignment of mortgage." Further, the Appellate Division found that Defendants "failed to proffer any affidavit or certification contradicting the assignment of the loan documented in the properly admitted loan documents and affirmed in [Plaintiff's] certification." Thus, because Plaintiff had possession of the note eight months prior to filing the foreclosure complaint and the mortgage was validly assigned to Plaintiff four months prior to filing of the foreclosure complaint, Plaintiff had standing at the time it filed the foreclosure complaint.

Finally, the Appellate Division found that Defendants' counterclaims were properly dismissed because Defendants failed to show that, even if the mortgage broker's actions were improper, that he was an employee or agent of Plaintiff and, further, Defendants waived and released any claims arising out of the origination or servicing of the loan.

[District Court Declines To Hearing Foreclosure Dispute](#)

In *Sheldrick v. Wells Fargo Bank, N.A.*, 2015 WL 5098180 (D.N.J. Aug. 31, 2015), the United States District Court for the District of New Jersey dismissed the complaint pursuant to the abstention doctrine established by the United States Supreme Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

After a series of unsuccessful efforts to secure refinancing, plaintiffs defaulted on their home mortgage loan. Wells Fargo filed a foreclosure action in state court. Plaintiffs filed a contesting answer that asserted multiple defenses, including lack of standing, fraud and violations of various state and federal laws. While the foreclosure action was pending, plaintiffs filed a complaint in state court asserting claims against Wells Fargo for deceptive practices relating to plaintiffs' attempted home loan modification, lack of standing, fraud and RICO violations. After plaintiffs filed their complaint, Wells Fargo moved for final judgment and a writ of execution in the foreclosure action and then removed plaintiffs' lawsuit to federal court.

Wells Fargo moved to dismiss plaintiffs' complaint in federal court arguing that their claims are barred under the *Younger* doctrine, *Rooker-Feldman* doctrine, New Jersey's Entire Controversy doctrine and for insufficient pleading under the federal rules of civil procedure. The court found all of Wells Fargo's arguments to be inapplicable.

Nonetheless, the court declined to hear plaintiffs' case under the *Colorado River* doctrine, which provides that a federal district court may abstain from hearing cases where two actions are "parallel," meaning the "parallel" state proceeding involves the same parties and substantially identical claims raising nearly identical allegations and issues. The court found that both the state court foreclosure action and federal action were parallel because both cases involve the same parties and nearly identical claims and issues. Accordingly, the court abstained from hearing the case and dismissed plaintiffs' complaint.

If you have any questions about this Alert:

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