SHERMAN WELLS SYLVESTER & STAMELMAN LLP

BANKING ALERT

Banks Not Precluded From Asserting Individual Arbitration Clauses Against Unnamed Class Members

In In re Checking Account Overdraft Litigation, 2015 WL 534657 (11th Cir. Feb. 10, 2015), the Eleventh Circuit Court of Appeals vacated and remanded a District Court's Order denying Wachovia's and Wells Fargo's attempt to compel unnamed class members to individually arbitrate their claims against the banks.

The named plaintiffs, five customers of Wachovia and Wells Fargo, brought suit alleging that the banks unlawfully charged excessive overdraft fees on debit card transactions. Critically, the deposit account agreements between the plaintiffs and the banks included a mandatory arbitration provision that required the parties to submit the dispute to binding arbitration. The provision further prohibited the customer from bringing his or her claim as part of a class action litigation or arbitration.

Due to several other class actions filed against other banks involving similar claims, the Judicial Panel on Multidistrict Litigation consolidated the suit against Wachovia and Wells Fargo with dozens of similar cases filed against thirty other banks. As part of its scheduling order, the District Court ordered that the parties wishing to move to compel individual arbitration do so by a date certain. After the date to move to compel arbitration had passed, the District Court inquired as to whether Wachovia and Wells Fargo intended to move for such relief. In response, Wachovia and Wells Fargo advised the District Court that they chose not to seek arbitration at that time, stating that they reserved the right to later seek to compel individual arbitration of any future or putative class plaintiffs. For the following year, the parties proceeded with discovery and motions relating to class certification. After the United States Supreme Court's decision in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), which held that the Federal Arbitration Act preempted state laws prohibiting the inclusion of arbitration provisions that bar class action arbitration procedures, Wachovia and Wells Fargo moved to compel the named plaintiffs to arbitrate their disputes.

The District Court denied the motion, finding that Wachovia and Wells Fargo had waived their right to enforce the individual arbitration clauses after waiting years to bring their motion to compel. After the District Court's decision to deny the motion to compel arbitration was affirmed on appeal, the named plaintiffs moved for class certification.

In This Issue

Office Locations

New Jersey
210 Park Avenue
2nd Floor
Florham Park NJ
07932
973.302.9700

New York
805 Third Avenue
10th Floor
New York NY
10022
212.763.6464

In opposition, Wachovia and Wells Fargo argued, in part, that the proposed class lacked numerosity as all potential class members would be subject to the individual arbitration provisions contained in their respective deposit agreements. Along those same lines, Wachovia and Wells Fargo filed a motion to dismiss the claims of the unnamed plaintiffs based on the individual arbitration provisions in the event the District Court granted class certification. Without reaching the merits of the plaintiffs' class certification motion, the District Court denied the conditional motion to dismiss in favor of arbitration, finding that the banks lacked standing to challenge the status of unnamed class members, who may be entitled to the benefit of the District Court's ruling that the banks had waived their right to enforce individual arbitration.

On appeal, the Eleventh Circuit reversed the District Court's decision to deny the conditional motions to compel individual arbitration, finding that Article III of the United States Constitution precluded the District Court from even ruling on the banks' motions. In particular, because the District Court had not yet certified the proposed class, the putative class members remained outside its jurisdiction. It is class certification, the Eleventh Circuit held, which binds a putative class member to the decision of the District Court overseeing the class action at issue. Without class certification, there was no justiciable controversy between Wachovia and Wells Fargo on one hand, and the unnamed plaintiffs on the other, and the District Court's decision to deny the motion was tantamount to an advisory opinion on the issue. The Eleventh Circuit also rejected the plaintiffs' position that it should affirm the District Court's decision to provisionally hold that Wachovia and Wells Fargo were collaterally estopped from asserting their contractual right to individual arbitration against the unnamed plaintiffs based on the District Court's earlier determination that they had waived the right to enforce individual arbitration against the named plaintiffs. The Eleventh Circuit held that the named plaintiffs lacked standing to assert these arguments on behalf of the unnamed plaintiffs at this juncture because: (1) the named plaintiffs possessed no stake in the outcome of that determination; and (2) there was no principled reason why the unnamed plaintiffs could not undertake those arguments themselves at the appropriate time.

Trial Period Plan Agreement Pursuant To Home Affordable Mortgage Program Is Not Binding Contract To Modify Loan

The New Jersey Appellate Division recently held that a Trial Period Plan ("TPP") agreement signed by home mortgagors pursuant to the federal Home Affordable Mortgage Program ("HAMP") is not a binding contract to modify a loan. Arias v. Elite Mortgage Grp., Inc., No. A-4599-12T1, 2014 WL 7665197 (N.J. Super. Ct. App. Div. Jan. 23, 2015) (approved for publication). In Arias, plaintiff home mortgagors ("plaintiffs") claimed that they had a contractual right to a loan modification under the terms of a TPP Agreement they signed that was breached by their loan servicer, Bank of America (the "bank"), who refused to give plaintiffs a loan modification following the end of their trial period.

After falling behind on their mortgage payments, plaintiffs entered into a TPP Agreement with the bank, pursuant to which, plaintiffs, among other things, agreed to make certain monthly mortgage payments by specified dates for a trial period of three months. The TPP Agreement included a "Time is of the Essence" provision. Under the TPP Agreement, if plaintiffs made full, timely payments, the bank would modify the loan effective on the first day of the month following the month in which the last trial period payment was due. The TPP Agreement put plaintiffs on notice that the TPP itself was not a loan modification and that their failure to strictly comply with the terms of the TPP Agreement would result in denial of a loan modification.

Plaintiffs failed to comply with the payment schedule set forth in the TPP and the bank sent plaintiffs a letter notifying them of their failure to make the required payments and giving them some additional time to cure their defaults. The letter advised plaintiffs that if they failed to make the required payments, they would not receive a Home Affordable Modification. Notwithstanding the bank's extension, plaintiffs again failed to satisfy the terms of the TPP Agreement and, accordingly, the bank sent them a letter advising plaintiffs that their loan was not eligible for a Home Affordable Modification.

Following the bank's refusal to enter into a loan modification, plaintiffs filed suit, alleging breach of contract and breach of the implied covenant of good faith and faith dealing. The trial court entered summary judgment in favor of the bank, finding that the TPP Agreement did not give plaintiffs a contractual right to modify the loan and that plaintiffs had "no viable cause of action" under HAMP.

The Appellate Division affirmed, holding that the TPP Agreement was a "unilateral offer," pursuant to which the bank promised to give plaintiffs a loan modification if and only if plaintiffs fully and timely complied with their obligations under the TPP. The Court found that plaintiffs had engaged in a pattern of non-payment and inadequate payment that constituted a breach of the TPP Agreement, which justified the bank in refusing to give them a loan modification. Under such facts, the Court concluded that there was neither a breach of contract nor a breach of the duty of good faith and fair dealing.

The Appellate Division's analysis of the TPP Agreement in Arias is apparently the first New Jersey decision on the issue selected for publication and provides helpful guidance to lenders and borrowers on the legal status of such agreements.

District Court Finds That Bank Has Duty To Prospective Buyers To Prevent Against Injury In Foreclosed Home

In Charlton v. Wells Fargo Bank, N.A., the United States District Court for the District of New Jersey held that a bank owes a duty of care to prospective purchasers of a foreclosed residence. 2015 WL 375667 (D.N.J. Jan. 28, 2015). In Chartlon, plaintiffs, Anna Charlton and Gary Francione ("Plaintiffs") alleged that Ms. Charlton slipped on a broken piece of glass while viewing a foreclosed home, causing serious injuries. Based on her injuries, Plaintiffs filed suit against defendant Wells Fargo Bank, N.A. ("Wells Fargo"), the owner of the foreclosed home, along with the real estate agent, real estate agency, and maintenance contractor.

Wells Fargo moved for summary judgment, essentially seeking a judgment as a matter of law that it did not owe Plaintiffs a duty of care. Wells Fargo argued that it had no relationship with Plaintiffs and made no representations regarding the condition of the property, had no knowledge of the broken glass and that requiring owners to conduct daily inspections of foreclosed properties would establish a harmful precedent. Wells Fargo further argued that the real estate agent's failure to inspect the property was a superseding and intervening cause of Ms. Charlton's injury.

Plaintiffs, in opposition and in support of their own motion for summary judgment, argued that Wells Fargo owed Plaintiffs a non-delegable duty of care to prevent against the reasonably foreseeable injury. The Court held that commercial lenders that take possession of a residential property through a foreclosure assume the position of the owner and assume the owner's duty to protect business invitees from reasonably foreseeable injuries due to dangerous conditions. The Court rejected Wells Fargo's argument that it had no relationship with Plaintiffs and found that, by marketing the property for sale and inviting Plaintiffs, Wells Fargo was receiving an economic benefit and it was reasonable for Plaintiffs to expect the property to be in safe condition for viewing.

The Court further held that the broken glass on the property was a foreseeable condition, especially given that approximately one month prior to the accident, local police had responded to a burglary call and reported that a squatter had broken into and was living in the house. Thus, the Court found that it was reasonably foreseeable that the property would be vulnerable to damage that would harm an invitee.

The Court rejected Wells Fargo's argument that it had no notice of the dangerous condition. While the Court recognized that Wells Fargo could not reasonably visit all of the foreclosed homes, it held that Wells Fargo could have paid for maintenance services. Lastly, the Court found that public policy supported a finding that a bank owed a duty to a prospective buyer of a foreclosed home. In New Jersey, a homeowner is in the best position to learn of a dangerous condition on its property and even a vacant property owner is in a superior position than an invitee who has neither the ability nor the duty to ensure that there is no dangerous condition on the property. The Court then found that there was a genuine issue as to whether Wells Fargo breached its duty of care to Plaintiffs, which precluded the entry of summary judgment.

Lenders taking possession of residential property in foreclosure should be aware that they may be liable for damages caused by unsafe conditions on the property.

If you have any questions about this Alert:

Attorney Contact Information

Anthony J. Sylvester
Partner
973.302.9713
asylvester@shermanwells.com

Charles R. Berman
Partner
973.302.9692
cberman@shermanwells.com

Timothy A. Kalas
Partner
973.302.9693
tkalas@shermanwells.com

Craig L. Steinfeld
Counsel
973.302.9697
csteinfeld@shermanwells.com

Caitlin T. Shadek
Associate
973.302.9672
cshadek@shermanwells.com

Anthony C. Valenziano
Associate
973.302.9696
avalenziano@shermanwells.com

Arjun Shah
Associate
973.302.9698
ashah@shermanwells.com