SHERMAN WELLS
SYLVESTER & STAMELMAN LLP

BANKING ALERT

March 2017

Litigation Reform Legislation Advances in the House

The United States House of Representatives recently passed two bills aimed at curbing both class-action and frivolous lawsuits. Both the Fairness in Class Action Litigation Act of 2017 and the Lawsuit Abuse Reduction Act of 2017 passed in the United States House of Representatives this month.

The Fairness in Class Action Litigation Act of 2017 would dramatically alter the certification of potential classes. In particular, in order to certify a class, a court would have to find that all class members suffered the same "type and scope" of injury as the named class representatives, a marked departure from the current scheme where class certification is permissible where class members have a wide range of claimed injuries. Additionally, the Act would require class counsel to disclose potential conflicts of interest, including whether a proposed class representative was either related to, employed by or had previously retained class counsel. If any of those circumstances exist, class certification must be denied.

The Lawsuit Abuse Reduction Act of 2017 would change Federal Rule of Civil Procedure 11 so as to require a Court to impose mandatory sanctions in the event of a finding that Rule 11 has been violated and remove the 21-day safe harbor provision. Additionally, any sanctions imposed under Rule 11 would be paid by the parties to the suit. This change would revert Rule 11 back to its former iteration prior to amendments made to the Rule in 1993.

Both acts have now advanced to the Senate and await a vote.

Appellate Division Finds That Witness Need Not Have Actual Personal Knowledge of Documents Presented in Mortgage Foreclosure Action

In *PMT NPL Financing v. Vilinsky*, 2017 WL 770980 (N.J. App. Div. Jan. 11, 2017), defendants Jeffrey and Pnina Vilinsky (together, "Defendants") appealed from final judgment of foreclosure following a trial in the New Jersey Superior Court, Chancery Division. Defendants argued that the "trial court clearly erred when it concluded that the documents produced at trial established that the note and mortgage were transferred to

In This Issue

Office Locations

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

New York
54 W. 40th Street
New York NY 10018
212.763.6464

Follow Sherman Wells on
Linkedin **Twitter**

plaintiff PennyMac Corp. ("PennyMac"). Defendants argued that PennyMac's witness lacked personal knowledge of the facts underlying PennyMac's claim.

At trial, PennyMac presented one witness, Jay Schwegel, servicer of Defendants' loan. Mr. Schwegel testified that PennyMac Servicing is the exclusive servicer of all of PennyMac's loans. Mr. Schwegel explained that when PennyMac purchases a loan, the prior servicer presents the collateral file containing the original loan documents and any assignments to PennyMac Servicing's third-party repository and submits the loan documentation and servicing records electronically to PennyMac Servicing. PennyMac Servicing verifies the records against the original documents in the collateral file.

Schwegel reviewed the file and, at trial, authenticated the original $471,000 promissory note that defendant Jeffrey Vilinsky executed to Quicken Loans. The original note was endorsed without recourse to CitiMortgage, Inc. Mr. Schwegel also identified a mortgage Defendants gave to Mortgage Electronic Registration System, Inc. ("MERS"), as nominee for Quicken Loans, and recorded in the office of the Bergen County clerk in April 2009, along with two assignments. The first assignment was from MERS to CitiMortgage and the second was from CitiMortgage to PennyMac. Mr. Schwegel testified from his review of PennyMac's records made in the usual course of business that Defendants' loan was sold by CitiMortgage to PennyMac on February 23, 2011 and PennyMac took possession and began servicing the loan. Based on this testimony, the Chancery Division admitted the note, mortgage and assignments into evidence and found that PennyMac had standing to proceed to foreclose the mortgage by a preponderance of the evidence.

On appeal, the Appellate Division found that the only issue at trial was whether PennyMac could establish that it controlled the note and mortgage at the time it filed its foreclosure complaint. The Appellate Division found that the trial court made findings of fact and PennyMac presented the original note and copy of the recorded mortgage and two subsequent recorded assignments. The Appellate Division found that there is no requirement that Mr. Schwegel possess personal knowledge of the events reflected in PennyMac's records, but could testify based on his personal knowledge of records in his regular course of employment. The Appellate Division affirmed the trial court's decision.

Appellate Division Vacates Default Based on Defendants' Allegations of Violations of the Consumer Fraud and Fair Foreclosure Acts

In *Nationstar Mortgage LLC v. Weedo*, Docket No. A-1986-15T3, 2017 WL 836184 (App. Div. Mar. 3, 2017), Nationstar Mortgage, LLC ("Nationstar") filed a foreclosure complaint against the defendant homeowners, who retained counsel and extended their time to file an answer. The defendants failed to file an answer by the due date. Thereafter, Nationstar requested default and moved for a final judgment.

The defendants filed a motion to vacate default, alleging violations of the Fair Foreclosure Act and the Consumer Fraud Act. The trial court determined that while there was good cause for vacating default, noting that the defendants had retained counsel and extended the time to file an answer. However, the trial court denied the motion and concluded that the defendants did not have a meritorious defense.

On appeal, the panel started with the factors that bear on whether good cause to lift default exists: whether the default was willful; whether granting relief from default would prejudice the opposing party; and whether the defaulting party has a meritorious defense. There is no point, the panel explained, in setting aside a default if there is no meritorious defense. That is especially so in the foreclosure setting, where labeling a case as contested moves

it from an expedited proceeding in the Office of Foreclosure to a more time consuming litigation in the Chancery Division. (citing *Trs. of Local 478 Trucking and Allied Indus. Pension Fund v. Baron Holding Corp*., 224 N.J. Super. 485, 489 (App. Div. 1988)).

Because nothing suggested that the defendants acted with culpability, the panel turned to whether they had a meritorious defense. It found that they did, "at least to the extent they were entitled to an order vacating default." Under New Jersey law, foreclosure actions require any counterclaims to be germane to the foreclosure action. The panel also found that a claim under the Consumer Fraud Act could be germane to a foreclosure proceeding. The Consumer Fraud Act claim, and the alleged violations of the Fair Foreclosure Act, arose out of the mortgage, and, as a result, the panel reversed the trial court's decision denying the defendant's motion to vacate default. The merits of defendant's defenses were thus saved for further proceedings.

Sherman Wells Partner Craig L. Steinfeld to Moderate and Speak at "Hot Topics in Banking Law" Seminar

Sherman Wells partner Craig L. Steinfeld, who currently serves as the Chair of the Banking Law Section of the New Jersey Bar Association, will serve as moderator for and speak at the New Jersey Bar Association's "Hot Topics in Banking Law" Seminar on March 30, 2017.

If you have any questions about this Alert:

Attorney Contact Information

Anthony J. Sylvester
Partner
973.302.9713
asylvester@shermanwells.com

Craig L. Steinfeld
Partner
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