

Bank of America Petitions Ninth Circuit on Preemption Case

On April 13, 2018, Bank of America, N.A. petitioned the United States Court of Appeals for the Ninth Circuit for rehearing, *en banc*, of a decision finding that the National Bank Act does not preempt a California state escrow interest law. That decision – handed down on March 2, 2018 by a unanimous three-judge panel in *Lusnak v. Bank of America, N.A.*, No. 14-56755 – held that the Dodd-Frank Act deprived states of the power to regulate national banks only where it prevents or significantly interferes with a bank’s exercise of its power. The decision is a victory for plaintiffs in a putative class action alleging that Bank of America failed to comply with a California law requiring it to pay interest on mortgage escrow accounts.

According to the decision, the California law does not rise to the level of interference required under Dodd-Frank, concluding that the intention of the National Bank Act was not to preempt state escrow interest laws. The court noted that another provision of Dodd-Frank requires creditors to

pay interest on escrow accounts “if prescribed by applicable state or federal law.” The decision also rejected Bank of America’s argument that Office of the Comptroller of the Currency (“OCC”) regulations allow national banks to make mortgage loans “without regard to state law limitations concerning [...] escrow accounts, impound accounts and similar accounts,” concluding that the OCC had failed to properly interpret precedent regarding preemption standards in crafting the regulation.

Bank of America’s petition argues that the panel decision conflicts with prior decisions holding that the National Bank Act preempts state laws regulating national bank’s pricing decisions and other terms on which they extend credit, and that the rejection of OCC regulations regarding escrow accounts also conflicts with prior decisions. The petition further argues that the panel’s decision creates uncertainty regarding which state laws apply to national banks. On April 23, 2018, the OCC filed an amicus brief supporting Bank

of America’s petition, arguing that courts have consistently sustained the agency’s interpretation of the preemption standard set forth in the Supreme Court’s 1996 decision in *Barnett Bank of Marion County NA v. Nelson*, 517 U.S. 25 (1996). Amicus briefs have also been filed by the American Bankers Association, U.S. Chamber of Commerce, and other industry groups.

We will continue to monitor this case as it develops, in light of its significance to preemption considerations. We encourage our clients to consider the decision in the *Lusnak* case while conducting preemption assessments of state law obligations, and whether this presents compliance requirements in light of the ruling.

If we may provide assistance or advice regarding the considerations above, please contact Brian Turetsky at brian.turetsky@piblaw.com, or James Berg at james.berg@piblaw.com. ■

New York Court Holds a Prior Foreclosure Action Commenced by a Plaintiff Without Standing Is Insufficient to Accelerate a Mortgage Debt and Trigger Statute of Limitations

On March 27, 2018, the Honorable Desmond A. Green of the Supreme Court of the State of New York, Richmond County, issued a Decision and Order in the matter of *U.S. Bank National Association, as Trustee v. Francisco Procel, et al.*, Index No. 135454/17, holding that a prior foreclosure action commenced by a Plaintiff without standing was insufficient to accelerate the mortgage debt and trigger the six year statute of limitations. Accordingly, the Court denied Defendant's pre-answer motion to dismiss, which was based in part on the assertion that the statute of limitations had previously expired.

By way of background, a prior foreclosure action was commenced against Defendant on April 26, 2007. The prior foreclosure action was dismissed at the request of the previous Plaintiff, as the Plaintiff admitted that it did not have standing at the commencement of the action. Specifically, the previous Plaintiff acknowledged that an Assignment of Mortgage establishing its standing was not executed until after the commencement of the action. The Court agreed, and the prior foreclosure ac-

tion was dismissed on September 1, 2016.

Thereafter, on July 13, 2017, the new foreclosure action was commenced against the Defendant. In lieu of an answer, defendant filed a motion to dismiss, arguing that the prior foreclosure action commenced on April 26, 2007 accelerated the mortgage, and that the current action was filed long after the expiration of the statute of limitations. The court denied the motion, finding that the new foreclosure action was timely. The court cited to the Second Department's recent holding in *U.S. Bank N.A. v Gordon*, 158 AD3d 832 [2d Dept 2018]: "[I]t has already been determined that the prior plaintiff in the 2007 action did not have standing to commence the action because it was not the holder of the note and mortgage at the time the 2007 action was commenced (citations omitted). Accordingly, service of the 2007 complaint was ineffective to constitute a valid exercise of the option to accelerate the debt, since the prior plaintiff did not have the authority to accelerate the debt or to sue to foreclose at the time."

Defendant's motion to dismiss also sought dismissal based on Plaintiff's failure to file a Certificate of Merit with the complaint, as required by CPLR § 3012-b. In acknowledging the clerical error, Plaintiff cross-moved pursuant to CPLR § 2001, to obtain leave of Court to file a Certificate of Merit. Plaintiff argued that a Certificate of Merit was executed prior to the commencement of the action, but due to a clerical error, was not attached to the complaint. Plaintiff further argued that since the exhibits attached to the Certificate of Merit were also attached to the complaint, Defendant would not suffer any prejudice if the Court granted Plaintiff's request for leave to file the Certificate of Merit. The Court adopted Plaintiff's argument and granted Plaintiff's cross-motion, finding that that "no substantial right of the defendant has been affected by the unaffixed certificate of merit," and gave Plaintiff leave to file the certificate of merit nunc pro tunc. ■

For more information, contact Melinda Colón Cox at melinda.cox@piblaw.com or Vanessa Williams at vanessa.williams@piblaw.com.

Supreme Court Holds that, If One Case in a Consolidated Action Is Finally Decided, the Losing Party Has an Immediate Right to Appeal

On March 27, 2018, the United States Supreme Court issued a unanimous decision in *Hall v. Hall*, holding that cases consolidated under Rule 42(a) of the Federal Rules of Civil Procedure retain their separate identities to

the extent that a final decision in one is immediately appealable by the losing party, notwithstanding the status of the other cases. The Supreme Court previously had issued a similar holding with respect to cases consolidated for multidistrict litigation

under 28 U.S.C. § 1407 (*Gelboim v. Bank of America Corp.*, 135 S.Ct. 897 (2015)) – but that case left open this issue with respect to cases consolidated under Rule 42(a).

Continued on next page

The issue in *Hall* stemmed from a dispute between siblings Samuel and Elsa Hall relating to a trust held by their mother, Ethlyn. In May 2011, Ethlyn sued Samuel and his law firm in the United States District Court of the Virgin Islands for breach of fiduciary duty, legal malpractice, and other claims relating to his management of her real estate holdings that she held in an inter vivos trust (the “Trust Action”). Ethlyn died prior to the conclusion of her case, but Elsa stepped into her shoes as trustee of Ethlyn’s trust. Samuel filed counterclaims against Elsa, in her representative and individual capacities, for intentional infliction of emotional distress, fraud, and other claims, alleging that she had taken advantage of their mother’s ailing health. Elsa, however, was not a party to the Trust Action, so Samuel filed a new complaint against Elsa in her individual capacity in the same District Court and raising the same claims. The cases initially proceeded along separate tracks, but upon Samuel’s motion, the District Court consolidated them under one docket pursuant to Rule 42(a).

Before trial, the District Court dismissed the counterclaims Samuel asserted against Elsa. The remaining claims were then tried before a jury. The jury returned a verdict in Samuel’s favor in his action and awarded him \$500,000.00 in compensatory damages and \$1.5 million in punitive damages. The District Court subsequently granted Elsa a new trial, and the matter remained

pending. In the Trust Action, the jury returned a verdict against Elsa, in her representative capacity, and the court directed the case to be dismissed on its merits.

Elsa filed a notice of appeal from the District Court’s judgment in the Trust Action. Samuel moved to dismiss the appeal on jurisdictional grounds, arguing that the judgment was not final and appealable because his claims against Elsa in the consolidated case were still pending. The Third Circuit agreed, holding that a final decision on one set of claims is generally not appealable while the second set remains pending, and noting that the fact that the Trust Action and Samuel’s action had been “scheduled together and tried before a single jury” “counsel[ed] in favor of keeping the claims together on appeal.” The Third Circuit dismissed Elsa’s appeal for lack of jurisdiction.

In reversing the decision of the Third Circuit, Chief Justice John Roberts, writing for the unanimous Supreme Court, analyzed the history of the legal term “consolidate.” That term stretches back to at least the first federal consolidation statute, enacted by Congress in 1813. Chief Justice Roberts remarked that, “[o]ver 125 years, this court, along with the courts of appeals and leading treatises, interpreted that term to mean the joining together – but not the complete merger – of constituent cases. Those authorities particularly emphasized that constituent cases remained independent when it came to

judgments and appeals. Rule 42(a), promulgated in 1938, was expressly based on the 1813 statute.” Chief Justice Roberts further rejected Samuel’s argument that the plain text of Rule 42(a) necessarily extended the definition of consolidation beyond the mere joining of cases as “substantially overreading” the rule. He noted that the decisions leading up to the enactment of Rule 42(a) preserved the independence of cases that had been consolidated.

The Court concluded that District Courts have discretion to consolidate cases for “all purposes” in appropriate circumstances, yet those consolidated cases “retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party.” ■

For more information, contact Scott Parker at scott.parker@piblaw.com, or Robert Pollock at robert.pollock@piblaw.com.