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Mortgage Class Action Litigation: Trends and Developments Webinar

October 27, 2011

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Creative Class Action Defense Strategies

P. Russell Perdew

Dukes v Wal-Mart

- Not just about statistical evidence of discrimination
- Plaintiff must make factual showing; overlap with merits is not a problem
- Sharply limits 23(b)(2) classes, which puts predominance and superiority at issue
- Puts teeth into commonality inquiry

New Decisions Make Removal Easier

- Multiple Seventh Circuit decisions in 2011
- No presumption against removal or jurisdiction
- Defendant's "plausible" estimate of amount in controversy controls unless legally impossible
- Plaintiff's statement in complaint that less is being sought does not control unless binding
- Even binding limit accepted by plaintiff may not control in class action
- Need some evidentiary support, but not much
- Other circuits impose higher standards

Preemptive Attack on Class Treatment

- Can be filed under Rule 12(c) or 23(d)(1)(D)
- Defendant can file at any time to resolve issue of whether class treatment is appropriate.
- Rule 12(c) Motion decided based on pleadings and judicially-noticed facts
- Rule 23(d)(1)(D) motion can be based on evidence, but that could permit limited discovery.
- Advantages: potential for expedited resolution; Defendant gets to frame the issue; Defendant gets reply brief.
- Disadvantages: burden shifting in many jurisdictions; tell plaintiff where their case is weak; early adverse ruling could make settlement more difficult.

Use Individualized Issues Raised by Plaintiff in Resisting Dismissal

- Equitable tolling to avoid statute of limitations
- Oral misrepresentations to avoid dismissal based on clear written disclosures
- Parol evidence regarding an allegedly ambiguous contract
- Use allegations in complaint or response to motion to dismiss
- Take plaintiff's deposition

Existence of Damage is Individual Issue

- Not amount of damages; existence of damage
- If plaintiff claims they were tricked into buying product, was that product harmful to them?
- Loan terms may have benefited plaintiff; what other loans could plaintiff have received?
- If plaintiff wasn't damaged, no typicality or adequacy.

Existence of Damage is Individual Issue (cont'd.)

- Individual question as to whether others were damaged.
- Why did others get the loan? Lower payments? Planning to re-fi, or want long term loan?
- What type of loan could others have received? Need to underwrite each individual class member.
- Individual question on damage precludes predominance.

Demand a Trial Plan

- Superiority requires manageability
- Trial plan can show if class trial is manageable
- Trial plan describes the issues to be presented at trial and how they will be proved class-wide
- FRCP Advisory committee notes and Manual for Complex Litigation reference
- Numerous courts have recommended trial plans in superiority analysis
- Not required, but absence weighs against plaintiff
- Do your own plan to show individual cases better

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HAMP Class Action and MDL Update

Simon A. Fleischmann

The Numbers

- Treasury Department Report (10/5/11)
  - 2.5 delinquent loans eligible for HAMP
  - 690,000 active permanent modifications
- The discrepancy has led many distressed borrowers to ask the courts to compel HAMP modifications.

Litigation Landscape

- Well over a hundred individual and class claims pending across the country
- Some issues essentially settled:
  - No private cause of action under HAMP
  - No third-party-beneficiary status for borrowers
- State-law claims hotly contested
- Class and MDL matters emerging

State-law Claims re TPP

- Breach of Contract
- Breach of Covenant of Good Faith
- Promissory Estoppel
- UDAP

State-law Claims Based on Alleged HAMP Violations

- Borrowers may not plead around the lack of a private right of action by recasting HAMP claims as state-law claims.
  - *Hunter v. CitiMortgage*, No. 11-1549, 2011 WL 4625973 (Dist. Ariz. Oct. 5, 20111).
  - *Michel v. Deutsche Bank Trust Co.*, No. 10-2375, 2011 WL 4628691 (E.D. Cal. Oct. 3, 2011).

Breach of TPP

- No servicer signature; no agreement.
  - *Stovall v. SunTrust Mortgage, Inc.*, No. 10-2836, 2011 WL 4402680 (D. Md. Sept. 20, 2011).
  - *Thomas v. JPMorgan Chase & Co.*, No. 10-8993, 2011 WL 3273477 (S.D.N.Y. Jul. 29, 2011).

Breach of TPP (cont'd.)

- TPP is not an agreement to modify a loan because it lacks definite terms.
  - *Olivares v. PNC Bank*, No. 11-1626, 2011 WL 4860167 (D. Minn. Oct. 13, 2011).
  - *Nadan v. Homesales, Inc.*, No. 11-1181, 2011 WL 3584213 (E.D. Cal. Aug. 12, 2011).
  - *Senter v. JP Morgan Chase Bank*, No. 11-60308, 2011 WL 4089585 (C.D. Cal. Sept. 28, 2011).

Breach of TPP (cont'd.)

- Borrower cannot establish consideration or damages because there was a pre-existing duty to make mortgage payments.
  - *Ishler v. Chase Home Finance, LLC*, No. 11-2117, 2011 WL 744538 (M.D. Pa. Feb. 23, 2011).
  - *Wigod v. Wells Fargo Bank*, N.A., No. 10-2348, 2011 WL 250501 (N.D. Ill. Jan. 25, 2011).

N.D. Ill / 7th Cir.

- *Wigod v. Wells Fargo*, 10-2348, 2011 250501
  - – Dismissed with prejudice
- *Boyd v. U.S. Bank,* No. 10-3367, 2011 WL 1374986
  - – ICFA-unfairness and ECOA claims allowed
- *Fletcher v. OneWest*, 10-4682, 2011 WL 2648606
  - – state-law claims allowed

Three MDL Actions

- *In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation*, MDL. No. 2193 (D. Mass.)
- *In re CitiMortgage, Inc., Home Affordable Modification Program (HAMP) Contract Litigation*, MDL No. 2274 (N.D. Cal.)
- *In re JPMorgan Chase Modification Litigation*, MDL No. 2290 (D. Mass.)

Class Certification

- *Durmic v. Chase*: denied plaintiffs' motion to certify "provisional" class of Mass. bwrs.
  - Directed the parties to develop "a more robust factual record through discovery" in order to address typicality and adequacy.
- *Bosque v. Wells Fargo*: ordered narrow discovery on class certification.
  - (1) foreclosure policies/procedures for HAMP applicants; (2) HAMP review procedures; and (3) numerosity.

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Growing Trends in TCPA Class Actions

J. Matthew Goodin

Brief Overview of the TCPA

- Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*
- Imposes restrictions on:
  - Use of fax machines, computers, or other devices use to send unsolicited advertisements or communications to facsimile machines;
  - Use of artificial or prerecorded voice to deliver messages to residential telephone lines; and
  - Use of automatic telephone dialing system or an artificial or prerecorded voice to make *any* call to, among other things, a telephone number assigned to a pager, cellular telephone, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.
- Exceptions: (1) established business relationships and published fax number in the case of facsimile communications; and (2) prior express consent in the case of autodialed or prerecorded calls.
- Both state attorneys' general and private citizens can enforce the TCPA through civil suits.
- Remedies include injunctive relief, actual damages, statutory damages of $500-$1,500 per violation (*i.e.*, per unauthorized call or message).
- No cap on statutory damages.

Cell Phone as Primary Phone

- 40% of American consumers identify their wireless phone as their primary phone.
- Move from landlines to cell phones exclusively has led to a recent increase in two types of class action lawsuits:
  - Those involving allegations of unauthorized "autodialed" and "prerecorded" solicitation or collection calls to cellular numbers; and
  - Those involving unauthorized solicitation or collection text messages.
- Key issue in all cases tends to be whether "prior express consent" was given and, if so, whether consent was revoked.

Prior Express Consent

- "Express consent" is not defined in TCPA or attendant regulations, but the FCC, the agency charged with drafting regulations and enforcing its provisions, has interpreted the meaning in the context of an existing debt or obligation:

> Although the TCPA generally prohibits autodialed calls to wireless phones, it also provides an exception for autodialed and prerecorded message calls … made with the prior express consent of the called party. ***Because we find that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the "prior express consent" of the called party, we clarify that such calls are permissible.*** We conclude that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.

In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 23 F.C.C.R. 559, 563, 2008 WL 65485, *3 (F.C.C.)

- Takeaways: Make good records! When taking phone numbers, ask borrowers/customers (a) to specify if it's a wireless number; and, if so, (b) whether they can be contacted on that number; and, if so, (c) using an automated dialer or recorded voice. Maintain clear records of how numbers were obtained.

Revocation of Consent

- Consent can be revoked orally or in writing.
- Dozens of pending class actions involving text messages sent to confirm revocation of consent.
- Many filed in the S.D. Cal. by a group of plaintiffs' lawyers (Hyde & Swigart, The Law Offices of Douglas J. Campion, and others).
- Starting to see large settlements. Example: *Gutierrez v. Barclays Group, et al.*, No. 10-cv-1012 (S.D. Cal.).
  - On October 11, 2011, court preliminary approved settlement whereby Barclays will pay $125 per class member, up to approximately $8.2 million, and up to $1.58 million in attorneys' fees to resolve "confirmatory text message" claims.
- Takeaway: Do not confirm revocation of consent with a subsequent call or text message.

Legislative Activity

- H.R. 3035 – the Mobile Informational Call Act of 2011. View and track at http://www.opencongress.org/bill/112-h3035/text
- Supported by trade groups including American Bankers Association, Financial Services Roundtable, Mortgage Bankers Association, and U.S. Chamber of Commerce.
- If passed, the Act should modernize TCPA by:
  - Exempting "informational calls" (*e.g.*, your account balance is low) from the restriction on auto-dialer and artificial/prerecorded voice calls to wireless numbers;
  - Clarifying "prior express consent" requirement to ensure that the TCPA facilitates communications between consumers and the businesses with which they choose to interact; and
  - Excluding from the restriction equipment that merely stores pre-determined numbers or that has latent (but unused) capacity to generate random or sequential numbers.

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Recent Developments in Mortgage Servicing Class Action Cases

Thomas G. Yoxall

Overview

- Few cases have reached the certification stage
  - Most courts have disposed of cases on the merits prior to reaching class certification issues
- Most courts that have reached the class certification issue have denied certification
- The following summarizes:
  - Representative pre-certification decisions
  - Representative servicing-related certification decisions

Representative Pre-Certification Decisions

- *Rodriguez v. Chase Home Finance, LLC* (N.D. Ill. Sept. 23, 2011)
- *Cervantes v. Countrywide Home Loans, Inc.* (9th Cir. Sept. 7, 2011)
- *Stone v. Washington Mutual Bank* (N.D. Ill. Aug. 19, 2011)
- *Stolba v. Wells Fargo & Co.* (D.N.J. Aug. 8, 2011)
- *Costigan v. CitiMortgage, Inc.* (S.D.N.Y. Aug. 2, 2011)
- *In re Bank of America HAMP Contract Litigation* (D. Mass. July 6, 2011)
- *Girgis v. Countrywide Home Loans, Inc.* (N.D. Ohio Oct. 28, 2010)

Rodriguez v. Chase Home Finance, LLC, No. 10 C 05876, 2011 WL 4435633 (N.D. Ill. Sept. 23, 2011)

- Relevant Facts
  - Plaintiff brought purported class action alleging that Defendant violated Homeowners Protection Act by failing to disclose amount and cancellation date of PMI when it offered a loan modification
  - Plaintiff successfully completed TPP by making payments that did not include PMI but alleged that permanent modification impermissibly added PMI to monthly payment
  - Payments $300 higher because of PMI
- Notable Issues
  - PMI disclosures are not required under the HPA if loan modification does not accelerate PMI cancellation
  - Court distinguished between a modification and a refinance under the HPA
  - Failure of individual claim rendered motion to certify class moot
- Disposition
  - Court granted motion to dismiss all of Plaintiff's claims
  - Court denied motion to certify class as moot

Cervantes v. Countrywide Home Loans, Inc., No 09-17364, 2011 WL 3911031 (9th Cir. Sept. 7, 2011)

- Relevant Facts
  - Plaintiffs brought putative class action alleging that Defendants targeted Plaintiffs for mortgages they could not repay
  - Plaintiffs argued that Defendants engaged in a conspiracy to commit fraud by participating in MERS
  - Good discussion of MERS history
- Notable Issues
  - Plaintiffs failed to adequately allege a fraud claim – the relevant deeds of trust disclosed MERS's involvement in the loans
  - Even if MERS somehow "splits" the note and deed of trust, that does not prevent any attempts to foreclose
- Disposition
  - Affirmed dismissal of all claims
  - Further found amendment would be futile

Stone v. Washington Mutual Bank, No. 10 C 6410, 2011 WL 3678838 (N.D. Ill. Aug. 19, 2011)

- Relevant Facts
  - Plaintiffs brought purported class action alleging Defendants engaged in alleged conspiracy to fraudulently foreclose on homes
  - Plaintiffs argued that Defendants "bifurcated" their loans by selling notes to other entities and filed fraudulent affidavits
- Notable Issues
  - Plaintiffs' attempt to certify a class as an independent cause of action failed because class certification rules are procedural and do not give rise to an independent claim
  - Claims based on foreclosure judgments were barred by *Rooker-Feldman* doctrine, issue preclusion, and collateral estoppel
- Disposition
  - Court dismissed majority of Plaintiffs' claims but held that Plaintiffs stated an FDCPA claim against a mortgage servicer and its attorneys
  - Court denied motion to dismiss IIED claims against Defendants involved in foreclosure actions
  - Court dismissed § 1983 and claims brought under various federal criminal statutes

Stolba v. Wells Fargo & Co., No. 10-cv-6014, 2011 WL 3444078 (D.N.J. Aug. 8, 2011)

- Relevant Facts
  - Plaintiffs brought putative class action related to HAMP TPPs
  - Plaintiffs made TPP payments, but their homes were foreclosed upon
- Notable Issues
  - No private right of action under HAMP
  - Breach of contract claim cannot be used to create a back-door private right of action under HAMP
  - TPPs do not guarantee permanent modifications even if all payments are made
  - Bank owes no duty of care to borrower, even if borrower is a consumer
  - No fraud or misrepresentation claims because no reasonable reliance on “conditional” language in TPP
- Disposition
  - Plaintiffs’ claims dismissed

Costigan v. CitiMortgage, Inc., No. 10 Civ 8776, 2011 WL 3370397 (S.D.N.Y. Aug. 2, 2011)

- Relevant Facts
  - Borrower filed putative class action related to HAMP modification and CitiMortgage's alleged breach of its SPA (Servicer Provider Agreement) with Fannie Mae
  - Borrower made TPP payments but modification was denied
- Notable Issues
  - Borrower could not assert claim for violation of SPA because he was not a party to the agreement
  - Claim for breach of covenant of good faith and fair dealing failed because CitiMortgage complied with terms of original mortgage – the only contract from which any such duty could arise
  - Good discussion of dismissal of breach of contract, promissory estoppel, fraud, and state consumer protection statutes
- Disposition
  - Court dismissed borrower's claims

In re Bank of America HAMP Contract Litigation, No. 10-md-02193, 2011 WL 2637222 (D. Mass. July 6, 2011)

- Relevant Facts
  - Plaintiffs brought putative class action alleging that Defendants improperly administered HAMP
  - Plaintiffs proposed two classes:
    - Those who were not offered TPPs
    - Those who entered a TPP but did not receive permanent modification
- Notable Issues
  - Plaintiffs were not beneficiaries of SPA and could not maintain breach of contract or promissory estoppel claims
  - Complaint sufficiently alleged that TPPs were enforceable contracts
  - Plaintiffs could not obtain preliminary injunction on behalf of absent class members
- Disposition
  - Court denied motion to dismiss TPP Plaintiffs' claims
  - Allows claims to proceed -- breach of contract, promissory estoppel, breach of implied covenant of good faith and fair dealing, state law consumer protection statutes
  - Court granted motion to dismiss SPA Plaintiffs' claims

Girgis v. Countrywide Home Loans, Inc., No. 1:10-cv-00590, 2010 WL 4365884 (N.D. Ohio Oct. 28, 2010)

- Relevant Facts
  - Plaintiffs brought putative class action alleging predatory loan servicing practices
  - More of an origination case
  - Plaintiffs alleged that Defendant falsified documents in order to qualify Plaintiffs for loans they couldn't afford
- Notable Issues
  - Sending copies of requested information (faxed flood policies) to a bank does not constitute a QWR under RESPA
  - Choice-of-law provision stating that contract is subject to "applicable law" does not render any alleged violation of the law a breach of contract
  - Claims for breach of contract and breach of duty of good faith and fair dealing failed because Plaintiffs failed to point to any contract provision that was breached
- Disposition
  - Court granted summary judgment and dismissed all of Plaintiffs' claims

Servicing-Related Class Certification Decisions

- *Schramm v. JPMorgan Chase Bank NA*, C.D. Cal. Oct. 19, 2011)
- *Toldy v. Fifth Third Mortgage Co.* (N.D. Ohio Sept. 30, 2011)
- *Bauer v. Dean Morris, L.L.P.* (E.D. La. Sept. 7, 2011)
- *Herrera v. LCS Financial Services Corp.* (N.D. Cal. June 1, 2011)
- *Hofstetter v. Chase Home Finance, LLC* (N.D. Cal. March 31, 2011)
- *Bosque v. Wells Fargo Bank, N.A.* (D. Mass Jan. 26, 2011)
- *Delebreau v. Bayview Loan Servicing, LLC* (S.D.W. Va. Jan. 18, 2011)
- *Durmic v. J.P. Morgan Chase Bank, N.A.* (D. Mass. Dec. 10, 2010)

Decisions Certifying a Class

- *Schramm v. JPMorgan Chase Bank NA* (C.D. Cal. Oct. 19, 2011)
- *Herrera v. LCS Financial Services Corp.* (N.D. Cal. June 1, 2011)
- *Hofstetter v. Chase Home Finance, LLC* (N.D. Cal. March 31, 2011)

Schramm v. JPMorgan Chase Bank NA, No. 2:09-cv-09442 (C.D. Cal. Oct. 19, 2011)

- Relevant Facts
  - Borrowers filed putative class action alleging that JPMorgan duped them into paying higher interest rates on ARMs
  - Borrowers alleged that misleading loan applications hid balloon payments
  - Allege origination issues more so than servicing
  - Brought claims under California § 17200
- Notable Issues
  - Class action not appropriate for rescission claims because allowing class-wide rescission would not promote judicial economy
  - Rescission of individual mortgages requires individual information and should not be done on a class-wide basis
  - Certification of class seeking restitution is appropriate
- Disposition
  - Class certification granted in part and denied in part

Herrera v. LCS Financial Services Corp., 274 F.R.D. 666 (N.D. Cal. June 1, 2011)

- Relevant Facts
  - Borrower filed putative class action against mortgage servicer of 50,000 borrowers
  - Borrower alleged that notifications regarding post-foreclosure deficiencies violated FDCPA and state debt collection law
- Notable Issues
  - Servicer argued that ascertainability depended on merits determination -- rejected
  - Class was ascertainable based on review of Uniform Residential Loan Applications and publicly available data
    - Determining whether purported class members received communications that violated the FDCPA was unnecessary because merely sending a letter with misleading information constitutes a statutory violation
  - Named plaintiff's failure to seek actual damages even though some class members would be entitled to actual damages, did not prevent finding of typicality
  - Court rejected argument that claims were subject to unique defenses such as bona fide error
  - Individualized damages issues do not bar class certification where common questions predominate regarding liability
- Disposition
  - Class certification granted

Hofstetter v. Chase Home Finance, LLC, No. C 10-01313, 2011 WL 1225900 (N.D. Cal. March 31, 2011)

- Relevant Facts
  - Plaintiffs sought to certify class action involving lender-imposed flood-insurance requirements for properties securing HELOCs
  - After policy change relating to minimum amount of necessary coverage, Chase gave borrowers an opportunity to obtain flood insurance that met new requirements. If borrowers failed to do so, Chase force-placed flood insurance.
- Notable Issues
  - Plaintiffs brought TILA and § 17200 claims
  - Variations in underlying credit agreements did not support argument that individualized issues predominated – sub-classes would be allowed if necessary
  - Variations in senior liens did not preclude certification because relevant inquiry for Plaintiffs' claims related solely to changes in Chase HELOCs
- Disposition
  - Class certified to pursue injunctive and declaratory relief
  - Class certified to pursue actual damages

Decisions Denying Certification

- *Toldy v. Fifth Third Mortgage Co.* (N.D. Ohio Sept. 30, 2011)
- *Bauer v. Dean Morris, L.L.P.* (E.D. La. Sept. 7, 2011)
- *Bosque v. Wells Fargo Bank, N.A.* (D. Mass Jan. 26, 2011)
- *Delebreau v. Bayview Loan Servicing, LLC* (S.D.W. Va. Jan. 18, 2011)
- *Durmic v. J.P. Morgan Chase Bank, N.A.* (D. Mass. Dec. 10, 2010)

Toldy v. Fifth Third Mortgage Co., No. 1:09 CV 377, 2011 WL 4634154 (N.D. Ohio Sept. 30, 2011)

- Relevant Facts
  - Borrower sought certification relate to allegations that mortgage company violated RESPA by providing kickbacks
  - Borrower alleged mortgage company referred borrower to wholly-owned subsidiary conduct settlement services in violation of RESPA
- Notable Issues
  - RESPA's fee shifting and treble damages provisions preclude a finding of superiority under Rule 23(b)(3)
    - Incentive to bring individualized actions
  - Individualized issues threatened to overwhelm class issues because each loan would need to be analyzed to determine whether RESPA applies
    - Question of whether loans were residential or commercial
- Disposition
  - Class certification denied

Bauer v. Dean Morris, L.L.P., No. 08-5013, 2011 WL 3924963 (E.D. La. Sept. 7, 2011)

- Relevant Facts
  - Plaintiffs filed putative class actions against law firm and lenders alleging that law firm overstated fees in foreclosure proceedings
  - Plaintiffs argued that lender's obligations under loan documents were non-delegable, making lenders liable for law firm's practices
- Notable Issues
  - Claims for conversion, unjust enrichment, intentional misrepresentation, fraud, breach of contract, and conspiracy
  - Class definition: All persons "who were charged excessive fees"
  - Proposed class was not ascertainable because proposed class definition would require individualized inquiry into merits of each purported class member's claim
  - Individualized issues related to reliance, affirmative defenses, and damages precluded certification
  - Damages can still be an important individual issue
- Disposition
  - Court granted motion to strike class allegations

Bosque v. Wells Fargo Bank, N.A., 762 F. Supp. 2d (D. Mass 2011)

- Relevant Facts
  - Plaintiffs who signed TPPs pursuant to HAMP brought putative class action
  - Plaintiffs argued they complied with TPPs, but Wells Fargo breached the agreements
- Notable Issues
  - Plaintiffs had standing
    - Although HAMP does not create a private right of action, Plaintiffs' claims related to alleged failure to comply with a contract for which there was consideration – the TPPs
  - Plaintiffs were permitted to conduct limited discovery to identify potential class members and support class certification argument
- Disposition
  - Court denied motion to dismiss claims for breach of contract, breach of duty of good faith and fair dealing, promissory estoppel, and Massachusetts Consumer Protection Act
  - Motion for class certification denied without prejudice

Delebreau v. Bayview Loan Servicing, LLC, 770 F. Supp. 2d 813 (S.D.W. Va. 2011)

- Relevant Facts
  - Plaintiffs brought putative class action against mortgage servicing company alleging assessment of illegal fees related to foreclosure
  - Alleged excessive late fees, attorney fees, and default fees
- Notable Issues
  - Claims under West Virginia consumer credit act
  - Plaintiffs' initial motion for class certification was denied because numerosity requirement was not satisfied, but parties continued discovery bearing on class issues
  - Court determined it had subject matter jurisdiction under CAFA
  - Plaintiffs' consumer protection claims were barred by the statute of limitations, so their claims were not typical of class members
- Disposition
  - Court granted motion to dismiss Plaintiffs' consumer protection claims and dismissed state law claims for lack of jurisdiction
  - Motion to certify class denied as moot because Plaintiffs' individual claims failed

Durmic v. J.P. Morgan Chase Bank, N.A., No. 10-CV-10380, 2010 WL 5141359 (D. Mass. Dec. 10, 2010)

- Relevant Facts
  - Plaintiffs sought certification of a "provisional" class of borrowers who entered into TPPs
  - Each of the named Plaintiffs qualified for a TPP and made all three trial payments but were denied a permanent modification
- Notable Issues
  - Plaintiffs were not typical of purported class because some named Plaintiffs failed to make timely TPP payments
  - Class certification was precluded because Plaintiffs' claims were subject to individualized defenses
    - Understatement of income, valuation of property, and other reasons for failing NPV test
- Disposition
  - Motion for provisional class certification denied

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Atlanta

Austin

Chicago

Dallas

Hong Kong

Houston

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Recent Developments in The War on MERS

Thomas J. Cunningham

London

Los Angeles

New Orleans

New York

Sacramento

San Francisco

Washington , DC

Common Attacks on MERS

- MERS Lacks Standing to Foreclose or Assign
- “Splitting” the Note from the Mortgage Renders the Debt Void
- MERS is a conspiracy to defraud consumers

Kansas & Arkansas Cases

- *MERS v. Southwest Homes of Arkansas, Inc.*, 2009 Ark. 152, 301 S.W.3d 1 (2009)

- *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158 (2009)

MERS Authority to Foreclose

- Most states recognize MERS authority to foreclose
  - California, Florida, Illinois, Missouri, Nevada, New York, North Dakota, Ohio, Utah
- Some have questioned MERS standing
  - Maine, Michigan, Oregon, Washington

Agard & Ibanez

- *In re Agard*, 444 B.R. 231 (Bankr. E.D.N.Y. 2011)

- *US Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 941 N.E.2d 40 (2011)

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The MERS MDL

- Dozens of cases filed in 2009
  - California, Nevada, Arizona
- Hager & Hearne law firm
- Hundreds of individual plaintiffs, also putative nationwide classes
- Virtually entire mortgage industry sued
- Multitude of claims
  - Standard “predatory lending”/”predatory servicing” claims

The MERS MDL (cont'd.)

- Also attacked MERS
  - MERS is a "sham beneficiary"
  - MERS created to conceal identity of lenders
  - "Split the Note" theory
  - MERS assignments are invalid
- Alleged violation of various state statutes and various common law theories

The MERS MDL (cont'd.)

- MDL Panel Split Cases
  - Claims attacking MERS transferred to MDL in Arizona
  - Claims unrelated to MERS remained in original jurisdictions
- Voluntary Injunctions re Foreclosures

The MERS MDL (cont'd.)

- State claims dismissed
  - Defendants needed to deal with stipulations and agreed injunctions related to foreclosures

- Judge Teilborg set schedule for briefing motions to dismiss the MERS-related claims

Cervantes

- *Cervantes v. Countrywide Home Loans, Inc.*, No. CV 09-517-PHX-JAT, 2009 WL 3157160 (D. Ariz. Sept. 24, 2009).

- *Cervantes v. Countrywide Home Loans, Inc.*, ___ F.3rd ___, 2011 WL 3911031 (9th Cir. 2011).

MDL Opinions

- In re Mortgage Electronic Registration Systems Litigation, No. 2:09-md-02119-JAT (D. Ariz. Jan. 25, 2011)
  - Courts around the country followed
- In re Mortgage Electronic Registration Systems Litigation, No. 2:09-md-02119-JAT, 2011 WL 4550189 (D. Ariz. Oct. 3, 2011)
- Plaintiffs' counsel vow appeal
  - But Cervantes seems to be the final word

False Claims Act Cases

- Barrett Bates/Hager & Hearne Cases
- County Prosecutor Cases
- Allege fraud by MERS and MERS members, depriving counties of revenue

False Claims Act Cases (cont'd.)

- Two states have dismissed
  - California
  - Nevada
- Motions to dismiss pending in others
- Some may still be sealed

False Claims Act Cases (cont'd.)

- No obligation to record in most states
- All information publicly disclosed and well-covered by the media

Conclusion/Q&A

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