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Newsletters

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U.S. Supreme Court Weighs in on Class Action Certifications

In the U.S. Supreme Court's first decision under the Class Action Fairness Act of 2005 (CAFA), the Court held that a class action plaintiff's stipulation, prior to class certification, that he and the proposed class would not seek damages exceeding $5 million, did not remove the case from the scope of CAFA.

CAFA provides the federal district courts with original jurisdiction to hear a class action if the class has more than 1,000 members, the parties are all minimally diverse, and the matter in controversy exceeds $5 million. 28 U.S.C. §§ 1332(d)(2), (5)(B). To determine whether the amount in controversy is met, the claims of individual class members are to be aggregated. 28 U.S.C. § 1332(d)(6).

In this case, the class representative filed — prior to class certification — the stipulation to seek damages less than $5 million, so as to defeat federal jurisdiction and removal. The Supreme Court held that the stipulation did not take the case outside of CAFA. The Court based its reasoning upon the proposition that stipulations must be binding. The stipulation did not speak for those the class representative purported to represent. Because pre-certification stipulation does not bind anyone but the class representative, he had not reduced the value of the putative class members' claims.

One interesting feature of this case is that it emphasizes the limited power of a class representative over putative "class" members before a class is certified.

Standard Fire Insurance Co. v. Knowles, Case No. ___ S. Ct. ___, Case No. 11-1450 (U.S. Mar. 19, 2013)

Supreme Court Rules That Damages Consideration Is Appropriate at

Class Certification Stage

On March 27, 2013, the U.S. Supreme Court held that a class was improperly certified under Fed. R. Civ. P. 23(b)(3). The lower court erred when it refused to entertain arguments on defendant cable company's damages model that bore on the propriety of class certification merely because it would involve a merits determination.

Consumers filed a class action antitrust suit claiming that they and other subscribers were harmed because the cable company's strategy lessened competition and increased prices. The district court certified a class on the basis that the cable company's activities reduced the level of competition from "overbuilders," companies that build competing cable networks in areas where an incumbent cable company already operates. The class was certified despite evidence that the proposed damages model used by plaintiff to certify the class did not properly isolate damages resulting from any theory of liability. The U.S. Court of Appeals for the Third Circuit affirmed, and in doing so, refused to consider any argument contravening the damages model used because to do so would preliminary reach the merits of the plaintiff's claims.

The Supreme Court reversed. Specifically, it held that "[b]y refusing to entertain arguments against [the consumers'] damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedent requiring precisely that inquiry." Moreover, under the proper standing for evaluating certification, "the [consumers'] model falls far short of establishing that damages are capable of measurement on a class-wide basis."

Comcast Corp. et. al. v. Behrend, et. al., ___ S. Ct. ___, Case No. 11-864 (U.S. Mar. 27, 2013)

Developments Since *Canning v. NLRB,* Which Held President Obama's Recess Appointments Unconstitutional

Earlier this year, the U.S. Court of Appeals for the District of Columbia Circuit in *Canning v. NLRB,* 705 F. 3d 490 (C.A.D.C. 2013) held that President Obama's three recess appointments made to the National Labor Relations Board (NLRB) were unconstitutional. There is also litigation pending to have U.S. Consumer Financial Protection Bureau (CFPB) Director Richard Cordray's recess appointment held invalid. Further, the Chairman of the Financial Services Committee sought clarification from the Board of Governors of the Federal Reserve System regarding its authority to fund the CFPB in the absence of a properly appointed CFPB Director.

Nevertheless, on March 19, 2013, the U.S. Senate Banking Committee approved Cordray's re-nomination to be CFPB Director. The nomination is headed for a vote by the full Senate. It is expected that Republican Senators will attempt to block a final vote while they push their call for major structural changes to the CFPB.

Mortgage Foreclosure Complaint in Florida May Be Verified by the Mortgagee's Loan Servicer

The Florida Second District Court of Appeal, in a matter of first impression, held that the trial court incorrectly required the mortgagee, not its loan servicer, to verify the foreclosure complaint. *Deutsche Bank National Trust Company v. Prevratil,* Case No. 2D12-2030 (Fla. 2nd DCA 2013)

Florida's civil procedure rules require verification of a complaint for mortgage foreclosure on residential real property. Verification includes the statement "[u]nder penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief." The mortgagors moved to dismiss the complaint, arguing that the mortgagee failed to comply with the rules because the loan servicer, not the bank, had verified the complaint. In response, the mortgagee filed a copy of the power of attorney that appointed the servicer as its attorney-in-fact in connection with the mortgage loans it serviced. The trial court granted the motion to dismiss, but gave the mortgagee leave to file an amended complaint. The mortgagee sought *certiorari* review of the dismissal order.

The appellate court found that the trial court erred by refusing to give effect to the loan servicer's power of attorney. While Florida statutory law provides that an attorney-in-fact may not make an affidavit as to the personal knowledge of the principal, the state's civil procedure rules do not require verification based upon personal knowledge, but rather as to the

facts being true and correct “to the best of my knowledge and belief.” Because the servicer verified the complaint as attorney-in-fact for the mortgagee, and the power of attorney predated the filing of the complaint, the servicer was within its authority to execute the verification. The court also noted that under Florida law, the mortgagee would be responsible for the servicer’s actions as its agent pursuant to the power of attorney. The trial court’s order on the motion to dismiss was quashed.

Deutsche Bank National Trust Company v. Prevratil, Case No. 2D12-2030 (Fla. 2nd DCA 2013)

New Foreclosure Rules Set to Take Effect in Illinois

On February 28, 2013, the Illinois Supreme Court delayed the effective date of three new rules aimed at mitigating uncertainty in the foreclosure process. The rules adopted by the Illinois Supreme Court were: (1) Rule 99.1 (which relies on existing Rule 99); (2) Rule 113; and (3) Rule 114. The rules were initially adopted on February 21, 2013, and were scheduled to take effect on March 1, 2013. The purpose of the delay is to determine how these rules will be applied to existing cases, or whether they should only apply to new cases. The rules are now scheduled to take effect June 1, 2013. It is noteworthy that the new rules do not appear to shorten the time it takes to foreclose on a property in Illinois.

Below is a brief summary of each rule:

Rule 99.1

Rule 99.1 provides guidance for those counties that desire to establish mortgage foreclosure mediation programs, which have to be submitted to the Administrative Office of the Supreme Court for approval. These programs must comply with the existing Supreme Court Rule 99 that addresses mediation programs.

The rule also gives those counties that have mortgage foreclosure mediation programs (Cook, Will, Peoria, Kane, Madison, Bond and McLean) until June 1, 2013, to comply with Rule 99.1.

Rule 113

Under this rule, all copies of a complaint for foreclosure must include a copy of the note, as it currently exists, including all endorsements and allonges. The plaintiff lender must also file an affidavit in support of the amounts due and owing when it files any motion requesting a judgment of default.

Where the defendant is defaulted by a court order, a notice of the default and entry of the judgment of foreclosure must be prepared by the lender’s attorney and mailed by the clerk of the circuit court. The notice must be delivered to the clerk within two business days of the entry of the order and must be mailed within five business days of the entry of the default. The notice is to be mailed to the property address or the address on any appearance or other document filed by the defendant.

In addition to the other requirements related to judicial sales, Rule 113 requires the lender’s attorney to send notice by mail to the defendant at least 10 business days before the sale. The notice must include the date of the sale, and its time and location.

Rule 114

Rule 114 provides that when a mortgagor has appeared or filed an answer or other responsive pleading in a foreclosure action, the plaintiff must comply with the provisions of any loss-mitigation program applicable to the loan before it can move for a judgment of foreclosure.

The plaintiff must file an affidavit demonstrating compliance with this rule prior to or at the time it moves for a judgment of foreclosure.

The affidavit must state:

(a) Any type of loss mitigation program applicable to the loan;

(b) What steps were taken to offer the loss mitigation program to the mortgagor; and

(c) The status of any loss mitigation efforts.

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