

FINANCIAL INSTITUTIONS SUBSECTION NEWSLETTER
FALL 2010

This newsletter continues an effort begun in large part by Reid Manley to establish and grow a Substantive Law Section of the FDCC with an emphasis on the representation of the financial services institutions. It only takes a quick read of today's news to see that the world of credit and securities has and continues to be dramatically impacted by the economic crisis and enhanced regulation, all of which will and has already generated a variety of new litigation. It is our hope that those of you who have an interest and emphasis in this practice area, which includes banking, consumer finance, mortgage lending and securities will see this as your opportunity to get more involved in a meaningful way as we work with and contribute to the Commercial Litigation Section with an emphasis on this area of the law practice. Opportunities to get more involved are noted further herein so please take a few minutes to read this!

RECENT DECISIONS

As already noted, there is a lot of statutory and regulatory activity developing in the world of financial institutions which has already generated considerable litigation. Some examples of recent cases touching on some of the more timely issues are these:

(1) **Servedio v. US Bank Nat Assn., 2010 WL 4226399 (Fla. App 2010).**

This case emphasizes the problems created through the multiple assignments of mortgages in the mortgage industry relating to the establishment of the true owner/holder of a mortgage in order to prevail in a judicial mortgage foreclosure. It further highlights the mistakes which lawyers can make in not clearly establishing the entitlement of the movant to the relief sought.

(2) **Zoher v. Chase Home Financing, 2010 WL 4064798 (SD Fla. 2010).**

This case involves a claim brought under the Home Affordable Modification Program (HAMP) which was created by the Department of Treasury and the Federal Housing Finance Agency and which offers financial incentives to mortgage lenders who modify the home loans of borrowers in danger of foreclosure. Here the borrower sought to compel Chase to modify her loan mortgage following the denial of her modification application. This case reaffirms that there is no private right of action under the HAMP program, whether

expressed or implied. In addition, the Court found that there can be no right to enforce compliance as an alleged third party beneficiary.

(3) **Frazile v. EMC Mortgage Corporation, 2010 WL 2331429 (11 Cir. 2010).**

This 11th Circuit case addresses the specific application of the Real Estate Settlement Procedures Act (RESPA) as well as the Truth in Lending Act (TILA) to a mortgagor borrowers' efforts to rescind a home mortgage loan approximately two years after the closing. The Court affirmed the denial of the RESPA claim which alleged the failure to fully disclose the costs of the loan and further concluded that the borrower failed to allege sufficient facts to state a RESPA violation for kickbacks, markup or fee splitting for services not performed (12 USC §2607) or for failing to provide an adequate response to a qualified written request (12 USC §2605(c)). However the Court found that the TILA claim for failure to timely rescind the mortgage transaction upon receipt of the borrowers notice was not time barred and the District Court was obligated to determine whether the alleged nondisclosure preserved the borrowers right to rescind for three years.

(4) **BOE v. TCF National Bank, 2010 WL 3827946 (D. Minn 2010).**

This case involves a borrower whose home mortgage loan was initially closed in August 2004 and modified in March, 2006. The borrower, whose mortgage was subject to foreclosure proceedings, sought damages in recoupment and set off under TILA even though the last mortgage transaction occurred in 2006. This claim was based on the July 2010 amendments to TILA under the Dodd-Frank Wall Street Reform and Consumer Protection Act (to be codified at 15 USC §1640 (2010)) which provides that a consumer against whom a foreclosure action has been initiated "may assert a violation of a condition. . . as a matter of defense by recoupment or set off without regard for the time limit on a private action for damages." However this significant amendment does not take effect until January 1, 2011 so the Court dismissed the claim under TILA, as well as the remaining claims seeking to void the mortgage note.

(5) **Share Now v. Impact Mortgage Holdings Inc., 2010 WL 2640195 (9 Cir. 2010).**

This 9th Circuit case re-emphasizes the importance of the provisions of the Private Securities Litigation Reform Act of 1995 and the decision in Tellabs Inc. v. Makor Issues & Rights Ltd., 551 US 308, 127 S.Ct 2499 (2007) in application to securities fraud claims under the Securities Exchange Act of 1934. The Court affirmed the finding that the allegations of fraud in the underwriting of loans and

representations regarding the quality of those loans was not sufficient to demonstrate a strong inference of scienter required to maintain such claims.

FALL P&O MEETING

One of the rewarding things about having an opportunity to serve this subsection was to be invited to participate in the Fall P&O meeting, held in Philadelphia this year. It was an inspiring meeting which addressed the “Projects and Objectives” for the coming year and included hearing from and being challenged by President Tom Cordell, Board Chairman Mike Lucey, President Elect Mike Neil, Secretary/Treasurer Ed Kaplan, as well as P&O Chairman Steve Farrar. It is easy to understand why the FDCC accomplishes what it does with leadership like this. But, perhaps the most important thing I took away from the meeting was an awareness that the benefits and rewards of our membership at the FDCC are the greatest when we take advantage of opportunities for active involvement. Section membership and involvement present one of the best opportunities.

UPCOMING EVENTS

WINTER MEETING AT INDIAN WELLS (PALM SPRINGS) CA – February 26 – March 5, 2011

I hope each of you will take advantage of the opportunity to attend the 2011 Winter Meeting in Indian Wells, California, which will begin the celebration of the FDCC’s 75th Anniversary. Bruce Celebrezze has put together an excellent CLE program and the planned events present great opportunity for fellowship and time away from your daily grind, which the FDCC is so noted for. Registration is open so please go on-line and get registered!

While our neophyte subsection will not present a separate program at this meeting with specific emphasis on this area of practice, we will be actively working toward finding those of you who want to be involved in future presentations relating to this subsection.

ANNUAL MEETING, COLONIAL WILLIAMSBURG RESORTS, VIRGINIA July 24-31, 2011

It is certainly not too early to begin planning for the 75th Annual Meeting which will be held in historic Williamsburg, Virginia. This meeting presents an excellent opportunity for one or more of you to get actively involved by participating in a presentation as part of the Commercial Litigation Section. A proposed topic for our subsection is recent federal legislation, regulations and case

law impacting the financial services industry, including the Dodd-Frank Reform and Consumer Protection Act, the developing mortgage foreclosure law and other trends impacting the world of credit and securities.

If any of you are interested in participating in this presentation, please let me know as soon as possible!

OPPORTUNITIES FOR YOUR INVOLVEMENT

We encourage each of you who are interested in becoming more involved in these efforts to consider any of the following:

(1) TOPICS AND PRESENTATIONS

In addition to the upcoming Annual Meeting, it is not too early to begin plans for the Winter (Phoenix) and Annual (Whistler Canada) Meetings in 2012. Please let us know if you are interested in participating as a presenter or if you have topic proposals for a Plenary or Section program. This is always an excellent opportunity for more meaningful involvement in the upcoming meetings.

(2) PUBLICATIONS

Don't forget that the FDCC Quarterly offers a great opportunity for you to present a timely and scholarly article for publication for wide circulation and for distribution to your clients and potential clients.

(3) HOT CASES

As part of the Commercial Litigation Section, we are responsible for contributing to the Hot Cases during the year. Please let me or Tom Hanekamp (Thanekamp@tsmp.com) know of your availability to assist in this effort.

(4) SECTION NEWSLETTER

Please consider providing to us any recent developments in the law pertinent to financial institutions, as well as any recent accomplishments in your practice which would be of interest to our members. This is something which will certainly add to the value of a newsletter. Also, we welcome any thoughts you may have to enhance this means of communicating to our members twice a year.

REMINDER: FDCC MEMBERSHIP DEVELOPMENT

Each section has an important obligation to propose at least two (2) new members for the FDCC each year. Please let us know of any candidates you may know and we will be glad to assist you in the process of nomination.

HELP US!

Please contact Todd or myself by dropping us an e-mail or just make a telephone call with any ideas you may have to help us in this process. We look forward to hearing from you and hopefully seeing you in February in California!

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