



THE NEW LITIGIOUS ENVIRONMENT

**MBA National Mortgage
Servicing Conference & Expo**

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TOPIC: MULTI-DISTRICT LITIGATION

- WHAT IS IT?
- WHEN DO YOU USE THE MDL DEVICE?
- HOW DOES THE MDL DEVICE WORK?
- PROS AND CONS OF USING THE MDL DEVICE



WHAT IS MULTI-DISTRICT LITIGATION?

- 28 U.S.C. § 1407 states:
 - (a) When civil actions involving one or more common questions of fact are pending in different ***districts***, such actions may be transferred to any district for coordinated or consolidated ***pretrial*** proceedings.
- Creates the Judicial Panel on Multi-District Litigation (Panel housed in Washington, D.C.; travels to different courts to hear consolidation requests)



MULTI-DISTRICT LITIGATION . . . WHEN CAN YOU USE THE MDL DEVICE?

Examples:

- Individual Copycat Cases Filed in District Courts All Over the Country
- Class Actions With Overlapping Classes
- Statewide Class Actions Filed in District Courts



HOW DOES THE MDL DEVICE WORK?

- File a Request With the Judicial Panel on Multi-District Litigation Requesting Consolidation of Specified Federal Court Actions
- Any Party Can Object
- Transfer Can Be By Any Convenient District Court Judge
- No Review of a Denial



HOW DOES THE MDL DEVICE WORK? (cont'd)

- Creation of MDL is Only Reviewed by Extraordinary Writ
- Cases Listed in Petition Will be Transferred for Pretrial to Convenient District Court (Typically One Which Has a Case)
- Often, New Consolidated Complaint is Filed to Cover All Cases
- Future Cases That are Similar Can Be Transferred (Tagged) to the MDL



BENEFITS OF THE MDL DEVICE

- Cuts Down on Cost and Inefficiency of Litigating Same Case All Over the Country
 - Can prevail on multiple cases with a single motion to dismiss
 - One set of discovery
- Can Avoid Local Prejudices



BENEFITS OF THE MDL DEVICE (cont'd)

- Disincentive for Plaintiffs' Lawyers to File Additional Suits (Loss of Control)
- Possibility of Enjoining Even State Court Cases
 - Anti-Injunction Act
 - All Writs Act



LIMITATIONS AND DOWNSIDES OF THE MDL DEVICE

- Only Applies to Cases in Federal Court
 - Must first remove state court cases to federal court
 - Can be a timing issue (race between transfer and remand)
- Reduces Diversification of Judicial Risk – One Judge
- Must Try the Case Before a Judge Different Than the Pretrial Judge
- Takes Much Longer to Resolve Individual Cases



TOPIC:
FDCPA (FAIR DEBT COLLECTION PRACTICES ACT)

- Focus on a Helpful Interpretation of the Act that Could Defeat Many Different FDCPA Cases



MOST ARE FAMILIAR WITH WHAT IS KNOWN AS THE MORTGAGE SERVICER EXCEPTION

15 U.S.C. § 1692a – Definition of Debt Collector:
The term debt collector does not include:

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- (F) any person collecting or attempting to collect any debt owed or due or assessed to be owed or due to the extent such activity ... (iii) concerning a debt which was not in default at the time it was obtained by such person
- Provision Immunizes Mortgage Servicers From Significant Liability Under the Act



LESSER KNOWN PROVISION CONTAINED WITHIN THE SAME DEFINITIONAL PHRASE

15 U.S.C. § 1692a – Definition of Debt Collector:

For purposes of 806(b) [The Definition of Debt Collector], such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business, the principal purpose of which is the enforcement of security interests.

- Implies That Mortgage Debt is Subject Only to 806(b) of the Act and No Other Provision
- Successfully Litigated this Argument in the Eastern District of Washington and the Ninth Circuit
 - Thomson v. Homeside Lending, (E.D. Wash. 2001) Aff'd Case no. 00-98-00478 (9th Cir. Jan. 16, 2004)



TOPIC: BEWARE - WHAT YOU NEED TO KNOW ABOUT THE FALSE CLAIMS ACT

- Imposes Liability and Harsh Penalties on Persons Who:
 - Submit false claims to the government
 - Make false statements which cause false claims to be submitted
- Could Include Claims to Federal Agency for Reimbursement on Federally Insured Mortgages
- Plaintiffs Will Be Your Employees Who Know Where the Bodies are Buried
 - A whistleblower can receive up to 30% of the value of the false claims



TOPIC: BEWARE - WHAT YOU NEED TO KNOW ABOUT THE FALSE CLAIMS ACT

- False Claims Act is Receiving A Lot of Attention Now
 - Amerigroup Case – Largest False Claims Verdict in History (\$48 million plus up to \$524 million in penalties)
 - New Incentives in Federal Legislation for States to Pass Their Own False Claims Acts
- The False Claims Act Often Encompasses Conduct That is Rampant in an Industry



TOPIC: FEDERAL PREEMPTION OF HOLA

1. OTS hereby ***occupies the entire field of lending regulation for federal savings associations***. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, ***without regard to state laws purporting to regulate or otherwise affect their credit activities***.

12 C.F.R. § 560.2(a) (emphasis added).

2. OTS regulations expressly preempt state laws regulating a variety of loan-related conduct, including “loan-related fees, including, without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees,” 12 C.F.R. § 560.2(b)(5); “escrow accounts, impound accounts, and similar accounts,” 12 C.F.R. § 560.2(b)(6); and “disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents.” 12 C.F.R. § 560.2(b)(9)



TOPIC: FEDERAL PREEMPTION OF HOLA (cont'd)

- These Provisions Create Arguments for the Preemption of a Wide Variety of State Law Claims Relating to Mortgage Servicing by OTS-Regulated Banks
- Preemption May Apply to Bank's Vendors as Well