PNC Loses Bid to Decertify Predatory Lending Class | The Legal Intelligencer

Friday, July 31, 2015 8:52 AM

The Third Circuit has rejected PNC Bank's bid to decertify a class of plaintiffs who alleged as far back as 2003 that a Virginia-based bank it later acquired had engaged in predatory lending practices.

It was the third time the U.S. Court of Appeals for the Third Circuit heard the case of *In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation*, which was initially filed in 2003, reached two separate settlements that were appealed by objecting plaintiffs and finally went back to the district court for a determination on class certification.

After the second time through the appeals court, the plaintiffs abandoned their settlement negotiations and joined forces with the objector plaintiffs in seeking class certification. The U.S. District Court for the Western District of Pennsylvania granted class certification in July 2013 and PNC, as successor to Community Bank of Northern Virginia, appealed.

The case involves allegations of an illegal home equity lending scheme involving two banks, including CBNV, according to Judge Kent A. Jordan.

According to the opinion, the plaintiffs alleged the existence of a predatory lending scheme affecting borrowers nationwide and allegedly masterminded by the Shumway Organization, a residential mortgage loan business operating in Chantilly, Virginia. Through a variety of entities, including EquityPlus Financial Inc., Equity Guaranty LLC and various title companies, Shumway offered high-interest mortgage-backed loans to financially strapped homeowners, according to the opinion.

As a non-depository lender, Shumway was subject to fee caps and interest ceilings imposed by various state mortgage lending laws, Jordan said. The putative class alleged that, in an effort to circumvent those limitations, Shumway formed associations with several banks, including CBNV. Shumway allegedly arranged payments to CBNV and others to disguise the source of its loan origination services so that fees for those services would appear to be paid solely to the banks, which were depository institutions. The plaintiffs alleged that, in reality, the overwhelming majority of fees and other charges associated with the loans were funneled through the banks to Shumway via EquityPlus and Equity Guaranty, Jordan said.

A number of class actions related to the alleged scheme were filed in the early 2000s and were consolidated in the Western District. The original plaintiffs in the instant case, which consisted of a putative class of 44,000 people, raised claims under the Real Estate Settlement Procedures Act, the Racketeer Influenced and Corrupt Organizations Act, and Pennsylvania law. Throughout the years of appeals, additional claims were added to now include claims under the Truth in Lending Act and the Home Ownership and Equity Protection Act, according to the opinion.

There are five subclasses to the class, which each focus on various claims, such as the RICO subclass.

PNC first took issue with the adequacy of class counsel, arguing the district court erred in not appointing separate counsel to represent the subclasses. But the court rejected that argument, finding separate counsel is needed only when fundamental conflicts exist between the goals of the various classes. The court said there were no such conflicts in this case.

"Unfortunately, PNC spends practically no effort in this appeal trying to demonstrate that any intra-class conflict should now be viewed as 'fundamental,' even though that issue is essential to its leading argument," Jordan said.

PNC further alleged the class members were not easily ascertainable because some of them may have filed for bankruptcy, making the estate and not the individual the real party in interest. PNC said an individualized inquiry of whether each putative class member filed for bankruptcy and the status of the bankruptcy would be required. Jordan rejected that argument as speculative.

In arguing the commonality requirement for class certification was not met, PNC said that, because fees charged to class members varied, a loan-by-loan analysis of each fee paid and each service performed would be required. Jordan said, however, the plaintiffs sufficiently pleaded common effects from the defendants' alleged actions, even if they were affected to varying degrees.

As to the predominance requirement, PNC argued, in part, that many of the class members' claims required equitable tolling to survive, and that would be an individualized inquiry. The plaintiffs sought equitable tolling of their later-added RESPA, TILA and HOEPA claims, arguing the defendants fraudulently concealed their actions, thus preventing the plaintiffs from uncovering those claims sooner, Jordan said. The plaintiffs argued they didn't have to each show an independent act of concealment when the overall alleged wrong is "self-concealing," Jordan said.

"The plaintiffs are able to claim an independent act of concealment with respect to each loan because CBNV allegedly misrepresented material facts in the HUD-1 settlement statements used in closing the loans of every class member, and those misrepresentations arguably support application of equitable tolling," Jordan said.

The judge further found the plaintiffs met their due diligence requirement for equitable tolling to apply, noting that reading the "blizzard of paper" put before them at signing is due diligence enough. Jordan said, however, that the court was not addressing whether the plaintiffs were entitled to equitable tolling on the merits, leaving that for the district court.

As to why the RICO claims are not suited for a class action, PNC argued they were antithetical to the nature of a class action given they presented individualized issues.

The plaintiffs claimed that "where proof of the RICO violation is demonstrated through common evidence of a common scheme, reliance may be inferred on a classwide basis." The court agreed.

PNC also argued that if each settlement fee at issue was improper, they would require a loan-by-loan and fee-by-fee analysis. But Jordan said PNC's argument was mistaken. He said the plaintiffs' argument, "again, is that classwide evidence demonstrates that EquityPlus performed no services in exchange for settlement charges."

Lastly, PNC argued the plaintiffs could not prove monetary loss on a classwide basis. According to Jordan, PNC reasoned the plaintiffs would need to demonstrate the difference between the fees that they paid and the fees that they should have paid.

"Once more, for the reasons set forth above, that argument fails," Jordan said. "The plaintiffs do not assert that EquityPlus rendered inadequate services for which class members are entitled to claw back part of the fee. They assert that EquityPlus performed no services and was entitled to no fee at all. For that reason, it was not an abuse of discretion for the district court to conclude in effect that individualized inquiry will not be necessary."

The plaintiffs' attorney, David M. Skeens of Walters Bender Strohbehn & Vaughan in Kansas City, Missouri, did not return a call seeking comment. PNC's lawyer, Martin C. Bryce Jr. of Ballard Spahr in Philadelphia, also did not return a call seeking comment.

P.J. D'Annunzio can be contacted at 215-557-2315 or pdannunzio@alm.com. Follow him on Twitter @PJDannunzioTLI.

Gina Passarella *can be contacted at 215-557-2494 or at gpassarella@alm.com.* Follow her on Twitter @GPassarellaTLI.

(Copies of the 63-page opinion in In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation, PICS No. 15-1203, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information.) •