

BANKING ALERT

September 2016

[Federal Court Strikes Bank's Affirmative Defenses in Identity Theft Case](#)

In a warning to defendants not to assert affirmative defenses without providing the plaintiff notice of the legal and factual basis for such defenses, the United States District Court for the Southern District of California in *Legacy v. Wells Fargo Bank, N.A.*, 2016 WL 2622953 (S.D. Cal. May 9, 2016), granted a plaintiff's motion to strike the affirmative defenses of the defendant, Wells Fargo Bank, N.A. (the "Bank"), in a suit brought by the plaintiff alleging violations of California's identity theft protection statute.

The plaintiff alleged that the Bank sought to collect on two loans purportedly obtained by the plaintiff from the Bank that were, in actuality, obtained by another individual by means of identity theft. After several attempts by the Bank to collect on the obligations, the plaintiff filed suit under California's identity theft protection statute. After the Bank answered, the plaintiff filed a motion to strike the Bank's twelve affirmative defenses. Initially, the Court noted that whether the pleading standard enunciated by the United States Supreme Court in both *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) applied to affirmative defenses was an unresolved issue in the Ninth Circuit. Instead of applying the standard set forth in those cases, the Court applied Ninth Circuit precedent governing the pleading of affirmative defenses, which holds that the sufficiency of the pleading of an affirmative defense depends on whether it gives the plaintiff fair notice of the defense.

Despite applying the less stringent pleading standard, the Court struck the Bank's affirmative defenses and denied the Bank's request for leave to amend. In finding the affirmative defenses were insufficiently pled, the Court noted that the Bank did not provide any facts that would support the viability of any of the legal defenses asserted in the answer, including defenses of excuse, waiver, consent, estoppel and laches. Just as important, the Court held that the Bank's first affirmative defense, asserting that the plaintiff failed to state a claim upon which relief could be granted, was not an appropriate affirmative defense, but instead one that should be raised as part of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

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Federal Court Denies Plaintiff's Motion to Remand in Action Alleging Contract and Fraud Claims Against Banks

In *Smith v. CitiMortgage, Inc.*, Civ. No. 15-cv-7629 (JLL) (D.N.J. Aug. 5, 2016), the United States District Court for the District of New Jersey denied a motion to remand filed by plaintiff homeowners in an action against CitiMortgage and Investors Bank alleging claims for breach of contract and fraud. Plaintiffs originally filed a complaint against CitiMortgage in state court on September 21, 2015, asserting breach of contract and fraud claims in connection with plaintiffs' home loan modification efforts with CitiMortgage. On October 21, 2015, CitiMortgage removed the case to the District Court of New Jersey and moved to dismiss. The District Court granted in part and denied in part CitiMortgage's motion and granted plaintiffs permission to file an amended complaint. In their amended complaint, plaintiffs, without having sought leave from the Court, added Investors Bank as a party defendant and asserted a fraud claim against Investors. CitiMortgage and Investors moved to dismiss plaintiffs' amended complaint arguing, among other things, that the joinder of Investors was improper. Plaintiffs opposed defendants' motions and filed a cross-motion to remand, arguing that the amendment of their Complaint to name Investors as a defendant destroyed diversity jurisdiction since both plaintiffs and Investors are New Jersey citizens. The basis of plaintiffs' action against CitiMortgage and Investors stemmed from alleged misrepresentations CitiMortgage made to plaintiffs that they were approved for a loan modification on their home mortgage loan under the Home Affordable Modification Program (HAMP). CitiMortgage serviced plaintiffs' mortgage, while Investors owned the loan. Plaintiffs alleged that based on CitiMortgage's approval, they made timely reduced monthly loan payments in accordance with CitiMortgage's instructions commencing in July 2009. On January 21, 2010, however, CitiMortgage advised plaintiffs that Investors did not participate in HAMP. In February 2011, CitiMortgage sent plaintiffs notices of intention to foreclose and subsequently commenced a foreclosure action. In November 2015, plaintiffs refinanced their loan and, in December 2015, the foreclosure action was dismissed.

In determining whether a remand was appropriate, the Court applied the following equitable factors developed by the Fifth Circuit Court of Appeals in *Hensgens v. Deere & Co.*: (1) the extent to which the purpose of the amendment is to defeat federal jurisdiction; (2) whether plaintiff has been dilatory in asking for amendment; (3) whether plaintiff will be significantly injured if amendment is not allowed; and (4) any other factors bearing on the equities.

The Court found that all of the *Hensgens* factors weighed against permitting joinder of Investors. With regard to the first factor, the Court noted that plaintiffs admitted in their motion that they sought to amend their complaint "solely in order to defeat jurisdiction." The Court further noted that the allegations that form the basis of plaintiffs' new claim against Investors were known to plaintiffs long before they filed their original complaint that did not include Investors as a defendant. For the same reason, the Court found that plaintiffs were dilatory in asking for an amendment, having waited several months after filing their original complaint to add Investors as a defendant. Plaintiffs did not address what injuries, if any, they would sustain if the Court denied joinder and no such potential injury was apparent to the Court. Lastly, plaintiffs also did not address any equitable factors in favor of permitting joinder and the Court could not identify any. Accordingly, the Court granted Investors' motion to dismiss. The Court further granted CitiMortgage's partial motion to dismiss certain claims based on fraud and quasi-contract theories of recovery because such claims were barred under the economic loss doctrine.

Plaintiffs' Amended Class Action Claims Regarding International Exchange Rates Are Dismissed With Prejudice

In *MZL Capital Holdings, Inc. v. TD Bank, N.A.*, 2016 WL 4163827 (D.N.J. Aug. 5, 2016), the United States District Court for the District of New Jersey dismissed the Second Amended Class Action Complaint of Plaintiffs arising from allegations that the defendant, TD Bank, N.A. (the "Bank"), charged customers an international exchange rate that was higher than the market rate for such transactions.

Plaintiffs filed a Class Action Complaint asserting the following claims: (1) violation of the New Jersey Consumer Fraud Act; (2) unjust enrichment; (3) violation of Regulation E, 12 C.F.R. 205.10(b) and the Electronic Funds Transfer Act; (4) breach of contract; and (5) violation of laws in other states. Plaintiffs MZL Capital Holdings and Thomas Raic alleged that in the course of conducting international transactions through their accounts at the Bank, they were charged exchange rates that were higher than both the rates identified in the Wall Street Journal and other banks conducting similar transactions. Plaintiffs alleged that they were advised by the Bank that the Bank charged the market rate and a separate service fee for such transactions. The Court dismissed the EFTA and unjust enrichment claims with prejudice and the other claims without prejudice to permit Plaintiffs an opportunity to amend. After Plaintiffs amended their Complaint, the Bank again moved to dismiss the remaining claims.

Turning first to the CFA claim, the Court reiterated that the allegations in the Amended Complaint were no better than the ones in the original Complaint. The Court held that the allegations only stated that the Bank charged an exchange rate different, albeit higher, than the going market rate for such transactions, and that such conduct is not "misleading" under the CFA. The Court also found that the Bank's usage of the term "applicable exchange rate" was not misleading as the Bank was under no obligation to define the term.

The Court also dismissed Plaintiffs' breach of contract claim because Plaintiffs were unable to identify specific allegations in their amended pleading that substantiated their conclusory allegation that the Bank charged a separate "fee" in addition to the exchange rate fee in violation of the parties' agreement.

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