

# BANKING ALERT

May 2023

## **Using Cost-Shifting in Responding to Overbroad and Burdensome Subpoenas**

Banks are often served with burdensome subpoenas seeking broad categories of documents, including emails and other electronically stored information (ESI). There are often strict deadlines, which can be as short as two weeks, for banks to assert and preserve objections to such subpoenas.

Where a federal subpoena will impose "undue expense", the cost of compliance may be shifted to the issuing party under Federal Rule of Civil Procedure 45. Certain state courts, including New Jersey and New York, have similar cost-shifting rules and statutes. Specifically, N.J.S.A. 17:16S-1(b) provides that the requesting party shall pay for "reimbursement of the reasonably necessary costs" for the non-party bank's production. Similarly, under New York CPLR 3111, the "reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery."

These cost-shifting provisions provide banks with much needed leverage when confronted with overbroad and burdensome subpoenas.

## **New Jersey Appellate Division Strikes Down "Unconscionable" Arbitration Provision**

In *Achey v. Cellco Partnership*, Docket No. A-3639-21 (N.J. App. Div. May 1, 2023), the Appellate Division struck down an arbitration provision contained in a consumer agreement issued by Verizon Wireless ("Verizon") to its customers.

In February 2022, 28 plaintiffs filed a class action against Verizon under the New Jersey Consumer Fraud Act (the "CFA"), alleging that Verizon failed to adequately disclose to its customer<sup>2</sup> an administrative charge of \$1.95 a month. Verizon subsequently moved to compel individual arbitration and stay the proceedings. In support of the motion, Verizon cited to several provisions of its Customer Agreement (the "Agreement"), which provided, among other things, that (1) customers had 180 days to dispute a charge on their bill, (2) customers could only recover direct damages and not recover treble damages, (3) customers could not pursue class or collective arbitration or litigation, and (4) Verizon could require a proposed class of plaintiffs to participate in coordinated individual

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arbitration where the parties would agree on a bellwether proceeding that would preclude customers from filing their respective arbitrations until the bellwether proceeding was completed.

The trial court conducted a hearing on the motion. Plaintiffs' counsel, in opposition, noted that, in view of the average time for the completion of a AAA arbitration, *i.e.*, nearly seven months, and the number of prospective plaintiffs (over 2,500), some plaintiffs would be required to wait 145 years to file their claims. The trial court ultimately struck down the damages limitation provision, severed it pursuant to the Agreement's severability clause, and upheld the remainder of the Agreement's arbitration provisions. Plaintiffs subsequently appealed.

On appeal, the Appellate Division focused on whether the provisions requiring a bellwether proceeding were unconscionable and, as a result, unenforceable. The Appellate Division noted that because the Agreement was a contract of adhesion, the court was required to look at the Agreement's subject matter, the parties' relative bargaining positions, the "degree of economic compulsion, and the public interests affected by the contract." Citing to a recent decision in federal court in California interpreting the Agreement, the Appellate Division held that the bellwether provision was unconscionable on its face because it gave "all decision-making power to [Verizon] as to how long the [bellwether] process' would continue and leaves plaintiffs without any protection to ensure that their claims would be heard in a timely manner." Given the lack of a tolling agreement, the Agreement's bellwether provision put plaintiffs at risk of potentially losing their claims against Verizon on the grounds that they were filed on an untimely basis.

The Appellate Division also struck the Agreement's requirement on customers to demand a refund within 180 days on the ground that it violated public policy and effectively abrogated the plaintiffs' CFA claims in the event the plaintiffs did not timely notify Verizon of the charge on their bill.

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