White and Williams LLP

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In *Lembo v. Marchese*, the **Supreme Court of New Jersey** considered whether the **Uniform Fiduciaries Law** (UFL), N.J.S.A. 3B:14-52 to -61, provides an **affirmative cause of action** against a **banking institution** that cashed checks containing **forged indorsements**. The court found that the **New Jersey Legislature** enacted the UFL to provide a **defense** when a bank is sued for **failing to take notice** of and **action** on the **breach of a fiduciary's obligation**. Further, the UFL confers a **limited immunity** on a bank, unless the bank acts in **bad faith** or has **actual knowledge** of a fiduciary breach. The court held that **no affirmative cause of action** arises under the UFL. (June 17, 2020)

In *Fawcett v. Citizens Bank, N.A.*, the **United States Court of Appeals for the First Circuit** held that a bank's **sustained overdraft fees** that it charged on overdrawn checking accounts were not "**interest**," and therefore did not constitute **usurious interest charges** in violation of the **National Bank Act**. (March 26, 2019)

In *Rotkiske v. Klemm*, the **United States Court of Appeals for the Third Circuit** addressed when **the statute of limitations begins running** on a claim under the **Fair Debt Collection Practices Act**. The court, following the plain language of the statute, held an action under the FDCPA must be filed **within one year of when the alleged violation of the act occurred**, not within one year of when the violation is discovered. (May 15, 2018)

In *Krieger v. Bank of America*, the **United States Court of Appeals for the Third Circuit** addressed the standards for a credit card holder's claims under the **Fair Credit Billing Act** (**FCBA**) and the **unauthorized-use provision** of the **Truth in Lending Act** (**TILA**). The court found that, in the event of a **disputed charge**, the requirement that a cardholder submit **written notice** of an alleged billing error within 60 days begins to run from the date that the charge is billed or, if initially removed, rebilled. The court further found that the unauthorized-use provision of TILA provides for a **private cause of action** where a creditor is alleged to have failed to comply with its requirements (i.e., advising the consumer of the potential liability, conducting a reasonable investigation and capping liability at $50). (May 16, 2018)

In *Nelux Holdings International, N.V. v. Dweck,* the **Supreme Court of the State of New York, Appellate Division, 1st Department**, addressed whether the **statute of limitations for breach of contract** could be extended under **General Obligations Law § 17-101** based on emails the lender received from a law firm regarding repayment of the loan. The court

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held that **the emails were a written acknowledgment of a debt, signed by the agent of the borrower, and therefore could be sufficient to extend the statute of limitations by a "new or continuing contract"** under G. O.L. § 17-101. (April 17, 2018)

In *Midland Funding LLC A/P/O Webbank v. Roberta Bordeaux,* the **Superior Court of New Jersey, Appellate Division**,considered the enforceability of an **arbitration clause** in a consumer credit application form. The court determined that there was insufficient evidence to establish that the debtor had **knowingly agreed** to arbitrate, and held that the **arbitration clause was unenforceable**. (September 29, 2016)

In *Heer v. North Moore Street Developers, LLC*, the **New York Supreme Court, Appellate Division, 1st Department**, held that a creditor who had been assigned the interests in fee proceeds being litigated in an underlying case was entitled to **intervene as of right** because it demonstrated that "**its interests would otherwise be inadequately represented** and that **it would be bound by the judgement**." The court ruled that because the creditor had "a **direct financial interest in the outcome** of the fee allocation proceeding" and counsel in the underlying case was seeking a smaller percentage fee than previously sought, **the creditor has shown that its interests would not be adequately represented**. (June 30, 2016)

In *Fergus v. Ross*, the **Appeals Court of Massachusetts** addressed whether a **principal** in a **private loan agreement** had **apparent authority** to bind his lawyer, who ran a private lending practice, to act as **a closing agent** on a **side loan** of which the lawyer had no knowledge. The court held that the **principal** had **apparent authority** to bind the lawyer as a **closing agent** on the side loan and, therefore, the lawyer was liable for the conduct and representations made by his client. (June 9, 2016)

In *2406-12 Amsterdam Associates, LLC v. Alianza, LLC*, the **New York Supreme Court, Appellate Division, 1st Department,** addressed whether a creditor sufficiently pleaded that an entity, which was 90% owned by Alianza Dominicana and had no employees and no function but to hold assets away from creditors, established that the entity was the **alter ego** of Alianza Dominicana. In holding that the creditor's allegations established the alter ego theory to sustain the creditor's contract claims against the entity, the court explained that the **creditor was not required to plead the elements of alter ego liability with particularity**, but only to plead in a non-conclusory manner. (February 16, 2016)

In *Citimortgage v. Barbezat,* the **Superior Court of Pennsylvania** addressed if a **mortgagee** is properly notified of a **foreclosure action** under **Act 6** when the **lender's name is incorrectly stated** on a notice which is otherwise in compliance with Act 6. The court held that the purpose of the Act 6 Notice is to **protect residential homeowners** who are in dire economic straits from overly zealous mortgage lenders. Therefore if the debt and the nature of the default are identified on the notice, an incorrect lender named on the notice **does not result in a deficient Act 6 Notice**. (January 7, 2016)

In *Pondview Corporation v. Russand, Inc.*, the **New York Supreme Court, Appellate Division, 2nd Department**, addressed whether the owners of a certain property must pay an **operating deficit** incurred while an assisted living facility located on the property was under **receivership**. The court found that CPLR 8004(b) applied, which allows the court to direct a party who moved for the appointment of a receiver to pay **necessary expenses and compensation**

under special circumstances. The receiver had demonstrated that the money it expended was necessary and beneficial to those parties who had sought the receiver's appointment. (October 28, 2015)

In *Summers v. Financial Freedom Senior Funding Corporation,* the **United States Court of Appeals for the First Circuit** addressed whether the inheritor of a property could set aside a foreclosure by the holder of a **reverse mortgage** taken out by the deceased because the holder of the mortgage had not filed a claim against the estate in **probate**. The court held while that the failure to file a claim in probate proceedings may extinguish **personal liability** on the note secured by the real estate mortgage, that failure does not extinguish the mortgage itself. Thus the foreclosure was valid. (October 23, 2015)

In *Kaymark v. Bank of America*, the **United States Court of Appeals for the Third Circuit** addressed the application of the **Fair Debt Collection Practices Act** (Act) to an attempt to collect for legal services not yet performed in a **mortgage foreclosure** action. The court held that including anticipated fees and expenses not yet incurred was contrary to the mortgage contract and the claim for such fees was a violation of the Act. (April 7, 2015)

In *Demetre v. HMS Holdings Corp.*, the **New York Supreme Court, Appellate Division, 1st Department**, addressed whether a claim for **breach of the implied covenant of good faith and fair dealing** was duplicative of a **claim for breach of contract**. Demetre entered into a **stock purchase agreement** with HMS, whereby HMS was to make an upfront cash payment at closing and two subsequent contingent payments. HMS never made the contingent payments. The court held that it was premature to determine whether the claim for breach of the implied covenant of good faith and fair dealing was duplicative of the claim for breach of contract because the allegations show that HMS **acted in bad faith** in attempting to destroy Demetre's rights to receive the contingent payments. (April 9, 2015)

In *Official Committee of Unsecured Creditors of Motors Liquidation Company v. JPMorgan Chase Bank,* the **Supreme Court of Delaware** held that a **mistaken termination statement** was effective as to a **security interest in collateral securing a syndicated term loan from a lender group**, because the secured lender **reviewed and knowingly approved** for filing a **UCC-3 termination statement** purporting to extinguish the **perfected security interest**. An intent to terminate in not required.

In *Ambac Assurance Corporation v. EMC Mortgage LLC,* the **New York Supreme Court, Appellate Division, 1st Department,** found that plaintiff **bond insurer** Ambac Asssurance Corp. did not have standing to bring **breach of contract** claims against JPMorgan Chase & Co. in a suit that accused the bank of **fraud** and breaches of contract by **misrepresenting loan quality.** The court ruled that the power to bring suit over the **residential mortgage-backed securities** insured by Ambac Assurance Corp. lies instead with the **securities' trustee.** (October 16, 2014)

In *Pehoviak v. Deutsche Bank National Trust Co.,* the **Massachusetts Court of Appeals** considered whether the **holder of the first mortgage** on a property acted with **good faith and reasonable diligence,** where the holder of the mortgage sent a notice of foreclosure to junior lien holders in compliance with **M. G. L. c. 244, § 14,** but did not forward the notices to the prospective buyer after repeated requests for documentation. The court **rejected the mortgage holder's argument** that compliance with M. G. L. c. 244, § 14, satisfied its duty to **act with good faith and reasonable diligence,** and it held that sending notice and fulfilling its duty to the prospective buyer were **two distinct issues.** (March 11, 2014)

In *U.S. Bank National Association v. Schumacher,* the **Massachusetts Supreme Judicial Court** addressed whether compliance of **M. G. L. c. 244, § 35A,** is part of the **mortgage foreclosure process** and whether the **mortgagee's failure to satisfy that statute's requirements** is an issue that may be heard in a **summary process action to recover possession of land.** The court reasoned that, because it provides the mortgagor with the opportunity to cure a default in order to avoid future foreclosure proceedings, compliance with **M. G. L. c. 244, § 35A is a pre-foreclosure process.** Thus, the court held that the mortgagee's failure to comply with the statute's requirements did not give rise to issues that were judiciable in the summary process proceeding. (March 12, 2014)

In *Galiastro v. Mortgage Electronic Registration Systems, Inc.,* the **Massachusetts Supreme Judicial Court** addressed whether parties, whose claims were preserved on appeal, could seek to **invalidate the foreclosure proceedings** pursuant to the court's interim decision in *Eaton v. Federal National Mortgage Association.* In *Eaton,* the court held that a "mortgagee" in G. L. c. 183, § 21 and in G. L. c. 244, §§ 11-17C is one who holds a mortgage and either: (1) holds the mortgage note or (2) acts as an authorized agent of the holder of the mortgage note. The court held that ***Eaton* should be applied** to the foreclosure proceedings where the parties argued and preserved the same interpretation of "mortgagee" that was announced in *Eaton.* (February 13, 2014)

In *In re Nortel Networks Inc.,* the **United States Court of Appeals for the Third Circuit** upheld the denial of a motion to **compel arbitration** where the agreement did not reveal an **intent to arbitrate** in plain language. The agreement at issue stated that the parties would **"negotiate in good faith** an attempt to reach agreement" as to allocation of the funds and use "dispute resolvers" if needed. This language was **not sufficiently clear** to require arbitration as opposed to other forms of dispute resolution. (December 6, 2013)

In *French v. The Bank of New York Mellon,* the **United States Court of Appeals for the First Circuit** addressed whether a mortgagor was entitled to **enjoin a foreclosure** on the grounds that the description of his property in the mortgage he signed did not satisfy **New Hampshire's statute of frauds.** The court concluded that the description of the property was sufficient under the statute of frauds because it was reasonably certain from the contract itself and the acts of the parties in performance of it what land was intended. (August 30, 2013)

In *Drakopoulos v. U.S. Bank National Association,* the **Supreme Judicial Court of Massachusetts** addressed whether a bank that was not the **original lender** but was holding a residential mortgage through **assignment** and its **servicer** were insulated from liability for claims seeking damages and **rescission** for violations of the **Predatory Home Loan Practices Act,** the **Massachusetts Consumer Protection Act,** and the **Borrower's Interest Act.** The court determined that the fact that the bank was the **assignee** and not the **original lender** did not shield the bank from liability. The court did conclude, however, that the **servicer** was not liable for such claims arising from the actions of the original lender, as it was not an **assignee.** (July 12, 2013)

In *Osprey Portfolio, LLC v. George Izett,* the **Supreme Court of Pennsylvania,** addressed the **limitation period** that applies to an action on a **guaranty executed under seal.** The court held that the **loan guaranty** executed under **seal** was an **"instrument in writing under seal"** subject to the **20-year limitation period** set forth in **Section 5529(b)(1) of the Judicial Code.** Section 5529(b)(1) states that "notwithstanding section 5525[(a)](7) (relating to four year limitation), an action upon an instrument in writing under seal must be commenced within 20 years." (May 28, 2013)

In *Graystone Bank v. Grove Estates, LP.,* the **Superior Court of Pennsylvania** addressed whether a **bank's confessed judgment on a promissory note** was flawed where the **warrant of attorney provision** was **not on the signature page.** The court found **no flaw** since the warrant of attorney appeared conspicuously in capitalized letters on the very bottom of the penultimate page of the agreement and immediately preceded the executor's signature at the top of the following page. (December 13, 2012)

In *Bebee v. Pennsylvania Human Relations Commission,* the **Commonwealth Court of Pennsylvania** addressed the circumstances in which a finding of **probable cause and entry of judgment of liability** may be **rescinded** as well as the time restraints for filing a claim for discriminatory lending practices under the **Pennsylvania Human Relations Act,** 43 P.S. § 955. The court held that three factors must be satisfied to remove an entry of judgment of liability: (1) the prompt filing of a petition to open; (2) a reasonable excuse for the failure to act; and (3) a meritorious defense. The court further held that, even after entry of judgment, a complaint can be dismissed as **untimely** if not filed within 180 days of the alleged act of discrimination or otherwise required by 43 P.S. § 959(j). (November 14, 2012)