

BURR ALERT

Fifth Circuit Vacates Class Certification Order in Bankruptcy Proceeding

by Stephen Bumgarner

July 2010

In recent years, a host of mortgage lenders and servicing companies have been targeted in Chapter 13 bankruptcy proceedings for claimed violations of the Bankruptcy Code and Rules stemming from their post-petition assessment of certain fees and costs to debtors' accounts. The majority of these actions seek to certify a class of similarly situated debtors pursuant to Federal Rule of Civil Procedure 23 (made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7023). However, a recent opinion issued by the United States Court of Appeals for the Fifth Circuit addresses the impropriety of certifying a class in these cases. In *Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn)*, No. 09-20415, --- F.3d ---, 2010 WL 2433091, 2010 U.S. App. LEXIS 12606 (5th Cir. June 18, 2010), the Fifth Circuit vacated the class certification order upon recognizing the individualized circumstances in each debtor's case.

In *Wilborn*, the plaintiff-debtors claimed that mortgagee Wells Fargo had charged unreasonable and unapproved post-petition fees during the pendency of their bankruptcies in violation of 11 U.S.C. § 506(b) and Federal Rule of Bankruptcy Procedure 2016. 2010 WL 2433091, at *1. The plaintiff moved for class certification, and the bankruptcy court granted the motion. *Id.* at * 2. Wells Fargo appealed. *Id.* at * 1.

On appeal, the Fifth Circuit vacated the bankruptcy court's class certification order and held that class certification was improper under Rule 23(b) "because individual issues for each class member, particularly with respect to damages, override class concerns." *Id.* at *5. Whereas the bankruptcy court had ruled that common issues predominated because all debtors had fees charged to their accounts, the Fifth Circuit stressed "the myriad of issues that may arise in each case" related to the charging of the subject fees. *Id.* at *6. The Fifth Circuit observed that the underlying circumstances of the charges assessed in each bankruptcy case would have to be considered to resolve the class claims. *Id.* at *5-6. Thus, the plaintiffs' claims failed to satisfy the predominance and superiority requirements for class treatment. *Id.* at *5.

The *Wilborn* decision illustrates the although a bankruptcy judge has the power to certify a class of debtors, a proposed debtor class must have more in common than simply their status as debtors. Even where a plaintiff alleges a pattern and practice of conduct affecting all class members, individual circumstances, such as the debtor's actions, the court's administration of the bankruptcy case, the lender's defenses, and the debtor's damages, crystallize why these claims are not suitable for class treatment.

For more information, contact:

[Stephen J. Bumgarner](mailto:sbumgarn@burr.com) in Birmingham at (205) 458-5355 or sbumgarn@burr.com

or your Burr & Forman attorney with whom you regularly work.