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## Class Certification Granted in Case Against Lender for Collection of Prepayment Penalties and Other Fees

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The United States District Court for the Eastern District of New York recently granted class certification in a class action against lenders for allegedly charging and collecting unlawful fees, prepayment penalties and finance charges in connection with the prepayment of mortgage loans. [See 255 FRD 89.](#)

On December 29, 2008, the Court granted class certification against a national servicer for allegedly charging and collecting unlawful fees, prepayment penalties and finance charges. The underlying dispute arose from plaintiffs' allegations that — despite the fact that they entered into standard form mortgage agreements and notes that allowed full or partial prepayments of the principal amount of their loans at any time without penalty — the plaintiffs were charged additional fees (Disputed Charges) when they prepaid their mortgage. The servicer reasoned that the fees at issue were charged for additional services such as providing the borrowers with payoff statements.

The Court dismissed Counts I through IV of the plaintiffs' complaint. Count I alleged that the defendant's prepayment penalties violated the federal Truth-in-Lending Act (TILA). The Court dismissed this Count, reasoning that the Disputed Charges fell within the TILA's tolerance for accuracy, which essentially provides that finance charges will be deemed accurate if the amount of the discrepancy is \$100 or less.

Count II of the complaint reported a violation of the federal Real Estate Settlement Procedures Act (RESPA), specifically, its prohibition against settlement services. The Court held that RESPA was not violated because the Disputed Charges were not assessed for settlement services; rather, they were assessed against the prepayment of principal.

Counts III and IV of the Complaint were dismissed as state law causes of action that are preempted by the federal regulations of the Home Owner's Loan Act. Importantly, Counts V through IX of the complaint were not dismissed. The remaining Counts included violations of state consumer protection laws, breach of contract, unjust enrichment and fraud.

The issue before the Court was whether the putative class qualified for certification. In order to be certified, a class must meet all of the factors listed in Rule 23(a) of the Federal Rules of Civil Procedure: (1) *The Numerosity Requirement* — The Class must be so numerous that joinder of all members is impracticable; (2) *The Commonality Requirement* — There must be questions of law or fact common to the class; (3) *The Typicality Requirement* — The claims or defenses of the representative parties must be typical of the claims or defenses of the class; and (4) *The Adequacy Requirement* — The representative parties must fairly and adequately protect the interests of the class.

*Numerosity Requirement.* The defendants did not dispute that plaintiffs met the numerosity requirement. Although some courts have held that the numerosity requirement can be met with as few as 40 plaintiffs, in the present case, hundreds of thousands of consumers had paid the Disputed Charges. The [Cassese](#) Court held that the class satisfied the commonality requirement.

*Commonality Requirement.* The Court held that the commonality requirement was satisfied, regardless of the distinctions in the amount or types of fees paid, because common questions of law existed, such as whether the servicer had violated its contractual obligations to its mortgage borrowers.

*Typicality Requirement.* The Court found that the typicality requirement had also been satisfied. For typicality to exist, class representatives' factual and legal arguments must be very similar to those of the rest of the class members to ensure that class representatives will not become the focal point of the case or have an unfair advantage over the rest of the class by the nature of their position as class representative. In the present case, the Court found that the core issue — the legality of fees charged by the servicer for repayment of home mortgage loans — was typical among the proposed class representatives and the proposed class.

*Adequacy Requirement.* In order to determine whether the representative parties will fairly and adequately protect the interests of the class, the courts must consider whether the proposed class representatives have interests that conflict with the interests of the proposed class and whether the proposed legal counsel has the capability (i.e. the resources, experience, willingness) to represent the interests of the class. The Court determined that the adequacy requirement had been satisfied.

The proposed class also has to satisfy at least one category in Rule 23(b). Plaintiffs requested and received certification under both Rule 23(b)(2) & (b)(3). Rule 23(b)(2) provides for certification "where the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief is appropriate for the entire class." The Court noted that other courts have granted Rule 23(b)(2) certification in cases in which plaintiffs requested injunctive relief in order to stop defendants' collection of unlawful fees. Rule 23(b)(3) provides for certification where the court finds (1) that the overarching questions of law and fact apply to the class as a whole and overshadow any questions affecting only individual members of the class, and (2) that class action is the best method for handling the case. The [Cassese](#) Court held that the core issue — the legality of fees — clearly predominated over any individualized issues, and that, for this matter, class action is superior to all other forms of adjudication. The Court certified the class under Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3).