

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION FIVE**

AMERIQUEST MORTGAGE CO., et al.,
Petitioners,

v.

THE SUPERIOR COURT OF THE COUNTY OF SAN MATEO,
Respondent;

GLENN P. BRYAN, et al.,
Real Parties in Interest.

Court of Appeal No. A102271
San Mateo Co. Super. Ct. No. JCCP 4162

ALTERNATIVE WRIT OF MANDATE

To the Superior Court of the State of California, in and for the County of San Mateo, Greetings:

The petition for writ of mandate on file herein having been considered and good cause appearing for the issuance of this alternative writ of mandate,

WE COMMAND YOU, forthwith upon receipt of this writ to either:

(a) Vacate your order of March 26, 2003 Order Granting Plaintiffs' Motion for Class Certification insofar as a predicate for the certification of a multi-state class was your refusal to enforce choice-of-law clauses which this court believes are enforceable, consistent with the views expressed in the order granting this alternative writ, and enter a new and different order as to this aspect of certification, after you engage in the analysis required by *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 922, in *Ameriquest Cases*, Judicial Council Coordination Proceeding No. 4162, OR;

(b) In the alternative, show cause before this court when ordered on calendar, why a peremptory writ of mandate should not issue.

Respondent court shall make a decision whether to comply with the directive of paragraph (a) on or before September 17, 2003. If respondent court chooses to comply, the alternative writ will be discharged and the petition will be dismissed as moot. If respondent court instead elects to show cause, the matter will be heard when ordered on calendar. Petitioners shall inform this court by letter of respondent court's decision as soon as possible, and serve and file in this court any new orders issued by respondent.

Witness the Honorable Lawrence T. Stevens, Acting Presiding Justice of the Court of Appeal of the State of California, First Appellate District, Division Five.

Attest my hand and the Seal of this Court this ^{7th} day of August, 2003.

RON D. BARROW
Clerk of the Court



By: MARY P. QUILIZ
Mary P. Quilez
Deputy Clerk

COPY

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FILED
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AUG 07 2003

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RON D. BARROW, CLERK
BY _____ DEPUTY

THE SUPERIOR COURT OF THE COUNTY OF SAN MATEO,
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BY THE COURT:*

The court has conducted a detailed review of the record and the parties' initial and supplemental briefs (including the cases cited therein) regarding this petition, which challenges an order granting certification of a class action.

It appears respondent superior court erred, in part, when it certified a multi-state class in this action.

Respondent correctly recognized that "the choice-of-law determination is of central importance to issues of predominance and manageability where certification of a nationwide class is sought," and that consequently it was required to apply the analysis set forth in *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 464-466 (*Nedlloyd*) to determine whether the claims of the putative class members are subject to enforceable choice-of-law agreements. (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 915-916 (*Washington Mutual*).)

In applying *Nedlloyd*, respondent declined to enforce the parties' choice-of-law agreements as they related to the laws of thirty-two states, and certified a multi-state class on that basis. In orally rendering its ruling from the bench, respondent reasoned that the consumer protection laws of those thirty-two states are contrary to California's fundamental policy, as manifested by the unfair competition law (UCL, Bus. & Prof.

Code, § 17200 et seq.), because those states' laws either apply only to the sales of goods and services and do not include mortgages, impose an intent or knowledge or scienter requirement, require a showing of individual reliance, do not permit class actions by private parties, do not provide for class actions, do not provide for a private right of action, do not allow private citizens to seek injunctive relief, provide shorter statutes of limitations than California's UCL, or provide narrower protections than California's UCL, such that the deterrent purpose of California's UCL would be frustrated if the choice-of-law clauses specifying application of those states' laws were enforced.

However, it appears respondent superior court erred, under the analysis dictated by *Nedlloyd*, in declining to enforce the choice-of-law agreements at issue, except insofar as respondent refused to enforce such agreements as to states possessing consumer protection laws that do not apply to mortgage transactions. (See *Nedlloyd, supra*, 3 Cal.4th at pp. 464-466, 468, 471.)

Thus, it appears respondent should have enforced the choice-of-law agreements as they relate to states other than those subject to the foregoing exception,¹ and then proceeded to determine whether or not a multi-state class should nevertheless proceed. (*Washington Mutual, supra*, 24 Cal.4th at p. 922 ["In the event a trial court determines that class claims will require adjudication under the laws of multiple states, the court must then ascertain whether variations exist among the applicable laws. Although the involvement of more than one state's law does not make a class action per se unmanageable, any variances among state laws must be examined to determine whether common questions will predominate over individual issues and whether litigation of a nationwide class may be managed fairly and efficiently."].) Because respondent declined to enforce the choice-of-law agreements in question, it did not reach that question. Even though the record may indicate what respondent's decision on that issue might be, it would be inappropriate for this court to engage in such surmise and hold respondent to a decision it never had the opportunity to make.

¹ The states of Alaska, Alabama and Texas were identified by respondent superior court as not providing coverage under their consumer protection laws for mortgage transactions. In this court, real parties in interest assert that Delaware is another such state, and that respondent so found. Although the record does not appear to support real parties' contention that respondent found that Delaware consumer protection law does not apply to mortgage transactions, nothing in this alternative writ shall bar respondent superior court from making that determination based on the record previously presented to it.

Therefore, let an alternative writ of mandate issue commanding respondent San Mateo County Superior Court, in *Ameriquest Cases*, Judicial Council Coordination Proceeding No. 4162, to set aside and vacate its March 26, 2003 Order Granting Plaintiffs' Motion for Class Certification insofar as a predicate for the certification of a multi-state class was respondent's refusal to enforce choice-of-law clauses which this court believes are enforceable, consistent with the views expressed in this order; and to enter a new and different order as to this aspect of certification, after respondent engages in the analysis required by *Washington Mutual, supra*, 24 Cal.4th at p. 922; or, in the alternative, to appear and show cause before Division Five of this Court why a peremptory writ of mandate should not be granted.

If respondent superior court complies with this court's directives as set forth above, and does so on or before September 17, 2003, the court will discharge the alternative writ, and dismiss the petition as moot. Petitioners shall inform this court by letter of respondent court's decision as soon as possible, and serve and file in this court any new orders issued by respondent.

Should respondent court choose not to follow the above procedure, but instead to appear and show cause before this court why a peremptory writ of mandate should not issue, this matter will be heard before Division Five when ordered on calendar.

The alternative writ is to be issued, served and filed on or before August 8, 2003, and shall be deemed served upon mailing by the clerk of this court of copies of the alternative writ and this order to all parties and respondent superior court.

A written return to the alternative writ shall be served and filed on or before September 26, 2003. If, however, respondent superior court complies with the alternative writ, and proof thereof is filed herein on or before that date, then no return need be filed.

Date AUG 07 2003 STEVENS, J. ACTING P.J.

* _ Jones, P.J. ✓ Stevens, J. ✓ Simons, J. ✓ Gemello, J.