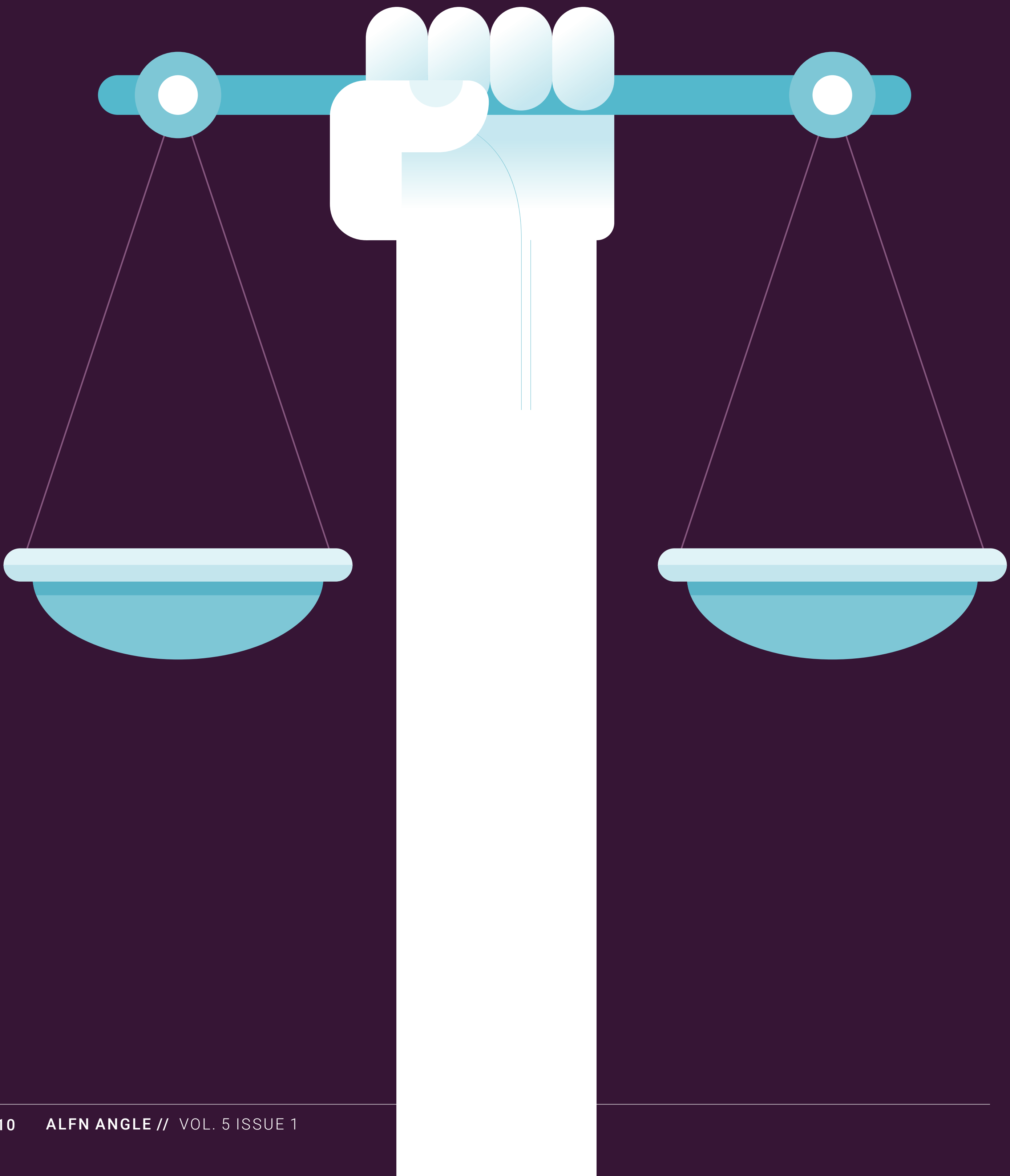
A TALE OF **TWO** AMICI



AMONG THE BENEFITS your ALFN membership provides are educational opportunities to help you understand and comply with the applicable laws and regulations and lobbying efforts to attempt to address the existing and potential impact of those laws and regulations on the industry. Another benefit with which you might be less familiar is the ALFN's sponsorship of amicus briefs in appropriate State and Federal appellate cases that raise issues of concern to lenders, loans servicers and trustees. Below are two recent examples where the ALFN, through Wright, Finlay & Zak, LLP, sponsored amicus efforts on behalf of its members.

1. *LINZA*:

One significant recent example was presented by the case of *Linza v. PHH Mortgage*. In *Linza*, a jury in Yuba County, California awarded a borrower $16MM in damages over the loan servicer's (PHH's) alleged failure to properly implement a loan modification. As part of the judgment, the jury slapped PHH with $15.7MM in punitive damages. PHH promptly filed a Motion for a Judgment Notwithstanding the Verdict and Motion for a New Trial. The trial court refused to order a new trial, but reduced the award from $16MM to roughly $158k. The court then awarded Linza's attorneys, $178k in fees and costs. Both sides appealed the decisions.

On appeal, Linza raised two particularly troubling arguments from a servicer, lender or trustee's point of view: (1) that a breach of contract (the loan modification agreement in this instance) can give rise to tort claims and (2) that an agent can be held liable for interference with its principal's contract with the borrower.

The ALFN (along with the UTA and the CMA) filed an amicus brief supporting the decision in favor of PHH, particularly focusing on these two issues. More specifically, the Amicus Brief discussed the industry's interest in the decision, as well as the potential adverse impact on the lending and loan servicing if an agent (a servicer or trustee) could be held liable for interfering with the beneficiary/lender's loan contract, or if an ordinary

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breach of contract claim were allowed to give rise to tort liability.

In October of this year, the California Court of Appeals issued a unanimous win for the mortgage industry! The Court upheld the Judgment Notwithstanding the Verdict and reversed the denial of the Motion for New Trial, ordering a new trial on the question of contractual damages only. The court also vacated the attorney fee award in favor of Linza's counsel – the United Law Center. The Court of Appeals agreed that: (1) PHH (the loan servicer and prior owner of the loan) was clearly a party to the loan modification and, thus, could not have interfered with its own contract; (2) as held in *Nymark v. Heart Fed. Sav. & Loan Assn.*, (1991) 231 Cal.App.3d 1089, 1095-96, PHH did not owe Linza a negligence duty of care because there was a contractual relationship between them and PHH was acting in the conventional role of lender/servicer (the Court noted that the only consumer loan decisions that had held that a negligence duty could exist notwithstanding the *Nymark* "rule" had all involved the loan modification application process—and even there the courts were even split on when and whether there was a duty); and (3) tort damages did not arise from an ordinary breach of contract and there was no such thing as negligent breach of a contract. There will be a new trial but it will be limited to the issue of proper <u>contract</u> damages. In sum, it was a significant victory for PHH, the ALFN, the other amicus parties, as well as the entire industry.

Although it is possible that Linza could seek review by the California Supreme Court, it is unlikely it would be accepted.

2. *DAVIDSON*

The ALFN also recently sponsored an amicus effort in *Davidson v. Seterus*, Inc., which involved a series of communications the loan servicer allegedly made to the borrower concerning his monthly mortgage payments. The borrower claimed that the calls violated the Rosenthal Act because the calls were made even though he had timely paid and even though (if he had not) he was still within the "grace" period before he would be considered to be in default. The borrower also claimed that the calls improperly threatened consequences if he did not pay. The Superior Court rejected the borrower's claims, finding that the Rosenthal Act did not apply to mortgage loans at all. The borrower appealed.

On appeal, the borrower argued that the scope of the Rosenthal Act was broader than that of the Federal Fair Debt Collection Practices Act and did not exclude creditors or their servicers, nor could it be properly read to exclude mortgage loans. The borrower attempted to distinguish the cases which had declined to apply the Rosenthal Act to mortgage loans by pointing out that most of them involved <u>foreclosure</u> activity whereas he was protesting the servicer's <u>collection</u> activity when there was no pending foreclosure. He also argued that the inclusion of the "mini-Miranda" warning on the servicer's correspondence (in compliance with the requirements of the Federal Act) was a concession by the borrower that it was a debt collector. Most disturbingly, the borrower argued that the parent of the loan servicer was also liable for the servicer's alleged violations (though borrower tried to disguise this by claiming it was the parent entity's own acts that were at issue, albeit no specific acts by the parent were ever identified).

The ALFN's amicus brief (joined by ALFN and CMA) addressed three of the key issues affecting the servicing industry at large:

1. Whether the inclusion of the required "mini-Miranda" warning in a party's communications constituted an admission that the party was a debt collector for purposes of the Rosenthal Act [although there are a few cases in other parts of the country that disagree, the cases in this Circuit tend to hold it does not];

2. Whether the Rosenthal Act applies to servicers of mortgage loans in the regular course of their servicing those loans [an issue on which the cases are mixed]; and

3. Whether the parent entity of a loan servicer can be held liable for violations of the Rosenthal Act

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(and, consequently, of Business & Professions Code § 17200) attributed to the loan servicer absent the parent's direct involvement in committing those violations [but for the borrower's attempts to muddy the waters by arguing that he alleged (unidentified) acts by the parent itself, this should be a clear-cut issue].

The *Davidson* appeal has been fully briefed and will be set for oral argument in January, 2018.

Although it is certainly true that the respondents in both these cases mounted strong defenses of the correctness of the lower court's decisions in their favor, and have the most direct interest in seeing those decisions affirmed, having the support of an amicus on appeal can provide the respondents (and the industries in which they do business) with several often crucial benefits, among which are the following:

1. Unlike the parties on an appeal, the amicus is not limited to the record presented to the lower court but can bring in relevant articles, expert opinions, industry practices, similar cases and/or statutes from other jurisdictions, studies and surveys that were not previously introduced in the case or which could not have been for some reason;

2. The filing by an amicus helps focus the Court on the potential broader impact of its decision and the public policy implications, showing how it might affect persons and entities other than the parties to the appeal;

3. The amicus typically brings a special depth and breadth of knowledge or expertise as to the issues before the Court that can help tilt the balance in favor of one side or the other;

4. An amicus brief filed in support of a respondent can address and rebut issues and authorities that might have first been raised in the appellant's reply brief (the respondent is not allowed a sur-reply); however, the appellant still gets the last word as an appellant is entitled to file a response to an amicus brief; and

5. In the event that the party whom the amicus seeks to support muffed an issue that might be important on the appeal, the amicus brief can seek to repair the damage (albeit an amicus, at least one in support of an appellant, cannot raise any issues not already properly asserted in that party's brief).

As recognized by the Ninth Circuit in *Miller-Wohl Co., Inc. v. Commissioner of Labor & Indus.*, (9th Cir. 1982) 694 F.2d 203, 204: "the classic role of amicus curiae [is fulfilled] by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration."

The pending *Davidson* appeal and the *Linza* decision thus highlight the importance and value of vigorous amicus efforts by the industry. If you have an appeal that you believe could affect the ALFN or its members, please contact the ALFN at info@alfn.org, or let our office know at rfinlay@wrightlegal.net or jfink@wrightlegal.net.