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Lender's Violation of Fair Foreclosure Act May Support a Claim under the New Jersey Truth-In-Consumer Contract Warranty and Notice Act

Stephanie G. Reckord

Greenbaum, Rowe, Smith & Davis LLP Client Alert

October 2018

On October 4, 2018, the Superior Court of New Jersey, Appellate Division issued an opinion which has been approved for publication in *Wright v. Bank of America, N.A., et al.*, holding that a technical violation of the Fair Foreclosure Act (FFA) in a notice of intention to foreclose (NOI) may serve as a basis for liability under New Jersey's Truth-in-Consumer Contract Warranty and Notice Act (TCCWNA). The Court's ruling has opened yet another door for lender liability under TCCWNA, reminding lenders and their agents to exercise care when drafting and reviewing communications with their borrowers.

TCCWNA, enacted in 1981, prohibits contracts or notices that violate consumer rights. The statute further provides that an "aggrieved consumer" can recover a civil penalty of not less than \$100 for a violation, or actual damages, or both, together with reasonable attorney's fees and court costs. In April of 2018, the New Jersey Supreme Court's ruling in *Spade v. Select Comfort Corp.* clarified the definition of an "aggrieved consumer," requiring that the claimant not only show a violation of consumer rights, but that the claimant demonstrate "actual harm."

In *Wright*, the plaintiff filed a complaint claiming that five NOIs issued by the servicer of the loans, defendant BAC Home Loans Servicing, LP, violated the FFA by failing to include the name and address of the lender, defendant Bank of America, N.A. Because no foreclosure action was ultimately filed, the FFA violations alone were not actionable. While the plaintiff did not contest the veracity of the information contained in the NOIs, he argued that the failure to include certain information required by the FFA, namely the name and address of the lender, was in and of itself a violation of TCCWNA. The trial court disagreed and dismissed the

Attorneys

Stephanie G. Reckord

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plaintiff's claim, holding that violations of the FFA cannot support a TCCWNA claim.

The Appellate Division reversed the trial court. The Court explained that in enacting TCCWNA, the legislature intended to create an "expansive" scheme for liability where there is "a departure from any 'clearly established legal right' or 'responsibility.'" The Court held that the FFA's requirements for NOIs "is part of the foreclosure 'practice' and, thus, a critical element that would fall within TCCWNA's scope."

In light of the opinion in *Spade*, the Appellate Division noted that the plaintiff's damages were "not readily apparent or assumable even from an expansive view of the complaint's contents." Therefore, it remanded to allow the plaintiff to file an amended pleading in order to articulate the damage claim.

The take-away for lenders and their agents is to have a system in place that ensures that lenders and their servicing providers take steps to ensure that NOIs, and all communications with borrowers, are in compliance with the FFA and other statutes to avoid exposure under TCCWNA.

If you have any questions concerning the issues discussed in this Alert, please contact the author, **Stephanie G. Reckord**.