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The New Jersey Supreme Court Extends The Powerful New Jersey Consumer Fraud Act To Foreclosures

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On August 29, 2011, the New Jersey Supreme Court issued an opinion in *Gonzalez v. Wilshire Credit Corp*., 207 N.J. 557, 25 A.3d 1103, 2011 N.J. LEXIS 931 (2011) that all New Jersey mortgage lenders should read. In sum, the Court held that the consumer-friendly New Jersey Consumer Fraud Act ("CFA"), *N.J.S.A*. 56:8-1 to -195, applies to mortgage loans and to, more specifically, a lender's activities post-foreclosure-judgment, including entering into a forbearance agreement to avoid a sheriff's sale. This ruling is detrimental for lenders because, among other reasons, a successful plaintiff on CFA claim is entitled to recover treble damages as well as their attorneys' fees and costs of suit. Additionally, because of these consumer-friendly provisions, more competent plaintiffs' counsel will be drawn to cases involving allegations by mortgagors of unconscionable practices in connection with mortgage lending.

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The facts in *Gonzalez* were troubling and tailor-made for a favorable ruling by the New Jersey Supreme Court. In 1994, plaintiff Blanca Gonzalez ("Plaintiff") and Monserate Diaz purchased a home as tenants in common, and both of their names appeared on the deed. Three years later, Diaz borrowed $72,000 from Cityscape Mortgage Corporation ("Cityscape") and executed a fixed rate balloon note. Plaintiff did not sign the note. However, Plaintiff and Diaz pledged both of their interests in the property as security for the loan by executing a mortgage in Cityscape's favor. Thus, Plaintiff's ownership interest in the home was subject to foreclosure if Diaz defaulted on the promissory note.

Soon after Cityscape made the loan, it assigned the note and mortgage to U.S. Bank N.A. ("U.S. Bank") along with a pool of other similar instruments under a pooling and servicing agreement. Wilshire Credit Corporation ("Wilshire") acted as U.S. Bank's servicing agent. As the Court noted, "[t]he role of a servicing agent generally is to collect payments on the loan and, in the event of default, pursue foreclosure or other alternatives to secure payment of the loan." *Gonzalez*, N.J. Lexis 931, at *13.

Thereafter, Diaz died intestate, yet Plaintiff continued to make payments and live in the house. However, after Plaintiff was laid off from her job and suffered a serious illness, she fell behind on the monthly mortgage payments. Thus, in March 2003 U.S. Bank filed a foreclosure complaint. In April 2004 the trial court entered a foreclosure judgment in favor of U.S. Bank, and a writ of execution was issued.

Before the sheriff's sale, however, Plaintiff entered into a forbearance agreement with Wilshire, the servicing agent. Wilshire agreed to forbear from foreclosing, and Plaintiff agreed to make a lump sum payment and several smaller payments to bring her account current. Plaintiff was represented by counsel in negotiating the forbearance agreement.

Over the next year and a half, Plaintiff made many of the payments owed under the forbearance agreement but missed four. A sheriff's sale was again scheduled and cancelled because Wilshire and Plaintiff entered into a second forbearance agreement. Wilshire, however, did not go through Plaintiff's counsel to negotiate the second forbearance; instead, Wilshire contacted Plaintiff directly, who did not speak or read English and had only a sixth-grade education. Wilshire's own servicing notes indicated that "borrower does not speak English[;] negotiating has been difficult." *Gonzalez*, 2011 N.J. LEXIS 931, at *16.

In September 2006, U.S. Bank's attorney copied Plaintiff on a letter to the sheriff's office stating that the sheriff's sale had been adjourned until October 2006. In fact, Plaintiff had not missed a single payment under the second forbearance agreement and had actually made additional payments. Additionally, as promised, Wilshire had not dismissed the

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foreclosure complaint when Plaintiff brought the loan current.

Plaintiff then visited her counsel who had helped her negotiate the first forbearance agreement. Counsel was not aware of the second forbearance agreement. Counsel contacted Wilshire's loan workout department, and was forwarded the second forbearance agreement. Wilshire could not explain to counsel why Plaintiff was not deemed current on the loan. Additionally, Wilshire had unnecessarily required Plaintiff to purchase force-placed insurance even though Plaintiff had provided proof that she had adequately insured the property.

Based on these facts, Plaintiff filed a complaint in the New Jersey Superior Court, Law Division, claiming that Wilshire and U.S. Bank violated the CFA. Plaintiff alleged that the lender and servicer, knowing that she did not speak English and that she previously had been represented by counsel, contacted her directly to negotiate the second forbearance agreement. Plaintiff further alleged that the lender and servicer improperly included unnecessary costs as part of the second forbearance agreement.

The trial court granted the defendant lender and defendant servicer summary judgment, holding that the CFA did not apply to post-judgment settlement agreements designed to avoid a sheriff's sale. The Appellate Division reversed. The appellate panel found that the post-judgment agreements were unquestionably subject to the CFA, and further that Plaintiff could withstand Wilshire's motion for summary judgment. The New Jersey Supreme Court granted defendants' petition for certification.

The Court first described the history of the CFA and its consumer-friendly purpose. The Court noted that the CFA is to be applied broadly to accomplish its remedial purpose and therefore should be liberally construed in favor of the consumer. Because of the ever-changing world of fraud, throughout its history the scope of the Act has been greatly expanded. *Gonzalez*, 2011 N.J. LEXIS 931, at *33-*34.

The Court then concluded that the CFA applies to mortgage lending generally and, more specifically, to activities relating to the collection or enforcement of a mortgage loan. "Accordingly, collecting or enforcing a loan, whether by the lender or its assignee, constitutes the 'subsequent performance' of a loan, an activity falling within the coverage of the CFA." *Gonzalez*, 2011 N.J. LEXIS 931, *36.

The Court then rejected defendants' attempt to avoid the CFA by asserting that Plaintiff was not in privity with the original lender, Cityscape, because she was not a party to the promissory note. The Court noted that contractual privity is not required in order to have an enforceable claim under the CFA. In any event, because here the assignee lender, U.S. Bank, through its servicer, Wilshire, directly contracted with Plaintiff by the two post-judgment forbearance agreements, the CFA clearly applied.*Gonzalez*, 2011 N.J. LEXIS 931, at *38-*39.

The Court then addressed the key issue on appeal, *i.e*., whether the CFA applies to extensions of credit after a foreclosure judgment. The Court observed that U.S. Bank had properly obtained a foreclosure judgment and that Plaintiff would have had not reason to complain had U.S. Bank proceeded straight to a sheriff's sale. However, U.S. Bank, through its servicer Wilshire, chose to enter into two post-judgment forbearance agreements with Plaintiff. The Court rejected defendants' argument that their post-judgment activities were not subject to the CFA because the original loan had merged into the final judgment of foreclosure. The Court noted that the doctrine of merger is an equitable principle that can be overcome by an examination of all of the facts and circumstances, and that equity cannot be invoked by someone with unclean hands such as U.S. Bank and Wilshire. Without deciding the merger issue, the Court concluded that the post-judgment forbearance agreements were "new" loans and that Wilshire's post-judgment collection activities could be characterized as the "subsequent performance" in connection with an extension of credit. *Gonzalez*, 2011 N.J. LEXIS 931, at *42. Therefore, the CFA applied.

The Court then rejected defendants' argument that any actions post-foreclosure-judgment could not be subjected to the strictures of the CFA. The Court noted that the country is "in the midst of an unprecedented foreclosure crisis in which thousands of our citizens stand to lose their homes, and in desperation enter into agreements that extend credit – post-judgment – in the hope of retaining homeownership. Defendants would have us declare this seemingly unregulated area as a free-for-all zone, where predatory-lending practices are unchecked and beyond the reach of the CFA." *Gonzalez*, 2011 N.J. LEXIS 931, at *44. The Court continued: "Lending institutions and their servicing agents are not immune from the CFA; they cannot prey on the unsophisticated, those with no bargaining power, those bowed down by a foreclosure judgment and desperate to keep their homes under seemingly any circumstances." *Id*. at *48. The Court then noted that the attorneys' fees provision of the CFA provides competent counsel with incentive to represent homeowners seemingly without the necessary resources to pursue such recovery on their own. *Id*. at *49.

In conclusion, the Court made clear that its holding was intended to be narrow and that the holding was not to be applied to litigation settlement agreements generally. *Gonzalez*, 2011 N.J. LEXIS 931, at *52. "This case addresses only the narrow issue before us: the applicability of the CFA to a post-foreclosure-judgment agreement involving a stand-alone extension of credit. We hold only that, in fashioning and collecting on such a loan – as with any other loan – a lender or its servicing agent cannot use unconscionable practices in violation of the CFA." *Id*.

Gonzalez is important for New Jersey mortgage lenders. The New Jersey Supreme Court has clearly held that the CFA, and its severe penalties of attorneys' fees, treble damages, and costs of suit, apply to mortgage loans and, more specifically, to lenders' and servicers' post-foreclosure-judgment activities. As a result of *Gonzalez*, lenders and servicers should expect even more lawsuits to be filed alleging unconscionable commercial practices in connection with the origination, servicing and collection of mortgage loans. Thus, lenders and servicers should be even more vigilant to ensure that they do not engage in such practices in order to avoid the hammer of the New Jersey Consumer Fraud Act.