DAY PITNEY LLP

September 9, 2011

NJ Supreme Court Rules Consumer Fraud Act Applies to Post-foreclosure Judgment Forbearance Agreements

In a recent decision, *Gonzalez v. Wilshire Credit Corp.*, A-99-00 ____ N.J. ____ (Aug. 29, 2011), the New Jersey Supreme Court determined that New Jersey's Consumer Fraud Act (CFA), *N.J.S.A*. 56:8-1 et seq., applies to a lender's conduct with respect to post-foreclosure judgment forbearance agreements, as such agreements are equivalent to new extensions of credit. The decision serves to further regulate the practice of lending in New Jersey, and lenders should be aware of the requirements resulting from the decision.

The plaintiff in *Gonzalez*, Blanca Gonzalez, had executed a mortgage encumbering real property she owned as a tenant in common with an individual named Monserate Diaz. Mr. Diaz was the borrower on the loan and executed the underlying note. The original lender assigned the note and mortgage to defendant U.S. Bank National Association, whose servicer was defendant Wilshire Credit Corporation. After Mr. Diaz passed away, plaintiff continued making payments on the mortgage but eventually defaulted, leading to the entry of a foreclosure judgment.

Plaintiff, with the assistance of counsel, and Wilshire entered into a forbearance agreement in 2004. Plaintiff eventually defaulted on the agreement. Plaintiff and Wilshire then negotiated a second forbearance agreement, in 2005. Plaintiff brought suit against defendants alleging they violated the CFA with respect to the second agreement because Wilshire: (a) failed to negotiate with plaintiff's prior counsel; (b) provided an agreement written in English, despite the fact that plaintiff did not speak English; (c) overstated plaintiff's arrears in the agreement; (d) failed to, once plaintiff became current on the loan, dismiss the foreclosure, as promised; and (e) obtained force-placed insurance on the property although plaintiff had provided proof she had homeowner's insurance.

After discovery, all parties moved for summary judgment. The trial court determined that, although the arrears in the second agreement were overstated, the appropriate remedy for plaintiff was a motion to vacate, modify, or enforce the second forbearance agreement. On appeal, the Appellate Division reversed. Defendants petitioned the Supreme Court for certification, which was granted.

In beginning its analysis, the Supreme Court noted the CFA is liberally construed in favor of consumers, and consumer protections under the act are constantly expanding. The Court further noted it had previously held

Related practice areas:

Consumer Finance and Creditors' Rights

For more information, please contact any of the individuals listed below:

Joy Harmon Sperling NJ
jsperling@daypitney.com
(973) 966 8217

Peter E. Lembesis NJ, PA
plembesis@daypitney.com
(973) 966 8237

that the CFA's provisions applied to lending and loan collection activities. Specifically, the Court explained, the CFA prohibits "unconscionable commercial practice[s]" and fraud/misrepresentation "in connection with the sale or advertisement of any merchandise or real estate, or with … subsequent performance" related to such sale or advertisement. Under the CFA, an advertisement includes any attempt to induce a person to enter or not enter into an obligation, acquire title or interest in any merchandise, increase the consumption of any merchandise, *or make any loan*. Merchandise includes any good, service, commodity, or other thing offered to the public for sale. Thus, the making of a loan constitutes a covered activity (as the sale or advertisement of merchandise), and loan collection practices constitute "subsequent performance" with respect to a loan.

The Court found that the post-judgment agreements, standing alone, constituted new loans.[1] As a result, Wilshire's collection activities could be characterized as "subsequent performance" in connection with the extension of credit. The agreements, the Court determined, "retained every characteristic of the initial loan," including a requirement of regular monthly payments and the assessment of fees and charges. Had plaintiff obtained a loan from a new lender to pay off the existing loan, the servicer of that loan would have unquestionably been subject to the requirements of the CFA. The Court additionally noted that, given the current economic climate and the adaptability and flexibility inherent in the CFA, it could not leave the area of post-judgment agreements unregulated. The Court disregarded the arguments of defendants and certain *amici curiae* that its decision would have a chilling effect on post-judgment agreements, noting the act is intended to curtail abusive practices, not commerce itself, and that many industries are capable of functioning while still being subject to the CFA. The Court thus affirmed the Appellate Division and reinstated plaintiff's complaint.

Although the Supreme Court's holding is yet another decision adverse to lenders, the requirements it imposes are not onerous. As the Court explained, the decision was confined solely to post-judgment forbearance agreements. Moreover, numerous industries are subject to regulation under the CFA without being compromised. Finally, the conduct plaintiff alleged against defendants was severe. Should lenders refrain from such conduct and enter into post-judgment negotiations and agreements on reasonable terms, they likely will avoid liability under the CFA.

---

[1] The Court noted that, had defendants not entered into the forbearance agreements, plaintiff would have lacked a CFA claim — the Court's inquiry was confined solely to post-judgment "extensions of credit," not the enforcement of a foreclosure judgment (or settlement agreements in general).

Bar Admissions: New Jersey NJ Pennsylvania PA