

## BANKING ALERT

December 2017

### [Federal Court Rejects Defendant's Attempt to Avoid Class Action Under TCPA](#)

In *Susinno v. Work Out World, Inc.*, the United States District Court for the District of New Jersey rejected a defendant's attempt to end a putative class action by tendering complete relief to the named plaintiff.

Noreen Susinno filed a complaint against Work Out World alleging violations of the Telephone Consumer Protection Act based on an automatic dialing system that left a pre-recorded message on Susinno's voicemail. Work Out World then served an offer of judgment on Susinno in the amount of \$1,501.00 in full satisfaction of Susinno's claims; however, Susinno rejected the offer. Nevertheless, Work Out World deposited the \$1,501.00 into Susinno's credit card account, although Susinno claimed that she never received the payment, as it was transferred into her employer's account.

Having tendered all available relief, and thus purportedly rendering Plaintiff's claims moot, Work Out World argued that the action should be dismissed. The Court looked to the Supreme Court's recent decision in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016). There, the Supreme Court held that once an offer of judgment is rejected (even if it is for the full amount of the claims), it no longer has any force and that, accordingly, the required adverseness between the parties still exists. However, the Supreme Court left open the possibility that actual payment of full amount of the plaintiff's claims would moot the case, as that question was not properly before the Court.

According to the District Court, "[it] [was] clear that the Supreme Court's hypothetical question inspired [Work Out World's] present motion." Still, the Court denied Work Out World's motion to dismiss. First, the Court recognized that there was a factual dispute as to whether Susinno actually received the payment. Second, even assuming that Work Out World properly tendered payment, the Court explained that Susinno "would still be entitled to seek class certification under the 'relation back doctrine.'" That doctrine prevents defendants from mooting the claims of the named plaintiffs before they can move for class certification. To the Court, it was apparent that Work Out World sought settlement with Susinno to avoid class certification. If class certification was denied, based solely on the mootness of Susinno's claim, she would not have a fair opportunity to show that certification was warranted.

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### **New Jersey Appellate Division Affirms Trial Court's Finding That Bank Had Standing To Foreclose**

In *U.S. Bank Nat'l Assoc. as Trustee v. Goe*, A-0709-16T3 (N.J. App. Div. Dec. 6, 2017), defendant Linda Goe appealed from the final judgment of foreclosure and denial of her motion for summary judgment and cross-motion to inspect the original note. On October 29, 2004, Ms. Goe executed a note to K. Hovnanian American Mortgage, LLC (KHAM), secured by a mortgage to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for KHAM on her property located in Edgewater, NJ. The mortgage was recorded on November 17, 2004, and re-recorded on March 6, 2006, to correct a missing legal description of the property. The note and mortgage were assigned to plaintiff in 2011 and the assignment was recorded on June 16, 2011 and on January 25, 2013, MERS executed a corrective assignment of the mortgage to plaintiff in order to include a legal description of the subject property. Upon Ms. Goe's default under the note, plaintiff's servicer, Nationstar, filed a foreclosure complaint on plaintiff's behalf in July 2014. Nationstar received the collateral file with the original note and remained in possession of the original note through the filing of the complaint.

Plaintiff produced a copy of the original note, indorsed in blank, and attached it to its certification in connection with its motion for summary judgment, indorsed in blank, to her certification. Ms. Goe did not challenge the validity of the note and mortgage; rather, she challenged plaintiff's standing to enforce the note under the New Jersey Uniform Commercial Code (UCC) and argued that plaintiff failed to establish it possessed the original note prior to instituting this foreclosure action and that the UCC exceptions to possession are inapposite. The motion judge granted plaintiff summary judgment and concluded that plaintiff established a prima facie right to foreclose, and the evidence established plaintiff had possession of the note prior to filing the complaint and standing to enforce the note and foreclose.

On appeal, the Appellate Division found that the record confirmed that plaintiff had both possession of the original note and an authenticated assignment of the mortgage and note that pre-dated the complaint. Thus, the Appellate Court affirmed the ruling that plaintiff had standing to foreclose. As the holder of the note, plaintiff was entitled to enforce it in a foreclosure proceeding.

### **New Jersey Appellate Division Affirms Summary Judgment to Foreclosing Bank and Subrogates Mortgage of Other Lender**

In *Morgan Stanley Private Bank, N.A. v. Earle*, A-4992-15T2 (App. Div. Dec. 4, 2017), the Appellate Division affirmed the grant of a motion for summary judgment in favor of a plaintiff-lender subrogating the defendant's mortgage.

The factual background, as stated by the Appellate Division, was "complicated." The defendant, Parke Bank ("Parke") obtained two mortgages on two separate properties totaling \$9,000,000 in 2008. In 2011, the plaintiff, Morgan Stanley Private Bank ("Morgan Stanley"), obtained a mortgage in the amount of approximately \$4,000,000 on both properties. On October 25, 2011, prior to the issuance of the Morgan Stanley mortgage, Parke entered into an agreement with one of the borrowers to release one of the mortgages in exchange for payment of \$3,900,00 and a *second* mortgage on the properties "to be recorded after the refinancing of the first mortgage" in the amount of \$1,100,000. Commensurate with the execution of the October 25, 2011 agreement, Parke obtained an executed mortgage in the amount of \$1,100,000, representing the shortfall between the \$3,900,000 payment and the balance of Parke's \$5,000,000 mortgage. Critically, the agreement did not reference the identity of the new first mortgagee.

Parke subsequently received the \$3,900,000 as required, which was obtained by way of the Morgan Stanley loan, on November 3, 2011. Parke recorded its shortfall mortgage on one of the properties on November 3, 2011, 117 days before Morgan Stanley filed its mortgage on both properties. Subsequent to the recording of the mortgages, a foreclosure action followed suit and Parke challenged the priority of Morgan Stanley's mortgage.

The Trial Court agreed with Morgan Stanley, finding that although New Jersey is a race-notice state, Parke possessed actual knowledge of Morgan Stanley's mortgage prior to its recording. On appeal, the Appellate Division agreed with the Trial Court's holding, finding that the facts were not in dispute, namely that Parke had actual knowledge of the new mortgage, even though Parke was unaware of the identity of the mortgagee. Parke also had conceded that if it had actual knowledge of Morgan Stanley's lien prior to recording, Parke would lose its first-lien status. Based on this concession, the Appellate Division agreed with the Trial Court and Morgan Stanley that Parke's lack of knowledge as to the identity of the mortgagee did not mean that Parke lacked actual knowledge.

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