SHERMAN WELLS
SYLVESTER & STAMELMAN LLP

BANKING ALERT

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## *New Jersey Supreme Court Holds Notice of Rejection in Real Estate Contract Sent Via Email and Fax is a Commonly-Used Form of Communication and Valid*

In *Conley v. Guerrero*, 2017 WL 1210172 (N.J. Apr. 6, 2017), the New Jersey Supreme Court reviewed the requirement of notice of rejection under the attorney review provisions of a standard form real estate contract. The plaintiffs ("Buyers") entered into a standard form real estate contract with defendant ("Seller") that included an attorney-review clause, mandated by the Court in *New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Boards (Bar Ass'n),* 93 N.J. 470, 476-77**,** *modified***,** 94 N.J. 449 (1983) and N.J.A.C. 11:5-6.2(g)(2), which gave the parties' respective attorneys three business days to review the contract before it became legally binding. If Buyers' or Seller's attorney disapproved the contract, the clause required that he or she notify the "REALTOR(S) and the other party . . . within the three-day period." Any notice of disapproval was required to be sent to the "REALTOR(S) by certified mail, by telegram, or by delivering it personally."

On the same day that the attorney-review period commenced, a bidding war began and the Seller accepted a higher bid than the contract with Buyers. The Seller's attorney e-mailed and faxed to Buyers' attorney and to the broker a letter rejecting the contract one day before the three-day notice period expired. Thereafter, after the deadline had passed, the Buyers' attorney e-mailed a letter to the agent, and faxed Seller's attorney a copy, stating that "the 3 days within which an attorney may terminate this contract ha[ve] expired. The contract is now in full force and effect."

Buyers then filed a breach-of-contract complaint in the Superior Court, Law Division, demanding specific performance and requesting a temporary restraining order to enjoin the sale of the condominium to the new buyer.

The trial court denied the application for a temporary restraining order and then ultimately dismissed the complaint. Buyers appealed, and the Appellate Division affirmed the trial court's decision. The panel found that the agreement detailed the method of delivering a notice of disapproval to the real estate agent only; any form of actual notice to Buyers was sufficient; and Buyers' right to notice of disapproval was satisfied here.

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The New Jersey Supreme Court held that because Buyers received actual notice of disapproval within the three-day attorney-review period by a method of communication commonly used in the industry, the notice of disapproval was valid. The Court also found that an attorney's notice of disapproval of a real estate contract may be transmitted by fax, e-mail, personal delivery, or overnight mail with proof of delivery. Notice by overnight mail will be effective upon mailing. The attorney-review period within which this notice must be sent remains three business days.

## *United States Supreme Court Permits Municipalities to File Claims Against Lender Under FHA*

In *Bank of America Corp. v. Miami*, 581 U.S. ___ (2017), the City of Miami filed lawsuits in federal court against Bank of America and Wells Fargo, alleging that the banks imposed predatory lending conditions on minority borrowers, violating the Fair Housing Act ("FHA"). More specifically, Miami alleged that those practices included "excessively high interest rates, unjustified fees, teaser low-rate loans that overstated refinancing opportunities, large prepayment penalties, and -- when default loomed -- unjustified refusals to refinance or modify the loans."

From those practices, Miami claimed a host of adverse consequences to the City. Because default rates were higher in minority neighborhoods, there were higher foreclosure rates in those neighborhoods. Higher foreclosure rates, Miami reasoned, meant lowered property values and decreased property-tax revenue. Moreover, when the foreclosures were accompanied by vacant property, the demand for municipal services increased.

The district court dismissed the complaint, reasoning that City alleged only economic, not discriminatory, harms and that there was not a sufficient causal connection between the discriminatory conduct and the City's damages. The Eleventh Circuit reversed, holding that the City's injuries were within the zone of interest protected by the FHA and that there was a sufficient causal relationship. The Supreme Court, in a majority opinion authored by Justice Breyer, affirmed in part and reversed in part.

Finding that the FHA makes it illegal for a person to discriminate on the basis of race in real estate-related transactions and allows for any aggrieved person to bring suit for statutory violations, the Court held that the definition of "aggrieved person" was designed to confer standing broadly. The Court explained that standing may indeed reach as far Article III of the Constitution -- which limits the jurisdiction of the federal courts to hear "cases" and "controversies" – allows, and certainly encompasses those within the FHA's zone of interests. A person falls within the zone of interests of a statute when the statute at issue grants the plaintiff the right to bring the cause of action he asserts, and the answer to that question lies in whether the plaintiff's interests fall within "the zone of interests protected by the law invoked."

The Court looked to prior cases in which suits under the Act were allowed to proceed, including white tenants who claimed that they were deprived of the benefits of a diverse community when discriminatory rental practices kept black residents out of their apartment community *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205; a municipality that alleged the racial balance of its community was undermined by racial-steering policies, *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); and a nonprofit organization that spent money combating housing discrimination, *Havens Realty v. Coleman*, 455 U.S. 363 (1982). That broad reading of the FHA, the Court explained, was in effect ratified when Congress amended the FHA with altering the definition of "person aggrieved."

Although recognizing that the definition of "aggrieved person" was broad, the bank-defendants argued that it was not unbounded. The bank-defendants argued that stretching the definition of "aggrieved person" as far as Article III would allow would lead to absurd results such as allowing small businesses to bring suit if people in the neighborhood were forced leave their home because of discriminatory lending practices. The Court concluded, however, that even if the FHA did not quite reach the outer limits of Article III standing, as the bank-defendants argued, the City's financial injuries fell under the zone of interests that the FHA protects. Miami alleged that bank-defendants intentionally targeted predatory practices at minority communities, that such conduct led to a concentration of foreclosure in those communities, and that those neighborhood suffered stagnation and decline as a result. All that "hindered the City's efforts to create integrated, stable neighborhood," "reduced property values," "diminish[ed] the City's property tax revenue," and "increas[ed] demand for municipal services." According to the Court, the economic injuries that the City put forward fell under the FHA's zone of interest.

The Court next turned to the causation question, which turned on whether the bank-defendants proximately caused the City's complained-of damages. The Court rejected the Eleventh Circuit's conclusion that the "answer [was] 'yes' because the City plausibly alleged that its financial injuries were foreseeable results of the Bank's misconduct." More was required that just foreseeability alone. The Court reasoned that, like a standard tort claim, loss following from a statutory violation can only be attributed to the proximate cause, not just any cause no matter how remote. The analysis turns on whether the alleged harm "has a sufficiently close connection" to the conduct that the statute proscribes. Foreseeability did not, in the Court's view, guarantee that close connection. Because the "housing market is interconnected with economic and social life," a violation of the FHA might cause harm that extended well beyond the discriminatory conduct. Justice Breyer explained that nothing in the FHA suggested that it was designed to provide a remedy for whatever far-reaching impact may follow from a statutory violation. If damages were bounded only by foreseeability, FHA violations could result in massive and complex litigation over damages.

The Court held that the FHA instead requires "some direct relation" between the injury and the conduct alleged. However, the Court declined to "draw the precise boundaries of proximate cause under the FHA and to determine on which side of the line the City's financial injuries fall." The Court left it to the lower courts to chart "the contours of proximate cause under the FHA and decide how that standard applies to the City's claims."

The Court's opinion thus creates a fairly liberal test for standing under the FHA and, at the same time, creates a fairly stringent test for causation. It appears that, in the future, these types of FHA claims brought by municipalities will likely be able to proceed, as municipalities who allege harm from FHA violations can fall under the FHA's zone of interest. However, proving the necessary connection between the FHA violation and the alleged damages will be a tough task, especially if those damages were multiples layers of connection removed from the initial discriminatory practice.

## If you have any questions about this Alert:

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