

[New York Legislature Passes Significant Changes to Foreclosure Settlement Conference Law](#)

At the close of the 2016 legislative session, the New York Legislature passed changes to the mandatory foreclosure settlement conference law. These changes are intended to bring more uniformity to the process throughout the state and engender more meaningful settlement negotiations. Specifically, the changes include the adoption of a uniform definition of the “good faith” standard referred to in the legislation with respect to the parties’ obligations to negotiate “in good faith.” In particular, the legislative amendment states that the Court is required to consider the “totality of the circumstances,” in determining if a party is negotiating in good faith, including, among other things, whether the party complies with CPLR 3408 and other court orders or directives and whether the parties’ conduct is consistent with actions taken to bring a mutually agreeable resolution to the foreclosure suit.

The amendments also include a method by which courts can adjudicate disputes arising from a purported violation of CPLR 3408. The new section, CPLR 3408(l), now permits a Court to make a finding of whether a party has engaged in “good faith” negotiations and the remedies associated with a determination that a party has not negotiated in good faith, including, the tolling of interest and fees during the period of undue delay caused by the plaintiff’s failure to negotiate in “good faith.” The remedies also include statutory civil penalties not to exceed \$25,000.

Finally, the amendments now make clear that the court must advise the defendant of his/her obligation to answer the complaint and his/her ability to contest the foreclosure and assert defenses to the complaint. The amendment also states the court must advise the defendant of the state’s foreclosure assistance resources and provide the defendant a copy of the Department of Financial Service’s Consumer Bill of Rights.

[U.S. Treasury Enacts New Reporting Requirements for Residential Real Estate Transactions in New York and Florida](#)

In a move that affects residential real estate transactions in New York City and Miami Florida, the United States Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”) enacted new reporting

In This Issue

New York Legislature Passes Significant Changes to Foreclosure Settlement Conference Law
Pg 1

U.S. Treasury Enacts New Reporting Requirements for Residential Real Estate Transactions in New York and Florida
Pg 1

Federal Court Rejects Borrower’s Attempt to Undo State Court Foreclosure Judgment
Pg 2

New Jersey Superior Court Denies Class Certification on TCCWNA and CFA Claims and Compels Arbitration
Pg 3

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requirements called “Geographic Targeting Orders,” intended to prevent money-laundering activities. The Geographical Targeting Orders not only expanded the geographical scope of such reporting requirements to purchases of \$1,500,000 in Brooklyn, Queens, the Bronx, and Staten Island and Broward and Palm Beach counties in Florida, but also included transactions involving the use of a personal check or a business check to the prior list of reportable transactions involving money order, cashier’s check, cash, traveler’s check or certified check. The new regulations were set to go into effect on August 28th and cover all transactions closing on or after that date.

Federal Court Rejects Borrower’s Attempt to Undo State Court Foreclosure Judgment

In *Denise Otto v. Wells Fargo Bank, N.A.*, Civ. No. 15-cv-8240 (D.N.J. July 15, 2016), the District Court of New Jersey dismissed with prejudice a federal court action brought by the plaintiff, as borrower and property owner, against her mortgagee, U.S. Bank, the attorneys who represented U.S. Bank in a state court foreclosure action and the servicer of her mortgage, Wells Fargo. Plaintiff’s complaint sought rescission of her home mortgage loan under the Truth in Lending Act (“TILA”) and restitution based on the rescission. Plaintiff further alleged that Wells Fargo’s and U.S. Bank’s attorneys violated criminal law by pursuing a foreclosure on a loan which they allegedly knew had been rescinded.

On November 13, 2012, U.S. Bank filed a foreclosure action against plaintiff. U.S. Bank was represented in the foreclosure by defendant Phelan, Hallin & Diamond, P.C. On August 12, 2014, the state court entered final judgment of foreclosure. Fifteen months after the entry of final judgment, plaintiff filed suit in federal court seeking to undo the foreclosure judgment and rescind her mortgage loan. In support of her claim for rescission, Plaintiff alleged that she was not provided with the required disclosures under TILA at the time of the origination of her mortgage loan in 2006. Plaintiff further alleged that the identity of her mortgagee was never disclosed to her, which was apparently in reference to U.S. Bank’s subsequent assignment of the mortgage. Defendants moved to dismiss.

The District Court dismissed plaintiff’s complaint under the *Rooker-Feldman* doctrine, which operates to prevent a party in state court litigation from subsequently attacking the results of that litigation in federal court. *Rooker-Feldman* bars “cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” The doctrine holds that federal courts cannot entertain federal claims that (1) were previously adjudicated in state court or (2) are inextricably intertwined with a prior state court decision. The District Court held that plaintiff’s federal claims, all of which rested on the alleged invalidity of the note and mortgage, were barred under *Rooker-Feldman* since the entry of the state court foreclosure judgment necessarily decided plaintiff’s claims challenging the validity of the note and mortgage, the alleged default by plaintiff and U.S. Bank’s right to foreclose.

Since the *Rooker-Feldman* doctrine does not bar any claim “independent” of the merits of the foreclosure, the Court, to remove any doubt, also dismissed plaintiff’s federal claims under the alternative grounds that such claims are barred under New Jersey principles of *res judicata* and claim preclusion and the statute of limitations under TILA.

New Jersey Superior Court Denies Class Certification on TCCWNA and CFA Claims and Compels Arbitration

In *Warren v. General Abstract & Title Agency and Investors Bank*, MER-L-2161-15, a putative class action that was pending in the Mercer County Superior Court, Judge Janetta D. Marbrey denied Plaintiff’s request to certify a class and, instead, ordered Plaintiff to individually arbitrate her claims against Defendants.

In her class action complaint, Plaintiff alleged that General Abstract, which acted as title insurance agent and conducted residential real estate closings in South New Jersey, deliberately overestimated the deed recording fees on HUD-1 Settlement Statements in a scheme to “pocket” the excess amounts. Plaintiff herself alleged that General Abstract overcharged her by \$7.00 and sought damages, on behalf of herself and those similarly situated, pursuant to New Jersey’s Consumer Fraud Act (CFA), N.J.S.A. § 56:8-1, *et seq.* and New Jersey’s Truth in Consumer Contract, Warranty and Notice Act (TCCWNA), N.J.S.A. § 56:12-14, *et seq.* In recent years, TCCWNA has become a favored dagger in the sheath of the plaintiff’s class action bar due to its seemingly broad application and the availability of statutory penalties in the amount of \$100 for each class member and the recovery of attorneys’ fees and costs.

On March 17, 2016, Defendants filed a motion to dismiss the class action complaint and to compel arbitration, arguing, among other things, that General Abstract, as agent of the title company, could enforce the arbitration clause found in Plaintiff’s title insurance policy. Shortly thereafter, Plaintiff filed a motion for class certification. Defendants opposed class certification, arguing that Plaintiff had failed to satisfy the requirements for class certification set forth in *R. 4:32-1*, including that Plaintiff had failed to satisfy *R. 4:32-1(B)*’s predominance requirement due to the individualized issues and defenses that would be specific to each class member resulting from the wide variety of recording fees that may be charged.

Oral argument for both motions was held on June 10, 2016. Judge Marbre issued orders earlier this month denying Plaintiff’s Motion for Class Certification and granting Defendants’ Motion to Compel Individual Arbitration.

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