NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

A newsletter covering bank legal and compliance information.

Volume 17 • Issue 04

September 21, 2017

ND Supreme Court Allows Separate Lawsuit Over Guaranty Obligations

The North Dakota Supreme Court has overturned a lower court decision to allow a mortgage foreclosure lawsuit to go forward. *Kulczyk v. Tioga Ready Mix Co.*, 2017 ND 218. The district court had dismissed the foreclosure, concluding it was barred on grounds of *res judicata*. *Res judicata* is a judicial doctrine to require litigants to "prevent relitigation of claims that were raised, or could have been raised, in prior [legal] actions between the same parties or their privies (citations omitted). The parties in *Kulczyk* had a history of litigation arising in connection with the Kulczy's 2011 sale of Tioga Ready Mix Co. to Bernard Vculek. Among others, documents executed to implement the sales agreement included a $1.4 million promissory note, a mortgage against Tioga Ready Mix property to secure repayment of the promissory note, a stock redemption agreement, and confidentiality and non-compete agreements. The Vculeks, the purchaser and his wife, also executed a guaranty agreement "promising to be personally responsible for Tioga Ready Mix's debt owed to the Kulczyks." Scott Financial, an advisor to the Vculeks, also took a mortgage on the Tioga Ready Mix property.

Before too long, relations between the Kulczyks and Tioga Ready Mix soured. In May 2012, Tioga Ready Mix was sued by a supplier. Tioga Ready Mix claimed the vendor supplied defective aggregate produce and brought a third-party action against Kulczyk, claiming he allowed defective product to be used by Tioga Ready Mix before the sale. In October 2014, the litigation over the aggregate was modified to add Vculeks as additional plaintiffs and to add Mrs. Kulczk as an additional defendant. Claims by Tioga Ready Mix and the Vculeks against the Kulczyks were expanded to include breach of contract, fraud, and negligent operation of Tioga Ready Mix prior to the sale. Kulczyks included a counterclaim for breach of contract and, as to the Vculeks, breach of the personal guaranty.

After a trial, the district court found Tioga Ready Mix to be in default on the promissory note and the Vculeks to be in breach of their obligations under the guaranty for the $1.4 million. Claims against the Kulczyks were dismissed and the Vculeks paid the $1.4 million judgment. However, that did not end the matter.

In October 2015, Kuczyks sued Tioga Ready Mix and others seeking to foreclose on the 2011 Tioga Ready Mix mortgage. The foreclosure was premised on the alleged failure by Tioga Ready Mix to pay $147,000 plus interest still owed on the mortgage debt after the Vculeks $1.4 million payment. Tioga Ready Mix denied the foreclosure claims and moved for summary judgment on the basis of *res judicata*. The trial court granted the motion in favor of the Vculeks. Kuczyks appealed.

In its decision reversing the trial court and allowing the Kuczyks to continue the foreclosure, the Court cited extensively from *Alerus Financial, N.A. v. Marcil Group*, 211 ND 205, 806 N.W. 2nd 16: "As we held in Alerus, (citation omitted), 'an action against a guarantor is based on the contract of guaranty which is an obligation distinct from the obligation imposed by a note and mortgage.'" Critically, as the Court noted, Scott Financial was neither a party to the first litigation nor required to be a party to that case in order to litigate the issues then before the lower court and that case did not litigate the Tioga Ready Mix mortgage. In the words of the Court, "[h]ad all of the parties involved [in this case] been involved in the first action perhaps we might have reached a different result..." But, as Scott Financial was not a party to the earlier actions and because that action did not litigate the promissory note and mortgage, the Court reaffirmed its holding in Alerus, and held "res judicata did not bar the Kulczyk's foreclosure action against Tioga Ready Mix. The Court also rejected assertions North Dakota requires an action against a guarantor to preceded an action to foreclose a mortgage.

Can a Consumer Revoke Consent to Receive Automated Calls to a Cell Phone?

The federal Court of Appeals for the 11th Circuit is stirring things up for businesses that make automated calls to cellphones. Federal law in the form of the Telephone Consumer Protection Act ("TCPA") requires callers to have the recipient consumer's consent to the calls and consumers are testing their claims about their rights to revoke their consent. Callers were having some success on this issue. For example, in *Reyes v. Lincoln Auto Financial Services*, a case that was decided on June 22, 2017, by the court of appeals for the 2nd Circuit, the court would not allow a consumer to revoke a TCPA consent that was given as a condition of an automobile lease and was part of the "bargained for exchange" of the parties' contract. However, in its August 10, 2017 decision, the 11th Circuit Court of Appeals, relying on its 2014 decision in *Osoria v. State Farm Bank*, held TCPA does allow a consumer to orally revoke consent to receive automated calls so long as the consent was not given as a condition of a contract. *Schweitzer v. Comenity Bank*, 11th Cir. Case No. 16-10498, August 10, 2017. The 11th Circuit decision means plaintiff Schweitzer will be allowed to resume the lawsuit which claims Comenity violated the TCPA by calling her more than 200 times after she told a bank employee she did not want to receive any more calls in the morning and during the work day. Comenity had argued the TCPA does not allow a consumer to make a partial revocation of consent.

Noting its decision in *Osario*, the 11th Circuit justices concluded "in law, as in life, consent need not be an all-or-nothing proposition", that a consumer's power to completely revoke consent includes the power to partially withdraw consent or to limit the conditions or parameters of that consent, and that a caller may be held liable for engaging in conduct that exceeds the boundaries of the consumer's consent.

The court also addressed banks' challenges when facing a partial revocation or a consumer's placement of conditions on his or her consent. Essentially, the court concluded a bank may use technology to implement and adhere to the conditions or simply decide to stop making automated calls to the consumer.

The effect of the decision is to reinstate the consumer's lawsuit against the bank. Violation of TCPA carries substantial penalties, including actual damages or up to $500 per violation and the possibility of treble damages for knowing or willing violations, plus recovery of the consumer's attorney's fees.

Credit Union Isn't Liable for Financial Abuse of Elderly Customer

An Illinois appellate court has determined a credit union may not be held liable for two caregivers' theft of funds from an elderly customer. *Epstein for Estate of Polchanin v. Bockhko*, 2017 IL App (1st) 160641. In April, 2008, the two caregivers obtained a power of attorney from the elderly victim. They then took her to her credit union where the three established a joint account. Using the power of attorney, the two caregivers then transferred some $300,000 from the victim's other accounts into the joint account. From there the caregivers wired some $250,000 the victim's to accounts in the Ukraine. In October 2008, the victim was diagnosed as suffering from dementia. The diagnosing psychiatrist concluded the dementia had existed for several years. After a public guardian was appointed, a lawsuit was brought to recover assets from the caregivers and credit union. The trial court dismissed the case finding there was no evidence the credit union knew or should have known of the victim's incapacity.

On appeal by the public guardian, the trial court decision was affirmed. Appeals court justices focused on the absence of evidence showing the credit union knew or should have known about its customer's incapacity and the fact that the credit union opened the joint account in good faith and without any improper advantage to itself. Evidence indicated the customer had participated in the opening of the joint account and had engaged in conversation on that occasion, and had signed the signature card on her own. The appeals court rejected claims by the public guardian that the credit union should be held liable without regard to its knowledge of the victim's mental incapacity, finding no authority to support that position.

Marilyn Foss
NDBA General Counsel

Role of the General Counsel

North Dakota Bankers Association is extremely fortunate to have the expertise of Marilyn Foss on staff. Marilyn has been with the association for over 19 years as general counsel and has served our members and staff with great professionalism.

NDBA's general counsel serves as the attorney for the association. Although she is pleased to be able to serve as a resource for NDBA members in responding to their questions, she is providing general information, not legal advice. Banks must obtain legal advice from counsel who has been retained by the bank to represent the bank's interests in a specific matter.

To contact Marilyn Foss, NDBA General Counsel, call 701.223.5303 or email at marilyn@ndba.com.