

PUBLICATION

Tennessee Court of Appeals Confirms Foreclosures Cannot Be the Basis for a TCPA Claim

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On September 25, 2012, the Middle Section of the Tennessee Court of Appeals issued an opinion confirming that foreclosure proceedings cannot serve as the basis for a Tennessee Consumer Protection Act (TCPA) claim. See *David A. Paczko, et al. v. SunTrust Mortgages, Inc., et al.*, No. M2011-02528-COA-R3-CV, 2012 WL 4450896 (Tenn. Ct. App. Sept. 25, 2012). While several Tennessee federal district courts have previously come to similar conclusions, this appears to be one of the first Tennessee state appellate courts to specifically find that a plaintiff cannot assert a TCPA claim based on a lender's alleged actions relating to a mortgage foreclosure.

In *Paczko*, the plaintiffs David and Barbara Paczko (collectively, "Paczkos") purchased property in Williamson County, Tennessee, in April 2008, at which time they executed a promissory note (Note) payable to SunTrust Mortgage, Inc. (SunTrust) and secured by a Deed of Trust, which named SunTrust as the lender and Mortgage Electronic Registration Systems, Inc. (MERS) as the nominee for the benefit of SunTrust. Three years later, in June 2011, after the Paczkos defaulted on the Note and Deed of Trust, MERS executed an Assignment of the Deed of Trust to SunTrust, which in turn executed an Appointment of Substitute Trustee naming Nationwide Trustee Services (Nationwide), as the Substitute Trustee. Thereafter, Nationwide instituted foreclosure proceedings on the Paczkos' property.

On July 6, 2011, the Paczkos filed a lawsuit in Williamson County Chancery Court and asserted various claims against SunTrust and other defendants, including a claim for violation of the TCPA. The TCPA generally provides a right of action to any person who suffers an ascertainable loss of money or property as a result of the unfair or deceptive act or practice of another and allows for the recovery of treble damages and attorneys' fees. See Tenn. Code Ann. § 47-18-109. In support of their TCPA claim, the Paczkos alleged, among other things, that the defendants were "intentionally instituting a foreclosure against the [Paczkos] with full knowledge that [SunTrust] has no right, title and/or interest in the property upon which to foreclose," that "[t]he scheme, intentionally employed by Defendants with full knowledge that they had no legal right to foreclose upon the property, had the capacity and tendency to deceive Plaintiffs into believing that [SunTrust] had the right to foreclose upon their property," and that "[t]he acts of Defendants whereby they have purposely provided the Plaintiffs with conflicting information regarding the servicing and ownership of their loan constitutes 'unfair and deceptive' business practices as defined by [the TCPA]." *Paczko*, 2012 WL 4450896, at *2.

Upon the defendants' motions to dismiss, the Williamson County Chancery Court dismissed the Paczkos' TCPA claim for failure to state a claim upon which relief could be granted. Relying on several Tennessee federal district court opinions, the Tennessee Court of Appeals affirmed the dismissal of the TCPA claim and held that "the TCPA does not apply to allegedly deceptive conduct in foreclosure proceedings." *Id.* The federal district courts upon which the *Paczko* court relied for its conclusion had looked to the Tennessee Supreme Court's decision in *Pursell v. First American National Bank*, 937 S.W.2d 838 (Tenn.1996), where the Tennessee Supreme Court had held that the TCPA did not create a cause of action for alleged deceptive repossession of an automobile because the actions of a bank and its agent in carrying out a repossession "did not affect the 'advertising, offering for sale, lease or rental, or distribution of any goods, services, or property,

tangible or intangible, real, personal, or mixed, and other articles, commodities, or things of value wherever situated.' *Paczko*, 2012 WL 4450896, at *2 (quoting *Pursell*, 937 S.W.2d at 841).

The Tennessee Court of Appeals' holding in *Paczko* is important because it confirms that lenders and servicers who are often involved in mortgage foreclosures do not have the threat of being hit with treble damages and attorneys' fees from a TCPA claim based on foreclosure proceedings.