

**BANKING ALERT**

August 2020

**[New York Federal Court Affirms \\$232,500 Arbitration Award  
Against Bank For Violation of Telephone Consumer  
Protection Act](#)**

In *Salerno v. Credit One Bank, N.A.*, Civil Action No. 15-cv-516 (W.D.N.Y. Jul. 28, 2020), the Western District of New York affirmed a \$232,500 arbitration award entered against a bank based on violations of the Telephone Consumer Protection Act (“TCPA”).

The plaintiff alleged that, for a period of six months, she received two to three telephone calls a day from Credit One Bank, N.A. (“Credit One”) seeking to collect on a debt owed by the plaintiff’s boyfriend. The total amount of phone calls the plaintiff received was allegedly 466. The plaintiff claimed she did not provide her cellphone number to Credit One for the purposes of collecting a debt owed by her boyfriend and did not know how Credit One got her phone number.

The parties commenced arbitration and, after a hearing, the arbitrator found that Credit One had violated the TCPA 466 times by making 466 phone calls to the plaintiff’s cellphone without her express consent and using an automatic telephone dialing system. Accordingly, the arbitrator awarded the plaintiff \$500 per phone call, for a total award of \$233,000. Credit One then requested a second *de novo* arbitration before a three-person panel. The panel found similarly and awarded the plaintiff \$232,500 based on 465 unauthorized telephone calls.

Credit One subsequently sought to vacate the arbitration award in federal court. The district court declined to vacate the award, finding that the plaintiff was entitled to statutory damages in the amount of \$500 per telephone call. The district court, however, refused to award the plaintiff pre-judgment interest, finding that the statutory damages remedy far exceeded the actual damages sustained by the plaintiff.

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### **[New Jersey Appellate Division Affirms Summary Judgment Order in Favor of Lender in Foreclosure Action](#)**

In *CIT Bank, N.A. v. Weakly*, 2020 WL 478447 (N.J. App. Div. Aug. 18, 2020), the Appellate Division upheld an order granting a bank's motion for summary judgment for foreclosure where the defendant-borrower challenged the bank's standing to foreclose.

In April 2004, the defendant executed a promissory note in the amount of \$142,700 in favor of IndyMac Bank, FSB ("IndyMac"), which was secured by a mortgage dated April 16, 2014. The loan was subsequently modified by the parties in 2007, but no new mortgage was executed or recorded. In February 2010, the FDIC, as receiver for IndyMac, assigned the mortgage to the plaintiff, OneWest Bank, FSB. The assignment was recorded in March 2010 and, in April 2011, a duplicate assignment of mortgage was recorded whereby the FDIC again assigned all its rights and interests to the plaintiff.

In May 2015, the plaintiff sent a notice of default and notice of intent to foreclose to the defendant, and a foreclosure complaint was filed in September 2015. After default was entered, the defendant sought to vacate the default, alleging that the plaintiff lacked standing because it did not establish it had possession of the original note and the assignments were forged and, therefore, invalid. Ultimately, default was vacated by the Appellate Division and the plaintiff filed an amended complaint to include the loan modification history. In September 2018, the trial court granted the plaintiff's motion for summary judgment and struck the defendant's contesting answer and affirmative defenses. In so doing, the trial court found that the amended note did not void the original note and mortgage and that the plaintiff had established its right to foreclose on the property. The trial court also concluded that the plaintiff had standing to foreclose.

On appeal, the Appellate Division held that the plaintiff maintained standing to foreclose due to the 2010 assignment of mortgage from the FDIC, as receiver for IndyMac. The plaintiff's presentation of evidence showing that the assignment was executed and recorded prior to the filing of the foreclosure complaint was sufficient to establish standing.

### **[New Jersey District Court Remands Foreclosure Action to State Court for Lack of Subject Matter Jurisdiction](#)**

In *Wells Fargo Bank, N.A. v. Schildknecht*, (D.N.J. Jul. 30, 2020), plaintiff Wells Fargo ("Plaintiff") filed a foreclosure action against the now-deceased Ann R. Schildknecht in the Superior Court of New Jersey. Defendant Ellen Heine ("Heine") removed to federal court on the basis that Heine's interest in the property at issue was part of a bankruptcy estate and bankruptcy proceeding and filed a counterclaim under 28 U.S.C. § 1331.

Plaintiff sought to remand based on lack of subject matter jurisdiction and procedural defects in removal. Plaintiff argued that the federal court did not have diversity jurisdiction based on the "forum defendant rule" since the removing defendant, Heine, was a citizen of New Jersey. The "forum defendant rule" prohibits removal where the defendant is a citizen of the state in which that action is brought. The federal court found the forum defendant rule did not apply to Heine because she was not properly served until after removal. The federal court found, however,

that other New Jersey defendants were served prior to removal and, thus, under the “forum defendant rule,” the case could not be removed to federal court.

Plaintiff further argued there were other defendants who had been served who did not consent to removal. The federal court found this to be a procedural defect, which does not deprive the court of subject matter jurisdiction. Lastly, Plaintiff argued that the federal court did not have federal question jurisdiction. The federal court agreed that Heine’s counterclaim did not give rise to federal question jurisdiction and the existence of a personal federal bankruptcy case did not give the court jurisdiction over any case against Heine. In addition, the federal court found that Heine had not shown that the amount in controversy amount had been met.

The federal court held that removal was not proper and remanded the case to the Superior Court of New Jersey.

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