COURT OF APPEAL NO. 75837-3

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

Respondent,

v.

RICHARD J. ZALAC; SARAH A. ZALAC,

Appellants.

APPELLANT ZALACS' PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The petitioners are Richard and Sarah Zalac ("Zalacs"), the appellants in the Court of Appeals and the Defendant/Counter-Plaintiff in the King County Superior Court proceeding. The Zalacs ask this Court to accept review of the decision designated in Part II.

II. DECISION BELOW

The Zalacs seek review of the unpublished opinion by the Court of Appeals for Division 1 on December 11, 2017, in *JPMorgan Chase Bank, N.A. v. Zalac*, No. 75837-3-I, 2017 WL 6336001 (Div. I, Dec. 11, 2017). A copy of the Opinion is included as Appendix A, which found Chase's failure to provide material information to the Zalacs was not a deceptive act under the Washington Consumer Protection Act ("CPA"), but simply "poor customer service."

On December 29, 2017, the Zalacs filed a motion for reconsideration of the Court of Appeal's Opinion. The Court of Appeals denied the Zalacs motion for reconsideration on January 5, 2018 and is attached as Appendix B.

Additionally, on December 28, 2017, the Zalacs filed a motion to publish the Court of Appeal's Opinion. The Court of Appeals denied the Zalacs' motion to publish on January 11, 2018, which is attached as Appendix C.

III. ISSUE PRESENTED FOR REVIEW

Whether the Court should accept review because:

1. The Court of Appeals' decision in this case conflicts with the Court of Appeals' decision in *Deegan.*[1] The *Deegan* Court held failure to provide statutorily required information is an unfair or deceptive act under Washington's Consumer Protection Act; whereas here, the Court of Appeals held Chase's failure to provide timely and accurate information was not unfair or deceptive even though it violated a federal statute.

2. The Court of Appeals' decision involves an issue of substantial public interest that should be determined by this Court. This Court has not interpreted whether a financial institution's failure to comply with a federal statute is an unfair or deceptive act under Washington's Consumer Protection Act.

3. The Court of Appeals' decision held the terms of a contract apply only when the terms "clearly vary" the terms contained in the UCC which conflicts with existing law and is an issue of public importance.

IV. STATEMENT OF THE CASE

A. Factual Background

In November 2010, the Zalacs experienced financial hardship

[1] *Deegan v. Windermere Real Estate/Ctr.-Isle, Inc.*, 197 Wn. App. 875, 391 P.3d 582 (Div. I 2017).

prompting the Zalacs to contact their loan servicer at the time, Chase, to work out an alternative to having their family's home foreclosed on. CP 401 ¶¶ 9-10. At the time, the Zalacs believed that selling the family home and paying in full the Zalac-CTX note, or negotiating a short sale, modification, or other alternative to foreclosure, would be the prudent course of action. *Id*. The Zalacs began sending Chase letters stating their intent to find a mutually beneficial solution and requested information regarding what entity was the proper party they needed to be discussing and negotiating with. CP 401 ¶¶ 9-11.

The record established that Chase did not provide them this information within ten (10) day:

- The Zalacs sent Chase their first letter on December 1, 2010, asking Chase for proof it was the factual holder of the mortgage, so they could sell their home. CP 410-11.
- After ten days, with no response from Chase, the Zalacs sent Chase a second letter on December 11, 2010. CP 413-14.
- While Chase continued to send automated monthly statements and various other automated notices, none responded to the Zalacs' letters or answered the Zalacs' questions. CP 509-90.
- The Zalacs sent Chase another letter on January 10, 2011, and again requested, "To accomplish an outright sale, short sale or deed in lieu

of foreclosure, we require the proper documentation to prove, beyond a shadow of doubt, that Chase and GMAC are the legitimate holders of the mortgages on our home." CP 416.

- With no clarification on the issue from Chase, the Zalacs began to research online to figure out how to obtain information on the parties involved in their note and deed. CP 402 ¶¶ 12-14. After learning they could verify whether Fannie Mae owned their note by way of the Fannie Mae website, the Zalacs took to the internet and discovered that Fannie Mae claimed to own the Zalac-CTX Note. *Id*

- On January 26, 2011, the Zalacs again wrote to Chase, specifically calling Chase's claimed ownership into question, again requesting the necessary information on their loan, and identifying how Chase's failure to respond was causing them injury. CP 420-22.

- On February 11, 2011, the Zalacs again wrote Chase:

> Chase is unwilling or unable to provide proof of ownership, since 12.01.10, which suggests that Chase does not possess a rightful claim to my home, nor legal standing to foreclose. [] Thus, there can be no loan modification, outright sale, short sale or deed-in-lieu of foreclosure. Clearly, the rightful owner has not been identified.

CP 424-25.

- The Zalacs did not hear anything back from Chase until April 14, 2011. CP 443. This was **134** days after the Zalacs first requested

information on the owner of their note and deed of trust.

Thus, the Zalacs did not hear anything back from Chase for months. *Id*. The record at trial court showed that Chase did not initially respond to the Zalacs from December 2010 until April 2011, which forced the Zalacs to re-send their requests multiple times, incur fees, penalties, and missed payments on the Zalac-CTX note, while at the same time reducing their ability to work out an alternative to foreclosure. CP 402 ¶ 14; CP 410-426. When Chase did respond to the Zalacs on April 14, 2011, it did not sufficiently respond to the Zalacs' requests. CP 443. Chase's letter merely stated, "Your loan was sold into a public security managed by FNMA A/A and may include a number of investors. As the servicer of your loan, Chase is authorized by the security to handle any related concerns on their behalf." *Id.* Importantly, Chase provided no documentation or other evidence with this letter that the Zalacs could rely on to support Chase's conclusory statement that it had authority to act or that the loan was owned by a trust. *Id*. Additionally, there was no objective manifestation from the Zalac-CTX note owner that Chase could act on its behalf.

During this time, Chase's internal records supported the Zalacs' testimony that they were making requests for information and Chase was being unresponsive. CP 428; CP 434-37. For example, in February 2011, two months after the Zalacs' first request for material information on their

account, there is a comment in Chase's internal records directing that a copy of the MERS Milestone report be sent to the Zalacs to provide information regarding the current party with an ownership interest in their note, which was followed by a subsequent notation "Unable to process this request, this is not a loan operations issue. Thanks." CP 428; CP 434-37. The Zalacs requests went unanswered. *Id*.

Approximately a month after finding out Fannie Mae claimed to own their loan, the Zalacs received a Notice of Default listing Chase as the owner. CP 402 ¶ 15. This information conflicted and contradicted what the Zalacs found on Fannie Mae's website, causing their concern and confusion to grow. CP 402 ¶¶ 15-18. In response, the Zalacs continued to write Chase letters requesting clarification in order to avoid foreclosure. *Id*. The Zalacs also consulted attorneys for the purpose of trying to find out who the proper party to pay was and who they needed to be working with to resolve the matter and possibly sell their home to avoid foreclosure. *Id*.

Chase's records were replete with multiple acknowledgments that Chase received and understood the requests being made by the Zalacs. CP 427-31.

- "This is a QWR [Qualified Written Request] issue, please forward to proper dept[.]" CP 429.

- "Cust[omer] requesting f[o]r us to provide proof that Chase is entitled to any rights under the note or Deed of Trust." *Id.*
- "[L]etter is requesting a copy of the assignment from the original loan company to Chase." CP 430.
- "Mortgagor is asking for assignment and proof that Chase owns the loan or servicing rights." CP 430-31.

B. Procedural History

On June 2, 2015, Chase filed a judicial foreclosure against the Zalacs. CP 1-29. On September 1, 2015, the Zalacs answered, raised affirmative defenses, and asserted a counterclaim against Chase under the CPA. CP 30-45.

On February 19, 2016, Chase filed for summary judgment. CP 116-38. On February 26, 2016, the Zalacs also filed a motion requesting the court grant summary judgment in their favor regarding their CPA counter-claim. CP 343-70. The Court denied the Zalacs Motion for Summary Judgment and granted Chase's Motion for Summary Judgment dismissing the Zalacs' CPA claim. CP 910-12. The basis of the Court's ruling was its finding that Chase's actions were not unfair or deceptive. VRP 60:7-23. Specifically, the court stated:

> regarding the counterclaim, it's hard for this court to divine what the unfair practice would be. It is true that the Zalacs, from all indications, made inquiries after the payments were

> -- after they were unable to make payments. But it does not appear to me that Chase was doing and responding the way that they were, that that was an unfair and deceptive practice.

Id. at 60:7-13. Based on the dismissal, the Zalacs filed a motion for reconsideration on April 12, 2015. CP 913-28. The Superior Court denied the motion on May 18, 2016. CP 956-57.

The Zalacs timely filed a notice of appeal on August 19, 2016, appealing the order granting Chase's first motion for summary judgment and the order denying the Zalacs motion for reconsideration. CP 1183-1202.

On December 11, 2017, The Court of Appeals affirmed the Trial Court's dismissal of the Zalacs' CPA claim on summary judgment. Essentially, the Court of Appeals held what the Zalacs had shown was Chase committed "poor customer service" and not an unfair or deceptive act under the CPA. Opinion at *7. ("The most the Zalacs have shown is that Chase engaged in poor customer service by not promptly responding to their request for information.") The Court of Appeals further opined:

> The letter sent by Chase to Zalac on April 14, 2011, clearly identified Fannie Mae as the note owner and explained that Chase, as the servicer of the loan, was authorized to handle any concerns on the owner's behalf. The Zalacs do not dispute that this information was true. The Zalacs may have been confused, but they do not show their confusion was the result of an unfair or deceptive act on the part of Chase.

* * *

> In any event, the Zalacs have not shown that Chase withheld information that the Zalacs were entitled to. The Zalacs' failure to demonstrate a deceptive or unfair act is fatal to their consumer protection claim.

Id. at ** 7-8.

However, the Court of Appeals failed to address the Zalacs' argument that under federal law, specifically 12 U.S.C. § 2605(k)(1)(C)-(E), the Zalacs were entitled to have the information on their loan within ten days. Chase's failure to do so was not only a federal violation, but also amounted to an unfair or deceptive act under Washington's Consumer Protection Act.

V. GROUNDS FOR REVIEW

A. Standard of Review

This Court may grant review and consider a Court of Appeals opinion if it conflicts with a Supreme Court or another Court of Appeals decision, or "if the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(1)-(4).

Here, this Court Should Accept Review of the Court of Appeals' unpublished opinion because it: 1) conflicts with the published appellate decision in *Deegan* and 12 U.S.C. § 2605(k)(1); and (2) involves an issue of substantial public interest that should be determined by the Washington

Supreme Court.

B. The Court of Appeals Opinion conflicts with *Deegan* and federal statute

Chase's failure to provide the Zalacs with information regarding ownership of their note is a violation of the federal statute, 12 U.S.C. § 2605(k)(1), which states:

> A servicer of a federally related mortgage shall not--
>
> ***
>
> (C) fail to take timely action to respond to a borrower's requests to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties;
>
> (D) fail to respond within 10 business days to a request from a borrower to provide the identity, address, and other relevant contact information about the owner or assignee of the loan; or
>
> (E) fail to comply with any other obligation found by the Bureau of Consumer Financial Protection, by regulation, to be appropriate to carry out the consumer protection purposes of this chapter.

12 U.S.C. § 2605(k)(1)(C)-(E).

Enacted for the purpose of protecting the public from abuse by the financial industry, the law works to ensure individuals are provided "greater and more timely information." 12 U.S.C. § 2601; 12 U.S.C. § 2605(E). Here, Chase's actions in failing to timely provide the Zalacs with critical information needed by the Zalacs to avoid a foreclosure is a

violation of this federal consumer protection statute.

In Washington, the CPA was enacted for this same consumer protection purpose. "[T]he CPA was adopted to protect the public from unfair or deceptive acts or practices in trade or commerce and is to be liberally construed" in Washington State. *Deegan v. Windereme Real Estate/Center-Isle, Inc.*, 197 Wn. App. 875, 884, 394 P.3d 582 (Div. I 2017) (citing *Indoor Billboard/Wash. V. Integra, 162* Wn.2d at 74, 170 P.3d 10 (2007)). Fittingly, Washington's CPA expressly directs courts to be guided by decisions of the federal courts and the Federal Trade Commission interpreting federal consumer protection and antitrust statutes when interpreting Washington's CPA. RCW 19.86.920; *Ameriquest Mortg. Co. v. Office of Attorney Gen. of Wash.*, 177 Wn.2d 467, 496 n.20, 300 P.3d 799 (2013).

In *Deegan*, the Court of Appeals held, "[a] "knowing failure to reveal something of material importance is 'deceptive' within the CPA."" *Deegan.*, 197 Wn. App. at 885. Deception also exists:

> if there is a representation, omission or practice that is likely to mislead a reasonable consumer. In evaluating the tendency of language to deceive, the [FTC] should look not to the most sophisticated readers but rather to the least. Under the FTCA, a communication may be deceptive by virtue of the "net impression" it conveys, even though it contains truthful information.

Panag v. Farmers Ins. Co. of Washington, 166 Wn.2d 27, 50, 204

P.3d 885 (2009)(internal citations omitted).

Further, “[t]he CPA significantly differs from traditional common law standards of fraud and misrepresentation. It replaces the now largely discarded standard of caveat emptor with a standard of fair and honest dealing.” *Deegan,* 197 Wn. App. at 884–85. Finally, there is a “rebuttable presumption of reliance” when a material fact is omitted from disclosure. *Id.* at 892.

In *Deegan*, the plaintiffs filed suit against real estate brokers responsible for listing homes they had purchased. *Id.* at 883. The plaintiffs alleged the brokers’ failure to disclose material facts regarding airport noise was in violation of a county ordinance, ICC 9.44.050, and in violation of Washington's CPA as an unfair or deceptive act. *Id*. The Plaintiffs claimed they were injured by the omission because they were deprived of possessing and using the information and the omitted information would have impacted their decision to purchase their homes and their obligation to disclose in any future sale would reduce their proceeds. *Id*. The Trial court dismissed the Deegan’s claims. *Id*.

On appeal, this Court in *Deegan* found the trial court improperly dismissed the purchasers' CPA claim. *Id*. This Court stated, "**the alleged unfair or deceptive act here is an omission of the material facts identified in ICC 9.44.050.**" *Id*. at 890 (emphasis added). The Court of

Appeals reversed and remanded, holding, *inter alia*, "there are adequate allegations that the **omissions** caused Deegan and O'Grady harm." *Id.* at 892 (emphasis added).

Here, just like the homeowners in *Deegan*, the Zalacs had a right, and a duty,[2] to make use of and possess the material information related to the CTX-Zalac loan, including the identity of the owner within ten (10) days of their request. 12 U.S.C. § 2605(k)(1). The record established that Chase did not provide them this information within ten (10) day:

- The Zalacs sent Chase their first letter on December 1, 2010, asking Chase for proof it was the factual holder of the mortgage, so they could sell their home. CP 410-11.
- After ten days, with no response from Chase, the Zalacs sent Chase a second letter on December 11, 2010. CP 413-14.
- The Zalacs continued to send multiple letters dated January 10, 2011, (CP 416), January 26, 2011 (CP 420-22); February 11, 2011 (CP 424-25)
- While Chase continued to send automated monthly statements and various other automated notices, none responded to the Zalacs' letters or answered the Zalacs' questions. CP 509-90.
- The. Zalacs did not hear anything back from Chase until April 14, 2011. CP 443. This was 134 days after the Zalacs first requested

information on the owner of their note and deed of trust.

When Chase eventually provided the Zalacs with information on April 14, 2011, the information conflicted with the Notice of Default previously sent to the Zalacs on March 28, 2011. *Compare* CP 440-42 *with* CP 443. Chase told the Zalacs: (1) Chase owned the Zalacs' note (CP 402 ¶ 15, CP 440-42); (2) Chase did not own the Zalacs' note (CP 443); (3) Chase was only a servicer for Fannie Mae (*Id.*); (4) Fannie Mae was the owner of the CTX-Zalac note (CP 402 ¶¶ 12-14); and (5) the CTX-Zalac note was in a "security" (CP 443).

Under federal law, the Zalacs were entitled to possess and make use of "the identity, address, and other relevant contact information about the owner or assignee of the loan" within ten (10) days of their December 1, 2010 request. When Chase failed to provide the identity, address, and other relevant contact information about the owner or assignee of the Zalac's loan within ten days, Chase not only violated 12 U.S.C. § 2605(k)(1), but also the Washington CPA. Further, it is presumed under *Deegan*, that the Zalacs relied upon Chase's omission. In fact, the record shows that because the Zalacs did not receive timely information from Chase, the Zalacs were unable to avoid a nonjudicial foreclosure and as the months dragged on without an answer from Chase, the Zalacs continued to expel time and money in an attempt to obtain the necessary

information that Chase should have initially provided.

In addition to Chase's failure to provide the information within ten (10) days pursuant to 12 U.S.C. § 2605(k), Chase provided the Zalacs multiple conflicting facts that caused an additional source of confusion. When Chase did respond, 134 days later, the Zalacs did not receive the information in a way that the "least" "sophisticated consumer" could understand. If Chase would have properly provided accurate information within ten (10) days as required, the Zalacs would not have been injured.

Consistent with Federal law, Washington State Supreme Court precedent, and *Deegan*, this Court's excusal of Chase's actions as "poor customer service" conflicts with existing published precedent.

C. A loan servicer's failure to provide statutorily required material information in ten days to a customer, in violation of a federal statute, amounts to an unfair or deceptive act under the Washington CPA is an issue of substantial public interest that should be determined by the Supreme Court.

Loan Servicers are required to provide information to customers in ten (10) days under 12 U.S.C. § 2605(k)(1). Individuals do not get to choose who their loan servicers are. Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1, 55 (2011) ("RESPA's significance for servicing is not the rights it grants, but those it does not. RESPA does not allow borrowers to choose their servicer or have any say in how the servicer handles their loan beyond complaining of errors. If a borrower is

dissatisfied with a servicer, the borrower can sue the servicer for specific acts, but has no ability to switch servicers...")

In Washington, the servicer is thrust upon the homeowner because most modern mortgage loans are sold by the originating lender and securitized. Alan M White, *Losing the Paper- Mortgage Assignments, Note Transfers and Consumer Protection,* 24 Loy. Consumer L. Rev. 468, 471 (2012) (vast majority of loans originated between 1990 and 2007 sold and securitized). This Court has previously recognized the reality of this situation, "Today, it is more common that the initial lender will sell the note in the large secondary market for mortgage loans. This secondary market complicates the issue that this case turns on- identifying the beneficiary of Brown's deed of trust." *Brown v. Washington State Dept. of Commerce*, 184 Wn.2d 509, 520, 359 P.3d 771 (2015).

This has brought the mortgage servicer unparalleled power, as the borrower's single point of contact:

> The mortgage servicer performs all the day-to-day tasks related to mortgages owned by SPV [single-purpose vehicle trusts for residential mortgages]. Servicers are responsible for account maintenance activities such as sending monthly statements to mortgagors, collecting payments from mortgagors, keeping track of account balances, handling escrow accounts, calculating interest-rate adjustments on adjustable rate mortgages, reporting to national credit bureaus, and remitting funds collected from mortgagors to the trust.

Id. at 23.

This hegemonic power is only truly appreciated when viewed by the fact that for most individuals, their home is their largest and most meaningful asset. Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28.1 Yale L.J. Vo. 1, 2 (2011) (internal citations omitted).

The Zalacs are like all Washington homeowners who find themselves stuck at the mercy of their loan servicer, in this case Chase, to provide material information in a timely and understandable manner. For the Zalacs, they needed critical information on the owner of their note in order to make hard decisions regarding their most important asset.

Essentially, this powerless position of homeowners is what brought the proliferation of laws and regulations governing the mortgage and financial industry over the last decade. *Id*. at 2-3. In order to protect their family and assets, it is imperative that Washington Home Owners have access to information related to their loan in a timely and accurate fashion.[2] Accordingly, it is no surprise that information regarding the ownership of a loan is required to be given to a borrower in ten days. 12 U.S.C. § 2605(k).

Here, Chase did not provide this information for months and when it

[2] There are 3,025,685 housing units in Washington. Approximately 1,888,027 are owner occupied. https://www.census.gov/quickfacts/fact/table/WA/HSG445216#viewtop

did, it conflicted. Chase did not provide the Zalacs the information they needed and the Court of Appeals simply said well, that is just “poor customer service.” However, it is imperative that this court hold financial entities, with all the power, responsible for providing Washington residents their federally mandated right to receive material information on their loans within ten days of the request.

D. The Court of Appeals’ decision that to have the terms of a contract apply the terms must "clearly vary" the terms contained in the UCC, conflicts with existing law, including the Washington Constitution, and is of public importance.

This Court should accept review of the Appellate Court’s holding that the note’s “definition does not clearly vary the rule that "actual physical possession of the original note indorsed in blank conveys holder status under Washington law."” Washington precedent establishes parties’ words will be given effect, not that a contract must “clearly vary” the UCC. Further, the Appellate Court’s holding gives no effect to the words and terms in the note that CTX and the Zalacs agreed to. The statutory definition has 1 requirement, and the definition agreed to by the parties has 2 completely different requirements.

Parties to a contract are not required to “clearly vary” a definition in the UCC. *See* Wa. Const. art. I, § 3; Wa. Const. art. I, § 23 (“No … law impairing the obligations of contracts shall ever be passed.”); RCW

62A.1-302 cmt. 1. *See also* RCW 62A.1-302(b) (providing that the parties, by agreement, may determine the standards of performance if they are not manifestly unreasonable); *Id*. § 1-302(a) (providing that, "[e]xcept as otherwise provided in subsection (b) [of section 1-302] or elsewhere in [the UCC], the effect of provisions of [the UCC] may be varied by agreement"); Fred H. Miller, *Writing Your Own Rules: Contracting Out of (and into) the Uniform Commercial Code; Intrastate Choice of Law*, 40 Loy. L.A.L. Rev. 217, 234 (2006). The UCC is a gap-filler statute, and if the parties include a definition for a term, that definition controls, not the UCC. *Id*.

Whenever there is a dispute over the meaning of a contract, the contract should be interpreted and construed to reflect the intent of the parties. 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 301.05 (6th ed.); 25 Wash. Prac., Contract Law And Practice § 5:8 (3d ed.)

Here, the Zalacs request this Court to accept review and reaffirm that parties do not have to "clearly vary" the terms contained in the UCC in order for their words and intentions to be given effect.

VI. CONCLUSION

Review of the Court of Appeals' unpublished opinion is needed because it: 1) conflicts with the published appellate decision in *Deegan* and 12 U.S.C. § 2605(k)(1); and (2) involves issues of substantial public

interest that should be determined by the Washington Supreme Court. This Court has not interpreted whether: 1) a financial institution's failure to comply with a federal statute is an unfair or deceptive act under Washington's Consumer Protection Act; or, 2) what standard is required to show parties to an agreement intended their chosen words to control their agreement rather than the UCC.

DATED this 9th day of February, 2018, at Arlington, Washington.

Respectfully Submitted By:

JBT & ASSOCIATES, P.S.

s/ Joshua B. Trumbull
Joshua B. Trumbull, WSBA# 40992

s/ Emily A. Harris
Emily A. Harris, WSBA# 46571

CERTIFICATE OF SERVICE

I, Ashley Brogan, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

2. That on the 9th day of February, 2018, I caused to be served a true and correct copy of Appellant Zalacs' Petition for Review to respondents in the above title matter by causing it to be delivered to:

Hugh McCullough Rebecca Francis Fred B. Burnside Frederick A. Haist Davis Wright Tremaine, LLP 1201 Third Ave Suite 2200 Seattle, WA 98101 hughmccullough@dwt.com rebeccafrancis@dwt.com fredburnside@dwt.com frederickhaist@dwt.com	☐ U.S. First Class Mail Postage Paid ☐ Hand Delivery ☒ Legal Messenger ☒ Electronic-Email

DATED this 9th day of February, 2018, at Arlington, Washington.

s/ Ashley Brogan
Ashley Brogan
Paralegal
JBT & Associates, P.S.

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, Respondent, v. RICHARD J. ZALAC and SARAH A. ZALAC, Appellants, and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; CTX MORTGAGE COMPANY, LLC; DOES 1-10 INCLUSIVE; UNKNOWN OCCUPANTS OF THE SUBJECT REAL PROPERTY; PARTIES IN POSSESSION OF THE SUBJECT REAL PROPERTY; PARTIES CLAIMING A RIGHT TO POSSESSION OF THE SUBJECT PROPERTY, Defendants.	)	No. 75837-3-I DIVISION ONE UNPUBLISHED OPINION FILED: December 11, 2017

BECKER, J. — The trial court properly dismissed this consumer protection claim against JPMorgan Chase Bank National Association and allowed Chase to proceed with a judicial foreclosure against the appellants. Appellants do not identify an unfair or deceptive act or practice. As the servicer of the loan, the

bank accurately informed the borrower that it was authorized to act on the note owner's behalf.

This court reviews a summary judgment order de novo, asking whether the record, viewed in favor of the nonmoving party, reveals no issues of material fact and demonstrates that judgment is proper as a matter of law. CR 56(c); Mahoney v. Shinpoch, 107 Wn.2d 679, 683, 732 P.2d 510 (1987).

Declarations and exhibits submitted to the trial court establish the underlying undisputed facts. Richard Zalac borrowed $352,500 from CTX Mortgage Company LLC in June 2005 to finance his Enumclaw home. To secure the loan, he executed a note and deed of trust. Sarah Zalac, Richard's wife, signed the deed of trust to perfect the lien. The note and deed of trust identified Zalac as the borrower, CTX as the lender, and Stewart Title as trustee. The designated beneficiary was Mortgage Electronic Registration Systems Inc. (MERS) as the nominee of the lender. Other relevant terms of the note and deed were:

- Zalac was required to make monthly payments of $2,029.19.
- Zalac agreed, "I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "'Note Holder.'"
- "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the 'Loan Servicer') that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law."

Soon after the note and deed were finalized, CTX notified the Zalacs that the loan had been transferred to Countrywide Home Loans "for future servicing." The notice said, "This is a common practice in the mortgage industry and has no effect on the terms and conditions of your mortgage." In October 2006, Countrywide notified the Zalacs that servicing, including "the right to collect payments," had been transferred to Chase Home Finance LLC.

In 2010, the Zalacs experienced financial difficulty and defaulted on their monthly loan payments. They have made no payments since November 1, 2010. They considered selling their home to avoid foreclosure. The Zalacs wrote a letter asking Chase to identify the proper party with whom to negotiate their options. Their letter to Chase on December 1, 2010, said, "To advance the outright sale or short sale of our home, we will need proof that your respective organizations are the factual holders of our mortgages." Chase did not respond to this inquiry. Chase sent a letter reminding Zalac of the past-due payments.

Over the next two months, Chase received four more letters from Zalac requesting information about ownership of the note and asking for confirmation that Chase was the "legitimate holder" of the mortgage. Zalac alleged that Chase's failure to provide "an adequate response" and show "proof of ownership" was causing the Zalacs "hardship and injury." Meanwhile, Zalac conducted online research and learned that Federal National Mortgage Association ("Fannie Mae") claimed to be the current owner of the Zalac-CTX note.

A notice of default dated March 28, 2011, was sent to the Zalacs. Under a section titled "Contact Information for Beneficiary (Note Owner) and Loan

Servicer," the notice identified Chase as the "beneficiary of the deed of trust" and the "loan servicer." Confused by this notice, Zalac consulted attorneys "to help figure out whether Chase was the proper party to pay."

In a letter dated April 14, 2011, Chase informed the Zalacs that "Your loan was sold into a public security managed by FNMA A/A and may include a number of investors. As the servicer of your loan, Chase is authorized by the security to handle any related concerns on their behalf."

On February 3, 2012, MERS (the original beneficiary) transferred to Chase "all beneficial interest" under the deed of trust. Northwest Trustee became the trustee on the loan by appointment dated March 31, 2012.

In April 2012, Northwest Trustee issued a notice of trustee's sale setting the sale for July 20, 2012.

In July 2012, Zalac filed a complaint in King County Superior Court against Chase, among other defendants, alleging wrongful foreclosure under the deed of trust act, chapter 61.24 RCW, and violation of the Consumer Protection Act, chapter 19.86 RCW. The court entered an order restraining the defendants from conducting the trustee's sale, and the sale was cancelled.

The defendants removed the case to federal district court and then successfully moved for dismissal based on Zalac's failure to state a claim. Under Fed. R. Civ. P. 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The district court ruled that Zalac had failed to allege a plausible claim. Zalac did not

contest that Chase had physical possession of the indorsed in blank note. Therefore, the court found, "Chase is the holder of the note as a matter of law. Further, despite the sale of Plaintiff's loan to Fannie Mae, Chase alerted Plaintiff that it remained servicer of his loan and was authorized to handle any of Plaintiff's concerns." Zalac v. CTX Mortg. Corp., No. C12-01474 MJP, 2013 WL 1990728 (W.D. Wash. May 13, 2013) (court order). The Ninth Circuit affirmed the district court's ruling. "By holding the note, Chase was the true beneficiary under Washington law, and there was nothing unfair or deceptive about representing itself as such." Zalac v. CTX Mortg. Corp., 628 F. App'x 522 (9th Cir. 2016) (mem.).

Chase filed the present suit in state court in June 2015, seeking a monetary judgment against Richard Zalac personally or a judgment against the property permitting Chase to proceed with a judicial foreclosure. The Zalacs raised affirmative defenses and a consumer protection counterclaim. Both parties moved for summary judgment. The trial court granted the bank's motion and dismissed the Zalacs' counterclaim.

The Zalacs timely appealed. The primary question is whether they have a viable consumer protection action against Chase. Chase contends the consumer protection claim is barred by res judicata as a result of the dismissal in federal court. The trial court, however, ruled on the merits rather than finding the claim to be precluded. Application of res judicata is arguably unjust because the standard applied by Washington courts to CR 12(b)(6) motions is less exacting than the standard articulated in Twombly. In this appeal, we do not need to

decide whether claim preclusion bars the action. Assuming it does not, the consumer protection claim still fails. The record lacks evidence that Chase committed an unfair or deceptive act, one of the five elements for which proof is required. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

Whether a particular act or practice is unfair or deceptive is a question of law reviewed de novo. Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 116, 285 P.3d 34 (2012). Proof of an unfair or deceptive act or practice may be predicated on a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act not regulated by statute but in violation of public interest. Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013). "Deception exists 'if there is a representation, omission or practice that is likely to mislead' a reasonable consumer." Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 50, 204 P.3d 885 (2009), quoting Sw. Sunsites, Inc. v. Fed. Trade Comm'n, 785 F.2d 1431, 1435 (9th Cir. 1986). A communication may contain accurate information yet be deceptive. Panag, 166 Wn.2d at 50. And an act or practice can be unfair without being deceptive. Panag, 166 Wn.2d at 51; Klem, 176 Wn.2d at 787. Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the Consumer Protection Act. Bain, 175 Wn.2d at 116.

The Zalacs identify two allegedly deceptive actions by Chase: (1) the bank's failure to timely respond to their requests to identify the owner of the note and (2) the bank's act of providing purportedly inconsistent and incorrect

information as to ownership of the note. They contend that Chase's failure to provide the requested information understandably and in a timely manner is the type of unfair act the Consumer Protection Act is intended to remedy. We disagree with their analysis. The most the Zalacs have shown is that Chase engaged in poor customer service by not promptly responding to their requests for information. They have not shown that Chase made a representation or omission, or engaged in a practice, that was likely to mislead a reasonable consumer. Panag, 166 Wn.2d at 50. Nothing in the record here is comparable to the trustee's practices in Klem of false notarization and failure to use independent judgment. Nor is the case comparable to Bain, in which the court allowed a consumer protection claim to go forward against MERS for documents mischaracterizing MERS as the beneficiary. Bain, 175 Wn.2d at 117.

Instead, this case resembles Blair v. Nw. Tr. Servs., Inc., 193 Wn. App. 18, 24-25, 372 P.3d 172, review denied, 186 Wn.2d 1019 (2016). The crux of the borrower's complaint in Blair was that the defendants misrepresented Bank of America as the deed of trust beneficiary. Because the bank was not the beneficiary, the borrower argued, it had no lawful authority to appoint the trustee "and therefore the entire nonjudicial foreclosure was unlawful." Blair, 193 Wn. App. at 26. The trial court properly dismissed the claim on summary judgment. Given the bank's status as note holder, it was not a misrepresentation to characterize itself as a "beneficiary." Blair, 193 Wn. App. at 33-34.

The letter sent by Chase to Zalac on April 14, 2011, clearly identified Fannie Mae as the note owner and explained that Chase, as the servicer of the

loan, was authorized to handle any concerns on the owner's behalf. The Zalacs do not dispute that this information was true. The Zalacs may have been confused, but they do not show their confusion was the result of an unfair or deceptive act on the part of Chase.

Appellants' brief cited Handlin v. On-Site Manager, Inc., 187 Wn. App. 841, 351 P.3d 226 (2015), to show that the injury element is met. During oral argument before this court, appellants invoked Handlin to support their claim that the bank acted deceptively. The issue in that case was whether the plaintiff tenants had alleged sufficient facts in support of their consumer protection claim to survive a CR 12(b)(6) motion to dismiss. Handlin, 187 Wn. App. at 844. The parties disputed whether the injury element was met. Handlin, 187 Wn. App. at 848-49. We found that the Handlins had a right to use and possess information in the defendant reporting company's files and the company's alleged deprivation of that right, as stated in the complaint, was sufficient to establish an injury at the CR 12(b)(6) stage. Handlin, 187 Wn. App. at 850-51. We reversed an order dismissing the complaint. Handlin, 187 Wn. App. at 852. Handlin does not help the Zalacs. It involved a different procedural issue and a different element (injury) than the one we are concerned with (unfair or deceptive act). In any event, the Zalacs have not shown that Chase withheld information that the Zalacs were entitled to.

The Zalacs' failure to demonstrate a deceptive or unfair act is fatal to their consumer protection claim.

The Zalacs separately assign error to the trial court's ruling that the bank was entitled to a decree of judicial foreclosure.

Chase holds an indorsed in blank note authorizing Chase to collect payment on the loan. As discussed in Blair, the holder of a note is the deed of trust beneficiary and may proceed with foreclosure, even if another entity (such as Fannie Mae) owns a beneficial interest in the note. Blair, 193 Wn. App. at 32. In other words, "actual physical possession of the original note indorsed in blank conveys holder status under Washington law." Blair, 193 Wn. App. at 33.

The Zalacs contend that cases such as Blair, which involved interpretation of the definition of "note holder" in the Uniform Commercial Code, do not apply here because the definition of "note holder" in the Zalac-CTX note supersedes the code definition and Chase does not satisfy the definition in the note.

The note defines "note holder" as anyone who "takes this note by transfer" and "is entitled to receive payments" under the note. This definition does not clearly vary the rule that "actual physical possession of the original note indorsed in blank conveys holder status under Washington law." Blair, 193 Wn. App. at 33. Even assuming that it does, the Zalacs fail to demonstrate that there are remaining factual issues as to Chase's status as note holder under the definition provided in the note. The record does not support an inference that Chase did not take the note by transfer or is not entitled to receive payments under the note.

Affirmed.

Becker, J.

WE CONCUR:

Trickey, ACJ

Spearman, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, Respondent, v. RICHARD J. ZALAC and SARAH A. ZALAC, Appellants, and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; CTX MORTGAGE COMPANY, LLC; DOES 1-10 INCLUSIVE; UNKNOWN OCCUPANTS OF THE SUBJECT REAL PROPERTY; PARTIES IN POSSESSION OF THE SUBJECT REAL PROPERTY; PARTIES CLAIMING A RIGHT TO POSSESSION OF THE SUBJECT PROPERTY, Defendants.	No. 75837-3-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellants, Richard and Sarah Zalac, have filed a motion for reconsideration of the opinion filed in the above matter on December 11, 2017. Respondent, JPMorgan Chase Bank, has not filed a response to appellants' motion. The court has determined that appellants' motion should be denied. Now, therefore, it is hereby

ORDERED that appellants' motion for reconsideration is denied.

FOR THE COURT:

Becker, J.

APPENDIX C

FILED
1/11/2018
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, Respondent, v. RICHARD J. ZALAC and SARAH A. ZALAC, Appellants, and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; CTX MORTGAGE COMPANY, LLC; DOES 1-10 INCLUSIVE; UNKNOWN OCCUPANTS OF THE SUBJECT REAL PROPERTY; PARTIES IN POSSESSION OF THE SUBJECT REAL PROPERTY; PARTIES CLAIMING A RIGHT TO POSSESSION OF THE SUBJECT PROPERTY, Defendants.	No. 75837-3-I ORDER DENYING MOTION TO PUBLISH OPINION

Appellants, Richard and Sarah Zalac, have filed a motion to publish the opinion filed in the above matter on December 11, 2017. Respondent, JPMorgan Chase Bank, has not filed a response to appellants' motion. The court has determined that appellants' motion should be denied. Now, therefore, it is hereby

ORDERED that appellants' motion to publish the opinion filed on December 11, 2017, is denied.

FOR THE COURT:

Becker, J.

JBT & ASSOCIATES, P.S.

February 09, 2018 - 12:10 PM

Transmittal Information

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