

North Carolina Court of Appeals to Consider Whether Lender's Exercise of Contractual Rights Constitutes an "Unfair and Deceptive" Trade Practice

This Spring, the North Carolina Court of Appeals will hear an appeal from a \$2.1 million judgment after a jury verdict against a lender for unfair and deceptive trade practices arising out of its handling of a commercial loan gone bad. The case, *SunTrust Bank v. Bryant/Sutphin Properties, LLC* (Docket No. 12-131), involves a lender's commercial lending relationship with a developer and his property development company. After the developer and development company defaulted under multiple loans, the lender placed a hold on a money market account owned by the developer. The lender subsequently set off the funds in the developer's account against the outstanding debts, initiated foreclosure proceedings on collateral securing the loans, and sued the developer and development company for the deficiency. The defendants asserted counterclaims for, among other things, wrongful setoff and violation of North Carolina's Unfair and Deceptive Trade Practices Act.

After trial, the jury concluded that the lender's actions did not breach any of the loan documents, but that it had placed the money market account on hold without providing notice to the defendants. The jury awarded \$700,000 in damages to the development company. The trial court went on to find that the lender had established a "course of dealing" with the defendants in which it "would routinely exercise leniency with respect to deadlines for payments on loans and compliance with other terms and conditions." The court held that by changing this course of dealing, the lender committed "an oppressive and inequitable exercise of superior power" in violation of the Unfair and Deceptive Trade Practices Act and trebled the jury's award to \$2.1 million.

If the decision stands, it could have an impact on how lenders and distressed borrowers interact in North Carolina. Many commercial loan agreements contain language that, on its face, permits the lender to deviate from strict compliance with the loan documents without prejudice to its rights. The trial court's holding that such conduct may give rise to a "course of dealing" creates uncertainty for both lenders and borrowers involved in workout situations. Until the Court of Appeals provides definitive guidance in this area, lenders' workout/special asset groups and their borrowers may not know whether forbearance or deviation from strict compliance with the loan documents may give rise to liability later.

If you have any questions concerning the issues raised in this alert, please contact the authors of this alert [Brent Powell](#), [Jim Cooley](#), [Ron Davis](#), and [Michael Montecalvo](#), or any of our other experienced [Business Litigation attorneys](#).

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