

## Can a Lender Sue a Borrower for Unfair and Deceptive Trade Practices?

In most lending-related cases under N.C. Gen. Stat. § 75-1.1, a borrower sues a lender. Borrowers often pursue these claims to resist their repayment obligations or to seek leverage against foreclosure.

*Makadia v. Continental Waste Management* departs from this pattern. In *Makadia*, it was a lender who sued a borrower under section 75-1.1. The lender claimed that the borrower lied about the intended use of loan proceeds. This claim survived a motion to dismiss.

### **The borrower fails to use the loan proceeds as intended**

In *Makadia*, an individual lender advanced \$1 million to a corporate borrower. The CEO of the borrower signed a promissory note to memorialize the loan.

The sole purpose of this loan was to allow the borrower to acquire two waste-management plants. Under the loan terms, the waste-management plants were supposed to serve as the collateral for the loan—that is, once the borrower actually acquired the plants.

After signing the promissory note, the borrower's CEO told the lender that the acquisitions of the plants had closed. This statement turned out to be untrue. When the lender learned that the acquisitions had not closed, it demanded immediate repayment of the loan. The borrower refused.

The lender then sued the borrower and its CEO in the U.S. District Court for the Eastern District of North Carolina. The lender's claims included breach of contract, conversion, and violations of section 75-1.1.

### **The lender's claims survive dismissal**

The borrower and the CEO moved to dismiss the lender's conversion claim and 75-1.1 claim. The district court (Senior District Judge James Fox) denied the motion.

On the 75-1.1 claim, the borrower and the CEO argued that the lender's allegations stated only a breach-of-contract claim and that the lender had not alleged [substantial aggravating circumstances](#).

The court, however, saw two types of aggravating circumstances in this fact pattern: (1) deceptive conduct, and (2) conversion, an intentional tort.

The district court's decision raises intriguing questions:

- Why does conversion state a “substantial aggravating circumstance,” given that some [decisions](#) hold that conversion alone falls short of a [per se violation](#) of section 75-1.1?
- What other types of conversion, if any, would count as substantial aggravating circumstances? For instance, would a borrower’s intentional misuse of collateral support a 75-1.1 claim? That conduct, unlike the conduct in *Makadia*, probably would not qualify as deceptive.
- Speaking of deception, what other types of misrepresentations by borrowers would show substantial aggravating circumstances? Would lies on a loan application or a related financial statement qualify? How about lies about the condition or value of collateral?

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The answers to these questions will have significant effects on lending-related litigation. Allowing a lender to seek treble damages from a borrower, after all, would dramatically shift leverage in the lender’s favor. It will be interesting to see whether *Makadia* starts a trend of “borrower liability” claims under section 75-1.1.