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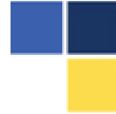

Consumer & Class Action Litigation NEWSLETTER

March 4, 2013

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U.S. Supreme Court Holds That Prevailing Debt Collector Can Recover Costs Without Showing of Bad Faith and Harassment in FDCPA Action

On February 26, 2013, the U.S. Supreme Court ruled 7-2 in favor of respondent debt collector in *Marx vs. General Revenue Corporation,* holding that the prevailing party in a Fair Debt Collection Practices Act (FDCPA) action may be awarded costs where the lawsuit was not brought in bad faith and for the purpose of harassment. Petitioner consumer had defaulted on a student loan, for which the creditor authorized the debt collector to collect. The consumer filed an FDCPA action against the debt collector, alleging that the collector harassed her and falsely threatened her with garnishment. After a one-day trial, the consumer did not prove any violation, and the district court awarded the debt collector costs for witness fees, witness travel expenses, and deposition transcript fees.

The consumer appealed the district court's decision awarding costs. Specifically, she argued that the court's discretion under Fed. R. Civ. P. 54(d)(1) was displaced by 15 U.S.C. § 1692k(a)(3) of the FDCPA, which provides, in pertinent part, that "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs."

Despite the filing of an amicus brief by the Consumer Financial Protection Bureau (CFPB) in support of the consumer's position, the Supreme Court held that costs are allowed under Fed. R. Civ. P. 54(d)(1). The Court concluded that the language and context of 15 U.S.C. §1692k(a)(3) demonstrate that it is not contrary to Rule 54(d)(1).

Marx vs. General Revenue Corporation, No. 11-1175, slip op. (U.S. Feb. 26, 2013)

For further information, please contact Barbara Fernandez or your regular Hinshaw attorney.

First Circuit Rules That Mortgagor Has Standing to Challenge Assignment of Mortgage

In *Culhane v. Aurora Loan Services of Nebraska,* ___ F.3d ___, 2013 WL 563374 (1st Cir. 2013), plaintiff consumer claimed that an assignor lacked authority to assign her mortgage to defendant assignee because the assignor did not hold the note, and, as a result, that the assignee could not foreclose. The U.S. District Court for the District of Massachusetts granted summary judgment in favor of the assignee. On appeal, the U.S. Court of Appeals for the First Circuit determined that the consumer had established a personal stake in the outcome of the litigation through injury, causation and redressability.

The First Circuit further analyzed whether the consumer had standing because she was asserting her own legal rights. Because a mortgagor has a right under Massachusetts law to ensure that a foreclosure is conducted lawfully, and because Massachusetts is a nonjudicial foreclosure state which does not give the mortgagor the opportunity to challenge the assignment of the mortgage as a defense to the foreclosure, the First Circuit ruled that a mortgagor has standing to challenge the validity of an assignment of mortgage. However, the First Circuit's holding is limited to lawsuits claiming that the assignment of mortgage is invalid, ineffective or void. Based on this, the First Circuit reviewed the record and affirmed summary judgment in favor of the assignee, finding that the assignor could assign the mortgage despite the fact that it was not the note holder.

Culhane v. Aurora Loan Services of Nebraska, ___ F.3d ___ (1st Cir. 2013)

For further information, please contact Jennifer S. Bunce or your regular Hinshaw attorney.

Debt Collector's President and Its Attorney Acted in Bad Faith by Failing to Disclose Professional Liability Policy

The U.S. Court of Appeals for the Tenth Circuit found that defendant debt collector's president and chief operating officer (president), along with the debt collector's lawyer, acted in bad faith by failing to disclose that the debt collector had a professional liability policy sufficient to cover plaintiff's Fair Debt Collection Practices Act (FDCPA) claims. Plaintiff brought a class action FDCPA suit against the debt collector and was awarded her fees and costs. The debt collector filed for bankruptcy and its insurer refused to cover the loss because the debt collector never tendered a timely claim. The district court found that the debt collector's attorney and president acted in bad faith to deprive plaintiff of a recovery from the insurer and ordered them to pay plaintiff's damages and fees owed by the debt collector as well as costs incurred litigating the bad faith issue.

The Tenth Circuit affirmed the sanction. The court noted that not only did the district court not believe the lawyer's and president's excuses for failing to disclose the insurance information, but also properly relied upon the facts that: (1) the debt collector had professional liability coverage for suits arising from its wrongful act, (2) the lawyer and president knew this, (3) during discovery the attorney failed to turn over documents reflecting the applicable insurance policy, and (4) the lawyer and president allowed the period for filing a timely claim to lapse. The court also found that there was sufficient evidence to uphold the district court's ruling that the attorney had a "peculiarly close relationship" with the debt

collector to warrant holding him jointly responsible for his "client's misdeeds in which he actively participated."

Anchondo v. Dunn, 2013 WL 599798 (10th Cir. Feb. 19, 2013)

For further information, please contact Jennifer W. Weller or your regular Hinshaw attorney.

Sixth Circuit Reaffirms Position on Lawyers as Debt Collectors Under the FDCPA

In a short but potent opinion, the U.S. Court of Appeals for the Sixth Circuit stood by its holding in *Glazer v. Chase Home Finance LLC,* No. 10-3416, 2013 WL 141699 (Jan. 14, 2013) — handed down just one month prior — which subjects lawyers who meet the general definition of "debt collector" to the provisions of the Fair Debt Collection Practices Act (FDCPA) when engaged in a mortgage foreclosure.

In this appeal, the borrowers, after losing a first home to foreclosure, defaulted in March 2010, on a mortgage loan secured by a second property. Foreclosure counsel notified the borrowers of the current loan servicer's intent to commence foreclosure proceedings on behalf of the mortgagee. The borrowers ultimately did not qualify, and later sued multiple defendants. Their claims included an FDCPA claim against foreclosure counsel. The district court dismissed the borrowers' FDCPA claim against foreclosure counsel, holding that a law firm enforcing a security interest in a mortgage can not be a debt collector for purposes of compliance with the FDCPA.

The Sixth Circuit reversed the district court's dismissal of the FDCPA claim against foreclosure counsel. The court concluded that the borrowers had sufficiently alleged foreclosure counsel's status as a debt collector under the FDCPA in their complaint. The court also considered the borrowers' appeal of the district court's dismissal of the Real Estate Settlement Procedures Act (RESPA) claim against the loan servicer and held that the borrowers' allegations — that the loan servicer untimely responded to a Qualified Written Request and that the borrowers had consequently suffered "damages," — met the plausibility standard in pleading a RESPA violation.

Mellentine v. Ameriquest Mortgage Company et al., 2013 WL 560515 (6th Cir. Feb. 14, 2013)

For further information, please contact Amanda J. Argentieri or your regular Hinshaw attorney.

CFPB's Additional Plans for 2013

In addition to the new mortgage rules announced in January, the Consumer Financial Protection Bureau (CFPB) declared on February 13, 2012, its plan to work with the mortgage industry to ensure that the CFPB's new rules are implemented accurately and expeditiously. The CFPB plans to finalize proposals later in 2013 concerning: various disclosure requirements that were added by the Dodd-Frank Act; integration of mortgage disclosures under the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA); and a simpler, more inclusive definition of the finance charge for purposes of disclosures for closed-end mortgage transactions under Regulation Z. The

CFPB expects to consider whether to adjust regulatory thresholds in connection with any change in the calculation of the finance charge later in 2013.

Specifically, the CFPB discussed its plans for the remainder of 2013, which include:

- Coordinating with other agencies to ensure that all regulators have a shared understanding of the CFPB's new rules
- Publishing plain-language, easy-to-understand summaries of the regulations in both written and video form
- Publishing updates to the official interpretations which will provide guidance on how to comply with the rules
- Publishing readiness guides to help mortgage originators and servicers prepare to comply with the new rules
- Educating consumers by providing information about their new protections under these rules through a broad-reaching consumer education campaign

For further information, please contact Tim Sullivan and Michael D. Morehead or your regular Hinshaw attorney.

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