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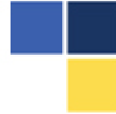

Consumer & Class Action Litigation NEWSLETTER

April 5, 2012

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Claims Allowed Against Wells Fargo for Failure to Modify Loan Under HAMP

In 2010, Wigod sued Wells Fargo Bank, N.A. (Wells Fargo) on behalf of a putative class alleging violations of Illinois law under common law contract and tort theories and of the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA). In her complaint, Wigod alleged Wells Fargo broke its promise to permanently reduce her mortgage loan payments under the Home Affordable Mortgage Program (HAMP) on a more than $700,000 mortgage after giving her a four (4) month trial modification. Wells Fargo had granted her a trial period plan (TPP), but refused her a permanent plan. Wells Fargo successfully moved to dismiss the complaint under Rule 12(b)(6), and Wigod appealed.

The Seventh Circuit affirmed the dismissal of Wigod's claims for negligent hiring and supervision and negligent misrepresentation or concealment because the economic loss doctrine barred them. The Seventh Circuit reversed the district court holding as to Wigod's claims for violations of ICFA, breach of contract, promissory estoppel, promissory fraud, fraudulent misrepresentation and fraudulent concealment. The appellate court held that federal law did not preempt these state law claims. As to the breach of contract claim, the court found there was consideration because when Wigod signed the TPP, she incurred new legal detriments, which included opening escrow accounts and agreeing to undergo credit counseling if required. The ICFA claim was allowed because Wigod's suit was based on claims that Wells Fargo unfairly refused to extend permanent loan modification plans to eligible homeowners under HAMP.

Wigod is a significant decision because, while no federal cause of action arises if a servicer violates the Federal HAMP statute when it does not modify a home loan, it (HAMP) does not prevent a homeowner from bringing a state cause of action against a servicer when a violation of HAMP occurs, including a claim under a state's consumer protection law.

Download to read: [*Wigod v. Wells Fargo Bank, N.A., et al.,* No. 11-1423, 2012 WL 727646 (7th Cir. March 7, 2012)].

For further information, please contact [Corinne C. Heggie] or your regular [Hinshaw attorney].

FDCPA, Bankruptcy Proofs of Claim and Sanctions

A Bankruptcy Court in Massachusetts stated that "Federal courts have consistently ruled that filing a proof of claim in bankruptcy court (even one that is somehow invalid) cannot constitute the sort of abusive debt collection practice proscribed by the Fair Debt Collection Practices Act (FDCPA), and that such a filing therefore cannot serve as the basis for an FDCPA action." *In re Claudio*, 463 B.R. 190, 193 (Bkrtcy.D.Mass.,2012)

In the *Claudio* case, the debtor filed an adversary proceeding against a party that filed a proof of claim for a debt owed. The debtor did not file an objection to the proof of claim as provided for in 11 U.S.C. § 502 (the bankruptcy code). Rather, the debtor and his counsel took a more aggressive approach and requested the imposition of sanctions in the adversary matter for the alleged invalid proofs of claim. The Court ruled that "the remedy adopted [by the debtor] has been rejected by every court which has considered the matter."

The Court advised that a statute of limitations operates to bar only the enforcement of a debt against a debtor. ("[I]t is important to remember that the statute does not extinguish the underlying obligation. Instead, if properly asserted, the statute makes the obligation unenforceable in a court. Nevertheless, the debts may be collected in other ways"). The Court further explained that in a Bankruptcy case, "a proof of claim based on a stale claim will be deemed allowed under § 501(a) unless the affirmative defense [of the statute of limitations] is raised in a filed objection." The Court explained that "the filing of a proof of claim does not constitute an act to collect a debt under the FDCPA, but instead is simply a request for leave to participate in the distribution of the bankruptcy estate." *In re Claudio*, 463 B.R. at 192.

The Court discussed when and how sanctions are available under Bankruptcy Rule 9011. Sanctions can be sought by a party only after the opponent has been afforded 21 days advance notice and an opportunity to withdraw or correct the allegedly offending allegation. See Rule 9011(c)(1)(A). Failure to comply with this safe harbor provision is fatal to the sanctions request. "The Court chose not to initiate consideration of sanctions against the debtor's counsel *sua sponte*, "but may do so in future cases should the safe harbor provision of Rule 9011 be ignored."

In re Claudio, 463 B.R. 190, 193 (Bkrtcy.D.Mass.,2012)

For further information, please contact [Nabil G. Foster] or your regular [Hinshaw attorney].

Eighth Circuit Rejects Claim That Losing the Underlying Collections Lawsuit Automatically Leads to FDCPA Liability

In *Hemmingsen v. Messereli & Kramer, P.A.,* 2012 WL 878654 (8th Cir. March 16, 2012), the Eighth Circuit held that an attorney suing to collect a debt is not automatically liable under § 1692e of the FDCPA simply because its motion for summary judgment in the underlying state-court collections case is denied. The Court rejected the defendant's contention that false statements are never actionable under § 1692e unless they are made directly to the debtor, opting instead for a case-by-case analysis.

The plaintiff's husband opened a Discover Card account shortly before the two were married; when they divorced several years later, the divorce decree recited that debts on the account were solely the responsibility of the husband. The defendant collection firm sued both of them on the account, and after the husband defaulted both the debtor and the law firm that had filed the suit sought summary judgment. The firm submitted an affidavit from Discover that said that both the husband and wife had applied for and used the credit card account. The plaintiff's motion was supported by an affidavit in which she stated that she had never applied for or received a card, made purchases on the account or agreed contractually to be responsible for it. After the state court judge granted the wife's motion, finding that there was no proof that she had assumed responsibility for the account and that the debts were the husband's under the terms of the divorce decree, the wife sued the law firm under the FDCPA, claiming that the state court's rejection of the firm's position established that statements made in support of it were false and misleading under § 1692e.

The Eighth Circuit declined to hold that representations had to be made directly to a debtor in order to be actionable under § 1692e, noting that representations made to third parties such as attorneys or courts would "routinely come to the consumer's attention and may affect his or her defense of a collection claim." The Court also declined to hold that the state court's rejection of the position taken by the law firm automatically established that the statements made in support of that position had been false.

Download to read: *Hemmingsen v. Messereli & Kramer, P.A.,* 2012 WL 878654 (8th Cir. March 16, 2012)

For further information, please contact Joel D. Bertocchi or your regular Hinshaw attorney.

Eleventh Circuit Court of Appeals Addresses Term "Creditor" as Defined by FDCPA

In *Bourff v. Rubin Lublin, LLC,*___ F.3d ___, 2012 WL 971800 (11th Cir. 2012), the U.S. Court of Appeals for the Eleventh Circuit addressed the term "creditor" as defined under the Fair Debt Collection Practices Act (FDCPA). The debtor in *Bourff,* failed to make a payment on his loan originally held by America's Wholesale Lender (AWL), causing a default under the terms of the note. AWL later assigned the loan to BAC Home Loan Servicing, LP f/k/a Countrywide Home Loans Servicing LP (BAC) for the purpose of collecting on the note. BAC hired Rubin Lublin, LLC (Rubin) to help collect on the loan. Rubin sent Bourff a notice stating it was an attempt to collect a debt pursuant to the FDCPA identifying BAC as the "creditor."

Bourff sued Rubin for violating §1692(e) and alleged that it was false to represent BAC as the creditor in the notice. Rubin moved to dismiss under Rule 12(b)(6) and the district court granted the motion. The district court concluded that BAC was a creditor according to the "ordinary meaning" of the term and that even if BAC was not a creditor, the error identifying BAC as such on the FDCPA notice was "harmless." Bourff appealed.

The Eleventh Circuit vacated the dismissal and remanded it. The Court noted that the Complaint alleged that BAC received the assignment in June 2009, after the debt was in default. The court also relied on the FDCPA's definition of creditor found at §1692a(4). In light of the facts and the definition, the court concluded that the FDCPA's creditor exemption did not apply to BAC. Since the creditor exemption did not apply, the court concluded, based on the facts alleged in plaintiff's Complaint, the pleading did state a claim upon which relief may be granted for Rubin's identification of BAC as the creditor in its notice.

Download to read: *Bourff v. Rubin Lublin, LLC,* No. 10-14618, 2012 WL 971800 (Mar. 15, 2012 11th Cir. 2012).

For further information, please contact Elizabeth K. Devine, Corinne C. Heggie or your regular Hinshaw attorney.

Seventh Circuit Court of Appeals Denies Class Certification of Claim Arising Under RESPA

In *Howland v. First American Title Ins. Co.,* ___ F.3d ___, 2012 WL 695636 C.A.7 (Ill. 2012), individuals who obtained title insurance policies from First American Title Insurance Company (the Company), through attorney title agents for the Company, brought a class action suit against the Company alleging that the compensation arrangement between the attorney title agents and the Company for the issuance of policies on behalf of the Company constituted illegal kickbacks in violation of RESPA. The United States District Court for the Northern District of Illinois denied class certification, and an appeal followed. On appeal the United States Court of Appeals, Seventh Circuit, affirmed the decision of the District Court, and thereby denied class certification.

The Seventh Circuit held that there are two alternatives regarding potential class certification for a RESPA claim of this nature. First, if the claim is that the Company was splitting its fees with attorney title agents who performed no services at all, class certification could be possible. However, more than mere allegations are needed; evidence would have to be offered to show the attorney title agents did not actually perform any work. Moreover, "the determination that no services were provided would need to be made on a case-by-case basis, which precludes certification under Rule 23(b)(3)."

Under the second alternative, if the claim is that the attorney title agents were overcompensated for services they actually performed, "RESPA Section 8 requires individualized inquiries into the services and compensation provided in each transaction and whether the two were reasonably related." Such inquiry is transaction-specific and therefore class treatment is not permitted. The Seventh Circuit further held that "where a person provides any services, the [RESPA] Section 8(c)(2) exception [permitting fee splitting "for services actually performed"] demands an individual analysis of each transaction."

In conclusion, the Seventh Circuit confirmed that "RESPA Section 8 kickback claims premised on an unreasonably high compensation for services actually performed are inherently unsuitable for class action treatment" and "individual issues predominate over common ones" when it comes to RESPA Section 8 kickback claims.

Download to read: *Howland v. First American Title Ins. Co.,* ___ F.3d ___, 2012 WL 695636 C.A.7 (Ill. 2012)

For further information, please contact Ian P. Luthringer or your regular Hinshaw attorney.

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