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Newsletters

Consumer & Class Action Litigation Newsletter - May 2013

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Supreme Court Ruling May Allow "Picking Off" Named Plaintiffs in Class Actions

Plaintiff employee filed a collective action under the Fair Labor Standards Act (FLSA) on behalf of herself and "other employees similarly situated." 29 U.S.C. § 216(b). After she ignored petitioners' offer of judgment under Fed. R. Civ. P. 68, the district court concluded that her suit was moot and dismissed it for lack of subject-matter jurisdiction because no other individuals had joined her suit and the Rule 68 offer fully satisfied her claim.

The U.S. Court of Appeals for the Third Circuit reversed, holding that the employee's individual claim was moot but her collective action was not. The court explained that allowing defendants to "pick off" named plaintiffs before certification with calculated Rule 68 offers would frustrate the goals of collective actions.

On appeal, the U.S. Supreme Court, in a 5-4 opinion, held that because the employee had no personal interest in representing the putative unnamed claimants, her suit was appropriately dismissed for lack of subject-matter jurisdiction. The Court noted that the federal appeals courts are split on whether an offer of settlement of a federal lawsuit is enough to make it moot, but stated that it would not resolve that dispute because the mootness issue "is not properly before us" because the employee had waived the mootness issue.

Although this opinion involves a FLSA collective action, rather than a Fed. R. Civ. P. 23 class action, and although the Supreme Court noted that there are fundamental differences between the two procedural devices, the opinion could apply to the defense of Rule 23 class action cases.

Genesis HealthCare Corp. v. Symczyk, 133 S.Ct. 1523 (Apr. 16, 2013)

Mortgage Holder Does Not Need Possession of Note to Foreclose in Rhode Island

In *Bucci v. Lehman Brothers Bank, FSB et al.,* ___ A.3d ___, 2013 WL 1498655 (R.I. Apr. 12, 2013), the Rhode Island Supreme Court considered whether a mortgage holder may foreclose on a mortgage, even if it is not the holder of the accompanying promissory note. The Court concluded that the mortgage holder does not need to have physical possession of the note to foreclose, so long as it is acting as the authorized agent of the note holder.

The matter was appealed to the Rhode Island Supreme Court after the Rhode Island Superior Court denied plaintiff mortgagors' request for injunctive relief to prevent a scheduled foreclosure sale. The mortgagors gave a promissory note to defendant lender in exchange for a $249,900 loan for the purchase of a property. The mortgagors also executed a mortgage on the property to defendant mortgagee. The mortgagors defaulted on the promissory note, and the mortgagee initiated foreclosure proceedings. Prior to the foreclosure auction, the mortgagors filed their complaint in the superior court, seeking declaratory and injunctive relief. The mortgagors' complaint included numerous arguments, including one that the mortgagee was not authorized to foreclose because it was not the note holder, and thus, not a proper mortgagee.

In its decision, the Supreme Court agreed with the Massachusetts Supreme Judicial Court's decision *Eaton v. Federal National Mortgage Ass'n et al.,* 462 Mass. 569 (2012). In that case, the Massachusetts Supreme Judicial Court (MSJC) held that the term "mortgagee," as used in Massachusetts' power of sale statute, means a holder of both the mortgage and the promissory note. However, the MSJC also held that a foreclosing entity is not required to have physical possession of the promissory note, so long as it is an authorized agent of the note holder. The Rhode Island Supreme Court arrived at the same conclusion, stating that "we interpret the term 'mortgagee' in our [power of sale] statutes in a similar fashion as did the Supreme Judicial Court of Massachusetts." Thus, the Court found that the mortgagee was not prohibited from foreclosing on the subject property, because it was acting as an agent of the note owner.

The Court also considered whether the mortgagee's status as a "nominee" for the lender affected whether it was considered a mortgagee under Rhode Island's power of sale statute. The Court held that the right to exercise the power of sale in a mortgage is derived from a contract. Because the mortgagors' contract specifically stated that the holder was the mortgagee, its capacity as a "nominee" for the lender does not diminish its role as a proper mortgagee under Rhode Island's power of sale provisions.

Bucci v. Lehman Brothers Bank, FSB et al., ___ A.3d ___, 2013 WL 1498655 (R.I. Apr. 12, 2013)

Eighth Circuit Applies "Genuine Injury" Standard for Emotional Distress Damages Under the FCRA

In *Taylor v. Tenant Tracker,* 710 F.3d 824 (8th Cir. 2013), the U.S. Court of Appeals for the Eighth Circuit affirmed — albeit for different reasons — the district court's award of summary judgment dismissing plaintiff consumer's Fair Credit Reporting Act (FCRA) claim against defendant consumer reporting agency. In doing so, the Eighth Circuit analyzed when *emotional distress damages* are recoverable under the FCRA.

The consumer, who had applied for federal housing assistance, sued the consumer reporting agency, alleging that it violated Section 1681e(b) of the FCRA by failing to adopt reasonable procedures to ensure the maximum possible accuracy of its credit reporting. Specifically, the consumer alleged that the inclusion of certain information in her credit report — which was prepared by the consumer reporting agency — was inaccurate and that publishing the inaccurate information caused her "severe humiliation, emotional distress and mental anguish."

Under the FCRA, a consumer may recover any actual damages that he or she sustained as a result of a reporting agency's negligent noncompliance with the statute's requirements. See 15 U.S.C. § 1681o(a)(1) (2013). The Eighth Circuit explained that emotional harm can constitute actual damages under the FCRA if it is supported by competent evidence of "genuine injury," which may be established by one's conduct and observed by others. The court highlighted the type of evidence that has been found sufficient to satisfy the "genuine injury" requirement, which included: (1) testimony detailing a consumer's loss of weight stemming from a two-year credit reporting ordeal; (2) testimony of a consumer's considerable embarrassment stemming from a five-month reinvestigation into his disputed credit report; and (3) testimony concerning the medical treatment a consumer received as a result of a disputed credit report. In other words, emotional harm must be demonstrable, genuine and adequately explained, to be compensable under the FCRA.

In this case, the consumer did not present competent evidence of a "genuine injury" to recover for her purported emotional distress under the FCRA. The court noted that the only evidence of the consumer's emotional distress was her conclusory testimony that she was extremely upset and embarrassed, and the testimony of an employee at the housing authority that the consumer cried briefly as a result of the inaccurate entries in her credit report, which were corrected and resolved within five to ten minutes. The court further noted that the consumer did not offer any "reasonable detail about the nature and extent" of her alleged emotional harm, only generalized claims of her emotional injury. The Eighth Circuit held that "a brief episode of frustration and unhappiness does not establish the sort of concrete emotional distress that is required to constitute a genuine injury and actual damages."

Taylor v. Tenant Tracker, 710 F.3d 824 (8th Cir. Mar. 28, 2013)

FDCPA Does Not Control Choice of Venue in Post-Judgment Enforcement Action
In May 2010, the New Bedford District Court (Massachusetts) entered a default judgment against plaintiff debtor in defendant creditor's lawsuit to recover a consumer debt. In March 2011, the creditor then sued the debtor in the Attleboro District Court, seeking to collect on the 2010 default judgment by attaching the debtor's wages from the Massachusetts Department of the Interior, via trustee process. North Attleboro is one of the locations in which the department maintained a usual place of business.

The debtor sued the creditor under 15 U.S.C. § 1692i(a), alleging that suit was filed against her in a district other than one in which she resided or signed the underlying contract. The U.S. Court of Appeals for the First Circuit held that the Fair Debt Collection Practices Act (FDCPA) did not control the enforcement action. Specifically, the court held that the trustee process is one that is directed against the third-party trustee, and not the consumer. Accordingly, the FDCPA is inapplicable.

The court pointed out that its decision was in accordance with the Federal Trade Commission's (FTC's) commentary with respect to 15 U.S.C. § 1692i. The FTC commented that "[i]f a judgment is obtained in a forum that satisfies the requirements of 1692i, it may be enforced in another jurisdiction, because the consumer previously has had the opportunity to defend the original action in a convenient forum." *Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act,* 53 Fed. Reg. 50,908, 50,109 (Dec. 13, 1988). The court further held that if the FDCPA did govern enforcement actions, it would be impossible for a debt collector to enforce a prior judgment unless the debtor happened to reside or to have signed the underlying contract in the same county in which the trustee had a usual place of business. The court did not read the FDCPA as "mandating such a strange result."

*Smith v. Solomon & Solomon, P.C.,*____F. 3d____2013 WL 1749593 (1st Cir. Apr. 24, 2013)