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Newsletters

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Attention Financial Institutions, Mortgage Companies and Loan Servicers: CFPB Releases Second Update to Exam Procedures Utilized to Determine Compliance With Its Regulations

On August 15, 2013, the Consumer Finance Protection Board (CFPB) released a second update to its exam procedures with regard to the agency's governance of its mortgage regulations (Second Update). The exam procedures, which mostly go into effect in January 2014, provide guidance as to how CFPB examiners will determine compliance with the regulations.

According to the CFPB's press release announcing the Second Update, the following are examples of what the agency's examiners will be evaluating: (1) requirements that lenders evaluate a borrower's ability to pay back the loan over the entire term of the loan, including verifying accuracy of financial information; (2) requirements that ban or limit on certain points, fees and risky features under the "Ability-to-Repay Rule" (*e.g.*, a qualified mortgage cannot exceed 30 years or be interest-only) and the "High-Cost Mortgages Rule" (*e.g.*, no balloon payment); (3) the requirement that servicers provide monthly statements and disclosures with a detailed breakdown of payments by principal, interest, fees, escrow and recent transaction activity and, for adjustable rate mortgages, disclosures are required before all interest rate adjustments; (4) the restriction on dual-tracking such that servicers cannot start a foreclosure proceeding if a borrower has submitted a complete application for a loan modification or other loss mitigation; (5) servicers' policies and procedures concerning direct, easy and ongoing access to employees responsible for helping delinquent borrowers and consideration of all alternatives to help a borrower retain the home if foreclosure seems likely; and (6) the requirement that creditors use a licensed or certified appraiser to prepare a report including a physical inspection of the

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interior of the property, provide a free copy, and disclose to the applicant the purpose of the appraisal.

The Second Update details several other compliance procedures, the most onerous of which appear to impact mortgage loan servicers and involve, among others: (1) error resolution procedures (a servicer cannot rely on the borrower's description in a qualified written request to determine whether it is an error notice, an information request, or both and must evaluate the letter despite how it is titled); (2) force-placed insurance (a servicer may not purchase force-placed insurance unless the borrower's escrow account lacks sufficient funds to maintain the borrower's existing hazard insurance); and (3) pyramiding of late fees (a servicer cannot charge a late fee in connection with a timely payment made in full when the only delinquency is from the late fee assessed on a previous payment).

The rules identified above are a limited selection taken from the Second Update. Given these regulations' broad scope, financial institutions, mortgage companies and servicers are encouraged to become familiar with all of the exam procedures discussed in the Second Update. Of note, the exam procedures were released by the CFPB in its attempt to increase the transparency of the examination process. Because the documents used by CFPB examiners are now available to financial institutions, mortgage companies and servicers, the CFPB can take a hard-line approach when enforcing its regulations.

CFPB Consumer Laws and Regulations: Real Estate Settlement Procedures Act

CFPB Consumer Laws and Regulations: Truth in Lending Act

The Third Circuit Holds TCPA Permits Revocation of Prior Express Consent at Any Point After It Is Given

The U.S. Court of Appeals for the Third Circuit recently became the first appellate court to hold that the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227 *et al.*, permits a consumer to revoke prior express consent to be contacted on his or her cellular telephone line via an automatic telephone dialing system (ATDS). *Gager v. Dell Financial Services, LLC*, --- F.3d ----, 2013 WL 4463305 (3rd Cir.) The Third Circuit held that revocation may be done at any time after prior express consent is given.

In *Gager*, plaintiff debtor disclosed her phone number to defendant creditor on an application for credit in order to finance the purchase of several thousand dollars of computer equipment. In doing so, the debtor identified the phone number as her home telephone number but did not reveal it as belonging to a cellular phone line as was the case. When the debtor failed to make mandatory payments towards the credit account, the creditor attempted to contact her multiple times using an ATDS on the phone number she had provided. The debtor wrote to the creditor, identified the phone number in her letter, and requested that the creditor stop calling the number regarding the credit account, but still did not disclose to the creditor that it had been calling a cellular phone line. The creditor continued to call the debtor on the same phone number via an ATDS, and the debtor subsequently brought her suit under the TCPA. The district court dismissed debtor's complaint, finding that the TCPA did not permit revocation of prior express consent and that while the debtor could have requested that an ATDS not be used to contact her, that limitation must have been requested at the time the debtor disclosed her phone number.

The Third Circuit reversed, basing its decision on three points. First, the court found the concept of prior express consent under the TCPA to be analogous to consent under common law, and determined that because consent may be revoked under the latter it should be revocable under the TCPA, too. Second, while the Third Circuit acknowledged that the TCPA is silent on revocation of prior express consent, it concluded that such silence should be construed in favor of permitting revocation. This is because, as the court found, the statute's purpose is to protect consumers, and if its intent was to limit revoking prior express consent Congress would have expressly indicated that. Third, the Federal Communications Commission, which Congress authorized to implement rules and regulations regarding the TCPA, had issued a decision in a separate matter following the district court's dismissal of the debtor's complaint that stated that in the context of text messaging a consumer may revoke prior express consent to receive further messages at any point after it is given. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, *SoundBite Communications, Inc*., 27 FCC Rcd. 15391, 15397 § 11 n.47 (Nov. 26, 2012). The Third Circuit was not persuaded that the debtor failed to identify the phone number that she provided to the creditor as belonging to a cellular phone line, finding that callers have a continuing responsibility to confirm the phone numbers being called.

While several issues remain unresolved following this decision — such as whether revocation of prior express consent must be given in writing to be effective — it underscores the importance for both creditors and collection agencies to have procedures in place for scrubbing the numbers they call using an ATDS and for addressing verbal and written requests to stop calling.

Gager v. Dell Financial Services, LLC, --- F.3d ----, 2013 WL 4463305 (3rd Cir.)

District Court in Colorado Found Consent Under the TCPA Should Be Imputed

The U.S. District Court for the District of Colorado recently held that prior express consent should be imputed to a debt collector, and when given, cannot be effectively withdrawn. *Chavez v. Advantage Group*, No. 12-cv-02819-REB-MEH (D. Co. Aug. 5, 2013).

In *Chavez*, plaintiff consumer sued defendant debt collector for calling her cellular telephone using an automatic telephone dialing system in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA). The debt collector contacted the consumer in an attempt to collect an amount owed to a medical center where the consumer had received medical services. At the time of the consumer's visit, she provided her cellular phone number to the medical center.

The *Chavez* court rejected the analysis in *Mais v. Gulf Coast Collection Bureau, Inc.*, (May 8, 2013), in which the U.S. District Court for the Southern District of Florida chose not to follow a 2008 Federal Communications Commission (FCC) ruling regarding the imputation of consent. The FCC there had concluded that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at that number which they have given, absent instructions to the contrary." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 F.C.C.R. 559, 564-65 ¶10 (FCC Jan. 4, 2008). Contrary to *Mais*, the *Chavez* court applied the 2008 FCC ruling to TCPA claims and held that consent had been given to the debt collector to contact her cellular telephone in connection with the debt incurred as a result of the services provided at the medial center because the number had been provided at the time of service. Moreover, contrary to the U.S. Court of Appeals for the Third Circuit's decision in *Gager v. Dell Financial Services, LLC*, --- F.3d ----, 2013 WL 4463305 (3rd Cir.), the *Chavez* court found that consent was not, and could not be, effectively withdrawn, as the statute does not provide for withdrawal of consent.

Of note, the U.S. Court of Appeals for the Eleventh Circuit recently granted the debt collector's petition to appeal the district court's opinion in *Mais*.

Chavez v. Advantage Group, No. 12-cv-02819-REB-MEH (D. Co. Aug. 5, 2013)

New York District Court Denies *Bona Fide* Error Defense for Unintentional Misrepresentation of Amount Owed

In a case brought by plaintiff tenant under the Fair Debt Collection Practices Act (FDCPA), the U.S. District Court for the Southern District of New York recently denied defendant law firm's *bona fide* error defense arising from an unintentional misrepresentation by the law firm's client of the amount of debt owed.

The law firm commenced an eviction proceeding on behalf of its client —the landlord of a rent-controlled building in which the tenant rented an apartment — based on an alleged rent delinquency by the tenant. The landlord's records in fact showed that it had not credited payment made by the tenant in the rent-controlled amount. Upon learning that the information provided by its client was erroneous, the law firm discontinued the summary eviction proceeding and the tenant's counsel was awarded fees by the New York City Housing Court. The tenant then commenced his federal court action alleging violations of Section 1692e of the FDCPA. The law firm's defense was reliance upon information provided by its client.

Interpreting the FDCPA as a strict liability statute, the district court rejected the law firm's argument that the mistake was unintentional. In rejecting *Stonehard v. Rosenthal*, No. 01 Civ. 651, 2001 WL 910771 (S.D.N.Y. Aug. 13, 2001), in which the court had held that a plaintiff must show that the debt collector knowingly misrepresented the amount of the debt in order to state a claim under Section 1692e(2) of the FDCPA, the court opined that such reasoning is at odds with binding Second Circuit precedent. Furthermore, the district court held that "[r]equiring a violation of § 1692e to be knowing or intentional would make superfluous a part of the statutory bona fide error defense . . . which requires a showing that the violation was not intentional as well as other elements."

With respect to its *bona fide* error defense, the district court found that the law firm lacked any procedures "to identify and resolve potential errors that were evident from the client's documents." The court noted that merely relying on the accuracy of the information received from a client, without more, is insufficient to establish *bona fide* error. The court further acknowledged that "the Second Circuit has not addressed, for purposes of the *bona fide* error defense, what procedures might be sufficient to avoid liability for reliance on a client's erroneous information. In this case there is no need to address the more difficult situation where the client's information is incorrect, but nevertheless seemingly proper." The court perceived this case to fall into the easier category, i.e., the records were obviously suspect and the law firm lacked any procedures to ascertain the accuracy of the information received.

Lee v. Kucker & Bruh, LLP, No. 12-cv-04662(LGS) (S.D.N.Y. Aug. 2, 2013)