



Newsletters

Consumer & Class Action Litigation Newsletter - November 2013

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First Circuit Confirms Validity of MERS Framework

Woods v. Wells Fargo Bank, N.A., --- F.3d ---, 2013 WL 5543637 (1st Cir. Oct. 9, 2013)

In *Woods*, the First Circuit confirmed dismissal of the plaintiff's claim that the defendant did not have authority to foreclose because MERS allegedly could not assign her mortgage. The First Circuit held that MERS, as the nominee identified in the plaintiff's mortgage, was contractually authorized to assign her mortgage. In addition, the First Circuit found that MERS status as the equitable trustee holding the mortgage for the benefit of the noteholder does not affect the ability of MERS to assign a mortgage. Finally, the First Circuit held that an assignment of mortgage from or to MERS need not account for every entity that may have held a beneficial interest in the note. Based on the foregoing, the First Circuit ruled that the defendant had the authority to foreclose and confirmed the dismissal of the plaintiff's complaint.

The First Circuit also noted that defendant's possession of the plaintiff's note and mortgage constituted an interest in a Massachusetts property such that the plaintiff was required to serve the defendant with a demand letter prior to filing a suit for violation of M.G.L. c. 93A (the Massachusetts consumer protection act).

For more information, please contact: your regular [Hinshaw attorney](#).

Rejecting Res Judicata Argument, Sixth Circuit Reverses Judgment for Debt Collector, But Finds that Debtor Lacks Standing

Tyler v. DH Capital Management, Inc., --- F. 3d ----, 2013 WL 5942072 (6th Cir. Nov. 7, 2013)

Plaintiff sued debt collector, defendant DH Capital Management ("DHC"), alleging that DHC violated the FDCPA and Kentucky's usury laws by attempting to collect a debt to which it was not legally entitled.

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In March 2011, DHC filed suit against plaintiff ("First Action") seeking collection of a credit card debt. DHC did not immediately serve plaintiff. Approximately three months later, plaintiff filed for bankruptcy, and was granted a discharge in October of 2011. DHC then served process on plaintiff, but upon learning of the discharge, filed a voluntary Notice of Dismissal without prejudice. Plaintiff, nevertheless, subsequently filed an answer to the complaint but did not assert any counterclaims.

In March, 2012, following the district court's dismissal of the First Action, plaintiff filed suit against DHC ("Second Action") asserting FDCPA and Kentucky usury law violations. DHC moved to dismiss the Second Action, asserting that plaintiff's claims were barred because he should have asserted them as counterclaims in the First Action. DHC also argued further that plaintiff lacked standing to assert claims against it because any claims were now the property of the bankruptcy estate. The district court agreed with DHC and dismissed the Second Action.

On appeal, the Sixth Circuit reversed in part and affirmed in part. Reversing the District Court's holding, the Sixth Circuit held that the claims alleged by plaintiff in the Second Action were not barred under *res judicata* or equitable principles because: (i) the case was voluntarily discontinued by DHC and therefore closed before plaintiff was required to file an answer to the Complaint, thus rendering the content of plaintiff's answer immaterial; and (ii) nothing was litigated on the merits in the First Action, and as a result, neither *res judicata* nor the equitable principles of waiver and estoppel barred the unraised counterclaims later asserted in plaintiff's Second Action. Despite the fact that plaintiff's claims were not barred, the Sixth Circuit affirmed the District Court's holding that plaintiff lacked standing to bring the claims asserted in the Second Action. The Sixth Circuit held, *inter alia*, that since plaintiff could have brought suit against DHC before filing for bankruptcy, those claims were the property of the bankruptcy estate. Specifically, with respect to plaintiff's FDCPA claims, the Sixth Circuit held that the alleged violation occurred at the filing of the First Action, before filing for bankruptcy, and said FDCPA claims were therefore property of the bankruptcy estate. Similarly, plaintiff's usury law claims pre-dated his bankruptcy petition by years. Moreover, because plaintiff failed to properly schedule his FDCPA and usury claims, the bankruptcy trustee cannot be considered to abandon these claims. The bankruptcy estate therefore retains exclusive authority to administer them.

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7th Circuit Holds that Collection Suits Were Filed in Proper Venue

[Suesz v. Med-1 Solutions, LLC](#), --- F.3d ---, Case 13-1821 (7th Cir. Oct. 31, 2013)

In March 2012 defendant filed, and won, a collection suit in the Pike Township small claims court, located in Marion County. Plaintiff lived one county over from Marion County. Though plaintiff incurred the debt in Marion County, he did so in Lawrence Township not in Pike Township. Plaintiff claimed that it was defendant's practice to file claims in Pike Township regardless of the origins of the dispute.

Plaintiff brought suit under the FDCPA's venue provision, which requires suits to be filed where the consumer signed the contract sued upon or where the consumer resides at the commencement of the action. The district court granted defendant's motion to dismiss, and reasoned that the Pike Township small claims court did not constitute an FDCPA judicial district, but was instead an administrative subset of the Marion County Circuit Court.

The Seventh Circuit upheld the Court's decision. The Court reaffirmed the holding that the township courts do not constitute free-standing judicial districts in either form or function. Specifically, the limitations on the court's authority were not coterminous with the township boundaries. Moreover, given their structure, the Court held that the township court, superior court, and circuit court were meant to function as a symbiotic whole, with the township court obviating the need for a superior court small claims docket. Plaintiff's counsel states it will file a petition to reconsider or for *en banc* hearing.

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District Court in Illinois Dismisses Case Based on Interest Waiver Theory



Swafford v. Unifund CCR Partners, et. al, No. 13 C 1572 (N.D. Ill. Oct. 18, 2013)

In *Swafford*, plaintiff incurred a debt on his credit card from Citibank. Collections were initiated by Unifund. Several collection notices were sent to plaintiff, and a suit was filed against him in Illinois state court. Plaintiff learned that the debt was accruing interest since it was charged off by Citibank, and accused the defendants of improperly adding interest to plaintiff's debt for the period of time between the time debt was charged off and its subsequent purchase by the defendants. Further, plaintiff alleged that there were added charges to the debt for interest that Citibank had previously waived. Plaintiff asserted claims under the FDCPA

Defendants argued that plaintiff lacked standing to bring an FDCPA claim because plaintiff failed to suffer any injury-in-fact. The Court agreed, holding that plaintiff only presented allegations in his complaint regarding defendants' general business practices. Since this was insufficient to vest the plaintiff with standing, his claim was dismissed.

Next, the Court agreed that plaintiff failed to allege sufficient facts to state a valid FDCPA claim. In his complaint, plaintiff argued that defendants engaged in deceptive and unfair collection practices because Citibank waived its rights to collect post-charge off interest on plaintiff's account, and therefore, defendants should not have proceeded on collecting such interest. The Court reasoned that waiver is a "voluntary and intentional relinquishment of a known right." As such, plaintiff's allegations describing Citibank's general policies and practices relating to collection of interest between the time of charge off and time of sale was not sufficient. Lastly, there were no allegations in the complaint that Citibank acted uniformly with respect to the collection of interest after the charge off date, and mere speculation on their general practices was insufficient. As such, the Court granted defendants' motion to dismiss Plaintiff's FDCPA claims.

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