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Newsletters

Consumer & Class Action Litigation Newsletter - March 2014

March 17, 2014

U.S. Supreme Court Again Declines to Decide Whether Congress Has Authority to Confer Article III Standing to Sue When the Plaintiff Suffers No Concrete Harm

Mutual First Federal Credit Union v. Charvat, --- S. Ct. ----, 2014 WL 901856 (U.S. Mar. 10, 2014)

Defendant banks filed a petition for writ of certiorari on December 2, 2013, arguing that the Supreme Court should grant the petition and hold that a mere violation of a statutory right does not ipso facto establish an "injury in fact" sufficient to create Article III standing. Defendants argued against Congress dictating access to the federal courts and removing the independent force of Article III's case-or-controversy limitation. In this case, the issue arose under the Electronic Funds Transfer Act (EFTA), 15 U.S.C. § 1693m, which provides for statutory damages between $100 and $1,000, as well as recovery of attorneys' fees and costs. For class actions, the total statutory damages recoverable are "the lesser of $500,000 or 1 per centum of the net worth of the defendant." *See* § 1693m(a)(2)(B).

In the lower court, Plaintiff alleged that he made withdrawals from an ATM operated by each defendant bank, and while the ATM provided an on-screen notice of the two dollar charge which would be applied, the on-machine fee notice required by the EFTA was missing from the machines. Despite his actual knowledge of the fee pursuant to the on-screen notice, Plaintiff argued that his statutory, as well as the rights of all users of the subject ATMs were violated as a result of the missing information. The district court dismissed the suit, concluding that there is no standing when, as here, the only injury being alleged is an "injury in law," because Article III requires that "[a] plaintiff must allege an

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Consumer Financial Services

injury in fact that was caused by the lack of an exterior fee notice on the ATM." However, the Eighth Circuit court of appeals reversed, holding that because "[t]he EFTA authorizes individual and class action suits for violations of the EFTA,...it create[s] legal rights via statute, the invasion of which can create standing to sue." Defendants sought review by the U.S. Supreme Court. However, on March 10, 2014, the Supreme Court denied the petition for writ of certiorari, again passing on the issue. Thus, we will continue to see class actions which often seek potentially ruinous statutory damages for technical statutory violations that do not result in an actual injury in fact.

Right-to-Cure Statute Is Not a Restriction on the Right to Conduct Non-Judicial Foreclosure

U.S. Bank, National Association v. Schumacher, --- N.E. 3d ----, 2014 WL 929185 (Mass. Mar. 12, 2014)

In *Schumacher*, the Massachusetts Supreme Judicial Court clarified that the Massachusetts right-to-cure statute, M.G.L. c. 244, § 35A, is not a regulation on the right of a mortgagee to conduct a non-judicial foreclosure sale under Massachusetts law.

Before *Schumacher*, some trial courts had incorrectly assumed that the right-to-cure statute was a restriction on the statutory power of sale and that any defect in a right-to-cure notice sent pursuant to the statute would result in the foreclosure sale being void *ab initio*. These holdings made clearing post-foreclosure REO properties more burdensome, as a post-foreclosure borrower could nearly always find some technical defect in the right-to-cure notice.

The facts of *Schumacher* were typical: after a non-judicial foreclosure sale, the purchaser at foreclosure commenced a summary process eviction action against the holdover borrower, who alleged that the right-to-cure notice was defective because it misidentified the mortgagee. The borrower argued that the misidentification rendered the entire foreclosure sale void.

The Supreme Judicial Court rejected that argument and ruled that the right-to-cure statute is not a restriction on the Massachusetts statutory power of sale. The SJC ruled that the mere misidentification of the mortgagee in the right-to-cure notice was insufficient to render the entire foreclosure sale void. The *Schumacher* majority opinion suggests that the borrower may be entitled to bring an independent equity action or even assert a counterclaim to challenge the validity of the right-to-cure notice, but a defect in the notice was not sufficient, standing alone, to void a foreclosure sale.

While the majority opinion is a major victory for mortgage servicers, Justice Gants's concurring opinion suggests that litigation over the right-to-cure issue will continue. He held that a borrower can still bring an action or a counterclaim to determine whether the alleged violation of the right-to-cure statute "rendered the foreclosure so fundamentally unfair that [the borrower] is entitled to affirmative equitable relief, specifically the setting aside of the foreclosure sale." Lower courts will now have to grapple with implementing the "fundamental unfairness" standard, but the facts of *Schumacher* show that borrowers will have to show much more than mere technical violations of the right-to-cure statute in order to invalidate a foreclosure sale.

Multiple FDCPA Violations Found Where Collector Attempted to Collect Debt Without Sufficient Evidence of Debt

Royal Financial Group, LLC v. Perkins, 414 S.W.3d 501 (Mo. App. 2013)

In *Royal Financial Group, LLC v. Perkins*, the Missouri Court of Appeals held that the debt collector violated the Fair Debt Collection Practices Act ("FDCPA") where it commenced suit to recover an alleged debt by assignment, interest and attorney's fees, without evidence to substantiate its claim.

The debt collector plaintiff, Royal, purchased a portfolio of charged-off debt from Routhmeir Sterling, Inc. Exhibit A to the purchase agreement listed each account file and provided the following information for the defendant: "PERKINS TERRI [redacted] 85421 CHASE MANHATTAN BANK $1,486.17." The agreement acknowledged that back-up documentation for legal enforcement of individual account debts may be provided upon request for $25 per page.

Royal filed a petition for breach of contract, seeking to recover $1,486.17, interest and attorney's fees as an alleged assignee of Chase Manhattan Bank. Perkins filed a counterclaim for violation of the FDCPA. Ultimately, the trial court dismissed Royal's petition for its failure to produce a corporate representative for deposition. After a bench trial on Perkin's FDCPA counterclaim, the trial court entered judgment in favor of Royal finding that there was insufficient evidence of an

FDCPA violation. Perkins appealed.

The Missouri Court of Appeals reversed and remanded for entry of judgment and an award of statutory damages and costs in favor of Perkins. During discovery, Royal admitted that it purchased the debt from Routhmeir and had no documentation linking the chain of ownership to Chase. Royal further admitted that it had no documentation to substantiate the debt or to establish Perkin's alleged obligations under the unauthenticated boilerplate cardholder agreement attached to the petition. Under these facts, the court found that Royal's allegation that it was Chase's assignee "was false, or in the very least misleading" to the unsophisticated consumer in violation of 15 U.S.C. § 1692e, and that the petition was an empty threat of further action that could not legally be taken or that was not intended to be taken in violation of § 1692e(5).

The court further held that Royal violated the FDCPA by alleging that it was entitled to collect attorney's fees, interest and other card-related fees. Royal's sole support for its fee and interest claim was the unauthenticated boilerplate cardholder agreement attached to the petition. The court found that the agreement was insufficient to support Royal's fee and interest claim and held that Royal violated 15 U.S.C. §§ 1692e(2)(B), (5) and (10) and 1692f, by requesting fees to which it was not entitled under law.

New Jersey Appellate Court Addresses Lack of Notice to Debtor of Sale of Credit Card Debt and Sufficiency of Electronic Records

New Century Financial Services, Inc. v Oughla, 2014 WL 839180 (N.J.Super., March 5, 2014) and *MSW Capital LLC v. Zaidi*, No. 2014 WL 839180 (N.J.Super., March 5, 2014).

In *New Century Financial Services, Inc.* and *MSW Capital LLC*, the Appellate Division for the Superior Court of New Jersey issued a consolidated opinion concerning two consumer credit card collection cases. In the cases, the consumers appealed the entry of summary judgment, contending that the plaintiff debt buyers did not submit sufficient proof of their ownership of the debts, and did not offer admissible evidence of the amounts allegedly owed. The Appellate Court provided a brief overview of the debt buying industry before concluding that "lack of notice to the debtor of the sale of the debt does not affect the validity of the assignment," and that monthly credit card statements are admissible as business records under N.J.R.E. 803(c)(6) and serve as "prima facia proof of the amount due on the debts."

Ultimately, the Court affirmed summary judgment in favor of MSW Capital LLC, concluding that the consumer had failed to raise a genuine dispute as to his responsibility for the account or the accuracy of the amount due. The Court reversed the judgment in *New Century Financial Services*, holding that the debt buyer did not provide sufficient proof of the ownership of the claim.