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Newsletters

# Consumer & Class Action Litigation Newsletter - May 2014

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## Eleventh Circuit Addresses the Meaning of "Called Party" Under the TCPA

*Osorio v. State Farm Bank, F.S.B.*, 746 F. 3d 1242 (11th Cir. 2014)

The Eleventh Circuit reversed the lower court's decision granting summary judgment to defendant bank in a TCPA claim, finding there were factual disputes regarding whether plaintiff had consented to receive the calls. Plaintiff sued under the TCPA after receiving 327 autodialed debt collection calls from the bank over a six-month period. The calls stemmed from a credit card debt owed to the bank by Betancourt, who has a child with plaintiff and shared a home and cellphone account with him, but is not married to him. Plaintiff Osorio was the subscriber of the cellphone account shared with Betancourt.

The Eleventh Circuit focused on the TCPA language requiring express consent of the "called party" for automated calls received on a cellphone. The bank argued that the "called party" was the "intended recipient" of the call, in this case Betancourt. Citing the Seventh Circuit's 2012 decision in *Soppet v. Enhanced Recovery Co. LLC*, the appellate court rejected this argument, noting that plaintiff had the right to revoke Betancourt's consent to receive the calls.

The court reasoned: "we believe this really means that Betancourt had no authority to consent in her own right to the debt collection calls to [Osorio's number] because one can consent to a call only if one has the authority to do so, and only the subscriber (here, Osorio) can give such consent, either directly or through an authorized agent."

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The appeals panel also reversed and remanded the bank's win on its counterclaim against Betancourt, Osorio's housemate, who the bank accused of negligent misrepresentation for providing it with Osorio's phone number when she signed up for a credit card.

For more information, please contact Barbara Fernandez

**Sixth Circuit Upholds Dismissal of Borrower's Challenges to Foreclosure on their Property**

*Dauenhauer v. Bank of New York Mellon*, --- Fed. Appx. ---, 2014 WL 1424494 (6th Cir. Apr. 15, 2014)

The Sixth Circuit upheld the dismissal of borrowers' complaint against the foreclosing entity based upon challenges to the securitization of the borrowers' mortgages. The district court dismissed all six of the borrowers' causes of action for quiet title, fraudulent misrepresentation, violation of the state and federal consumer protection acts, slander of title and civil conspiracy.

In affirming the dismissal, the Sixth Circuit approved MERS's role in loans when designated as nominee and beneficiary under a mortgage, along with its ability to assign notes and mortgages. The Sixth Circuit rejected the borrowers' challenges to securitization of their note and mortgage on the basis that securitization alone does not render a note or mortgage unenforceable or otherwise alter a borrower's obligation to pay back his loan. Moreover, the Sixth Circuit adopted the majority view rejecting a borrower's request to have mortgage assignments invalidated due to non-compliance with a pooling and servicing agreement, based on the borrower's lack of standing. As the borrowers failed to meet basic pleading standards to allege any claims against foreclosing entity arising out of the foreclosure, the Sixth Circuit affirmed the district court's dismissal of all six causes of action.

For more information, please contact Hale Yazicioglu Lake

**Dismissal of Class Action Filed by Borrowers Raising Challenges Under State and Federal Law to Foreclosures of Their Homes Affirmed by Sixth Circuit**

*Clark v. Lender Processing Services*, --- Fed. Appx. ---, 2014 WL 1408891 (6th Cir. Apr. 14, 2014)

Ohio homeowners who were defendants in judicial foreclosure suits brought a class action against the loan processing companies and law firms who commenced foreclosure actions. Plaintiffs asserted claims under the FDCPA and the Ohio Consumer Sales Practices Act (OCSPA) based on the defendants filing of state court foreclosure actions on behalf of the trustees of securitized trusts.

The district court previously dismissed a number of the plaintiffs' claims at the motion to dismiss stage, including several claims under FDCPA. With respect to the one remaining FDCPA claim, the Sixth Circuit concluded that because under Ohio law, possession of either a note or mortgage gives a party standing to foreclose, and because there was no dispute that the foreclosing entity validly held the note, there was no false or misleading statement made when the lender commenced foreclosure proceedings that would give rise to liability under the FDCPA. The Sixth Circuit also affirmed dismissal of the OCSPA claims finding that the defendants were not "suppliers engaged in a consumer transaction" for purposes of establishing liability under the statute.

For more information, please contact Hale Yazicioglu

**Outgoing Message on Voicemail Insufficient to Revoke Consent Under the TCPA**

*Andersen v. Harris & Harris, Ltd.*, 2014 WL 1600575 (E.D. Wis. Apr. 21, 2014)

Plaintiff initiated suit on July 30, 2013, alleging that the defendant, Harris & Harris, Ltd. (H & H), violated the Telephone Consumer Protection Act (TCPA), 47 U.S.C. §§ 227, *et seq.,* by using an automated telephone dialing system to place collections calls to him. The parties filed cross-motions for summary judgment. Finding no TCPA violation, the Court focused on two points:
(1) whether plaintiff provided consent and (2) whether he revoked that consent.

The Court concluded that it "has no doubt that Mr. Harris consented to receive the phone calls in question." WE Energies, the underlying creditor, received plaintiff's cell phone number from plaintiff himself. Accordingly, under the guidance of the FCC and relevant caselaw, the Court found that plaintiff consented to be called on his cell phone number by WE Energies. That consent inured to H & H as the debt collector attempting to collect the WE Energies debt.

As to the revocation of consent, the Court found that even if consent is revocable, plaintiff's revocation via voicemail was insufficient to revoke consent under the TCPA. To revoke consent, plaintiff placed on his outgoing voicemail message that he revoked all consent for purposes of the TCPA. Because H & H used an autodialer to call plaintiff, H & H never received that message.

The court explained that there is no authority to support the contention that an outgoing message is sufficient to revoke consent. Further, the court reasoned that plaintiff's proposal that his outgoing messages should be sufficient to revoke consent would create a totally unworkable rule, as it would create a trap for all debt collectors who use automatic dialers. The court found no TCPA violation and accordingly granted summary judgment for H & H.

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**Massachusetts Highest Court Declines to Extend Four Year Right of Rescission Based on Defensive Recoupment**

*May v. SunTrust Mortg., Inc.*, 467 Mass. 756 (2014)

In *May v. Suntrust Mortg., Inc.,* the Supreme Judicial Court of Massachusetts (SJC) concluded that a mortgagor may not rescind a mortgage by way of defensive recoupment after the expiration of the four year statute of limitations set forth in M.G.L. c. 140D, § 10(f). The plaintiffs executed a mortgage on October 7, 2005 and, after filing a petition for Chapter 13 bankruptcy, sent a letter to the defendant on June 4, 2010 seeking rescission of their loan. Because the defendant did not rescind the loan, the plaintiffs filed an adversary proceeding. The defendant filed a motion for summary judgment on the basis that the plaintiffs' claim was barred by the four year statute of limitations.

Due to conflicting decisions, the Bankruptcy Court certified the following question to the SJC:
"[m]ay an obligor who grants a mortgage in a consumer credit transaction rescind the transaction under the Massachusetts Consumer Credit Cost Disclosure Act, 140D, § 1 et seq. (the 'MCCCDA'), defensively by way of common law recoupment after the expiration of the four year statute of limitations set forth in 10(f) of the MCCCDA?" Based on this question, the SJC determined that rescission is defined as "the 'unmaking' or 'voidance' of a contract" whereas a successful recoupment claim acts "to reduce or extinguish" the opposing party's claim but cannot result in affirmative relief. *Id.* at 763. The SJC found that rescission and recoupment "were consistently treated as separate, non-overlapping, remedies" at common law. Moreover, section 10(f) imposes strict time limitations on a mortgagor's right to rescind, but section 10(i)(3) did not restrict a mortgagor's right of recoupment. Accordingly, the SJC ruled that the MCCCDA "does not include rescission as one type of defensive recoupment." However, the SJC indicated that a mortgagor may still seek damages by way of defensive recoupment based on alleged violations of the MCCCDA.

For more information, please contact your regular Hinshaw attorney.

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