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Newsletters

Consumer & Class Action Litigation Newsletter - June 2014

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First Circuit Holds That Failure to Record Intermediary Transfers of Note Does Not Affect Chain of Assignments Under MERS Framework

Mills v. U.S. Bank, NA, --- F. 3d ----, 2014 WL 2186592 (1st Cir. May 27, 2014)

Plaintiff filed suit against Defendants U.S. Bank as Trustee (US Bank), OneWest Bank, F.S.B. (OneWest), and Mortgage Electronic Registration Systems, Inc. (MERS) challenging the foreclosure of her property. The U.S. District Court of Massachusetts rejected the plaintiff's statute of frauds-based argument that OneWest lacked authority to foreclosure on her property because none of the prior transfers of the note before the MERS-OneWest assignment were recorded. The First Circuit confirmed the district court's dismissal of the plaintiff's complaint and held that, because legal title to the mortgage vested in MERS — and remained vested in MERS, and not with the noteholder — any intermediary transfers of the note did not undermine the subsequent assignment of the mortgage from MERS to OneWest.

The gravamen of plaintiff's claim that OneWest lacked authority to foreclosure is that MERS was acting solely as an agent of the successive noteholders, and therefore had no legal title to her property. As a result, since MERS was not the mortgagee with legal title to the property, the plaintiff argues that each intermediary transfer of the note should have been recorded to reflect the change of principals (and the corresponding transfers of the mortgage from one principal to the next). Because none of the prior transfers before the MERS-OneWest assignment were recorded, the plaintiff contends that the chain of assignments was broken and MERS had no interest to assign to OneWest, rendering the foreclosure void.

The First Circuit held that its recent decision in *Culhane v. Aurora Loan Services of Nebraska* makes it clear that MERS validly serves both as "the holder of 'bare legal title as mortgagee of record' and as 'nominee for the member-noteholder.'" 708 F.3d 282, 282-83 (1st Cir. 2013). Therefore, MERS, as the lender's nominee, holds legal title for the owner of the beneficial interest, and is authorized to transfer the mortgage. *Id*. Moreover, the First Circuit noted that the plaintiff only alleged that the note was sold by the lender — she made no allegations that the mortgage had transferred hands. Thus, the First Circuit explained that, given the separability of the mortgage and note under Massachusetts law, any transfers of the note between MERS members did not affect legal title to the mortgage.

Accordingly, the First Circuit held that MERS had legal interest to assign to OneWest and the foreclosure was valid because MERS, as the lender's nominee, was the holder of legal title, and the intermediary transfers of the note did not affect the subsequent assignment of the mortgage from MERS to OneWest.

For more information, please contact Vanessa V. Pisano

Eleventh Circuit Affirms Their Previous Decision That Wrong Party Calls Violate the TCPA

Breslow v. Wells Fargo Bank, N.A., 2014 WL 2565984 (11th Cir. Jun. 9, 2014)

On June 9, 2014, the Eleventh Circuit Court of Appeals vacated its original opinion in *Breslow v. Wells Fargo*, --- F. 3d ----, 2014 WL 2523091 (11th Cir. Jun. 5, 2014). The original opinion seemed to expand TCPA liability to the subscriber or the user of the phone for wrong party calls. However, *Breslow* vacated its original opinion and now just holds that a "called party" under the TCPA means the subscriber of the cell phone.

Defendant made multiple calls using an ATDS to a cell phone number subscribed to by the plaintiff. Plaintiff did not consent to the defendant's use of autodial calls. At the time the calls were made, Plaintiff was subscriber for the cell phone number, but she was not the primary user of the phone. Defendant argued that it had consent of the "called party" because it intended to contact a debtor who had listed the phone number on an account application. Defendant argued that it was unaware that the phone number no longer belonged to its former customer, and that the former customer was the intended recipient — the "called party." The district court granted the plaintiff's motion for partial summary judgment because it found that the "called party" (for purposes of 47 U.S.C. 227(b)(1)(A)(iii)) was not the intended recipient but rather the subscriber.

On June 5, 2014, the Eleventh Circuit issued an opinion inthis matter holding that "called party" meant the subscriber to the cell phone service *or* user of the cell phone called. However, days later the Court vacated their opinion because during the pendency of the *Breslow* appeal, another panel of the Eleventh Circuit set precedent on the issue that a "called party" under the TCPA is the subscriber. *See Osorio v. State Farm Bank, F.S.B*., 746 F.3d 1242, 1251 (11th Cir. 2014). *Breslow* found that *Osorio* was presented with the same issue and *Osorio* held that "called party," means the subscriber to the cell phone service. Therefore, the *Breslow* court vacated its original opinion, and now simply follows *Osorio*, which stands for the proposition that a "called party" means the subscriber to the cell phone service and not the intended recipient under the TCPA.

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CFPB Spring 2014 Survey Report Summary

The Consumer Financial Protection Bureau (CFPB) periodically publishes *Supervisory Highlights* intended to disseminate information about the findings of its examinations. The Spring 2014 edition includes findings of supervision work completed between November 2013 and February 2014. In 2013, the CFPB conducted over 100 supervisory activities, including full scope reviews and follow-up examinations. They also plan to conduct approximately 150 supervisory activities in 2014. The CFPB reported that its supervisory work contributed to a public enforcement action against Bank of America and FIA Card Services, resulting in approximately $727 million in relief to consumers for illegal practices. The report also notes that recent nonpublic supervisory actions resulted in over $70 million in remediation for approximately 775,000 consumers.

The CFPB emphasizes in the report the importance of strong compliance management systems (CMS), which can mitigate potential risks to consumers and reduce potential violations of federal consumer financial law. Every CFPB examination must contain some level of CMS review, which aids an entity in the following: 1) establishing its compliance responsibilities; 2) communicating these responsibilities to employees; 3) ensuring that responsibilities are incorporated and met; and 4) ensuring corrective action is taken and systems and materials are updated as necessary. Although the

CFPB does not mandate a particular CMS structure, it notes that effective CMS commonly includes: 1) board of directors and management oversight; 2) a compliance program; 3) a consumer complaint management program; and 4) an independent compliance audit. When the aforementioned four interdependent control components are strong and well-coordinated, the CFPB believes that a supervised entity is more likely to be successful at managing its compliance responsibilities and risks.

Recent examinations identified significant shortcomings in the CMS of some entities reviewed. One examination showed that the entity had inadequate written CMS policies and procedures, lacked sufficient board and management oversight of CMS, and lacked an effective compliance audit function. In another instance, examiners observed that a creditor that relied on a network of third party debt buyers to collect its debts failed to adequately assess the debt buyers' compliance with Federal consumer financial law. Consequently, CFPB examiners directed the creditor to take steps to ensure that its business arrangements with the debt buyers would not expose consumers to unwarranted risks.

The CFPB also examined several entities' compliance practices and found some violations of Federal consumer financial law. In one review, examiners reported that a debt collector that furnished information to consumer reporting agencies (CRA) failed to investigate disputed information, and instead directed the CRAs to delete the disputed accounts. The CFPB believes that debt collectors may be doing this because of an erroneous belief that this satisfies the investigation requirement, or alternatively, because furnishers assume that once the information is deleted, they are no longer furnishers with respect to the disputed information. Examiners directed the debt collector to investigate disputes it receives regarding the information that it has furnished. Several other examinations revealed that entities violated Regulation E when they failed to secure written authorization before initiating recurring electronic transfers from consumer's accounts. The CFPB's guidance emphasizes the importance of a reasonable investigation of disputed information to ensure the completeness and accuracy of the furnished information. The reasonability of an investigation will vary based upon the circumstances.

The report similarly found several violations of the Federal Debt Collection Practices Act (FDCPA) by one debt collector. The CFPB found that the debt collector engaged in repeated violations of the FDCPA by making approximately 17,000 calls to consumers outside of the appropriate calling times required by the FDCPA. The entity also violated the FDCPA when it repeatedly contacted more than 1,000 consumers; contacting some consumers as often as 20 times within two days. The CFPB also found that the same entity misled debtors by stating that it intended to prove the debt was owed in court, although the entity had no such intention. The CFPB found that in 70% of lawsuits initiated by the entity, when the consumer filed an answer, the entity would dismiss the suit due to a lack of documentation to support its claims.

It is imperative that industry participants become aware and have knowledge of the periodical reports released by the CFPB. This will help industry participants identify what is important to the CFPB, thus allowing them to adjust agency practices in accord with what the CFPB sets forth.

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