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Attorneys

Samuel C. Bodurtha

David M. Schultz

Service Areas

Consumer and Class Action Defense

Mortgagors Lack Standing to Challenge Compliance with Trust Agreements

Rajamin v. Deutsche Bank Nat. Trust Co., --- F.3d ---, 2014 WL 2922317 (2d Cir. Jun. 30, 2014).

In *Rajamin,* the plaintiffs' alleged that the mortgagee's assignments of the loans and mortgages to the various trusts were ineffective because the assignors failed to comply with certain obligations under the relevant trust agreements. The Second Circuit Court of Appeals upheld the District Court's dismissal of the complaint on the grounds that the plaintiffs-mortgagors lacked standing to challenge compliance with the trust agreements as they were not parties to those agreements and thus failed to state a claim.

The trusts were created under the laws of the New York State. The third-amended complaint challenged, among other things, the defendants' ownership of plaintiffs' loans and mortgages and alleged that the assignments of the loans were defective because the mortgage loans were not specifically identified in the mortgage loan schedules and the assignments of mortgages were recorded years after First Franklin ceased operations and years after the securitization transactions took place. The complaint further alleged that certain provisions of the relevant Pooling and Servicing Agreements ("PSA") were not complied with. The plaintiffs sought a declaratory judgment finding that as a result of defendants' failure to comply with the PSA, the trusts did not own the plaintiffs' notes and mortgages.

The district court dismissed the plaintiffs' third-amended complaint on the grounds that it failed to state a cause of action upon which relief can be granted finding that the plaintiffs' lacked standing to challenge noncompliance with the PSAs. The Second Circuit agreed, finding that the plaintiffs lacked both constitutional and prudential standing as their claimed injuries were "hypothetical" and they are barred from asserting the rights or legal interests of

others in order to obtain relief from injury to themselves. As the Court noted, the plaintiffs acknowledged that they took out the loans and were obligated to repay the loans. Additionally, the plaintiffs did not allege that there were entities other than the defendants seeking payment from them on the subject notes.

The plaintiffs raised several theories for prudential standing which were all rejected by the Second Circuit. The plaintiffs advanced a breach of contract claim based on defendants' alleged failure to perform all of their obligations under the PSA. The Second Circuit concluded "that the district court properly ruled that the plaintiffs lacked standing to enforce the agreements to which they were not partie [and] were not intended beneficiaries." The plaintiffs also advanced a breach of trust theory based on their claim that the assignments of mortgages were recorded years after the closing date of the trusts which violated the PSA and New York trust laws rendering the trusts void. The Second Circuit rejected this claim. First, in analyzing New York law, the Court held that only the intended beneficiary of a private trust may enforce the terms of the trust. Here, the plaintiffs were not parties to the PSAs and thus lacked standing to assert noncompliance with the PSAs. Moreover, under New York law, unauthorized acts by trustees are generally subject to ratification by the trust beneficiaries." The principle that a trustee's unauthorized acts may be ratified by the beneficiaries is harmonious with the overall principle that only trust beneficiaries have standing to claim a breach of trust." *Rajamin*, 2014 WL 2922317 *9. In support of their claimed violation of breach of trust, plaintiffs relied on a couple of cases, including *Wells Fargo Bank, N.A. v. Erobobo*, 2013 WL 1831799 (Sup. Ct. Kings Co. Apr. 29, 2013) which the Court found "unpersuasive." In *Erobobo*, the trial court stated "every sale, conveyance or other act of the trustee in contravention of the trust is void." 2013 WL 1831799 *8. The Second Circuit noted, however, that the *Erobobo* court's finding was unsupported by case law and was contrary to existing New York authority that only a beneficiary of a trust can challenge the trust's actions and that the beneficiaries of a trust can ratify the trustee's actions.

In rejecting *Erobobo*, the Second Circuit held that "unauthorized acts of a trustee may be ratified by the trust's beneficiaries, such acts are not void but voidable; and that under New York law such acts are voidable only at the instance of a trust beneficiary or a person acting on his behalf." *Rajamin*, 2014 WL 2922317 *9. plaintiffs are not beneficiaries, incidental or otherwise, of the securitization trusts and as such, cannot maintain their lawsuit.

Statutory Dispute of Debt Not Required to File FDCPA Lawsuit

McLaughlin v. Phelan Hallinan & Schmieg, LLP, --- F.3d ----, 2014 WL 2883891 (3d Cir. Jun. 24, 2014)

In *McLaughlin*, the Third Circuit held that before filing a lawsuit for an alleged violation of the Fair Debt Collection Practices Act ("FDCPA"), a consumer is not required to dispute or seek validation of a debt he believes is inaccurately described in a debt communication, pursuant to the procedure set forth in 15 U.S.C. § 1692g. The Court found that the text of § 1692g does not impose such a requirement, and creating such a requirement would allow a debt collector to avoid liability for false communications, which would be inconsistent with the FDCPA's goal of ensuring debt collectors act responsibly. The Court explained that its holding would not frustrate the FDCPA's validation procedure which continues to facilitate the exchange of information and provide a quick and inexpensive means of resolving disputes with debt collectors.

The Court further held that a letter from a mortgagee's foreclosure counsel constituted debt collection activity because it stated the law firm was a debt collector, identified the amount of the debt and explained how to obtain a current payoff quote. Consequently, misrepresentations in the letter may provide a basis for relief against the mortgagee's attorneys under the FDCPA.

Based on the above holdings, the Third Circuit reversed the District Court's dismissal of the consumer's claims pursuant to the FDCPA, 15 U.S.C. § 1692e (2) and (10), for failure to state a claim upon which relief can be granted.

Receipt of Collection Letters not Necessary to Confer Article III Standing Under the FDCPA

Tourgeman v. Collins Financial Services, Inc., --- F. 3d ----, 2014 WL 2870174 (9th Cir. Jun. 25, 2014)

In *Tourgeman*, the United States Court of Appeals for the Ninth Circuit addressed whether the plaintiff, Tourgeman, who never received the allegedly violative collection letters, possessed Article III standing and standing under the Fair Debt Collection Practices Act ("FDCPA"). Specifically, defendant, Nelson & Kennard, argued that Tourgeman lacked both statutory and Article III standing to assert any claims based on the collection letters, which Tourgeman admittedly never received when they were sent. Even if the FDCPA does endow such consumers with a cause of action, Nelson & Kennard

argued that plaintiff lacked Article III standing insofar as he never received the offending communication and thus suffered no injury in fact.

The Appeallate Court disagreed. The Court explained that the injury required by Article III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing." The Court opined that while Tourgeman could not have suffered any pecuniary loss or mental distress as the result of a letter that he did not receive until months after it was sent, the injury he suffered was the violation of his right not to be the target of misleading debt collection communications.

The Appeals Court reasoned that the alleged violation of this statutory right constituted a cognizable injury under Article III. More specifically, "[w]hen the injury in fact is the violation of a statutory right that we inferred from the existence of a private cause of action, causation and redressability — the two other elements of standing — will usually be satisfied."

The Court also looked to the FDCPA's statutory construction to confer standing on Tourgeman. Specifically, the Court reasoned that "[t]he manner in which the majority of courts have applied the FDCPA aligns with this construction of the statute. To begin with, a consumer possesses a right of action even where the defendant's conduct has not caused him or her to suffer any pecuniary or emotional harm."

Homeownership Protect Act Preempts State Law Claims for Fraudulent Concealment and Unjust Enrichment

Gregor v. Aurora Bank, FSB et al., ---F.Supp.2d ---, 2014 WL 2767384 (D.R.I. Jun. 18, 2014)

In *Gregor*, the Rhode Island Federal Court dismissed claims for fraudulent concealment and unjust enrichment concluding that the plaintiffs' claim for violations of the federal Homeowners Protection Act (HPA), 12 U.S.C. §§4901 *et seq.*, preempted these state law causes of action.

Plaintiffs claimed that the defendants violated the HPA by failing to disclose the acquisition of lender-purchased mortgage insurance on their property at closing, which allegedly resulted in their inability to refinance. Based on the same conduct forming the basis of the HPA claim, plaintiffs pursued state law claims for fraudulent concealment and unjust enrichment.

In response to defendants' motions to dismiss, Senior District Judge Ronald R. Lagueux reviewed the HPA's preemptive language and the handful of interpreting decisions. Judge Lagueux noted two decisions where federal courts held that state law claims for fraud and misrepresentation were not preempted because these claims were unrelated or stemmed from a duty that was separate and apart from those imposed by the HPA. *Dwoskin v. Bank of America*, 850 F.Supp.2d 557 (D.Md. 2012); *Scott v. GMAC Mortgage, LLC*, 2014 WL 3340518 (W.D.Va. Aug. 25, 2010). In two other decisions, however, federal courts held that the HPA preempted state law claims based upon the breadth of preemptive language in the statute. *Auguston v. Bank of America*, 864 F.Supp.2d 422 (E.D.N.C. 2012); *Fellows v. Citimortgage, Inc.*, 710 F.Supp.2d 385 (S.D.N.Y. 2010).

Judge Lagueux found the reasoning of *Auguston* persuasive when applied to plaintiffs' complaint. Plaintiffs' state law claims for fraudulent concealment and unjust enrichment all stemmed from a singular inaction in their mortgage loan originator's alleged failure to disclose lender-purchased mortgage insurance at closing. The conduct that formed the basis of plaintiffs' state law claims duplicated precisely the same conduct plaintiffs claimed violated the HPA. Preemption was appropriate because allowing the state law claims to proceed would function as an alternative enforcement mechanism and would frustrate Congress' objective of a uniform regulatory scheme in enacting the HPA.