HINSHAW

Newsletters

Consumer & Class Action Litigation Newsletter - January 2015

January 28, 2015

- U.S. Supreme Court Rules that Rescission of Mortgage under TILA Requires Mere Written Notice
- Eighth Circuit Reverses Class Certification in FDCPA Action Where District Court Failed to Apply the "Rigorous Analysis" Standard
- A Settlement Offer on a "Time Barred" Debt Could Imply a Threat of Litigation
- Florida Third District Court of Appeal Holds that Involuntary Dismissal of Foreclosure Does Not Decelerate Lender's Prior Acceleration of Debt

U.S. Supreme Court Rules that Rescission of Mortgage under TILA Requires Mere Written Notice

Jesinoski v. Countrywide Home Loans, Inc., slip op. (US SC Jan. 15, 2014)

On January 13, 2015, the United States Supreme Court unanimously ruled that borrowers merely need to notify creditors in writing of their intention to rescind their mortgages within three years under the Truth in Lending Act (TILA). The Court reversed the Eighth Circuit's holding that that a borrower can exercise his right to rescind a loan under TILA Sections 15 U.S.C. §1635(a) and (f) only by filing a lawsuit within three years of the date the loan was consummated.

Exactly three years after borrowing money from defendant bank to refinance their home mortgage, the borrowers sent the bank a letter purporting to rescind the transaction. The bank replied, refusing to acknowledge the rescission's validity. One year and one day later, the borrowers filed a federal lawsuit seeking a declaration of rescission and damages. The district court entered judgment on the pleadings for respondents, holding that a borrower can exercise his right under TILA to rescind a loan only by filing a lawsuit within three years of the date the loan was consummated. Therefore, the borrowers' complaint, filed four years and one day after the loan's consummation, was ineffective. The Eighth Circuit affirmed, and the Supreme Court has now overturned its decision.

The Supreme Court's ruling ends a circuit split over whether TILA requires borrowers to file a lawsuit to rescind a mortgage within three years of the home loan's issuance or simply give written notice that they intend to walk away from the loan. The First, Sixth, Ninth and Tenth circuits take the former position, agreeing with the Eighth Circuit. In contrast, the Third, Fourth and Eleventh circuits have said that notification, and not filing a lawsuit, is sufficient.

Attorneys

Jennifer W. Weller

Service Areas

Consumer and Class Action Defense

Consumer Financial Services

Mortgage Servicing and Lender Litigation

©2025 Hinshaw & Culbertson LLP

Justice Scalia wrote, "The language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. It follows that, so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years."

Courts' various interpretations of the statute have led to confusion as to how and when borrowers are to notify their lenders of the decision to rescind their mortgages. The decision may make it easier for borrowers to walk away from their mortgage obligations.

Eighth Circuit Reverses Class Certification in FDCPA Action Where District Court Failed to Apply the "Rigorous Analysis" Standard

Powers v. Credit Management Services, Inc., et al., Case No.: 13-2831 (8th Cir. 2015)

In *Powers v. Credit Management Services, Inc., et al.,* the Eighth Circuit reversed the district court's certification of four classes of plaintiffs who alleged that Credit Management Services, Inc. and its in-house counsel violated the Fair Debt Collection Practices Act (FDCPA) through their use of standard-form complaints and discovery demands. The Eighth Circuit determined the district court did not "rigorously analyze" what the "plaintiffs must prove to prevail on their facial invalidity theories."

The plaintiffs alleged that the defendants' use of standard-form pleadings and standard-form discovery demands violated various provisions of the FDCPA, making them unfair or deceptive acts or practices that also violate the Nebraska Consumer Protection Act (NCPA). The district court, in certifying the class, agreed with plaintiffs that the predominant common question was whether the defendants sent each class member standard collection complaints and discovery requests which violate the FDCPA and the NCPA. The Eighth Circuit disagreed and reversed.

The Eighth Circuit held that the district court abused its discretion by failing to conduct the "rigorous analysis" required by Rule 23. The three-judge panel noted that "run of the mill" certified FDCPA class actions involved standard-form collection letters sent directly to consumers prior to commencement of an action whereas the conduct at issue in this case were pleadings filed with the court and discovery demands that were served on the named plaintiffs' counsel. The Eighth Circuit noted that it "is common knowledge in the legal community that standard-form pleadings are routinely used by cost-conscious attorneys in all types of litigation." The panel also stated that it had "recently surveyed the complex question of FDCPA liability for litigation activities in a non-class action" and it concluded "that a debt collector's fact allegations in a state court pleading are not false and misleading for purposes of §1692€ simply because they were rejected as not adequately supported in the collection suit."

With respect to the standard-form discovery demands, the Court of Appeals agreed with other circuits that the "unsophisticated consumer standard" is "inappropriate for judging communications with lawyers. Rather, 'representation by a debt collector that would be unlikely to deceive a competent lawyer, even if he is not a specialist in consumer debt law, should not be actionable.'" *Powers* citing *Evory v. RJM Acquisitions Funding, LLC,* 505 F.3d 769, 775 (7th Cir. 2007). Accordingly, applying the "competent lawyer" standard to the discovery demands sent to debtor represented by counsel, the panel concluded that the class plaintiffs' facial invalidity claims did not meet the commonality and predominance requirements of Rules 23(a) and 23(b)(3).

Finally, with respect to the in-house counsel defendants, the panel held that the district court erred in ruling that plaintiffs' separate claims against the in-house collection attorneys "did not affect class certification because 'the question of individual defendant liability should be addressed at a later stage in the proceedings.'" Only one lawyer signed the standard-form pleadings above a signature box with all four in-house attorneys listed. "Thus, by alleging that impecunious individual defendants are jointly and severally liable to all members of the largest possible classes, plaintiff's created an issue of class action superiority that cannot be ignored at the certification stage."

A Settlement Offer on a "Time Barred" Debt Could Imply a Threat of Litigation

Buchanan v. Northland Group, Inc., --F.3d--, 2015 WL 149528 (6th Cir. Jan. 13, 2015)

©2025 Hinshaw & Culbertson LLP

Plaintiff stated a plausible claim for relief under the FDCPA where she alleged that Defendant's offer to settle a debt on which the statute of limitations for legal enforcement of the debt had expired implied that she could be sued.

In *Buchanan*, Plaintiff alleged that Defendant's offer to settle her account falsely implied that Northland had a legally enforceable obligation because the letter did not disclose that the Michigan statute of limitations expired for filing suit to collect the debt. The district court held that the letter was not misleading as a matter of law because Northland could attempt to collect the debt after the expiration of the statute of limitations and the offer to settle would not mislead the least sophisticated consumer into believing he or she could be sued. The district court granted Defendant's motion to dismiss.

On appeal, Plaintiff argued that she should be entitled to present evidence on behalf of her theory. The Sixth Circuit agreed and held that whether a letter is misleading is a question of fact. The Court went on to state "[f]or now, it suffices to say that parties who wish to present evidence in support of their claim usually will be given an opportunity to do so, making summary judgment, not a motion to dismiss, the relevant time for ascertaining whether the claim should be resolved as a matter of law." *Id*. at *4. The Court also noted that an unsophisticated consumer who reads the settlement offer could infer that some payment is better than no payment where a partial payment could restart the statute of limitations and leave the consumer in a worse position.

Judge Kethledge authored a dissent finding that Plaintiff's reading of Northland's letter was implausible and that Plaintiff's reading reflected the perspective of a lawyer and not an unsophisticated consumer. Judge Sutton delivered the opinion and Judge Rosenthal, sitting by designation, joined the opinion. Northland has until February 10, 2015 to file a petition for rehearing en banc.

Florida Third District Court of Appeal Holds that Involuntary Dismissal of Foreclosure Does Not Decelerate Lender's Prior Acceleration of Debt

Deutsche Bank Trust Company Americas v. Harry Beauvais, et al., --- So. 3d --- 2014 WL 7156961 (Fla. 3d DCA December 17, 2014)

In *Deutsche Bank Trust Company Americas v. Harry Beauvais, et al.*, the Third District Court of Appeal for the State of Florida held that when a lender files a foreclosure action upon a borrower's default, and expressly exercises its contractual right to accelerate all payments, an involuntary dismissal of that action without prejudice does not, in and of itself, negate or otherwise decelerate the lender's prior acceleration of payments. Therefore, there can be no new cause of action filed based upon an alleged "new" and subsequent default.

In *Beauvais*, the borrower defaulted in September 2006. The loan was accelerated and a foreclosure action was filed by the mortgagee in January 2007. That initial foreclosure was dismissed by the court, without prejudice, in December 2010. The condominium association took title to the property in 2011, pursuant to its own lien foreclosure action. The mortgagee subsequently filed a second foreclosure in December 2012, and in that action alleged a default date of October 2006 (one month after the default date alleged in the first action) but sought the same principal amount as claimed in the first action. The association raised a statute of limitations defense and moved for summary judgment on that basis, arguing that the debt was accelerated in September of 2006 and was never decelerated, therefore the December 2012 foreclosure was barred by the statute of limitations. The trial court agreed and granted the association's motion, and further held that the expiration of the statute of limitations rendered the mortgage null and void.

The Third District Court of Appeal agreed, in part, with the trial court, finding that the involuntary dismissal without prejudice of the first action had no legal effect on the acceleration of the debt. The Court noted the mortgagee's reliance on *Singleton v. Greymar Associates*, 882 So.2d 1004 (Fla. 2004), where the Supreme Court held that "when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by res judicata," and that a separate alleged default created a new and independent right to accelerate payment and foreclose. However, the Court distinguished *Singleton* and other related cases, as in those actions the dismissal of the original foreclosure had been **with** prejudice, operating as an adjudication on the merits. In *Beauvais*, however, the initial foreclosure was dismissed **without** prejudice, and the Court reasoned that the mortgagee's exercise of its option to accelerate survived the dismissal. The Court concluded that the only cause of action to be filed at that point would be an action on the debt as originally accelerated - it could not sue on any "new" default because there were no "new" payments due.

©2025 Hinshaw & Culbertson LLP

The Third District Court of Appeal certified conflict with the Fourth District Court of Appeal decision in *Evergrene Partners, Inc. v. Citibank, N.A.*, 143 So.3d 954 (Fla. 4th DCA 2014), which recently applied *Singleton* to hold that a subsequent foreclosure action was not barred by the statute of limitations following a dismissal without prejudice of the first foreclosure. Of note, the *Beauvais* Court did reverse the trial court's order to the extent that it declared the mortgage to be null and void, noting the difference between the statute of limitations and statute of repose.

©2025 Hinshaw & Culbertson LLP