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Newsletters

# Consumer & Class Action Litigation Newsletter - February 2015

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## Service Areas

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### Law Firm Publication Notice of Foreclosure Sale Despite Injunction is Not Debt Collection Under the FDCPA

*Dunavant v. Sirote & Permutt, P.C.*, 14-13314 (11th Cir. Feb. 9, 2015) (per curium).

The Eleventh Circuit recently upheld a decision finding that a law firm's publication of a notice of foreclosure sale in direct violation of a state court injunction did not amount to actionable debt collection activity under section 1692e of the FDCPA. *Dunavant v. Sirote & Permutt, P.C.*, 14-13314 (11th Cir. Feb. 9, 2015) (per curium).

In *Dunavant*, the plaintiffs filed a state court action against their mortgage servicer, GMAC Mortgage, LLC, to prevent a scheduled foreclosure sale of their real property. The state court granted their request, in part, by enjoining GMAC from proceeding with any foreclosure action on the subject property during the pendency of the case. The Plaintiffs then amended their complaint against GMAC alleging, among other things, tortious interference because GMAC violated the state court's injunction and published foreclosure sale notices in the local newspaper. GMAC moved for summary judgment and the state court granted GMAC's motion on all claims except for the plaintiffs' claims for permanent injunction.

Plaintiffs then filed a separate action in federal court alleging that GMAC's counsel violated several provisions of the FDCPA and committed invasion of privacy when the law firm published the notices of foreclosure sale on GMAC's behalf. The district court granted the law firm's motion for judgment on the pleadings on all FDCPA claims except for the section 1692f(6) claim. In dismissing the FDCPA claims, the district court specifically found that the law firm's act in publishing the foreclosure notices did not amount to debt collection activity, as is required to sustain a claim under section 1692e, because the

notices "did not demand payment of the underlying debt." Thereafter, on summary judgment, the district court denied the plaintiffs' motion for reconsideration of its dismissal of their section 1692e claim; held that res judicata barred their section 1692f(6) claim; and dismissed the remaining state law claim without prejudice because it no longer had supplemental jurisdiction. In an unpublished opinion, the Eleventh Circuit affirmed on all issues.

The Court first noted that in order to state a plausible claim under section 1692e, the challenged conduct must be "related to debt collection." *See* 15 U.S.C. §1692e (prohibiting certain conduct "in connection with the collection of any debt").

The Court then found that the district court did not abuse its discretion in refusing to reconsider its dismissal of the section 1692e claim because its ruling was based, in part, on the Court's unpublished opinion in *Warren v. Countrywide Home Loans, Inc.*, 342 F. App'x 458 (11th Cir. 2009). In *Warren*, the Court found that "an enforcer of a security interest," such as a mortgage company foreclosing on mortgages of real property, "falls outside the ambit of the FDCPA except for the provisions of section 1692f(6)."

The Court went on to recognize that an entity may be liable under section 1692e if it seeks to both enforce a security interest and collect a debt. *Citing Birster v. Am. Home Mortg. Serv., Inc.*, 481 F. App'x. 579, 583 (11th Cir. 2001); *see also Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, (11th Cir. 2012) ("[t]he fact that [a] letter and documents relate to the enforcement of a security interest does not prevent them from also relating to the collection of a debt within the meaning of §1692e").

The Court also distinguished *Dunavant* from its prior decision in *Caceres v. McCalla Raymer, LLC*, 755 F.3d 1299 (11th Cir. 2014). In *Caceres*, the Court held that a particular letter was "a communication in connection with the collection of a debt" because it stated that it was "for the purpose of collecting a debt," was addressed "Dear Property Owner," referred to "collection efforts," and "state[d] the amount of the debt and indicate[d] that it must be paid in certified funds." *Id.* at 1303. By contrast, the Court noted that the foreclosure notices at issue in *Dunavant* "were published in a newspaper to inform the public about the status of the foreclosure sale, were not addressed to the debtors, and included no information relating to the collection of payments from them."

**Sixth Circuit Holds that Neither Discovery Rule nor Equitable Tolling Apply to §1692e Claims and Information Letter Not Actionable**

*Goodson v. Bank of America, N.A.*, No. 14-5419, 2015 WL 364045 (6th Cir. Jan. 28, 2015) (unpublished)

In *Goodson v. Bank of America*, the Sixth Circuit affirmed summary judgment for defendant Bank of America (BOA). Plaintiff Inge Goodson (Goodson) filed suit in district court alleging that four letters sent by or on behalf of BOA included "false, deceptive or misleading" representations in violation of the Fair Debt Collection Practices Act (FDCPA). Although two of the letters central to her claims were sent outside of the FDCPA's one-year statute of limitations, she contended that equitable tolling and the discovery rule made her claims timely.

The Court of Appeals affirmed the district court's findings and held that neither the discovery rule nor the equitable tolling doctrine applied. The Court reasoned that Goodson could have discovered, in the exercise of reasonable diligence, that BOA had misidentified the creditor, as a reasonable person, after receiving two letters that identified different creditors, would have been put "on notice of the possibility that one of the letters may have misidentified the creditor."

The Court of Appeals also held that the district court correctly found that the two letters sent within the limitations period — letters that Goodson alleged falsely represented that she owed in excess of her loan balance and misidentified the creditor — did not violate the FDCPA because they were not communications made "in connection " with debt collection activities. Specifically, the Court of Appeals found that those letters were not made "in connection" with debt collection activities because their "animating purpose" was not to induce Goodson to make payments on her defaulted mortgage.

Neither letter made an express demand for payment, list a payment due date or threaten consequences should Goodson fail to pay. In rendering its opinion, the Court of Appeals further clarified that the standard disclaimer language — which stated that BOA was "*a debt collector attempting to collect a debt*" — did not, by itself, transform the informational letter into debt collection activity.

**The New Jersey Appellate Division Recognizes That a Trial Period Plan under HAMP May Give Rise to a Breach of Contract Claim if a Modification is Denied**

*Arias v. Elite Mortgage Grp., Inc.,* No. A-4599-12T1, 2014 WL 7665197 (App. Div. Jan. 23, 2015)

On January 23, 2015, the New Jersey Appellate Division resolved a question of first impression in New Jersey, addressing the contractual status of a Trial Period Plan (TPP) Agreement under the federal Home Affordable Mortgage Program (HAMP). Although the bank ultimately prevailed in the lawsuit, the Appellate Division nonetheless opined that a homeowner who complies with a TPP Agreement under HAMP may sue for breach of contract if a modification is denied, and may also have a claim under the New Jersey Consumer Fraud Act (NJCFA).

In *Arias*, the plaintiffs-mortgagors commenced suit against their home mortgage servicer, alleging they had a contractual right to a loan modification under the terms of their TPP Agreement under HAMP, which the defendant allegedly breached. Alternatively, they alleged that the defendant breached the covenant of good faith and fair dealing in denying them a loan modification.

The trial court held that the TPP Agreement was not a binding contract to modify the loan, reasoning that the bank was not required to provide the plaintiffs with a loan modification if the bank determined that they were not qualified. The New Jersey Appellate Division affirmed, providing a different analysis. The Appellate Division held that the TPP Agreement, based upon its express terms, was a "unilateral offer," wherein the bank promised to provide a loan modification to the plaintiffs if they fully complied with their obligations under the TPP Agreement, which included, timely making all required payments. Based upon the undisputed facts of the case, however, the Court concluded that the plaintiffs engaged "in a pattern of non-payment and inadequate payments which constituted a breach of the TPP Agreement and justified the bank in refusing to give them a loan modification." As such, the Court held that the bank did not breach a contract and did not breach the duty of good faith and fair dealing.

Notwithstanding the lack of New Jersey cases addressing the contractual status of a TPP Agreement, however, the Appellate Division opined that "case law suggests that an agreement that purports to bind a debtor to make payments while leaving the mortgage company free to give her nothing in return" may give rise to a claim under the NJCFA.

Although the bank ultimately prevailed in this case, this ruling marks a significant shift in New Jersey law. While the full impact remains to be seen, lenders and servicers in New Jersey may now be faced with expansive and prolonged litigation arising out of alleged breaches of TPP Agreements under HAMP.