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Newsletters

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Eleventh Circuit Requires Sender to Have Knowledge That Fax Violates TCPA in Order to Impose Treble Damages

Lary v. Trinity Physician Financial & Insurance Services, 780 F.3d 1101 (11th Cir. 2015)

A *pro se* plaintiff brought a TCPA suit against a medical professional liability insurance company claiming that they sent two faxes to his emergency line. In reviewing the District Court's award of damages following a default judgement, the Eleventh Circuit held that an individual receiving a fax that violates multiple provisions of the TCPA can recover per violation of the statue, even if it is multiple times per fax. The Circuit further held that in order for treble damages to be awarded, a sender must have knowledge that the fax violates the statute, i.e. that it is to an emergency number or that it is an unsolicited advertisement.

The recipient claimed that the faxes violated both sections 227(b)(1)(C) and 227 (b)(1)(A)(i) of the TCPA, the prohibition on sending an unsolicited advertisement using an auto-dialer, and the prohibition on advertising to an emergency line. The senders did not defend the merits of the case, but instead filed a "notice of withdrawal of defense" and accepted a default judgement. The District Court awarded statutory damages to the recipient for each fax, but declined to award double damages for faxes that violated multiple provisions or to award punitive damages.

The Eleventh Circuit held that pleadings failing to allege facts more than the simple legal conclusion that the sender acted "willfully and knowingly," are insufficient to award treble damages. The Court explained that the sender's knowledge of sending a communication to Plaintiff was not enough and further pointed out that interpreting the TCPA's willful and knowing requirement to only

require a willful and knowing telephone call, and not the higher burden of knowledge that the call was violative, would eliminate the distinction between strict liability and treble damages.

The Third Circuit Rules That the FDCPA Covers Foreclosure Complaints

Kaymark v. Bank of Am., N.A., No. 14-1816, 2015 WL 1529120 (3d Cir. Apr. 7, 2015)

On April 7, 2015, in *Kaymark v. Bank of America, et. al.*, the Third Circuit Court of Appeals reversed in part a lower court's decision in a class action alleging violations of the Fair Debt Collection Practices Act by Bank of America NA (BOA) and a New Jersey law firm over assessing not yet incurred legal fees, establishing precedent that FDCPA protections extend to foreclosure complaints.

The three-judge panel ruled that a Pennsylvania homeowner, who became delinquent on home loan payments to BOA, had his rights under the FDCPA violated when Udren Law Offices PC, on behalf of the bank, filed a foreclosure complaint against him and included legal fees that he had not yet incurred, but would within the coming months. The Court observed that nothing in Udren's foreclosure complaint indicated that the fees and costs were estimates. Employing the "least sophisticated debtor" standard, the Court concluded that the foreclosure complaint misrepresented the amount of the debt owed forming a basis for actionable misrepresentation under the FDCPA. The Court went on to observe that the debtor sufficiently alleged that Udren's attempt to collect the misrepresented fees was not expressly authorized by the mortgage contract (which provided that BOA could charge for "services performed in connection with" the default and collect "all expenses" incurred in pursuing authorized remedies) or permitted by law.

Relying on *McLaughlin v. CitiMortgage* (including "not yet incurred" fees and costs in a debt collection letter constituted an actionable misrepresentation under the FDCPA), the Court ruled that Kaymark sufficiently pled that the disputed fees constituted actionable misrepresentation under the FDCPA and reversed the lower court order, finding that it is well-established in the Third Circuit that the FDCPA covers attorneys engaged in debt collection litigation.

Seventh Circuit Finds Debtor's Online Mortgage Payment Valid on Day Authorized

Elena Fridman v. NYCB Mortgage Company LLC; 780 F.3d 773 (7th Cir. 2015)

Plaintiff, Elena Fridman, went on her mortgage servicer's website and authorized her monthly mortgage payment on the actual date the payment was due. Despite Fridman's belief she paid her obligation on time, her mortgage servicer, NYCB Mortgage Co., disagreed. NYCB argued that because it took two days for Fridman's payment to process and the funds to arrive to its bank account that Fridman's payment was late. As a result, NYCB assessed Fridman a late fee. Fridman, unhappy with being assessed a late fee, sued under the Truth in Lending Act (TILA) arguing her payment was on time under the language of the Act. The Seventh Circuit agreed and ruled that her payment was valid on the day she authorized it and not on the date the actual funds arrived to NYCB. Under this ruling, mortgage services must credit payments made on their websites at the time the borrower approves it, not at the point the actual electronic transfer of funds is completed.

Under TILA, a mortgage servicer must credit payments "as of the date of receipt." The "date of receipt" is defined by the Consumer Financial Protection Bureau as the date the payment instrument reaches the servicer. By way of example, if Fridman had mailed her mortgage payment in, her payment would be considered paid at the time the check was received and not when the funds cleared. According to NYCB, Fridman's online authorization was not a payment instrument (i.e. check), only the beginning of a payment process.

The majority opinion rejected NYCB's argument, noting that electronic authorizations easily fit within the definition of payment instruments and are explicitly included in state laws and the Dodd-Frank Wall Street Reform and Consumer Protection Act. Since Fridman's payment instrument was received in time, NYCB was required to treat her payment as valid.

Additionally, the court reasoned that to allow NYCB to wait until actual funds were received would allow it to needlessly delay receipt of payment in order to maximize fees. Accepting NYCB's interpretation would allow mortgage servicers to collect payments through slower methods in order to collect more late fees.

The majority's logic was rejected by Judge Easterbrook in his dissent, where he noted that mortgage servicers' desire to protect their reputation would be enough to prevent such actions. Judge Easterbrook also took a more literal interpretation of the TILA, arguing that "payment" could only be received when actual money was transferred to the mortgage servicer.

Rhode Island Supreme Court Further Limits Borrower's Standing to Challenge Assignment of Mortgage and Curtails Assignment Discovery

Genao v. Litton Loan Servicing, L.P., et al., 108 A.3d 1017 (R.I. 2015)

In *Genao*, the borrower claimed that the assignment of mortgage from Mortgage Electronic Registration Systems, Inc. (MERS) to the foreclosing lender was invalid because the signatory lacked authority to execute the agreement. The borrower's claim is one which Rhode Island state and federal courts have consistently rejected for lack of standing because the borrower is not a party to the assignment and asserts mere voidable grounds to challenge the assignment of mortgage. Rhode Island law only permits a non-party borrower to challenge an assignment on void grounds. *Mruk v. Mortg. Elec. Regis. Sys., Inc.*, 82 A.3d 527, 536 (R.I. 2013). The Court in *Genao* affirmed summary judgment entered in favor of the defendants based upon the borrower's lack of standing and overruled the trial court's denial of a motion for protective order to limit a 30(b)(6) deposition of MERS. In doing so, the Court prescribed further limitations on a borrower's standing to challenge the assignment of mortgage and on a borrower's authority to obtain discovery concerning the assignment agreement.

The borrower in *Genao* admitted that he operated the property as a rental unit and for business purposes alone. The Rhode Island Supreme Court found that a borrower does not have standing to challenge the assignment of mortgage where the property forming the basis of suit is commercial as opposed to residential. The Court reasoned that its *Mruk* decision provides homeowners in Rhode Island with standing to challenge the assignment of mortgage only to the extent necessary to contest the foreclosing entity's authority to foreclose. The Court confined this limited exception to the general rule that third parties do not have standing to challenge a contract to private residential mortgagors challenging foreclosure. As a result, borrowers who challenge assignments of mortgage on rental property lack standing to sue.

The Rhode Island Supreme Court also reviewed the borrower's 30(b)(6) notice of deposition for MERS, which included some thirty topics dealing in large part with the authority of the individual who executed the assignment. The Court overruled the trial court's denial of defendants' motion for protective order and concluded that the borrower was not entitled to the discovery sought. Because the borrower lacked standing to challenge the assignment on voidable grounds, the borrower was not entitled to obtain discovery from MERS to challenge the authority of the individual executing the assignment or on other voidable grounds. This portion of the Court's decision is critical to defense of contested foreclosure actions filed in Rhode Island state courts where the court denies the foreclosing lender's motion to dismiss, requires discovery and a summary judgment motion.

U.S. District Court of Massachusetts Finds Federal Diversity Jurisdiction Proper in Registered Land Dispute Against Servicer

Hinshaw successfully proved that the United States District Court, District of Massachusetts had diversity jurisdiction over claims concerning registration of title to real property.

Similar to a few other states, Massachusetts has a statutory scheme in which real property can be registered and, subsequently, the title to that property is certified by the Commonwealth. After Hinshaw removed the case to the U.S. District Court on behalf of the defendant mortgage loan servicer, the plaintiff borrower filed a motion to remand alleging that the federal court should abstain from exercising diversity jurisdiction based on the *Younger v. Harris*, 401 U.S. 37 (1971), and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) abstention doctrines. In rejecting the application of the *Younger* doctrine, the court held that the plaintiff could not identify a pending state proceeding, which is required for application of the doctrine.

Regarding *Burford* abstention, which applies where the review by the federal court may result in that becoming the regulatory decision making center, the court held that, even when title to the property is registered under state law, the "interests at stake in a straightforward quiet title action do no reach the same level of complexity and import as the complicated regulatory scheme at play in *Burford*."