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Newsletters

Consumer & Class Action Litigation Newsletter - June 2015

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Attorneys

Peter L. Isola

Schuyler B. Kraus

Hale Yazicioglu Lake

John P. Ryan

Todd P. Stelter

Service Areas

Consumer and Class Action Defense

Consumer Financial Services

U.S. Supreme Court Unanimously Rules that Chapter 7 Debtors Cannot Void Liens of Junior Lienholders Even if Property Is Underwater

Bank of America v. Caulkett, No. 13-1421, --- U.S. ---, 2015 WL 2464049 (June 1, 2015)

In a unanimous decision, the United States Supreme Court decided that Chapter 7 debtors cannot use Bankruptcy Code Section 506(d) to void junior mortgage liens where the debt on the senior lien exceeds the value of the collateral if the junior lienholder's claim is both secured by a lien and allowed under Section 502.

The debtors in two consolidated Chapter 7 petitions each had two mortgage liens on their homes, and the amount owed on the senior mortgage exceeded the value of the property. Relying on Section 506(d), which allows a debtor to void a lien on his property to the extent the "lien secures a claim that is not an allowed secured claim," the debtors moved to "strip off" the liens of the junior mortgagee (Bank of America). The Bankruptcy Courts granted the debtors' motions, and the 11th Circuit Court of Appeals affirmed, and Bank of America appealed to the United States Supreme Court.

In reversing the decisions of the Bankruptcy Court and the 11th Circuit, the Supreme Court concluded that a debtor can only void a junior mortgage lien if the Bank's claim is not "an allowed secured claim." The Supreme Court

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acknowledged that Section 506(a)(1) provides that a claim is secured to the extent of the value of the creditor's interest in the collateral, and unsecured to the extent that the value is less than the amount of the allowed claim. However, the Court relied on its prior definition of "secured claim" in *Dewsnup v. Timm*, 502 U.S. 410 (1992), to reject the debtors' arguments. *Dewsnup* defines "allowed secured claim" as a claim secured by a lien and fully allowed by Section 502, regardless of whether a lien is wholly or partially underwater. Here, the Court concluded that a junior lien could only be voided if the claim was not an "allowed secured claim." Because the junior liens were allowed secured claims even though the property was underwater, the debtors could not void the liens under Section 506(d).

For more information, please contact Hale Yazicioglu Lake.

California Court of Appeal: May Debtors Sue Junior Lienholder for Trying to Collect a No-Longer-Enforceable Debt If Lienholder's Collection Efforts Inaccurately Imply That Debt Is Still Enforceable?

Alborzian v. JP Morgan Chase Bank, N.A. et al., 235 Cal.App.4th 29 (2015 Cal. App. 2nd Dist)

On March 12, 2015, a California appellate court reversed a dismissal of claims against a junior lienholder bank and its debt collector arising from collection efforts made after the senior lienholder's foreclosure sale wiped out the defendant bank's interest. Both loans had been used by plaintiffs to purchase residential real property. The court held that plaintiffs may sue the debt collector under the Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. § 1692 et seq.); and may sue the bank and its debt collector under California's Rosenthal Fair Debt Collection Practices Act (Rosenthal Act) (Civ. Code § 1788 et seq.) and Unfair Competition Law (UCL) (Bus. & Prof. Code § 17200 et seq.). However, plaintiffs may not sue for violations of California's Consumer Legal Remedies Act (CLRA) (Civ. Code § 1750 et seq.).

The governing statute, California Code of Civil Procedure (CCP) § 580b, was amended in 2013 to bar any attempt to collect a legally unenforceable debt. Since the plaintiffs obtained the two loans to purchase their home in 2005, the issue of the viability of plaintiffs' claims depended, not on "whether [the bank] may *enforce* its loan (it may not), but rather on whether [the bank] may *attempt to collect* on its loan." The court, considering the facts from the perspective of the "least sophisticated debtor," accepted plaintiffs' argument that letters sent by the bank and calls by the bank and the debt collector were misleading for implying that the debt was still enforceable.

The court found that plaintiffs sufficiently alleged that the letters sent by the bank were actionable under the FDCPA (and therefore the Rosenthal Act) because of the letters' offer to "settle" a "debt" plaintiffs "owe" by giving them two short "windows of opportunity" that, if missed, would leave them with "fewer options" and subject them to "acceleration" of the loan and continued "calls and efforts to collect the amount owed." The court concluded that the "unspoken but unmistakable premise of these letters is that borrowers' debt is still valid, due, and owing — in a word, enforceable." In rejecting the bank's attempt to create "wiggle room" by arguing that the first collection letter expressly disclaimed that it was an attempt to collect a debt, the court found that the letter clearly implied that the debt was enforceable and reasoned that the average borrower would have "no idea" that the debt had been discharged "unless he or she happened to be familiar with [CCP] section 580b." The court also rejected the standing and preemption arguments of the bank and the debt collector.

In California, the risk of litigation for banks and debt collection services is greater than in some other states. Since California's Rosenthal Act does not incorporate the FDCPA's applicability only to "debt collector[s]," a bank is subject to the California statute whether or not it qualifies as a "debt collector" under the FDCPA. For the same conduct — attempting to collect a debt that is no longer legally enforceable — banks and debt collection services are also subject to liability under California's expansive Unfair Competition Law (UCL).

For more information, please contact Peter L. Isola.

New York Appellate Court Rejects Lower Court's Application of New York's EPTLand Finds That Borrower May Not Raise Noncompliance With Provisions of the PSA

Wells Fargo Bank, N.A., as Trustee v. Rotimi Erobobo, 2015 N.Y. Slip Op. 03522 (2d Dep't 2015),

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On April 29, 2015, a New York appellate court reversed the lower court's denial of the Trustee's summary judgment motion. The Appellate Division rejected the lower Court's finding that the assignment of the mortgage loan to the securitized trust was void pursuant to New York's Estate Powers and Trusts Law (EPTL) § 7-2.4 as "a mortgagor does not have standing to challenge the plaintiff's possession or status as assignee of the note and mortgage based on purported noncompliance with certain provisions of the [pooling and servicing agreement] PSA."

This case was commenced in 2009 and sought to foreclose on a property located in Brooklyn, New York. The defendant, acting *pro se*, served and filed an answer with a general denial. Thereafter, a motion for summary judgment and an order of reference was made on behalf of the plaintiff Trustee. In response, defendant raised defenses challenging the Trustee's standing to foreclose based upon alleged violations of the terms of the applicable PSA which, defendant argued, voided the assignment of the loan pursuant to EPTL § 7-2.4. Under EPTL § 7-2.4, every sale, conveyance or other act of the trustee in contravention of the instrument creating the trust is void. Defendant's contention was that because the date of the written Assignment of Mortgage was after the closing date of the PSA, the Trustee's acceptance of his mortgage loan on behalf of the Trust was in contravention of the terms of the PSA, and therefore void as opposed to voidable to by the parties to the PSA.

The Supreme Court of New York, County of Kings, determined that defendant's general denial was sufficient to assert a standing defense. Further, the court went on to deny the Trustee's motion for summary judgment, finding that defendant raised triable issues of fact precluding summary judgment based upon his contention that the transfer of his mortgage into the Trust violated the terms of the PSA which governed acquisitions by the Trust. The court accepted defendant's contention that the transfer of his note and mortgage to the Trust violated the chain of title provisions of the PSA because the mortgage note was assigned to the Trust without having first been transferred to, and then from, the depositor under the PSA.

The lower Court's decision was widely cited in other jurisdictions, because it was the first case in New York to rely upon EPTL § 7-2.4 and the date of a later written Assignment of Mortgage to find that the acceptance of the note and mortgage by the Trustee, after the date the Trust closed, was void. As many securitized trusts were created under, and are governed by, New York law, the decision was cited by defaulting mortgagors across the country as a defense to foreclosure. The decision by the Appellate Division puts this defense to rest.

For more information, please contact Schuyler B. Kraus.

Ninth Circuit Allows Debt Collector to Seek Interest Without Prior Judgment

Diaz v. Kubler Corp., No. 14-55235, 2015 WL 2214634 (9th Cir. May 12, 2015)

In *Diaz,* a debt collector sent plaintiff debtor a collection letter seeking ten percent interest on the debt, which is the statutory interest set by California. The debtor filed suit, alleging that the debt collector violated Section § 1692f(1) of the FDCPA and thereby also violated California's Rosenthal Act by sending a letter seeking pre-judgment interest in the letter without first getting a judgment. The debtor moved for summary judgment. The district court granted summary judgment and held that "[w]ithout a judgment for breach of contract awarding prejudgment interest, Defendant cannot seek to collect prejudgment interest on Plaintiff's debt at the rate set forth in California Civil Code section 3289."

The debt collector appealed. The Ninth Circuit reversed, stating:

> It is quite plain that Kubler would have been entitled to prejudgment interest under California law when it sent its collection letter if the debt in question was certain or capable of being made certain at that time, even if Kubler had not yet obtained a judgment from a court. Section 3287(a) allows recovery of interest from the time the creditor's right to recover "is vested," and we have previously explained that "California cases uniformly have interpreted the 'vesting' requirement as being satisfied at the time that the amount of damages become certain or capable of being made certain, not the time liability to pay those amounts is determined.'"

Thus, the court found that the debt collector did not violate the FDCPA or Rosenthal Act.

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Based on this opinion, it appears that California law can entitle a debt collector to seek interest even without a prior judgment.

For more information, please contact your Hinshaw attorney.

Two Recent District Court Decisions Describe What is NOT an Automatic Telephone Dialing System (ATDS)

Modica v. Green Tree Servicing, LLC, 2015 WL 1943222 (N.D. Ill. 2015)

On April 29, 2015, summary judgment was granted in favor of a defendant in the Northern District of Illinois on the portions of a TCPA claim alleging that the defendant used a system that employed a "click" method to place calls to plaintiff's cell phone. According to the opinion, defendant had two methods for making calls. Defendant could make calls using either a traditional "Dialer" or by the "click" method, which operated through custom-built software. Agents were only required to be connected to a server to access customer information. The server and the custom-built software were separated from and not connected to the Dialer. Upon accessing customer information from the server, an agent would then initiate a telephone call by clicking on a customer's phone number, which would then be displayed on the agent's computer. Because defendant did not "store or produce telephone numbers to be called" on call center computers and phones, agents were not able to access customer information on their computers without logging into the server. Agents could, however, initiate calls without being logged into the Dialer. Since defendant's system's "click" method involved equipment that was connected to a server but not directly logged into the Dialer, and because agents could initiate calls to plaintiffs using the "click" method connected to the server but not logged into the Dialer, the court ruled that defendant was not using an ATDS to place these calls. Plaintiffs argued that defendant's "click" method still had the capacity to auto-dial because agents only needed to log into the Dialer from their computer in order to have the capacity to do so. However, the court ruled that this one additional step, although minimal, rendered the numbers incapable of being dialed without human intervention. Therefore, defendant did not use an ATDS for the calls.

Derby v. AOL, Inc., 2015 WL 3477658 (N.D. Cal. 2015)

On June 1, 2015, a motion to dismiss was granted in favor of a defendant in the Northern District of California on the portions of a TCPA claim alleging that the defendant sent unsolicited text messages to plaintiff. Defendant argued that its system was not an ATDS because it required human intervention to send text messages and that this fact was admitted in the complaint. According to the complaint, plaintiff was sent an unsolicited text message after a non-party user of defendant's system prompted defendant's system to transmit a text to plaintiff's mobile phone. Plaintiff argued that the court should draw a distinction between "conduct that triggers dialing" of a mobile phone number, and "the actual act of dialing" that number. In other words, plaintiff argued that where there is human intervention in the form of some conduct that prompts an automatic system to dial a number, the system still qualifies as an ATDS. The court rejected this distinction.

Distinguishing *Sterk v. Path, Inc.* , 47 F. Supp. 3d 813 (N.D Ill. 2014), as an out-of-Circuit case which is in conflict with rulings from the Northern District of California, and furthermore, finding that *Sterk* did not support plaintiff's argument, the court granted defendant's motion to dismiss. The court held that *Sterk* involved the sending of promotional text messages to numbers already in the defendant's database which had been populated by non-party users who had elected to upload their contact lists. To the contrary, this case involved personalized text messages, composed by individual non-party users of defendant's system, sent to numbers chosen and manually inputted by these users. In *Sterk*, the defendant's system determined which number to call or text (from the user-provided list of numbers), when to call, and what the message would be. Here, the non-party user of defendant's system had control over each of those variables, and the user was simply using defendant's system to send a text to someone containing a personalized message. The court found that the allegations of the complaint showed that extensive human intervention was required to send the messages through defendant's system. Therefore, defendant did not use an ATDS for the texts.

For more information, please contact Todd P. Stelter.

FCC Chairman Releases Fact Sheet Urging Greater Protections Under TCPA – Indication That Ruling May Be On Its Way

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On Wednesday, May 27, 2015, Federal Communications Commission (FCC) Chairman Tom Wheeler wrote a blog and circulated a fact sheet about his plan to "protect consumers against robocalls, spam texts, and telemarketing." The timing of the blog post and fact sheet is possibly related to a letter Chairman Wheeler received on May 14, 2015, from eleven U.S. Senators strongly urging the FCC to maintain the "TCPA's privacy protections and to continue to protect consumers from unwanted calls." The terse fact sheet is Chairman Wheeler's view of how the FCC should interpret the TCPA in its upcoming declaratory ruling. An open meeting is scheduled for June 18, 2015.

However, the fact sheet shows that the FCC will address several pending petitions under the TCPA by issuing a declaratory ruling soon. Chairman Wheeler outlines his vision for the anticipated declaratory ruling in his fact sheet but the fact sheet does not paint a clear picture of his positions on the issues that will be decided. There are a few points of significance regarding the fact sheet which may impact the asset recovery industry and the mortgage loan industry. Under Chairman Wheeler's plan, consumers may revoke their consent to receive robocalls and robotexts in "any reasonable way at any time." Chairman Wheeler's plan also provides that callers must stop calling a reassigned number after "one call." The fact sheet does not elaborate on what constitutes "one call." Lastly, Chairman Wheeler wishes to define an autodialer as any technology with the "capacity" to dial random or sequential numbers so that "robocallers cannot skirt consumer consent requirements through changes in calling technology design or by calling from a list of numbers." The fact sheet is unclear about how or whether this may affect the FCC's previous decisions on what constitutes an autodialer.

For more information, please contact John P. Ryan.

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