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Newsletters

Consumer & Class Action Litigation Newsletter - July 2015

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- Third Circuit Holds That Misstatement In Subpoena Not Actionable Under FDCPA, Unless Material
- First Circuit Affirms Dismissal of Borrower's Contested Foreclosure Action on Grounds that Borrower Failed to Demonstrate Adverse Title Interest
- Expansive Ruling in Eleventh Circuit Holds Communications to Debtor's Attorney Actionable Under FDCPA
- Right to Foreclosure Survives Bankruptcy
- New York's Highest Court Clarifies Plaintiff Standing in Mortgage Foreclosure Actions
- Maine Governor's Veto of Legislation Concerning Nominee Mortgages Overridden

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Third Circuit Holds That Misstatement In Subpoena Not Actionable Under FDCPA, Unless Material

Jensen v. Pressler & Pressler, et al., --- F.3d ----, 2015 WL 3953754 (3rd Cir. Jun. 30, 2015)

The United States Court of Appeals for the Third Circuit recently held that a collection law firm did not violate the Fair Debt Collection Practices Act (FDCPA) when it issued a post-judgment information subpoena that contained the incorrect name and electronic signature for the New Jersey superior court clerk. Although the subpoena contained a statement that was technically false, the court reasoned that its use would not affect the decision-making process of the least sophisticated debtor because the subpoena remained legally enforceable. In so holding, the Third Circuit unanimously adopted a "materiality" requirement for false, misleading or deceptive statements under the FDCPA.

The plaintiff commenced this lawsuit as a class action alleging unlawful debt collection activity under the FDCPA's section 1692e, which prohibits making false, misleading, or deceptive statements in debt collection. After obtaining a default judgment against the plaintiff, the defendant collection law firm issued a subpoena to the plaintiff attempting to discover the plaintiff's assets, pursuant to New Jersey state law; however, the subpoena listed the incorrect name and electronic signature of the court clerk. The plaintiff argued that the FDCPA was violated because the name and electronic signature of the court clerk was incorrect and; therefore, false. Additionally, the plaintiff alleged that as a result of

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the incorrect electronic signature of the clerk the subpoena was invalid; thereby subjecting her to false debt collection. The Third Circuit rejected the plaintiff's argument that the FDCPA is violated whenever a false statement in debt collection is made. Instead, using the so-called "least sophisticated debtor, standard — which is an objective standard that assumes a quotient of reasonableness and presumes a basic level of understanding and willingness to read with care — the court held that the false name and signature of the clerk on the subpoena would not have impacted the ability of the least sophisticated debtor to engage in intelligent decision-making.

In arriving at this decision, the Third Circuit joined a majority of other federal circuit courts that require a false, misleading or deceiving statement to be material in order to be actionable under the FDCPA. Thus, unless the least sophisticated debtor's decision-making ability would be impacted as a result of the falsity of a statement and cause that debtor to be confused or mislead, the fact that a statement may be technically false is insufficient. The Third Circuit noted that the requirement of materiality was already built into the least sophisticated debtor standard because, according to the court, the focus is always on whether a debt collector's statement would deceive or mislead the least sophisticated debtor.

The court was not persuaded by any of the plaintiff's other arguments. It disagreed with the plaintiff's argument that the subpoena was invalidated without the signature of the actual clerk of court. The Third Circuit also rejected the plaintiff's argument that the defendant collection law firm should be subject to more intense scrutiny as lawyers because the law firm was not using its status as attorneys to wrongly imply that legal action may be taken. Finally, the court declined the plaintiff's request to reverse the district court's decision, finding that issues of materiality can be decided on summary judgment, as the district court had done in this case.

This ruling shows that it is essential to carefully verify the accuracy of content in documents sent to debtors and to confirm whether the jurisdictions in which collections are taking place permit for any safe harbor language in letters.

First Circuit Affirms Dismissal of Borrower's Contested Foreclosure Action on Grounds that Borrower Failed to Demonstrate Adverse Title Interest

Lister v. Bank of America, N.A., et al., ---F.3d ---, 2015 WL 3635282 (1st Cir. June 12, 2015)

The United States Court of Appeals for the First Circuit has affirmed dismissal of a "quieting of title" complaint filed by a borrower who had defaulted on her mortgage and was facing foreclosure. Applying Rhode Island law, the Court found that the borrower failed to allege sufficient facts to demonstrate the adverse interest necessary to quiet title under Rhode Island law. The Court's decision analyzes and applies the import of a mortgagor-mortgagee relationship in states that have adopted the title theory of mortgages.

In a title theory state like Rhode Island, a mortgagor conveys legal title to the mortgaged real estate to the mortgagee, and that conveyance is subject to defeasance only upon full payment of the debt owed. Title is split with the mortgagor retaining equitable title but conveying legal title to the mortgagee. As a result, both mortgagor and mortgagee possess complimentary and separate claims, and the interests of mortgagor and mortgagee do not interfere with one another.

For this case, the borrower alleged uncertainty over who holds her mortgage, and the First Circuit found that this concern addressed solely the legal title to the real state and not her equitable interest. The Court applied the reasoning of *Lemelson v. U.S. Bank Nat'l Ass'n*, 721 F.3d 18 (1st Cir. 2013), where the Court determined under Massachusetts law that the concomitant relationship between mortgagor and mortgagee in a title theory jurisdiction is not adverse. Under Rhode Island law, the First Circuit reached the same conclusion finding that allegations concerning who holds the mortgage do not create a sufficient adverse interest to maintain a quiet title action.

Expansive Ruling in Eleventh Circuit Holds Communications to Debtor's Attorney Actionable Under FDCPA

Miljkovic v. Shafritz & Dinkin, P.A., No. 14-13715, 2015 WL 3956570 (11th Cir. June 30, 2015)

In *Miljovic v. Sharfritz & Dinkin*, P.A., the plaintiff claimed violations of multiple sections of the FDCPA, stemming from a reply in support filed in a state court debt collection lawsuit. The defendant law firm had filed a sworn reply in opposition to the debtor's claim for exemption from wage garnishment as part of an attempt to enforce a judgment. The Eleventh Circuit affirmed the District Court's dismissal of the FDCPA claims on grounds other than the district court's determination that the FDCPA provisions were not triggers regarding communications and papers sent to a debtor's lawyer. In doing so, the

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Eleventh Circuit held that pleadings and papers filing in court proceedings can be the basis of FDCPA claims under 1692d (harassing, abusive or oppressive conduct), 1692e (false or misleading misrepresentations), and 1692f (unfair practices). In reaching this conclusion that the FDCPA could be triggered based upon papers filed in litigation and served upon a debtor's counsel, the court relied in significant part upon the reasoning of the United Stated Supreme Court in *Heinz v. Jenkins*, 514 U.S. 291, 115 S.CT. 1489 (1995), and *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 130 S.CT. 1605 (2010) and other cases addressing lawyers' liability for FDCPA claims. Nevertheless, the court held that while the reply filed in state court could be subject to the FDCPA and related compliance, the reply filed by the debt collector lawyer was not false, misleading, or otherwise violative of the FDCPA.

The debtor had claimed that the reply violated Sections 1692d-f alleging that the law firm had no basis to dispute the debtor's claim of exemption and the accompanying affidavit. In its review, the Eleventh Circuit rejected the argument that the filing was directed to the court or to the debtor's attorney, and therefore not actionable, and instead held that communications to a debtor's attorney can be actionable under the FDCPA, except where expressly limited by the statute. The court did not examine what standard should apply to communications sent to a debtor's attorney, holding that in this case the reply was not misleading even to the "least sophisticated consumer." The court did note that the law firm's argument that communications to an attorney should not be evaluated under the "least sophisticated consumer" standard was a "reasonable" argument, but declined to adopt or reject the Seventh Circuit's "competent attorney" standard. *See Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 773, n.10 (7th Cir.2007).

Despite holding that the reply was governed by the FDCPA, the Eleventh Circuit affirmed the dismissal of the suit because nothing in the reply violated the FDCPA. The court held that the reply could not violate Section 1692d because a simple adversarial filing was not more intimidating than the filing of a lawsuit, which has been held to *not* have the natural consequence of harassing, abusing, or oppressing a debtor. Similarly, the court held that the reply did not violate Section 1692e, because nothing in the reply was deceptive or misleading, and because lawyers are free to dispute facts asserted by debtors in litigation. Finally, the court held that the catch-all provision of Section 1692f was not a "free-for-all," and that plaintiff had failed to make the necessary allegations that the reply was somehow unfair or unconscionable in addition to being abusive, deceptive, or misleading. Furthermore, the court held that the filing in this case was far removed from the types of conduct found in other cases to be unconscionable.

In holding that communications to a debtor's attorney are actionable under the FDCPA, the Eleventh Circuit interpreted the FDCPA differently from how district courts in the circuit have previously applied the statute. However, the language in the opinion at least suggests that the Court is open to adopting a more lenient standard than the "least sophisticated consumer" in cases involving communications with a debtor's attorney.

Right to Foreclosure Survives Bankruptcy

On July 1, 2015, in *Deutsche Bank Trust Company Americas v. Stefanos Vitellas* (2015 N.Y. Slip Op 05634) the New York Court of Appeals upheld the lower court's denial of the borrower's motion to dismiss and held that a bank can proceed with foreclosure on a mortgage that was assigned after a property owner's personal debt was discharged in bankruptcy. Justice Jeffrey Cohen held that although a debtor's liability can be extinguished through bankruptcy, a mortgage holder's right to foreclose on the mortgage to seek repayment survives the bankruptcy.

This case was commenced in 2012 and sought to foreclose on a property located in Queens, New York. The borrower moved to dismiss the complaint, arguing that Deutsche Bank was incapable of foreclosing on the mortgage because the borrower had discharged his underlying debt through bankruptcy. On January 11, 2013, the Queens Supreme Court granted the defendant's motion. The plaintiff moved to reargue the case, and in May 2013, the Court overturned its prior decision and wrote that the plaintiff had met its burden for establishing standing.

The Appellate Court disagreed with the borrower's position that a note must be "collectable" and "payable" at the time of transfer, holding, that even after the debtor's personal obligations have been extinguished, "the mortgage holder still retains a right to repayment in the form of its right to the proceeds from the sale of the debtor's property." This holding presents a novel ruling in New York.

New York's Highest Court Clarifies Plaintiff Standing in Mortgage Foreclosure Actions

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Aurora Loan Services, LLC v. Taylor, No. 83, 2015 WL 3616293, 2015 NY Slip Op 04872 (N.Y. June 11, 2015)

On June 11, 2015, the New York Court of Appeals issued an instructive decision clarifying how a noteholder can establish standing in a mortgage foreclosure action. The Court affirmed the decision of the Appellate Division of the Supreme Court in the Second Judicial Department, entered February 5, 2014, holding that plaintiff established its standing by demonstrating that it was in physical possession of the defendants' original note before commencement of the foreclosure action.

In *Taylor*, Aurora commenced an action to foreclose on a mortgage, secured by real property, following borrowers' default on their loan payments. The defendants moved for summary judgment seeking dismissal of the complaint, alleging that Aurora lacked standing to commence the action. Aurora cross-moved for summary judgment on the complaint. In support of its cross-motion, Aurora submitted the affidavit of an employee of its legal liaison, who stated that, based upon her personal knowledge of the facts and review of the note, mortgage and other loan documents and related business records kept in the ordinary course of the regularly conducted business activity, the defendants' original note has been in the custody of Aurora and in its present condition since May 20, 2010. She further stated that prior to commencement of the action, Aurora had been in exclusive possession of the original note and allonge indorsed to Deutsche Bank as Trustee, which had not been transferred to any other person or entity.

The Supreme Court denied the defendants' motion, granted Aurora's cross-motion, and appointed a referee to compute the amount due under the note. The Appellate Division affirmed in part, holding that Aurora demonstrated its standing through admissible evidence, namely, the affidavit establishing that Aurora obtained physical possession of the defendants' original note on May 20, 2010, four days prior to commencement of the action. *Aurora Loan Servs., LLC v. Taylor*, 114 A.D.3d 627, 628-29, 980 N.Y.S.2d 475, 477 (2d Dep't 2014).

Applying long-standing principles, the Court of Appeals determined that Aurora was vested with standing to foreclose. The Court held that Aurora sufficiently demonstrated that Deutsche Bank, as trustee under the pooling and servicing agreement, became the lawful owner of the defendants' note, and that Aurora's affidavit established that Aurora came into possession of the note on May 20, 2010, prior to commencement of the foreclosure action on May 24, 2010. The Court further noted that "[f]rom these specific statements, together with proof of Aurora's authority pursuant to the [master servicing assignment and assumption agreement] and the limited power of attorney, the Appellate Division held, '[i]t can reasonably be inferred ... that physical delivery of the note was made to the plaintiff' before the action was commenced." *Taylor*, 2015 WL 3616293, *1, *3-4. In so holding, the Court further confirmed that the validity of a written assignment of mortgage was irrelevant to Aurora's standing to foreclose.

The Court also dispensed with the Appellate Division's dissent, which opined that the affidavit was lacking details regarding Aurora's possession of the note. As a caveat, the Court noted that "[a]lthough the better practice would have been for Aurora to state how it came into possession of the note in its affidavit in order to clarify the situation completely, we conclude that, under the circumstances of this case, the court did not err in granting summary judgment to Aurora." *Taylor*, 2015 WL 3616293, *1, *4-5.

This decision provides necessary clarification to what some New York courts previously found to be an ambiguous issue surrounding standing in a mortgage foreclosure action. Those courts questioned what specific details regarding possession of the note were needed in a plaintiff's supporting affidavit. This decision undoubtedly marks a significant contribution to mortgage foreclosure law by providing a roadmap for noteholders to establish standing to foreclose.

Maine Governor's Veto of Legislation Concerning Nominee Mortgages Overridden

In *Bank of America v. Greenleaf*, 96 A. 3d 700 (2014), the Maine Supreme Court held that "despite the language in [a] mortgage suggesting otherwise,"…a mortgage does not as a matter of law grant to Mortgage Electronic Registration Systems, Inc. (MERS) any right to foreclose on property. Rather, the mortgage conveys to MERS only the right to record the mortgage as nominee for the lender. Therefore, in *Greenleaf*, the lender who received a mortgage by assignment from MERS did not obtain the right to foreclose on the property because MERS could only assign its limited right to record the mortgage. It could not assign ownership to the mortgage itself. The Court held that ownership must be established by independent evidence beyond MERS's assignment of its right to record. The practical effect of this decision is that many lenders have been prevented from moving forward with judicial foreclosures because they have a MERS assignment in

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their chain of title, and cannot prove ownership of the mortgage itself.

To bring Maine law into conformance with this decision, the Maine Legislature passed 33 MRSA 508, the text of which may be found here. The bill amends Maine law by establishing a baseline presumption that a nominee mortgagee has the authority to assign or otherwise affect the mortgage even if the instrument assigning authority to the nominee mortgagee does not specifically so state. But, this presumption does not apply if: (1) the instrument explicitly negates the authority or (2) if a separate written instrument negates the authority and the instrument is recorded in the appropriate registry of deeds.

Previously, Governor Paul LePage vetoed the foregoing legislation, but just recently, the Maine Legislature overrode the Governor's veto. The law becomes effective in October on the 91st day after formal adjournment of the 127th legislative session for the State of Maine.

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