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Newsletters

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Hinshaw Wins in Seventh Circuit Court of Appeals – Not Unfair or Unconscionable to Seek Contract Interest or File Summary Judgment in Collection Case After debtor Sought Arbitration

Bentrud v. Bowman, Heintz, Boscia & Vician, P.C., 2015 WL 4509935 (7th Cir. July 27, 2015)

In *Bentrud*, the Seventh Circuit evaluated whether a law firm (the firm) violated the Fair Debt Collection Practices Act (FDCPA) when it (1) filed a second motion for summary judgment in state court to collect on an underlying credit card debt after the debtor ("debtor") sought arbitration, and (2) allegedly asserted the interest rate on debtor's credit card debt was lower than the rate actually applied to debtor's credit card. The firm, represented by Hinshaw & Culbertson LLP partners David Schultz and Jennifer Kalas, was successful in its defense. The court held the firm's filing of its second motion for summary judgment was not an unfair or unconscionable means to collect a debt and that there was no evidence the firm misrepresented debtor's interest rate. As such, the district court's ruling that the firm did not violate the FDCPA was affirmed.

The debtor owed Capital One Bank, N.A. (Capital One) $10,955.20 in credit card debt, and took issue with how Capital One's attorneys, the firm, attempted to collect this debt. The firm originally brought a state court action seeking the full amount of the debtor's credit card debt owed to Capital One. After some inconsequential motion practice, the firm filed a motion for summary judgment.

debtor responded by invoking the arbitration provision of the credit card agreement with Capital One. As such, the state court denied the firm's motion for summary judgment and stayed the case for thirty days to allow debtor to initiate arbitration. However, the stay would "automatically dissolve" if debtor did not initiate arbitration within that window.

Upon debtor's failure to meet the thirty-day deadline, the stay was dissolved and the Firm filed a second motion for summary judgment. This filing was the basis of the debtor's first FDCPA claim against the Firm. Debtor appealed to the Southern District of Indiana after the district court granted summary judgment in favor of the Firm on each of the debtor's FDCPA claims. debtor characterized the filing of the second motion for summary judgment after he had elected to pursue arbitration of the debt claim, as an unfair or unconscionable means of attempting to collect a debt pursuant to 15 U.S.C. § 1692f. The second FDCPA claim against the firm concerned the interest rate on the credit card debt. Debtor claimed the 10.65% interest rate indicated on the firm's complaint was either misrepresented because the actual rate indicated on the credit card agreement was 13.9%, or, the 10.65% was correct, in which case, the firm was attempting to collect a debt not authorized by the terms of the credit card agreement.

The Seventh Circuit affirmed the district court's ruling and held that, under the FDCPA, it is implied that state judicial proceedings are outside the scope of § 1692f. Additionally, the FDCPA was not an enforcement mechanism for matters governed elsewhere by state and federal law, like the enforcement of an arbitration provision in a credit card agreement. As such, debtor's remedy sounded in breach of contract and not under the FDCPA. The Seventh Circuit further held the firm had every right to resume litigation on behalf of Capital One once the stay was automatically dissolved per the court's order. As to the debtor's claim regarding the loan's interest rate, the Seventh Circuit rejected his argument, as no evidence existed to support a theory under the FDCPA that the firm misrepresented the interest rate applicable to the credit card debt or attempted to collect a debt not authorized by the credit card agreement.

Seventh Circuit Holds Mooting the Litigation is Not a Consequence of Rejecting an Offer of Judgment

Chapman v. All-American Painting, Nos. 14-2773, 14-2775 (7th Cir, Aug. 6, 2015)

The Seventh Circuit held that an expired or unaccepted offer of judgment does not moot litigation because the court still has power to award relief. It specifically ruled that the plaintiff's claim was not mooted because it did not accept the defendant's offer of judgment offering the plaintiff full compensation. With its opinion, the Seventh Circuit explicitly overruled *Damasco, Thorogood,* and *Rand* to the extent they hold that a defendant's offer of full compensation moots the litigation ending the Article III case or controversy.

In *Chapman,* the plaintiff alleged the defendants violated the TCPA by sending it and similarly situated individuals faxes without their consent. The plaintiff attempted to certify a class of all persons who received a fax from the defendant without consent dating back four years before the plaintiff's complaint was filed. The judge denied the motion to certify the class because determining who had given their consent made it infeasible to determine who would be in the class. The plaintiff then proposed a different class consisting of people who received a fax that either lacked an opt-out notice or contained one of three specific notices the plaintiff believed violated the FCC's regulations. The district court denied the motion to certify the second proposed class reasoning that the proposal was too late as plaintiff knew of the potential notice issue from the outset of the litigation. While the plaintiff's motion for class certification was pending, the defendant made an offer of judgment for full relief of the plaintiff's demand. The offer expired without any acceptance. The district court dismissed plaintiff's personal claims as moot because the plaintiff did not accept the offer of judgment. The Seventh Circuit affirmed, denying both motions but remanded the decision dismissing the plaintiff's personal claims.

The Seventh Circuit remanded the plaintiff's personal claim reasoning that Justice Kagan's dissent in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532-37 (2013) demonstrates that an expired offer of judgment does not satisfy the court's definition of mootness because relief remains possible. The court based its decision on the definition of moot – "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (citing *Knox v. Service Employees International Union*, 132 S. Ct. 2277, 2287 (2012). According to the Seventh Circuit, if the case is moot then the court cannot enter judgment pursuant to the offer of judgment but can only dismiss the case for lack of case or controversy. The court stated that even if an offer of judgment was accepted, a court would not be able to enforce a payment for the judgment or enter an injunction if the offer of judgment mooted the litigation because the offer destructed the case once it was made. According to the Seventh Circuit, rejecting a fully compensatory offer may have consequences, but mooting the litigation is not one of them.

NYC is Allowed to Regulate Some Legal Professionals Performing Debt Collection

Eric M. Berman, P.C., et al. v. City of New York, et al., *No. 13-598 (2d Cir. August 5, 2015)*

The Second Circuit recently issued an opinion in *Eric M. Berman, P.C. and Lacy Katzen, LLP v. City of New York, et al.*, stating that district court erred in ruling that New York State's authority to regulate attorney conduct preempted a New York City law regulating certain debt collection activities of attorneys (Local Law 15). Local Law 15 amended Local Law 65 to add language regarding attorneys and the regulation of debt collection in New York City. See N.Y.C. Admin. Code § 20-489 (a)(5).

Plaintiffs are New York law firms who argued that Local Law 15 violates New York State law and the New York City Charter. Plaintiffs argue that "it is the New York State Judiciary, not municipal governments, that has the sole authority to regulate attorney admissions, practice, and conduct." They contend that by policing attorney conduct related to debt collection, Local Law 15 intrudes upon New York State's authority to regulate the practice of law.

The Second Circuit certified two questions to the NY court of Appeals, which answered the questions and "conclude[d] that there is no conflict between Local Law 15 and the State's authority to regulate attorneys," as set out in Sections 53 and 90 of the New York Judiciary 15 Law. Although Local Law 15 regulates certain debt collection activities that may be performed by attorneys, "it does not purport to regulate attorneys as such." The Second Circuit followed the court of Appeals stating "[t]he court of Appeals' opinion resolves this appeal in favor of Defendants."

However, the Second Circuit left Plaintiffs' vagueness challenge to be addressed on remand. It remains unclear what aspects of Local Law 65, which regulates debt collection agencies and requires such agencies to obtain a license prior to engaging in debt collection activities, will actually be applied to licensed NY attorneys.

Massachusetts Supreme Judicial Court Issues Prospective Decision Requiring Strict Compliance with Paragraph 22 of Mortgages

Pinti v. Emigrant Mortgage Co. Inc., SJC-11742, --- N.E.3d ---, 2015 WL 4366801 (July 17, 2015)

In a long-awaited decision, the Massachusetts Supreme Judicial Court ruled that strict compliance with paragraph 22 is required for a valid foreclosure. Paragraph 22 provides that prior to acceleration of a loan following any breach by a borrower, the mortgagee is required to, *inter alia*, notify the borrower of the default, the action required to cure the default, the date the default must be cured and that failure could result in acceleration.

Following the foreclosure of their mortgage in 2012, the borrowers filed an action seeking a declaratory judgment that the sale was void because the mortgagee failed to comply with paragraph 22 in their standard Fannie Mae/Freddie Mac mortgage. The trial court rejected the borrowers' argument, reasoning that the mortgagee was not required to strictly comply. The borrowers appealed.

The SJC ruled that as Massachusetts is a non-judicial foreclosure state, in order to invoke the statutory power of sale and sell the property at a foreclosure auction, a mortgagee must first strictly comply with the terms of the mortgage relating to foreclosure as well as the statutes relating thereto. Thus, failure to strictly comply with all requirements in paragraph 22 of the mortgage is fatal to a mortgagee's foreclosure. The SJC distinguished its prior decision in *U.S. Bank Nat'l Association v. Schumacher*, 467 Mass. 421 (2014), which held that G.L. c. 244 § 35A (setting forth certain requirements related to notices of default and right to cure) was not part of the foreclosure process and thus strict compliance was not necessary. According to the SJC, while § 35A was enacted to provide homeowners with a generous period to cure a default without a threat of foreclosure, it does not govern the power of sale like paragraph 22 of the mortgage, which is a contract term requiring the mortgagee to take certain actions before accelerating a loan and proceeding with foreclosure.

The decision was specifically given prospective effect, as the SJC ruled that strict compliance would only be required for notices sent after July 17, 2015 – confirming that mortgagees will not be penalized for any mistakes sent in earlier notices.

Blank Endorsement and Possession of Promissory Note Sufficient under Florida UCC to Enforce Terms

Summerlin Asset Mgmt. V Trust v. Jackson, No. 9:14-cv-81302, 2015 WL 4065372 (S.D. Fla. July 2, 2015).

Summerlin Asset Mgmt. V Trust v. Jackson, issued in early July, 2015, in the Southern District of Florida, has ramifications in litigation and compliance related to debt buyers, assignees, and debt collectors, including lawyers, proceeding with claims on assigned promissory notes—particularly in the area of debt collection litigation and the pursuit of foreclosure and deficiency proceedings.

First, in a foreclosure proceeding, the court looked to the UCC as applied to negotiable instruments and opined like other courts that, where the assignment came via a "blank indorsement," assignee demonstrating standing and ownership simply by possession of the promissory note. The court stated:

> Plaintiff's possession of the original note, indorsed in blank, is sufficient under Florida's Uniform Commercial Code to establish that it is the lawful holder of the note, entitled to enforce its terms.

Second, in Florida, assignees of debts are required to provide notice of the assignment under Fla. Stat. 559.715. Plaintiffs often bring claims under the FDCPA, Florida Consumer Collection Practices Act, and sometimes other statutes, alleging that the debt buyer, assignee, debt collector or someone else violated the consumer statute by proceeding with collection efforts before the 30 day time contemplated by 559.715 has expired after sending the notice of assignment. Section 559.715 provides as follows:

> 559.715 Assignment of consumer debts.—This part does not prohibit the assignment, by a creditor, of the right to bill and collect a consumer debt. However, the assignee must give the debtor written notice of such assignment as soon as practical after the assignment is made, but at least 30 days before any action to collect the debt. The assignee is a real party in interest and may bring an action to collect a debt that has been assigned to the assignee and is in default.

Importantly, the court held that the failure to comply with 559.715 is not a bar to the commencement of a mortgage foreclosure action, and stated the following:

Plaintiff argues that compliance with Florida Statute section 559.715 is not a condition precedent to the commencement of a mortgage foreclosure action.

The court agrees with Plaintiff. Defendants have not cited, and the court has been unable to find, any case law that supports Defendants' position. Federal district courts in Florida have held that "the purpose and intent of the FCCPA, like the [federal Fair Debt Collection Practices Act ("FDCPA")], is to eliminate abusive and harassing tactics in the collection of debts. It is not meant to preclude a creditor or someone otherwise holding a secured interest from invoking legal process to foreclose." *Trent v. Mortgage Elec. Registration Sys., Inc.,* 618 F.Supp.2d 1356, 1361 (M.D.Fla.2007) *aff'd,* 288 F. App'x 571 (11th Cir.2008). Florida state courts have agreed, and state court decisions on this exact issue have agreed with Plaintiff's position. *See, e.g., Am. Home Mortg. Servicing, Inc. v. Zapico,* No. 11– CA–16648, 2014 WL 5700879 (Fla.Cir.Ct. July 30, 2014); *U.S. Bank, Nat'l Ass'n v. Lord,* No. 12–7707–CI–07, 2014 WL 3674680 (Fla.Cir.Ct. July 10, 2014). Accordingly, failure to comply with Florida Statute section 559.715 will not bar Plaintiff's mortgage foreclosure causes of action.

This case can be argued to also extend to any collection litigation that proceeds before the notice of assignment statutory provision has been fully complied with and the 30 day period has been exhausted.

Massachusetts Appeals court Enforces the HUD Requirement for a Face-to-Face Meeting in Order to Conduct a Proper Foreclosure

Wells Fargo Bank, N.A. v. Cook, 87 Mass. App. Ct. 382 (May 19, 2015)

The borrower/mortgagor in *Wells Fargo Bank v. Cook* had a Housing and Urban Development (HUD) insured loan, which mortgage provided, "Lender may, except as limited by regulations issued by [HUD] Secretary in the case of payment defaults, require immediate payment in full . . . and [i]n many circumstances [HUD] regulations . . . will limit Lender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by [HUD regulations]." The HUD regulations referenced in

the mortgage include a provision that, "a mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three monthly installments due on the mortgage are unpaid." 24 C.F. R. § 203.604(b). In addition to the meeting, the HUD Handbook requires the representative conducting the face-to-face interview to "have the authority to propose and accept reasonable payment plans . . . [because] [t]he interview has little value if the mortgagee's representative must take proposals back to a superior for a decision." HUD Handbook, ¶ 7-7(C)(3). Based on the regulations and handbook, the appeals court reversed the trial court's order granting summary judgment in favor of Wells Fargo so that the finder of fact could determine if there was compliance with the regulations. Unfortunately, this decision did not address how, if ever, a lender could ever foreclose if a timely face-to-face meeting was not conducted.