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Newsletters

Consumer & Class Action Litigation Newsletter - September 2015

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Service Areas

Consumer and Class Action Defense

Consumer Financial Services

Mortgage Servicing and Lender Litigation

First Circuit Holds That Delinquency Advances Do Not Eliminate Default on Mortgage Loan

Ouch v. Federal Nat. Mortg. Ass'n., Nos. 13–1209, 13–1651, --- F.3d ---- , 2015 WL 5001013 (Aug. 24, 2015)

The U.S. Court of Appeals for the First Circuit concluded in *Ouch v. Federal National Mortgage Association* that a borrower's default was not eliminated by a mortgage loan servicer's advancement of funds to the owner of the promissory note because advance payments were not intended to satisfy the borrower's debt.

In *Ouch*, the borrowers executed promissory notes and mortgages granting their lenders the ability to conduct a judicial nonforeclosure sale in the event of default pursuant to Mass. Gen. Laws ch. 244, § 14. The borrowers' loans were sold and transferred into trust, and the trustees entered into agreements with mortgage loan servicers, who assumed responsibility for servicing the loans. The pooling and servicing agreements required the servicers to advance monthly mortgage payments when the borrowers failed to make payments on their loans.

The borrowers claimed that the payments the servicers advanced to the trust were monthly mortgage loan payments, and that, as a result, the borrowers' mortgages were not in default. The First Circuit disagreed and held that the delinquency advances did not eliminate the borrowers' default or prevent the servicers from foreclosing on the borrowers' rights of redemption in the properties securing the debt. The court relied upon the Uniform Commercial Code to conclude that these advances would constitute "payment" of the debt to the trustees if made "by or *on behalf of* a party obliged to pay the instrument. " Money is tendered "on behalf of" a borrower only if the servicer acted "with the intention to satisfy the debt." In that regard, the court found that the servicing agreements between the servicers and trustees demonstrated that the servicers did not have that intention. The servicing agreements provided that "a borrower's failure to pay the debt constitutes a 'default' on the mortgage," and that foreclosure is a specific remedy in the event of borrower default.

For more information, please contact your Hinshaw attorney.

Rhode Island Federal Court Denies Borrower's Standing to Challenge Foreclosure Based Upon Alleged Noncompliance With Pooling and Servicing Agreement

Katherine Caito v. Mortgage Elec. Regis. Sys., *Inc.*, 2015 WL 4480348 (D.R.I. July 21, 2015)

The U.S. District Court for the District of Rhode Island continues to limit the grounds upon which a borrower can challenge his or her mortgagee's authority to foreclose. The borrower in this action sought relief from a pending foreclosure on the grounds that the assignment and transfer of her mortgage violated the terms of the Pooling and Servicing Agreement (PSA) that governed the trust into which her loan was deposited. The borrower further claimed violations of the Internal Revenue Service's regulations governing Real Estate Mortgage Investment Conduits (REMIC). The court denied standing to challenge the PSA because the borrower was not a party. It denied standing to sue under the REMIC regulations because there is no private right of action.

The case and decision turned on the New York Appellate Court's reversal of *Wells Fargo Bank, N.A., as Trustee v. Erobobo*, 127 A.D.3d 1176 (N.Y. App. Div.2015). The borrower had relied upon the lower court's ruling that a borrower has standing to assert a claim for noncompliance with the pooling and servicing agreement to oppose the mortgagee's motion to dismiss. Reversal of the lower court's ruling effectively eliminated any case law the borrower could rely upon to assert standing to sue.

Based upon this decision, it appears that Rhode Island courts, both state and federal, will continue to follow the First Circuit's decisions on borrowers' standing to challenge foreclosure and the assignment of mortgage beginning with *Culhane v. Aurora Loan Servs. of Nebraska*, 708 F.3d 282, 291 (1st Cir. 2013) and particular to pooling and servicing agreement challenges with *Butler v. Deutsche Bank Trust Co. Americas*, 748 F.3d 28 (1st Cir. 2014).

For more information, please contact Samuel C. Bodurtha.

Post-FCC Ruling in Favor of Defendant, a Las Vegas Strip Club, Because a Human Was Involved in Sending Spam Text Messages to Clientele

Luna v Shac LLC, 2015 WL 4941781 (N.D. Cal. Aug. 15, 2015)

This case originated when plaintiff received unwanted texts from defendant, which were sent through a web-based text service. In one of the first court rulings to address the scope of the term "automatic telephone dialing system" (ATDS) after the release of the Federal Communications Commission's (FCC's) July 2015 Declaratory Ruling (2015 Ruling), U.S. Magistrate Judge Howard R. Lloyd granted summary judgment in favor of Sapphire Gentlemen's Club, which is owned by Shac LLC, finding that sufficient human intervention was involved in several stages of drafting and sending the texts. The court rejected plaintiff's argument that human intervention was limited to the act of uploading his phone number to a database maintained by third-party mobile marketing company CallFire Inc. In analyzing the CallFire system Shac used, the court noted that the fact that the system sent text messages from a preprogramed list, rather than randomly or sequentially, did not initially disqualify it as an ATDS. Instead, it was the fact that the CallFire system could not dial numbers without human intervention that ultimately disqualified it as an ATDS.

In holding that Shac's CallFire system was not an ATDS, the court followed *Glauser v. GroupMe, Inc.*, 2015 WL 475111, at *5 (N.D. Cal. Feb. 4, 2015) and *McKenna v. Whisper Text*, 2015 WL 428728 (N.D. Cal. Jan. 30, 2015). Plaintiff filed an appeal to the U.S. Court of Appeals for the Ninth Circuit on September 9, 2015, which is still pending.

The outcome of the case hinged primarily on whether defendant utilized an ATDS to send the texts. In its Order Granting Defendant's Motion for Summary Judgment, the court held that: (1) the capacity to dial numbers without human intervention is required for TCPA liability; and (2) human intervention was required at several points before defendant could send texts (*e.g.*, inputting numbers into the system, typing the message, scheduling the time/date the texts would be sent and pressing a "send" button); therefore, the system was not an ATDS.

Interestingly, while the court cited the 2015 Ruling to support the position that equipment can be an ATDS even if it dials from a list of telephone numbers, it did not address the "potential ability" standard set forth by the FCC in the 2015 Ruling. That may have been a byproduct of the procedural posture of the case, however. Summary judgment briefs were filed approximately one week prior to the date the FCC approved the 2015 Ruling. Oral argument was heard between the date the 2015 Ruling was approved and the date it was released. The focus of the briefs and oral argument, based on prior precedent in the Northern District of California, was whether the equipment had the *present capacity* to dial numbers without human intervention.

After the 2015 Ruling was released, plaintiff filed a Notice of New Authority, asking the court to take judicial notice of the 2015 Ruling and arguing that a system can be an ATDS even if it lacks the present ability to perform the requisite autodialing functions. However, the court found that defendant did not use an ATDS because sufficient human intervention was required before a text could be sent. While the decision and the focus on a human intervention standard are good for businesses that manually dial telephone numbers, the court did not provide much analysis on the issue of present versus potential capacity. Similarly, the court omitted any analysis of whether the 2015 Ruling can be applied retroactively. It will be interesting to see how other courts — especially those that previously adopted a "present capacity" standard — address these issues moving forward.

For more information, please contact Raven E. Mackey and Jonathan D. Drews.