HINSHAW

Newsletters

Consumer Financial Services Newsletter - February 2017

February 13, 2017

Download or read the complete newsletter here: Consumer Financial Services Newsletter

- Seventh Circuit Finds Bank's Response to RESPA Request "Almost Perfect"
- No FDCPA Violation for Attempting to Collect Mortgage Debt Beyond Statute of Limitations
- Proceed Directly to Suit, Do Not Pass Pre-Suit

Seventh Circuit Finds Bank's Response to RESPA Request "Almost Perfect"

Perron v. J.P. Morgan Chase Bank, N.A., Case No. 15-cv-2206 (7th Cir. 2017)

The United States Court of Appeals for the Seventh Circuit recently held that a mortgage servicer's response to a borrower's written request for information complied with the Federal Real Estate Settlement Procedure Act (RESPA). The Court opined that the servicer's response almost perfectly complied and that the borrowers suffered no actual damages and had no viable claim.

By way of background, due to the borrowers' failure to notify the servicer of a change in their home insurance provider, the servicer sent payments to the wrong insurer. The servicer independently learned of the error and promptly paid the premiums to the correct insurer from the escrow account. The servicer then gave instructions to the borrowers that a refund check would be sent to them from the prior insurer and to submit that check to the servicer to replenish the escrow account. The borrowers failed to submit the check and instead pocketed the funds. As a result, the borrowers eventually defaulted on the loan.

Instead of curing the default, the borrowers sent the servicer a qualified written request for information under RESPA. The servicer responded but the borrowers sent a second written request accusing the servicer of failing to provide an adequate response. The servicer treated that second letter as a duplicate request and did not respond. The borrowers then filed suit alleging the servicer violated RESPA and the common law duty of good faith and fair dealing. The district court entered summary judgment in favor of the servicer and the borrowers appealed.

Attorneys

Barbara Fernandez

Service Areas

Consumer Financial Services

The Seventh Circuit concluded that the servicer did not act unreasonably or unfairly as to violate the implied duty of good faith and fair dealing assuming that Indiana would recognize the duty exists in the mortgage servicing context. The Court reasoned that the servicer took the required actions under RESPA regarding the plaintiffs' written request for information and classified the servicer's response as "almost perfect." In addition to the response being almost perfect, the Seventh Circuit ruled that the borrowers did not suffer any actual damages as a result of the alleged failure to comply with RESPA. While the borrowers claimed that it caused their marriage to dissolve, the Court held that the breakdown of a marriage is not the type of harm that compliance of RESPA duties avoids. The Court also foundthat the borrowers failed to produce evidence showing a pattern or practice of RESPA noncompliance to support a claim for statutory damages.

No FDCPA Violation for Attempting to Collect Mortgage Debt Beyond Statute of Limitations

Garrison v. Caliber Home Loan, Inc., Case No. 6:16-cv-978- Orl-37DCI (Order, Jan. 10, 2017)

The Middle District of Florida, in *Garrison v. Caliber Home Loans, Inc.*, granted defendant servicer's motion to dismiss borrower's claims under the Fair Debt Collection Practices Act (FDCPA) and Florida's Consumer Collection Practices Act (FCCPA), holding that the statute of limitations can only be raised as an affirmative defense in a foreclosure action. The borrower initiated the lawsuit based on the servicer's 2015 issuance of mortgage statements seeking past due amounts dating back to 2009. The borrower argued that based on Florida's five-year statute of limitations, the servicer was barred from recovering a portion of the debt since five years had passed since default. The servicer moved to dismiss the lawsuit.

The servicer argued that the borrower's claims under the FDCPA and FCCPA fail because Florida's statute of limitations may only be raised as an affirmative defense, not as an affirmative cause of action. The court distinguished the lawsuit from two Eleventh Circuit decisions cited by borrower, *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1844 (2015) and *Johnson v. Midland Funding, LLC*, 823 F.3d 1334 (11th Cir. 2016), *cert. granted*, 137 S. Ct, 326 (2016). In both *Crawford* and *Midland Funding*, the courts held that bankruptcy debtors may assert adversary proceedings based on a creditor's filing of a proof of claim that is unenforceable under the applicable statute of limitations. The court explained that both *Crawford* and *Midland Funding* were particular to bankruptcy, and therefore did not apply to the borrower's claims that arose outside of the bankruptcy context. The court granted servicer's motion to dismiss the FDCPA and FCCPA claims, and held that the statute of limitations is not an affirmative cause of action in and of itself, and "should be raised – if at all – as an affirmative defense to an actual collection or foreclosure action." *Garrison*, No. 16-978, *16.

Proceed Directly to Suit, Do Not Pass Pre-Suit

Settlement *Moronta v. Nationstar Mortgage, LLC*, SJC-12042, 476 Mass. 1013 (Dec. 22, 2016)

Massachusetts' highest court recently loosened the requirements for borrower's consumer protection claims under the Massachusetts Consumer Protection Action (General Laws c. 93A, § 9) (Chapter 93A), which if successful, can result in up to treble damages and attorneys' fees awards to borrowers. The sole issue on appeal was an interpretation of Chapter 93A's pre-suit demand letter requirements. The mortgagee argued that the borrower must serve a demand letter unless the respondent has neither a place of business nor assets in the Commonwealth.

By contrast, the borrower argued that a pre-suit demand letter was not required if the mortgagee either lacked a place of business or kept assets in Commonwealth. The issue has vast implications as this provision is commonly used by corporations doing business in Massachusetts (including many lenders and servicers of residential mortgage loans) to defend against consumer protection claims brought by consumers.

The Court analyzed the statutory language and concluded that the Legislature could not have intended a consumer to undertake a daunting task of verifying both that the respondent lacked an office and lacked assets before proceeding with suit. The end result is a "win" for consumers as the pre-suit demand is effectively eliminated when asserted against a corporation with no offices in Massachusetts allowing a consumer to proceed directly to suit. These foreign corporations no longer have a defense to consumer protection claims and will have to litigate these matters risking a possible attorneys' fee award and treble damages in favor of the consumer. The Court acknowledged in its opinion that while the demand letter requirement is intended to encourage settlement of disputes and limit damages, its ruling does not place mortgagees in a worse position as they have the option to make written offers of settlement and pay the rejected tender

into Court. But, the impact of the decision and interpretation remains to be seen as the opinion also eliminates pre-suit settlement discussions that may have discouraged the filing of meritless claims. As the pre-suit demand has effectively been eliminated for many corporations doing business in Massachusetts, this decision may result in more Chapter 93A actions filed in state court against lenders and servicers with offices outside of the Commonwealth.

Download or read the complete newsletter here: Consumer Financial Services Newsletter