# Consumer Financial Services Newsletter - May 2017

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### Southern District of California Denies Certification of Wrong Number TCPA Class

On March 28, 2017, the Southern District of California denied class certification in a case arising under the TCPA. Plaintiff alleged that defendant AT&T repeatedly called his cell phone beginning in June 2013 continuing through December 2015, even though he had no account with AT&T. Plaintiff also alleged that on two of the calls, he informed AT&T that they had the wrong number. Nevertheless, the calls continued. Plaintiff filed a series of amended pleadings, all of which through the Third Amended Complaint, defined the class as persons who received violative calls "whose phone number was obtained by skip tracing or through other third parties."

Plaintiff then requested leave to file a Fourth Amended Complaint, which defined the class as those who received violative calls when "Defendant had reached a 'wrong number' or similar notation in defendant's records." The Court denied plaintiff leave to file his Fourth Amended Complaint due to plaintiff's failure to show good cause under Rule 16(b). In particular, plaintiff failed to explain the delay in filing his motion for leave to amend given his knowledge of the facts and his filing of prior several amended complaints.

Regardless, plaintiff filed a motion for class certification anyway seeking to certify the class alleged in his proposed Fourth Amended Complaint, for which leave to file had been denied, as opposed to the class definition in the pending Third Amended Complaint.

In denying class certification, the Court held that in some cases it may be permissible for a plaintiff to certify a class which is narrower than the class defined in the pending complaint. That was not the case in this instance,

## Attorneys

Dana B. Briganti

Todd P. Stelter

## Service Areas

Consumer Financial Services

instead, plaintiff attempted to certify an entirely different class from the class definition contained in the pending Third Amended Complaint. The Court held that this was not permitted. Further, the Court held that it would not allow plaintiff to make an end-run around the Court's decision to deny plaintiff leave to file the Fourth Amended Complaint, by allowing the new class definition to be certified even though it was never properly plead. The Court further denied class certification because a search of defendant's records for calls with "wrong number" notations would not resolve consent issues on a classwide basis.

Read the Southern District of California decision here:
*Eric Davis v. AT&T Corp.*, Case No.: 15-cv-2342-DMS (DHB) (S.D. Cal., March 28, 2017).

**Second Circuit Weighs in on What Constitutes an "Initial Communication" Under the FDCPA**

*Carlin v. Davidson Fink LLP*, 852 F.3d 207 (2d Cir. 2017)

On March 29, 2017, the United States Court of Appeals for the Second Circuit clarified what constitutes an "initial communication" and whether a Payoff Statement sent by the debt collector adequately stated the amount of the debt under the FDCPA. In *Carlin v. Davidson Fink, LLP*, the plaintiff-debtor filed a putative class action against the defendant-debt collector. The debtor alleged that the debt collector violated 15 U.S.C. §1692g(a) when it failed to provide the "amount of the debt" within five days after an initial communication.

The debt collector filed a foreclosure complaint, which included a notice required by the FDCPA referring the debtor to the Complaint for the amount of the debt and stating that he had thirty days to dispute the validity of the debt. Following the filing of the foreclosure action, the debtor sent the debt collector a letter disputing the validity of the debt and requesting a verification of the amount purportedly owed. In response, the debt collector mailed a letter to the debtor, including a payoff statement, and further indicated it was valid through a certain date. The payoff statement included a total amount due and stated that amount "may include estimated fees, costs, additional payments and/or escrow disbursements that will become due prior to" a certain date. However, it did not indicate what those estimated fees, costs, or additional payments were for or how they were calculated.

The debt collector moved to dismiss the complaint, which the trial court, upon reconsideration, granted. On appeal, the Second Circuit held that the foreclosure complaint did not constitute an initial communication, concluding "that even documents that are superfluously attached to a formal pleading are not initial communications within the meaning of the FDCPA." The Court further held that the debtor's initial letter to the debt collector did not constitute an initial communication, determining that communications initiated by a debtor to a debt collector are not initial communications under the FDCPA.

However, the Second Circuit held that the subsequent letter with attached payoff statement was an initial communication within the meaning of the FDCPA.

Further, the Court concluded that the payoff statement did not adequately "state the amount of the debt" under §1692g(a). The Court noted that the payoff statement did not specify the estimated costs and additional payments, leaving it unable to determine whether those amounts were properly part of the amount of the debt. As such, absent fuller disclosure, an unsophisticated consumer may not understand how these fees are calculated, whether they may be disputed, or what gives rise to these fees. The Second Circuit emphasized that debt collectors can take measures to shield themselves from FDCPA liability by revising their standard payoff statements or by including the safe harbor language expressed under *Avila v. Riexinger & Assocs., LLC*, 817 F.3d 72 (2d Cir. 2016).

Read the Second Circuit Opinion here:
*Carlin v. Davidson Fink LLP*, 852 F.3d 207 (2d Cir. 2017)

**Seventh Circuit Provides Some Guidance on the Issue of Article III Standing**

In May 2016, the decision, *Spokeo, Inc. v. Robins,* 136 S.Ct. 1540, 1549 (2016), initially was thought to be one that would deter consumer litigation based on technical violations of statutes. The post-*Spokeo* world was not as clear as many thought it would be. Federal courts around the country, despite *Spokeo*, still came to the conclusion that a plaintiff could maintain standing for a claim of a statutory violation because the claimed violation was "one that Congress has elevated to the status of a legally cognizable injury," was "sufficient on its own to constitute an injury in fact," and that a plaintiff "need not establish further concrete harm" outside of a statutory violation. Many in the consumer litigation community were both surprised and disappointed in these decisions because they appeared to be at odds with the Supreme Court's guidance in *Spokeo*.

Many of these decisions relied on the Eleventh Circuit's per curiam decision in *Church v. Accretive Health, Inc.*, 654 Fed. Appx. 990 (11th Cir. 2016). *Church* held that the plaintiff had standing by virtue of a claimed statutory violation because Congress had elevated that violation of statute to the status of a legally cognizable injury. This decision appeared to be in direct conflict with *Spokeo*, yet *Church* has been cited favorably on numerous occasions.

The Seventh Circuit may have altered the standing landscape in two critical decisions issued this winter. First, *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724 (7th Cir. Dec. 13, 2016), rejected the plaintiff's claim that he had Article III standing by virtue of a claimed violation of the Fair and Accurate Credit Transactions Act that caused him no harm. *Meyers* cited *Spokeo* and explained that "Congress does not have the final word on whether a plaintiff has alleged a sufficient injury for purposes of standing." Of perhaps even more importance is that the Seventh Circuit explained that whether a claim is for a "substantive" or a "procedural" violation is not relevant, as the only question is whether any claim for a statutory violation was accompanied by an injury-in-fact. About a month later, the Seventh Circuit reaffirmed the elimination of this distinction in *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909 (7th Cir. Jan. 20, 2017), wherein the Court also rejected the plaintiff's argument that he had standing when he failed to show that the claimed statutory violation was harmful to him.

These two Seventh Circuit holdings are important for a few reasons. First, the elimination of the "substantive" and "procedural" distinction helps to combat the effect of cases that found a plaintiff to have standing by virtue of more technical violations, including those for failure to disclose certain statutorily required information. After *Meyers* and *Gubala*, the fact that a plaintiff can sue for a more "substantive" type of violation is of no consequence if the violation does not cause any injury. The elimination of this distinction appears to have made the Seventh Circuit one of the more "friendlier" circuits when it comes to the issue of Article III standing. Secondly, these two cases offer potentially significant authority in support of the proposition that a violation of a consumer protection statute must actually result in harm to the plaintiff. While *Meyers* and *Gubala* appear to have brought some certainty on the issue of Article III standing to the Seventh Circuit, only time will tell to see if they result in the same impact that much of the consumer community thought that *Spokeo* would bring.

Read the two Seventh Circuit opinions here:
*Myers v. Nicolet Rest. Of De Pere, LLC*, 843 F.3d 724 (7th Cir. Dec. 13, 2016)
*Gubala v. Time Warner Cable, Inc.,* 846 F.3d 909 (7th Cir. Jan. 20, 2017)

**Massachusetts Court Clarifies Compliance Requirements for Foreclosure Sale Provisions**

*Turra v. Deutsche Bank Trust Company Americas*, 68 N.E.3d 631 (Mass. 2017)

In a decision providing important clarification on prior precedent, the Supreme Judicial Court of Massachusetts ("SJC") in *Turra v. Deutsche Bank Trust Company Americas*, 68 N.E.3d 631 (Mass. 2017), recently upheld the validity of a foreclosure sale despite the foreclosing mortgagee's failure to strictly comply with the power of sale provisions set forth in M.G.L. c. 244, §§ 11-17C. The SJC affirmed the lower court's finding that the bank's failure to send the requisite post-foreclosure notices required under M.G.L. c. 244, § 15A did not render the foreclosure sale void.

The borrower executed a mortgage, ultimately assigned to the bank, on which the borrower later defaulted. The bank's loan servicer then notified the borrower of the default and foreclosed on the property. Soon thereafter, the borrower commenced an action alleging that the foreclosure sale was void based on the failure to strictly comply with § 15A, which, as he argued, falls within the provisions regulating a mortgage holder's power of sale in §§ 11–17C.

Previously, the SJC stated in prior cases, most notably *U.S. Bank Nat. Ass'n v. Ibanez*, 941 N.E.2d 40, 49–50 (Mass. 2011), that the power of sale granted to a mortgagee "must follow strictly its terms" or the foreclosure sale will be "wholly void." In dicta, the SJC defined these powers to be regulated within §§ 11-17C. This reference was thereafter propelled through several subsequent decisions, including *Pinti v. Emigrant Mortg. Co.*, 33 N.E.3d 1213, 1224 (Mass. 2015), which ultimately led courts to infer that strict compliance is absolutely required for any provision within the §§ 11-17C grouping.

Presented with an opportunity to explain its earlier holdings, the SJC, here, elected to resolve any doubt regarding its original interpretation. The Court acknowledged "that some of the language in our prior cases may have suggested that the failure to strictly comply with any provision contained in G. L. c. 244, §§ 11–17C, will render a foreclosure void. That was not our intent." Unlike those earlier cases, the relevant provision in *Turra*, § 15A, while included in §§ 11-17C, relates to post-foreclosure conduct involving notice to potential third parties—not the mortgagor. As the Court reasoned, the motivating factors in protecting a mortgagor during the foreclosure process are not present in § 15A's requirements because it does not impact the mortgagee's right to foreclose.

The *Turra* decision is likely to have far-reaching implications in Massachusetts. Not only did the SJC hold that strict compliance does not automatically apply to all power of sale provisions within §§ 11-17C, but it also provided important guidance for determining when a mortgagor may be deemed to be unjustly deprived of his or her property. While it is always recommended that lenders, servicers, and other financial institutions comply to the best of their ability with the requirements of applicable law, to the extent there is any deviations in post-foreclosure conduct, as far as the SJC has held, such deviations will not jeopardize the validity of the sale or any effect thereof.

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