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Newsletters

Consumer & Class Action Litigation Newsletter - March 2012

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FCC Adopts Final Rule for TCPA and Does Not Require Prior Written Consent for Nontelemarketing Calls

On February 15, the Federal Communications Commission (FCC) voted on its final rulemaking regarding its Notice of Proposed Rulemaking (NPRM) implementing the Telephone Consumer Protection Act (TCPA). The commission's final rule does not include its original proposal to require prior express written authorization to call a consumer's wireless number when utilizing an automatic telephone dialing system or prerecorded message for informational calls. Rather, the FCC revised its consent rules to require prior written consent only for telemarketing calls. The rules for nontelemarketing calls will continue to permit oral consent if made to wireless consumers and other specified recipients, and to require no prior consent if made to residential lines.

Action by the Commission February 15, 2012, by Report and Order (FCC 12-21)

Attorneys General and Federal Government Secure $25 Billion Settlement With Mortgage Servicers

In what is the largest settlement obtained by the state attorneys general except for the 1998 Tobacco Settlement, the five leading bank mortgage servicers—Ally Financial, Bank of America, Citigroup, JPMorgan and Wells Fargo—have agreed to pay approximately $25 billion in monetary sanctions and relief. Following months of investigation and negotiations, which began over allegations of "robo-signing" in connection with mortgage foreclosure proceedings, the settlement includes not just monetary relief but also comprehensive reformation of loan mortgage servicing practices. The new servicing standards will include required loss mitigation review prior to foreclosure referral, full disclosure of legal standing to foreclose, and restrictions on default and other late fees.

The settlement will be reflected in a court-approved consent judgment, and will remain in effect for 3.5 years. It is unclear whether borrowers will have a private right of action to enforce the terms of the settlement. We will keep our readers apprised of the status of the consent judgment, as well as the implications for future mortgage foreclosure litigation.

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Borrowers' Claims Related to Alleged "Robo-Signing" in Mortgage Foreclosures Barred If Not Raised in Original Foreclosure Action

In *Smalley v. Shapiro & Burson,* No. JFM-11-906 (D. Md. Jan. 26, 2012), the U.S. District Court for the District of Maryland held that plaintiff borrowers' claims for alleged common law fraud, violations of the Fair Debt Collection Practices Act (FDCPA), and other statutes were barred by *res judicata* because the borrowers had failed to raise the claims in the underlying foreclosure case.

The class action plaintiffs, two Maryland homeowners, sued over alleged improprieties in the foreclosure process, including the alleged use of affidavits that were "robo-signed" by lawyers and paralegals who allegedly had failed to verify that the foreclosing lender was entitled to foreclose. The homeowners also claimed that nonlawyers signed attorneys' names to certain documents used in the foreclosures.

After the state court foreclosure cases were litigated to final judgments, the homeowners filed a separate class action lawsuit in federal court, seeking damages under the FDCPA, the Maryland Consumer Protection Act, and other statutes. The homeowners argued that attorneys' fees assessed against them in the state court foreclosure cases were improper because of the alleged "robo-signing" activities.

The court dismissed the case in its entirety, ruling that the homeowners could have raised their claims in the state court foreclosure proceedings. Because those proceedings were litigated to final judgments, the court ruled that *res judicata* barred the homeowners from bringing a new lawsuit for damages allegedly incurred in the foreclosure case. The court rejected the homeowners' argument that *res judicata* did not apply because the homeowners did not become aware of the alleged "robo-signing" until after foreclosure cases were fully litigated. The court held that "[t]he fact that plaintiffs may not have been aware of the existence of their claims during the litigation of the previous action does not render the doctrine of claims preclusion from being applicable."

Smalley v. Shapiro & Burson, No. JFM-11-906 (D. Md. Jan. 26, 2012)

Second Circuit Court of Appeals Again Finds A Class-Action Waiver Unenforceable

The U.S. Court of Appeals for the Second Circuit has held, for the third time in the same antitrust litigation, that a class-action waiver contained in a contract's arbitration provisions is unenforceable where the waiver's practical effect would be to preclude the plaintiff from pursuing his or her "statutory rights." *See American Express Merchants' Litigation*, No. 06–1871, 2012 WL 284518 (2d Cir. Feb. 1, 2012) (Amex III). It did so despite: the U.S. Supreme Court's *vacatur* of the first of those three decisions (*American Express Co. v. Italian Colors Rest.,* 130 S. Ct. 2401 (2010), *vacating American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009) (*Amex I*)); as well as the signals in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 130 S.Ct. 1758 (2010), *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *Affiliated Computer Services, Inc. v. Fensterstock,*131 S. Ct. 2989 (2011) that the "Roberts Court" favors enforcement of class arbitration waivers.

In the *Amex* cases, plaintiffs, and the members of the class they seek to represent, are merchants who accuse defendant financial services company of a tying arrangement, in violation of the Sherman Act, 15 U.S.C. § 1, involving its charge card and its credit card. In *Amex I*, the Second Circuit held that enforcement of the class-arbitration waiver would "deprive [plaintiffs] of substantive rights under the federal antitrust statutes." The financial services company filed a petition for a writ of *certiorari*. While the petition was pending, the Supreme Court decided *Stolt-Nielsen*, a case involving allegations of price fixing in violation of federal antitrust laws. Reversing the Second Circuit, the Supreme Court held that the arbitrators exceeded their authority in ordering a class arbitration because the parties' agreement did not expressly authorize one. Two weeks later, the Supreme Court granted the financial services company's petition, vacated the Second Circuit's decision in *Amex I* based on *Stolt-Nielsen*, and remanded to the Second Circuit for further consideration.

On remand, the Second Circuit adhered to its opinion in *Amex I*, and again held that the waiver was unenforceable because it "precludes plaintiffs from enforcing their statutory rights. *See American Express Merchants' Litigation,* 634 F.3d 187 (2d Cir. 2011) (Amex II). In so doing, the Second Circuit relied in part on its decision in *Fensterstock v. Affiliated Computer Services, Inc.,* 611 F.3d 124 (2d Cir. 2010), where the court read *Stolt-Nielsen* narrowly. About a month after the Second Circuit decided *Amex II*, the Supreme Court revisited class arbitration waivers in *AT&T*, reversing a decision of the U.S. Court of Appeals for the Ninth Circuit and holding that a class arbitration waiver in a cell phone agreement was

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enforceable under the Federal Arbitration Act, despite contrary state law. Several weeks later, the Supreme Court granted a petition for *certiorari* in *Fensterstock,* vacated the Second Circuit's decision in light of *AT&T*, and remanded the case to the Second Circuit. On remand, the Second Circuit acknowledged that its priorrationale was no longer viable. *Fensterstock v. Affiliated Computer Services, Inc.,*426 Fed. Appx. 14, 2011 WL 2580166 (2d Cir. June 30, 2011).

Faced with the Supreme Court's decision in *AT&T* (and, presumably, the vacatur in *Fensterstock*), the Second Circuit *sua sponte* decided to rehear *Amex II*. In February 2012, in *Amex III*, it decided to continue to read the Supreme Court's pronouncements narrowly and to distinguish the situation before it because it involved federal "statutory rights."

(Hinshaw & Culbertson LLP represented the defendant in the *Fensterstock* cases.)

Documents Relating to Original Loan Transaction Proper Inquiry for Qualified Written Request (QWR) Pursuant to RESPA

In *Junod v. Dream House Mortg. Co.,* 2012 WL 94355 (C.D. Cal. Jan. 5, 2012), the U.S. District Court for the Central District of California ruled that documents relating to the original loan transaction and its subsequent history do not fall within the confines of a Qualified Written Request (QWR) pursuant to the Real Estate Settlement Procedures Act (RESPA). In *Junod*, plaintiffs in their purported QWR requested documents such as: true and present copy of the promissory note and deed of trust; a complete life of loan transactional history; and name, address and telephone number of a contact person for the current holder in due course and owner of the mortgage note. Plaintiffs asserted that defendant refused to produce a certified copy of the original promissory note. The court ruled that the all-encompassing request for documents and records are not the type of information that RESPA contemplates, as the purported QWR did not request information directed to the servicing of a loan. The court further held that plaintiffs purported QWR and document requests were unrelated to the servicing of the loan and that the request was largely for documents relating to the original loan transaction and its subsequent history.

This decision is consistent with the recent federal court decisions that QWR requests seeking information on the validity of the loan and mortgage documents (such as documents relating to the original loan transaction and its subsequent history) simply do not fall within the confines of RESPA. See *Obot v. Wells Fargo Bank, N.A., No.* C11–00566, 2011 WL 5243773, at *2 (N.D. Cal. Nov**.** 2, 2011);*Patton v. Ocwen Loan Servicing, LLC,* No. 6–11–cv445–Orl–19, 2011 WL 1706889, at *3 (M. D. Fla. May 5, 2011); *Petracek v. Am. Home Mortg. Servicing,* No 2:09–cv–001403, 2010 WL 582113, at *3 (E.D. Cal. Feb. 11, 2010).

Junod v. Dream House Mortg. Co., 2012 WL 94355 (C.D. Cal. Jan. 5, 2012)

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