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Newsletters

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Third Circuit Holds That FDCPA Section 1692g(a) Claim Must Be Filed Within One Year of Initial Communication

In *Peterson v. Portfolio Recovery Associates, LLC,* 2011 WL 2181508 (3d Cir. 2011), plaintiff debtor sued, alleging that defendant debt collector had failed to provide a validation notice pursuant to Section 1692g(a) of the Fair Debt Collection Practices Act (FDCPA). In December 2003, the debt collector sent a letter to the debtor at an address believed to be the latter's residence. The debtor did not receive the letter.

In 2007, the debt collector made a series of telephone calls attempting to collect the debt. The debtor denied that he owed the debt and gave the debt collector his then-current address. In 2008 and 2009, the debt collector sent debtor letters (and electronic mail) in an effort to settle the debt and learn more about the debtor's identity-theft claim. None of the debt collector's communications with the debtor in 2007, 2008 or 2009 included a validation notice pursuant to the FDCPA.

The District Court granted the debtor's motion for summary judgment, holding that the 2003 letter did not satisfy Section 1692g(a) because it was not actually sent to the debtor's address. The Court further held that the debt collector was obligated to provide a new validation notice when it made its initial contact with the debtor by telephone in 2007. Last, the Court reasoned that the one-year statute of limitations did not apply because the debt collector's 2008 and 2009 letters could serve as a basis for a "non-time-barred action."

On appeal, the U.S. Court of Appeals for the Third Circuit rejected the argument that the FDCPA claim was timely based on the 2008 and 2009 communications and reversed the District Court's entry of summary judgment in favor of the debtor. The Third Circuit recognized that: (1) there can only be *one* initial communication between a debt collector and a consumer, and (2) communications between a debt collector and a consumer after the initial contact are irrelevant for the purposes of the FDCPA's validation notice requirements. As such, the Appellate Court declined to apply the "continuing violations" rule, which would serve to "re-set the statute of limitations clock" with each subsequent communication sent without notice. Instead, the Court, following other federal circuit court decisions, reasoned that the FDCPA's statute of limitations should begin to run on the date of the debt collector's last

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opportunity to comply with the act (i.e., five days after the first communication). Based on the facts presented in this case, the Third Circuit held that the one year statute of limitations began to run five days after the debt collector's first communication with the debtor in 2007, and that his claim filed in June 2009, was untimely as a matter of law.

Peterson v. Portfolio Recovery Associates, LLC, case nos. 10-2824 & 10-4013, 2011 WL 2181508 (3d Cir. June 6, 2011).

Borrower's Challenge to Initiation of Foreclosure Proceedings Dismissed as Time-Barred and for Lack of Standing

In *Kelly v. Deutsche Bank National Trust Company, as Trustee for Soundview Home Loan Trust 2006-OPT3, Asset-Backed Certificates, Series,* 2006-OPT3, C.A. No. 2011-10328 (D. Mass.), plaintiff borrower refinanced his mortgage on December 30, 2005, with a loan from a lender. The borrower defaulted on his payments and defendant bank, in its capacity as trustee-holder of the mortgage, initiated foreclosure proceedings and scheduled a foreclosure sale for February 16, 2011. On February 4, 2011, the borrower sued the bank, seeking rescission of the loan and challenging the bank's authority to foreclose on the basis of the transfer of his promissory note and the mortgage.

The borrower alleged that he had the right to rescind the loan because the lender had failed to provide two copies of the notice of right to cancel the loan transaction, and thus violated the Massachusetts Consumer Cost Credit Disclosure Act (MCCCDA), Mass. Gen. Laws ch. 140D, §10a (Massachusetts' state law counterpart to the federal Truth in Lending Act). A borrower's right of rescission under the MCCCDA expires four years after the date the loan transaction is consummated. The borrower's rescission right in this case thus expired on December 30, 2009. The borrower claimed that the four-year limitations period did not apply because he was seeking rescission by way of recoupment, and the MCCCDA provides that "[n]othing in this section shall be construed so as to affect a consumer's right of recoupment under the laws of the commonwealth." Mass. Gen. Laws ch. 140D, §10(i)(3).

The Court dismissed the borrower's rescission claim because he was attempting to use recoupment not as a defense but as a means to obtain affirmative relief in a request that the Court cancel his debt. The Court found that recoupment is an affirmative defense that may only serve to reduce or extinguish a plaintiff's claim and cannot result in affirmative recovery for a defendant.

The borrower also alleged that the bank lacked the authority to initiate foreclosure proceedings under Massachusetts law because it was not the holder or possessor of the promissory note executed in favor of the lender. The Court dismissed this claim because Massachusetts' foreclosure statute did not require the bank to demonstrate that it was holder of the note. Mass. Gen. Laws ch. 244, §14. The Massachusetts foreclosure statute only addresses mortgagees and does not make any reference to the holder of the note. Accordingly, the bank did not have to prove possession of the note in order to initiate foreclosure.

Finally, the borrower alleged that the bank lacked authority to initiate foreclosure proceedings because it did not acquire his mortgage and note in accordance with the terms of the pooling and servicing agreement. The Court dismissed that claim for lack of standing. The Court found that the borrower could not challenge the bank's authority to initiate foreclosure proceedings under the terms of the pooling and servicing agreement because he was neither a party to, nor third-party beneficiary of the agreement. Absent proof that the borrower was a party to the pooling and servicing agreement or a third-party beneficiary of it, which was not the case, the borrower had no legal basis to enforce the pooling and servicing agreement.

John A. Kelly v. Deutsche Bank National Trust Company, as Trustee for Soundview Home Loan Trust 2006-OPT3, Asset-Backed Certificates, Series, 2006-OPT3, C.A. No. 2011-10328 (D. Mass. June 9, 2011).

The "Unsophisticated Consumer" Knows Something . . . Finally

In *Franklin v. CCB Credit Services, Inc.,* the Court applied Seventh Circuit case law in a ruling on a motion for summary judgment and helped reduce some confusion about the unsophisticated consumer standard. Plaintiff debtor received correspondence from a creditor that if he did not pay his tuition bill, it would be sent to a collection agency and a collection fee of 33 percent would be added to the amount due. The debtor did not pay his bill and when he received a collection letter from defendant debt collector, the amount owed included the 33 percent collection fee. The debtor, a frequent Fair Debt Collection Practices Act (FDCPA) filer, filed yet another FDCPA lawsuit.

The Court stated that "[i]mportantly, the unsophisticated consumer is not relieved of all responsibility" and "is imputed with knowledge of the account history. . . . This may include why the debt was incurred, and the contents of collection letters, among other things." The Court stated further that "[i]ndeed, the hypothetical standard means little without knowledge of the debtor's account history, which may include creditor correspondence."

The Court ruled in favor of the debt collector on most of the claims and stated that the collection letter did not facially violate the FDCPA, "because an unsophisticated consumer would not be clearly misled given this account history." However, the Court reserved for trial is the issue of whether it is within the skill set of the unsophisticated consumer to "realize that $497 plus 33% equals $661."

The good news for creditors and debt collectors is that the unsophisticated consumer's knowledge clearly includes the account history of the debt and the contents of recent correspondence from creditors and debt collectors. However, the question of the level of the unsophisticated consumer's math skills remains murky.

On another note, the Court confirmed that the following contract language clearly authorized the addition of a collection fee to the debt: "I authorize [the creditor] to collect any and all fees associated with my account." The Court stated that "authorization may be express without being acutely specific" and thereby rejected the debtor's argument that the contract language was too vague to explicitly authorize a collection fee of 33 percent.

Franklin v. CCB Credit Services, Inc, case no. 09-cv-5307 (N.D.Ill. June 15, 2011).

Sanctions Levied Against Borrowers and Their Attorney in Attempted Mortgage Elimination Scheme

In an appeal arising out of a foreclosure action, the Florida Third District Court of Appeals in *JP Morgan Chase Bank, N.A. v. Hernandez,* No. 3D10-1099, 2011 WL2499641 (Fla. 3d DCA, June 22, 2011) recently awarded plaintiff lender appellate attorney's fees and sanctioned defendant borrowers and their attorney. The borrowers had recorded a new, unilateral promissory note, which purported to change the lender into a borrower and borrowers into lenders in an effort to avoid a final judgment of foreclosure and foreclosure sale. Inexplicitly, the borrowers and their attorney convinced the trial court that a mere letter of tender and fabricated unilateral note without payment of any kind was sufficient to discharge the debt. The trial court dismissed the foreclosure complaint with prejudice.

The Appellate Court reinstated the lawsuit and granted the lender's motion for appellate attorney's fees and sanctions against both the borrowers and their attorney, jointly and severely. In addition, the borrowers' attorney was referred to the Florida Bar for its determination of whether professional discipline was warranted.

JP Morgan Chase Bank, N.A. v. Hernandez, No. 3D10-1099, 2011 WL2499641 (Fla. 3 DCA, June 22, 2011).