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Newsletters

Consumer & Class Action Litigation Newsletter - June 2011

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Building Manager Is Not a "Debt Collector" Under the FDCPA

A dispute arose when defendant building manager filed suit in state court to have plaintiff tenant evicted. The trial court entered an eviction order, but the Illinois Appellate Court reversed. One of the Appellate Court justices opined that there was a violation of the Fair Debt Collection Practices Act (FDCPA). Thereafter, the tenant filed a federal suit contending that the building manager violated the FDCPA by telling a credit bureau that she owed rent, without informing it that she disputed that position, in violation of 15 U.S.C. § 1692e(8), and by misrepresenting the status of the debt during the state litigation, in violation of 15 U.S.C. § 1692e(2)(A).

The U.S. Court of Appeals for the Seventh Circuit held that the service manager for the building owner was not a "debt collector" under the FDCPA. The Court observed that an entity that tries to collect money owed to itself is outside the FDCPA. The FDCPA excludes not only the original creditor, but also any person who tries to collect a debt that was not in default at the time it was "obtained" by such a person. Other federal appellate courts have concluded that if a servicing agent for a mortgage loan obtains the debt, though the bank owns the note, the agent is not a debt collector. The question of whether this is also true of a servicing agent for a lessor had never arisen in an appellate court, at least in any precedential case.

The federal district courts have uniformly held that a servicing agent who "obtains" the debt when a lease is signed is not a debt collector under the FDCPA. The staff of the Federal Trade Commission has also concluded that the managing and servicing agent for a lessor or condominium association "obtains" the debt when it becomes a creditor's agent and thus is not debt collector unless the debt was in arrears when the agent assumed that role. The U.S. Court of Appeals for the Seventh Circuit concluded that a servicing agent "obtains" a debt in the sense it acquires the authority to collect money on behalf of another, and that under 15 U.S.C. § 1692a(6)(f)(iii), the servicing agent is not a debt collector and does not owe a plaintiff any duties under the FDCPA.

The significance of this case is that a federal appellate court—the Seventh Circuit—has now held that a servicing agent for a building manager is not subject to the FDCPA and does not owe a plaintiff any duties under the act. The only exception would be if the servicing agent "obtains" the debt when it is in default.

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Geaniece D. Carter v. AMC, LLC, 2011 WL 1812524 (7th Cir. May 13, 2011).

For further information, please contact your regular Hinshaw attorney.

Florida Appellate Court Holds That Borrower Does Not Waive Right to Attorneys' Fees When Claim Is Not Pled in Motion to Dismiss Foreclosure Action

In *Nudel v. Flagstar Bank, FSB, et al.,* 2011 WL 1878127 (4th Dist. May 18, 2011), the Florida Fourth District Court of Appeals held that defendant homeowner was entitled to recover attorneys' fees as a prevailing party in a mortgage foreclosure action under Fla. Stat. § 57.105(7) (2009), after the court dismissed the case without prejudice upon the homeowner's motion to dismiss.

Plaintiff bank sued the homeowner to foreclose a mortgage. Under the mortgage, the bank was entitled to recover reasonable attorneys' fees and costs incurred in the foreclosure proceedings. The borrower was thus entitled to recover fees and costs as well under Section 57.105(7), which provides:

If a contract contains a provision allowing attorney's fees to a party when her or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

The homeowner moved to dismiss the complaint for lack of standing, as the nominee for the original lender had not assigned the subject mortgage to the bank until after the complaint was filed. The court granted the motion to dismiss without prejudice and the homeowner moved for fees and costs under the subject mortgage's fee provision.

The circuit court denied the motion for fees and costs, accepting the bank's argument that the homeowner had waived entitlement to fees as she had not sought them in her motion to dismiss. The Florida Supreme Court, in *Stockman v. Downs,* 573 So. 2d 835 (Fla. 1991), had set forth the general rule that attorneys' fees must be pled or they are deemed waived. Later, the Court, in *Green v. Sun Harbor Homeowner's Ass'n,* 730 So. 2d 1261, 1263 (Fla. 1998), explained that the pleading requirement referred only to complaints, answers and counterclaims. Thus, the Fourth Circuit Court of Appeals held that the homeowner had not waived her entitlement to seek fees as she was not required to have pled entitlement to fees in a motion to dismiss. Furthermore, the homeowner was considered the prevailing party pursuant to section Fla. Stat. § 57.105(7), even though the suit was dismissed without prejudice. This is the case even in circumstances where a plaintiff subsequently refiles the same lawsuit and ultimately prevails.

Tatyana Nudel v. Flagstar Bank, FSB, et al., 2011 WL 1878127 (4th Cir. May 18, 2011).

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Statute of Limitations Is Tolled During Period of Pending Class Action

In *Sawyer v. Atlas Heating and Sheet Metal Works, Inc.,* 2011 WL 2039663 (7th Cir. May 26, 2011), the U.S. Court of Appeals for the Seventh Circuit held that where a plaintiff voluntarily dismisses a class action, the statute of limitations is tolled during the period in which the case was pending.

The suit arose from an unsolicited fax sent by defendant HVAC contractor to a number of individuals. On May 18, 2009, a bank that received the fax filed a class action complaint in Wisconsin state court alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. §227. The statute of limitations for this cause of action is four years. On March 16, 2010, the bank voluntarily dismissed the complaint prior to a ruling on class certification. At this point, it had been over four years since the faxes had been sent. Plaintiff, another individual who received the fax from the contractor, moved to intervene in the suit. That motion was denied. The individual movant then filed his own class complaint on March 19, 2010, which was removed to the U.S. District Court for the Eastern District of Wisconsin. The contractor subsequently moved to dismiss, claiming that the complaint was time-barred. The district court denied the motion, holding that the limitations period was tolled during the period in which the bank's suit was active. The contractor then filed an interlocutory appeal.

The Seventh Circuit cited U.S. Supreme Court precedent for the proposition that, "the commencement of a class action

suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 544 (1974). The Court emphasized that the individual movant had no way to stop the bank from dismissing the original suit. For these reasons, the Seventh Circuit affirmed the judgment of the district court allowing the class action to proceed.

Sawyer v. Atlas Heating and Sheet Metal Works, Inc., 2011 WL 2039663 (7th Cir. May 26, 2011).

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Debt Collection Agency Operating Under Assumed Name Did Not Violate FDCPA

The court in *Mahan v. Retrieval-Masters Credit Bureau, Inc.,* held that defendant debt collection agency did not violate 15 U.S.C. § 1692e(14) of the Fair Debt Collection Practices Act (FDCPA) by sending plaintiff consumer a collection letter that did not state the collection agency's true name. The FDCPA prohibits "the use of any business, company or organization name other than the true name of the debt collector's business, company or organization" but does not define the term "true name." The Federal Trade Commission, however, has stated that a debt collector's "true name" encompasses not only its formal corporate name, but also the name under which it usually transacts business.

The collector had sent the consumer letters using its assumed name "American Medical Collection Agency," rather than the collection agency's true corporate name. The agency, however, possessed a certificate of the assumed name and had been conducting business under that name for over 20 years. Against these facts, the court held the collection agency was not in violation of Section 1692e(14), finding there was nothing deceptive or misleading about the collection agency contacting the consumer using its trade name.

Mahan v. Retrieval-Masters Credit Bureau, Inc., 2011 WL 1397227,--- F. Supp. 2d --- (S.D. Ala. Apr. 13, 2011).

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