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Newsletters

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Lender's Compliance With Federal National Housing Act No Defense to Foreclosure Action

The Broward County (Florida) court recently held that the Federal National Housing Act (Act), 12 U.S.C. §1701(x)(c)(5) was not a valid defense to a foreclosure action. Defendant borrowers alleged violations of the Act as affirmative defenses to a foreclosure action. The Act provides that certain classes of homeowners shall be eligible for homeownership and pre-foreclosure counseling. The court, having reviewed the statutory language contained in the Act, agreed with plaintiff bank that compliance with the Act is not a condition precedent to a foreclosure action. The court found that the regulations promulgated under the Act deal only with relations between mortgagee and the government and give mortgagors no claim to a private right of action. Accordingly, the court granted the bank's motion for partial summary judgment as to all affirmative defenses related to the Act.

Deutsche Bank National Trust Company v. Mario A. Lavette and Althea M. Lavette, Case No. 09-013453, Division 08 (Fla. 17th Cir., Broward County, Oct. 12, 2010).

Second Circuit Holds That FDCPA Not Applicable to a Claim Challenging Bankruptcy Proof of Claim

Plaintiff debtor filed a class action lawsuit, alleging that defendant creditor violated the Fair Debt Collection Practices Act (FDCPA) by filing an inflated proof of claim in the debtor's bankruptcy case. The creditor moved to dismiss, arguing that, as a matter of law, an inflated proof of claim in a bankruptcy proceeding cannot be brought under the FDCPA. The district court agreed and dismissed the case. The U.S. Court of Appeals for the Second Circuit agreed, holding that "[t]he FDCPA is designed to protect defenseless debtors and give them remedies against abuse by creditors. There is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by the bankruptcy itself." The Second Circuit has now articulated a point made by several district courts — that an inflated proof of claim in a bankruptcy proceeding cannot be the basis for an FDCPA claim.

Simmons v. Roundup Funding, LLC, 622 F.3d 93 (2nd Cir. 2010).

Attorneys

Peter E. Pederson

Jennifer W. Weller

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Putative TCPA Class Action Fails - Court Clarifies Scope of "Consent"

Plaintiff placed in her credit report a "fraud alert" message which stated that she was the victim of identity theft and that potential creditors should verify her identity by calling her cell phone number before establishing credit using her personal information. After a third party tried to open a satellite television account with DirecTV using plaintiff's Social Security number, DirecTV received plaintiff's fraud alert message and cell phone number from a credit bureau. Plaintiff did not have any relationship with DirecTV. DirecTV's contractor, iQor, used a predictive dialer to call plaintiff's cell phone and play a prerecorded message asking her to confirm whether she had opened a DirecTV account. Plaintiff then filed a class action lawsuit, alleging that iQor and DirecTV violated the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227(b)(1)(A)(iii), by using a prerecorded message to call her cell phone number, without her consent. Plaintiff sought statutory damages on behalf of herself and the class for each offending call. She also sought an injunction prohibiting defendants from committing further violations of the TCPA.

The TCPA allows businesses to use a prerecorded message to call to a cell phone as long as the called party has given "prior express consent" to receive such calls. The court entered summary judgment for defendants, finding that plaintiff gave "prior express consent" to be contacted on her cell phone when she instructed potential creditors to verify her identity by calling the number assigned to her cell phone. The court relied on the Federal Communication Commission's (FCC's) 1992 implementing regulation under the TCPA, which states that "persons who knowingly release their telephone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary. [A party] will not violate [the TCPA] by calling a number which was provided as one at which the called party wishes to be reached."

This case shows that a called party may give consent under the TCPA by knowingly releasing his or her number to the caller through an intermediary even where there is no direct relationship between the caller and called party. Absent a direct relationship, the caller must still demonstrate that the called party expressly consented to receiving the call in order to avoid liability under the TCPA.

Greene v. iQor Holdings US Inc., et al., No. 10-cv-117, 2010 U.S. Dist. LEXIS 118270 (N.D. Ill. Nov. 8, 2010).

Seventh Circuit Applies the All Writs Act to Enjoin "Copycat" Class Action

Plaintiff buyer, a Tennessee resident, brought a suit in Illinois state court seeking damages in connection with his purchase of a Kenmore-brand dryer from Sears. The buyer alleged that the advertising that defendant seller used to market the product was deceptive in that the dryer was advertised as "stainless steel," when in fact part of the machine was made of mild steel. He claimed that as a result of the allegedly misleading advertising, his clothes were damaged by rust. The suit was brought on the buyer's behalf and approximately 500,000 other purchasers from around the country. It was removed to federal district court, at which time the class was certified.

The U.S. Court of Appeals for the Seventh Circuit reversed the decision and decertified the class on the grounds that the case "was a notably weak candidate for class treatment." The case was dismissed on remand and the Seventh Circuit affirmed the dismissal. The buyer's attorney then filed a nearly identical suit with a new plaintiff in California state court. The seller removed the case to federal court, arguing that the issue of class certification had already been litigated in the Illinois proceeding. Subsequently, plaintiff's counsel amended the complaint with language that the California court held was distinct enough from the Illinois action that it merited a new hearing on class certification. The seller then petitioned the district court in Illinois to issue a ruling under the All Writs Act (28 U.S.C. § 1651(a)) enjoining the California district court from relitigating the issue of class certification. The district court denied the request. The Seventh Circuit, in a strongly-worded opinion by Judge Richard A. Posner, reversed the lower court's decision and, applying the All Writs Act, barred the class and its attorney from bringing a similar class action in California, or any other jurisdiction. The court portrayed plaintiff's counsel in a particularly unflattering light, calling the claim "near-frivolous" and an "abuse of litigation."

Steven Thorogood v. Sears, Roebuck and Company, No. 10-2407, --F.3d --, 2010 WL 4286367 (7th Cir. 2010).