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Newsletters

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Florida Mandates New Mediation Process for All Foreclosure Actions

The Florida Supreme Court, as well as all Florida judicial circuits, have passed administrative orders requiring that all newly filed foreclosure actions be automatically referred to mediation unless the parties agree to forego mediation in writing. Titled as the Residential Mortgage Foreclosure Mediation (RMFM) Program, a notice regarding the right to managed mediation for homestead residences must be served with the summons. Counsel for the mortgagee must also submit a form to the designated mediation program manager that gives contact information for the parties and designates a representative of the lender with full settlement authority who will be appearing at the mediation. The borrowers are then to be contacted by the program manager to determine whether there is an interest in participating; if so, the borrower is first required to meet with a foreclosure specialist and complete financial paperwork for the lender.

On the flip side, the lender is required to supply certain information to the borrower prior to mediation, including evidence that the plaintiff is the owner/holder of the note, loan payment history, present amount owed on the mortgage, and current property appraisal. Mediation must be held prior to any summary judgment hearing, and is to be scheduled between 60 and 120 days after suit is filed. The lender's representative may appear telephonically upon request; however counsel for the lender must appear in person. The lender is responsible for the mediation fee. Sanctions for the lender’s failure to appear at mediation include potential dismissal of the action by the court.

For cases filed before the effective date of the respective Order, mediation is not mandatory. However, the borrower may request referral and the judge may order mediation at his or her discretion. The Orders have various effective dates in 2010; examples of the effective dates in larger jurisdictions are as follows:

- Fourth Judicial Circuit (Clay, Duval & Nassau Counties): March 2, 2010
- Seventeenth Judicial Circuit (Broward County): July 1, 2010
- Fourteenth Judicial Circuit (Bay, Calhoun, Gulf, Holmes, Jackson & Washington Counties): March 29, 2010
- Eleventh Judicial Circuit (Dade County): March 29, 2010
- Ninth Judicial Circuit (Orange & Osceola Counties): July 2, 2010
- Second Judicial Circuit (Franklin, Gadsden, Jefferson, Leon, Liberty and Wakulla Counties): June 1, 2010

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The Orders are silent as to whether the failure to adhere to the notice requirements and mandatory disclosures described above may be utilized as the basis for a motion to dismiss the foreclosure complaint. However, it is likely that borrowers' counsel will begin to make this argument if such noncompliance should occur.

Trial Victory in Individual FDCPA Case: Why One Needs to Take a Good Deposition

It is sometimes worthwhile or necessary to take a lawsuit to trial, especially those cases that turn on the credibility of the witnesses. In *Nelson-McGourty v. L & P Financial Adjusters, Inc.,* the dueling versions of the operative facts of the case could not have been more divergent. The "he said / she said" problem of the case could only be resolved through a trial. Although the 31-page opinion discusses some interesting evidentiary issues for debt collectors, its salient point is that plaintiff was less credible than the defendant. The lesson to draw from this opinion is two-fold. First, trials *never* go exactly as planned. Second, and more importantly, taking a good deposition is critical to attacking a witness's credibility at trial. In this case, plaintiff was impeached 12 times regarding a basic fact of her case. These impeachments, along with a plausible explanation for the other evidence in the case, allowed the trial judge to rule in favor of L&P Financial Adjusters.

Actual Knowledge by Creditor of Debtor's Attorney Representation Will Not Be Imputed to Debt Collector Who Has Contracted With Creditor to Collect Debt Under FDCPA and FCCPA

In a September 2009 letter to the creditor of her account, plaintiff debtor stated that she was represented by counsel. In April 2010, the creditor's attorney contacted plaintiff regarding the collection of debt. The debtor alleged that the creditor violated the Fair Debt Collection Practices Act (FDCPA) and the Florida Consumer Collection Practices Act (FCCPA) by failing to notify its attorney that the debtor was represented by counsel. The debtor also alleged that the creditor's attorney had violated the FDCPA and FCCPA by directly contacting her, rather than her attorney, regarding the debt. Both defendants moved to dismiss the debtor's claims.

The court denied the creditor's motion to dismiss. The court held that the debtor's allegation that the creditor contracted with the collection attorney to collect the debtor's debt was sufficient to withstand a motion to dismiss, because under Florida state law, a presumption exists "that an attorney is an agent of the client whom he professes to represent." Because the creditor did not argue that this allegation was fraudulent, the claim could not be dismissed.

The court did, however, grant the creditor's attorney's motion to dismiss. The court explained that both the FDCPA and FCCPA, the plain language of the Acts, and the case law require actual knowledge by the debt collector that a debtor is represented by an attorney. Because the debtor's complaint failed to sufficiently allege that the debt collector had actual knowledge of this representation, the court dismissed the debtor's claim without prejudice and with leave to replead.

Seventh Circuit Rules Internet Transactions Not Covered by FACTA's Credit Card Receipt Truncation Requirements

Plaintiff buyer purchased contact lenses over the internet. The vendor emailed to the buyer a confirmation of his order, which reflected the expiration date of his credit card. The Fair and Accurate Credit Transaction Act of 2003 (FACTA) prohibits a vendor who accepts a credit or debit card as a means of payment from printing more than the last five digits of the card number or the card's expiration date on any receipt provided to the cardholder at the point of sale or transaction. Plaintiff sued, alleging that the e-mail confirmation he received violated FACTA because it contained the credit card expiration date.

The court concluded that FACTA covers only receipts printed on paper, i.e., printed receipts. It reasoned that when one refers to a printed receipt, what springs to mind is a tangible document. The printed receipt thus ordinarily connotes recording it on paper. Whatever sort of printing a consumer might do on his or her computer is not printing done by a person that accepts credit cards or debit cards for the transaction of business under FACTA, and it is the printing by the vendor, rather than by the consumer, at which the FACTA is aimed. E-mails generated by a vendor might never be viewed or displayed by the consumer and thus might never be printed. The court also observed that it did not view as material the distinctions between a receipt that is displayed on a merchant's website and one that is e-mailed to the consumer for purposes of the issue before it.

Thus, as a matter of first impression, the court held that FACTA's prohibition of a vendor from printing more than the last five digits of the card number or the expiration date on any receipt does not apply to e-mail receipts.

Eduard Shlahtichman v. 1-800 Contacts, Inc., 615 F.3d 794 (7th Cir. Aug. 10, 2010).