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Consumer Financial Services *Newsletter*

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Seventh Circuit Held No Implicit Threat to Proceed to Trial by Debt Collector When Filing a Collection Lawsuit

***St. John v. CACH, LLC*, No.14-2760, 2016 WL 2909195 (7th Cir. May 19, 2016)**

On May 19, 2016, the United States Court of Appeals for the Seventh Circuit held that although § 1692e(5) of the Fair Debt Collection Practices Act (FDCPA) prohibits debt collectors from threatening to take an action that they do not intend to take, this provision does not make it unlawful for a debt collector to file a collection lawsuit without intentions of proceeding to trial.

In *St. John v. CACH, LLC*, debt collectors brought collection actions seeking to recover delinquent credit card accounts from debtors and later voluntarily dismissed the actions without prejudice prior to trial. The debtors then brought federal claims against the debt collectors claiming that by initiating the state court proceedings with no intention of going to trial, the debt collectors were in violation of § 1692e(5) of the FDCPA. The U.S. District Court for the Northern District of Illinois granted the debt collectors' motions to dismiss. The debtors then filed a consolidated appeal.

On appeal, the Seventh Circuit reviewed the issue of whether the debtors stated a plausible claim under § 1692e(5) of the FDCPA by alleging that the debt collectors filed suit without intending to proceed to

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trial. The FDCPA prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e(5). This includes making a "threat to take any action that cannot legally be taken or that is not intended to be taken." *Id*. Debtors asserted that the act of filing a lawsuit included an implied representation or "threat" that the case would go to trial. As such, if a debt collector filed a collection lawsuit without intent to go to trial, then it would be a violation of § 1692e(5).

The Seventh Circuit disagreed with the debtors and affirmed the district court's rulings that the debtors failed to state a viable claim under § 1692e(5), as there was no threat. The Seventh Circuit defined a threat as something that "involves a declaration of an intention to take some action." "The mere filing of a civil action does not include an implicit declaration that the plaintiff intends to advance the action all the way through trial." It is known that litigation is inherently a process, and thus, hoping to recover via default or settlement (as opposed to trial) is not trickery. An unsophisticated consumer could not reasonably conclude that a debt collector implicitly threatens to proceed to trial simply by filing a lawsuit.

For more information, please contact **S. Cortney Sedighi**.

Massachusetts Supreme Judicial Court Further Limits Borrower's Post-Foreclosure Challenges to Sale

***Federal National Mortgage Association v. Rego*, SJC-11927, 474 Mass. 329 (May 24, 2016)**

The Massachusetts Supreme Judicial Court (SJC) recently resolved another post-foreclosure challenge in favor of mortgagees in *Fannie Mae v. Rego* and further clarified the Housing Court's jurisdiction to hear and determine borrowers' counterclaims in eviction actions.

In *Rego*, the borrowers claimed the foreclosure sale of their property was void because the mortgagee's legal counsel did not have written authorization to take all of the actions required to exercise the statutory power of sale. The borrowers relied on G.L. c. 244, § 14, which in addition to providing for certain foreclosure publication requirements, also provides that the mortgagee, a person authorized by the power of sale, "or the attorney duly authorized by a writing under seal" may perform all of the acts required to foreclose on a mortgage.

The SJC analyzed the statutory language, including the history and legal treatises at the time the "attorney duly authorized by a writing under seal" language was added to the statute, and rejected the borrowers' claims. The SJC concluded that the language was not intended to require the mortgagee's legal counsel to have written authorization from the mortgagee to proceed to foreclosure. In so ruling, the SJC removed yet another technical challenge to foreclosure sales.

The SJC also clarified the Housing Court's authority to rule on borrower's counterclaims in post-foreclosure eviction actions. The SJC acknowledged that the Housing Courts have authority to resolve claims relating to the health and welfare of occupants. The SJC also acknowledged that the Housing Court may consider a borrower's defenses and counterclaims, including those under the Massachusetts Consumer Protection Act (Chapter 93A). But, it has limited authorization to entertain those claims. Where a borrower raises challenges that would affect the plaintiff's claim for possession, the SJC ruled that the Housing Court should sever all other counterclaims and determine all issues with respect to the possession first. After ruling on possession, the Housing Court can then consider the other claims and damages raised by borrowers if appropriate or dismiss or transfer the claims to another court if it determines it does not have jurisdiction to hear those claims.

As borrowers are increasingly filing counterclaims in post-foreclosure eviction actions in Housing Court instead of pre-foreclosure challenges to a mortgagee's standing to proceed with foreclosure, the impact of these two rulings remains to be seen.

For more information, please contact **Hale Yazicioglu**.

TCPA Defendant Escapes Liability Because it Did Not Authorize Fax Broadcaster's Transmission of Unsolicited Fax Advertisements Promoting its Services

***Paldo Sign & Display Co. v. Wagener Equities, Inc.*, No. 15-1267, ---F.3d. ----, 2016 WL 3348738, at *1 (7th Cir. June 16, 2016)**

In *Paldo Sign & Display Co. v. Wagener Equities, Inc.*, the United States Court of Appeals for the Seventh Circuit reiterated that agency principles govern whether a firm is a liable for violating the TCPA's prohibition against transmitting unsolicited fax advertisements when a fax broadcaster sends out fax advertisements on behalf of that firm.

The *Paldo Sign* case involves fax advertisements promoting the services of Wagener Equities. The main issue on appeal was whether the district court had incorrectly found that Wagener Equities was not the sender of the fax advertisement because it had not authorized the marketing company to transmit fax advertisements promoting its services.

The fax recipient argued that under Federal Communications Commission regulations, the "sender" of a fax advertisement is the "person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement." 47 C.F.R. § 64.1200(f)(10). According to the fax recipient, the TCPA imposed strict liability on Wagener Equities for the unsolicited advertisements sent by the fax broadcaster, as it was undisputed that its services were promoted in the advertisements.

The Seventh Circuit, however, held that the recipient's argument would lead to absurd and unintended results. "For example, if a competitor of Wagener Equities sent out ten thousand unsolicited fax advertisements promoting Wagener's services, the resulting lawsuit could bankrupt Wagener even though Wagener played no part in sending the

faxes." To avert such outcomes, the *Paldo Sign* court held that "agency rules are properly applied to determine whether an action is done 'on behalf' of a principal," such that a company whose services are promoted in a fax can be held liable for a violation of 47 U.S.C. § 227(b)(1)(C).

Defendants in cases where a third-party fax broadcaster has transmitted allegedly unsolicited fax advertisements should consider whether the fax broadcaster acted with actual or apparent authority in transmitting the advertisement. Absent actual or apparent authority granted to the fax broadcaster, the company whose services are promoted in the fax advertisement may not be liable for any resulting violation of the prohibition against unsolicited fax advertisements.

For more information, please contact **Peter E. Pederson**.

How to Cure a Mortgage Recorded with an Error in the Execution and Acknowledgment? An Affidavit by the Closing Attorney

***Bank of America, N.A. v. Debora A. Casey, Trustee*, --- N.E.3d ---, 2016 WL 3314033 (Mass. June 16, 2016)**

In *Bank of America, N.A. v. Debora A. Casey, Trustee*, the Massachusetts Supreme Judicial Court (SJC) considered the issue of whether a mortgagee can correct a material defect in a mortgage by having the closing attorney execute an affidavit to clarify the chain of title. The particular defect in the mortgage was that the acknowledgement, and the page of the mortgage that contained the acknowledgment, did not include the names of borrowers who appeared before the notary. Seven years after the mortgage was recorded, the closing attorney executed and recorded an affidavit explaining: (1) that he presided over the execution of the mortgage; (2) that he witnessed the borrowers' execution; (3) that borrowers provided satisfactory evidence of their identity; (4) that borrowers acknowledged executing the mortgage voluntarily; (5) that he recorded the mortgage in the registry; and (6) that through inadvertence the borrowers' names were omitted from the notary clause.

> ***"The affidavit remedied the prior recorded mortgage so that the mortgage and affidavit, taken together, provided legally adequate constructive notice to any third-party bona fide purchaser, or a bankruptcy trustee, of the security interest."***

The trustee in the borrowers' bankruptcy petition filed an adversary proceeding to avoid the mortgage on the grounds that the agreement contained a material defect by omission of the borrowers' names from the acknowledgment, that this defect eliminated a valid recording of the mortgage, and that the subsequently recorded affidavit could not cure the defect. The SJC, however, concluded that the attorney affidavit cured what the trustee in bankruptcy argued was a material defect, and that such an affidavit was permitted under Massachusetts law because it clarified what actually occurred at execution of the mortgage agreement. In addition, the SJC determined that the affidavit remedied the prior recorded mortgage so that the mortgage and affidavit, taken together, provided legally adequate constructive notice to any third-party bona fide purchaser, or a bankruptcy trustee, of the security interest. Finally, the SJC permitted the affidavit to correct and clarify title even though the mortgagee did not obtain the borrowers' consent.

Servicers and mortgagees can utilize this decision, on discovery of any error or omission in the execution and acknowledgment of the mortgage, to cure the mortgage and confirm a valid recorded security interest from the date of the original recording through an affidavit of the closing attorney.

For more information, please contact **Samuel C. Bodurtha**.

About Hinshaw

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Authors

Samuel C. Bodurtha
Partner | 617-213-7039
sbodurtha@hinshawlaw.com

Peter E. Pederson
Partner | 312-704-3604
ppederson@hinshawlaw.com

S. Cortney Sedighi
Associate | 904-359-9620
csedighi@hinshawlaw.com

Hale Yazicioglu
Associate | 617-213-7000
hyazicioglu@hinshawlaw.com

Editors

Barbara Fernandez
Partner | 305-428-5031
bfernandez@hinshawlaw.com

Palak N. Shah
Associate | 312-704-3341
pshah@hinshawlaw.com