McGlinchey Stafford and the Manufactured Housing Institute (MHI) are pleased to bring you the Manufactured Housing Law Update. With content prepared by McGlinchey Stafford's nationally-recognized consumer financial services team, the Update focuses on legal and regulatory actions in the manufactured housing industry. More about MHI and McGlinchey Stafford can be found at the end of the Update.

WELCOME!

Thank you for reading the August Manufactured Housing Law Update. We hope you are enjoying Autumn.

If you are a community operator, you should read the recent decision from California addressing, in part, rules and regulations requiring children to be supervised by parents. There are several other items of interest, including lot lease transfer legislation in Delaware.

On the lending side, the *In re Glenn* decision will interest you. So will a New Jersey fee limitation and a case in California that held charging interest at a high-rate, despite the lack of a usury ceiling, can give rise to a claim of unconscionability.

These items and many more, so read on!

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COMMUNITIES

CASE LAW

Fair housing - Discrimination

CASE NAME: *Brown v. Perris Park Apartments P'ship*
DATE: *07/17/2018*
CITATION: *United States District Court, C.D. California. Slip Copy. 2018 WL 3740522*

Plaintiffs alleged four causes of action: (1) violation of the Fair Housing Amendments Act ("FHAA"); (2) violation of the California Fair Employment and Housing Act ("FEHA"); (3) breach of warranty of habitability; and (4) negligence. Plaintiffs alleged Defendant engaged in a pattern or practice of discrimination based on familial status and disability. Defendant moved to dismiss.

Defendant argued Plaintiffs lacked standing to bring a claim for discrimination based on familial status because its policy was not directed to adults. However, the minor children of Plaintiffs were also named Plaintiffs. Additionally, the FHA was implemented to protect families with children from discrimination, not just the children as individuals. Defendant's Motion to Dismiss regarding Plaintiffs' standing to bring a familial status discrimination claim was denied.

Moreover, a rule which requires children to be supervised by adults while outside is unlawful. Here, the policy dictated that all children under eighteen must be under adult supervision, which manifests significantly greater restriction than in precedent cases.

With regard to the disability discrimination claim, Plaintiffs' complaint stated Plaintiff Robbins suffered from macular degeneration, was legally blind, and had been issued a disabled parking placard by the state. These facts established Robbins qualified as a disabled person.

While Robbins did not drive, her family members picked her up and took her where she needed to go. There was a "considerable distance" between Robbins's assigned parking space and her home, and the terrain was "bumpy and unsafe," "uneven and unpaved." Robbins made repeated requests for a parking space near her home. Plaintiffs sufficiently set forth facts which demonstrated the accommodation would affirmatively enhance Robbins's quality of life by ameliorating the effects of the disability. As a result, Plaintiffs alleged sufficient facts for Plaintiff Robbins to state a claim for relief under the FHAA.

The Court held that the Fair Housing Council of Riverside County ("FHC") failed to sufficiently establish standing. The FHC alleged that it conducted "outreach and education at or near the subject property," but it did not discuss how these activities diverted resources or where those resources were originally allocated.

While Plaintiffs generally alleged they "repeatedly made repair requests that went unfulfilled," they failed to connect these general statements about repair to the facts grounding their claim for breach of warranty of habitability. Additionally, they failed to allege notice to the landlord was given within a reasonable time after the tenant's discovery of the condition, or how long it took for management to respond. Accordingly, this claim was dismissed with leave to amend.

The Court also found it was unclear upon which facts Plaintiffs stated their claim for negligence. Accordingly, this claim was dismissed with leave to amend.

The Court granted in part and denied in part Defendant's Motion to Dismiss.

CASE LAW

Abandonment

CASE NAME: *MetPark II, LLC v. Kempfee*
DATE: *08/16/2018*
CITATION: *Superior Court of New Jersey, Appellate Division. Not Reported in Atl. Rptr. 2018 WL 3887618*

Metpark was a mobile home community, owned and operated by Adubato. Houlday, a resident of Metpark, assisted in managing the park. Defendant leased a lot in Metpark.

Defendant had a physical altercation with Houlday and another resident and Metpark filed an eviction action against him. The parties resolved the matter by signing a written consent judgment for possession.

Under the terms of the agreement, Metpark agreed to stay a warrant for removal for ninety days to permit defendant to sell or rent his mobile home. If he did not, defendant acknowledged he could lose his mobile home. Any sale or sublet of defendant's mobile home was conditioned on Metpark's approval, which could not be unreasonably withheld. During the ninety days, defendant agreed to abide by Metpark's rules and regulations and to pay all outstanding rent. Upon the expiration of the ninety days, defendant agreed to move out of Metpark. Thereafter, defendant would be permitted to return to Metpark solely to meet with individuals interested in purchasing or subleasing his mobile home.

Despite the agreement, defendant filed several post-judgment motions, including a motion to vacate the consent judgment. The motions were denied.

Defendant failed to abide by the terms of the consent judgment and plaintiff executed the warrant of removal. However, defendant's mobile home remained on Metpark's property. Consequently, Metpark served defendant with a notice pursuant to the Abandoned Tenant Property Act. The notice provided seventy-five days for defendant to remove the home or it would be sold. Defendant failed to comply and plaintiff sought a declaration that the home was abandoned.

After receiving Metpark's complaint for declaratory relief, defendant began to scavenge items from the mobile home, contravening a court order restraining defendant from entering the mobile home absent prior notice to Metpark.

Defendant filed a counterclaim and a third-party complaint alleging Metpark, Houlday, and Adubato interfered with his right to rent or sell the mobile home.

The judge found defendant had more than sixteen months to remove the mobile home and failed to do so, and declared plaintiff "established the right to the property, and defendant has no available remedies that would allow him to take possession of the property in question."

The judge found that the only non-hearsay testimony presented by defendant was the potential sale of the mobile home to his mother. The judge determined the sale to defendant's mother for one dollar was not an arms' length transaction and violated the terms of the consent judgment. The judge dismissed defendant's counterclaim and third-party complaint. Subsequently, the judge entered an order awarding counsel fees and costs to plaintiff. Defendant appealed.

The appeals court found that the issues raised by defendant lacked sufficient merit to warrant discussion in a written opinion. Instead, the Court commented:

Defendant raised arguments on appeal that related to disposition of the original tenancy action. However, he never appealed from any of the orders issued by the tenancy court judge. And an order entered with the consent of the parties is generally not appealable for purposes of challenging the substantive provisions of the order.

Plaintiff served the required notice consistent with the Abandoned Tenant Property Act. Defendant's failure to remove his mobile home within the time provided under the Act resulted in his property being "presumed to be abandoned."

Defendant's reliance on hearsay testimony and speculation in support of his counterclaim and third-party complaint was legally insufficient to defeat the summary judgment motion.

And there was ample support in the record that plaintiff was entitled to attorneys' fees and costs under Metpark's rules and regulations.

Affirmed.

LEGISLATION
California
Emergency assistance

2017 CA A 2413. Enacted 8/24/2018. Effective 1/1/2019.

This bill adds Cal. Civ. Code § 1946.8 to declare void a provision in a rental or lease agreement that limits or prohibits a tenant's, resident's, or other person's right to summon law enforcement assistance or emergency assistance as, or on behalf of, a victim of abuse, a victim of crime, or an individual in an emergency.

The bill amends Cal. Civ. Proc. Code § 1161.3 to provide the Tenant Statement and Qualified Third Party Statement under Code of Civil Procedure Section 1161.3 to indicate that the tenant or household member is seeking assistance for physical or mental injuries or abuse resulting from an act of domestic violence, sexual assault, stalking, human trafficking, elder abuse, or dependent adult abuse.

The bill also adds Cal. Gov't. Code § 53165 to provide that a local agency shall not promulgate, enforce, or implement any ordinance, rule, policy, or regulation that authorizes, or requires the imposition, or threatened imposition, of a penalty against a resident, owner, tenant, landlord, or other person as a consequence of law enforcement assistance or emergency assistance being summoned by, or on behalf of, a victim of abuse, a victim of crime, or an individual in an emergency.

LEGISLATION
California
Rent – Third party payment

2017 CA A 2219. Enacted 8/28/2018. Effective 1/1/2019.

This bill amends Cal. Civ. Code § 1947.3 to provide that, subject to limitations, a landlord or a landlord's agent shall allow a tenant to pay rent through a third party.

LEGISLATION
California
Unlawful detainer – Notice

2017 CA A 2343. Enacted 9/5/2018. Effective 9/1/2019.

This bill amends Cal. Civ. Proc. Code § 1161 to change the 3-day notice period a landlord must give a tenant to cure violations or vacate in an unlawful detainer action to exclude judicial holidays, including Saturday and Sunday.

The bill also amends Cal. Civ. Proc. Code § 1167 to make the same change to the 5-day period a defendant has to respond to the summons in an action to obtain possession of real property.

LEGISLATION
Delaware
Lot transfers

2017 DE H 436. Enacted 9/4/2018. Effective immediately.

This bill amends Del. Code Ann. tit. 25, § 7022 to clarify conditions under which a manufactured home owner can transfer the existing lot lease to the purchaser of the home. The bill adds that, within 15 days of the receipt of a completed application package, including the applicable fee, a landlord must provide written notice to the tenant under the lot rental agreement and the proposed rental agreement transferee that states whether the proposed rental agreement transferee is accepted or rejected. If the application is rejected the notice must explain the specific eligibility requirement not satisfied and the grounds for the rejection.

LEGISLATION
Illinois
Abandonment – Removal

2017 IL S 3261. Enacted 8/24/2018. Effective 1/1/2019.

This bill amends the Abandoned Mobile Home Act.

The bill adds 210 Ill. Comp. Stat. 117/10.1 to provide for a proceeding to remove an abandoned mobile home to be maintained by a mobile home park owner or operator.

The bill amends 210 Ill. Comp. Stat. 117/15 to provide that the corporate authority of a municipality may remove and dispose of any abandoned mobile home found within the municipality and may legally enter upon any land to do so if the mobile home park owner or operator of the mobile home park where the abandoned mobile home is located has not initiated proceedings under Section 10.1 of the Act (above) within 45 days after written notice to the mobile home park owner or operator.

LEGISLATION
Massachusetts
Abandoned animals

2017 MA S 2646. Enacted 8/9/2018. Effective 11/7/2018.

This bill adds a new section to Mass. Gen. Laws, Chapter 186, to provide that not more than 3 days after a property owner or a lessor knows or should have known that a property has been vacated, the property owner, lessor or a designee shall inspect the property for the presence of abandoned animals.

If the property owner, lessor or a designee encounters an abandoned animal, that person shall immediately notify an animal control officer, a police officer or other authorized agent of the presence and condition of the animal.

If the property owner, lessor or designee fails to comply with this section, the lessor or property owner shall be subject to a civil penalty of not more than $500 for a first offense and not more than $1,000 for a second or subsequent offense.

The bill also makes similar amendment to Chapter 239, relating to Summary Process for Possession of Land, and Chapter 244, relating to Foreclosure and Redemption of Mortgages.

LEGISLATION
New York
Eviction – Companion animals

2017 NY A 8684. Enacted 8/23/2018. Effective immediately.

This bill amends N.Y. Real Prop. Acts. § 749 by adding subsection (2)(b), relating to the presence of a companion animal when executing a warrant for eviction or dispossession of property. The bill directs the warrant executing officer to make arrangements for the safe removal of such animal.

ADOPTED RULES
Oklahoma
Water supply

Effective 9/15/2018, these rules amend Okla. Admin. Code §§ 252:626-1-2, concerning Public Water Construction Standards, and 252:631-1-2, concerning Public Water Supply Operation, to provide that mobile home parks which are constructed, inspected and maintained under a State or locally approved plumbing code, purchase water from a permitted water system, do not provide treatment, and do not resell water are not classified as Public Water Supply systems.

CYBERSECURITY

PRESS RELEASE

New York

Compliance

Issued 8/8/2018.

All DFS-regulated financial services companies are required to comply with the regulation's governance policies and procedures, as well as risk based monitoring systems requirements and encryption programs for nonpublic information by September 4, 2018.

DEFAULT SERVICING

CASE LAW

Bankruptcy - Preference

CASE NAME: *In re Veltre*
DATE: *07/19/2018*
CITATION: *United States Court of Appeals, Third Circuit. 732 F. App'x 171. 2018 WL 3486149*

Veltre owned residential property on which there were two mortgages: the first was held by Capital One Bank, and the second was held by Fifth Third. After Veltre defaulted on her mortgage, Capital One initiated foreclosure proceedings. Fifth Third purchased the property at a sheriff's sale for $90,000, an amount sufficient to satisfy Capital One's mortgage.

Months later, Veltre filed for bankruptcy and initiated an adversary proceeding alleging that Fifth Third's purchase of the property was a preference under § 547. In so doing, she asserted that Fifth Third received a pre-bankruptcy windfall at the expense of her estate and other creditors by purchasing the property for a sum well below its alleged market value. The Bankruptcy Court dismissed Veltre's action, concluding that, as a matter of law, execution of a properly conducted, non-collusive sheriff's sale is not a preferential transfer under § 547. The District Court affirmed and Veltre again appealed.

The Court noted that, to avoid a transfer under § 547, a plaintiff must establish, inter alia, that the transfer of the debtor's property enabled a creditor "to receive more" than that creditor would have received in a hypothetical Chapter 7 bankruptcy without the alleged preferential transfer. To complete this inquiry, a court must "construct a hypothetical Chapter 7 case and determine what the creditor would have received if the case had proceeded under Chapter 7 without the alleged preferential transfer."

Under Pennsylvania law, "it is presumed that the price received at a duly advertised public sale is the highest and best obtainable."

Against this background, as the District Court rightly found, the Court could presume that the $90,000 obtained for the property at the sheriff's sale was as much as—if not more than—a trustee would have obtained under a hypothetical Chapter 7 liquidation. As such, Fifth Third could not "receive more" by purchasing the property at the sheriff's sale than it would have received in a hypothetical Chapter 7 liquidation.

Affirmed.

CASE LAW

Bankruptcy – Repossession

CASE NAME: *In re Dunn*
DATE: *07/24/2018*
CITATION: *United States District Court, E.D. Pennsylvania. Slip Copy. 2018 WL 3549310*

The personal property at issue here was a Toyota Land Rover, collateral for a loan from Toyota to Dunn.

On June 12, 2017, Dunn filed Chapter 7 and filed a statement of intention, which indicated that his intent with respect to the Land Rover was to "Retain—Debtors [sic] will continue to make payments." The Bankruptcy Court found that Dunn's statement meant he wanted to retain the Land Rover and would attempt to reaffirm the debt. The court reasoned that the language constituted a reaffirmation because it did not sound in either surrender or redemption.

The first date for the meeting of creditors was set for August 2, 2017. Sixteen days after that date, on August 18, 2017, Toyota repossessed the Land Rover. Dunn moved for sanctions against Toyota for violation of the automatic stay. The Bankruptcy Court found that Dunn timely complied with § 521(a)(2)(A) and could have fulfilled his intention to reaffirm in compliance with § 521(a)(2)(B), but Toyota made it impossible by repossessing the Land Rover only sixteen days later. The court concluded that § 362(h)(1) did not provide Toyota relief from the automatic stay and, therefore, Toyota was not within its rights to repossess the vehicle on August 18, 2017.

Toyota appealed the order for sanctions, arguing Dunn did not timely file a statement of intention with respect to the Land Rover because his statement that he "will continue to make payments" did not indicate either an intent to redeem or to reaffirm the debt. Toyota asserted, instead, that Dunn elected the "ride-through" option, but that option was eliminated by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Accordingly, Toyota contended that Dunn failed to timely file the required statement of intention and that the automatic stay had terminated pursuant to 11 U.S.C. § 362(h).

The Court found that, regardless of whether the ride-through option remained viable, Toyota violated the automatic stay by not waiting until thirty days after the date set for the creditors' meeting before repossessing Dunn's vehicle.

CASE LAW
Foreign statutory trusts – Collection Agency License

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CASE NAME: *Blackstone v. Sharma*
DATE: *08/02/2018*
CITATION: *Court of Appeals of Maryland. --- A.3d ----. 2018 WL 3691347*

This appeal consolidated four cases, in each of which the respondents obtained a mortgage loan to purchase, convey, or refinance their homes. The loans were evidenced by promissory notes and secured by deeds of trust. Eventually, the banks declared the loans to be in default, after which the banks transferred the loans and all beneficial interest in the deeds of trust as part of a securitized pool of mortgage loans to either Ventures Trust or LSF9, both of which were foreign statutory trusts organized under Delaware law.

These foreign statutory trusts acted through trustees. The trustees subsequently appointed substitute trustees, conveying all rights and duties under the deeds of trust, including the power of sale. The substitute trustees initiated foreclosure actions.

The homeowners filed counter complaints arguing that the foreign statutory trusts acted as collection agencies as defined under the Maryland Collection Agency Licensing Act (MCALA) without being licensed, and that, by attempting to collect mortgage payments without the required license under MCALA, the foreign statutory trusts violated the Maryland Consumer Debt Collection Act ("MCDCA"). The borrowers requested that the circuit courts dismiss or enjoin the foreclosure sales.

The circuit courts dismissed the foreclosure proceedings, finding that the foreign statutory trusts were in the business of collecting consumer debt. The courts determined that the foreign statutory trusts did not fall under the trust company exemption to MCALA and lacked the required collection agency licenses. The substitute trustees appealed.

The appeals court found that this matter boiled down to one question: Did the Maryland General Assembly intend to require foreign statutory trusts, one of the entities in the mortgage industry, to obtain a collection agency license before pursuing an in rem foreclosure proceeding? Its answer was no.

The Court first concluded that the plain language of MCALA was ambiguous as to whether a foreign statutory trust that owns a defaulted mortgage debt falls under the scope of MCALA when a substitute trustee brings a foreclosure action on the trust's behalf.

The Court then interpreted the legislative history to signify that the General Assembly did not intend to regulate or license the mortgage industry actors, including foreign statutory trusts serving as a repository for mortgage loans, as collection agencies due to the specific exemptions and the limited scope of MCALA.

When comparing the legislative history of MCALA, against the almost contemporaneous Maryland mortgage foreclosure law reform, the Court concluded that the General Assembly consciously separated the consumer debt collection agency industry from the mortgage industry. The complete absence of any discussion of MCALA or collection agencies when the legislature considered the problem of rising foreclosure rates as well as bad practices by certain actors within the mortgage industry persuaded the Court that the General Assembly did not intend to license one of the mortgage industry actors, foreign statutory trusts, under MCALA.

In addition, when passing the 2010 Maryland Statutory Trust Act, the General Assembly specifically concluded that: "In addition to any other activities which may not constitute doing business in this State, for the purposes of this subtitle, the following activities of a foreign statutory trust do not constitute doing business in this State ... (5) Foreclosing mortgages and deeds of trust on property in this State[.]"

Reversed and remanded.

CASE LAW

Foreclosure – Statute of limitations

CASE NAME: *Cortes-Goolcharran v. Rosicki, Rosicki & Associates, P.C.*
DATE: *08/07/2018*
CITATION: *United States District Court, E.D. New York. Slip Copy. 2018 WL 3748154*

In May 2008, HSBC began a foreclosure proceeding against Cortes-Goolcharran, expressly declaring its election to accelerate the note and mortgage. A judgment of foreclosure and sale was entered on June 19, 2009.

In 2013, HSBC moved to vacate the judgment and discontinue the foreclosure action for unspecified "administrative reasons." Although the motion was granted, Cortes-Goolcharran continued to receive statements "that her loan ha[d] been referred for foreclosure, or that her loan ha[d] been accelerated, or both."

After terminating the foreclosure proceeding, HSBC sold the mortgage. Fay Servicing, LLC took over as mortgage servicer. Rosicki was Fay's law firm.

In November 2016, Cortes-Goolcharran filed a quiet-title action in state court to cancel and discharge the mortgage as time-barred. The action was against HSBC, its successor-in-interest, and various other entities, but not Fay or Rosicki. It remained pending.

In April 2017, Rosicki sent Cortes-Goolcharran a "Notice of Default." Failure to pay, the notice warned, "may result in acceleration of your loan" and "a lawsuit to foreclose the mortgage." Fay also sent Cortes-Goolcharran a pre-foreclosure notice.

Cortes-Goolcharran claimed that the notices misrepresented the "character, amount, or legal status" of the mortgage, in violation of 15 U.S.C. § 1692e(2), and threatened to take action that "cannot legally be taken or that is not intended to be taken," in violation of 15 U.S.C. § 1692e(5).

The defendants moved to dismiss. Both argued that the FDCPA does not apply to mortgage foreclosures and that the mortgage was not time-barred. Fay argued that, in light of the quiet-title action, the Court should abstain.

The Court first found that, as the defendants acknowledged, their first argument was recently rejected by the Second Circuit.

The Court also found that the filing of a foreclosure action normally constitutes an affirmative action to accelerate the mortgage. Cortes-Goolcharran alleged not only that HSBC filed a foreclosure action, but that its complaint expressly declared its election to accelerate, subjecting the mortgage to the six-year statute of limitations.

In addition, the plain language of the mortgage gave the mortgage the right to undo acceleration, contingent on payment of the arrears. Since Cortes-Goolcharran never cured her default, and so never obtained the right to undo HSBC's acceleration.

And, even if the defendants were correct that only entry of judgment triggered acceleration, that event occurred on June 19, 2009.

The Court rejected the defendants' argument that HSBC's motion to vacate the judgment and discontinue the foreclosure action effectively revoked its acceleration. A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation. Discontinuance of a foreclosure action does not necessarily constitute such an affirmative act.

In addition, Cortes-Goolcharran alleged that she continued to receive statements that her loan was still accelerated and/or being foreclosed.

Finally, the Court found that this suit and the state-court quiet-title action were not parallel and, therefore, abstention did not apply.

Motions to dismiss denied.

CASE LAW
FDCPA – Foreclosure

CASE NAME: *Bushlow v. MTC Financial*
DATE: *08/07/2018*
CITATION: *United States District Court, N.D. California, San Jose Division. Slip Copy. 2018 WL 3744022*

Bushlow and Hall executed a promissory note and deed of trust ("DOT") to purchase a mobile home. The named lender was SCME Mortgage Bankers, Inc. At some point, Bushlow defaulted on his mortgage payments, ultimately resulting in the sale of his property.

Bushlow sued defendant MTC Financial, Inc. d/b/a Trustee Corps ("Trustee Corps") for violation of the FDCPA. Trustee Corps moved to dismiss.

Specifically, Bushlow alleged that Trustee Corps violated 15 U.S.C. § 1692f(6) by:

1. taking a nonjudicial action to unlawfully dispossess Bushlow of his property by executing a trustee's deed upon sale ("TDUS") without any legal right to do so;

2. attempting to grant title to Bushlow's property to FNMA without ever having possessed legal title to the property;

3. taking a nonjudicial action to unlawfully dispossess Bushlow of his property by executing the TDUS, when a legal sale as described in the notice of trustee's sale ("NOTS") did not take place;

4. instructing Service Link to request the recording of the TDUS without any legal right to do so, in an effort to unlawfully repossess the property; and

5. attempting to dispossess Bushlow of his property when it knew or should have known that FNMA did not possess a valid enforceable security interest in the property or in Bushlow's mortgage.

According to the Court, an FDCPA claim must be brought within one year from the date on which the alleged violation occurred.

The Court found that the TDUS was recorded on November 16, 2016, providing constructive notice of the sale on that date, and that Bushlow knew of all the other bases for his “no legal right” theory no later than August 24, 2016. Thus, the limitations period for Bushlow’s FDCPA claim based on the theory that Trustee Corps had no legal right to act began to run no later than November 16, 2016.

In addition, because Bushlow conceded that he knew all of the facts supporting his allegation that a sale of his property did not take place on November 10, 2016 as noticed, the limitations period for his claim based on an irregularity in the sale of his property began to run no later than November 16, 2016, when the sale was recorded.

Accordingly, under either the “no legal right” theory or the “irregular sale” theory, Bushlow’s FDCPA claim was barred by the one-year statute of limitations.

Further, even if Bushlow’s claim as pled were not time-barred, it was simply not actionable.

Because the defects that Bushlow identified in the First and Third Assignments rendered those agreements, at most, voidable, but not void, he did not have standing to challenge either assignment.

And because an irregular sale is not proscribed conduct under that section of the FDCPA, Bushlow could not state a claim for a violation of Section 1692f(6) based on this theory.

Trustee Corps’s motion to dismiss the Amended Complaint granted without leave to amend.

CASE LAW
FDCPA – Debt collector

CASE NAME: *Tepper v. Amos Financial, LLC*
DATE: *08/07/2018*
CITATION: *United States Court of Appeals, Third Circuit. --- F.3d ----. 2018 WL 3733862*

The Teppers entered into a home equity line of credit with NOVA Bank secured by a mortgage on their home. The Teppers made timely payments, until the Pennsylvania Department of Banking and Securities closed the Bank and the FDIC was appointed as receiver.

Though the Teppers stopped receiving periodic statements, they attempted to remit a periodic payment to the FDIC, but it neither cashed nor returned their check. The couple decided to wait until they received a periodic statement from the loan’s new servicer.

Some months later, the FDIC declared the loan to be in default and sold it, also assigning the mortgage securing the loan, to Amos Financial, LLC, an Illinois company. Not a financial institution or lender, its sole business was purchasing debts entered into by third parties and attempting to collect them.

Amos filed a foreclosure action in Pennsylvania court in March 2015. At that time, Amos was not registered to do business in Pennsylvania.

The Teppers filed a complaint alleging Amos violated the FDCPA.

The trial court found: (1) Amos was a “debt collector” as defined in § 1692a(6); (2) the Teppers’ loan was a “debt” as defined in § 1692a(5) of the Act; and (3) Amos violated the Act. Amos was not liable for failing to register as a foreign business in Pennsylvania, however, because it was a debt collector. Amos appealed, arguing that it was not a debt collector.

The appeals court found that Amos’s admitted sole business was collecting debts it purchased. It used the mails and wires for its business. It could be no plainer that Amos “uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts.” § 1692a(6). “Any debts” does not distinguish to whom the debt is owed. And it stands in contrast to “debts owed or due ... another,” which limits only the “regularly collects” definition. Asking if Amos is a debt collector is thus akin to asking if Popeye is a sailor. He's no cowboy.

The Court noted that an entity may satisfy the statutory definition of "creditor" and yet be a "debt collector."

The Court affirmed the portion of the trial court's opinion Amos challenged on appeal—that it was a debt collector under the "principal purpose" definition. Whether an entity acquired the debts it collects after they became defaulted does not resolve whether that entity is a debt collector. Instead, the Court followed the plain text of the statute: an entity whose principal purpose of business is the collection of any debts is a debt collector regardless whether the entity owns the debts it collects.

CASE LAW
TCPA – Consent

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CASE NAME: *Few v. Receivables Performance Management*
DATE: *08/09/2018*
CITATION: *United States District Court, N.D. Alabama, Eastern Division. Slip Copy. 2018 WL 3772863*

Few asserted that Receivables Performance Management violated the Telephone Consumer Protection Act, 47 U.S.C. § 227, by contacting her at least 184 times using an automated dialing machine in an attempt to collect a debt for satellite television and internet services.

Receivables moved for summary judgment arguing, in part, that Few's claim had to fail because she consented to receiving the debt-collection calls on her cell phone. Few responded that she revoked her consent before receiving many of the calls.

Citing *Reyes v. Lincoln Automotive Fin. Servs., 861 F.3d 51, 56-57 (2d Cir. 2017)*, the Court found that Few could not unilaterally revoke her consent to receive debt-collection calls because she agreed to provide that consent as part of a bargained-for exchange. Receivables's motion for summary judgment granted.

CASE LAW
FDCPA – Property services

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CASE NAME: *Schlaf on behalf of plaintiffs v. Safeguard Property, LLC*
DATE: *08/10/2018*
CITATION: *United States Court of Appeals, Seventh Circuit. --- F.3d ----. 2018 WL 3803800*

Andrew and Wendy Schlaf owned property subject to an FHA-insured mortgage serviced by Green Tree Servicing, LLC. The Schlafs defaulted, and Green Tree was unable to contact them.

Green Tree contracts with Safeguard, a "mortgage field servicing company," to perform a variety of services on properties with defaulted mortgages, including lawn maintenance, winterizing, property inspections, lock changes, pool maintenance, and utility management. Most relevant here, Green Tree arranged with Safeguard to assist Green Tree in complying with certain HUD regulations to which any of its properties with FHA-insured mortgages are subject, including to inspect those properties for occupancy.

To comply with the HUD inspection obligation, Green Tree contracted with Safeguard to perform "contact attempt inspection[s]" on the properties, during which a Safeguard representative visits the property to determine its occupancy status and places a door hanger on an outside doorknob of the property. The door hanger it placed for Green Tree gave instructions for the property owner to contact Green Tree. Safeguard representatives were not to identify themselves as Safeguard representatives and were instructed "to avoid talking about why they are on the property."

The Schlafs filed suit, alleging that Safeguard had violated the FDCPA by failing to comply with the initial disclosure requirements of 15 U.S.C. § 1692g and by violating 15 U.S.C. § 1692e(11), which requires debt collectors to disclose in their initial communications that they are communicating with the debtor in an attempt to collect a debt and that any information they obtain will be used for that purpose.

The district court held that Safeguard was not a debt collector and therefore not subject to the FDCPA's disclosure requirements.

The district court held that Safeguard was not a debt collector under the principal purpose definition because Safeguard performs numerous other services to Green Tree.

As to whether Safeguard "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another," the district court held that Safeguard's role was too remote and incidental even to be considered "indirect" debt collection.

The Schlafs appealed.

The appeal court noted that the parties focused on whether Safeguard's contact attempt inspections were "indirect" debt collection services.

The Court found that the door hanger did not identify Safeguard in any way, and the phone number connected the homeowner directly to Green Tree. Safeguard did not discuss the debt with the homeowners and had no other contact with the homeowners other than to leave the door hanger. The door hanger did not give any details about the homeowners' debt or demand payment. Further, there was no evidence that Safeguard was compensated based on the number of mortgagors who contact Green Tree after the contact attempt inspection or begin to repay their debt to Green Tree. The principal purpose of the contact inspection was to assist Green Tree in its FHA property preservation efforts, not its debt-collection efforts.

Affirmed.

CASE LAW

Bankruptcy – Value of collateral

CASE NAME: *In re Glenn*
DATE: *08/13/2018*
CITATION: *United States Court of Appeals, Fifth Circuit. --- F.3d ---- 2018 WL 3846202*

21st Mortgage Corporation financed Kayla Glenn's purchase of a used manufactured home for the "base price" of $29,910. This base price apparently included the cost of delivering the manufactured home, as well as the costs of blocking, leveling, and anchoring required by Mississippi law. 21st Mortgage retained a purchase-money security interest in the home and had a secured claim of $27,714.

Glenn filed Chapter 13. Glenn's plan allowed her to retain the home and pay 21st Mortgage the secured value (plus 5% interest) over the life of the plan. 21st Mortgage objected to the confirmation of the plan. The dispute was whether the cost of delivery and setup for the home should be included in the valuation. Because Glenn would retain the home, she would not again incur the costs of delivery and setup.

The bankruptcy court determined that the delivery and setup costs should not be included in the valuation of Glenn's manufactured home, overruling 21st Mortgage's objection. The district court affirmed. 21st Mortgage again appealed.

The appeals court found that § 506(a)(1) of the Bankruptcy Code states that the value of a creditor's claim "shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property ...." Section 506(a)(2) requires calculating replacement value "without deduction for costs of sale or marketing." The Court agreed with the district court that there is nothing in § 506(a)(2) that prohibits considering the "proposed disposition or use" of the property in the valuation.

Moreover, the Supreme Court in *Associates Commercial Corp. v. Rash, 520 U.S. 953, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997)*, considering the language of what is now § 506(a)(1), stated that "the 'proposed disposition or use' of the collateral is of paramount importance to the valuation question." In *Rash*, the Supreme Court held that § 506(a) requires a replacement-value standard when a debtor exercises the "cram down" option. The Supreme Court stated that "where the proper measure of the replacement value of a vehicle is its retail value, ... [a] creditor should not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning."

Here, the Court found that this meant that 21st Mortgage "should not receive portions of the retail price ... that reflect the value of items [Glenn] does not receive" when she retains her manufactured home and held that delivery and setup costs of a manufactured home retained by a debtor must be excluded from the manufactured home's valuation under § 506(a) of the Bankruptcy Code.

Affirmed.

CASE LAW
Foreclosure – Statute of limitations

CASE NAME: *Milone v. US Bank N.A.*
DATE: *08/15/2018*
CITATION: *Supreme Court, Appellate Division, Second Department, New York. --- N.Y.S.3d ----. 2018 WL 3863269*

On September 20, 2004, the plaintiff purchased residential real estate, executing a note secured by a mortgage. The note provided for interest-only payments for 120 months, with full maturity on April 1, 2036. On December 28, 2007, MERS, as nominee, assigned the mortgage to U.S. Bank.

The plaintiff defaulted beginning October 1, 2008. On November 16, 2008, America's Servicing Co. ("ASC") advised the plaintiff that if the delinquency and fees were not paid within 30 days, the circumstances "will result in the acceleration of your Mortgage Note ..." On January 13, 2009, U.S. Bank commenced a foreclosure action.

The standing of U.S. Bank must have been an issue since the court directed U.S. Bank to produce the original note. No original note was produced, and on February 29, 2012, the foreclosure action was dismissed.

On October 21, 2014, Wells Fargo, the loan servicer, sent the plaintiff a letter which noted the plaintiff's continued default and stated that Wells Fargo "hereby de-accelerates the maturity of the Loan, withdraws its prior demand for immediate payment of all sums secured by the Security Instrument and re-institutes the loan as an installment loan."

The plaintiff sued to cancel and discharge the mortgage and note, alleging that more than six years had passed from ASC's letter of November 16, 2008, by which the note was accelerated; that U.S. Bank's foreclosure action had been dismissed; and that no new foreclosure action had been timely commenced.

The trial court granted U.S. Bank's motion to dismiss the complaint with prejudice.

On appeal, the Court found that, to be effective, an acceleration notice to the borrower must be clear and unequivocal, and here, the language that the plaintiff's failure to cure her delinquency within 30 days "will result in the acceleration" of the note, was merely an expression of future intent that fell short of an actual acceleration.

Nevertheless, when U.S. Bank commenced its foreclosure action, the complaint expressly "elect[ed] to call due the entire amount secured by the mortgage." The Court therefore measured the applicable six-year statute of limitations from the date the foreclosure action was commenced. Since U.S. Bank withdrew its original foreclosure action and did not commence a new action, the plaintiff established that the six-year statute of limitations had expired.

However, an acceleration of a mortgaged debt, by either written notice or the commencement of an action, is only valid if the party making the acceleration had standing at that time to do so. The absence of a valid acceleration would mean that the statute of limitations had never even begun to run on the full debt.

The Court also held that de-acceleration notices must also be clear and unambiguous to be valid and enforceable. The Court found that the de-acceleration language used in this instance met that criteria, and U.S. Bank's de-acceleration occurred within six years measured from the commencement of its foreclosure action. But just as standing, when raised, is a necessary element to a valid acceleration, it is a necessary element, when raised, to a valid de-acceleration as well. The Court noted that this was particularly germane here because U.S. Bank had been directed to provide the original note at the time of the 2009 foreclosure, and the foreclosure action was thereafter dismissed.

The trial court's order was affirmed, except that the portion of the order dismissing the plaintiff's complaint was reversed.

CASE LAW
FDCPA – Creditor name

☹

CASE NAME:	*Levins v. Healthcare Revenue Recovery Group LLC*
DATE:	*08/22/2018*
CITATION:	*United States Court of Appeals, Third Circuit. --- F.3d ----. 2018 WL 3999888*

Elaine and William Levins alleged that Healthcare Revenue Recovery Group LLC ("HRRG") violated the FDCPA, 15 U.S.C. §§ 1692e(14), 1692d(6), and 1692e(10) by leaving telephone voice messages that did not use its true name, did not meaningfully disclose its identity, and used false representations and deceptive means to collect or attempt to collect a debt or obtain information about a consumer. The Levinses complained that voicemail messages in which HRRG went by the name of "ARS" were insufficient to identify it as HRRG or even as "ARS ACCOUNT RESOLUTION SERVICES," which was an alternative business name used by HRRG. HRRG moved to dismiss the complaint, and the District Court granted that motion. The Levinses appealed.

HRRG claimed the collection letter it said it mailed to the Levinses bore a company logo consisting of the letters "ARS," said in the letterhead that "Account Resolution Services" is "a division of HRRG, LLC," and, in the body of the letter, used "ARS" as an abbreviated name. The Court declined to rely on the collection letter attached to HRRG's motion because the complaint did not reference or rely on it.

According to the Court, § 1692e contains a non-exhaustive list of prohibited conduct, one of which is "[t]he use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization." The Court found that the Levinses plausibly alleged facts suggesting that "ARS" was not the "true name" of HRRG. The acronym is commonly associated with other debt collection companies, including "ARS National Services, Inc." and "Advanced Recovery Sys., Inc." The Court concluded that the Levinses stated a plausible claim for relief under § 1692e(14).

However, the Court concluded that the District Court was correct to rule that the Levinses did not state a claim under § 1692d(6). "Meaningful disclosure of the caller's identity" is not restricted to providing the name of the debt collector. Here, the voicemail messages would not mislead the least sophisticated debtor because the messages gave some identifying information about the caller, stated that the call was from a debt collector, and stated that the call was an attempt to collect a debt. Nothing in the messages rose to the level of "harass[ment], oppress[ion], or abuse ... in connection with the collection of a debt."

Also, when Congress enacted the FDCPA, it used the term "true name" in § 1692e(14), whereas it used "meaningful disclosure of the caller's identity" in § 1692d(6). The difference must have significance. If Congress had wanted § 1692d(6) also to require that a debt collection company use its "true name[,]" then it would have so specified.

Finally, The Court also agreed with the District Court's conclusion that the Levinses failed to state a claim under § 1692e(10). Nothing in the messages rose to the level of being materially deceptive, misleading, or false. The plain language of each message revealed that the caller was a debt collector, that the call was part of an attempt to collect a debt, and that any information obtained would be used in that attempt.

The Court vacated the District Court's dismissal of the § 1692e(14) claim and remanded for further proceedings. The dismissal of the claims under §§ 1692d(6) and 1692e(10) was affirmed.

LEGISLATION
Illinois
Foreclosure - Publication

😐

2017 IL H 5176. Enacted 8/3/2018. Effective immediately.

This bill amends 735 Ill. Comp. Sale 5/15-1507, regarding judicial sale of real estate which is the subject of a judgement of foreclosure, to provide that, in counties with a population of more than 3,000,000, the required notice of sale shall be published in a newspaper different from the newspaper that publishes the notice required by item (A) (which provides: advertisements in a newspaper circulated to the general public in the county in which the real estate is located, in the section of that newspaper where legal notices are commonly placed), and the newspaper in which the notice required by this item (B) (providing: separate advertisements in the section of such a newspaper, in which real estate other than real estate being sold as part of legal proceedings is commonly advertised to the general public) is published shall be a newspaper published in the township in which the real estate is located.

LEGISLATION
New York
Adverse liens – Code violations

😐

2017 NY A 416. Enacted 7/31/2018. Effective immediately.

This bill adds N.Y. Real Prop. Tax Law § 901 to authorize the city of Syracuse to collect any unpaid housing, building and fire code violation penalties, costs and fines through placement by the city's commissioner of finance on the city's annual tax levy.

Notwithstanding any other applicable provisions of law, nothing in this section shall be applied to a residential dwelling that is owner-occupied or is the primary residence of a homeowner.

Prior to the placement of any property with unpaid code violations on the tax levy, the City of Syracuse shall develop a program to assist tenants residing in a dwelling at risk for tax foreclosure due to unpaid code violations.

Nothing in this section shall preclude an owner or landlord from entering into a payment plan with the city of Syracuse for past amounts due for code violations.

LEGISLATION
New York
Adverse liens – Code violations

😐

2017 NY A 10618. Enacted 7/31/2018. Effective immediately.

This bill adds N.Y. Real Prop. Tax Law § 905 to authorize the City of Buffalo to collect any unpaid housing, building and fire code violation penalties, costs and fines through placement by the city's commissioner of finance on the city's annual tax levy.

Notwithstanding any other applicable provisions of law, nothing in this section shall be applied to a residential dwelling that is owner-occupied or is the primary residence of a homeowner.

Prior to the placement of any property with unpaid code violations on the tax levy, the City of Buffalo shall develop a program to assist tenants residing in a dwelling at risk for tax foreclosure due to unpaid code violations.

Nothing in this section shall preclude an owner or landlord from entering into a payment plan with the City of Buffalo for past amounts due for code violations.

BULLETIN
Rhode Island
Foreclosure Disclosure Form

Rhode Island Banking Bulletin 2018-2. Issued 7/27/2018.

Mortgage Foreclosure Disclosure Form Pursuant to R.I. Gen. Law § 34-27-3.1.

The bulletin includes the required disclosure form attached in both English and Spanish versions that must be provided to an individual consumer mortgagee by a mortgagor in order to comply with R.I. Gen Law 34-27-3.1.

ADOPTED RULE
Washington
Servicing

Effective 9/1/2018, this rule amends Wash. Admin. Code §§ 208-620-010 thru -935 (non seq.) to clarify the roles of parties investing in, owning, and servicing residential mortgage loans.

The rules provide additional detail to industry to help them comply with the law. Additionally, technical changes were made. The rules have been amended to clarify what residential mortgage loan servicing activities can be conducted outside the United States.

The rules have also been amended to detail the requirements of the compliance management system and provide resources to industry.

INSTALLATION

CASE LAW
Breach of duty

CASE NAME: *Ross v. Quality Homes of McComb, Inc.*
DATE: *07/26/2018*
CITATION: *United States District Court, S.D. Mississippi, Western Division. Slip Copy. 2018 WL 3594997*

The Rosses sued five defendants involved in the manufacture, sale, or transportation of their mobile home. Only one, Miss/Lou, remained. The Court compelled the Rosses to arbitrate their claims against Quality Homes of McComb, Inc., the home's seller, and Platinum Homes, LLC, the manufacturer. The Court dismissed with prejudice the Rosses' claims against Joey Harbin, a Platinum Homes employee, and U.S. Bank, the bank that financed the purchase.

Miss/Lou transported and installed the mobile home. But its name was mentioned just once in the complaint, in the section identifying the parties. And Miss/Lou was not the focus of any of the complaint's nine counts.

Miss/Lou failed to appear. The Clerk of Court thus entered a Federal Rule of Civil Procedure 55(a) default against Miss/Lou and the Rosses asked the Court to enter a default judgment against Miss/Lou.

The Court noted that it could not enter a default judgment against Miss/Lou unless the Rosses' complaint contained well-pleaded allegations that provided a sufficient basis for doing so.

According to the Court, the Rosses' shotgun-style complaint attempted to allege, against all defendants, claims for (1) breach of fiduciary duty, (2) breach of contract, (3) breach of the implied covenant of good faith and fair dealing, (4) fraudulent misrepresentation, (5) unconscionability, (6) negligent misrepresentation, (7) violation of federal and state consumer protection statutes, (8) slander, and (9) violations of 42 U.S.C. § 1983.

The Court found that it was unclear how Miss/Lou could owe the Rosses a fiduciary duty.

The thrust of Count 2, like Count 1, was the "business relationship ... for the purchase of [the] home." The only parties with which the Rosses could have had any "business relationship" for the purchase of the mobile home were Quality Homes of McComb and Platinum Homes.

The claim for breach of the implied covenant of good faith and fair dealing against Miss/Lou failed because the complaint did not identify a contract between the Rosses and Miss/Lou.

The complaint failed to allege a plausible fraudulent misrepresentation claim because the complaint did not identify a representation by Miss/Lou.

The complaint failed to allege a plausible claim against for unconscionability because unconscionability is not a cognizable claim.

The complaint failed to allege a plausible negligent misrepresentation claim because the complaint failed to identify any misrepresentation Miss/Lou made.

The complaint failed to allege a plausible claim against Miss/Lou for violation of any of the cited (but unexplained) consumer protection laws in Court 7.

Count 8 alleged that "defendants" slandered the Rosses when Platinum Homes employee Joey Harbin called the Rosses "n-----s." The allegations had nothing to do with Miss/Lou.

Count 9 of the Rosses' complaint attempted to allege a claim for emotional distress under 42 U.S.C. § 1983. The Rosses alleged that they "suffered mental anguish and emotional distress" as a result of the misrepresentations and racial slurs of unspecified defendants. Miss/Lou's involvement was again unexplained.

The motion for default judgment against Miss/Lou was denied.

EXECUTIVE ORDER
California
Wildfires

California Executive Order B-53-18. Ordered 8/9/2018.

Effective immediately, this order streamlines recovery efforts in communities impacted by the wildfires that are burning in Lake, Siskiyou, Shasta, Mendocino, and Napa Counties.

The order provides:

The Department of Housing and Community Development and local enforcement agencies will jointly develop standards in the impacted areas to provide reasonable consistency with appropriate fire, health, flood, and other factors normally considered in the mobilehome or special occupancy park approval process for the construction of a new park or manufactured home installation standards and appurtenances during the three-year suspension authorized by this Executive Order.

All fees authorized by the Mobilehome Parks Act are suspended and waived for three years after the date of this Order with regard to manufactured home installation, inspections or plan checking, the late renewal of registration certificate or certificate of title, and relating to establishing proof of ownership for disaster survivors who are owners or occupants of a manufactured home or mobilehome, or recreational vehicle, whose homes were damaged or destroyed as a result of the wildfires.

The planning and zoning requirements in Government Code sections 65852.3 through 65863.13 as applicable to housing projects in the impacted counties, are suspended for three years after the date of this Executive Order, for recreational vehicles, mobilehomes and manufactured homes and mobilehome and special occupancy parks damaged or destroyed as a result of the wildfires.

Any local government zoning and land use ordinances that would preclude the placement and use of a manufactured home, mobilehome, or recreational vehicle on a private lot outside of a mobilehome park or special occupancy park for use during the reconstruction or repair of a home damaged or destroyed by the wildfires or subsequent floods and debris flows, are suspended for three years. Those individuals placing manufactured homes, mobilehomes, or recreational vehicles on lots pursuant to this paragraph shall obtain permits as described above.

LEGISLATION
California
Conversion to resident-owned

2017 CA A 1943. Enacted 9/5/2018. Effective immediately.

This bill amends Cal. Health & Safety Code § 18551 to specify that a registered owner of a manufactured home or mobilehome in a mobilehome park that is converted or proposed to be converted to a resident-owned subdivision, stock cooperative, or condominium project, may submit written evidence of that owner' s resident ownership in the mobilehome park in order to comply with the requirement to submit written evidence that the manufactured home, mobilehome, or commercial modular owner owns, holds title to, or is purchasing the real property where the manufactured home, mobilehome, or commercial modular is to be installed.

ADOPTED RULE
New Jersey
Park models

Effective 8/20/2018, this rule amends N.J. Admin. Code § 5:23-4D.3, Standards, to provide that the following chapters, sections or pages of "ANSI A119.5 Standard for Park Model Recreational Vehicles, 2015 Edition" are amended as follows:

Chapter 5, Construction Requirements, shall be amended as follows:

i. Delete the text of section 5-1 entitled "General Requirements" and insert the following in its place: " Park model recreational vehicles shall be constructed in accordance with the requirements of this chapter."

ii.-xi. (No change.)

xii. Delete the text of Section 5-8.4 and insert the following: "The park model recreational vehicle shall be anchored to withstand the design wind load for the location."

The rule also amends N.J. Admin. Code § 5:23-4D.4, Certification, to provide:

(a) A Recreational Vehicle Industry Association (RVIA) label or an approved equivalent label or certification for each recreational park trailer indicating that the unit has been manufactured in compliance with the adopted recreational park trailer subcode shall be permanently attached thereto in an accessible and visible location. The location of the label shall be indicated on the approved building system documentation.

(b) An approved label for a recreational park trailer shall bear the following information:

1. The name and seal of the Recreational Vehicle Industry Association or such other organization with a quality assurance program as may be approved by the Department; and

2. (No change.)

LENDING

CASE LAW

Discrimination – Disparate impact

CASE NAME:	*City of Miami Gardens v. Wells Fargo & Co.*
DATE:	*06/29/2018*
CITATION:	*United States District Court, S.D. Florida, Miami Division. Slip Copy. 2018 WL 3213488*

The City of Miami Gardens, sued Wells Fargo for intentional lending discrimination and disparate impact discrimination in violation of the Fair Housing Act. The crux of the claim was that the loans made to white borrowers in Miami Gardens were less expensive than loans made to African-American and Hispanic borrowers. Miami Gardens argued that because the loans to minority borrowers were more expensive, they resulted in defaults, and foreclosures, which in turn lowered property values and decreased the City's tax revenue.

At the outset of this case, the Court identified the Fair Housing Act's applicable statute of limitations and the threshold issue: whether Wells Fargo issued any predatory loans or discriminatory loans during the limitations period in Miami Gardens that violated the Fair Housing Act. If the City could show a Fair Housing Act violation during the limitations period, the continuing violations doctrine allowed it to recover for past violations.

The Court found that the evidence showed Wells Fargo issued 153 loans during the limitations period. Of the 153 loans, 130 of them were to minority borrowers and 8 loans were made to non-Hispanic white borrowers. There were only two loans that the City alleged were at a higher cost to minorities. For two loans, even assuming they were more expensive, there was insufficient record evidence to show the policies produced "statistically-imbalanced lending patterns." Accordingly, the Court found the City failed to show a violation of the Fair Housing Act during the limitations period under a disparate impact theory.

In addition, there was no factual dispute that the "loan details" between the minority and non-minority borrowers in these circumstances were not "nearly identical." The minority borrowers opted to receive a higher rate of interest in exchange for lender credits ($1,878 and $8,000) to defray closing costs, while the non-minority borrower only received $479 as a credit to close, in addition to receiving a promotional discount. The loans originated at different times, and the borrowers elected different structures to either finance closing costs over time or pay them at the outset. These variations were sufficient for the Court to find that the comparator loans were not nearly identical.

Accordingly, the Court granted the motion for summary judgment finding even if the City could state a prima facie case by providing "nearly identical" comparators, the City ultimately could not carry its burden to show by a preponderance of the evidence that Wells Fargo's reasons for the price differentials were mere pretext for discrimination.

CASE LAW

Interest rates – Unconscionability

CASE NAME:	*De La Torre v. CashCall, Inc.*
DATE:	*08/13/2018*
CITATION:	*Supreme Court of California. --- P.3d ----. 2018 WL 3827233*

CashCall, Inc. is a lender of consumer loans to high-risk borrowers. One of its products was an unsecured $2,600 loan, carrying an APR of either 96% or, later in the class period, 135%.

Plaintiffs alleged that CashCall violated California's Unfair Competition Law (UCL). The UCL defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) Plaintiffs asserted that CashCall's lending practice was unlawful because it violated Cal. Fin. Code § 22302, which applies the unconscionability doctrine to consumer loans.

The district court found that the UCL could not be used as a basis for Plaintiffs' unconscionability claim because ruling on that claim would impermissibly require the Court to regulate economic policy. The court reasoned it could not fashion a remedy under the UCL "without deciding the point at which CashCall's interest rates crossed the line into unconscionability." The court found that Cal. Fin. Code § 22303 does not cap interest rates on loans exceeding $2,500. The court granted CashCall's motion for summary judgment. Plaintiffs appealed.

The Ninth Circuit certified to the California Supreme Court this question: "Can the interest rate on consumer loans of $2500 or more governed by California Finance Code § 22303, render the loans unconscionable under California Finance Code § 22302?"

According to the Court, the doctrine of unconscionability reaches contract terms relating to the price of goods or services exchanged. An interest rate is the price charged for lending an amount of money. As with any other price term, an interest rate may be deemed unconscionable. As such, just because loans of at least $2,500 are not subject to a numerical ceiling on the interest rate does not mean that they cannot be found unconscionable.

Plaintiffs' claim was premised on unlawful business conduct, which section 17200 of the UCL proscribes. By prohibiting unlawful business practices, section 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. In this case, section 22302 makes "[a] loan found to be unconscionable" a violation of the Financing Law. The UCL, in turn, makes that violation "independently actionable." Plaintiffs were not praying for remedies under section 22302. They were seeking UCL remedies.

Section 22302 expressly provides that an unconscionable loan breaks the law and the UCL supplies a cause of action to police such unlawful conduct.

Further, finding unconscionable a contract setting an interest rate is categorically different from imposing an unvarying cap on the interest rate. To declare an interest rate unconscionable means only that—under the circumstances of the case, taking into account the bargaining process and prevailing market conditions—a particular rate was "overly harsh," "unduly oppressive," or "so one-sided as to shock the conscience." The absence of a rate cap on loans of at least $2,500 does not make all rates lawful, for all purposes, under all regulations. In particular, section 22303 does not insulate interest rates from the scrutiny authorized by section 22302.

The Court also found that courts are not devoid of power to issue properly-fashioned remedies to mitigate unconscionability and certain relief should raise no issue of rate-cap setting.

The Court found that California courts have the authority to decide whether contract provisions, including interest rates, are unconscionable.

The Court noted that the Ninth Circuit did not ask it to decide whether CashCall's loans were unconscionable. The Court held only that California law permits such a finding, as long as the requirements of unconscionability are satisfied.

ADOPTED RULE
Mississippi
Insurance

Effective 9/16/2018, this rule adds 19-34 Miss. Code R. § 34.11, to provide an Outline of Coverage and Comprehensive Policy Checklist to be provided by an insurer to an insured, with reference to homeowners, mobile/manufactured housing, and renters/tenant insurance.

LEGISLATION
New Jersey
Fees

2018 NJ A 2035. Enacted 8/24/2018. Effective 11/22/2018.

This bill revises the New Jersey Residential Mortgage Lending Act, adding provisions to allow for transitional MLO licenses and impacting third-party loan processors and underwriters.

In addition to amendments related to licensing, the bill amends N.J. Stat. Ann. § 17:11C-74 to provide that a residential mortgage lender, incidental to the origination, processing and closing of any mortgage loan transaction, shall have the right to charge only the following fees: (1) application fee; (2) origination fee: (3) lock-in fee; (4) commitment fee; (5) warehouse fee; (6) discount points; and (7) fees necessary to reimburse the residential mortgage lender for charges imposed by third parties which shall include: (i) an appraisal fee; (ii) a credit report fee; and (iii) such other third party charges as the commissioner may expressly permit to lenders by rule in accordance with a procedure established by rule.

A residential mortgage broker, incidental to the brokering of any mortgage loan transaction, shall have the right to charge only the following fees: (1) application fee; (2) broker fee; and (3) fees necessary to reimburse the residential mortgage broker or lender for charges imposed by third parties.

BULLETIN
CFPB
HMDA

Issued 8/9/2018.

The Bureau of Consumer Financial Protection announced the availability of the File Format Verification Tool (FFVT) for HMDA data collected in 2018 and submitted in 2019. The FFVT is a resource for testing whether the HMDA file meets certain formatting requirements specified in the HMDA Filing Instructions Guide (FIG).

BULLETIN
CFPB
Annual privacy notice

Issued 8/10/2018.

The Bureau of Consumer Financial Protection finalized amendments to implement legislation that allows financial institutions that meet certain requirements to be exempt from sending annual privacy notices to their customers.

The Gramm-Leach-Bliley Act (GLBA) generally requires that financial institutions send annual privacy notices to customers.

In December 2015, Congress amended the GLBA as part of the Fixing America's Surface Transportation Act (FAST Act). This amendment to the GLBA provides financial institutions that meet certain conditions an exemption to the requirement under the GLBA to deliver an annual privacy notice. A financial institution can use the annual notice exception if it limits its sharing of customer information so that the customer does not have the right to opt out, and has not changed its privacy notice from the one previously delivered to its customer. The rule issued by the Bureau implements this legislation and establishes deadlines for institutions resuming annual privacy notices if their practices change and they therefore cease to qualify for the exemption.

FINAL RULE
CFPB
Annual threshold adjustments

83 Fed. Reg. 43503 (August 27, 2018). Effective 1/1/2019.

12 CFR Part 1026.

Truth in Lending (Regulation Z) Annual Threshold Adjustments (Credit Cards, HOEPA, and Qualified Mortgages).

The Bureau of Consumer Financial Protection is required to calculate annually the dollar amounts for several provisions in Regulation Z; this final rule revises, as applicable, the dollar amounts for provisions implementing TILA and amendments to TILA, including under the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act), the Home Ownership and Equity Protection Act of 1994 (HOEPA), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The Bureau is adjusting these amounts, where appropriate, based on the annual percentage change reflected in the Consumer Price Index (CPI) in effect on June 1, 2018.

Specifically, for open-end consumer credit plans under TILA, the threshold that triggers requirements to disclose minimum interest charges will remain unchanged at $1.00 in 2019. For open-end consumer credit plans under the CARD Act amendments to TILA, the adjusted dollar amount in 2019 for the safe harbor for a first violation penalty fee will increase by $1 to $28 and the adjusted dollar amount for the safe harbor for a subsequent violation penalty fee will increase by $1 to $39. For HOEPA loans, the adjusted total loan amount threshold for high-cost mortgages in 2019 will be $21,549. The adjusted points-and-fees dollar trigger for high-cost mortgages in 2019 will be $1,077. For qualified mortgages, which receive certain protections from liability under the ability-to-repay rule, the maximum thresholds for total points and fees in 2019 will be 3 percent of the total loan amount for a loan greater or equal to $107,747; $3,232 for a loan amount greater than or equal to $64,648 but less than $107,747; 5 percent of the total loan amount for a loan greater than or equal to $21,549 but less than $64,648; $1,077 for a loan amount greater than or equal to $13,468 but less than $21,549; and 8 percent of the total loan amount for a loan amount less than $13,468.

BULLETIN
HUD
Affirmatively Furthering Fair Housing

Issued 8/13/2018.

The U.S. Housing and Urban Development (HUD) published a notice inviting public comment on amendments to its Affirmatively Furthering Fair Housing (AFFH) regulations. HUD's goal in pursuing new rulemaking is to offer more helpful guidance to states and local communities to effectively promote fair housing choice through the use of their federal funds. Read HUD's Advance Notice of Proposed Rulemaking.

As HUD begins the process of amending the existing AFFH regulations, it is soliciting public comment on changes that will: (1) minimize regulatory burden while more effectively aiding program participants to meet their statutory obligations, (2) create a process focused primarily on accomplishing positive results, rather than on analysis, (3) provide for greater local control and innovation, (4) seek to encourage actions that increase housing choice, including through greater housing supply, and (5) more efficiently utilize HUD resources.

LICENSING

LEGISLATION
Illinois
Advertisements

😐

2017 IL S 2615. Enacted 8/10/2018. Effective immediately.

This bill amends 205 Ill. Comp. Stat. 635/3-3, under the Residential Mortgage License Act of 1987, to replace "Commissioner" with "Secretary."

The bill provides that mortgage loan advertisements must reference the Nationwide Multistate Licensing System and Registry's Consumer Access website, except where exempted by the Secretary.

The bill deletes the provision that all advertisements by a licensee shall contain the name and an office address of such entity.

The bill also provides that no licensee shall advertise its services in Illinois in any media, whether print or electronic, without including its unique identifier (formerly, the words "Illinois Residential Mortgage Licensee").

LEGISLATION
Illinois
Loan processors

😐

2017 IL H 4404. Enacted 8/14/2018. Effective immediately.

This bill amends the Residential Mortgage License Act, 205 Ill. Comp. Stat. 635/1-3, to add that an entity that is exempt from licensure as an independent loan processing entity shall annually apply to the Secretary through the Nationwide Multistate Licensing System and Registry for an exempt company registration for the purpose of sponsoring one or more individuals subject to mortgage loan originator licensing requirements. A loan processor who performs clerical or support duties at the direction of and subject to the supervision and instruction of a licensed mortgage loan originator sponsored by an independent loan processing entity shall be exempt from his or her own licensing as a mortgage loan originator. An independent loan processing entity shall not be subject to examination by the Secretary. The Secretary may adopt rules to implement any provisions necessary for the administration of this subsection.

The bill amends 205 Ill. Comp. Stat. 635/1-4 to provide that "exempt person or entity" includes any entity engaged solely in providing loan processing services through the sponsoring of individuals acting as mortgage loan originator licensees.

LEGISLATION
Illinois
Repossession agencies

😐

2017 IL S 3504. Enacted 8/17/2018. Effective 1/1/2019. Scheduled for repeal 1/1/2022.

This bill amends 225 Ill. Comp. Stat. 422/45, under the Collateral Recovery Act, to provide that no repossession agency employee may be issued a recovery permit if the person has been convicted of any crime under the laws of the United States or any state or territory thereof that is (i) a felony, (ii) a misdemeanor, an essential element of which is dishonesty, or (iii) a crime that is related to the practice of the profession.

The bill amends 225 Ill. Comp. Stat. 422/85 to make changes concerning which crimes the Commerce Commission may require a repossession agency licensee, a recovery manager licensee, or a recovery permit holder to disclose and which crimes the Commission may use in denying or disciplining a licensee or permit holder.

TITLING AND PERFECTION

CASE LAW

Security interest – Affixation

☺

CASE NAME: In re Riffe
DATE: 08/06/2018
CITATION: United States Bankruptcy Court, S.D. West Virginia, at Beckley. Slip Copy 2018 WL 3788973

The Riffes purchased a manufactured home, in part, with the proceeds of a loan from Vanderbilt. The loan was secured by a vehicle title lien on the manufactured home. The Riffes made a down payment of $30,000, with the balance of $45,695.94 being financed. The estimated monthly payment was $535.92.

The Riffes filed Chapter 13 and listed Vanderbilt as an unsecured creditor. Vanderbilt filed its Proof of Claim as a secured creditor. The Riffes objected to the Proof of Claim, contending that since the home was now permanently affixed to the real estate and taxed as real property, it was regarded as real property rather than personal, and, in order to obtain a lien on real property, West Virginia law requires the execution and filing of a deed of trust, which Vanderbilt did not hold.

The Court found that W. Va. Code § 17A-4A-1 provides the sole effective means of perfecting a security interest in a mobile home:

"The ... [West Virginia Division of Motor Vehicles] upon receiving an application for a certificate of title to a ... factory-built home ... for which a certificate of title is required under article three of this chapter, all of which are hereinafter in this article referred to as vehicles, showing liens or encumbrances upon the vehicle, shall, upon issuing to the owner thereof a certificate of title therefor, show upon the face of the certificate of title all liens or encumbrances disclosed by the application."

According to the Court, the later affixation of the manufactured home to the real estate did not change its character. Under the West Virginia UCC, W. Va. Code § 46-9-334(e)(4), a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if:

(4) The security interest is:

(A) Created in a manufactured home in a manufactured-home transaction; and

(B) Perfected pursuant to a statute described in section 9-311(a)(2).[2]

Thus, there was no merit to the Riffes' contention that affixation cancelled or voided Vanderbilt's security interest.

Motion to Dismiss Adversary Proceeding granted.

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