Consumer Financial Services Update

Recent Eleventh Circuit Opinion Confirms Mortgage Statements are not Debt Collection

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The United States Court of Appeals for the Eleventh Circuit issued an opinion last week that provides significant clarity to an issue that has otherwise been undeveloped at the appellate level until now: whether mortgage statements constitute debt collection communications. The Eleventh Circuit ruled that they do not.

The Federal Truth in Lending Act, 12 C.F.R. § 1026.41 (TILA) requires loan servicers to send consumers periodic mortgage statements that include information about the debt and any delinquency that may exist, giving these communications the appearance of being attempts to collect that debt. As a result, consumer lawyers have created a cottage industry using mandatory mortgage statements as the "debt collection" communications that serve as the vehicle for claims brought pursuant to the Fair Debt Collections Practices Act, 15 U.S.C. § 1692 (FDCPA) and its state analogs, taking advantage of the one-way statutory fee provisions. However, the United States Court of Appeals for the Eleventh Circuit recently ruled, among other things, that mortgage statements sent in compliance with TILA do not constitute attempts to collect a debt and therefore do not trigger liability under the FDCPA, serving a significant defeat to this cottage industry. See *Green v. Specialized Loan Servicing, LLC*, 2019 U.S. App. LEXIS 7066 (11th Cir. Mar. 11, 2019).

The *Green* case involved a consumer who defaulted on his mortgage loan, and subsequently received mortgage statements, a default letter regarding the debt, and a foreclosure complaint seeking to enforce the mortgage. Due to a previously unsuccessful foreclosure action, the mortgage statement, default letter, and foreclosure complaint at issue in *Green* were all sent more than five years after the initial date of default. Florida provides a five-year statute of limitations for foreclosure actions. Therefore, the consumer took the position that the loan servicer violated the FDCPA through these communications by misrepresenting the debt, insofar as the total outstanding debt was not reduced to eliminate amounts that came due more than five years earlier. The consumer also asserted that the communications improperly sought to collect attorneys' fees from the prior unsuccessful foreclosure action.

The loan servicer filed a motion to dismiss that was granted by the District Court, dismissing the action with prejudice. The District Court explained that the claim failed because of an overarching issue: the consumer's theory regarding the impact of the statute of limitations was incorrect, and further, it was improper to turn a potential statute of limitations affirmative defense into an affirmative claim under the FDCPA. The District Court also ruled that the claim failed as to the default letter because it was sent outside the one-year FDCPA statute of limitations. In so ruling, the District Court rejected the consumer's argument that the default letter was part of a continuing violation of the FDCPA that extended through the filing of the foreclosure action and subsequent mortgage statements. The District Court explained that

each communication triggers the statute of limitations for that communication. Lastly, the District Court ruled that the mortgage statement at issue did not add impermissible demands for payment beyond that which was required by TILA, and therefore it was not debt collection as a matter of law. The Eleventh Circuit affirmed on all grounds, except that it did not find it necessary to reach the issue of whether it is permissible to turn a potential affirmative defense into an FDCPA claim.

Mortgage Statements are Not "Debt Collection"

Most notably, the Eleventh Circuit agreed with the District Court's finding that the mortgage statement was not an attempt to collect a debt because it did not include an impermissible demand for payment beyond that which is required by TILA. This is the first time a Circuit Court has concluded that a mortgage statement sent in accordance with the requirements of TILA is not a debt collection communication for purposes of the FDCPA. In reaching that conclusion, the Eleventh Circuit recognized that mortgage statements serve a "useful purpose" and explained that the mortgage statement did not deviate from the requirements of TILA in a manner that rose to the level of being unlawful debt collection language. The Eleventh Circuit also distinguished a case involving escalating debt collection language that was included in monthly statements, explaining that the mortgage statement in *Green* "lacks the strong demands for payment" used in that case. In effect, the Eleventh Circuit signaled that a mortgage statement will not be considered debt collection unless the deviations from the requirements of TILA can independently be considered debt collection language.

This finding is significant because consumer lawyers will continue to adapt new theories as to why a debt is being misrepresented, but they need a "debt collection" communication to trigger a potential FDCPA violation and the associated one-way fee provision. Since loan servicers are required to send mortgage statements, there is no way to avoid potential FDCPA claims if mortgage statements can constitute the triggering "debt collection" communications. Moreover, it can be a violation of the FDCPA to send consumers "debt collection" communications while they are represented by counsel, leaving loan servicers in a catch-22 if the mandatory mortgage statements are considered "debt collection." By eliminating mortgage statements as a potential vehicle for FDCPA claims, loan servicers gain control over their FDCPA exposure, since they can limit or control the other communications they send.

The Statute of Limitations does not Reduce the Amount that can be Collected

Another significant conclusion reached by the Eleventh Circuit is that the statute of limitations for filing a foreclosure action does not impact the amount that can be collected in that action. The Eleventh Circuit followed Florida's Third, Fourth, and Fifth District Courts of Appeals in reaching that conclusion, and Florida's Second District Court of Appeals subsequently reached the same result. See *Grdic v. HSBC Bank USA, N.A.*, 2019 Fla. App. LEXIS 3829 (Fla. 2d DCA Mar. 13, 2019); *Grant v. Citizens Bank, N.A.*, 2018 WL 6816805 (Fla. 5th DCA 2018); *Gonzalez v. Federal National Mortgage Ass'n*, 2018 Fla. App. LEXIS 10786 (Fla. 3d DCA 2018) and *Bank of America, N.A. v. Graybush*, 253 So. 3d 1188, 1193 (Fla. 4th DCA 2018).

Requests in Lawsuits are not Necessarily Debt Collection

It has long been held that a foreclosure action can constitute a "debt collection" communication under certain circumstances. However, the Eleventh Circuit confirmed that the communication must actually request payment. The

issue arose in *Green* because the consumer alleged the loan servicer was seeking improper attorneys' fees, but the actual communication merely asked the trial court to determine the amount of attorneys' fees to which it is entitled. The Eleventh Circuit found that this was not debt collection activity, and appears to reject the notion that a consumer can go outside the four corners of the communication to anticipate what the loan servicer may seek to collect.

Action Item

The *Green* decision provides a strong defense against FDCPA claims predicated upon a mortgage statement. The decision should help ease concerns over sending mortgage statements to consumers and will hopefully result in a downturn in litigation brought pursuant to the FDCPA and its state analogs. However, loan servicers should review their mortgage statements to determine whether there is added debt collection language that may take them outside the protection afforded by *Green*, and update their form mortgage statements as appropriate. The Eleventh Circuit did not define precisely when a mortgage statement deviates from the requirements of TILA enough to become debt collection, but it appears the deviation must be significant enough that in isolation, it would be considered debt collection language.

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For further information, please reach out to the authors of this alert or another member of the firm's Consumer Financial Services Litigation Team.

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