State Bar of Michigan

N E W S L E T T E R

Consumer Law

V. 17, No. 1 State Bar of Michigan Consumer Law Section January 2013

Contents

From the Chair

Michael Nelson, Esq.

Despite the unfortunate demise of the Consumer Protection Act at the hands of the Michigan Supreme Court, there remain practical ways to get relief for consumers. The Magnuson Moss Warranty Act provides a cause of action, with attorney fees, for breach of express or implied warranty. The Fair Debt Collection Practices Act is alive and well and covers a number of abusive practices by debt collectors, including bad debt buyers. The Fair and Accurate Credit Transactions Act (FACTA) and The Telephone Consumer Protection Act are emerging sources of litigation.

During the coming year, the Consumer Section intends to provide education about consumer rights and remedies to consumers as well as section members. I encourage members to use their contacts with local organizations and media to help educate consumers about their rights and to contact section council members when you think we might help. Consumers who know their rights are less likely to be ripped off – and they might provide you with some new business.

—Michael Nelson, Esq.

The Telephone Consumer Protection Act (TCPA)— 47 U.S.C. § 227

What's the TCPA All About?

By Rex Anderson, Esq.

The TCPA is one of the most popular federal consumer laws of all time. Its purpose is to protect our right to privacy. This law allows "we the people" to chose how, when, and by what means we are contacted by telemarketers and debt collectors. Even members of Congress and federal judges get annoying phone calls from telemarketers and debt collectors. These calls wake people up and interrupt our dinnertime. These calls are even more irksome when we realize it's not even a human being calling us; it's a blasted computer. So Congress acted and the federal judges are enforcing this law. This article concerns prohibited telephone calls, not junk faxes.

Over 20 years ago, in 1991, Congress enacted the TCPA in response to an increasing number of complaints consumers had regarding the practices and frequency of phone calls made by telemarketers and debt collectors. Congress was concerned with balancing the privacy interests of telephone subscribers who were frequently harassed and inconvenienced by incessant calling from telemarketers and debt collectors with the interests of facilitating interstate commerce. Congress found that unwanted automated calls were a "nuisance and an invasion of privacy, regardless of the type of call." Banning such calls was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." Pub. L. No. 102-243, §§ 2(10-13) (Dec. 20, 1991) codified at 47 U.S.C. § 227. The purpose of the TCPA is to reduce the number of nuisance calls. The following statement was made part of the congressional record back in 1991. The situation is not much different 20 years later.

> Computer telephone calls are invading our homes and destroying our privacy. Consumers around the country are crying out for Congress to put a stop to these computerized telephone calls. Congress has a clear opportunity to protect the interests of our citizens, and we should not pass up this chance.
>
> Computerized telephone calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall. These machines are out of control, and their use is growing by 30% every year. It is telephone terrorism, and it has got to stop.

137 Cong. Rec. S16204 at *S16205- S16206, 1991 WL 229525 (Nov. 7, 1991) (Remarks of Sen. E. Hollings)

Congress found that unwanted automated calls were a "nuisance and an invasion of privacy, regardless of the type of call." The trend of automated calls has skyrocketed since 1990. Technological advancements have reduced the cost of robotic dialers, allowing many small businesses to afford and incorporate this equipment as part of their marketing or debt collection campaigns. Congress believed that banning such calls was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." Pub. L. No. 102-243, §§ 2(10-13) (Dec. 20, 1991) codified at 47 U.S.C. § 227. In response Congress created a private right of action for consumers, on three claims, 1) calls to cell phones, 2) calls to residential lines, and 3) calls to numbers registered on the "Do Not Call List" (DNC). As a quirky side note, the TCPA legislation gave ultimate interpretation and rule making authority to the Federal Communication Commission (FCC), which does not provide for federal district court review. So it is essential to review the expanding body of FCC rulings to fully understand intricacies of the TCPA. The "Hobbs Act" (aka "Administrative Orders Review Act") 28 USC 2342(1); 47 USC 402(a) provides specific procedures for reviewing FCC orders which are otherwise considered final. Federal district courts cannot overturn FCC rulings.

The TCPA allows for actual and statutory damages. Statutory damages are a penalty for non-compliance with the TCPA or, essentially, "for getting caught." Unlike other consumer protection laws, statutory damages are generally more than actual damages in a TCPA case. Unlike other federal consumer laws such as the Fair Debt Collection Practice Act (FDCPA) and the Fair Credit Reporting Act (FCRA), the TCPA does not have an attorney fee shifting provision when the consumer wins. Nevertheless, these cases can attract competent counsel when there is a high volume of calls and multiple section violations. In certain circumstances, a single call may warrant up to $3,000.00 in statutory damages. TCPA cases are also ideal for class action remedy because of the common questions of law and fact and the uniformity of statutory damages. In Michigan, there is a four-year statute of limitations on TCPA violations.

What Violates the TCPA?
Calls to Cell Phones—Section 227(b)(1)(A)(iii)

The TCPA makes it unlawful for any person within the United States…to make any call using any automatic telephone dialing system or an artificial or prerecorded voice.…" 47 U.S.C. § 227(b)(1)(A)(iii) The TCPA defines ATDS as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C § 227(a)(1). According to the FCC, an ATDS is any telephone equipment that has the capacity to dial numbers without human intervention. This is an extremely broad standard. If the telephone equipment can potentially be configured or programmed to auto dial, then it is considered an ATDS and is regulated by the TCPA and the FCC.

Presumably, this broad definition resulted because Congress anticipated and pre-empted loopholes by TCPA defendants, who could simply flip a switch on their phone systems and say "it never happened" to avoid liability. In both *Satterfield v Simon et al* and *Griffith v Consumer Portfolio Recovery,* the courts have followed the FCC's broad definition of an ATDS:

> When evaluating the issue of whether equipment is an ATDS, the statute's clear language mandates that the focus must be on whether the equipment has the *capacity* "to store or produce telephone numbers to be called, using a random or sequential number generator. Accordingly, a system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it.
>
> Satterfield v Simon *et al* No. 07-16356 D.C. No. CV-06-02893-CW
>
> The FCC concluded that predictive dialers are governed by the TCPA because, like earlier autodialers, they have the capacity to dial numbers "without human intervention." In doing so, it interpreted "automatic telephone dialing system" to include equipment that utilizes lists or databases of known, nonrandom telephone numbers.
>
> *Griffith v. Consumer Portfolio Serv., Inc.*, 838 F.Supp.2d 723 (N.D.Ill. 2011)

The TCPA prohibits both the use of an "Automatic Telephone Dialing System" ("ATDS") for 1) Automated dialing calls to cellular telephones and/or 2) leaving "Artificial or Prerecorded Voice" messages. An "artificial" voice message is a computer-generated message that

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sounds like a robot. A "pre-recorded" voice message, on the other hand, is a recorded human voice message that the caller uses when contacting consumers. Section 227(b) applies to all cell phones whether used for business or personal use. The TCPA also prohibits text messages to cell phones sent by an ATDS. The TCPA does not require the consumer to answer the call in order to establish a violation. *Fillichio v M.R.S. Associates, Inc.,* Case No. 09-61629-CIV-JORDAN.

It's illegal every time you receive a robo call and/or an artificial or pre-recorded voice message to your cell phone. The only defense is that you previously gave the caller permission to call you. Courts have held that consumers have "consented" to calls from a debt collector if the consumer provided her cell phone number on the credit application or gave express permission to either the creditor or collector over the phone. You can revoke consent previously given to a collector or creditor by sending a certified letter asking the creditor/collector to stop calling your cell phone.

An automated or "robo" call is a call dialed by a computer. Computers allow debt collectors and telemarketers to make billions of calls per day. You know that you have been robo-dialed when you hear dead air while trying to answer the call, and then hear some clicking noises and then you finally hear a pre-recorded voice message or your call is transferred to a live person.

Sometimes bill collectors will mistakenly data enter an innocent (stranger to the debt) person's cell phone number into their automated dialer, instead of the true debtor's number. This frequently happens because phone companies are recycling and re-selling old cell phone numbers soon after terminating service with the cell phone number's previous owner. In *Soppet v Enhanced Recovery Co* 679 F.3d 637 (7th Cir 2012), the court held that it is caveat emptor when it comes to dialing the wrong numbers and even suggested that the collector seek indemnification against the original creditor (jointly liable) for its TCPA violation losses. The court specifically held, 'Wrong Number' calls, where plaintiff inherited a debtor's phone number, are actionable because such calls are not made with the 'prior express consent' of the recipient." *Soppet* also held that the use of airtime minutes on cells phones constitutes "out of pocket" damages. Robo-dialed calls to the wrong person are GOLDEN CASES! It's just a matter of how much the statutory damages calculate to be. These calls and damages can add up fast.

Even if you owe a debt and are in collections, robocalls to your cell phone are illegal unless you provided express consent to be contacted on your cell phone, either to the collector or the original creditor. Creditors and collectors who skip trace your cell number and fail to scrub it (determine whether it's a cell number they are calling) are violating the TCPA unless you consented. Sometimes the original creditor will obtain a consumer's cell number by skip tracing or by capturing it on its own caller ID when the debtor returns a call. The creditor may provide the skipped traced cell number with the account to the collector. In these cases, the creditor can be sued for TCPA violations right along with the collector. Banks, payday lenders, and mortgage companies are all subject to the TCPA, to name a few.

Calls to Residential Lines—47 U.S.C. 227(b)(1)(B)

The TCPA prohibits "Artificial or Prerecorded Voice" messages for calls to *residential* line phones. This TCPA section only applies to *solicitations* from sellers with which the consumer does not have an "Established Business Relationship" (EBR). If the seller uses a telemarketing contractor who violates the TCPA, then both seller and telemarketer are jointly liable. If you have done business with a seller within the last 18 months or made inquiry within the last 3 months, then the TCPA presumes that you have an EBR with that seller, absent evidence to the contrary. Evidence to the contrary would be a letter to the seller or telemarketer requesting that they stop calling you.

A terrible loophole in this section of the TCPA is that calls from debt collectors to residential lines are not illegal. And here's the kicker; debt collection calls to residential lines are not considered illegal under the TCPA even when the collector mistakenly calls a person who does not owe the debt. A consumer's remedy in this situation would be under the Fair Debt Collection Practice Act (FDCPA), for harassment where the collectors continue to call after the consumer has pointed out the mistake and requests them to stop.

There is no need to prove that the caller is using an ATDS under this TCPA section. The consumer only needs to show that the call is a solicitation and that seller used an artificial or pre-recorded voice message.

Telemarketing Calls to "Do-Not-Call" … ("DNC") Numbers Prohibited— 47 USC 227(c)(5)

This section only applies to telephone solicitation calls. Anyone whose numbers are registered on the DNC list that has received two telemarketing calls within a 12-month period can sue for all calls including the first. It does not matter if calls are live, pre-recorded or robo calls.

It is easy to register your numbers on the national DNC list. Simply Google the "Do-Not-Call Registry" and register up to three numbers on its website. You will receive email confirmation of your registration. Make sure you hold onto this, as it would be the exhibit # 1 to your federal lawsuit. You can also register your numbers with the DNC over the phone.

The DNC provision is a powerful section of the TCPA because it prohibits calls to both cell phone and residential lines, which are registered on the federal or company-specific do-not-call lists. It is not necessary to prove the telemarketer used an ATDS or used artificial or pre-recorded voice messages. Live calls to numbers registered on the DNC are prohibited.

The best part about DNC violations from the consumer perspective is that the Sixth Circuit Court of Appeals has held that damages under this section may be stacked on top of the TCPA 227(b) section covering "calls to cell phones." This means that the consumer can get up to $3000.00 per call for violations of the cell phone prohibitions and the DNC provisions. *Charvat v NMP*, LLC, 656 F. 3d 440 (6th Cir. 2011).

TCPA Damages

According to the TCPA, as codified in 47 U.S.C. § 227, an individual or entity has a private right of action to bring an action based on a violation of a subsection of the Act. (47 U.S.C. § 227(b)(3) (calls to a cell phone). An individual or entity may bring an action to enjoin such violations, for monetary loss for such violations, for $500.00 for each such violation, whichever is greater, or for both injunction and damages. If the court finds that the defendant willfully or knowingly violated the regulations under the TCPA, the court may, in its discretion, increase the amount of the award to an amount equal to not more than three times the amount of the statutory compensatory damages above.

The body of case law addressing the available damages for a plaintiff suing under a TCPA private right of action reflects the general rule that where the court finds that the defendant caller has violated a subsection of the Act, it will at least award to the plaintiff $500 per violation as required by the Act.

Furthermore, when the facts of the specific case rise to the level of showing a knowing or willful violation of the Act, the court will, in its discretion and within its jurisdiction, also award exemplary or treble damages that may be as much as three times the damages award. In determining willfulness, the court looks at whether the defendant's actions show its knowledge of the facts that constitute the offense (knowing); at the prior interactions between the plaintiff and the defendant; and at whether the defendant attempted to stall, evade or avoid its obligations under the TCPA.

Willful and Knowing—Treble Damages

One of the best arguments for trebling damages is the standard set forth in 47 USC § 312 F, Administrative Sanctions, which is part of the same section of the United States Code that the TCPA falls under.

> (f) **"Willful" and "repeated" defined** For purposes of this section: (1) The term "willful," when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States. (2) The term "repeated," when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

Courts may treble the damages award if the court finds that defendant's violations were committed "willfully or knowingly." 47 U.S.C. § 227(b)(3). Although neither the TCPA nor the FCC regulations define the terms "willfully or knowingly," courts have generally interpreted willfulness to imply only that an action was intentional. *Smith v. Wade,* 461 U.S. 30, 41 n.8 (1983).

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While the TCPA does not define willful, the Communications Act of 1943, of which the TCPA is a part, defines willful as "the conscious or deliberate commission or omission of such act, irrespective of any intent to violate any provision, rule or regulation." In *Dubsky v. Advanced Cellular Communications, Inc.,* No. 2008 cv 00652, 2004 WL 503757, at * 2 (Ohio Com. Pl. Feb. 24, 2004), the court found that in the context of the TCPA, the term acting "willfully" means that "the defendant acted voluntarily, and under its own free will, regardless of whether the defendant knew that it was acting in violation of the statute." 47 U.S.C.§ 227(b)(3).

Importantly though, the intent for treble damages does not require any malicious or wanton conduct, but rather is satisfied by merely 'knowing' conduct. Alea London Ltd., 638 F.3d at. 776. The court in SENGENBERGER, held:

> "The statute does not require an entity to state its telephone number at any given time during the message. The fact that Plaintiff's personal voice message recording did not record Defendant's message in its entirety is insufficient to constitute a violation…. In *Dubsky v. Advanced Cellular Communications, Inc.*, No. 2008 cv 00652, 2004 WL 503757, at * 2 (Ohio Com. Pl. Feb. 24, 2004), the court found that in the context of the TCPA, the term acting "willfully" means that "the defendant acted voluntarily, and under its own free will, regardless of whether the defendant knew that it was acting in violation of the statute."
>
> *Sengenberger v Credit Control Services, Inc.,* Case No. 09-C-2796

In summary, damages under the TCPA are:

1. $500 per violation *minimum* for Autodialer or prerecord violations, 227(b)(3).
2. "Up to" $500 per violation for DNC violations, 227(c)(5).
3. Up to $1,500 per violation if found to be willful. You only have to show the caller intended to call your number but it's better if the caller ignores your request to stop calling.
4. Injunction against future violations.

How To Document Evidence of TCPA Violations

If you think that you are getting illegal calls from telemarketers or debt collectors, call a consumer lawyer who specializes in TCPA law right away. Damages from these calls can add up quickly and sometimes exceed six figures and may be considered for class action.

1. Try to answer your phone as much as possible. This ensures the incoming call will appear on your phone bill.
2. Research who is calling you. Google the caller ID number and read what others have to say on popular websites "1 800 notes," "whocalledus" and other website bulletin boards with discussion about calls from these numbers.
3. Take digital photos of the specific caller ID, showing the date and time of call. Avoid taking photos which display your other calls.
4. Save and digitalize all voice messages to your computer.
5. Obtain and save all phone records and highlight incoming calls from debt collectors and telemarketers.
6. Transfer this information to written or electronic form so that you can see the total number and summary of the calls.
7. Keep track of the following information: 1) date of call, 2) time of call, 3) caller ID, 4) caller's identity, 5) summary of conversation.
8. You can always revoke consent to receive calls on your cell phone; an example of a revocation letter follows:

   Citibank Client Services
   100 Citibank Dr.
   San Antonio, TX 78245
   Date: ______

   RE: Acct# xxxx-xxxx-xxxx-xxxx

   I don't believe that I have ever given you *permission to call me at my cell phone number (xxx) xxx-xxxx, but if I did, I am now revoking consent for you to call my cell phone number. Please stop calling me at this number.*

You may contact me by mail at my residence and I will respond accordingly.

Thank you for your cooperation regarding this matter.

Signed,
XXXXX
Address, city and state

Make sure you keep a photocopy of your letter and envelope with correct addresses to and from, with the stamp on it. If your spouse is receiving calls, add that number to the above letter. All robo calls or pre-recorded voices messages to your cell phone after you revoke consent to be called are actionable.

Conclusion

Many sellers, telemarketers, and collection agencies ignore their responsibilities to comply with the Telephone Consumer Protection Act. They have not implemented reasonable practices and procedures to avoid violating the TCPA. It is relatively easy and inexpensive to scrub numbers against the DNC registry and cell phones lists. Instead, these businesses choose to operate in the grey areas and on the fringes of the law and treat consumer lawsuits as a cost of doing business. Most consumers cannot find lawyers to represent them on TCPA cases and so some will file pro per cases in small claim courts. These cases are inevitably removed to higher courts where corporate defense lawyers often get their clients off the hook. State district court judges who are bogged down with criminal and landlord eviction cases are generally not interested in learning about this relatively complex and technical law. Federal judges, on the other hand, are much better equipped and more experienced in deciding TCPA cases. It will be as a result of costly litigation by consumer advocates that telemarketers and collectors will finally decide it is less costly to comply with the TCPA than to risk expensive lawsuits.

About the Author

Attorney Rex C. Anderson has been practicing law in the State of Michigan since 1992. He is the principle of Rex Anderson, P.C. in Davison, MI. Mr. Anderson practices exclusively in consumer bankruptcy, FDCPA, TCPA, FCRA, state consumer law, collection defense, and serious injury litigation. He is a council member of the Michigan Consumer Law Section and a member of the National Association of Consumer Bankruptcy Attorneys, the National Association of Consumer Advocates, Michigan Association for Justice, and the Flint Bay City Bankruptcy Bar Association. He was lead counsel in a successful appeal to the 6th Circuit Court of Appeals involving a fraudulent mortgage, *Sutter v U.S. Bank, Saxon*—CA No 10-1656 and a successful appeal holding that Qualified Written Requests are allowable in bankruptcy adversary proceedings. *Conley v Central Mortgage Company*, (08-CV-13432 ED Mich 2009). He has tried or settled multiple cases exceeding six-figure consumer damage awards.

He may be reached at his office at (810) 653-3300 or by email: *rex@rexandersonpc.net*.

From the Bench

Issues: Fair Credit Reporting Act (FCRA); 15 USC § 1681s-2; *Safeco Ins. Co. v. Burr;* Private right of action to enforce the FCRA; 15 USC § 1681o; Actual or statutory damages, punitive damages, and attorney's fees and costs; 15 USC § 1681n; *Beaudry v. Telecheck Servs., Inc.;* Private right of action against furnisher; *Nelson v. Chase Manhattan Mtg. Corp. (9th Cir.); Chiang v. Verizon New England Inc. (1st Cir.); Gorman v. Wolpoff & Abramson, LLP (9th Cir.); Saunders v. Branch Banking & Trust Co. of VA (4th Cir.); Westra v. Credit Control of Pinellas (7th Cir.);* Private enforcement of FCRA; *Castleberry v. Daimler Chrysler Truck Fin. (ED MI);* Information furnisher's duty to conduct reasonable investigation, review relevant information, report results, and report incomplete or inaccurate information to other credit reporting agencies (CRAs); *Johnson v. MBNA Am. Bank, NA (4th Cir.); Sepulvado v. CSC Credit Servs., Inc. (5th Cir.); Koropoulos v. Credit Bureau, Inc. (DC Cir.)*

Court: U.S. Court of Appeals Sixth Circuit

Case Name: *Boggio v. USAA Fed. Sav. Bank*

e-Journal Number: 52793

Judge(s): Moore, Merritt, and McKeague

The court held that the district court erred in granting summary judgment to the defendant-bank because a reasonable jury could have found that defendant's investigation was unreasonable, and that plaintiff was not responsible for the debt. Unbeknownst to plaintiff, his wife purchased a car in his name as the couple was going through a divorce. During divorce proceedings it was made clear that his wife would be responsible for the payments. When he started having credit problems, he wrote to the credit agencies and defendant to dispute his status as co-obligor. The CRAs sought verification from defendant, which requested more information from plaintiff. When plaintiff did not provide the information, defendant considered the dispute a civil matter between plaintiff and his ex-wife. Plaintiff sued, and the district court granted summary judgment for defendant. On appeal, the court first held that consumers such as plaintiff may file actions pursuant to §§ 1681n and 1681o claiming that furnishers of information have violated § 1681s-2(b). The court next concluded that FCRA expressly creates a private right of action against a furnisher who fails to satisfy one of five duties identified in § 1681s-2(b). It held that a consumer who demonstrates that a furnisher was negligent in breaching one of these duties with respect to that consumer's disputed information is entitled to actual damages under § 1681o. Further, it concluded that, if a consumer can establish that a furnisher wilfully violated one of its duties, then under § 1681n the consumer may recover actual or statutory damages, as well as punitive damages. It further found that costs and reasonable attorney's fees are also authorized under both §§ 1681n and 1681o. Finally, the court concluded that there was a genuine dispute as to whether defendant conducted a reasonable investigation, and whether the violation was wilful. Reversed and remanded.

Issues: Statutory interpretation of foreclosure by advertisement statutes (MCL 600.3204 *et seq.*); *In re Complaint of Rovas; Rose Hill Ctr., Inc. v. Holly Twp.;* MCL 600.3204(1) and (4); MCL 600.3204(4)(a) and (b); Former MCL 600.3205a; "Shall"; *Manuel v. Gill;* MCL 600.3204(4)(c) and (d); MCL 600.3205b(1); MCL 600.3204(4)(e) and (f); MCL 600.3205c(1); Promissory estoppel; *Crown Tech Park v. D & N Bank, FSB; Tkachik v. Mandeville;* MCL 566.132(2)(b); *Al-Shimmari v. Detroit Med. Ctr.; Contract modification; Quality Prods. & Concepts Co. v. Nagel Precision, Inc.;* MCL 566.132(2); Equitable relief of setting aside the foreclosure sale or enjoining eviction; *Detroit Trust Co. v. Agozzinio; Freeman v. Wozniak;* The federal Home Affordable Modification Program; *Miller v. Chase Home Fin., LLC (11th Cir.);* Dismissal of negligence per se claim; *Klanseck v. Anderson Sales & Serv., Inc.*

Court: Michigan Court of Appeals (Unpublished)

Case Name: *Vasilakis v. Trott & Trott, PC*

e-Journal Number: 53206

Judge(s): Per Curiam—Wilder, Gleicher, and Boonstra

Concluding that plaintiffs the Vasilakis failed to follow the clear procedures in the 2010 version of the foreclosure by advertisement statutes to trigger the statutory process to avoid foreclosure, the Court held that the trial court properly determined that the

foreclosure sale was valid and summarily dismissed their claims. Plaintiffs defaulted on their home mortgage loan. Defendant Trott, who was handling the foreclosure process, notified plaintiffs that their mortgage loan was in default. Plaintiffs did not contact a housing counselor from the list provided by Trott to work out a modification of the mortgage loan to avoid foreclosure. Instead, plaintiff Maria Vasilakis personally telephoned Trott on 4/21/10, to request a loan modification meeting. Plaintiffs then retained an attorney, and an employee of the law firm contacted Trott on 5/13. Despite these contacts, Trott notified plaintiffs of the upcoming foreclosure sale. The sale occurred as advertised on 6/18 and defendant-First Franklin entered the winning bid. Plaintiffs filed suit three days before the expiration of the statutory redemption period. In an amended complaint, they challenged the various defendants' actions under the foreclosure by advertisement statutes, MCL 600.3205a in particular. The foreclosure by advertisement statutes were amended in 2011. However, at the time of the 2010 proceedings, MCL 600.3204 provided the procedures for a lender or its agent to pursue foreclosure by advertisement. The conditions to proceed to foreclosure by advertisement were met in this case. "Plaintiffs had defaulted on their properly recorded mortgage loan that contained a power of sale and there was no pending action to recover the debt from plaintiffs." The conditions of MCL 600.3204(4) were also met. Trott notified plaintiffs as required by MCL 600.3204(4)(a). There was no dispute that the 4/19 notification included all the required information. Trott complied with MCL 600.3204(4)(b) by waiting 14 days to allow plaintiffs an opportunity to contact it through a housing counselor to request a modification meeting. They never requested a meeting as provided in former MCL 600.3205b(1). "According to the plain language of the statute, plaintiffs could not request a meeting personally, through a retained attorney or through a retained financial consultant. The request had to come from an authorized housing counselor. MCL 600.3204(4)(c) and (d) only precluded a lender from proceeding to foreclosure if the borrower requested a meeting through a housing counselor under MCL 600.3205b(1). As plaintiffs did not request a meeting through such a counselor, defendants were free under MCL 600.3204 to advertise the foreclosure and conduct the sale." Defendants did not violate the statutes by conducting the foreclosure sale. Affirmed.

Issues: Quiet title action related to a foreclosure by advertisement; MCL 600.3204(1)(d); Residential Funding Co., *LLC v. Saurman;* The "law of the case" doctrine; *Ashker v. Ford Motor Co.;* Whether the trial court complied with MCL 600.2932(1) & (3); Whether summary disposition was premature; *Peterson Novelties, Inc. v. Berkley;* Whether the trial court properly denied the plaintiff the opportunity to amend his first amended complaint under MCR 2.116(I)(5); Validity of defendant-MERS's assignment of the mortgage to defendant Bank of New York Mellon (BNYM)

Court: Michigan Court of Appeals (Unpublished)

Case Name: *Bakri v. Mortgage Elec. Registration Sys.*

e-Journal Number: 53125

Judge(s): Per Curiam—Borrello, Meter, and Shapiro

After a prior remand to the trial court, the court concluded that in light of the Michigan Supreme Court's decision in *Saurman*, the trial court properly granted the defendants summary disposition in this quiet title case arising from a foreclosure by advertisement. In the court's prior opinion, it held that "in order for an entity to foreclose on a mortgagor by advertisement, the mortgagee must also have an interest in the note itself, pursuant to MCL 600.3204(1)(d)." Thus, the court had remanded to the trial court to determine whether defendant BNYM owned the note at the time that the plaintiff was served written notice pursuant to MCR 600.3205a. The court rejected plaintiff's claim that the trial court erred in denying him the opportunity to amend his first amended complaint. The court also found no merit in his argument that summary disposition was improper because defendant MERS's assignment of the mortgage to BNYM was null and void where MERS was not the lender and thus, assigned the mortgage to the BNYM without the promissory note—the underlying debt. Because plaintiff granted MERS the power to assign the mortgage, the assignment of the mortgage to BNYM was valid. Further, because the mortgage specifically granted MERS the power to foreclose on and sell the property as nominee for the lender, BNYM, also had that power. While those findings supported the trial court's decision, the court previously ruled that the case was governed by its decision in *Saurman.* However, the Supreme Court later reversed the court's holding in *Saurman*. Given that reversal, the court now held that regardless of whether BNYM possessed an interest in the note, or the note itself, foreclosure by advertisement was available here. The court noted that the law of the case doctrine does not preclude reconsideration in light of a subsequent change in the law. Thus, it was not precluded from reversing its prior reliance on the holding in *Saurman* and upholding the trial court's grant of summary disposition. Further, the court noted that on remand the trial court found that BNYM had possession of the note at the time plaintiff was served with written notice, a finding he did not contest after the case returned to the court. The court also held that there was no violation of MCL 600.2932(1) or (3), and that summary disposition was not premature. Affirmed.

Issues: Fair Debt Collection Practices Act (FDCPA); 15 USC § 1692 et seq.; Michigan Collection Practices Act (MCPA); MCL 445.251 et seq.; Definition of "debt" under the FDCPA and MCPA; 15 USC § 1692a(5); MCL 445.251(a); *Levant v. American Honda Fin. Corp.* (ED MI)*;* Relevant point in time for determining the character of the obligation to pay a condominium assessment; *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.* (7th Cir.)*; Hunter v. Washington Mut. Bank* (ED TN)*; Newman v. Boehm, Pearlstein & Bright, Ltd.* (7th Cir.)*; Theis v. Law Offices of William A. Wyman* (SD CA)*;* "Business debt"; *Van Eck v. BAL Global Fin., LLC* (Unpub. ED MI)*; Schram v. Federated Fin. Corp.* (Unpub. ED MI)*; First Gibraltar Bank v. Smith* (5th Cir.)*; Kattula v. Jade* (Unpub. ED MI)

Court: U.S. Court of Appeals Sixth Circuit

Case Name: *Haddad v. Zelmanski*

e-Journal Number: 53020

Judge(s): Siler, Kethledge, and Graham

In an issue of first impression in the 6th Circuit, the court held that the district court erred in finding that the debt at issue did not meet the statutory definition of "debt" under the FDCPA or the MCPA simply because plaintiff no longer derives a "personal" use from the condominium. Plaintiff purchased a condominium and lived there for 15 years until he relocated. Defendant, representing the condominium association, subsequently attempted to collect the money plaintiff owed for association dues. Plaintiff later filed suit against defendant, claiming it had violated the FDCPA and MCPA in its efforts. The district court granted summary judgment for defendant, finding that the assessments did not qualify as a "debt" under the Acts. On appeal, the court first adopted the analysis of the Seventh Circuit in *Newman,* which held that, as to condominium owners, the obligation to pay past-due assessments qualifies as a "debt" under the FDCPA because the obligation to pay arose from the purchase of the underlying property units. The court, applying this analysis, found that the district court erred in finding that the assessment here did not qualify as a debt simply because plaintiff was not living there at the time the dues were incurred. It held that, because the statute's definition of a "debt" focuses on the transaction creating the obligation to pay, the obligation to pay is derived from the purchase transaction itself. It concluded that, even though plaintiff no longer resides at the property, the record was clear that he purchased the condominium for personal usage and lived there for 15 years. As such, it held, the assessments at issue were a "debt" within the FDCPA and MCPA. Reversed and remanded.

Issues: Foreclosure by advertisement; Whether the defendant condo association complied with its duties under Article II, § 6 of the association's bylaws; The Condominium Act (MCL 559.101 *et seq.);* MCL 559.108; The master deed and incorporated bylaws as a contract between the condo owners and the condo association; *Rossow v. Brentwood Farms Dev., Inc.;* Determining the parties' intent; In *re MCI Telecomm.* Complaint; Interpreting the bylaws' language; *DeFrain v. State Farm Mut. Auto. Ins. Co.; Altman v. Meridian Twp.; Hastings Mut. Ins. v. Safety King, Inc.;* MCL 559.208; "Waiver"; "Prejudice"; Applicability of the doctrine of "substantial compliance"; *Plunkett v. Department of Transp.;* Defective statutory notice; *Sweet Air Inv., Inc. v. Kenney;* Foreclosure by advertisement based on contract; *Cheff v. Edwards;* "Shall"*; Walters v. Nadel;* Strict compliance with contractual terms; *Quality Prods. & Concepts Co. v. Nagel Precision, Inc.;* Whether defendant's breach of its contractual duty rendered the sheriff's sale invalid; *Michigan Trust Co. v. Cody*

Court: Michigan Court of Appeals (Unpublished)

Case Name: *Gorosh v. Woodhill Condo. Ass'n*

e-Journal Number: 52962

Judge(s): Per Curiam—Fitzgerald, Meter, and Boonstra

Holding that the defendant condo association breached its express contractual duty to provide ad-

ditional notice to the plaintiff condo owner of his right to request a judicial hearing by suing defendant, the court concluded that plaintiff was entitled to have the sheriff's sale set aside as a matter of law. Thus, the Court reversed the trial court's order granting defendant summary disposition, vacated the order of possession, and granted plaintiff summary disposition on his claims to quiet title and set aside the sheriff's sale. Plaintiff did not primarily live in the condo, and had instructed defendant that any notices should be sent to his address in another Michigan city. He was in arrears on his association dues in 1/10. The amount originally owed was $1,992.78. In 2/10, plaintiff submitted two checks to defendant totaling $1,525. However, at that point defendant had already accelerated plaintiff's condo dues obligations, and had charged him another $3,465. Before plaintiff's partial payment, defendant recorded a lien against his condo interest in the total amount of $5,544.28. Defendant initiated a foreclosure by advertisement in 3/10. The redemption period expired on 10/22/10. Plaintiff did not redeem during this time period. Defendant was the highest bidder and acquired the condo. The sheriff's deed indicated that defendant paid $5,135.41, although the affidavit of the auctioneer attached by defendant did not list the amount of the highest bid or identity of the highest bidder. Plaintiff received notice that an eviction proceeding was initiated against him in district court in 11/10. He offered to redeem the property for the amount due, but defendant rejected the offer. Plaintiff alleged that a default judgment was entered against him in the eviction proceeding. He then filed suit in the circuit court asserting claims for quiet title, declaratory relief, and to set aside the foreclosure sale. The default judgment was later set aside by the district court after plaintiff moved to do so based on lack of notice. The district court case was then consolidated with this case in the circuit court. Defendant's primary argument was that plaintiff was not prejudiced by any defect in the notice provided to him. While defendant referenced the doctrine of substantial compliance, the Court held that the doctrine did not apply. While the Court has held that "defective *statutory* notice renders a foreclosure sale voidable, not void," a foreclosure by advertisement is based on contract. "Nothing in the contractual language of the bylaws indicates that substantial compliance with the duties imposed therein is sufficient, or that an aggrieved co-owner must show they were prejudiced by the association's breach of its duties. The bylaws indicate that defendant 'shall' inform plaintiff that he is entitled 'to request a judicial hearing by bringing suit against the association.'" The Court noted that "shall" generally designates a mandatory provision. Defendant could not show that it complied with its explicit contractual duty.

SBM Member Advisory

Notice to Michigan Lawyers about FDIC Insurance Change for IOLTA and Non-Interest-Bearing Accounts

For the past two years, IOLTA accounts and non-interest-bearing accounts enjoyed unlimited FDIC insurance coverage pursuant to Section 343 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. That provision has a sunset date of December 31, 2012.

Congress is expected to adjourn without extending that coverage, so it is likely that as of January 1, 2013, FDIC insurance available to IOLTA accounts will be $250,000 per owner of the funds (client), per financial institution, assuming that the account is properly designated as a client trust account and proper accounting of each client's funds is maintained.

This is the same coverage client funds had before the temporary provision permitting unlimited coverage. The $250,000 amount is not the cap on the total in the pooled IOLTA account; that cap applies to each individual client's funds in that institution (see item 2 at the FDIC link below). Client trust accounts, including IOLTA accounts, are interest-bearing accounts, but it is also worth noting that non-interest-bearing bank accounts will also have this same $250,000 coverage limit.

Further information on FDIC insurance coverage for IOLTA and other accounts as of January 1, 2013, is at *http://www.fdic.gov/deposit/deposits/unlimited/expiration.html.*

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