PUBLICATION

So Far in 2012, Florida Servicers Win Some, Lose Some, and Email Service Becomes Mandatory

July 31, 2012

The year 2012 has added some hills and valleys to the continuous roller coaster of consumers-versus-servicers in mortgage litigation, and has seen Florida enter the 21st century.

A case from Florida's Second District Court of Appeal, *Dish Network Service L.L.C. v. Myers*, 87 So.3d 72, 80-81 (Fla. 2d DCA Apr. 25, 2012), will really assist lenders and servicers who are faced with the flock of Florida Consumer Collection Practices Act (FCCPA) cases in which borrowers make claims of collection calls or letters that either are allegedly too many in number, at the wrong times of day, done after notice of representation, or violative in some other way. In its decision, the court analyzed the economics of these claims which, due to the statutory regime, benefit lawyers and their experts rather than borrowers -- essentially, the court made a call for legislative reform. The court noted that as the FCCPA case progresses, it becomes far more valuable to the borrowers' lawyers and experts than to the borrower. But the most important aspect of the case, and its holding, is that "the Florida Legislature expressly requires that courts apply and construe the civil remedies provision in the Florida act [FCCPA] with an eye to the federal law [Fair Debt Collection Practices Act (FDCPA)]. The court noted that although state law does not mandate that the state courts obey federal precedent, it does provide that '[i]n applying and construing this section, due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the federal Fair Debt Collection Practices Act.'" Accordingly, the court held that the trial court erred in awarding a contingency multiplier, stating:

"It is noteworthy that the legislature chose to provide a $1000 statutory damage award that is essentially a penalty for violating the statute. See § 559.77(2). Neither state nor federal case law authorizes a trial court to use a multiplier as an extra cost for the defendant. Thus, if penalizing DISH for defending this case is the reason the trial court has chosen to disregard the comparable federal law, it is an inappropriate reason. Accordingly, we conclude that the trial court erred in awarding a contingency multiplier, at least in the absence of a well-articulated basis to demonstrate why the federal prohibition against contingency enhancements should not apply in this case."

Interpreting the federal law discussed in *Dish Network*, the 11th Circuit just issued its opinion in *Birster v. American Home Mortgage Servicing, Inc.* (11th Cir. Jul. 18, 2012), but with a result not so pleasant for servicers. In *Birster*, the court relied on *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211 (11th Cir. 2012), and reversed the district court's summary judgment. The 11th Circuit held that, although *Reese* had been decided under section 1692e, the practical effect of *Reese* was to overrule the reasoning relied upon by the district court that any letter or call that relates to a foreclosure action cannot *also* be related to collection of a debt. The *Reese* court had held that a communication related to debt collection does not become *unrelated* to debt collection simply because it also relates to the enforcement of a security interest; a debt is still a debt even if it is secured. The *Reese* court had noted that a contrary reading would create a big loophole in the FDCPA, rendering it applicable only to unsecured debt. Accordingly, the *Birster* court, relying on *Reese*, noted that a servicer's letter that gives notice of a foreclosure action may *also* demand payment of a debt, and therefore be covered under the FDCPA. The court held that "…it is apparent that an entity that regularly attempts to collect debts can be a 'debt collector' beyond section 1692f(6) of the FDCPA, even when that entity is also enforcing a security interest."

On the other hand, the case of *Castillo v. Deutsche Bank National Trust Co*., released by Florida's Third District Court of Appeal on June 6, 2012, is the legal equivalent of a hydrogen bomb against the delaying tactics of firms that have sought to use real or purported non-compliance with pooling and servicing agreements (PSAs) or burdensome discovery targeting securitization documents as justification for delaying foreclosures. *Castillo* essentially held that, since the borrower was neither a party nor third-party beneficiary of the PSA, the borrower *had no standing to challenge standing* on the basis of a PSA. It is the only appellate decision in Florida on the issue, and previously, lenders and servicers had been relegated to citing Florida trial court orders, federal cases, or law from other states, some of which was cited by the *Castillo* court. Because in the absence of countervailing Florida appellate law *Castillo* is binding on every trial court, after *Castillo*, discovery targeted at PSAs or compliance with them should no longer be tolerated, as, to quote the legal jargon in Florida, such requests are "not reasonably calculated to lead to the discovery of admissible evidence."[1]

A case released by Florida's Fourth District Court of Appeal on June 13, 2012, *Weisenberg v. Deutsche Bank*, concerned admitting servicing records under the business record hearsay exception set forth in Florida Statutes section 90.803(6). Foreclosure defense firms had previously sought to capitalize, for delay purposes, on the Fourth District's case of *Glarum v. LaSalle Bank Nat. Ass'n*, by attempting to heighten what a servicer's affiant had to understand regarding a prior servicer's computer systems and data entry, above what is required in § 90.803, despite the fact that the court on clarification had basically limited *Glarum* to its facts. *Weisenberg* makes clear that the servicer's affiant does not have to be omniscient to be able to get the records into evidence, and brings a bit of sanity to the issue.[2]

Finally, the Florida Supreme Court just approved a service rule change, effective on September 1, 2012, mandating email service of court papers (with very limited exceptions) according to the revised Florida Rule of Judicial Administration 2.516(b)(1)(E) and conforming changes to the Florida Rules of Civil Procedure. Some of the email format requirements are very specific. For instance, all documents served by email must be attached to an email message containing a subject line beginning with the words 'SERVICE OF COURT DOCUMENT' in all capital letters, followed by the case number of the proceeding in which the documents are being served. The body of the email must identify the court in which the proceeding is pending, the case number, the name of the initial party on each side, the title of each document served with that email (which cannot exceed 5 MB), and the sender's name and telephone number. "Mailing time" is still accorded under the new rule, because for time computation purposes email service is treated as mail service (same as the federal rule).

Most importantly, service is not valid without complete compliance with the rule. One of the co-authors of the rule, Baker Donelson shareholder Don Christopher, had this to say regarding the rule: "The Rules Committees sought to craft a rule that fully utilizes the convenience, cost savings and capabilities of email. At the same time, we sought to preserve all the equivalent essential functionality of regular mail. Our intent is that, in routinely serving pleadings, email adequately satisfies the needs and requirements that attorneys have traditionally relied upon regular mail to satisfy."

This rule change will hopefully prevent delay and ambush tactics that snail mail encouraged and precipitated. Firms should consider designating one mailbox as the secondary service email address and have someone designated to route such emails to the designated attorneys and secretaries.

1 As an aside, a case released last year, *Harvey v. Deutsche Bank Nat'l Trust Co.*, 69 So. 3d 300, 304 (Fla. 4th DCA 2011), essentially said the same thing regarding allegedly fraudulent assignments -- it was basically an issue between assignor and assignee, not the borrower. *See Harvey v. Deutsche Bank Nat'l Trust Co.*, 69 So. 3d 300, 304 (Fla. 4th DCA 2011) ("Even if Harvey could prove [the assignment of mortgage was fraudulent], the dispute would be between AHMAI and Deutsche.") This has long been the holding of courts in some other jurisdictions.

2 Another helpful case that sheds some light on what is required in an affidavit of indebtedness or testimony to admit prior servicer's records into evidence is set forth in *Wamco v. Integrated Electronic Environments, Inc.*, 903 So.2d 230 (Fla. 2nd DCA 2005).