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THE PIB REPORT

BMW Financial Services Enters into SCRA Settlement with DOJ on Early Lease Terminations

On February 22, 2018, the Department of Justice ("DOJ") announced that it had reached a $2 million settlement with BMW Financial Services, N.A. ("BMW FS"), resolving allegations that BMW FS violated the Servicemembers Civil Relief Act ("SCRA") by failing to refund certain up-front lease payments by servicemembers. Under the SCRA, eligible servicemembers can terminate motor vehicle leases early upon entering military service or receiving military orders for a permanent change of station or deployment. Part of those termination rights include a refund of any lease amounts paid in advance. The servicemember complaints against BMW FS specifically alleged that the lender should have refunded the prorated remainder of capitalized cost reduction ("CCR") payments made by the servicemembers, which are amounts paid at the lease's inception that operate to reduce the monthly payment over the term of the lease.

CCR payments, by operation, are made to the motor vehicle dealer at lease inception to "buy down" the monthly lease payments. CCR payments are received by the dealer, not the lender. As such, many lenders have not traditionally viewed a CCR as part of the lease payment under the SCRA because these amounts are not amounts actually charged by the lender. But in *Venneman v. BMW Financial Services NA, LLC*, 990 F. Supp.2d 468 (D.N.J. 2013), the District Court for the District of New Jersey held that CCR payments are part of the lease amount under the SCRA and therefore refundable. *Durm v. American Honda Finance Corp*., Civ. WDQ-13-223 (D. Md. 2013), a putative class action that had similar allegations to the *Venneman* case, settled in 2015.

Under the settlement, BMW will provide refunds to servicemembers and an additional payment of three times the refund or $500.00, whichever is larger, to compensate 492 servicemembers. In addition to those payments, which total $2,165,518.84, BMW FS must also pay $60,788.00 to the U.S. Treasury and revise its policies and procedures to ensure that servicemembers who terminate their motor vehicle leases early receive a full refund of all eligible prepaid CCR amounts

Financial services companies and others with servicemember customers should review their SCRA policies and procedures and assess their products and services regularly to ensure they are in compliance with their SCRA obligations. PIB Law is one of the country's leading law firms in matters involving the SCRA and Military Lending Act ("MLA"). We have defended SCRA class action and individual case litigation, criminal, and civil investigations brought by the Department of Justice, and represented institutions in consent orders, regulatory reviews, and settlements with the Office of the Comptroller of the Currency, Consumer Finance Protection Bureau, and State Attorneys General. We routinely advise clients on SCRA and MLA compliance and developments.■

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PIB Law Obtains Favorable Decision in Northern District Court of New York Confirming Denial of Motion to Amend Where Amendment Would be Futile

On January 10, 2018, the United States District Court for the Northern District of New York entered a Memorandum Decision and Order, in the matter of *Eqeel Bhatti v. Federal National Mortgage Association, et al*., Case No. 16-cv-00257 (GLS/CFH), reaffirming the long-standing principle that a motion to amend the complaint should be denied – even if filed by a *pro se* litigant – if the proposed amendments are substantively futile and would not cure the pleading deficiencies.

In *Bhatti*, the *pro se* plaintiff filed a complaint alleging a breach of contract stemming from a mortgage loan, along with allegations that the underlying mortgage and/or note were erroneously and/or fraudulently assigned and transferred without notice, resulting in a breach of contract. Parker Ibrahim & Berg LLP filed a motion to dismiss in lieu of an answer, seeking dismissal based on lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. In response, plaintiff filed opposition, seeking permission to amend the complaint.

In granting defendants' motion to dismiss and denying plaintiff's request to amend the complaint, the Court reasoned that although the complaint must be liberally construed to suggest a properly raised claim, the request should be denied where the proposed amendment would be futile. In so ruling, the Court acknowledged that a pro se litigant typically should be afforded at least one opportunity to amend the pleading – but reaffirmed the principle that, where the problem with the *pro se* complaint is substantive and any amendment would be futile, the Court need not afford the litigant with such an opportunity.

In this instance, the Court found that an amended pleading was not necessary, as plaintiff failed to sufficiently plead any concrete or particularized injury or damage allegedly suffered that was more than mere conjecture or hypothetical. Plaintiff conceded execution of the loan documents, plaintiff did not claim that he paid more than what was owed under the loan, and any allegations related to his inability to obtain title insurance or the marketability of the property was pure speculation.

The Court further found that the *pro se* plaintiff failed to state a breach of contract claim with regard to an alleged erroneous transfer of the loan without notice to the plaintiff. This is because the subject mortgage unambiguously stated that plaintiff is not entitled to notice in the event the loan is transferred to a new investor. As such, even if plaintiff suffered damages allegedly stemming from the lack of notice, such allegations did not support a breach of contract claim. Indeed, "[w]here a contract's language is unambiguous, interpretation is determined by the court as a matter of law." (citing *Hartford Accident & Indem. Co. v. Wesolowski*, 33 NY2d 169, 171-72 [1973]). Thus, the mortgage did "not confer a right to receive prior notice if the loan changes hands," and in fact, explicitly stated that the note or mortgage could be sold without notice to the borrower. Therefore, the Court ruled that "[e]ven assuming that Bhatti had specific instances of injury in mind, . . . he can prove no set of facts supporting his claim which would entitle him to relief because the contract plainly does not require defendants to provide him notice of any transfer of the note or mortgage. Because the problem with Bhatti's complaint is substantive, it cannot be cured by better pleading. As such, Bhatti's futile motion to amend is denied, defendants' motion is granted, and the complaint is dismissed."

Thus, although courts liberally grant motions to amend pleadings, this should not deter parties from filing pre-answer motions to dismiss. Amended pleadings will not be permitted where there are simply no facts that a litigant could plead to cure the deficiencies, rendering any proposed amended pleading futile. ■

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DC Circuit Scales Back TCPA Expansion

On March 16, 2018, the United States Court of Appeals for the District of Columbia Circuit issued a ruling in *ACA International, et al. v. FCC*, No. 15-1211, which significantly scaled back the scope of a 2015 Federal Communications Commission's ("FCC") order that expanded the Telephone Consumer Protection Act ("TCPA"). The Court's 51-page decision was issued more than a year after oral argument. It struck down the FCC's expansive definition of an "automatic telephone dialer system" (an "ATDS" or, more commonly, an "autodialer"), and also struck down the "one-call safe harbor" for reassigned numbers as arbitrary and capricious. The Court upheld the FCC's approach to revocation of consent – under which a party may revoke consent to be called through "any reasonable means clearly expressing desire to receive no further messages from the caller" – and sustained the FCC's exemption for time-sensitive healthcare calls.

The TCPA generally prohibits the use of certain kinds of automated dialing equipment to call wireless telephone numbers absent advance consent. The Act vests the FCC with authority to implement these restrictions, and the FCC has done so through a series of Declaratory Rulings and Orders," including the 2015 Declaratory Ruling at issue in this case, which sought to clarify various aspects of the TCPA's general bar against using autodialers without first obtaining consent.

An ATDS is defined in the TCPA 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). The 2015 Declaratory Ruling held that equipment's capacity is not confined to its "present capacity," but rather encompassed its "potential functionalities" with modifications, including software changes. In striking down this expansive definition of an autodialer, the Court noted that the FCC's attempt to clarify the definition "would appear to subject ordinary calls from any conventional smartphone to the Act's coverage, an unreasonably expansive interpretation of the statute." As the Court concluded, "[t]he TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent."

With regard to reassigned numbers, the Court was asked to address whether, when a caller obtains a party's consent to call them, does a call nonetheless violate the TCPA if, unbeknownst to the caller, the consenting party's wireless number has been reassigned to a different person who has not given consent. The FCC had adopted a position that reassignment extinguishes consent, but provided a one-call safe harbor allowing the caller to learn of the reassignment; the FCC believed this to represent "an appropriate balance between a caller's opportunity learn of the reassignment and the privacy interests of the new subscriber." 30 FCC Rcd. at 8009. In finding the FCC's position to be arbitrary and capricious, the Court held that the safe harbor did not actually give effect to the caller's reasonable reliance on the previous subscriber's consent. The Court also noted that the FCC is already addressing whether there is a better way to address reassigned numbers that have greater potential to give full effect to the caller's reasonable reliance.

In striking down both the expansive definition of an autodialer and the one-call safe harbor for reassigned numbers, the Court addressed two areas that have presented operational and compliance challenges since 2015.

PIB Law routinely advises clients on TCPA compliance and represents financial institutions and others in TCPA litigation.

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