PIB LAW | PARKER IBRAHIM & BERG
WWW.PIBLAW.COM
Boston | Chicago | New Jersey | New York | Orange County | Philadelphia

THE PIB REPORT

# United States Supreme Court Holds that Filing Proof of Claim on Obviously Time-Barred Debt Does Not Violate FDCPA

On May 15, 2017, in *Midland Funding v. Johnson*, 137 S. Ct. 1407 (2017), the United States Supreme Court reversed the Eleventh Circuit and held that the filing of a proof of claim on account of an obviously time barred debt is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*. ("FDCPA").

In 2014, respondent Aleida Johnson ("Johnson") filed a petition under Chapter 13 of the Bankruptcy Code. Prior to Johnson commencing that action, petitioner Midland Funding, LLC ("Midland") purchased unpaid and time-barred credit card debt owed by Johnson. Despite the fact that the statute of limitations to collect on the debt had expired nearly four years earlier, Midland proceeded to file a proof of claim in Johnson's bankruptcy case. The Bankruptcy Court later disallowed Midland's claim as time-barred.

Thereafter, Johnson filed an affirmative action against Midland in the United States District Court for the Southern District of Alabama, asserting claims for violations of the FDCPA arising from Midland's filing of its proof of claim. The District Court dismissed Johnson's claims, finding that Midland's actions did not violate the FDCPA. Johnson then appealed to the Eleventh Circuit, which reversed the District Court's dismissal. The Supreme Court granted *certiorari* and, in a 5-3 decision, reversed the holding of the Eleventh Circuit.

Section 101(5)(A) of the Bankruptcy Code defines the term "claim" as a "right to payment," and state law usually determines whether a person has such a right. In Johnson's case, Alabama law governed Midland's right to payment. The relevant Alabama law provides that a creditor has the right to payment of a debt even after the limitations period has expired. Johnson argued that the word "claim" in Section 101(5)(A) means "enforceable claim." As the Court noted, however, the word "enforceable" does not appear in the Bankruptcy Code's definition, and such an interpretation would be difficult to square with Congress's intent to adopt the broadest available definition of "claim."

The Court noted that the FDCPA only prohibits a debt collector from asserting any "false, deceptive, or misleading representation," or using an "unfair or unconscionable means" to collect on an unfair debt. The Court found that it is not "false" or "misleading" under the FDCPA to file a proof of claim on a debt that is unenforceable simply because the statute of limitations has run. Although the Bankruptcy Code treats the unenforceability of a claim as a defense to allowance of that claim in the bankruptcy, the claim may still be filed and does not give rise to the type of practices the FDCPA was enacted to prevent. The Court also found that, while other cases have held that the filing of a civil suit on a time-barred debt is not permitted, the same reasoning does not apply in the context of a bankruptcy case. As the Court noted, the Bankruptcy Code and the FDCPA serve different purposes, and to allow an FDCPA suit to proceed under these circumstances would upset the balance between the two statutory schemes.

The Supreme Court's decision in *Midland Funding* resolved the prior Circuit split on this issue. ■

*For more information, contact James P. Berg at james.berg@piblaw.com or Fred W. Hoensch at fred.hoensch@piblaw.com*

**Continued on next page**

# New Jersey Appellate Division Holds that a Lender or Its Assignee Does Not Become a "Mortgagee in Possession" of a Condominium Unit Simply by Winterizing the Property and Changing the Locks

On June 6, 2017, in *Woodlands Community Association, Inc. v. Adam T. Mitchell et al.*, Docket No. A-4176-15T2, New Jersey's Appellate Division held that, when a borrower defaults on a loan for a condominium unit, the lender is not considered a "mortgagee in possession" for purposes of liability on unpaid association fees – even if the lender's assignee winterizes the unit and changes the locks.

In March 2007, Defendant Adam Mitchell ("Mitchell") purchased a condominium unit in property managed by Plaintiff Woodlands Community Association, Inc. (the "Association"). In July 2013, Mitchell's mortgage was assigned to defendant Nationstar Mortgage LLC ("Nationstar"). Mitchell defaulted on the mortgage and vacated the unit, after which Nationstar replaced the locks and winterized the property. In April 2014, the Association sued Mitchell for unpaid monthly maintenance association fees. The Association then amended the complaint to include Nationstar as a defendant, alleging that as the lender's assignee, Nationstar was also responsible for the association fees by virtue of being in possession of the property.

On April 19, 2016, the trial court granted summary judgment in favor of the Association, finding that Nationstar was a mortgagee in possession and therefore responsible for maintenance fees. As the trial court found, Nationstar held "the keys, and no one else can gain possession of the property without [Nationstar's] consent. This constitutes exclusive control, which indicates the status of mortgagee in possession."

On appeal, the Appellate Division reversed and remanded to the trial court for entry of summary judgment in favor of Nationstar. As the Court noted, once a mortgagor has defaulted on a property, the lender or its assignee has "the right of possession, subject to the mortgagor's equity of redemption" – but the mortgagee does not become the owner of the property until there is a foreclosure and sale of the premises to the mortgagee. Only if the mortgagee is determined to be in possession of the property is the mortgage liable for delinquent condominium common charges, and whether the mortgagee or its assignee is in "possession" must be "determined on a case-by-case basis."

In this case, the Appellate Divison concluded that Nationstar was not in possession of the property, for purposes of liability for the association fees, because Nationstar did not occupy the unit, collect rents or other profits, or make any repairs. The Court held that the "sole act of changing the locks" did not put Nationstar into possession of the property. The Court recognized that the use of the word "possession" when describing a "mortgagee in possession" was somewhat misleading, as it actually referred to control and management rather than physical possession. As the Court found, once Mitchell defaulted, Nationstar was obligated to protect the collateral, and and Nationstar's winterizing of the property and changing of the locks was part of preventing damage to that collateral." Finally, the Court rejected Plaintiff's argument that Nationstar was required to pay the association fees under any equitable theory, including unjust enrichment and quantum meruit. ■

*For more information, contact Scott W. Parker at scott.parker@piblaw.com*

**Continued on next page**

# New Jersey Appellate Division Excludes Insurance Coverage Expert on Grounds that He Merely Offered a "Net Opinion"

On June 7, 2017, New Jersey's Appellate Division affirmed the trial court's order barring admission of Plaintiff's expert report and testimony on the grounds that the expert offered nothing more than a "net opinion".

In *Satec, Inc. v. The Hanover Ins. Group, Inc*., 2017 WL 2458133 (N.J. App. Div. 2017) Plaintiff sought compensation for damages to real and personal property in the amount of $2,342,347.71 as a result of Hurricane Irene on August 28, 2011. Among the defendants are Plaintiff's insurance broker and insurance provider. Plaintiff's property is located in a flood zone, but Plaintiff's policy did not contain flood insurance coverage. Plaintiff alleges that defendants breached their duty of care to Plaintiff for failing to determine that Plaintiff's property is located in a flood zone, for failing to procure a policy of flood insurance for Plaintiff, and for failing to inform Plaintiff of its property's flood zone status. The trial court granted defendants' motion for summary judgment, noting that Plaintiff's expert's report relied solely upon his personal experience in the insurance industry and failed to cite to an objective industry standard or authoritative treatise.

On review, the Appellate Division noted that "insurance brokerage is a field beyond the ken of the average juror. Thus, in the insurance coverage context, the common knowledge doctrine is limited to 'obvious' cases of negligence…." In this case, the Court held that expert testimony was necessary to assist the jury to understand the intricacies of the fiduciary relationship between the claimant and the broker, and any breach of that duty that may have occurred.

Additionally, the Court affirmed the trial court's decision to exclude plaintiff's liability expert on the grounds that he offered a "net opinion", holding that "[i]t is well-established that the trial court 'must ensure that [a] proffered expert does not offer a mere net opinion.' Such an opinion is inadmissible and 'insufficient to satisfy a plaintiff's burden on a motion for summary judgment.'" Stated another way, the proffered expert testimony "must be based upon a consensus of the involved profession's recognition of the standard defined by the expert"; in this case, it was the generally accepted standards, practices, or customs of the insurance industry.

The Appellate Division found that, if as here, an expert's testimony is based on a personal view as opposed to an objective standard, the expert would be precluded. Because the plaintiff's expert was excluded, the Appellate Division found that Plaintiff could not prove its claims, and therefore affirmed the trial court's granting of summary judgment in favor of defendants. ■

*For more information, contact Anthony W. Vaughn, Jr. at anthony.vaughn@piblaw.com*