

Important Fair Debt Collection Practices Act Holding by the Third Circuit Court of Appeals: Misstatements in Foreclosure Complaints are Actionable under the FDCPA.

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On April 7, 2015, a decision in the case of *Kaymark vs. Bank of America, N.A.* was handed down by the Third Circuit Court of Appeals, in a precedential opinion authored by Judge Fisher and joined in by Judges Fuentes and Krause. There are some important holdings found in this opinion. In this case, the consumer Kaymark defaulted under a residential mortgage held by Bank of America ('BOA'). The foreclosure action included a demand for attorney fees and expenses, however, not ALL of those fees and expenses had yet been incurred by the lenders. The mortgagor sued in federal court alleging that the inaccurate claim for damages in the Complaint was a violation, among other statutes, of the Federal Fair Debt Collection Practices Act ("FDCPA"). The District Court granted the motion to dismiss the lender and counsel but the Third Circuit reversed with respect to making a false communication under FDCPA §§ 1692f(1) and 19692e(2)(A) and (10). With respect to the FDCPA, the Court notes that while Kaymark agreed to the collection of "attorney fees, property inspection and valuation fees," BOA could only charge for services performed in connection with the default and collect expenses that were incurred. Including anticipated fees and expenses not yet incurred was contrary to the mortgage contract and the claim for such fees was a violation of the FDCPA. Citing the Supreme Court decision in *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995), for the proposition "that attorneys 'engage[d] in consumer-debt-collection activity, even when that activity consists of litigation' are covered by the FDCPA, the Circuit points out that the FDCPA has been amended twice to exempt formal legal pleadings from Sections 1692e(11) and 1692g(d) so that if Congress intended for legal pleadings to be excepted from the entire statute, it could have done (citing *Sayed v. Wolpoff & Abramson*, 485 F.3d 226, 231 (4th Cir. 2007))." The Circuit thus holds that the FDCPA applies to mortgage complaints, not just debt-collection letters, as the complaint is a communication directed at the consumer. So, a misstatement in the complaint of the attorney fees was a violation of FDCPA § 1692f(1) and also forms a basis for violations of FDCPA § 1692e(2)(A) and (1). The Circuit does affirm the dismissal of the § 1692e(5) claim, and also upheld the dismissal of the counts alleging violations of the Pennsylvania Fair Credit Extension Uniformity Act ("FCEUA"), 73 P.S. § 2270.1 et seq, the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-1 et seq., and breach of contract. Importantly, the Circuit does hold that if a plaintiff cannot state a claim under the FCEUA, it cannot state a claim for relief under the UTPCPL.

Use this link to view the opinion. [Kaymark Decision -4-7-2015](#)