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Class Actions Against Foreclosure Lawyers on the Rise

By: John L. Bunyan and Johannes S. Kingma

One of the silver linings of the Great Recession has been a boom in business for foreclosure lawyers. The increase in foreclosures, however, has also led to a surge of lawsuits against foreclosure lawyers. Typical claims brought by individual homeowners seeking to delay foreclosure sales continue. But foreclosure lawyers have also recently faced a wave of class actions brought by people looking to cash in on alleged statutory violations of foreclosure notice requirements.

Due to the high volume of business handled by foreclosure lawyers, class actions pose a serious threat. Foreclosure lawyers often send multiple notices to each homeowner regarding a sale and may send hundreds or thousands of letters to homeowners each year. If a foreclosure lawyer's standard letter contains language that violates federal or state law, then he may be subject to a class action from every borrower who received that letter. For example, the Federal Fair Debt Collection Practices Act (the "FDCPA"), which governs debt collection practices, allows for class action damages of up to one percent of the lawyer or law firm's net worth or $500,000, whichever is less, and attorney's fees.[1]

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FDCPA Claims for Misidentifying a Homeowner's Creditor

The FDCPA's requirement that a debt collector identify the borrower's creditor is one basis for potential FDCPA class action claims.[2] This is not as easy as it sounds as mortgage loans are often packaged into securities and resold multiple times. In order to avoid recording fees, some lenders wait until a borrower defaults before recording an assignment to clean up the property records. Lawyers are often asked to initiate foreclosure proceedings on behalf of a lender before the property records show that lender is entitled to foreclose.

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Several courts have concluded that homeowners have stated a FDCPA claim against a lawyer who sent letters identifying a lender as a creditor before an assignment to that lender had been recorded. For example, in *Bourff v. Rubin Lublin, LLC*, the Eleventh Circuit reversed the dismissal of a FDCPA claim where the defendant law firm sent a letter identifying BAC Home Loan Servicing as the plaintiff's creditor before it received an assignment of the loan.[3] Thus, the industry practice of not recording assignments when loans are transferred has exposed foreclosure lawyers to individual FDCPA claims and could lead to class action claims against lawyers representing lenders who routinely follow this practice.

Wrongful Foreclosure Claims for Failing to Identify the Secured Creditor

A recent Georgia Court of Appeals decision on Georgia's foreclosure notice requirements could also lead to more individual or class action claims against foreclosure lawyers. In *Reese v. Provident Funding Associates, LLP*,[4] the Court concluded that Georgia law requires that a foreclosure notice properly identify the secured creditor and reflect that the notice is being sent by the secured creditor.[5] Defendant Provident Funding was the plaintiffs' loan servicer at the time foreclosure proceedings were initiated. Its attorneys sent a letter notifying the plaintiffs that Provident Funding was commencing foreclosure proceedings but did not identify the party that was the plaintiffs' secured creditor at the time. The Court held that the foreclosure sale was invalid because Provident Funding and its attorneys did not specifically identify who held the note.[7]

The *Reese* decision could lead to individual claims if a lawyer initiated foreclosure proceedings on behalf of a loan servicer and may help support FDCPA class actions. But the impact of *Reese* could be even greater if Georgia courts apply it retroactively to allow homeowners to challenge foreclosure sales that already occurred. Given the large number of foreclosure sales in Georgia in the past few years, lawyers could face innumerable claims from homeowners or banks that have their foreclosure sales invalidated.

Conclusion

Foreclosure notices are being scrutinized by homeowners and plaintiffs' lawyers for any technical statutory violations that will allow them to seek damages, invalidate a foreclosure sale, or simply stall a scheduled foreclosure. By the time a foreclosure lawyer learns that his standard letter has breached federal or state law, he may have already sent hundreds or thousands of letters to homeowners, who may turn into members of a class action. In order to decrease their exposure to class action claims, foreclosure lawyers should be vigilant in confirming that all of the information received from their client on a homeowner's account is accurate and that the property records show the proper entity entitled to foreclose. They should ensure that all of the required information is disclosed properly to the borrower in its communications. This additional work at the outset when receiving a referral could go a long way in eliminating the time and expense of defending class action claims later on.

Resources

1. 15 U.S.C. § 1692k(a)(2)(B), (a)(3).
2. 15 U.S.C. § 1692g(a)(2).
3. 674 F.3d 1238, 1241 (11th Cir. 2012); see also Wallace v. Washington Mutual Bank, F.A., 683 F.3d 323, 324-325 (6th Cir. 2012).
4. No. A12A0619, 2012 WL 2849700 (Ga. Ct. App. July 12, 2012).
5. Id. at *2-4.
6. Id. at *2.
7. Id. at *5.

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Limited Liability Corporation Members and Managers Cannot Avoid Personal Liability for Their Own Negligence

By: Laura Paris Paton

In the recent case of 16 Jade Street, LLC v. R. Design Const. Co.[1], the Supreme Court of South Carolina held that the Uniform Limited Liability Company Act (ULLCA)[2] does not shield a member of a limited liability company ("LLC") from personal liability for his actions taken as a member of the LLC in furtherance of the business. The ULLCA provides that:

> (a) Except as otherwise provided…, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.[2]

Traditionally, business-people associated with construction projects have sought to shield themselves from personal liability by forming LLCs. Claims against individual contractors have largely been treated as synonymous with claims against their businesses. However, in *Jade St.*, a case of first impression in South Carolina, the Court analyzed the intent of ULCCA and held that the LLC corporate form does not shield individual members from their own negligent acts.

In *Jade St.*, licensed residential builder, Carl Aten, and his wife formed a limited liability corporation called R. Design. A developer known as 16 Jade St. retained R. Design to build condominiums in Beaufort, SC. A dispute arose between 16 Jade St. and R. Design and R. Design walked off of the job. 16 Jade St. hired an engineer to review the work performed under R. Design's supervision. The engineering firm found numerous construction deficiencies in the project, and 16 Jade St. brought suit against R. Design, the subcontractors, and Carl Aten individually. Among its claims, 16 Jade St. sued Mr. Aten for acts of negligence he was alleged to have personally committed.

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Spotlight on...

LEGAL MALPRACTICE

Carlock Copeland's legal malpractice defense team is the largest in Georgia and South Carolina. Our goal is to quickly and cost-effectively win our clients' cases. We understand the emotional and professional pressures that malpractice claims present for busy attorneys and pride ourselves on making the process as easy as possible for clients and insurers.

We frequently help prevent claims from being made. In appropriate cases, we engage in pre-suit settlement negotiations to help preserve our client's time, reputation and assets. We aggressively file motions to dismiss and motions for summary judgment so courts can quickly dispose of or narrow claims. Our discovery is thorough but well-targeted and provides a firm foundation for success by motion or trial. We enjoy trying legal malpractice cases and have been quite successful in doing so. Our success is evidenced by the growth of the practice and the victories achieved for our clients.

Carlock Copeland lawyers regularly defend attorneys against claims arising from real estate transactions, family law, trusts and estates, commercial transactions, business litigation, workers' compensation, criminal law and personal injury litigation.

Our attorneys speak at several seminars per year on legal malpractice issues and attend multiple national attorney malpractice conferences. Our participation in continuing education and industry gatherings helps us identify trends and stay abreast of new legal developments, both locally and nationally.

Attorneys choose Carlock Copeland to represent them in their time of need because:

(1) we have specialized knowledge that results from decades of focus on defending attorneys;
(2) we are talented trial lawyers who compete to win;
(3) we have a track record of success; and
(4) we make the process as convenient, cost-effective and painless as possible.

If you'd like to learn more, contact Joe Kingma at 404.221.2278 or jkingma@carlockcopeland.com.

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The Circuit Court found Mr. Aten liable for his role as the residential construction license holder for R. Design on the basis that the licensing statute created civil liability for the licensee. The case was appealed to the South Carolina Supreme Court.

On appeal, Mr. Aten argued that the ULLCA shielded him from personal liability for ordinary negligence committed while working for R. Design. Addressing this issue, the Court analyzed whether the General Assembly intended the statute to shield members from personal liability. Ultimately, the Court determined that based on the plain language of the statute, the intent was to shield managers and members of an LLC where the obligation or liability would arise "solely" as a result of an act of the company. Here, the liability against Mr. Aten arose as a result of his own actions taken on behalf of the LLC. The Court gave significant weight to the common law right to sue a wrongdoer in tort, and to case law which holds that common law rights should not be abrogated in favor of statutes unless there is clear intent on the part of the legislating body to do so. The Court

> "The Court made it clear... corporate structures are not intended to shield individual tortfeasors from their actions..."

made it clear that in the broader sense, corporate structures are not intended to shield individual tortfeasors for their actions; the protection afforded by LLCs and corporations is intended to shield innocent members from vicarious liability for the actions of the corporation and from liability for actions taken by other members and managers of the corporation.

The *Jade St.* case should serve as a cautionary tale to attorneys defending individual claims against their clients. After this case, it may be more difficult to seek these simple LLC -based dismissals. The rehearing of this case is scheduled to be heard before the Supreme Court of South Carolina, and the South Carolina Legislature has pending legislation to address the current holding.[3]

Resources

1. 16 Jade Street, LLC v. R. Design Const. Co., 728 S.E.2d 448 (2012) (rehearing granted).
2. S.C. CODE ANN. § 33-44-303.
3. S. 1416, 2011, 119 Gen. Assem. (SC 2011).

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Change of Condition or New Accident?

By: Jeremy R. Davis

In 1978, the Georgia Court of Appeals used the case of *Central State Hosp. v. James* to draw the distinction between a change in condition and a fictional new injury in worker's compensation cases.[1] Since then, Georgia courts have struggled in applying the principles of *Central State* to individual cases. The Georgia Supreme Court recently added additional clarification to the distinction between a change of condition and a fictional new injury and provided instruction on how to distinguish between them in the case of *Scott v. Shaw Industries*.[2]

Consider the following scenario: an employee sustains a work-related injury and is deemed to be totally disabled. The insurer begins providing weekly disability benefits, but after a few weeks, the employee recovers and returns to work. The insurer suspends payment of the disability benefits, and everyone rides happily into the sunset. But what happens if the injured employee's condition gradually deteriorates and the treating physician determines that the employee is unable to continue working? Is the employee entitled to additional weekly disability benefits for the second period of disability? The answer depends on whether the employee had a change of condition or a fictional new injury.

Under O.C.G.A. § 34-9-104(b), an injured worker is not entitled to additional weekly disability benefits as a result of a change of condition if more than two years have passed since the last time the employer/insurer paid temporary total or temporary partial disability benefits. Therefore, in the scenario above, if the employee continued to work for more than two years before the second period of disability, then he or she cannot recover additional weekly disability benefits. However, if the second period of disability arose from a fictional new injury rather than a change of condition, the statute of limitations would not apply, and the injured worker would be eligible for additional benefits.

In the *Scott* case, the employee sustained a foot injury in 1996, and eventually underwent surgery. She was unable to work for nearly a year, and during that time she received temporary total disability (TTD) benefits. Her employer offered a light duty job in 1997, and when Scott returned to work, the insurer suspended payment of TTD benefits. Scott continued with her sedentary job for approximately 12 years, but on March 24, 2009, her physician determined that her injury had gradually worsened, and she was unable to continue working.

Scott requested additional TTD benefits, arguing that she sustained a fictional new injury on March 24, 2009. However, Shaw Industries contended that since Scott had received

TTD benefits immediately after her injury in 1996, her disability in 2009 must be considered a change of condition rather than a fictional new injury. Since Scott had not received benefits in more than a decade, the employer argued that the change of condition statute of limitations barred her request for additional TTD benefits.

After a hearing, the State Board decided that Scott sustained a fictional new injury rather than a change of condition, and awarded TTD benefits. The Superior Court affirmed, and Shaw Industries appealed. The Court of Appeals reversed, stating that in order to distinguish between a change of condition and a fictional new injury, the fact finder must determine whether the injured worker's condition had been established by a previous award, or by payment of TTD benefits. If the worker's condition had been established, a subsequent period of disability caused by a gradual worsening should be classified as a change of condition. However, if the worker had not already received compensation or benefits, the worker's condition had never been established. In that situation, the worker cannot possibly undergo a change of condition and has sustained a fictional new injury instead. The Court of Appeals concluded that Scott underwent a change of condition in 2009 because her condition was established when she received TTD benefits in 1996. Since Scott last received benefits approximately 12 years before her new request, the two-year change of condition statute of limitations in O.C.G.A. § 34-9-104(b) barred her request.

Scott appealed to the Georgia Supreme Court, which unanimously affirmed the Court of Appeals' decision. The Supreme Court also provided a reminder that *Central State* included an exception to the rule stated above. If an injured worker's light duty job is "inappropriately strenuous," or if the job duties exceed the restrictions assigned by the treating physician, a gradual worsening can be considered a new injury, even if the injured worker's condition has already been established.

The *Scott* holding does not create new law, but the decision is a strong affirmation of the principles of *Central State*. For the most part, the holding is favorable for employers and insurers; it confirms that an injured worker cannot circumvent the change of condition statute of limitations by simply alleging a new injury. However, it also serves as a cautionary reminder that employers must comply with light duty work restrictions, even if several years have passed since the employee's injury.

Resources

1. Central State Hosp. v. James, 147 Ga.App. 308, 248 SE2d 678 (1978).
2. 2012 WL 2512751, 2012 GA LEXIS 638 (July 2, 2012).

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Firm News & Notes

CARLOCK, COPELAND & STAIR WELCOMES NEW ATTORNEYS TO ATLANTA & CHARLESTON OFFICES

We are please to announce that we have added **Mary Katherine Greene** as Of Counsel to our health care litigation team. **Previously, she practiced with the firm for over 15 years** and earned a reputation as a formidable trial lawyer.

Mary Katherine's practice is primarily focused in the defense of catastrophic injury, wrongful death and medical malpractice cases. She has represented large manufacturers, motor common carriers and property owners in catastrophic injury and wrongful death cases. In addition, she has represented physicians and surgeons in a variety of specialties in medical malpractice cases.

We have also added Associates to both the Atlanta and Charleston, SC offices.

Claire B. Arnett joins the Atlanta office, and her practice focuses primarily on health care and commercial litigation. Claire received her J.D., *cum laude*, from the University of Tennessee College of Law. Claire completed her undergraduate studies in 2009 at the University of North Carolina at Chapel Hill.

Andrew M. Bagley joins the the Atlanta office and focuses his practice on health care and general litigation. Andrew received both his Bachelor of Arts and Juris Doctor degrees from the University of Georgia, graduating *cum laude* from each.

Kristen M. Kelley joins the Charleston office and focuses her practice on general civil litigation including medical malpractice, automobile and motor carrier accidents and commercial litigation. She received her J.D., *magna cum laude*, from the Charleston School of Law. Kristen earned her M.P.A and her B.A. from the College of Charleston.

We're in this to win.

Legal Malpractice Claim Dismissed After Prevailing on Novel Issue of Federal Patent Jurisdiction

David Overstreet and Mike McCall obtained dismissal of a patent law legal malpractice action after successfully defeating a motion to remand. Overstreet and McCall asserted federal patent jurisdiction to remove the case from state court and then moved to dismiss the Complaint for failure to file the requisite expert affidavit. The federal district court, the first in the District of South Carolina to address the issue of patent jurisdiction in the context of a legal malpractice claim, agreed that the allegations in the Complaint triggered federal patent jurisdiction. After retaining jurisdiction, the court rejected the Plaintiff's argument that the case fell within the common knowledge exception to the expert affidavit statute and dismissed the case against the attorney in its entirety.

Fourth Circuit Upholds District Court Dismissal of Eye Surgeon in Class Action Suit

Partners Lee Weatherly and Gary Lovell recently prevailed before the 4th Circuit Court of Appeals, affirming the dismissal of a class action case where Lee and Gary represented a North Carolina eye surgeon. In this suit, the class representative claimed that a number of ophthalmologist eye surgeons and their employer, a national corporation, conspired together to violate the Federal Racketeer Influenced and Corrupt Organizations Act (RICO). The Plaintiff alleges that all of the Defendants conspired together to fraudulently misrepresent and hide from patients the fact that negligent medical care had been rendered. The Plaintiff alleges that the national corporation developed, and all Defendants utilized, an electronic data system to further the conspiracy to delay disclosure of the alleged negligent care to patients until after the state statute of limitations had expired. Lee and Gary's client adamantly denied providing negligent care to any patients or participating in any conspiracy. The South Carolina District Court dismissed the class action for a number of reasons and the Fourth Circuit Court of Appeals recently upheld the lower court's dismissal. For more information on the case, contact Lee at lweatherly@carlockcopeland.com or Gary at glovell@carlockcopeland.com.

Class Action Claims Defeated

John Bunyan and Shannon Sprinkle successfully defended a well-respected local law firm against putative class action claims. Following John and Shannon's successful dismissal of many of the Plaintiff's original claims, the Plaintiff sought class certification for remaining FDCPA claims. The District Court dismissed the putative class claims agreeing with the Defendants that they had not been timely pursued.

Attorney Dismissed from FDCPA Action

David Overstreet and Mandi Dudgeon recently prevailed on a Motion to Dismiss in a malpractice case filed against an attorney over a debt collection matter in federal court. Plaintiffs filed an action for Violation of the Fair Debt Collection Practices Act (FDCPA), Fraud and Negligent Misrepresentation, alleging that the attorney had harassed the Plaintiffs in collecting an improper debt. The Court held that the FDCPA claim failed as a matter of law and also dismissed the remaining causes of action.

Motion to Dismiss Granted in Fair Debt Collection Practices Act Case

Pete Werdesheim and Joe Hoffman secured dismissal of a lawsuit brought against a law firm under the Fair Debt Collection Practices Act. The Complaint alleged that the law firm's foreclosure notice violated various sections of the FDCPA. The Plaintiff had previously sued the lender in state court. In entering a judgment in favor of the lender for attorney's fees under Code Section 9-15-14, the state court made findings of fact and conclusions of law, including that the subject loan was for a business, rather than consumer, purpose. In the Motion to Dismiss, we argued that the state court order had preclusive effect insofar as the FDCPA does not apply to such loans. The Magistrate Judge entered a Report and Recommendation that the Motion be granted on collateral-estoppel grounds. This Report and Recommendation was adopted by the District Judge in the Northern District of Georgia, resulting in entry of final judgment in favor of the law firm.

Summary Judgment Shuts Down Investor Claims Against Lawyer Arising From Failed Condo Conversion

Michele Jones and Joe Kingma had their motion for summary judgment granted in the State Court of Chatham County. Plaintiffs were wealthy investors from Savannah who helped to fund the acquisition and development of several buildings in downtown Savannah. While the project was initially successful in selling units at New York City prices, it eventually failed in the teeth of the real estate slump, and millions of dollars in investor money was lost. In separate actions, the investors sued the managing members of their LLC, the LLC itself, the LLC's contractor and the LLC's lender. The lender failed and was taken over by the FDIC, and the contractor filed for bankruptcy, although some of that litigation continues.

Michele and Joe filed a motion contending that while their law firm client had represented the LLC which did the development and had drafted the organizational documents for one of the Plaintiff investors, they owed no duty to the investor Plaintiffs. The trial court agreed and granted the motion for summary judgment.

Defense Verdict in Admitted Liability Car Wreck Case

Erica Parsons and Jason Hammer represented an individual in an admitted liability motor vehicle accident case filed in DeKalb County State Court. The Defendant admitted negligently rear-ending the Plaintiff, but contested causation, the nature and extent of the Plaintiff's injuries, and damages at trial. The only medical evidence presented by the Plaintiff was the testimony of his chiropractor. Despite the admission of negligence, the jury considered the minor damage to the vehicles, gaps in treatment and questionable testimony by the chiropractor as to causation, and returned a verdict in favor of the Defendant.

Federal Court Grants Motion to Dismiss for Collections Law Firm

Shannon Sprinkle, John Bunyan, and Joe Kingma won the dismissal of a federal action against a law firm that was retained to initiate foreclosure proceedings. The Plaintiff alleged that his promissory note and security deed were forged and that the collections law firm "robo-signed" the assignment of his security deed and failed to get government authorization before foreclosing. In dismissing the action, the U.S. District Court for the Northern District of Georgia concluded that none of these allegations stated a plausible claim for relief.

Defense Verdict for Chiropractor in Medical Malpractice Case

Partners Chip Emge and David Harmon obtained a defense verdict for a chiropractor on in Charleston County, South Carolina. The Plaintiff alleged that she had suffered a herniated disk as the result of a complimentary chair massage given at a community event. At issue was the ability of a chair massage to produce enough force to cause a disk herniation as well as whether it was the chiropractor or his massage therapist who had actually attended the event on behalf of the practice group. The Plaintiff sought $5 million in damages. After a five day trial, the jury found in favor of the chiropractor as well as the practice group.

Federal Court Dismisses Racketeering and Conspiracy Claims Against Attorney

John Bunyan, Michele Jones, and Joe Kingma obtained a dismissal in federal district court for an attorney on alleged civil RICO and section 1983 conspiracy claims.

Georgia Court of Appeals Affirms Dismissal of Direct Action Against National Insurance Company

John Bunyan and Joe Kingma prevailed in the Georgia Court of Appeals, which affirmed the dismissal of claims brought directly by the Plaintiff against a national insurance carrier. The Superior Court of Fulton County had dismissed the complaint in its entirety for failure to state a claim.

Publications & Presentations

- In October, Shannon Sprinkle appeared on PBA 30's **"Leyes Cotidianas" (Everyday Law)** to share the defense and lawyer's perspective on legal malpractice claims.

- Partner Charlie McDaniel presented **"Are Safe Harbors For Insurers Eroding or Being Obliterated,"** a presentation addressing complicated coverage and bad faith issues for insurers at the 31st Annual Insurance Law Seminar hosted by ICLE on September 20, 2012.

- Amy Urban and Dave Root presented at the **2012 Georgia Safety, Health and Environmental Conference** on September 13 & 14, 2012 at the Savannah Marriott Riverfront Hotel.

- Joe Kingma recently spoke on the use of CPA experts at the September 2012 **Fraud and Forensic Accounting Conference** sponsored by The Georgia Society of CPA's.

- Paul Sperry and David Harmon presented **"Professional Liability: Beyond the Design"** to an audience of 70 plus professionals at a meeting for the Eastern Branch of the American Society of Civil Engineers (ASCE) on September 7, 2012 at the Citadel campus.

*Please visit **www.CarlockCopeland.com** for additional events, publications and presentations.*

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At a glance...

Carlock, Copeland & Stair Welcomes New Attorneys to Atlanta and Charleston Offices
We are pleased to announce that we have added four new attorneys to the Firm.
More on page 5.

Carlock, Copeland & Stair Partner Appears on PBA 30's "Leyes Cotidianas"
Shannon Sprinkle appeared on "Leyes Cotidianas" (Everyday Law) on PBA 30 on October 7, 2012.
More on page 7.

Legal Malpractice Claim Dismissed After Prevailing on Novel Issue of Federal Patent Jurisdiction
David Overstreet and Mike McCall obtained dismissal of a patent law legal malpractice action after successfully defeating a motion to remand.
More on page 6.