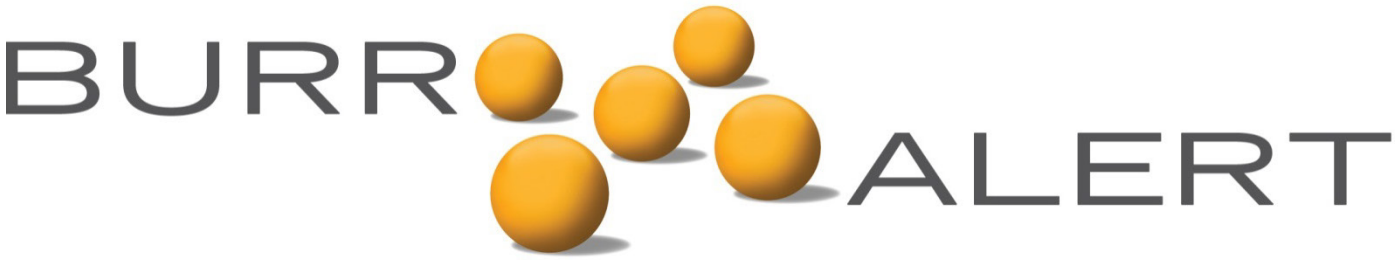

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Mortgage Debt Lesson:
Don't Pursue Collection of a Discharged Mortgage

Creditors should double check the bankruptcy status of a debtor/borrower before pursuing collection. As a pending case illustrates, pursuing collection of an initially reaffirmed, but later discharged mortgage could be a violation of the Fair Credit Reporting Act ("FCRA") and Fair Debt Collection Practices Act ("FDCPA"), even when a debtor takes post-bankruptcy action related to the debt, such as making payments, seeking a modification of the loan or short sale of the property.

The facts at issue are not uncommon in the mortgage industry. In 2005, a borrower obtained a first and second mortgage. The borrower then filed for Chapter 7 bankruptcy protection in 2008. In the bankruptcy, the debtor filed a Statement of Intention to retain the collateral, but later failed to enter into formal reaffirmation agreements. The mortgage debts were subsequently discharged. After obtaining a discharge, the debtor remained in the property and sought a post-bankruptcy loan modification and then a short sale. Both were unsuccessful. During the modification/short sale process, the debtor's second mortgage loan was transferred to a new loan servicing company. After learning of the transfer, the debtor called the new loan servicing company to notify it of the bankruptcy discharge. The debtor also requested not to receive further collection calls and was placed on a "do not call" list. Shortly thereafter, the property was sold at foreclosure in October 2010.

In 2011, the new loan servicing company again pulled the debtor's credit reports, sent account statements to the debtor and reported to credit agencies that the second mortgage was past due. The account statements included a standard bankruptcy disclaimer indicating that if the debt had been discharged, the account statements were not an attempt to collect a debt.

The debtor subsequently filed suit alleging, among others, violation of the FCRA, FDCPA, invasion of privacy and credit defamation, along with a claim for emotional damages. The debtor asserted that because of the discharge, there was no longer a credit relationship with the loan servicing company. The debtor further alleged that the account statements were sent in violation of the FDCPA. After discovery, which included a deposition of the debtor, the loan servicing company filed for summary judgment arguing that because of the debtor's post-bankruptcy actions, it had a reasonable, good faith belief that it had a credit relationship and its bankruptcy disclaimers precluded the FDCPA claim.

In denying summary judgment, the United States District Court for the District of Minnesota held that because the loan servicing company had knowledge of the bankruptcy, a reasonable jury could conclude that the company wrongfully accessed the debtor's credit reports and attempted to collect a discharged debt in violation of the FCRA and FDCPA. *Barton v. Ocwen Loan Servicing LLC*, No. 12-cv-00162, 2013 U.S. Dist. Lexis 153276 (D. Minn., Oct. 25, 2013).

For more information, contact:

James A. Haltom in Nashville at (615) 724-3237 or jhaltom@burr.com

or your Burr & Forman attorney with whom you regularly work.