

Montana Supreme Court Upholds Large Award against Mortgage Servicer for Deceptive Collection Practices

Mortgage servicers have come under scrutiny since the mortgage meltdown resulted in many consumers losing their homes to foreclosure. In response to the foreclosure actions, some consumers brought unsuccessful lawsuits against their servicers alleging that the servicers violated master servicing agreements by failing to consider consumers for or grant loan modifications per federal law or alleging that the servicers violated state foreclosure laws. In a Montana case that was making its way through the state courts around the same time, a borrower alleged that the servicer engaged in deceptive collection practices after default and was awarded \$284,615 in damages from the servicer that was not to be applied toward the mortgage debt, plus \$109,000 in fees. The Montana Supreme Court recently upheld this award. Here is what happened.

The Facts

To purchase a home, Robin and Kathleen Jacobson executed a promissory note for \$391,400 in favor of Citimortgage and a deed of trust naming Mortgage Electronic Registration Systems, Inc. as the "nominee" beneficiary in October 2007. Citimortgage transferred servicing rights to Bayview Loan Servicing, LLC in March 2009 after the Jacobsons defaulted. Bayview commenced foreclosure proceedings the same month by sending a faulty default notice that did not give the Jacobsons a full 30 days to cure the default or state a specific cure date as required by the note. The notice also misrepresented the statutory pre-foreclosure sale reinstatement right. A Bayview representative convinced the Jacobsons to stop making payments in April 2009 so they could qualify for a loan modification, but Bayview did not forward a modification application after the payments stopped. Instead, Bayview reinstated foreclosure proceedings by filing an assignment of the deed of trust from MERS to Citimortgage, a substitution of trustee that named Charles Peterson as trustee, and a notice of sale that incorrectly named Bayview as the beneficiary. Bayview had no authority to execute the assignment or substitution of trustee.

Bayview subsequently told the Jacobsons that they did not qualify for a HAMP loan modification when they had never applied for one. Bayview later offered the Jacobsons a reasonable loan modification, but the modification could not be finalized because Bayview would not put the terms in writing. Bayview later sent another faulty default notice in December 2009, sent a second notice of sale that incorrectly named Bayview as the beneficiary and set a foreclosure sale date of

June 15, 2010, made assignments without authority, assigned the deed of trust to a nonexistent entity, and misrepresented the party on whose behalf Bayview was servicing the loan.

Trial Court Decision

The Jacobsons sued Bayview and Peterson on June 9, 2010 to cancel the foreclosure sale. The Jacobsons also alleged violations of the Fair Debt Collection Practices Act and the Montana Consumer Protection Act. The trial court canceled the foreclosure sale. Bayview contacted the Jacobsons instead of their attorney after the case was filed. Bayview moved for summary judgment and alleged that it had the authority to foreclose because it was the beneficiary of the deed of trust, that its actions did not establish an FDCPA violation, and that it did not violate the MCPA because any violation must be based on independent grounds and not on an FDCPA violation. The trial court denied the motion.

The trial court later found Bayview liable due to the multiple misrepresentations and Bayview's contact with the Jacobsons when they were represented by counsel. The trial court awarded the Jacobsons \$172,615 for actual damages, \$50,000 for emotional distress, \$1,000 each in statutory damages under the FDCPA, and court costs and attorney fees exceeding \$109,000. The trial court subsequently awarded additional damages of \$60,000 due to Bayview's continued contact with the Jacobsons when they were represented by counsel. Bayview appealed, arguing that the trial court erred in finding violations of the FDCPA and MDCPA and in determining the amount of the damage award. Bayview argued that there were no actual damages because the house was never foreclosed and sold. The Jacobsons requested costs and fees for the appeal.

Supreme Court Analysis

The Montana Supreme Court upheld the trial court's decision. The court concluded that Bayview violated the FDCPA because its misrepresentations were material and would confuse the least sophisticated consumer. The court also concluded that Bayview violated the MCPA because a violation of the FDCPA can constitute grounds for a violation of the MCPA. In addition, Bayview's misrepresentations independently established violations of the MCPA. Next, the court found that the damage award was proper because the actual damages equaled the amount of late charges and additional interest the Jacobsons were charged due to Bayview's actions. The court noted that it did not require the actual damages to be subtracted from the mortgage balance because Bayview did not hold the mortgage. The court

also concluded that it was appropriate for the trial court to award damages for emotional distress, additional damages due to Bayview's actions and statutory damages to each plaintiff. Finally, the court concluded that the Jacobsons were entitled to costs and fees on appeal as the prevailing party. The case was remanded to the trial court to determine reasonable costs and fees of the appeal.

Impact on Servicing Practices

While the facts of this case took place over five years ago, they still provide a guide as to deceptive servicing practices that mortgage servicers should avoid. The CFPB issued the Supervisory Highlights Mortgage Servicing Special Edition in June 2016 that identifies some deceptive mortgage servicing practices similar to those Bayview engaged in as deceptive practices that some mortgage servicers are engaging in today. Some of the deceptive mortgage servicing practices identified by the CFPB are:

- Including deceptive statements that a home would not be foreclosed on before the deadline for submitting loan modification application documents had expired in loss mitigation acknowledgement notices;
- Misrepresenting the available terms of a loan modification; and
- Sending loan modification denial notices that did not state the correct reason for denial.

Mortgage servicers need to be aware of the deceptive servicing practices identified in this case and the Supervisory Highlights so they can implement appropriate policies and procedures to avoid them. Failing to do so may result in substantial monetary penalties for violating state or federal laws or regulator action. Servicers of other credit products should also avoid engaging in similar practices as they could be subject to monetary penalties or regulator action for engaging in similar practices.

Jacobson v. Bayview Loan Servicing, LLC, 371 P.3d 397 (Mont. May 4, 2016).