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Client Bulletin

Volume XXIX, No. 8 **December 31, 2012**

New Statutes Pertaining to Residential Construction Services of $25,000 or More

Chapter 4722 of the Ohio Revised Code became effective August 31, 2012. This statute is the "Home Construction Service Suppliers Act," and pertains to residential construction services in one to four family residential dwellings, the cost of which services equals or exceeds $25,000. The Act only applies to construction services provided pursuant to an agreement between a supplier and a property owner; the Act does not apply to other agreements of a construction services supplier (i.e., it does not apply to the contract between a general contractor and a subcontractor).

The Act states that any home construction service over $25,000 must be reflected in a signed writing (contract) which must include the following: (1) the supplier's name, physical business address, business telephone number, and taxpayer identification number; (2) the owner's name, address and telephone number; (3) the address or location of the property where the service is to be performed; (4) a general description of the service, including the goods and services to be furnished as part of the service; (5) the anticipated date or time period for commencement and completion of the service; (6) the total estimated cost of the service; (7) any costs likely to be incurred that the total estimated cost set forth in the writing does not cover; (8) a copy of the supplier's certificate of insurance showing general liability coverage in an amount of not less than $25,000; and (9) the dated signatures of the owner and the supplier.

The supplier must give the owner notice and an estimate whenever the supplier reasonably anticipates that excess costs of the construction service above that set forth in the writing as the total estimated cost could at any time exceed $5,000. The Act also provides provisions regarding deposits for home construction services. The supplier may not take more than 10% of the contract price as a down payment before the supplier commences the work, except the supplier may take not more than 75% of the total cost of any special order item, which item is not returnable or usable before the supplier commences the work. It should be noted that although some aspects of the Act do apply to cost-plus contracts, the requirements set forth in this paragraph do not apply to cost-plus contracts.

A benefit of the Act to suppliers is that the Act expressly provides that where the Act applies, Ohio's Consumer Sales Practices Act does not apply.

It is imperative that all home construction service suppliers, including builders and remodelers, review their existing contracts to ensure compliance with the Act.

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Ohio Supreme Court Decides Who Can (and Who Cannot) Bring a Foreclosure Action

On April 15, 2009, the Federal Home Loan Mortgage Corporation ("Freddie Mac") commenced a foreclosure action against the Schwartzwalds claiming they had defaulted on their mortgage loan, attaching a copy of the mortgage identifying the property, the Schwartzwalds as the borrowers and Legacy Mortgage as the lender, but not attaching a copy of the promissory note, stating that a copy of the note was "currently unavailable." At the time Freddie Mac filed for foreclosure, the Schwartzwalds were working with Wells Fargo on a short sale. Nine days after filing the foreclosure action, Freddie Mac filed a copy of the promissory note to Legacy Mortgage by the Schwartzwalds, which had an endorsement by Legacy Mortgage payable to Wells Fargo and a blank endorsement by Wells Fargo. On June 17, 2009, Freddie Mac filed with the court a copy of an assignment of the note and mortgage from Wells Fargo to Freddie Mac dated May 15, 2009. The trial court granted a default judgment against the Schwartzwalds, which judgment was affirmed by the Second District Court of Appeals on the basis that Freddie Mac had established its right to enforce the promissory note as a non-holder, but in possession of the promissory note, and that although Freddie Mac lacked standing to sue at the time it commenced the foreclosure action, such defect was cured by the assignment of the mortgage and the transfer of the promissory note to Freddie Mac before the default judgment was granted. The Second District certified to the Ohio Supreme Court that its decision conflicted with decisions of the First District and the Eighth District.

The Ohio Supreme Court, in a slip opinion issued on October 31, 2012, reversed the judgment for Freddie Mac. The Court held that standing to sue, or a court's jurisdiction of a plaintiff's suit, is determined at the time of the initiation of the suit and because Freddie Mac had not been assigned the mortgage and had not been transferred the promissory note at the time it filed the foreclosure suit against the Schwartwalds, the suit could not be brought by Freddie Mac. The Supreme Court held that Freddie Mac's foreclosure action should have been dismissed as Freddie Mac lacked standing to sue. The dismissal would have been a dismissal without prejudice (which means that Freddie Mac could have re-filed the complaint for foreclosure after it was assigned the mortgage and transferred the promissory note).

This decision, *Federal Home Loan Mortgage Corporation v. Schwartzwald, et al.*, Slip Opinion No. 2012-Ohio-5017, will have similar implications as to lawsuits on credit card accounts, which suits are frequently brought by other than the financial institution that issued the credit card. (Such suits are frequently brought by companies that purchase "charged off" credit card debt.)

Notice

This bulletin provides general information and is not legal advice. Please contact us if you need legal advice.

If you have friends or associates who you think would enjoy receiving a copy of this Client Bulletin, please feel free to forward it on. Thank you.

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