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Consumer Financial Services *Newsletter*

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Seventh Circuit Rules: Filing a Proof of Claim for Old Debt Is Okay — Circuits Split

***Owens et al. v. LVNV Funding LLC et al.*, Nos. 15-2044, 15-2082, 15-2109 (7th Cir. Aug.10, 2016)**

In *Owens v. LVNV Funding LLC*, a consolidated appeal, the Seventh Circuit Court of Appeals ruled "that a proof of claim on a time-barred debt does not purport to be anything other than a claim subject to dispute in the bankruptcy case. Filing such a proof of claim is not inherently misleading or deceptive." The court affirmed the rulings in three different district court cases that the defendants did not violate the Fair Debt Collection Practices Act (FDCPA). In so doing, the Seventh Circuit joins the Eight Circuit (see *Nelson v. Midland Credit Mgmnt.*, No. 15-2984 (8th Cir. July 11, 2016)) and the Second Circuit (see *Simmons v. Roundup Funding, LLC,* 622 F.3d 93, 94 (2d Cir. 2010) in opposition to the reasoning of the Eleventh Circuit (see *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1259–60 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1844 (2015)).

The ruling is a significant affirmation of a creditor's right to participate in a debtor's bankruptcy estate. District courts, and now the Seventh Circuit, have rejected the argument that the act of filing a proof of claim on a stale debt is deceptive or unfair under the FDCPA. The rights granted to creditors under the Bankruptcy Code will now be less encumbered by the flood of claims spawned by the *Crawford* case. Dozens of "*Crawford*-style" claims currently stayed in the Seventh Circuit can now be dispatched because the filing of a proof of claim, even for a time-barred debt, is not a violation of the FDCPA.

Hinshaw & Culbertson LLP was significantly involved with this appeal and the underlying district court cases.

For more information, please contact **Nabil G. Foster**.

HINSHAW & CULBERTSON LLP

Hinshaw's Consumer and Class Action Litigation group effectively and efficiently defends individual and class action litigation across the United States. We routinely represent financial institutions in defending claims involving the FDCPA, TCPA, and FCRA, as well as state law claims. We have expertise in the latest industry trends and regularly advise clients on the impact of state and federal regulatory agencies, including the Consumer Financial Protection Bureau.

Hinshaw's national Mortgage Servicing and Lender Litigation practice provides sophisticated and extensive legal services to these businesses across the United States. We routinely defend banks, lenders, investors, servicers and trustees in mortgage-related litigation filed in state and federal district as well as bankruptcy courts.

Debt collectors may not need to disclose that communication is from debt collector in subsequent communications with debtors

***Davis v. Hollins Law*, 14-cv-16437, 2016 WL 4174747 (9th Cir. Aug. 8, 2016)**

***Key Take Away*: A debt collector's subsequent communications with debtor that did not expressly state "this communication is from a debt collector" did not violate the FDCPA.**

Section 1692e(11) of the FDCPA requires debt collectors "to disclose in subsequent communications [with debtors] that the communication is from a debt collector." 15 U.S.C. §1692e(11). In *Davis,* The Ninth Circuit Court of Appeals held that a debt collector's subsequent communication with a consumer did not violate §1692e(11) even though the debt collector did not expressly state "this communication is from a debt collector." The Court reasoned that a subsequent communication with a debtor does not violate §1692e(11) so long as it is sufficient to disclose that it is from a debt collector.

In *Davis,* the district court granted summary judgment for debtor finding that the debt collector technically violated §1692e(11) because the "voicemail message did not expressly state that Hollins Law is a 'debt collector.'" The Ninth Circuit reversed, finding that the consumer's prior communications with the debt collector combined with the statement that the call was from "Gregory at Hollins Law" were sufficient to disclose to that the communication was "from a debt collector." Of importance were the prior communications between the debtor and the debt collector. Prior to the voicemail message at issue, the debtor had been involved in settlement discussions with the debt collector for a two week period, made a telephone inquiry with the debt collector, and exchanged eight emails. At the time the voicemail message was left, the debtor had a pending settlement offer and he had inquired as to the creditor's response to the settlement offer. Relying on these prior communications, the Court concluded they were sufficient to disclose to the least sophisticated consumer that the voicemail was from a debt collector.

This appears to be a slight departure from the bright line rule that a debt collector is liable unless it states the magic words, "this communication is from a debt collector." While all communications should include the §1692e(11) disclosures, some courts may review all communications in context with an alleged violative communication.

For more information, please contact **Jonathan D. Drews**.

Rhode Island Mortgage Lenders Should Give Special Attention to Tax Sale Matters

***Izzo v. Victor Realty*, 132 A.3d 680 (R.I. 2016); *Conley v. Fontaine*, 138 A.3d 756 (R.I. 2016)**

***Key Take Away*: Rhode Island should give special attention to any and all tax sale notices and citations issued in petitions to foreclose in order to protect their mortgage interest in property.**

The Rhode Island Supreme Court recently issued two decisions that ease the process for individuals or entities who purchase tax liens at municipal tax sales to obtain clear legal title to such properties.

In *Izzo v. Victor Realty*, a mortgagee sought to vacate the entry of a final decree foreclosing all rights of redemption in property based on inadequate notice of the petition to foreclose required by Rhode Island law. While there was no dispute that the mortgagee had not received the notice of the petition to foreclose, the Rhode Island Supreme Court concluded that the tax sale purchaser satisfied due process by proof that the notice was sent certified mail, even though the mortgagee did not receive the citation. "Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections…[h]owever, [d]ue process does not require that a [mortgagee] receive actual notice before the government may take…property."

More recently, in *Conley v. Fontaine*, a tax lien purchaser sought to vacate a Superior Court judgment authorizing a mortgagee to redeem property after the 20-day return date contained in the tax lien purchaser's petition to foreclose. The Rhode Island Supreme Court vacated the judgment, holding that a mortgagee's right of redemption is barred if the mortgagee fails to respond to a petition to foreclose *within* 20 days of service. In other words, failing to respond to a citation in support of a petition to foreclose within 20 days will result in an automatic default and the foreclosure of all rights of redemption.

These decisions illustrate the relative ease with which tax sale purchasers can obtain clear title to property purchased at tax sale. Lenders doing business in the state of Rhode Island should give special attention to any and all tax sale notices and citations issued in petitions to foreclose in order to protect their mortgage interest in property.

For more information, please contact **Matthew R. Shechtman**.

"Attorney" Does Not Automatically Imply Meaningful Legal Involvement or Threat of Suit

***Jones v. David Sean Dufek & Cach LLC*, No. 15-7013 (D.C. Cir. July 26, 2016)**

On July 26, 2016, the United States Court of Appeals for the District of Columbia Circuit held that a collection letter from an attorney neither falsely implied that the attorney was meaningfully involved nor that the letter threatened litigation.

In *Jones,* the debtor alleged that use of the title "attorney" in the letterhead of a collection letter and signature block implied that an attorney had evaluated the case from a legal standpoint and impermissibly threatened legal action in violation of the FDCPA and state law statutes.

The Court held that the FDCPA does not require attorneys collecting debts to conceal the fact that they are attorneys, but only requires that they not mislead debtors by falsely representing they have formed a legal opinion regarding the debtor's liability. The Court reasoned that because the letter made no reference to legal action and included the *Greco* disclaimer (language to make clear that at the time of the letter's transmission the law firm or attorney was not acting as an attorney but was acting as a debt collector), the letter was not a threat to take legal action.

For more information, please contact **Lindsey Conley**.

Two U.S. District Courts Dismiss TCPA Claims for Lack of Standing Under *Spokeo*

***Susinno v. Work Out World, Inc.*, No. 3:14-cv-05881 (PGS) (TJB) (D.N.J. Aug. 1, 2016) and *Romero v. Department Stores Nat'l Bank,* No. 15-CV-193-CAB-MDD (S.D.Cal. Aug. 5, 2016)**

The United States District Court for the District of New Jersey and the United States District Court for the Southern District of California both dismissed TCPA claims for lack of Article III standing following the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016).

The district court in New Jersey dismissed a putative class action suit with prejudice where the complaint alleged that a single voicemail left on a consumer's cellular telephone violated the Telephone Consumer Protection Act (TCPA). In *Susinno v. Work Out World, Inc.*, the called party, who had a gym membership with Work Out World (WOW), received a marketing voicemail from WOW on her cellphone without prior express consent. WOW moved to dismiss the action pursuant to *Spokeo* arguing that the called party lacked Article III standing for failure to establish injury-in-fact from the single telephone call. WOW also pointed out that the majority of consumers today have "flat-fee" or "unlimited" cellular phone plans and argued that the called party failed to establish any injury-in-fact because she did not provide details regarding her cellphone contract. In opposition, the called party argued that her general allegations in the complaint that claimed, among other things, nuisance, invasion of privacy, aggravation, loss of use of the cellphone and depletion of battery life was sufficient to establish an injury-in-fact. The called party argued that even though these harms may be small, they were sufficient to establish injury-in-fact. The district court agreed with WOW and dismissed the lawsuit with prejudice. Because the decision was rendered from the bench after oral argument, there is currently no written record of the court's exact reasoning for the dismissal; however, it can be inferred that the dismissal was likely based on the failure to establish injury-in-fact. The called party has appealed the court's decision. More details regarding the court's reasoning will be revealed once the transcript of the court's ruling is released.

> ***"The consumer has not and cannot demonstrate that any one of the...alleged violations of the TCPA, considered in isolation, actually caused her concrete harm."***

Additionally, in *Romero v. Department Stores Nat'l Bank*, the district court in Southern California also dismissed a TCPA claim for lack of Article III standing following *Spokeo*. In *Romero*, defendant department store placed more than 290 calls to the consumer who owed a balance on her department store credit card. The consumer had provided her cellular telephone number for her account; however, she alleged that she told the department store to stop calling her on two separate occasions. After close of discovery, the department store filed a motion to dismiss for lack of jurisdiction prompted by the U.S. Supreme Court's decision in *Spokeo*. The district court agreed that *Spokeo* requires a showing that the alleged injury is "concrete" in order to have Article III standing. Applying that standard, the district court held that standing must be established for each alleged TCPA violation and found that the consumer "has not and cannot demonstrate that any one of the Defendants' over 290 alleged violations of the TCPA, considered in isolation, actually caused her concrete harm." For instance, the court found that the debtor could not have suffered an injury in fact as a result of a phone call she did not know was made or calls that she heard ring but did not answer. The court further found that even for the two calls that the debtor did answer, she did not offer any evidence demonstrating how she suffered "lost time, aggravation, and distress" as a result of answering two calls made using an automated telephone dialing system.

These cases are likely to have significant importance as they may balance the realities of the cost and usage of cellphones today as compared to when the TCPA was enacted, and may shed light on the absence of injury to persons who are either unaware of calls made or do not answer calls.

For more information, please contact
Han Sheng Beh or **Barbara Fernandez**.

Award of Interest Requires Specific Proof

***Marsden v. BAC Home Loans Servicing, L.P.*, No. 4D14-1623, 2016 WL 3746536 (Fla. Dist. Ct. App. July 13, 2016)**

> ***Key Take Away*: Specific evidence must be presented to prove all amounts sought in a judgment.**

The District Court of Appeal of the State of Florida recently considered whether a mortgage servicer was entitled to an award of interest in a final judgment entered in its favor. In *Marsden v. BAC Home Loans Servicing, L.P., et al.*, borrowers appealed a final foreclosure judgment in favor of BAC, arguing that BAC had failed to prove the damages set forth in the judgment, which included an award of interest. The bank had relied upon a payment history to prove its damages, but failed to submit any testimony or other evidence as to the amount of interest owed. As such, the appellate court reversed and remanded the judgment for amendment to "remove any calculations for interest". The case serves as an important reminder that specific evidence must be presented to prove all amounts sought in a judgment, including interest.

For more information, please contact **Renee Choy Ohlendorf**.

CFPB Gives Preview of Changes Coming to the Collection Industry

Originally published as a Consumer Financial Services Alert on August 3, 2016

On July 28, 2016, the Consumer Financial Protection Bureau (CFPB) issued a detailed **outline** of proposals that address some of the hot topic issues in the collection industry. Before they become rules, these proposals will first be sent to the Small Business Review Panel for feedback, and the public will also have the opportunity to comment. The proposals generally focus on broad topic areas, but also briefly outline a number of key issues addressing consumer complaints, as outlined below.

Collector Contacts with Consumers

In response to complaints of high volume of calls and letters, the CFPB is proposing limits on contact with consumers. The CFPB proposes that collectors should be limited to six attempts before they have reached the consumer and additional restrictions once contact has been confirmed. Also proposed is a new set of locations where a collector may not contact a consumer, plus a requirement of a 30-day waiting period before a collector may contact any survivor after the death of a consumer. Additionally, any consent given to a creditor to contact a consumer outside of the FDCPA's restrictions may not be relied on by a creditor or collector down the line.

Validation of Information

According to the CFPB, one third of consumers contacted regarding a debt have reported that the attempt to collect was for the wrong amount. The new rules propose that collectors must scrub their files and substantiate the debt before contacting consumers and must ensure they have accurate information such as the full name, last known address and telephone number, account number of the consumer, the date of default and the amount owed, and the date and amount of any payments after default.

Restrictions Following a Dispute

Under the proposed rules, collectors must stop collection and review documentation once a dispute has been made; and if there is insufficient evidence, the collector may not proceed. Importantly, the CFPB is considering allowing a verbal questioning of the debt by the consumer to be done at any time which would prompt the requirement for the collector to check its documentation. Any warning signs that information is inaccurate or incomplete require a halt in the collection process until the issue is solved. A few common warning signs cited are a portfolio with high rates of disputes and the inability to obtain underlying documents to respond to a specific dispute. Lastly, before filing any collection lawsuit, collectors must again check their information.

Litigation Disclosure

In the initial collection notice, the collector must include information concerning the consumer's federal rights, and whether the debt is time barred for purposes of a collection lawsuit. This "litigation disclosure" includes information on how a collector intends to sue and provision of contact information for legal service programs. Lastly, the initial notice contains a tear-off portion that consumers can easily send back to either pay the debt or dispute it.

The proposed rules require that if a dispute is made within 30 days, the collector must provide the consumer with a debt report containing written information that substantiates the debt and cannot proceed until it is sent. The proposed rules attempt to prevent the "burying" of debt by transferring it when a consumer disputes the debt, and requires that upon a transfer, the collector must send information regarding the debt so consumers do not have to dispute a second time.

Incidental Fees

One important issue facing many collectors are "convenience fee" lawsuits in which a consumer sues because of a small dollar amount that a collector charged for paying the debt on a website. The CFPB is proposing that these fees may be collected permissibly if: a) state law expressly permits them, or b) the consumer has expressly agreed to them in the contract that created the underlying debt and state law does not either expressly permit or prohibit such fees.

***Key Take Away*: While the CFPB's proposed rules are now only a set of proposals, collectors must be aware of the proposals that may soon become law. Please continue to rely on Hinshaw to closely monitor the status of the rulemaking process, and contact your Hinshaw Attorney regarding any questions.**

For more information, please contact **Brandon S.Stein**.

About Hinshaw

Hinshaw & Culbertson LLP is a national law firm with approximately 525 attorneys providing coordinated legal services across the United States and in London. Hinshaw lawyers partner with businesses, governmental entities and individuals to help them effectively address legal challenges and seize opportunities. Founded in 1934, the firm represents clients in complex litigation and in regulatory and transactional matters.

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