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Consumer & Class Action Litigation NEWSLETTER

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Illinois Supreme Court Finds That TCPA Is a Remedial and Not Punitive Statute

In *Standard Mutual Insurance Company v. Lay,* --- N.E.2d ---, 2013 WL 2253203 (Ill. May 23, 2013), the Illinois Supreme Court concluded that the Telephone Consumer Protection Act (TCPA) is a remedial and not a punitive statute, and thus liquidated damages of $500 per violation do not constitute uninsurable punitive damages.

In June 2009, plaintiff fax recipient brought a class action against defendant insured in the Circuit Court of Madison County, alleging violations of the TCPA. The fax recipient and the other plaintiffs sought the TCPA-prescribed damages of $500 per violation and injunctive relief. The insured tendered its defense to its insurer, which had issued to the insured a commercial general liability insurance policy and a primary business owners' liability insurance policy.

In July 2009, the underlying action was removed to the U.S. District Court for the Southern District of Illinois, and on September 18, 2010, the district court entered a final order approving the class certification and settlement. The judgment against the insured was for $1,737,500, plus costs. Pursuant to the settlement agreement, the fax recipient would seek satisfaction of the judgment only from the insurance policies of the insured; the insured assigned to the fax recipient all of its claims against, and rights to payment from, the insurer.

In July 2010, the insurer filed a complaint and alleged, in relevant part, that TCPA-prescribed damages of $500 per violation constitute punitive damages, which "are not insurable as a matter of Illinois law and public policy." Finding that the insured was not covered, the circuit court granted summary judgment in favor of the insurer.

The Illinois Supreme Court disagreed with the circuit court's finding that TCPA-prescribed damages of $500 per violation constitute punitive damages, which "are not insurable as a matter of Illinois law and public policy and are not recoverable from [the insurer]." The Court explained: "Whether we view the

$500 statutory award as a liquidated sum for actual harm, or as an incentive for aggrieved parties to enforce the statute, or both, the $500 fixed amount clearly serves more than purely punitive or deterrent goals."

Standard Mutual Insurance Company v. Lay, --- N.E.2d ----, 2013 WL 2253203 (Ill. May 23, 2013)

For further information, please contact Katherine H. Tresley or your regular Hinshaw attorney.

Georgia Supreme Court Holds That Assignee of Security Deed Can Conduct Nonjudicial Foreclosure Sale Without Holding or Owning the Underlying Promissory Note

The Supreme Court of Georgia decided questions certified by the U.S. District Court for the Northern District of Georgia regarding state nonjudicial foreclosure proceedings. In the district court, the borrowers challenged, *inter alia,* the authority of the holder of the security deed to exercise the power of sale in that deed without also holding the promissory note.

The Court held that state law does not require a party seeking to exercise a power of sale in a deed securing debt to also hold the promissory note evidencing the underlying debt. The Court noted that no such requisite existed in the statute, and highlighted the legislature's refusal to specifically define the term "secured creditor." In further support of its holding, the Court highlighted the long-standing practice surrounding nonjudicial foreclosures that recognizes the ability of a deed holder to exercise its rights under the deed, apart from the note. In addition, the Court gleaned no evidence from which to conclude that the legislature intended to make substantive changes to this law through subsequent amendments.

The Court also rejected the borrowers' argument that the secured deed was a negotiable instrument governed by Article 3 of Georgia's Uniform Commercial Code. It further held that the statute's notice provision did not require that the secured creditor be identified in the notice of default to the debtor unless the secured creditor is the individual or entity with full authority to negotiate and modify the terms of the mortgage. Thus, identifying only a loan servicer in a foreclosure notice meets the statutory requirement as long as the servicer has authority to modify the terms of the loan and deed.

You v. JP Morgan Chase Bank, N.A., --- S.E.2d ---, 2013 WL 2152562 (Ga. May 20, 2013)

For further information, please contact Amanda J. Argentieri or your regular Hinshaw attorney.

Debtor's Writ of Garnishment Is Quashed After He Refuses to Provide Tax Info and Tries to Collect Judgment from Debt Collector

This Fair Debt Collection Practices Act / Telephone Consumer Protection Act case settled and judgment was entered in plaintiff's favor. However, after judgment, plaintiff refused to provide a tax identification number or W-9 to defendant in order to facilitate payment and satisfaction of the judgment. Instead, defendant initiated a process referred to in the tax code as "backup withholding" and paid plaintiff 72 percent of the judgment with the remaining 28 percent going directly to the IRS. Plaintiff

sought a writ of garnishment against defendant in order to collect the judgment in full. Defendant sought to quash the writ. The court quashed the writ, holding that under the law, defendant was entitled to take a protective approach and its undertaking of backup withholding was proper. The court ruled that the judgment had been satisfied in full.

Childers v. Receivables Performance Management, LLC, 2013 WL 1944551 *1-*3 (W.D. Wash. May 9, 2013)

For further information, please contact Todd P. Stelter or your regular Hinshaw attorney.
