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Consumer & Class Action Litigation NEWSLETTER

November 7, 2012

CFPB Announces It Will Supervise Larger Consumer Debt Collectors and That Attorneys Are Subject to Supervision

On October 24, 2012, the Consumer Financial Protection Bureau (CFPB) released its final rule for overseeing debt collectors, and included attorneys among those who will be subject to direct federal supervision. Under the rule, which goes into effect on January 2, 2013, the CFPB will have the power to send field examiners out to the law offices of attorneys who engage in debt collection to: review their procedures, evaluate the quality of their compliance, and identify risks to consumers. Additionally, any firm that has more than $10 million in annual receipts from consumer debt collection activities — about 60 percent of the debt collection market — will be subject to the CFPB's supervisory authority.

In distinguishing its rule from allegations that the CFPB is impermissibly regulating the conduct of lawyers, the CFPB stated that "[c]onsumer debt collection is a consumer financial service . . . debt collection attorneys do not provide 'legal advice or services' to those consumers." The agency further stated that nothing in the rule "requires attorneys to engage in or refrain from engaging in any particular conduct." Of course, federal consumer financial law does impose some conduct rules that apply to lawyers. These requirements are likely consistent with state professional conduct rules, which presumably do not obligate attorneys to violate federal law.

However, the CFPB did narrow one of its definitions in response to a concern raised by the American Bar Association's Committee on Consumer Financial Services. Committee chair Therese Franzen wrote: "it appears that the [CFPB] may believe that any legal action that an attorney undertakes that is adverse to a consumer in any way related to a consumer financial product or service" would subject the attorney to CFPB supervision. As an example, she said, a high-net worth individual could default on a jumbo mortgage, in which case the creditor might call its ordinary litigation counsel to handle the matter. Would that lawyer then be a debt collector and fall under CFPB oversight?

The CFPB answered in the negative. Citing the jumbo mortgage example, the rule states that "[t]he Bureau agrees that not every occasion on which an attorney seeks money from a consumer client constitutes debt collection." The CFPB amended its definition to specify that it only applies to debt collection performed by people "whose principal business activity is debt collection."

For further information, please contact Andrew M. Schneiderman or your regular Hinshaw attorney.

12 CFR Part 1090 Docket No. CFPB-2012-0040, RIN: 3170-AA30

Equifax Agrees to Settle Two Lawsuits by the FTC

The Federal Trade Commission (FTC) alleged that Direct Lending Source, Inc. and its affiliates and principals violated the FTC Act and the Fair Credit Reporting Act (FCRA) because the company obtained prescreened lists without having a permissible purpose and then resold the lists. Further, the FTC alleges that Direct Lending failed to ensure that there was permissible purpose for obtaining the lists, to control access to sensitive consumer financial information, and to keep a record of criteria used to select consumers identified on the prescreened list.

Equifax agreed to pay $393,000 and Direct Lending agreed to pay $1.2 million to resolve the FTC's claims. The FTC approved the consent agreement package against Equifax, which includes terms prohibiting the company from providing prescreened lists without ensuring that there is a permissible purpose for such list. Comments on the consent agreement may be made until November 9, 2012.

For further information, please contact Jennifer S. Bunce or your regular Hinshaw attorney.

FTC Settles with Equifax and its Credit Information Customers

Sixth Circuit Rules on What Is the Relevant Time When Deciding the Purpose of a Debt

Plaintiff debtor purchased a condominium unit in which he lived for 15 years, and thereafter relocated and leased the unit. When assessments became outstanding, defendant debt collector sent a letter to the debtor demanding payment. The debtor sued the debt collector under the Fair Debt Collection Practices Act (FDCPA) for allegedly using false and deceptive means to collect a disputed debt.

The debt collector argued that because the debtor was renting the condominium unit at the time the collector initiated collection efforts, the underlying debt was exempted from the FDCPA's coverage because it was a commercial, not consumer, debt. The U.S. Court of Appeals for the Sixth Circuit disagreed. It held that the relevant time period for determining the nature of the debt is when the obligation is incurred, which here was when the loan was made to the debtor for purchase of the condominium. The court opined that while a debt collector's conduct is relevant for purposes of determining whether a violation of the FDCPA has occurred, it is not relevant to the determination of whether the debt in question is regulated by the FDCPA.

For further information, please contact Barbara Fernandez, Andrew M. Schneiderman or your regular Hinshaw attorney.

Haddad v. Alexander, Zelmanski, Danner & Fioritto, ___ F. 3d ___, 2012 WL 5188812 (6th Cir. Oct. 22, 2012)

Scope of the TCPA: FCC Seeks Comments on Predictive Dialers

On October 16, 2012, the Federal Communications Commission (FCC) issued a Public Notice asking for comments regarding whether the agency should reconsider its prior order that predictive dialers fall under the prohibitions of the Telephone Consumer Protection Act (TCPA). The Public Notice provides:

> With this Public Notice, we seek comment on a Petition for Declaratory Ruling filed by Communication Innovators. Communication Innovators asks the Commission to clarify that predictive dialers that are not used for telemarketing purposes and do not have the current ability to generate and dial random or sequential numbers are not "automatic telephone dialing systems" as defined by the Telephone Consumer Protection Act and the Commission's related rules.

The Public Notice provides that comments are due on November 15, 2012, with reply comments due on November 30, 2012. ACA International and others are preparing comments. If the FCC declares that predicative dialers do not constitute "automatic telephone dialing systems" under the TCPA, the current wave to TCPA lawsuits against companies using predictive dialers would be subject to dismissal.

For further information, please contact James C. Vlahakis or your regular Hinshaw attorney.

In The Matter if Petition for Declaratory Ruling Regarding Non-Telemarketing Use of Predictive Dialers, CG Docket No. 02-278, DA 12-1653, (Oct. 16, 2012) (Public Notice)

First Court to Decide Consent Granted Only if Cell Number Given to Creditor at Time of Transaction

The U.S. Court of Appeals for the Ninth Circuit issued a pro-plaintiff opinion on October 12, involving claims brought pursuant to the Telephone Consumer Protection Act (TCPA). The appellate court affirmed the district court's grant of preliminary injunction prohibiting autodialed calls to cell phones and the lower court's order granting provisional class certification.

Plaintiff sued defendant debt collector for calling his cellular telephone with an autodialer after the debt collector obtained his cell phone number via skip tracing. The district court provisionally certified the class and granted plaintiff a preliminary injunction against continued use of an autodialer to call cellular numbers that were obtained via skip tracing.

The debt collector appealed the preliminary injunction, in part, by arguing that its predictive dialer did not constitute an "automated telephone dialing system" (ATDS) under the terms of the TCPA. The TCPA defines an ATDS as "equipment which has the capacity to store or produce telephone numbers

to be called, *using a random or sequential number generator*; and to dial such numbers" (italics added). The debt collector argued that its predictive dialer system did not randomly or sequentially generate numbers. The Ninth Circuit affirmed the preliminary injunction, holding that predictive dialers properly fell within the TCPA's definition of "automatic telephone dialing system," citing the Federal Communication Commission's (FCC's) 2003 TCPA Order.

The Ninth Circuit also affirmed the district court's order preliminarily approving class certification, rejecting the debt collector's argument that "individualized issues of consent should have precluded a finding of typicality or commonality because some debtors might have agreed to be contacted at any telephone number, even telephone numbers obtained after the original transaction." In the first ruling of its kind in the country, the court cited the FCC's 2008 Order and held that "prior express consent is deemed granted only if the wireless telephone number was provided by the consumer to the creditor, *and only if it was provided at the time of the transaction that resulted in the debt at issue*" (italics added). The court concluded that "consumers who provided their cellular telephone numbers to creditors after the time of the original transaction are not deemed to have consented to be contacted at those numbers for purposes of the TCPA."

The Ninth Circuit also rejected the debt collector's due process challenge to the TCPA, in which defendant argued that it was improper to apply the TCPA to debt collectors because the act was originally intended only to apply to telemarketers. The court held that Congress properly enacted the TCPA to prevent invasions of privacy. A petition for rehearing was filed on October 26, 2012.

For further information, please contact James C. Vlahakis or your regular Hinshaw attorney.

Jesse Meyer v. Portfolio Recovery Associates, LLC, 3:11-cv-01008 (9th Cir. Oct. 12, 2012)

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