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Consumer & Class Action Litigation NEWSLETTER

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Watch What You Say: The Hypothetical Least Sophisticated Consumer

The U.S. Court of Appeals for the Second Circuit, in *Easterling v. Collecto*, Inc., took a broad view of the "least sophisticated consumer" standard and reversed a judgment for defendant debt collector. The district court had held that informing plaintiff debtor in a collection letter that her student loan debt could never be discharged in bankruptcy was not a misleading statement under the Fair Debt Collection Practices Act (FDCPA). Although the statement was technically inaccurate, the lower court ruled for the debt collector because the debtor was represented by counsel throughout the course of her bankruptcy proceeding and so could not successfully argue that she had been misled about her legal rights. In addition, the lower court found that even if the debtor had asserted her rights, the difficulty in getting student loans discharged in bankruptcy undermined the reasonableness of her interpretation of the collection letter.

In reversing, the U.S. Court of Appeals for the Second Circuit pointed to *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993), where the court held that "false, deceptive or misleading" statements under the FDCPA are determined from the perspective of the objective "least sophisticated consumer." Consequently, the lower court was found to have used the wrong standard of review. Instead, the court instructed, the focus should have been on whether a hypothetical least sophisticated consumer would have thought that she was completely foreclosed from ever seeking a discharge of student loan debts in bankruptcy. Under that test, the collection letter would literally be considered "false, misleading or deceptive" on its face.

The collection letter was also characterized as fundamentally misleading because it suggested that the debtor had no means whatsoever of discharging student debt in bankruptcy. In the court's opinion, "the least sophisticated consumer might very well refrain from seeking the advice of counsel, who could then assist her in pursuing all available means of discharging her debt through bankruptcy." Accordingly, including inaccurate information on the discharge of student debt in the collection letter was deemed an "abusive debt collection practice."

For further information, please contact Jason J. Oliveri or your regular Hinshaw attorney.

Easterling v. Collecto, Inc., 2012 WL 3734389 (2d Cir. 2012)

Ninth Circuit Holds That Letter to Employer Violated FDCPA and Debtor Did Not Waive Right to Appeal Denial of Class Certification by Accepting Offer of Judgment

In *Evon v. Law Offices of Sidney Mickell*, plaintiff debtor filed a class action alleging that defendant debt collector, a law firm, violated the Fair Debt Collection Practices Act (FDCPA) by sending collection notices addressed to the debtor in "care of" the debtor's employer. The letter followed collection calls to debtor's home. The debtor asked that she not be contacted at work. However, the debt collector sent a dunning letter to the debtor's place of employment, a mortgage servicing company. The letter was opened and read by various individuals, including people in her employer's legal department, before the debtor received it.

The district court denied the debtor's motion for summary judgment and class certification, finding the debt collector's act of sending letters to the debtor's workplace did not violate the FDCPA. The U.S. Court of Appeals for the Ninth Circuit reversed, reasoning that such conduct violated the FDCPA's prohibition against communications with third parties. The appellate court reasoned: "[the debt collector] knew or could reasonably anticipate that a letter sent to a class member's employer might be opened and read by someone other than the debtor as it made its way to him/her. This is exactly what happened to [the debtor], causing her stress and embarrassment, precisely what the Act is designed to prevent."

The Ninth Circuit also reversed the trial court's denial of class certification. The court held that debtor satisfied the commonality requirement for class certification by alleging that the debt collector violated the FDCPA by sending collection notices addressed to the debtor in "care of" his employer, where the debt collector admitted it sent letters to all class members at their places of employment, and there was no indication that any class members had consented to receipt of letters at work.

After the district court's decision but before issuance of the Ninth Circuit's ruling, the debtor accepted the debt collector's Fed. R. Civ. P. 68 offer of judgment. The court of appeal found that the debtor did not waive her right to appeal denial of her motion for class certification by accepting the Rule 68 offer of judgment.

For further information, please contact Gary E. Devlin or your regular Hinshaw attorney.

Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015 (9th Cir. August 1, 2012)

Seventh Circuit Holds Debtor's Potential FDCPA Claim Cannot Be Assigned to Individual

In *Todd v. Franklin Collection Service*, a *pro se* plaintiff appealed the district court's dismissal of the claims purportedly assigned to him. The court determined that he was engaged in the unauthorized

practice of law. Plaintiff attempted to purchase claims against defendant debt collector from a debtor, with whom plaintiff had no relationship prior to the assignment of her claims. Plaintiff then sued the debt collector for violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, and for common law negligence.

The debt collector moved to dismiss, contending that the assignment of claims contravened public policy and was void because plaintiff appeared to be using the assignment to engage in the unauthorized practice of law. Plaintiff argued that the assignment was valid and that he was not engaged in the unauthorized practice of law because he was representing only himself and pursuing claims that he then owned. Plaintiff also argued that his complaint stated claims for relief and, if the district court disagreed, that he should be given leave to amend it.

The district court dismissed the complaint, finding that the assignment was void because plaintiff was using it merely to attempt to practice law without a license. Further, the court took judicial notice of "the many other lawsuits [plaintiff] has filed in this district as an assignee of legal claims." The court also ruled that plaintiff failed to state a claim for relief.

On appeal, plaintiff argued that the assignment was valid and also that he should have been allowed to amend his complaint. The U.S. Court of Appeals for the Seventh Circuit found that the lower court had correctly ruled that the assignment was void and that plaintiff did not state valid claims for relief. Accordingly, the Seventh Circuit held that the district court did not abuse its discretion by dismissing the complaint without allowing plaintiff to amend it, especially given that, as the debt collector pointed out, amendment would have been futile after the court found that the assignment of the claims was void. The Seventh Circuit further stated that for completeness, the district court also properly found that even if the assignment was not void, plaintiff failed to state a claim for relief.

Hinshaw & Culbertson LLP handled this case.

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

Todd v. Franklin Collection Service, Inc., Case No. 11-3818 (7th Cir. Sept. 5, 2012)

Debt Collection Activities Do Not Support a Claim for Deceptive or Unfair Trade Practices

Plaintiff debtor sued defendant debt collector under the Telephone Consumer Protection Act (TCPA) and Florida's Deceptive and Unfair Trade Practices Act (FDUTPA) based upon automated calls to the debtor's cellular telephone. Notably, the FDUTPA allows the prevailing party to recover fees and costs, where the TCPA does not. The FDUTPA is a Florida consumer protection statute designed to protect from unfair trade practices. See Fla. Stat. § 501.202. It creates a cause of action for "unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." The debtor alleged that automated calls to her cell phone without her consent was a deceptive and unfair trade practice in violation of the FDUTPA.

The debt collector argued that it could not have violated the FDUTPA because it was attempting to collect a debt, which is not engaging in "trade or commerce." The FDUTPA defines "trade or commerce" as "the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated." The district court dismissed the FDUTPA claim, finding that because the debt collector did not offer the debtor any goods or services, it was not engaged in trade or commerce with the debtor when it placed the collection calls.

Hinshaw & Culbertson LLP handled this case.

Williams v. Nationwide Credit, Inc., Case No. 11-cv-62127 (S.D. Fla. Sept.10, 2012)

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