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Consumer Financial Services *Newsletter*

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The "Unique Factual Circumstances of Each Individual" in Plaintiffs' Proposed Class Prompts Appellate Court to Affirm Denial of Class Certification

***Landeros v. Pinnacle Recovery, Inc.*, 2017 U.S. App. LEXIS 9419, 2017 WL 2333589 (11th Cir. Ala. May 30, 2017)**

The Eleventh Circuit Court of Appeals affirmed a district court's decision to deny Plaintiff debtor's motion to certify a class in an FDCPA action regarding a letter it received from a debt collector. According to the United States District Court for the Southern District of Alabama, the debtors in this action failed to satisfy the predominance requirement set out in Federal Rule of Civil Procedure 23. Under the predominance requirement, the debtors were required to demonstrate that there are questions of law and fact common to all class members.

Plaintiff debtors are husband and wife, and they filed a class action complaint against debt collector Pinnacle for violations of the FDCPA. The Complaint against the debt collector asserted that Pinnacle attempted to collect a debt through a false, misleading and deceptive communication. The debtors proposed a class consisting of all persons in the United States who received a collection letter from Pinnacle, which states in part:

Your current real estate interest with Westgate Resorts (our client) is current[ly] in the foreclosure process…Failure to respond will continue to force the current foreclosure process. If the foreclosure of your interest is completed, the foreclosure will be reported to the credit bureaus and this "'forgiveness of debt" will be reported to the Internal Revenue Service (IRS). When a creditor makes such a

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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.

report, you will receive a 1099-C form. The IRS treats the forgiven debts as income, on which you may owe income tax."

> According to Plaintiffs "the letter falsely states or implies that a foreclosure always resulted in forgiveness of debt and tax liability." The debtors emphasized that the letter must only be deceptive to the least sophisticated consumer. The debtors moved to certify a Rule 23(b)(3) class.

Plaintiff sought to certify the class as a Rule 23(b)(3) class, which means that the court had to consider whether the questions of law or fact common to class members predominate over any questions affecting only individual members and whether a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Essentially, issues presented in the class action must be subject to generalized proof as opposed to individualized proof for each member in the class.

According to the Eleventh Circuit Court of Appeals, the District court was correct in holding that whether the contents of the letter were false, deceptive or misleading *turns on the individual who received that letter*. Determination of liability turns on the "factual circumstances of each recipient's indebtedness and the intentions of [the debt collector] as to that particular recipient." The least sophisticated consumer standard did not apply because "the merits of [P's] FDCPA claims do not turn on the sophistication of the person who read the Pinnacle letter. Rather, the merits of the claims depend on the objective factual circumstances unique to each recipients indebtedness"

For more information, please contact **Brittney N. Cato** or your regular Hinshaw Attorney.

Illinois Federal Court Dismisses FDCPA Claims Focused on "Bounced Check" Language in Collection Letter

Recently, an Illinois federal court denied and dismissed two plaintiffs' Fair Debt Collection Practices Act (FDCPA) claims after the plaintiffs failed to present evidence sufficient to establish materiality.

The plaintiffs in Gonzalez v. Credit Protection Association, LP, 16-cv-08683, and Stockman v. Credit Protection Association, LP, 16-cv-08059 owed unpaid utilities. These debts were referred for collection. The collection letters warned plaintiffs that if they paid with a check that was returned as unpaid (i.e. a bounced check), the debt collector would be authorized to collect the state-allowed service fee and any applicable sales tax, in addition to initiating legal action if the debt remained unpaid. The debtors claimed this language impermissibly threatened legal action and was false, deceptive and misleading because sales tax for a bad check cannot be recovered under Illinois law.

On review, the Court concluded that the language in the collection letter was neither false nor misleading, and did not threaten impermissible legal action. The Court specifically cited to the debtors' deposition testimony that they would not have paid the accounts with a check. The Court further noted that the debtors did not provide any evidence showing that the debt collector's reference to legal action indicated imminent litigation or that any decision had already been made to pursue litigation. On those facts, debtors' general feelings of stress lacked factual support that was immaterial to an FDCPA violation.

The Court's ruling strengthens the requirement that plaintiffs produce evidence of a material FDCPA claim; evidence that supports a claim from the unsophisticated consumer's viewpoint and not purely conclusory references to being harmed. Plaintiffs have to overcome the hurdle of proving they were truly misled by a debt collector's communication.

For more information, please contact **Lindsey Conley** or your regular Hinshaw Attorney.

U.S. District Court for the Northern District of Illinois Continues Trend of Courts Finding that Live Vox Human Call Initiator is Not an Automatic Telephone Dialing System

The Telephone Consumer Protection Act (TCPA) prohibits the use of an automated telephone dialing system (ATDS) to call a person's cellular phone, unless the person gives prior consent or the call is made for emergency purposes. 47 U.S.C. § 227(a)(1)(A)(iii). Thus, a consumer can claim a violation of the TCPA if he or she shows an ATDS was used to call their cellular phone number. In *Arora v. Transworld Systems Inc.*, 1:15-cv-04941, (N.D. Ill. Aug. 23, 2017), the U.S. District Court for the Northern District of Illinois confirms summary judgment can be used to get rid of a TCPA claim based on allegations that a Human Call Initiator System constitutes an ATDS.

In granting Defendant Transworld Systems Inc.'s (TSI) motion for summary judgment against Plaintiff Ashok Arora (Arora), the U.S. District Court for the Northern District of Illinois concluded that the telephone system in place used by TSI, a program called Live Vox Human Call Initiator ("Human Call InitiatorLive Vox HCI") did not fit under the definition for a TCPA prohibited ATDS. 47 U.S.C. § 227(a)(1) (AnATDS is defined as, "equipment which has the capacity to store or produce telephone numbers to be called, using random or sequential number generator; and to dial such numbers.")

TSI argued, in its motion for summary judgment, that it could not be liable under the TCPA because LiveVox HCI requires human intervention in order

to make a call, a "Human Call Initiator." With TSI's Human Call Initiator system, each call must be initiated by a human "clicker agent." The clicker agent must click on a dialogue box to confirm the launching of a call to a particular telephone number, and a call cannot be initiated without this.

Arora, the consumer, argued summary judgment should not be granted because while the calls required a Human Call Initiator, there was a "hidden autodialing potential." The Court disagreed. Arora's opposition based on speculation failed because he offered no evidence in support of his contention that TSI did not use a human person to initiate calls..In addition, Arora's claim that the Human Call Initiator used by TSI had the potential capability to be an ATDS has previously been expressly rejected by other federal court opinions.

This decision falls in line with other U.S. District Courts. In the Middle District of Florida (in the Eleventh Circuit), the district court found that a Human Call Initiator System did not constitute an ATDS because it was not capable of making any calls without human intervention. *Pozo v. Stella Recovery Collection Agency, Inc.*, 2016 WL 7851415, at *6 (M.D. Fla. Sept. 2, 2016). In the Eastern District of Michigan (also in the Sixth Circuit), the Magistrate Judge found the plaintiff failed to create a genuine issue of material fact over whether a Human Call Initiator system constitutes an ATDS because the use of human intervention "is clearly required" and "the basic function of an autodialer is the capacity to dial phone numbers 'without human intervention.'" *Smith v. Stellar*, 2017 WL 13336075, at *6 (E.D. Mich. Feb. 7, 2017).

Without providing any evidence—other than speculative—of how TSI's Human Call Initiator system was used by TSI without any human intervention, this Illinois federal court granted summary judgment. Arora's claim failed as a matter of law because all calls TSI placed used human intervention.

For more information, please contact **Stella Padilla** or your regular Hinshaw Attorney.

Hinshaw's David Schultz Receives Judicial Advocacy Award from ACA International

We're very pleased to share news that Chicago-based partner David Schultz was honored with the Jonathan Elliot Judicial Advocacy Award by ACA International, the Association of Credit and Collection Professionals (ACA). The award recognizes an attorney who in the past year has been an "outstanding advocate on behalf of the credit and collection industry." The award was announced and distributed at the ACA 2017 Convention & Expo in Seattle, Washington, on July 18, 2017.

"This is an impressive and well-deserved honor," said Ellen Silverman, the chair of our Consumer Financial Services Practice Group. "There are few lawyers in the legal defense bar who have had a greater impact than Dave in advocating for the debt collection industry and our clients. He is a leader in this field and we are proud that he's been recognized by the ACA."

David concentrates his practice on defending Fortune 500 companies, debt buyers, debt collection agencies, lawyers, lending institutions and others in consumer litigation and counsels organizations throughout the consumer financial services industry on risk management. At Hinshaw, he has successfully defended hundreds of consumer law cases (including pursuant to the FDCPA, TCPA and FCRA) and other class actions. In his capacity as an ACA member, Schultz has written and submitted to the U.S. Supreme Court an amicus curiae brief in Mims v. Arrow Financial Services, LLC, 132 S.Ct. 740 (2012) and was also selected by ACA International's president to serve on the organization's five-person Members' Attorney Program Committee (2012–2015).

About Hinshaw

Hinshaw & Culbertson LLP is a national law firm with over 450 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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