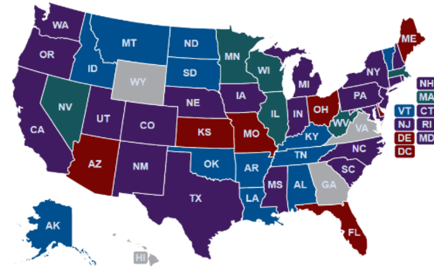
Consumer Law Hinsights

Welcome to ***Consumer Law Hinsights***—a monthly compilation of nationwide consumer protection cases of interest to financial services and accounts receivable management companies. This edition highlights our interactive COVID-19 regulatory map and also includes an analysis from our blog, *Consumer Crossroads*, of the Second Circuit's decision in *LaBoom* and the deepening circuit split over what constitutes an automatic telephone dialing system (ATDS) under TCPA.

Tracking State Regulators' Response to COVID-19

To assist consumer financial services lenders, servicers, and investors, Hinshaw has developed an interactive tracker of state regulations related to the COVID-19 pandemic. The tracker documents actions by various state regulators, along with the limits imposed by states on foreclosures, evictions, and debt collections, and allows users to click on any state to view applicable provisions. We recommend adding the tracker to your browser bookmarks, as we will update it on a regular basis.



Second Circuit: Okay to Say You "May" Charge Interest so Long as There is a "Mere Existence of that Future Possibility"

A debt collector sent a collection letter with the common safe harbor disclosure: "Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection." Under the ever-expanding theory of the consumer bar, the debt collector was sued in a class action that alleged that the letter was false, deceptive, and misleading, because it suggested that late charges—and other charges—would be added when such charges were not legally or contractually recoverable. This disclosure was initially understood to provide safe harbor when the amount of the debt could change over time. However, recently decided confusing cases have explained that mentioning interest in conjunction with other charges could violate the FDCPA when interest cannot accrue, even when other charges can.

The district court dismissed the case and the Second Circuit considered the argument. The court disagreed with the consumer's allegation finding that, "[w]hile her amended complaint does allege that the addition of late charges and other charges are impossible, it does not allege that interest could not accrue. Rather, the amended complaint simply asserts that [debt collector] did not previously charge interest and did not intend to do so in the future. Even if there is no current intention to charge interest, the mere existence of that future possibility is completely consistent with the word 'may' in the Letter's language."

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This opinion offers some welcome cover on this thinly sliced class theory where collectors are left to choose whether to include the language adopted by the courts when only one form of additional charges are available, even if remotely—or in this case, allegedly—not intended.

The case is *Pettaway v. Nat'l Recovery Sols., LLC*, No. 19-1453 (2d Cir. 2020).

Listing Interest and Charges at $0 and Totaling Amount as "Current Balance" Does Not Violate FDCPA

The debt collector sent a letter to the consumer seeking to collect the following:

- The total amount of the debt due as of charge-off: $10,536.94
- The total amount of interest accrued since charge-off: $0.00
- The total amount of non-interest charges or fees accrued since charge-off: $0.00
- The total amount of payments and credits made on the debt since charge-off: $0.00
- Current Balance: $10,536.94

Plaintiff's theory was that the itemization of the amounts breaking out interest and non-interest charges or fees, coupled with the use of the words "current balance," implied that the debt might increase, when in fact the amount was not increasing. Thus, the consumer claimed the letter violated the FDCPA.

The Eastern District of New York observed that the Second Circuit has held that "'if a collection notice correctly states a consumer's balance ... and no such interest or fees are accruing, then the notice will neither be misleading within the meaning of Section 1692e, nor fail to state accurately the amount of debt under Section 1692g.'" In this case, however, the letter plainly said no interest or other fees were accumulating on the debt because the letter "'clearly explained that no interest or fees had accrued ... and stated the balance owed.'" The court also pointed out that the total amount of debt due as of charge-off and current balance were listed as the same amount.

Ultimately, the court granted the debt collectors motion to dismiss reasoning that even if the consumer were to construe the term "current balance" to indicate that there were fees accruing on the remaining debt, "'the only harm . . . a consumer might suffer by mistakenly believing that interest or fees are accruing on a debt is being led to think that there is a financial benefit to making repayment sooner rather than later'. . .[s]uch harm 'falls short of the obvious danger facing consumers' in asserting a claim under the FDCPA."

The case is *Shahin v. Client Servs., Inc.*, 19-cv-02070 (E.D.N.Y. Mar. 30, 2020).

Second Circuit: Letter Listing All Relevant Parties Failed to Identify to Whom Debt Was Owed

The debt collector in this case faced a growing problem of correctly identifying to whom the debt is owed while also trying to list the creditor involved in the transaction. The consumer obtained a Kohl's credit card that he failed to pay. The debt collector sent a letter identifying "Kohl's Department Stores Inc." as "Our Client" and "Chase Bank USA N.A." as the "Original Credit Grantor." Capital One had replaced Chase as the credit grantor on the Kohl's credit card. The letter did not state that Capital One owned the debt.

The consumer filed suit, alleging that the debt collector did not name the creditor to whom the debt is owed. The district court considered the fact that Kohl's actively serviced the account and was involved in the credit card program and hold that, "Kohl's is the 'creditor to whom the debt is owed,' and the failure to disclose the owner of the debt was not misleading because it would not have materially affected a consumer's decision-making process."

The U.S. Court of Appeals for the Second Circuit disagreed with the district court's conclusion. The Second Circuit found that the debt collector had not accurately provided the name of the creditor to whom the debt is owed. It stated the fact that Kohl's "participated in the credit card program with Capital One and played an active role in the servicing of accounts does not necessarily convert Kohl's into a creditor, and certainly not into the creditor to whom the debt is owed." Rather, the Second Circuit reasoned Capital One had replaced Chase as the "credit grantor," making Capital One—not Chase and certainly not Kohl's—the creditor to whom the debt was owed. Because the collection letter did not identify Capital One at all, the Second Circuit held that it did not comply with Section 1692g.

This case illustrates an increasing challenge in instances where the entity with whom the consumers would identify their account may not be the entity who issued the loan. Even innocent efforts to assist consumers in identifying the debt can run afoul of the technical mandates and restrictions of the FDCPA.

The case is *Bryan v. Credit Control, LLC*, No. 19-244-CV (2d Cir. Apr. 3, 2020).

Consumer Crossroads Blog | Quarterly Highlights

La Boom! Second Circuit Detonates Expanding Circuit Split over Auto-Dialer Definition Under TCPA

Hinshaw continues to monitor the deepening circuit split over what constitutes an automatic telephone dialing system (ATDS) under the Telephone Consumer Protection Act (TCPA), which restricts certain automated calls and text messages. To say there has been substantial debate by the courts and FCC concerning what constitutes an ATDS would be putting it lightly. And, just when it seemed a majority position was emerging, the playing field seems to have leveled with the Second Circuit's decision in *Duran v. La Boom Disco, Inc.*

The 2003, 2008, and 2015, FCC Orders swept predictive dialers—technology that dials from a preprogrammed list—into the ATDS definition. Then, in *ACA International v. FCC*, the D.C. Circuit Court of Appeals invalidated the FCC Orders (*or did it?*), bringing litigants back to the federal courts, eventually resulting in a circuit split. In *Marks v. Crunch San Diego*, the Ninth Circuit held that the TCPA applies to devices with the capacity to automatically dial telephone numbers from a stored list *or* devices that dial telephone numbers produced from a random or sequential number generator. However, in *Glasser v. Hilton Grand Vacations* and *Gadelhak v. AT&T Services, Inc.*, the Eleventh and Seventh Circuits took the opposite approach and found that an ATDS *only* includes technology that dials randomly or sequentially. Meanwhile, in *Dominguez v. Yahoo,* the Third Circuit followed *ACA International* and found that the equipment Yahoo used to send text messages—its "Email SMS Service"—did not meet the definition of an auto-dialer because Yahoo's service sent messages only to numbers that had been individually and manually entered into its system by a user. Now, in *La Boom Disco*, the Second Circuit joins the Ninth Circuit, rejects the Eleventh and Seventh Circuit's definition of an ATDS, and also weighs-in on what constitutes "automatic" dialing by applying the as-of-yet undefined "human intervention test."

Duran's putative class action stems from his receipt of hundreds of text messages from La Boom Disco, Inc. La Boom sent these text messages through programs called "EZ-Texting" and "Express Text." The dispute was whether those messages were sent using an ATDS. La Boom argued that the programs required too much human intervention when dialing to constitute an ATDS because they did not dial automatically. A human La Boom-er had to initiate the text campaign by clicking "send." In granting summary judgment, the Eastern District of New York found that the singular click text campaign—which included hundreds of messages—was sufficient to constitute human intervention, so the programs were not an ATDS. Duran appealed.

The Second Circuit reversed finding that a "single click" that started a campaign of hundreds of messages was not sufficient human intervention to remove the programs from the definition of an ATDS. The TCPA defines an ATDS as "*equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers*."

In assessing the history of the TCPA, the FCC's prior Orders, and the plain language of the statute—and with a bit of mental gymnastics—the Second Circuit determined that the words "store" and "produce" were not both modified by the use of a "random or sequential number generator." Contrary to the Eleventh and Seventh Circuit's findings in *Glasser* and *Gadelhak*, the court found that the word "produce" is modified by the clause after the comma *using a random or sequential number generator.* Focusing on avoiding surplusage and maintaining Congress' intent that each word in a statute has a purpose, the court determined that each verb in the statute has different meanings. Even though La Boom generated the call list and uploaded it to messaging programs by clicking "send," as opposed to a software automatically generating the numbers, the programs met the "capacity to store numbers" requirement of an ATDS.

Having found that to "store" numbers uploaded by a human was sufficient to meet the first prong of the definition of an ATDS, the court went further than *Marks*, and dove into the amount of human intervention required to send the text messages from the programs, without defining the term "automatically." The court focused on the difference between pressing "send" and individually "dialing" a number: "[C]licking 'send' is accomplishing a different task altogether, telling the ATDS to go ahead and dial a separate list of contacts, often numbering in the hundreds or thousands." Therefore, the court found the programs are an ATDS subject to the TCPA.

The Second Circuit has now furthered the circuit split on what constitutes an ATDS under the TCPA, and the emerging majority has subsequently dissipated. This issue may ultimately be decided by the U.S. Supreme Court.

Popular Video Conferencing Zoom App Hit with CCPA Class Actions

We recently reported on the California Attorney General's ongoing and active enforcement of the California Consumer Privacy Act (CCPA) despite COVID-19 and the availability of private actions. In *Robert Cullen v. Zoom Video Communications, Inc.,* N.D. Cal., No. 20-cv-02155, filed on March 30, 2020, plaintiff alleges that Zoom failed to properly safeguard the personal information of him and other users of its software application (Zoom App) and video conferencing platform.

According to the allegations, upon installing and any subsequent opening of the Zoom App, Zoom collected personal information of users without adequate notice or authorization and disclosed it to third parties, including Facebook. The complaint alleges violations of the CCPA for the failure to provide adequate notice to users of its collection and use of such data, and for violating its duty to implement and maintain reasonable security practices. Similar to other CCPA class actions, the complaint alleges claims under California's Unfair Competition Law, arguing that Zoom's CCPA violations are unlawful, unfair, and fraudulent business practices.

Another recent case, *Samuel Taylor v. Zoom Video Communications, Inc*., N.D. Cal., No. 20-cv-02170, also involves claims that Zoom violated the CCPA. Specifically, the plaintiff alleges that Zoom collected and disclosed personally identifiable information, also known as PII, without providing the required notice, and also failed to provide notice of the customer's right to opt out of such disclosure. In this instance, the PII was described as specific device information—model, time zone, and location—and a unique advertiser identifier, which can be linked to the individual identity of the Zoom customer.