Consumer Law Hinsights

Welcome to ***Consumer Law Hinsights***—a monthly compilation by Hinshaw & Culbertson LLP of nationwide consumer protection cases of interest to financial services and accounts receivable management companies. As a bonus, once each quarter we also include the most popular posts from our blog, Consumer Crossroads, in the areas of mortgage loan servicing, debt collection, and regulatory compliance and enforcement.

Three Issues to Watch in 2020

I. Constitutional Limits of the TCPA

The U.S. Supreme Court has already granted *certiorari* in one case considering the Constitutional limits of the Telephone Consumer Protection Act (TCPA). There are two more cases in which the parties are seeking *certiorari* to further consider the issue.

In *Barr v. American Association of Political Consultants*, the petitioners have challenged the constitutionality of a 2015 exception to the TCPA's autodialer ban. The exception permits robocalls made by the government's debt collectors. In this case, political consultants challenged the law, and the trial court held that the TCPA, including the exception, was constitutional under the First Amendment despite the new content-based exception. On appeal to the U.S. Court of Appeals for the Fourth Circuit, the case was reversed, the amendment was held not constitutional, and the Fourth Circuit severed the exception from the TCPA. The U.S. filed a petition for a writ of *certiorari*, and the Supreme Court agreed to consider "whether the government-debt exception to the Telephone Consumer Protection Act of 1991's automated-call restriction violates the First Amendment, and whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute." There are two additional cases with *certiorari* pending: *Facebook v. Duguid* and *Charter Communications Inc., et al. v. Steve Gallion*. Both could further implicate the metes and bounds of the TCPA's constitutionality if *certiorari* is granted.

II. Constitutionality of the CFPB

In March, the U.S. Supreme Court will hear oral arguments in the case of *Seila Law LLC v. CFPB*, a case that considers the constitutionality of the CFPB. In *Seila Law*, the plaintiff argues that the CFPB's structure violates the Constitution's separation of powers because it is an independent agency headed by a single Director. The plaintiff argues that because the Director exercises substantial executive power, coupled with the fact that she can be removed by the President only for cause, then the CFPB is unconstitutionally structured.

III. CFPB's Proposed Rulemaking to Implement the FDCPA to Modern Forms of Communication

Although enacted in 1977, the Fair Debt Collection Practices Act (FDCPA) has never had a detailed set of rules to illuminate how best to follow the statute. In May 2019, the CFPB issued a Notice of Proposed Rulemaking to implement the FDCPA. The rollout of the rules has been delayed, but it is anticipated that the proposed rules will offer guidance on the application of the 40 year old FDCPA to modern forms of

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communication, such as text messages. In addition, there are safe harbor rules for communications and guidance on "limited content" messages that will not constitute communications covered by the FDCPA.

Calls to a reassigned number are not actionable under the TCPA

Wrong number cases continue to be a major driver of individual and class action TCPA litigation. The U.S. District Court for the District of Massachusetts recently joined a line of cases holding that callers have a right to reasonably rely upon the prior subscriber's consent when placing calls to a reassigned number. In the case, the plaintiff alleged that he received prerecorded calls without his consent. The calls were intended for a party whose number was reassigned after the party had given defendant consent to call. Defendant argued it was not liable under the TCPA because it was reasonably relying upon the party's consent when making the calls. Plaintiff argued reasonable reliance was not a valid defense.

In examining the issue, the court found that "[a]lthough the text of the TCPA does not provide for reasonable reliance, this Court finds persuasive the FCC's order emphasizing that the TCPA does not require the impossible of callers. It is unclear what else, if anything, [defendant] could have done to ensure the numbers of [the called parties] had not been reassigned." The case also highlighted a challenge on the class treatment of wrong party TCPA claims, observing that the competing expert reports in the case demonstrated that detecting a number reassignment is "either impossible, or at least highly unreliable." The court looked to the expert reports to underscore "the difficulty and unreliability associated with matching telephone numbers to subscribers."

The case is *Sandoe v. Bos. Sci. Corp.*, No. CV 18-11826-NMG, (D. Mass. Jan. 8, 2020).

Statute of limitations disclosure from debt buyer does not violate the FDCPA

A debt buyer collecting on debt outside the statute of limitations included the oft used disclosure explaining: *"The law limits how long you can be sued on a debt and how long debt can appear on your credit report. Due to the age of this debt, we will not sue you for it or report payment or non-payment of it to a credit bureau."*

The plaintiff alleged the letter violated the FDCPA in two ways: (1) the consumer argued the letter was misleading because it said defendants "will not" sue the consumer instead of saying they "cannot" sue him; and (2) the disclosure failed to explain that a partial payment or a promise to pay would restart the statute of limitations. The defendants argued the letter was neither false nor material, and was required by the CFPB and a related FTC consent order. As noted by the court, these issues are subject to much litigation and there are varying opinions on the legality of the disclosure.

Here, the U.S. District Court for the District of Colorado agreed with the defendants. First, the court found that use of the words "will not" rather than the word "cannot," in context, was not misleading. Following related authority, the district court held that the letter's disclosure concerning the age of the debt was not misleading because it "'uses basic language (1) that conveys the substance of the underlying legal concept and (2) clearly informs the consumer that the [d]efendants will not sue them based on the age of the debt.'" The court also asserted that its reasoning was bolstered by the fact that the "will not" sue language "was consented to by the FTC and CFPB, regulatory bodies with enforcement authority over the FDCPA."

Additionally, the court found that defendants were not required to disclose that a partial payment would potentially restart the statute of limitations. First, the court determined that in the state in question a payment would not have reset the limitations period. The court also observed that while some courts have required such disclosures, they have not stated what such disclosure language could or should be.

Depending on a state's statute of limitations, there could be room for disagreement about the precise scope of a state's statute of limitations and how it is applied.

Finally, the court observed that the FDCPA does not require a revival disclosure, but noted that the CFPB is currently considering prescribing rules addressing such disclosures. Based on these facts and factors, the court concluded that no revival disclosure was required by the FDCPA.

The case is *Goodman v. Asset Acceptance LLC, et al.*, No. 18-cv-01667-RM-KMT (D. Colo. Dec. 20, 2019).

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Fifth Circuit Rules For-Profit Student Loans Are Dischargeable Without Proof of "Undue Borrower Hardship"

Many student loan borrowers, lenders, and servicers operate under the presumption that student loans are generally not dischargeable in bankruptcy, absent an "undue hardship." That notion may no longer be a bright line rule, following a recent ruling by the Fifth Circuit Court of Appeals. The court ruled that certain private, for-profit student loans can in fact be discharged without the borrower providing a showing of undue hardship. This decision is particularly notable as private, for-profit student loans—including loans to cover increasing tuition costs not covered by federal loans, refinance loans, and consolidation loans—continue to see increased use.

In *Crocker, et al. v. Navient Solutions, LLC, et al.*, one bankruptcy debtor had previously obtained private, for-profit loans to cover bar exam preparation costs, while the other debtor had used private, for-profit loans to attend a technical school. The two debtors had completed a chapter 7 bankruptcy and received a debt discharge. When the bankruptcy concluded, the loan servicer sought repayment of the loans believing they had not been discharged. The debtors responded by filing an adversary proceeding seeking a declaration that their private education debt had been discharged.

Included within 11 U.S.C. § 523(a)(8) are three categories of education debt that are exempt from discharge absent a showing of undue hardship. At issue in this case was the exemption in § 523(a)(8)(ii). The debtors urged the court to find that this exemption for "an obligation to repay funds received as an educational benefit, scholarship, or stipend," does not include private, for-profit loans; the court agreed.

In a complex process of statutory interpretation, the Fifth Circuit determined the definition of the term "educational benefit" is limited to "conditional payments with similarities to scholarships and stipends." In other words, educational payments that are not initially loans but whose terms will create a reimbursement obligation upon the failure of conditions of the payments. The court noted that Congress's most recent changes to section 523(a)(8) did not indicate an intent to make private, for-profit student loans nondischargeable. In this case, the bankruptcy debtors' loans did not qualify under the exemption because their repayment was always unconditional.

Servicers and collectors must be mindful of the type of student loan at issue before seeking to collect following a borrower's bankruptcy discharge. If this legal trend continues, we should expect to see a corresponding increase in private, for-profit student loan interest rates, as lenders account for the increased risk of discharge.

Senate Hearing Panel Suggests a Bipartisan National Data Privacy Standard Could Include a Private Right of Action

A recent hearing at the Senate Committee on Commerce, Science, and Transportation explored the contours for a comprehensive and bipartisan federal data privacy law. Titled "Examining Legislative Proposals to Protect Consumer Data Privacy," the hearing featured an all-female panel of experts, including two former FTC leaders, and representatives from industry, academia, and consumer rights groups.

The panel discussion centered on current privacy legislation proposed by U.S. Senators Maria Cantwell (D-Wash.) and Roger Wicker (R-Miss.) which would provide consumers with greater security, transparency, choice and control over their personal information on- and off-line, and provide the Federal Trade Commission (FTC) with additional resources and authority to regulate. The hearing and written testimony are available on the Senate Committee's website.

Senator Cantwell's Consumer Online Privacy Rights Act (COPRA) and Senator Wicker's Consumer Data Privacy Act of 2019 (CDPA) cover much of the same ground and establish principles, rights and regulations that echo the California Consumer Privacy Act (CCPA) and the European General Data Privacy Regulation (GDPR). These include granting consumers rights: (1) of access, correction, deletion, and portability for personal information; (2) to give affirmative express consent before collection and processing of sensitive categories of information; and (3) to opt out of the sale or transfer of personal information. The legislative proposals also establish similar boundaries on how companies can collect, use, and share information and impose obligations on companies, including data minimization, use limitations, data security, and the responsibility to bind other companies that receive personal information to the same obligations.

Both bills recommend expanded FTC enforcement and rulemaking authority and provide state Attorneys General with authority to enforce a new law. The panelists contributed insight on a significant point of contention, specifically whether a new federal data privacy law should include a private right of action, allowing individual consumers to bring cases in addition to regulators. On one hand, with a strong new law that gives the FTC and state AGs the ability to enforce, a private right of action may not provide additional data privacy benefit. On the other hand, the FTC would need a radical increase in staff, technology and financial resources to effectively enforce any new law (it was noted in the hearing that the FTC currently has 40 dedicated data privacy staff, while the UK has more than 500 and Ireland more than 100)—increases that may not be realized. One solution proposed by the panelists would be to specifically delineate what provisions can be enforced via private right of action and under what conditions, thus avoiding abusive litigation and directing consumer redress to the most egregious violations and harms. Litigation controls could be crafted, including how a case proceeds to court, the standard by which statutory damages are triggered, the use of injunctive relief as well as imposing upon companies the responsibility for escalating and resolving data privacy issues through internal administrative processes.

Everyone agrees on the urgency and need of getting a new federal law passed given the looming effective date of CCPA and other patchwork laws, but details over the private right of action, federal preemption, and incorporation of related/important issues raised in other bills (The Filter Bubble Transparency Act, for example) will slow this roll.

U.S. Supreme Court Resolves Circuit Split, Applies Occurrence Rule to FDCPA Statute of Limitations

Earlier this year, this blog reported on the Supreme Court's grant of certiorari in *Rotkiske v. Klemm* to resolve a split in circuits on the Fair Debt Collection Practices Act's (FDCPA) statute of limitations. This

week, in an 8:1 opinion delivered by Justice Thomas, the Court concluded that the one-year statute of limitations in the FDCPA begins to run when the violation occurs, not when the violation is discovered. In doing so, they overturned rulings by the Fourth and Ninth Circuit, which had held the FDCPA's statute of limitations was subject to equitable tolling.

Rotkiske's unpaid credit card debt was referred to Klemm & Associates in 2008 for collection, Klemm filed suit in 2008 to collect the unpaid debt but served the wrong person at Rotkiske's old address. Klemm withdrew the suit because Rotkiske could not be located, but then refiled and attempted service at the same address again in 2009. Rotkiske did not respond to the summons, Klemm obtained a default judgment, and Rotkiske discovered the default judgment against him in 2014 when he was denied a mortgage because of the judgment. Within one year of learning about the default judgment, Rotkiske filed suit against Klemm for violating the FDCPA in commencing the 2009 debt-collection lawsuit after the state-law limitations period expired.

The Third Circuit affirmed dismissal of Rotkiske's suit for failure to file within one year of the alleged FDCPA violation by concluding that the text of the FDCPA mandated application of the occurrence rule. In doing so, the Third Circuit split with the Fourth and Ninth Circuit's application of the discovery rule.

The Supreme Court resolved the circuit split by concluding that the FDCPA unambiguously requires the limitations period to begin from the date of the violation, whether or not discovered, because FDCPA section 1692k(d) states that the action may be brought "within one year from the date on which the violation occurs." Moreover, the Court refused to impose a discovery rule when Congress has not expressly provided one under the FDCPA.

The Court's decision provides much needed clarity on a statute of limitations that has been the subject of significant disagreement and a statute in general that has involved tremendous uncertainty on the whole. In comments provided to this blog, Issa Moe, ACA International's Vice President and General Counsel, agreed, noting that "*vague interpretations surrounding the [FDCPA] have been problematic for decades, often leading to troublesome and expensive lawsuits that negatively impact the accounts receivable management industry. We appreciate that this decision resolves a circuit split, which can only create more uniformity in FDCPA litigation across the country*." Hinshaw is an ACA International member firm.