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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 also highlights the recently updated *50 State Guide on Student Loan Servicing Regulations* and Hinshaw's interactive tracker of state regulations related to the pandemic, along with a selection of popular posts from our blog, *Consumer Crossroads*.

Supreme Court to Determine Scope of Autodialer for TCPA

In 2017, the Telephone Consumer Protection Act (TCPA) class action filed against Facebook was dismissed. The subsequent appeal led to a reversal of the decision in 2019, as the U.S. Court of Appeals for the Ninth Circuit reaffirmed their earlier decision in *Marks v. Crunch San Diego, LLC*. In *Marks*, the court had found that the adverbial phrase only modified the verb "to produce" a grammatic construction which would mean that automatically dialing any number—whether entered or generated—would meet the requirements of the TCPA's definition of autodialer, thus violating the TCPA whenever used to communicate with consumers.

The TCPA—which restricts the unsolicited use of automated phone calls, and text messages—originally had two exceptions: (1) calls made for emergency purposes; and (2) calls made with the prior express consent of the consumer. In 2015, Congress amended the TCPA to include a third exception: calls made solely to collect on a debt owed to, or guaranteed by, the United States, which was recently held unconstitutional.

In *Duguid v. Facebook* the court held that the broad definition of an ATDS should be applied and the amended language was unconstitutional. The case has now been granted *certiorari* and will be heard by the U.S. Supreme Court in October.

In the meantime, a number of organizations have submitted briefs for and against the dueling TCPA interpretations. While some of these only discuss the constitutionality of the amendment, others are taking advantage of the opportunity to have the Supreme Court decide not just on the interpretation of the language of the TCPA, but also its legality.

For more on *Facebook v. Duguid*, and the impact a ruling may have on the credit industry's future use of predictive dialers, listen to Hinshaw's John Ryan in an appearance on a Great Lakes Credit and Collection Association podcast.

How the New California Department of Financial Protection and Innovation Impacts Debt Collectors

A new bill has been approved by both chambers of the California legislature and signed into law by Governor Newsom. Starting January 1, 2022, all debt collectors operating in the state of California will be required to:

- Maintain a license

- Pay an application fee
- Undergo a criminal background check
- Include the license number in all written and digital communications with debtors
- Maintain a surety bond
- Comply with reporting requirements
- Pay the commissioner its *pro rata* share of all costs and expenses reasonably incurred during any administrative activity

The bill provides the Department of Financial Protection and Innovation—currently called the Department of Business Oversight—the authority to monitor the licensing, regulation, and oversight of debt collectors. This includes bringing civil actions or other proceedings to enforce the Consumer Financial Protection Act of 2010. The commissioner is afforded the authority to begin taking steps as early as January 1, 2021 to prepare for the management and enforcement of these changes.

Additionally, the bill creates an exemption for depository institutions. This exemption applies to those licensed under California's Financing Law, the Residential Mortgage Lending Act, or the Real Estate Law. It also includes those subject to the Rental-Purchase Act, trustees of nonjudicial foreclosures, and debt collection associated with the Student Loan Servicing Act.

Debt Collectors Not Subject to Unique Consumer Interpretations of Collection Notices

Debt collectors are not required to use the exact language of the Fair Debt Collection Practices Act (FDCPA) to comply with the law. In a recent case, the U.S. Court of Appeals for the Second Circuit found that a debt collector was not required to explicitly state that a debt can be disputed in whole or in part, following a decision in the Sixth Circuit. Effectively, a debt collector is required to notify the consumer of their right to contest a debt in order to comply with the FDCPA. The Second Circuit opined that it while it would not be a bad idea to include language indicating that a portion of a debt can be disputed by a debtor, such language was not required by the statute. Both the Second and Sixth Circuit use the "least sophisticated consumer" test in determining whether or not a debt collector's letter to a consumer violates the FDCPA. Thus the Second Circuit has agreed with the Sixth Circuit that debt collectors are not responsible for the "bizarre or idiosyncratic interpretations of collection notices."

The case is *Chaperon v. Sontag & Hyman*, PC, No. 19-4244, 2020 WL 5240609 (2d Cir. Sept. 3, 2020).

Debtors Must Show Actual Harm for Article III Standing in FDCPA Claims

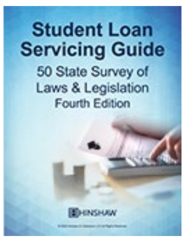
The Eleventh Circuit dismissed a class action for lack of damages due to a lack of reliance on the alleged misrepresentations of the collection letters by the plaintiffs. Article III standing is required to bring a claim under the Fair Debt Collection Practice Act. To establish standing, the plaintiff must have suffered an injury caused by the defendant, and a favorable ruling must be able to resolve the injustice. The alleged risk must be particularized and concrete—for example, a plaintiff who took some action in reliance on the collection letter to their detriment.

In the Eleventh Circuit case, the plaintiffs alleged that the collection letter created a risk that unsophisticated consumers might be misled as to the nature and amount of their financial obligations. Here, the plaintiffs alleged only that such an action was possible, not that it actually happened. Further, it was also determined that the plaintiffs were not actually misled, nor was the text of the collection letter proven to create any increased risk of misrepresentation. Thus, simply claiming that someone might be misled has again been determined by the courts as insufficient to establish Article III standing.

The case is *Trichell v. Midland Credit Mgmt.*, 964 F.3d 990 (2020).

Fourth Edition of 50 State Guide on Student Loan Servicing Regulations

Hinshaw recently announced the publication of the Fourth Edition of its *50 State Guide on Student Loan Servicing Regulations*. The guide aims to inform readers of the laws specific to the student loan servicing industry by providing state-by-state summaries of legislation, an overview of who is impacted, the process for licensure, servicer's duties and prohibitions, and the state's enforcement powers.



Currently, 13 jurisdictions have passed laws regulating student loan servicers, with some of them now having more than one law on the books related to student loan servicing. Since the Third Edition of this reference guide was released in September 2019, California has enacted (pending signature of Governor Newsom) a comprehensive student loan bill of rights. Additionally, Virginia has enacted two new laws on this subject. Otherwise, the COVID-19 pandemic has mostly halted or postponed state legislative activity. However, states have already begun inquiring about implementation of hardship relief in many financial services sectors, including of student loan servicers.

The Fourth Edition also reports on the latest developments in several ongoing federal preemption challenges to state student loan servicing laws, including court decisions in the District of Columbia, Florida, and Pennsylvania.

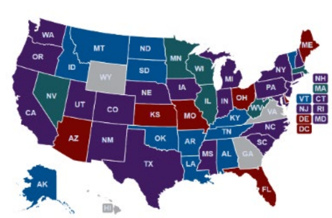
Hinshaw's *50 State Guide on Student Loan Servicing Regulations* is designed to serve as a quick reference and resource for student loan servicers regarding industry-specific regulations, as well as pending state legislation, litigation, and court rulings.

Download Your Copy of the Guide (PDF)

Note, *this guide does not contain legal advice or establish an attorney-client relationship. We recommend review of the actual language and status of each law and piece of legislation as well as continued review on an ongoing case-by-case basis and consultation with counsel as appropriate to ensure compliance.*

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.



Consumer Crossroads Blog | Quarterly Highlights

SCOTUS Decides Federal Debt is not Exempted from TCPA, While FCC Autodialer Declaration Further Alters TCPA Landscape

With a major U.S. Supreme Court decision leading the way, recent developments continue to reshape the landscape of the TCPA.

First, the Federal Communications Commission (FCC) issued a Declaratory Ruling and Order on June 25th, which significantly narrows its definition of an automatic telephone dialing system (ATDS). An ATDS—commonly referred to as an "autodialer"—cannot be used to call or text a consumer's cellular phone without prior express consent. As described in more detail in this prior post, the FCC stated that any device requiring manual dialing of each number to be called is not an ATDS. Although this does not resolve questions about devices with multiple capabilities or configurations, it is a significant retrenchment from prior FCC expansions of the definition of an ATDS.

This summer, the U.S. Supreme Court struck down the TCPA's exemption for "robocalls" to cellular telephones that seek to collect on federal government debts. In *Barr v. American Association of Political Consultants*, political consultant groups had argued that the entire TCPA should be invalidated because the government-debt exception violated the First Amendment by favoring speech to collect government debt over speech for political purposes. In a 7-2 decision, the Supreme Court ruled the exception was indeed unconstitutional, but instead severed the offending exemption from the TCPA, leaving the remainder of the law intact.

Additionally, SCOTUS agreed, after Facebook's renewed petition, to look at the current split among several Circuit Courts of Appeals regarding the definition of an ATDS. A class action lawsuit against Facebook related to security notification text messages in *Duguid v. Facebook, Inc.* currently survives under the Ninth Circuit's current interpretation of an ATDS, but it would not survive under alternative interpretations from the Seventh and Eleventh Circuits.

In light of these shifts, compliance with the TCPA requires revisiting. *Barr* immediately creates significant potential liability for servicers and collectors of government-backed or insured debts, including federal student loans, federally-backed mortgages, or debts to government agencies such as the Internal Revenue Service, Department of Housing and Urban Development, and Social Security Administration. Since the TCPA provides for statutory penalties ranging from $500 to $1,500 per call, it can quickly create very significant potential exposure. The upcoming review of the *Duguid* case may have an even more seismic impact on the TCPA landscape.

SCOTUS Holds CFPB's Single Director Structure Unconstitutional, Leaves Open Questions on Existing Bureau Matters

The United States Supreme Court issued a two part decision in *Seila Law LLC v. Consumer Financial Protection Bureau*. The Court first decided, in a 5-4 decision with Chief Justice Roberts authoring the Court's opinion, that the CFPB's leadership by a single Director removable only for inefficiency, neglect, or malfeasance violates the separation of powers doctrine. The Court next decided that the Director's unconstitutional removal protection is severable from the other provisions of Dodd-Frank that establish the CFPB and define its authority. The severability holding was also authored by Roberts, but drew a 7-2 split.

The Court declined to push the boundaries of the President's unrestricted removal power. In prior cases (*Humphrey's Executor v. United States* and *Morrison v. Olson*), the Court carved out two exceptions to the President's removal power: One in the context of the Federal Trade Commission's multi-member commission, and the other in the context of an inferior officer with narrowly defined duties. Here, the Court did not find a reason to hold the Bureau's structure consistent with one of those two exceptions, or to push those exceptions any further, due primarily to the following three factors:

1. The CFPB wields a tremendous amount of unique power in breadth and scope. The Court summarized this power, articulating that "[t]he Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priories, initiate prosecutions and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans…And the Director may do so without even having to rely on Congress for appropriations."
2. The Bureau's Director is not an inferior officer, but rather a principal officer who commands a great deal of influence and whose duties are far from limited; and
3. The Bureau bears little resemblance to the FTC because unlike the FTC which has bi-partisan commissioners who serve staggered terms, the Bureau's 5 year term limit and single director "guarantees abrupt shifts in leadership and loss of agency expertise."

In short, the Court found no historical precedent allowing a person like the CFPB Director to be unaccountable to the President's policies, and therefore to the people who elect the President.

Importantly, with respect to the severability of the unconstitutional provision, the Court decisively articulated that the provisions of Dodd-Frank bearing on the CFPB's structure and duties "remain fully operative" and that there is "nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred no CFPB to a CFPB supervised by the President." The Court also went on not to foreclose Congress from creating a multi-member agency, but concluded it is not within the Court's power to re-write Congress's work.

Meanwhile, the issue that precipitated the case, a civil investigative demand issued by the CFPB to Seila Law while the agency was still led by former Director Richard Cordray, has been remanded to the Ninth Circuit Court of Appeals to decide whether the civil investigative demand was validly ratified when the new acting Director Mick Mulvaney came in. The remand may have implications for companies with cases pending from the Cordray or Mulvaney eras.

July 7, 2020 update: in response to the Seila Law decision, the CFPB announced it had ratified "most regulatory actions the Bureau took from January 4, 2012 through June 30, 2020."