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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.

Classifying a Static Debt as a "Current Balance" is Not Misleading

The Seventh Circuit considered the situation where a collection letter listed a "current balance" of $2,034.03. The plaintiff alleged that the letter was misleading because the phrase "current balance" could be interpreted to mean that the balance could grow, when in reality, the amount owed was "static" and additional interest and fees could no longer be added to the balance. The plaintiff further alleged the letter ran afoul of 15 U.S.C. § 1692g(a)(1), which requires a debt collector to correctly identify the "amount of the debt." The district court granted the debt collector's motion to dismiss, and an appeal to the Seventh Circuit followed.

In its decision, the Seventh Circuit distinguished other instances where a static debt was listed in a way that implied the amount could increase. For example, in one case the letter at issue identified the static amount due and also stated, "To obtain your most current balance information, please call . . ." In the *Koehn* case, however, the Seventh Circuit observed that the letter in this case, however, "contains no directive to call for a 'current balance,' nor does it include any language implying that 'current balance' means anything other than the balance owed."

The Seventh Circuit concluded that a debt collector "can comply with the Fair Debt Collection Practices Act without answering all possible questions about the future. A lawyer's ability to identify a question that a dunning letter does not expressly answer ('Is it possible the balance might increase?') does not show the letter is misleading, even if a speculative guess to answer the question might be wrong." This reasoning should be helpful in other theories involving implied misrepresentations in other alleged violations. In the meantime, debt collectors should ensure that letters seeking to collect on static debts do not unintentionally imply that the current balance could mean anything other than the amount owed.

Koehn v. Delta Outsource Group, Inc., No. 19-1088, --- F.3d --- (7th Cir. Sept. 25, 2019)

Sixth Circuit Affirms: Job Service Text Messages Are Not an ATDS

A district court in Michigan heard a case where a company sent text messages about potential jobs to people who signed up for the service. The plaintiff acknowledged signing up for the service and consenting to receive updates on his phone, but claimed he received over 5,600 texts after he revoked his prior consent. Defendant challenged whether the text was sent via an Automatic Telephone Dialing System (ATDS) and argued that the service used did not have the capability to randomly or sequentially dial or text to potential job applicants. The plaintiff provided evidence that defendant used a third party aggregator which used equipment with the capacity to randomly generate phone numbers such that it was an ATDS. The plaintiff further argued the system was an ATDS, because it operated without human

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intervention. The district court rejected the plaintiff's position at summary judgment and held that the system used was not an ATDS. The plaintiff appealed to the Sixth Circuit, which affirmed the district court's decision in a brief opinion.

Courts analyzing what constitutes an ATDS often evaluate the impact of the FCC's orders interpreting the issue. The Sixth Circuit here, however, found that the plaintiff had failed to demonstrate that "the FCC's orders from before 2015 [were] binding," and had not offered sufficient evidence in the district court to create any fact issues over whether the system used to send the text messages at issue had the capacity to randomly or sequentially generate telephone numbers.

While the Sixth Circuit's opinion does not evaluate the validity of the FCC's rulings, or the interpretation of the statutory definition of ATDS, it does affirm the district court's well-reasoned and thorough order granting summary judgment. Both the district court and Sixth Circuit opinions also underscore the importance of providing evidence that supports the capability—or lack thereof–of the dialing system when defending TCPA claims.

Gary v. Trueblue, Inc., No. 18-2281, --- F.3d --- (6th Cir. Sep. 5, 2019)

Another Court Holds *Avila* Does Not Require Disclaimer Regarding Interest When Not Accruing

Federal courts in New York have been addressing the disclosure requirements related to current balances that may increase due to interest, fees, and other charges, as compared to what disclosures, if any, are required when the amount cannot increase. In *Avila v. Riexinger & Associates, LLC*, the Second Circuit held that a debt collection letter violates the FDCPA if it states a "current balance" of a consumer's debt without disclosing that interest and fees are accruing on that balance, when they are in fact accruing such that paying the balance listed on a letter would not pay a debt in full. Since then, there has been a substantial amount of litigation considering what disclosures, if any, are required when the debt is fixed.

In a recent case, a debt collector sent a collection letter containing a table with "Account Information," including the current creditor, the original creditor, the amount owed ($3,981.89), and a "reduction offer" of $2,389.14. Plaintiff alleged that the letter violated Sections 1692e and 1692g of the Fair Debt Collection Practices Act (FDCPA) because it failed to disclose that interest, late fees, and/or other fees were accruing at the time the defendant sent the letter. Plaintiff argued her claims were just like those in *Avila* because her credit agreement with the creditor provided that her account would accrue interest and fees and the debt collector lacked the ability to change the contract. The consumer further stated that she believed the debt was accruing interest and fees when she received the letter.

The court disagreed with the plaintiff stating, "it suffices that the debt was static at the time, even if the creditor could assess additional charges at a later date, so long as the balance due in the collection notice accurately reflects the amount that would satisfy the debt through reasonably prompt payment." The court found that the letter did not misstate the amount of the debt because it provided the amount needed to satisfy the debt.

This decision helps define the implications of *Avila*'s holding. It also stands for the proposition that debt collectors will conform with *Avila* when they do not insert a disclosure regarding the potential for additional interest and fees, so long as no interest or fees are accruing on the debt at the time of the letter.

Roman v. RGS Financial, Inc., No. 2:17-CV-04917, (E.D. New York Sept. 6, 2019)

Two Letters in Validation Period Does Not Automatically Violate the FDCPA

The Northern District of Illinois recently considered a situation where a debt collector sent the initial letter and followed it with a second letter exactly 30 days later. The second letter urged the plaintiff to use her tax refund to pay off the debt she owed. The letter also requested the plaintiff to "call us immediately to work out a solution before further steps are necessary" if plaintiff was not receiving a tax refund, or if the refund was less than the balance of the debt.

The plaintiff filed suit, alleging the second letter violated Section 1692g of the FDCPA because it overshadowed the validation notice in the first letter. The plaintiff also argued that including the "call us immediately" statement amounted to a demand for immediate payment. The defendant argued that the statement did not indicate that payment was required immediately. The district court agreed, noting that the statement was "tucked away at the end of the second paragraph of the letter, and, at best, conveys [the debt collector's] desire to expedite payment, which does not amount to a violation of § 1692g in [the Seventh Circuit]." The plaintiff also claimed that the second letter's statement that the debt "may have been reported" to a credit bureau as an unpaid debt was misleading. The district court disagreed and explained that an unsophisticated consumer would know that "may" does not mean the same as "will."

The district court's distinction between "may" and "will," as well as the evaluation of the second letter as a whole in considering its overshadowing nature is well-reasoned. Debt collectors should ensure, however, that letters sent during the dunning period do not contain any language implying urgency or of a time-sensitive nature.

Oloko v. Receivable Recovery Services, LLC, No. 17-CV-7626, (N.D. Ill. Aug. 19, 2019)

New Edition of 50 State Guide on Student Loan Servicing Regulations Now Available

An important resource for financial services compliance professionals just received a new update. The Third Edition of the *50 State Guide on Student Loan Servicing Regulations*—a quick reference guide and resource for student loan servicers regarding the regulations specific to the industry, along with pending legislation, litigation, and court rulings—now also includes language of the rules implementing state student loan servicer laws.

Since the Second Edition published last year, the total number of states with laws regulating student loan servicers has nearly doubled, to a total of 13. Colorado, Maine, Nevada, New Jersey, New York, and Rhode Island all enacted new student loan servicer laws, while California and Washington, D.C., have developed regulations outlining licensing fees, processes, and actions that servicers must take in order to meet compliance. In addition, proposed rules are currently pending in Illinois and New York.

The guide features state-by-state summaries, which provide an overview of the major provisions of state laws, processes for licensure, loan servicers' duties and each state's enforcement powers.

Case to Watch: U.S. Supreme Court Decision Provides Florida Homeowner Grounds to Challenge Excessive Fees for Code Violations

Cities and towns have become increasingly aggressive in their efforts to avoid blight resulting from vacant and foreclosed properties and enforce the state and local sanitary codes. At what point does a valid code violation enforcement effort become an excessive fee or receiver lien, motivated by cities and towns' need to raise revenue? Is there any way for a property owner to challenge a city's or town's $500/day fine for failing to correct minor code violations? A state court in Florida is currently hearing just such a case.

In *James Ficken v. City of Dunedin, Florida et al.*, Mr. Ficken, the homeowner, alleges that the city fined him $500/day for around eight weeks while he was out of town settling his mother's estate. He further alleges that he never received notice of the violation or the $500/day fine, that the city has placed two liens on his property totaling $29,833 and also plans to foreclose on the house. According to Mr. Ficken, the city's $500 per day fine for failing to mow his lawn is excessive under the U.S. and Florida constitutions and that the ultimate penalty—foreclosure—is disproportionate to the offense for which it is imposed, violating the Due Process Clause.

Mr. Ficken's constitutional argument is supported by a recent U.S. Supreme Court decision, *Timbs v. Indiana*, which held that the Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the states under the Fourteenth Amendment's Due Process Clause. In *Timbs,* the Supreme Court vacated the judgment in favor of the State of Indiana on its civil forfeiture taking of Timbs' $40,000 car to enforce the $10,000 monetary fine assessable against him for his drug conviction. While Indiana argued that the Excessive Fines Clause did not apply to its use of civil *in rem* forfeitures, the Supreme Court disagreed, noting, "[e]ven absent a political motive, fines may be employed 'in a measure out of accord with the penal goals of retribution and deterrence,' for 'fines are a source of revenue,' while other forms of punishment 'cost a State money.'" The Supreme Court concluded that the "historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming" and "[p]rotection against excessive punitive economic sanctions secured by the Clause is,

to repeat, both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'" The Supreme Court's analysis and reasoning can—and should—extend to fines for code violations and receiverships that are excessive and result in the taking of private property by state and local governments.

The *Ficken* case is ongoing and definitely one to watch for its impact on municipal code violations.

Lack of Standing Is Not Dead as a Defense to TCPA Actions

The Eleventh Circuit, in *Salcedo v. Hanna*, has concluded that receipt of a single unsolicited text, allegedly sent in violation of the Telephone Consumer Protection Act (the "TCPA"), does not constitute a sufficient "concrete injury" to confer standing under Article III of the United States Constitution.

In *Salcedo*, the plaintiff filed a TCPA class action against a law firm after he received a single unsolicited text, in which the firm advertised its services at a ten percent discount. The plaintiff asserted he had Article III standing because receipt of the text message caused him to "waste his time answering or otherwise addressing the message" and caused his cellular phone to be "unavailable for other legitimate pursuits." The Eleventh Circuit disagreed. The Court explained that receipt of text messages does not consume a cellular device such that it is unavailable for continued use because a "cell phone user can continue to use all of the device's functions, including receiving other messages . . ." The Court further explained that the plaintiff's receipt of the text message amounted to a "brief inconsequential annoyance categorically distinct from those kinds of real but intangible harms" and that the "chirp, buzz, or blink of a cell phone receiving a single text message is more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face . . . [a]nnoying, perhaps, but not a basis for invoking the jurisdiction of federal courts."

Importantly, the Eleventh Circuit explained that the focus of Article III standing to sue should be on the "qualitative nature of the injury" rather than the "quantitative" nature (i.e., the degree of intrusion and harm rather than the number of texts at issue). As a result, *Salcedo* may apply to cases where a plaintiff alleges receipt of more than a single text message. *Salcedo* may also hamper a party's ability to certify a class.

Salcedo appears to create a circuit split on standing to sue under the TCPA with the Ninth Circuit's 2016 decision in *Van Patten v. Vertical Fitness Group, LLC*.

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