HINSHAW

Alerts

Important Wins on Behalf of Debt Collection Industry

October 29, 2018
Consumer Financial Services Alert

As all of us settle into the fall season, we wanted to take a moment and reflect on the busy summer of litigation wins Hinshaw obtained for the debt collection industry.

Hinshaw's consumer financial services team achieved more than a dozen notable federal court decisions on behalf of our loyal clients over the summer months, and they are substantial wins for the industry. They include multiple wins at the Third and Seventh Circuit Court of Appeals, as well federal districts in Florida and Illinois. The cases involved Fair Debt Collection Practices Act (FDCPA) and Fair Credit Reporting Act (FCRA) claims along with a memorable win via a successful Rule 11 motion that sought attorneys' fees and costs due to bad faith actions by prolific and familiar plaintiff's counsel.

With the kind permission of our clients, we bring you news of several of these decisions, which include some that establish important new precedent favorable to the industry.

Third Circuit Closes the Door on Highway Tolls as FDCPA Debt
Thomas E. St. Pierre v. Retrieval-Masters Creditors Bureau, Inc., 898 F.3d 351 (3d Cir. 2018)

In a case of first impression among the U.S. circuit courts, Hinshaw successfully persuaded the Third Circuit that highway tolls are not FDCPA consumer debts. This win is obviously an important one to the growing portion of the industry collecting on debt that is not traditional consumer debt. The Third Circuit reasoned that a toll itself is primarily for a public benefit, not private. The obligation to pay a toll, therefore, cannot be considered a consumer debt, even if it involved a transaction with an intermediary like E-ZPass. This matter had involved a putative class action, which Hinshaw succeeded at getting dismissed at the district court level.

This decision will assist with making the collection of unpaid tolls more efficient and assist in keeping the scope of the FDCPA to the original intent, limiting it to consumer debts.

Seventh Circuit Upholds Dismissal of Claims of Misleading Statements on Tax Implications
Dunbar v. Kohn Law Firm, S.C., et al., 896 F.3d 762 (7th Cir. 2018)

Service Areas

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Hinshaw secured dismissal of claims alleging that a settlement letter explaining that "This settlement may have tax consequences" was false or misleading because the consumers were insolvent, such that there could not be any tax consequences. The Seventh Circuit upheld the dismissals, first noting that "may" does not mean "will," and insolvent debtors might become solvent before settling their debt, triggering the possibility of tax consequences. The Seventh Circuit continued to explain that the consumers' personal insolvency does not negate the truth of the generalized statement that a debt settlement "may" have tax consequences. Finally, the Seventh Circuit reasoned that there was no false impression that debtors should pay their entire debt to avoid a tax liability. Instead, the letters were merely invitations to settle the debt and were clearly meant to encourage the debtor to take advantage of the discount offered. Hinshaw secured and preserved a rare win on a motion to dismiss claims of misleading statements.

With litigation over informational statements and disclosures violating the FDCPA on the increase, this win is a welcome reasonable interpretation of the plain language of a collection letter that should help the industry in a variety of claims confusion.

Debt Collector Conundrum Addressed Regarding Serving Papers Directly on Consumer in Underlying Collection Litigation
Holcomb v. Freedman Anselmo Lindberg, LLC, 900 F.3d 990 (7th Cir. 2018)

Hinshaw won a beneficial victory for collectors who file collection lawsuits in another case of first impression for the Seventh Circuit. In this case, the debt collector filed a collection lawsuit against the consumer who sent attorneys to go to court in the collection matter, but who never filed a formal appearance. The debt collector ultimately filed a motion for default and served it on the consumer directly as well as her attorneys, who had said they were representing the consumer. The Seventh Circuit, referring to the Illinois Supreme Court Rules, said that Illinois has a bright line rule that filing a written appearance with the court is the only way to become an attorney of record. Because the consumer's attorney failed to follow the bright line rule, the service of the motion directly on the consumer was not only permitted, but required by the Illinois courts.

This well-reasoned and logical approach to the FDCPA will hopefully assist others who find themselves in a dilemma because consumers' counsel failed to follow required court protocol.

Plaintiff Firm Hit With Sanctions for Splitting False FDCPA Claims
Jack Wesley Cooper v. Retrieval-Masters Creditors Bureau, Inc. (N.D. Ill) No. 17 CV 773, 2018 U.S. Dist. LEXIS 136910 (Aug. 14, 2018)

The District Court sanctioned plaintiff consumer lawyers for bringing a Complaint on allegations that the lawyers knew to be false. Hinshaw had convinced the District Court to dismiss plaintiff's FDCPA putative class action because the same plaintiff and consumer lawyers had filed an earlier case that was based on the same collection letter. Hinshaw creatively argued an interesting dismissal theory based upon plaintiff's improper claims splitting. Because the statutory damages cap under the FDCPA applies per proceeding, Hinshaw argued regardless of the number of alleged violations, there is a general court-imposed prohibition against claims splitting, which is the practice of asserting some allegations in one case, and saving others for a subsequent case that are all based on a common nucleus. In this case, the District Court found that the consumer lawyers had included allegations in the Complaint that they knew were false, which, when combined with the claims splitting "crossed the line."

If and when members of the collection industry are sued under the FDCPA, this case underscores the importance of carefully reviewing the Complaints to ensure that claims are not being split.

Corporate Officer of Collection Agency Dismissed from Lawsuit Due to Corporate-Shield Doctrine
Rafferty v. Retrieval-Masters Creditor's Bureau, Inc., et al., No. 5:17-cv-426-Oc-PGBPRL, 2018 U.S. Dist. LEXIS 136694 (M.D. Fla. July 31, 2018)

A frequent tactic is to sue individuals at a debt collector in their personal capacity. In this case, a corporate officer, who the plaintiff had added as a co-defendant, is no longer a party to this lawsuit after Hinshaw persuaded the District Court to dismiss the individual based on lack of personal jurisdiction. Under the Florida corporate-shield

doctrine, a nonresident employee-defendant who works only outside of Florida, commits no acts in Florida, and has no personal connection with Florida will not be subject to the personal jurisdiction of Florida courts simply because he or she is a corporate officer or employee. This same doctrine applies in other parts of the country when analyzing whether an out-of-state defendant has sufficient contacts to be subject to that court's jurisdiction. Here, the corporate officer neither resided in Florida nor committed any acts there.

When a collection agency or its employee is named as a defendant in a jurisdiction that is outside of their home state, it is important that the defendant consider whether personal jurisdiction has been satisfied.

Plaintiff Firm Denied Additional Attorney's Fees After Refusing Defendant's Settlement Offer
Cooper v. Retrieval-Masters Creditor's Bureau, Inc., No. 16-cv-2827, 2018 U.S. Dist. LEXIS 84361 (N.D. Ill. May 21, 2018)

Hinshaw obtained a reduction of over $58,500 in attorney's fees that plaintiff's attorneys were seeking after the case had gone to trial. Early in the case, the defendant made an offer of settlement, which included terms that matched what the jury, after months of litigation, ultimately awarded. The District Court found that the offer of settlement qualified as a substantial offer that plaintiff should have accepted at the time it was made based on the information that was available to plaintiff at that point. The Court held that plaintiff and his attorneys do not receive the benefit of the attorney's fees award they were seeking when they were responsible for continuing the litigation and no additional monetary benefit was ultimately obtained.

This decision highlights the importance of developing a strategy early in any lawsuit, and allowing the strategy to guide your actions throughout the litigation.

Safe Harbor Language Adopted for Settlement Offers that Include Expiration Dates
Bass v. Portfolio Recovery Associates, LLC, No. 17-cv-08345, 2018 U.S. Dist. LEXIS 142494 (N.D. Ill. Aug. 22, 2018)

The plaintiff filed a complaint alleging violations of the FDCPA. The lawsuit alleged that defendant sent the debtor two separate collection letters each offering to settle his account for less than the amount owed, and these were false because the offers to settle had false expiration dates. Essentially, the debtor challenged whether defendant could place expiration dates on its settlement offers and then decide to make the same offer in the future. The Seventh Circuit previously ruled in *Evory v. RJM Acquisitions Funding LLC*, 505 F.3d 769 (7th Cir. 2007) that a defendant would not violate the FDCPA by including the phrase "we are not obligated to renew this offer" in a settlement letter with an expiration date for the offer. The Court established the phrase as safe harbor language that sufficiently informs consumers that there may be other settlement offers. The *Bass* Court relied upon the Seventh Circuit's creation of the safe harbor language to dismiss the plaintiff's FDCPA claim.

This opinion reinforced that a debt collector or debt owner could set expiration dates for its settlement offers and make those same offers in the future without risking violating the FDCPA.

Conclusion

First and foremost, we were proud to secure these significant wins on behalf of our clients in order to help them thrive amidst this complex regulation. We know the debt collection industry will continue to adapt its best practices as a result of consumer litigation and we'll continue to share those insights in order to help our clients avoid future risks and minimize potential exposure.

The Hinshaw team is proud too of our contribution towards establishing important new legal precedent and generating outcomes that benefit the industry at large. That is a role made possible by our clients, and we appreciate the confidence each has put in our team.