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Alerts

Consumer & Class Action Litigation Newsletter - October 2010

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Hinshaw & Culbertson LLP is pleased to introduce the *Consumer & Class Action Litigation Alert*, a publication reporting on specific cases, legal developments, trends and other relevant news. In each issue of the *Consumer & Class Action Litigation Alert,* we will present information that is helpful across industry boundaries, and inform readers about upcoming Hinshaw events and seminars of interest.

We hope that you enjoy this publication and find it useful. Our editors, David M. Schultz and John P. Ryan, welcome your comments and suggestions.

FDPCA Applied to Mortgage Servicer's Loan Workout Letter, Even Though It Contained No Demand for Payment – Possible "Foti" Implications

The U.S. Court of Appeals for the Seventh Circuit recently held that although defendant mortgage service company did not specifically demand payment in its correspondence with plaintiff debtor, the debtor could still state a claim against the mortgage servicer for a violation of the Fair Debt Collection Practices Act (FDCPA).

The debtor in this case fell behind on her mortgage, and the mortgage service company consequently sent her a letter discussing ways that she could avoid foreclosure and asking for current financial information. The mortgage service company also hired another company, Titanium Solutions, which sent the debtor a similar letter. The debtor sued the mortgage service company, claiming that it had violated the FDCPA by using a third-party to communicate with the debtor to work out a repayment plan, by communicating with a debtor who was represented by counsel, and by communicating with a third party about the debtor's mortgage without the debtor's consent. The mortgage service company argued that the FDCPA did not cover its conduct because the letters did not contain a demand for payment and therefore were not "communications" as

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defined by the act.

The Seventh Circuit held that FDCPA does not establish a "categorical rule that only an explicit demand for payment will qualify as a communication made in connection with the collection of a debt." Because the loan was in default and the "text of the letters indicate they were sent to induce [the debtor] to settle her mortgage-loan debt in order to avoid foreclosure," the court held that the complaint sufficiently alleged that the communications were "sent in connection with an attempt to collect a debt." Based upon the holding in this case, plaintiffs can now state claims under the FCDPA against mortgage service companies when the loan is in default, and the correspondence threatens foreclosure and recommends ways to avoid foreclosure. Therefore, mortgage service companies, especially those within the Seventh Circuit (which includes Illinois, Wisconsin and Indiana) should ensure that their correspondence with homeowners in default complies with the FDCPA's requirements.

Further, this case may have "*Foti*" implications, which concern voice messages by debt collectors. Based upon its holding, the Seventh Circuit indicated that there does not need to be a demand for payment for a correspondence to qualify as a "communication" under the FDCPA. Will the same reasoning apply to a phone message that conveys nothing about a debt? While there has not yet been a ruling on that question from any Circuit, it should be expected that consumers' attorneys, (especially those in the Seventh Circuit) will attempt to use the Seventh Circuit's interpretation of the term "communication" in other areas such as a "*Foti*" claim.

Gburek v. Litton Loan Servicing LP, No. 08-3776, 2010 WL 2899110 (7th Cir. 2010).

For further information, please contact your regular Hinshaw attorney.

Over 200 Calls to Non-Debtor Did Not Violate the FDCPA, and TCPA Was Not Violated Even Though the Auto-Dialed Calls Were to the Wrong Person

Plaintiff mother received more than 200 calls to her residential phone line in regard to a debt owed by her daughter, who lived with her at the time of the calls. The debt collector made calls using an auto-dialer. The mother sued the debt collector for alleged violations of the Fair Debt Collection Practices Act (FDCPA), claiming harassment, third-party disclosure and attempting to collect a debt at an inconvenient time. She also sued under the Telephone Consumer Protection Act (TCPA), for unlawfully initiating a telephone call to a residential telephone line using an artificial or prerecorded voice without her prior express consent. The mother testified that she was annoyed by the number of calls made to her residence, and that at least one of the calls made her feel intimidated and threatened.

The U.S. District Court for the Northern District of Alabama held that the mother lacked standing to bring an action under Section 1692c(b) of the FDCPA for third-party disclosure because she was neither the borrower nor otherwise obligated to pay the debt. Although the mother had standing to bring claims under Section 1692d for harassment, the district court applied the "least-sophisticated consumer" standard and determined that a handful of calls per week, particularly when the vast majority of them were unanswered, did not reach the level of harassment under the FDCPA.

In regard to the mother's TCPA claim, the district court held that in calling the mother's number, the debt collector was attempting to contact a debtor using the number provided by that debtor. Although the mother was not the intended recipient of the calls, the district court found that the debt collector's actions did not violate the TCPA. This holding conflicts with *Watson v. NCO Group, Inc.,* 462 F. Supp. 2d 641 (E.D. Pa. 2006).

Meadows v. Franklin Collection Service, Inc., 2010 WL 2605048 (N.D. Ala. June 25, 2010).

For further information, please contact Barbara Fernandez or your regular Hinshaw attorney.

Court Holds That Debtor Can Not Orally Revoke Consent to Be Contacted on a Cellular Telephone

The U.S. District Court for the Western District of New York recently held that a debtor cannot orally revoke consent to be contacted on a cellular telephone. Plaintiff debtor provided a cable company with her cellular telephone number when she

signed up for service. Her account later went into default and the cable company turned the matter over to a debt collector. The debt collector placed automated calls to the debtor's cell phone. After receiving approximately 10 automated calls, the debtor returned the call and spoke to a live operator. During this initial conversation, the debtor claimed that she had asked the debt collector to stop calling her. The debt collector's records showed no such request, and the debtor never sent a letter to the debt collector requesting that the debt collection calls stop. The debt collector continued to call the debtor's cell phone until she agreed to a payment plan. The debtor subsequently sued, alleging that the debt collector violated the Fair Debt Collection Practices Act (FDCPA) and the Telephone Consumer Protection Act (TCPA) by calling her cell phone after she orally revoked her consent.

The court granted summary judgment in favor of the debt collector. In regard to the FDCPA claim, the court held that "[i]t is irrelevant whether plaintiff made a verbal request to defendant to cease the debt collection calls, the statute explicitly provides for notice in writing and such notice, in writing, was never provided." Therefore, the debtor's admission that she failed to notify the debt collector in writing defeated certain claims that she alleged under the FDCPA.

As for the debtor's TCPA claims, the court held that debt collection calls are not subject to the act's separate restrictions on telephone solicitations. In explaining its holding the court stated:

[a]lthough the TCPA has some application to the instant case as defendant was placing prerecorded automated calls to plaintiff's cellular telephone, Congress has clearly stated that debt collection efforts are governed by the FDCPA. Thus, plaintiff's attempt to infer that a verbal request to cease debt collection calls is sufficient under the TCPA and that any subsequent calls are in violation of the TCPA misses the mark. To cease debt collection calls, written notice is required.

Starkey v. Firstsource Advantage, LLC, 2010 WL 2541756 (W.D.N.Y. Mar. 11, 2010), *Opinion Adopted by,* 2010 WL 2541731 (W.D.N.Y. June 21, 2010).

For further information, please contact your regular Hinshaw attorney.

Hinshaw Mourns the Loss of Attorney Stephen D. Vernon

Hinshaw sadly announces the untimely passing of Stephen D. Vernon, an attorney in the firm's Chicago office and a member of the firm's Consumer & Class Action Litigation Practice Group. Mr. Vernon died of natural causes on August 15, 2010. David M. Schultz, the chair of the Consumer & Class Action Litigation Practice Group said upon learning of Mr. Vernon's passing, "Steve was so highly regarded by the attorneys at the firm, not just because of his legal work, but for his personality and compassion. We also know that his clients knew how good a lawyer he was." Our thoughts and prayers are with Steve's family and friends at this time of loss.

This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.