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Newsletters

Consumer & Class Action Litigation Newsletter - August 2012

August 6, 2012

U.S. Supreme Court to Weigh In on Two Important Consumer Law Issues

The U.S. Supreme Court has granted *certiorari* in two important consumer law cases. First is *Comcast v. Behrend*, Case No. 11-864, which addresses a class representative's burden to show damages on a class-wide basis when seeking class certification. Argument has been scheduled for November 5, 2012. The issue certified is as follows:

"Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."

This case will likely further define the burden faced by a plaintiff in attempting to certify a class post-*Wal-Mart Stores, Inc. v. Dukes*. In *Behrend*, defendant corporation was alleged to have engaged in "anticompetitive clustering" in violation of the Sherman Act antitrust laws. In arguing against class certification, the corporation asserted that plaintiff customers' theory as to how individuals were injured could not be established through classwide proof. The U.S. Court of Appeals for the Third Circuit declined to determine "on the merits" whether the damages methodology offered by the customers was "a just and reasonable inference or speculative." It further held that the corporation's attacks on the "merits of the methodology" "have no place in the class certification inquiry." Thus, the court held that the customers had met their burden under Fed. R. Civ. P. 23 and certified the class. The corporation's petition for *certiorari* sought review of a much larger issue concerning whether a district court must resolve all "merits arguments" directly relevant to class certification prior to certifying a class. The U.S. Supreme Court certified a narrower question. This case has the potential to greatly expand upon or minimize *Dukes* and will likely further define the evidentiary burdens applicable to class certification motions in the future in federal courts.

Second, the Supreme Court granted *certiorari* in *Genesis Healthcare Corp. v. Symczyk*, Case No. 11-1059, which should clarify whether a maximum settlement offer to the named plaintiff moots a collective action. The issue certified is as follows:

"Whether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims."

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This case involves an action brought under the Fair Labor Standards Act (FLSA), Section 219(b), which allows for collective actions. Defendants made what was conceded to be a maximum offer to the individual plaintiff before plaintiff moved for conditional certification and before any other individuals had joined the action. Plaintiff never responded to the offer. Therefore, defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), arguing that the offer had deprived plaintiff of any ongoing personal stake in the litigation. The district court granted the motion. The U.S. Court of Appeals for the Third Circuit reversed. Relying heavily upon cases involving class actions, the Third Circuit held that the case had not yet become moot on the theory that the certification of a class "relates back" to the filing of the complaint and therefore plaintiff could still proceed with the action. It thus ordered the case to proceed. After this decision, the U.S. Court of Appeals for the Seventh Circuit rejected the relation back theory in *Damasco v. Clearwire* in a similar situation. The Seventh Circuit in *Damasco* specifically stated that it disagreed with the Third, Fifth, Ninth and Tenth circuits on the relevant issue.

While collective actions under the FLSA differ from most class actions in that plaintiffs only may join by affirmative acts of consent, it is very possible that the Supreme Court will use this case as an opportunity to clarify the law in a manner that also directly affects Fed. R. Civ. P. 23 class actions. From a practical standpoint, the result of *Damasco* is that to avoid mooting, plaintiffs now usually file their motions for class certification at the same time they file their complaint. This case may expand that practice nationwide or eliminate it.

CFPB Files Its First Enforcement Action

On July 17, 2012, the U.S. Consumer Financial Protection Bureau (CFPB) filed its first enforcement action. The case was filed in the U.S. District Court for the Central District of California. The CFPB seeks an injunction, rescission, restitution, disgorgement and other various equitable remedies against an attorney, law firm and related entities alleged to have improperly engaged in providing foreclosure relief and loan modification services to debtors. The filing is significant as it is anticipated to be the tip of the spear as the CFPB ramps up its enforcement activities having now reached its one-year anniversary after starting operations on July 21, 2011.

Consumer Financial Protection Bureau v. Gordon et al., Case No. CV12-06147 (C.D. Cal.) (Complaint)

Debt Collector May Be Liable Under FDCPA Beyond Section 1692f(6) Even Though It Is Enforcing a Security Interest

In *Birster v. American Home Mortgage Servicing, Inc*., 2012 WL 2913786 (11th Cir. July 18, 2012), plaintiff debtors defaulted on a loan serviced by defendant mortgage servicer. The mortgage servicer commenced collection activities through letters and telephone calls to the debtors. The debtors sued the mortgage servicer, asserting claims for violations of the Fair Debt Collection Practices Act (FDCPA). The district court granted summary judgment in favor of the mortgage servicer, finding that its actions were not taken solely for the purpose of collecting a debt and that the conduct alleged related to enforcement of a security interest, which rendered the FDCPA inapplicable, with the exception of 15 U.S.C. § 1692f(6) claims. The district court further found that the debtors did not state any information to support a Section 1692f (6) claim.

The U.S. Court of Appeals for the Eleventh Circuit found that the court in *Reese v. Ellis*, *Painter, Ratterree & Adams, LLP*, 678 F.3d 1211 (11th Cir. 2012), which was issued after the district court's summary judgment ruling, provided that an entity can both enforce a security interest and collect a debt. As such, the Eleventh Circuit ruled that "[The mortgage servicer] may be liable under the FDCPA beyond Section 1692f(6), even though it was also enforcing a security interest." On those grounds, the court reversed the summary judgment and remanded to the district court "for further proceedings in light of *Reese*."

The Eleventh Circuit also stated that the debtors still were required to show that the mortgage servicer was a "debt collector" under the FDCPA and that it was impossible to tell from the current record. To that end, the court stated that the mortgage servicer did not waive the right to argue it was not a debt collector even though it included the "FDCPA mini-Miranda" disclosure in its earlier letter to the debtors.

Birster v. American Home Mortgage Servicing, Inc., 2012 WL 2913786 (11th Cir. July 18, 2012)

Massachusetts District Court Enters Judgment for Debt Collector in TCPA Claim

Plaintiff debtor brought a class action against defendant debt collector, which was represented by Hinshaw & Culbertson LLP, alleging that it violated the Telephone Consumer Protection Act (TCPA) by placing pre-recorded calls to her cell phone in an effort to collect the debt. The debtor presented no evidence that the debt collector called her cell phone; instead, the evidence showed that the calls were placed to the phone at her home, where her son resided, as it was his debt. The debtor's phone records and the debt collector's phone records contained no evidence that the debt collector had called the debtor's cell phone on the dates in question. In fact, the debt collector never had the debtor's cell phone number in its internal system, and thus had no way of calling the number. The debtor testified that one of the calls of which she was complaining was actually made to her son's phone, and that she had a practice of forwarding all calls made to her home phone to her cell phone.

The debtor submitted an affidavit in which she swore to have received phone calls from the debt collector to her cell phone. The district court held that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record so that no reasonable jury could believe it, a court should not adapt that version of the facts for purposes of ruling on a motion for summary judgment." The court further held that the debtor's version of the debt collector's conduct was significantly outweighed by the record evidence to such an extent that no jury could reasonably believe her testimony. Accordingly, the district court entered summary judgment in debt collector's favor.

Harper v. Credit Control Services, — F. Supp. 2d —, 2012 WL 1866606 (D. Mass. May 18, 2012)

Fifth Circuit Finds No Overshadowing in Debt Collector's Section 1692g Notice

In *McMurray v. Procollect Inc.*, 2012 WL 2892386 (5th Cir. July 16, 2012), the Fifth Circuit considered whether defendant debt collector's collection letter comported with Section 1692g of the Fair Debt Collection Practices Act (FDCPA). Plaintiff debtor alleged that language in the debt collection letter contradicted and overshadowed the statutorily required notices of her rights. The U.S. District Court for the Northern District of Texas granted the debt collector's motion for summary judgment.

In upholding the District Court's decision, the U.S. Court of Appeals for the Fifth Circuit first found that the collector's letter was consistent with the Section 1692g(a) notice requirement. The court explained that the letter contained no demand for payment, much less one made within the 30-day statutory contest period. While the court recognized that the letter urged the debtor to take "timely" action, the express reference was to "timely validation" of the debt, not timely payment of it.

Second, the court rejected the debtor's contention that the notice was overshadowed by a purported "threat" of bad credit that was placed prominently, while the notice language was at the bottom of the letter. The court explained that the supposed threat fell in the category of "letters [that] encourage debtors to pay their debts by informing them of the possible negative consequences of failing to pay," words that did not overshadow the required notice language (citing *Durkin v. Equifax Check Servs., Inc*., 406 F.3d 410, 417–18 (7th Cir. 2005)). The court stated that the letter essentially provided such warnings and nothing more. Therefore, the bad-credit warnings did not overshadow the notice language in the letter.

McMurray v. Procollect Inc., 2012 WL 2892386 (5th Cir. July 16, 2012)

New Jersey Court Holds State's Fair Foreclosure Act Affords No Protection for Mortgagors Who Abandon Property

Defendant mortgagors purchased a single-family home in New Jersey and executed a note and mortgage in favor of plaintiff mortgagee. On their loan application, the mortgagors stated that they intended that the property would be used as their primary residence. The mortgagors defaulted on the note and mortgage and vacated the property sometime thereafter. The mortgagee brought a foreclosure action against the mortgagors in April 2010 and, by that time, it was apparent that the mortgagors were no longer residing at the property. The mortgagee attempted to serve the mortgagors but was unable to locate them despite a variety of inquiries. A default was entered against the mortgagors. The mortgagee then made an application to the court seeking a determination that the mortgage in question was not a "residential mortgage" and that it be permitted to proceed with the foreclosure without being required to comply with certain provisions

of the Fair Foreclosure Act and the New Jersey Court Rules.

The court granted the application in part and denied in it part. The court held that under the New Jersey's Fair Foreclosure Act, a "residential mortgage" loses the protections afforded by the Act when the mortgagor, who did occupy the property at the time the loan was originated, elects to vacate the property with no intention to return as of the date the foreclosure was commenced. However, the court concluded that under New Jersey Court Rules, the term "residential foreclosure action" includes any action to foreclose a mortgage that encumbers a property occupied by the mortgagor in question, regardless of whether that occupancy continued through the date the foreclosure was commenced, and that such an action requires the filing of a certificate of diligent inquiry and affidavit of diligent inquiry.

Sturdy Savings Bank v. Roberts, — A.3d —, 2012 WL 2443251 (Chancery Div. Cape May County 2012; Decided February 21, 2012, Approved for publication June 25, 2012)