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Newsletters

Consumer & Class Action Litigation Newsletter - December 2013

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TCPA Does not Preempt State Regulation Banning Autodialed Calls

Patriotic Veterans v. Indiana, --- F. 3d ----, 2013 WL 6114836 (7th Cir. Nov. 21, 2013)

The Seventh Circuit reversed and remanded the district court's finding that the Telephone Consumer Protection Act ("TCPA") preempted an Indiana statute prohibiting the use of autodialed calls unless the receiver had consented to such calls.

In the underlying action, the plaintiff was a non-profit Illinois corporation that sought a declaration that the Indiana Automated Dialing Machine Statute was either invalid as applied to plaintiff's political messages or was preempted by the TCPA. The district court granted the Plaintiff's motion for summary judgment on the grounds that the TCPA preempted the Indiana statute.

The Seventh Circuit reversed. Specifically, it held that states have long-regulated the content of abusive telephone calls and interference with peaceful home enjoyment, and the plain language of the TCPA itself did not expressly preempt state laws regulating or prohibiting autodialer. Furthermore, conflict preemption did not apply insofar as it was possible to comply with the local statute without violating any aspect of the TCPA.

For more information, please contact: your regular Hinshaw attorney.

Mortgage Servicer May be Liable for "False Name" FDCPA Violation

Vincent v. The Money Store, --- F. 3d ----, 2013 WL 5989446 (2nd Cir. Nov. 13, 2013)

In *Vincent*, the Second Circuit ruled that a creditor may be liable under the FDCPA's "false name" exception if it hires a law firm to perform mass collection mailings on the law firm's letterhead. Mortgage servicer, the Money Store, hired the law firm to draft a form collection letter on the firm's letterhead. The Money Store then provided names and the firm sent the letters.

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The Second Circuit ruled that the Money Store *could* be liable under the “false name” exception of § 1692a(6) because the firm supposedly only acted as a “mere conduit” for the Money Store and did not actually perform any debt collection activities.

The dissent in *Vincent* points out that the majority’s ruling creates a potential void in which a debt collection firm could be performing too much debt collection to be held liable as “flat raters” under § 1692j, while not performing enough collection activity to be held liable as debt collectors. The *Vincent* opinion does not address the firm's liability, so the majority does not conclusively resolve this potential gap in FDCPA coverage.

For more information, please contact: your regular Hinshaw attorney.

Request for Statutory Pre-Judgment Interest Deemed Proper

Stratton v. Portfolio Recovery Associates, 2013 WL 6191804 (E.D. Ky. Nov. 26, 2013)

Plaintiff filed suit against Portfolio Recovery Associates, LLC ("PRA"), alleging that it violated the FDCPA by improperly seeking statutory prejudgment interest in an underlying debt collection action. The court granted PRA's motion to dismiss.

In June 2012, PRA filed a complaint seeking collection of a debt owed by Plaintiff. PRA purchased the charged-off debt in the amount of $2,630.95 from GE in January 2010. GE did not charge Plaintiff any contractual interest on the account from the charge-off date until PRA bought the debt in January 2010. In its complaint, PRA sought recovery of the full face value of the debt ($2,630.95), plus prejudgment interest at the rate of 8% per annum from the charge-off date until the date of judgment.

In May 2013, Plaintiff filed suit against PRA asserting violations of the FDCPA. The crux of Plaintiff's claim was focused on the argument that PRA was not entitled to collect statutory interest because GE's decision to forego the contractual interest effectively barred GE's right to collect statutory interest. Therefore, PRA, as assignee of the debt, similarly had no right to collect statutory interest from Plaintiff. PRA moved to dismiss the action, asserting that PRA had the right to request statutory prejudgment interest under KRS § 360.010 (local interest rate statute). PRA further argued that, even if it was not entitled to recover statutory interest, its request for statutory interest did not constitute a violation of the FDCPA. The Court agreed with PRA.

The Court held that PRA's request for statutory prejudgment interest was proper. The Court reasoned that the fact that GE waived its right to collect contactual interest on the debt did not automatically operate as a waiver of its right to collect statutory interest because: (1) KRS § 360.010 operates in the absence of a contractually agreed-upon rate of interest; and (2) Plaintiff failed to put forth evidence that GE intentionally waived its right to collect statutory prejudgment interest. Thus, PRA, as assignee, stepped into the shoes of GE and acquired all of GE's rights, which included the right to collect statutory prejudgment interest.

The Court also held that, even if PRA was not entitled to recover statutory interest, its request for statutory prejudgment interest did not violate the FDCPA because it was a request for judicial relief, not an unsupervised demand to the debtor. As such, it falls outside the purview of the FDCPA.

For more information, please contact: Vanessa V. Pisano.

Major Revisions to Mortgage Insurance Guidelines Finalized

The Federal Housing Finance Agency has completed major revisions to the guidelines regarding minimum requirements for private mortgage insurance policies. The stated purpose of the revisions is to clarify the responsibilities of insurers, originators and servicers with respect to mortgage insurance, and enhance insurance protection to Fannie Mae and Freddie Mac, which ultimately benefits taxpayers.

Mortgage insurance is utilized when a home buyer is unable to make a 20 percent down payment, and provides coverage to mortgage investors in the event of a subsequent borrower default. The guideline changes include new loss mitigation strategies for troubled homeowners, as well as new coverage assurance guarantees for policyholders and more efficient claims processing. The revisions will overall result in more thorough communication between mortgage insurers, servicers,

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and Freddie Mac/Fannie Mae.

The new guidelines are tentatively set to go into effect some time in 2014.

For more information, please contact your regular Hinshaw attorney.

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