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Newsletters

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- Fourth Circuit Court of Appeals Addresses Validation Notice and "in Writing" Requirements
- Incomplete Settlement Offer Does not Moot Claim
- First Circuit Rejects "Robo-Signing" Allegation as Basis to Challenge Assignment of Mortgage
- Illinois Appellate Court Holds That Attorney who Filed Lawsuit on Behalf of Unlicensed Debt Buyer Did Not Violate FDCPA

Fourth Circuit Court of Appeals Addresses Validation Notice and "in Writing" Requirements

Clark v. Absolute Collection Services, Inc., --- F. 3d ----, 2014 WL 341943 (4th Cir. Jan. 30, 2014)

In *Clark*, the 4th Circuit sided with the Second and Ninth Circuits in holding that § 1692g(a)(3) does not require a debtor to contact a debt collector "in writing" to dispute the validity of a debt. However, other portions of the validation disclosure require the "in writing" language.

In *Clark*, the debtor incurred medical debts, which were later referred to ACS for collection. ACS sent the debtor a collection notice stating that "ALL PORTIONS OF THIS CLAIM SHALL BE ASSUMED VALID UNLESS DISPUTED IN WRITING WITHIN THIRTY (30) DAYS." The debtor sued ACS and alleged that the notice implied a requirement that the debtor dispute the debt in writing that was not supported by the statute. The district court granted ACS's motion to dismiss on the grounds that § 1692(a)(3) includes an implied writing requirement.

On appeal, the Fourth Circuit reversed on the ground that § 1692(a)(3)'s plain text does not require a debtor to challenge the debit in writing. The court noted that oral notice is sufficient to at least trigger different credit reporting requirements, and limits the manner in which the creditor can apply payments made by the debtor.

This does not mean agencies should remove the "in writing" language entirely from the validation notice. Consult with your attorney on the proper language to use.

Attorneys

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Service Areas

Consumer Financial Services

Incomplete Settlement Offer Does not Moot Claim

Scott v. Westlake Services LLC, --- F. 3d ----, 2014 WL 250251 (7th Cir. Jan. 23, 2014)

The Seventh Circuit recently revisited the issue of when a settlement offer moots a claim in *Scott v. Westlake Services LLC*, No. 13-2699 (Jan. 23, 2014). Plaintiff filed a class action lawsuit under the Telephone Consumer Protection Act for improper calls to her cell phone. Defendant made a settlement offer to pay the maximum statutory penalty "for each and every dialer-generated telephone call made to plaintiff." However, the settlement offer was qualified by stating that Defendant believed there were fewer calls than what Plaintiff had alleged. After the settlement offer was rejected, Defendant moved to dismiss the case for mootness. The Court granted Defendant's motion to dismiss the case for mootness, but acknowledged that there was sufficient uncertainty about the actual terms of the settlement such that the court retained jurisdiction to enforce compliance with the offer.

The Seventh Circuit remanded the case to the district court and directed the court to convert the "post-judgment" (although no judgment had actually been entered) discovery regarding the number of phone calls into discovery on the merits. In explaining the remand, the court focused on the language of the settlement offer, which indicated that Defendant was offering to pay only for those dialer-generated calls that Defendant believed Plaintiff received. The court interpreted the qualified settlement offer as Defendant's "offering to pay only the amount it felt might be due" and that this was insufficient to moot Plaintiff's case.

The Seventh Circuit acknowledged the split among the circuits on how and when an unaccepted settlement offer can render a case moot. The court stated that since this case did not challenge this circuit court's position, "we will continue to await a resolution of the split." The court did not modify its previous holding in *Demasco v. Clearwire*, 662 F.3d 891 (7th Cir. 2001) because the court viewed the settlement offer in this case to be different than the one in *Demasco*, which offered to pay the plaintiff for each text message received. Thus, *Demasco* remains good law in the Seventh Circuit.

First Circuit Rejects "Robo-Signing" Allegation as Basis to Challenge Assignment of Mortgage

Wilson v. HSBC Mortg. Services, Inc., --- F.3d ----, 2014 WL 563457 (1st Cir. Feb. 14 2014)

Mortgagors argued that they had standing to challenge the assignment of mortgage from Mortgage Electronic Registrations Systems, Inc. (MERS) to HSBC Mortgage Services, Inc. (HSBC) because they alleged in their complaint that the assignment was, *inter alia*, fraudulent and thus, void, because it was "robo-signed."

Under Massachusetts law, a mortgagor has standing only "to challenge a mortgage assignment as invalid, ineffective or void (if, say, the assignor had nothing to assign or had no authority to make an assignment to a particular assignee)." *Culhane v. Aurora Loan Servs. of Neb.*, 708 F.3d 282, 291 (1st Cir. 2013). Likewise, "a [Massachusetts] mortgagor does not have standing to challenge shortcomings in an assignment that render it merely voidable at the election of one party but otherwise effective to pass legal title." *Id.* The Court's own research confirmed that there is neither a definition of the term "robo-signing" nor any authority showing that the term has any legal significance under Massachusetts law or in the First Circuit. Although the mortgagors alleged, at most, that the assignment of mortgage was potentially voidable under Massachusetts law, the Court held that "the bare allegation of 'robo-signing' does nothing to undermine the validity" of the assignment of mortgage.

Illinois Appellate Court Holds That Attorney who Filed Lawsuit on Behalf of Unlicensed Debt Buyer Did Not Violate FDCPA

Gibbs v. Blitt and Gaines, P.C., --- N.E.3d ----, 2014 IL App (1st) 123681, 2014 WL 554550

In *Gibbs*, the Illinois Court of Appeals upheld dismissal of a complaint against a law firm for an alleged violation of the FDCPA, finding that the suit filed by the law firm on behalf of its unlicensed debt collector client did not violate the Illinois Collection Agency Act ("the Act"). Accordingly, it could not serve as a viable basis for the FDCPA violation claim. Hinshaw & Culbertson handled the defense of the case. [according to Dave Schultz, we have client permission to identify we handled the case.

The defendant initially filed suit on behalf of its debt collector client for recovery of alleged outstanding credit card debt. The debt collector was not licensed in Illinois at the time the lawsuit was filed. The plaintiff filed a putative class action complaint, asserting the law firm engaged in illegal debt collection activity and violated the FDCPA. Defendant moved to dismiss the complaint on the grounds that attorneys are expressly exempted from liability under the Act, thus precluding the Act from serving as a basis for the FDCPA claim. The claim was dismissed, and this appeal ensued.

The court discussed *LVNV Funding, LLC v. Trice*, 952 N.E.2d 1232, 2011 IL App (1st) 092773. Plaintiff claimed that *Trice* stood for the proposition that a judgment obtained by an unlicensed debt collector was void. The plaintiff argued that the defendant was aware of this law and should have known that filing suit on behalf of its unlicensed client would result in a void judgment, thus constituting a violation of section 1692e.

The Court, however, stated that the *Trice* case was remanded and, on remand, the trial court upheld the judgment obtained by the unlicensed collector, finding portions of the Act were unconstitutional. That ruling is currently on appeal to the Illinois Supreme Court and Hinshaw & Culbertson is handling the appeal. Given its posture, the *Gibbs* Court held that the *Trice* decision does not support the debtor's claim that the law firm pursued a frivolous lawsuit. Furthermore, the law firm's filing of the complaint on behalf of its client did not violate the Act, which specifically exempts licensed attorneys. The court concluded that filing the lawsuit could not constitute an FDCPA violation.