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Newsletters

Consumer & Class Action Litigation Newsletter - June 2012

June 28, 2012

***First American v. Edwards*—U.S. Supreme Court Punts on Deciding Statutory Damages Standing Case**

Having agreed to decide whether Article III of the U.S. Constitution permits federal courts to entertain suits where no actual injury is claimed, the U.S. Supreme Court today, June 28, 2012, changed its mind and dismissed the appeal. *First American Financial Corp. v. Edwards,* 567 U.S. ____ (2012). This case had presented an important issue, not only in the consumer law and class action field but as to federal courts generally. The Court was expected to consider the impact on these cases of its prior decisions that had held that Article III's "case and controversy" provision required that plaintiffs allege, and eventually prove, that they had suffered "actual injury" as a result of a defendant's conduct in order to have standing to sue in federal court.

The case involved a class action lawsuit filed under the Real Estate Settlement Procedures Act (RESPA), in which plaintiffs had claimed no actual injury to them but sought so-called "statutory damages" under that statute. RESPA is only one of a number of federal statutes that contain such statutory damages provisions, which allow plaintiffs to seek set penalties—often assessed per violation—in addition to (or regardless of) whether they have suffered any financial loss or other actual injury. (Other statutes like this include the Fair Debt Collection Practices Act and the Telephone Consumer Protection Act.) Today's somewhat anticlimactic result, which the Court did not explain, leaves standing a decision of the U.S. Court of Appeals for the Ninth Circuit that had held that plaintiffs in that case had standing to sue over allegations that their real estate agents were paid kickbacks for referring clients to certain title insurance agencies even though the clients did not pay any additional amounts for the insurance they received.

Results like these, in which the Court dismisses a petition for *certiorari* it had previously accepted as "improvidently granted," are referred to among Supreme Court practitioners as "DIGs." They usually happen once or twice each term. They are supposed to result from a determination by the Court, usually after full briefing and argument, that the case did not turn out to do a good job of presenting the question the Justices wanted to decide, although sometimes they actually reflect the fact that not enough Justices could agree on a result (which is what many experts think happened here, especially given how long the Court waited to announce this result). But the decision—or, more precisely, the lack of one—still may hold portents for the future. After all, in granting the

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petition in the first place the Court essentially announced that the issue is important enough to merit its consideration, and today's result does not change that. Often after the Court DIG's a case it picks up the issue in another case a term or two down the road. Because there are many statutory damages lawsuits out there, it seems very likely that this issue will be before the Court again.

Hinshaw & Culbertson LLP submitted to the Supreme Court an *amicus curiae* brief on behalf of the National Association of Retail Collection Attorneys.

First American Financial Corp. v. Edwards, 567 U.S. ____ (2012)

For more information, please contact David M. Schultz, Joel D. Bertocchi or your regular Hinshaw attorney.

Sixth Circuit Holds That Mortgagor States Claim for FDCPA Violation Against Law Firm That Misidentifies Bank as Holder of Mortgage

In *Wallace v. Washington Mutual Bank, F.A., ___ F. 3d ___,* 2012 WL 2379664 (6th Cir. June 26, 2012), plaintiff mortgagor sued a law firm for violation of the Fair Debt Collection Practices Act (FDCPA) for filing a foreclosure action on behalf of a bank that did not own and hold the promissory note or mortgage. The district court dismissed the complaint for failure to state a cause of action. On appeal, the U.S. Court of Appeals for the Sixth Circuit held that the mortgagor stated a claim against the law firm under the FDCPA.

In the underlying foreclosure action, the bank foreclosed on the mortgagor's property before receiving an assignment and transfer of the subject promissory note and mortgage. The mortgagor sued the law firm that filed the foreclosure on behalf of the bank, alleging false, deceptive or misleading misrepresentation under the FDCPA for the law firm's claims that the bank was the owner and holder of the mortgage. The law firm argued that Ohio law permitted its client to anticipate that it would become the title holder after the foreclosure was initiated but before it became final. The Sixth Circuit disagreed that the issue of standing had any bearing on whether misidentifying a creditor was materially misleading under the FDCPA.

Holding that the filing of a foreclosure action by a law firm claiming ownership of the mortgage by its client constitutes a "false, deceptive or misleading representation" under the FDCPA, when the bank has not received a transfer of the ownership documents, the Sixth Circuit reversed the lower court's dismissal of the action. The appellate court noted that a clearly false representation of a creditor's name may constitute a false representation under 15 U.S.C. § 1692e, and that the mortgagor had sufficiently alleged facts in her complaint of a misrepresentation that would confuse or mislead an unsophisticated consumer.

Wallace v. Washington Mutual Bank, F.A., ___ F. 3d ___, 2012 WL 2379664 (6th Cir. June 26, 2012)

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The Foreclosing Entity Must Either Hold the Note or Be Acting on Behalf of the Note Holder in Massachusetts

On June 22, 2012, the Massachusetts Supreme Judicial Court (SJC) issued its decision in *Eaton v. Federal National Mortgage Ass'n et al., ___ N.E.2d ___,* 2012 WL 2349008, a case involving the question of whether a foreclosure sale "conducted by a mortgagee who holds the mortgage but not necessarily the underlying promissory note at the time of foreclosure" is valid. In *Eaton*, the Massachusetts Superior Court granted plaintiff mortgagor's motion for a preliminary injunction enjoining defendant, the Federal National Mortgage Association (Fannie Mae), from proceeding with an eviction because the court found that the mortgagor had a likelihood of success on the merits of proving her claim that the foreclosure sale conducted by an entity that did not hold both the mortgage and the promissory note was invalid. *Eaton v. Federal National Mortgage Association, et al.,* 2011 WL 6379284 (Mass. Super. 2011).

On appeal, the SJC analyzed the common law and statutory provisions relating to nonjudicial foreclosures. The SJC held that the term "mortgagee" as used in the power of sale statute, Mass. Gen. Laws. ch. 244, § 14, means a mortgagee who also holds the underlying promissory note. However, the SJC did not interpret this as a requirement that the foreclosing entity have physical possession of the note. The SJC concluded that the foreclosing entity may either be the holder of the note or an authorized agent of the note holder. The SJC further ruled that this interpretation of the term "mortgagee" in Mass. Gen. Laws. ch. 244, § 14 would only apply to foreclosure sales in which the notice of sale is given after June 22,

2012.

Eaton v. Federal National Mortgage Ass'n et al., ___ N.E.2d ___, 2012 WL 2349008 (Mass. June 22, 2012)

For further information, please contact your regular Hinshaw attorney.

TCPA Does Not Provide for Subsequent Revocation of Prior Express Consent

In *Gager v. Dell Financial Services, LLC,* No. 11-02115, (M.D. Pa. May 29, 2012) the U.S. District Court for the Middle District of Pennsylvania considered the issue of the revocation of "prior express consent" under the Telephone Consumer Protection Act (TCPA). Plaintiff debtor's allegations arose from a line of credit she had secured with defendant creditor to purchase computer equipment. Upon completing her credit application with the creditor, the debtor provided her mobile telephone number as her "house phone" number, as she did not possess a landline. After the debtor became delinquent on her payments to the creditor, the creditor called the debtor regarding the debt on her mobile phone number with pre-recorded messages. Subsequently, the debtor sent the creditor a letter asking the creditor to stop calling her. The debtor contended that her letter revoked the consent she had earlier provided to the creditor to call her on her mobile phone.

The debtor admitted that she had consented to have the creditor call her on her mobile phone upon completing the credit application. The debtor's claim therefore turned on whether she was able to revoke that consent in her letter to the creditor. The court discussed a 1992 TCPA Order in which the Federal Communications Commission (FCC) determined that, "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." The debtor contended that this "*absent instructions to the contrary*" language authorized unilateral withdrawal of her prior consent to be contacted.

Ultimately, the court expressly declined to hold that the TCPA—or any FCC regulation or advisory opinion construing the statute, for that matter—contains any provision permitting the court to find that post-formation revocation of consent is authorized under the TCPA. The court noted that the TCPA itself does not address whether prior express consent, once given, may be revoked, and that a plain reading of the 1992 TCPA Order indicates that "instructions to the contrary" are to be provided at the time one "knowingly release[s]" her telephone number and gives her "invitation or permission to be called" at that number. The court concluded that the phrase, "absent instructions to the contrary," provides no basis for the court to find such instructions as providing a method of revocation. Accordingly, the court granted the creditor's motion to dismiss.

Gager v. Dell Financial Services, LLC, No. 11-02115, (M.D. Pa. May 29, 2012)

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