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Newsletters

Consumer & Class Action Litigation Newsletter - December 2014

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Eighth Circuit Holds that Debt Collector's Debt Verification with Credit Reporting Agency Was not Misleading and Was not a Communication "in Connection with the Collection of any Debt"

McIvor v. Credit Control Services, Inc., No. 14-1164, ___F.3d ___, 2014 WL 6805380 (8th Cir. Dec. 4, 2014)

In a case handled by Hinshaw & Culbertson LLP, the Eighth Circuit held that a debt collector did not violate the FDCPA by failing to expressly communicate that a debt was disputed in its response to a credit reporting agency's inquiry regarding the disputed debt. The communication was not misleading because the credit reporting agency already knew the debt was disputed, and the purpose of the communication was not to encourage payment of the debt, but rather to comply with the FCRA's reinvestigation procedures.

The plaintiff's Complaint asserted that she disputed a debt to TransUnion, that TransUnion reported the dispute to Credit Control pursuant to the FCRA's reinvestigation requirements, and that when Credit Control responded to TransUnion, it did not explicitly state that the debt was disputed. The plaintiff alleged that Credit Control's communication violated section 1692e(8) of the FDCPA which prohibits debt collectors from communicating false credit information, "including the failure to communicate that a disputed debt is disputed."

In affirming the lower court's ruling, the Eight Circuit emphasized that the legislative purpose and intent of the FDCPA was "to eliminate abusive debt collection practices." The Court then held that, to be actionable under section 1692e, the failure to report that the debt is disputed must be: (1) both "false, deceptive, or misleading"; and (2) made "in connection with the collection of any

debt." The Eight Circuit held that TransUnion could not have been deceived or mislead because it was already aware that the debt was disputed—the only reason Credit Control communicated with TransUnion was in response to TransUnion's notification that the plaintiff disputed the debt.

The Eight Circuit also joined the Third, Sixth, and Seventh Circuits in holding that, for a communication to be "in connection with the collection of any debt," an animating purpose of the communication must be to induce payment by the debtor. The Court then held that Credit Control's communication to TransUnion was not an elective report of credit information, but rather was a part of the reinvestigation process required by the FCRA. Therefore, the communication was not "in connection with the collection" of the debt because it lacked "collection related motivation."

For more information, please contact Russell S. Ponessa.

District Court Broadens Servicer's Obligation in Responding to Qualified Written Request But Applied a Strict Standard in Evaluating Compensatory or Statutory Damages

Bulmer v. Midfirst Bank, FS, 2014 WL 6070695 (D. Mass. Nov. 14, 2014)

In *Bulmer v. Midfirst Bank,* the District Court of Massachusetts interpreted the Real Estate Settlement Procedures Act ("RESPA") to require a current servicers to provide the borrower's account information from a ***prior*** servicer in response to a Qualified Written Request (QWR). In that regard, the Court stated, "[t]o be sure, there may be times when, in defiance of logic, a loan servicer does not have ready access to such prior information. In the court's estimation, however, that provides little excuse to avoid the statutory mandate."

Although the Court found a technical violation of RESPA because the servicer failed to provide the information from the prior servicer, he did not award compensatory damages because the borrowers did not prove actual damages. The Court reasoned: "the RESPA violation did not cause Plaintiff any actual damage, which, as alleged, boils down to an assertion that the violation somehow placed him on an irreversible path to foreclosure. That damage, however, could not have been caused by Defendant's failure to adequately respond to the QWR on July 6, 2012, after pre-foreclosure proceedings were well underway." The Court also refused to award statutory damages under RESPA because "[f]or the court to grant such damages, there needs to be a showing that Defendant engaged in 'a pattern or practice of noncompliance.'"

For more information, please contact Justin M. Fabella.

Eleventh Circuit Court of Appeals Holds an Unaccepted Rule 68 Offer of Complete Relief Does Not Moot an Individual Claim or a Class Action

Stein v. Buccaneers LP, 772 F.3d 698 (11th Cir. Dec. 1, 2014)

In *Stein v. Buccaneers,* the Eleventh Circuit evaluated whether six Plaintiffs' individual and class action claims became moot when the Plaintiffs did not accept Federal Rule of Civil Procedure ("FRCP") 68 offers of judgment that, if accepted, would have provided the full relief Plaintiffs sought. The Court held that a plaintiff can reject an offer for settlement, no matter how good the terms, and the plaintiff's interest in the lawsuit remains just what it was before; and so does a court's ability to grant him relief. Thus, the six Plaintiffs' individual claims were not moot. Further, even if the individual claims were somehow deemed moot, the class claims would remain live and the named Plaintiffs would retain the ability to pursue them.

In *Stein*, six named Plaintiffs filed their proposed class action against Defendant, Buccaneers Limited Partnership ("BLP"), alleging BLP sent unsolicited faxes to the named Plaintiffs and more than 100,000 others in violation of the Telephone Consumer Protection Act ("TCPA") and its implementing regulations. Shortly after BLP was served with the lawsuit, it tendered each named Plaintiff an offer of judgment under FRCP 68, offering each Plaintiff full relief. Shortly thereafter, BLP moved to dismiss the action for lack of jurisdiction, stating that the unaccepted Rule 68 offers rendered the case moot. Plaintiffs subsequently moved to certify a class long before the deadline. The district court denied the motion to certify because it was "terse" and "admittedly premature." Being that Plaintiffs did not accept the offers of judgment, the district court granted BLP's motion to dismiss, concluding the action was moot.

The only question presented on appeal was whether BLP's FRCP 68 offers of judgment rendered the case moot. The Eleventh Circuit reversed the district court's dismissal. It cited to FRCP 68, which provides: "An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in proceedings to determine costs." The Court determined that "dismissing a case based on an unaccepted offer as was done here—is flatly inconsistent with the rule." Once the offers were unaccepted, they were "considered withdrawn" and were "not admissible." Thus, the Plaintiffs' individual claims were not moot. Further, even if the Plaintiffs' individual claims were somehow deemed moot, Plaintiffs retained the ability to pursue the class action claims because a live controversy still existed between the parties.

For more information, please contact your regular Hinshaw attorney.

New York State Enacts New Debt Collection Regulations

New York State recently enacted new regulations governing debt collection entitled, “Debt Collection By Third-Party Debt Collectors And Debt Buyers.” The new regulations, codified in 23 NYCRR 1, contain new disclosure requirements that go beyond those of the Fair Debt Collection Practices Act (“FDCPA”). The new regulations will become effective on March 3, 2015 except as to §§ 1.2(b) and § 1.4, which will become effective on August 30, 2015 in order to give debt collectors time to gather the documentation required by those sections. Debt collectors ought to review and modify their form letters and procedures in order to conform with not only the FDCPA but also with New York’s more stringent regulations so long as they engage in collection activity in New York. Notably, the Consumer Financial Protection Bureau has indicated that it may promulgate new federal regulations for debt collection and will look at New York’s new regulations as a model.

The most salient changes are as follows:

Enhanced Initial Disclosure

§1.2 requires that collectors provide, within five days of the initial communication, written notification to a consumer expressly stating the following: that debt collectors are “prohibited from engaging in abusive, deceptive, and unfair debt collection efforts” which include but are not limited to the use or threat of violence; the use of obscene or profane language; and repeated phone calls with the intent to annoy, abuse or harass.

In addition, the written notification must note that in the event of a money judgment obtained against a consumer, state and federal laws may prevent garnishment of certain income including but not limited to supplemental social security income; social security; public assistance (welfare); alimony or child support; unemployment benefits; disability benefits; workers compensation benefits; public or private pensions; veterans’ benefits; federal student loans, grants or work study; and ninety percent of wages or salary earned in the last sixty days.

Finally, this Section also mandates that within five days of the initial communication with a consumer, a debt collector must provide clear written notification of the name of the original creditor; and itemized accounting of the debt including the total amount of the debt due as charge-off, the total amount of interest accrued since charge-off, the total amount of non-interest charges or fees accrued since charge-off, and the total amount of payments made on the debt since charge-off.

Disclosing Time Barred Debt

§ 1.3 requires that a collector maintain reasonable procedures to determine if a debt is time barred. Additionally, if the collector knows or has reason to know that the debt is time barred, before accepting payment on the debt, the collector must advise the consumer that the statute of limitations may have expired; that suing on a time-barred debt is a violation of the FDCPA; that the consumer may stop a lawsuit by raising the expiration of the statute of limitations as a defense; that the consumer is not required to provide an admission, affirmation, acknowledgement or promise to pay the debt or waive the statute of limitations; and if the consumer makes any payment on a time-barred debt, the statute of limitations may restart. § 1.3 also provides sample language that would satisfy these requirements.

Additional Debt Validation Procedures

§ 1.4 significantly alters the debt validation process under the FDCPA by allowing a consumer to dispute the debt orally and requiring the debt collector to provide a consumer within 14 days of the oral dispute with written instructions on how to request substantiation of the debt. In the event that a dispute is made in writing, a debt collector must provide the consumer with written instructions on how to request substantiation of the debt within 21 days of the written dispute.

Whether made orally or in writing, § 1.4(b) states that the collector must provide written substantiation of a charged-off debt within 60 days of receiving the request for substantiation of the debt and cease collection until written substantiation is provided to the consumer. A debt collector must substantiate the debt only once during the period that it owns or has the right to collect the debt.

§ 1.4(c) provides an outline of the different documents that will satisfy the substantiation requirements of this statute.

Disclosures Related to Settlement

§ 1.5 governs settlement of a debt. It provides that within five business days of a settlement agreement, a debt collector must provide written confirmation of a debt payment schedule or other agreement to settle within the agreement and, a specific notice identifying a list of certain types of income that are exempt from collection. Furthermore, a collector must provide an accounting of the debt on a quarterly basis while the consumer is making payments under a payment plan and upon completion of a payment plan, the collector must send, within 20 business days, written confirmation of satisfaction of the debt.

E-mail Correspondence with Debtor

§ 1.6 allows subsequent communications by a debt collector with a consumer following the written disclosures required under § 1.2 through email only if the consumer voluntarily provides an affirmation that the email is not employment related and that the consumer consents to such e-mail communication.

For more information or guidance on the newly enacted New York regulations, please contact Concepcion A. Montoya or Han Sheng Beh.

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