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Newsletters

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U.S. Supreme Court to Consider Whether Prevailing FDCPA Defendants Can Recover Costs Absent a Showing of Plaintiff's Bad Faith

On May 30, 2012, the U.S. Supreme Court granted certiorari in *Marx v. General Revenue Corp.,* No. 11-1175. The Court will consider whether costs may be awarded to the defendant in a Fair Debt Collection Practices Act (FDCPA) case only if the court holds that the action was brought in bad faith, or if such costs may be awarded pursuant to Fed. R. Civ. P. 54 without a finding of bad faith.

The FDCPA provides that prevailing defendants in FDCPA litigation "may" recover reasonable attorney's fees and costs upon "a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment." Fed. R. Civ. P. 54(d)(1) provides that "[u]nless a federal statute . . . provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party."

Plaintiff in Marx was a debtor, who alleged that she received threatening and abusive telephone calls, and that a facsimile sent by defendant debt collector to her employer was a "communication" regarding the debt, all in violation of the FDCPA. After a bench trial, the district court found in favor of the debt collector and awarded it costs pursuant to Rule 54(d)(1). The trial court did not, however, enter a finding that the debtor had acted in bad faith.

The U.S. Court of Appeals for the Tenth Circuit affirmed both on the merits and on the issue of costs. As to the latter, the appellate court held that the reference to "costs" in the FDCPA's fee-shifting provision "merely recognizes that the prevailing party is entitled to receive the costs of suit as a matter of course," and while the FDCPA requires a showing of bad faith to recover attorney's fees, it does not supersede the rule that costs should be awarded to the prevailing party regardless of whether such a showing of bad faith can be made. The Tenth Circuit disagreed with the contrary conclusion of the U.S. Court of Appeals for the Ninth Circuit, which has held that the provision's express mention of "costs" evidences an intent "to condition an award of costs to a prevailing defendant upon a finding of bad faith and harassment on plaintiff's part." *Rouse v. Law Offices of Rory Clark,* 603 F.3d 699, 706 (9th Cir. 2010).

Of note, in the article, "Tenth Circuit Rejects Foti-Type Claim," which appeared in the January 2012 issue of the *Consumer & Class Action Litigation Newsletter*, we reported that in *Marx* the Tenth Circuit held that facsimiles in this case were not a "communication" as defined by the FDCPA. In *granting*

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certiorari, however, the Supreme Court did not take up the "communication" issue, making the Tenth Circuit's ruling the first and only court of appeals decision on the *Foti*issue.

*Marx v. General Revenue Corp.,*No. 11-1175 (S. Ct.)

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

District Court Lost Subject Matter Jurisdiction Over FDCPA Case After Plaintiff Rejected Maximum Individual Offer and Class Certification Motion Was Denied

The U.S. District Court for the Southern District of Texas dismissed a Fair Debt Collection Practices Act (FDCPA) putative class action pursuant to Fed. R. Civ. P. 12(b)(1) holding that there was "nothing left to litigate" because plaintiff's claims had become moot. Defendants, represented by Hinshaw & Culbertson LLP, had earlier made a maximum individual offer to the plaintiff. Instead of accepting the offer, plaintiff instead moved for class certification. After briefing, the class certification motion was denied.

Defendants moved to dismiss, arguing that the district court had lost subject matter jurisdiction over all pending claims because plaintiff had previously been offered make-whole relief and did not accept it. The district court granted the motion. The U.S. Court of Appeals for the Fifth Circuit affirmed.

Brookter v. GC Services LP et al., No. H–10–3149 (S.D. Tex. Apr. 26, 2011) aff'd by *Brookter v. GC Services LP et al.,* No. 11-20377 (5th Cir. May 7, 2012)

For more information, please contact Todd P. Stelter or your regular Hinshaw attorney.

Seventh Circuit Confirms Dismissal of Claim for Violation of FDCPA § 1692g Without Allowing the Plaintiff to Conduct a Consumer Survey

In *Zemeckis v. Global Credit & Collection Corp.,*2012 WL 1650479 (7th Cir. 2012), plaintiff debtor alleged that defendant debt collector's dunning letter included "insistent language and repeated threats of legal action" overshadowing mandatory language informing the debtor that she had 30 days to dispute the validity of the debt. The debt collector moved to dismiss, arguing that such urgent language is considered puffery and does not violate Section 1692g of the Fair Debt Collection Practices Act. The district court granted the motion and the debtor appealed.

In analyzing dunning letters, the district court was concerned about language which contradicted the 30-day deadline to dispute the debt. The U.S. Court of Appeals for the Seventh Circuit held that unsophisticated consumer such as the debtor could not misunderstand her rights even though the debt collector's dunning letter contained language urging the debtor to act quickly and repeated threats of legal action, and the validation notice was located on the back of the letter. The Seventh Circuit consequently held that the debtor had failed to state a claim for violation of Section 1692g. Moreover, the court found that no reasonable person would be confused by the dunning letter and upheld the district court's decision to dismiss, without allowing a consumer survey.

*Zemeckis v. Global Credit & Collection Corp.,*2012 WL 1650479 (7th Cir. May 11, 2012)

For more information, please contact your regular Hinshaw attorney.

Plaintiff Adequately Pleads That Loan Servicer and Bank Subject to Liability Under FDCPA

In *Bridge v. Ocwen Federal Bank, FSB,* ___F. 3d ___, 2012 WL 1470146 (6th Cir. 2012), a married couple sued defendants, a loan servicer and a bank, alleging that defendants engaged in improper collection practices in violation of the Fair Debt Collection Practices Act (FDCPA). Plaintiffs alleged that the loan servicer and bank sent collection letters to the husband seeking to collect on the wife's mortgage even though he was not obligated on it. Furthermore, plaintiffs contended that the loan servicer and bank engaged in a series of practices that violated the FDCPA, including threatening to take impermissible actions with respect to the debt, falsely representing that the borrowers had committed a crime, and continuing to call the them after repeated requests to cease all collection calls.

The loan servicer moved to dismiss on the basis that as a loan servicer it was not subject to the FDCPA or, alternatively, that it was exempt from liability under the FDCPA insofar as the debt was not in default when acquired. The bank argued that it was exempt from liability based upon its status as a "creditor." The court rejected the loan servicer's argument insofar as the debt was acquired while in default. Therefore, irrespective of its status as a loan servicer, it was still subject to liability under the FDCPA insofar as it was a nonoriginating debt holder. The court further held that the complaint did not indicate that the bank was a "creditor," and the cumulative effect of the allegations of the complaint were sufficient to establish that it was instead acting as a debt collector. The court held that the borrowers therefore had adequately pleaded their claims under the FDCPA, and reversed the dismissal of the complaint.

Bridge v. Ocwen Federal Bank, FSB, ___F. 3d ___, 2012 WL 1470146 (6th Cir. Apr. 30, 2012)

For more information, please contact Andrew M. Schneiderman or your regular Hinshaw attorney.

Rule 68 Allows For "Post-Offer" Fees, But Defendant Still Wins Summary Judgment Because Voicemail It Used Was Not a Communication

In *Zortman v. J.C. Christensen & Associates, Inc.,* Case No. 10-3086 (D. Minn. May 2, 2012), plaintiff debtor alleged that defendant debt collector violated Section 1692c(b) of the Fair Debt Collection Practices Act (FDCPA) by improperly communicating with a third party. The debt collector had left a voicemail on the debtor's cell phone, stating the debt collector's name and that it had an "important message." The debtor allowed her children to use her phone and they heard the voicemail message. The debt collector made a Fed. R. Civ. P. 68 offer of judgment to plaintiff debtor for $1,001, plus fees and costs through the date of the offer, then moved for summary judgment, arguing that: (1) the debtor's claim was moot because the debt collector made a Rule 68 offer of judgment to the debtor; and (2) the debt collector's message did not violate Section 1692c(b) of the FDCPA.

The district court held that the Rule 68 offer did not moot the debtor's claim because it did not encompass all the relief sought such as "post-offer" fees. But the court granted the debt collector's motion for summary judgment because the voicemail did not constitute a "communication." The court ruled that the unintended listener would have to make two key inferences for the message to fall within the "conveying of information regarding a debt" language of Section 1692a(2) of the FDCPA: (1) the debtor was being contacted in connection with a debt he or she owed even though the message did not identify him or her by name; and (2) the only reason that the debt collector would call the debtor is to collect a debt. Thus, the message was not a communication because it did not identify a consumer and a debt.

The district court distinguished other cases where it was held that a voicemail constitutes a communication, finding that those cases involved messages that conveyed more information than would be available from a hang-up or missed call. Further, the court disagreed with some courts' suggestions that debt collectors should use nontelephonic means to communicate with consumers, noting that the FDCPA specifically permits telephone calls from debt collectors. "Drawing a distinction that would allow a call but outlaw the corresponding voicemail would not be a fair reading of the [FDCPA] and would not advance consumer interests."

This is a win for the defense, but the opinion highlights the continuing struggle to comply with Foti and Section 1692c(b).

Zortman v. J.C. Christensen & Associates, Inc., Case No. 10-3086 (D. Minn. May 2, 2012)

For more information, please contact John P. Ryan or your regular Hinshaw attorney.

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