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Newsletters

Consumer & Class Action Litigation Newsletter - May 2012

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Act That Is Violation of FDCPA Not Automatically Actionable as Violation of Florida Consumer Collection Practices Act

Plaintiff debtor attempted to assert claims against defendant debt collector under the Florida Consumer Collection Practices Act (FCCPA) for failing to disclose its identity in two voicemail messages left for the debtor. The complaint failed to specifically identify which of the FCCPA's enumerated list of prohibited practices was violated. The debtor claimed that the failure to disclose the collector's identity was a violation of the Fair Debt Collection Practices Act (FDCPA) and, because Florida courts have previously held that consumers are entitled to the benefit of whichever of the statutes is more protective of the consumer, the alleged FDCPA violation constituted a FCCPA violation. The trial court granted judgment on the pleadings in favor of the debt collector.

The Florida Second District Court of Appeal affirmed. The court acknowledged the debtor's contention that a Florida consumer is entitled to the benefit of whichever is more protective of the consumer—the FDCPA or the FCCPA—but stated that "a consumer seeking to recover damages under either the FDCPA or the FCCPA must allege and prove a violation of the provisions of the act actually sued upon." The court noted that the FCCPA does not include any requirement that a debt collector disclose its identity in the voice messages. Instead, that act has a separate provision relating to caller identity disclosure that differs from that of the FDCPA in that it only requires identification if requested by the debtor. As there was no request for identification in this case, the court held that the debt collector did not violate the FCCPA. The court further held that in order "to successfully assert a claim under the FCCPA, a plaintiff must allege a violation of a specific provision of the FCCPA—not a violation of the FDCPA."

Read v. MFP, Inc., 2012 WL 1058876 (Fla. App. 2 Dist. Mar. 30, 2012)

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

FACTA Truncation—Which Credit Card Numbers Can Be Redacted?

The Fair and Accurate Credit Transactions Act (FACTA) requires truncation of credit card numbers on electronic receipts, specifically providing that the receipt must not display "more than the last 5 digits of the card number." In *Straaten v. Shell Oil Products Company LLC,*No. 09 C 1188, defendant vendor was sued in

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a class action for violating FACTA because it did not print the final four digits of the number visible on the credit card, but rather the last four digits of what it designates as the primary account number (which are the first nine numbers shown on the card). The vendor moved for an interlocutory appeal of the district court's denial of its motion for summary judgment, presenting the question of whether the terms "card number" and "primary account number" are interchangeable.

FACTA does not define the term "card number," and the U.S. Court of Appeals for the Seventh Circuit did not particularly care about a definition, noting that the purpose of FACTA, in limiting the amount of exposed digits on a receipt, was to avoid identity theft. The class representative did not assert that she, or any member of the class, was injured or damaged in any way; nor was the class put at higher risk of identity theft based upon the vendor's selection of digits. Only the statutory penalty of $100 - $1,000 per consumer for willful failure to comply with FACTA was sought, which could have resulted in over $1 billion in penalties.

The Seventh Circuit held that the vendor's reading of FACTA was not "objectively unreasonable," in light of the lack of any definition for the term "card number" and an absence of any increased risk to the customer. Thus, the court held that the vendor did not "willfully" violate FACTA, and it was not necessary to decide whether it had violated FACTA at all.

Straaten v. Shell Oil Products Company LLC, No. 09 C 1188 (7th Cir. Apr. 18, 2012)

For more information, please contact your regular Hinshaw attorney.

New York Supreme Court Holds That Bank Acted in Bad Faith in Foreclosure Proceeding

The Supreme Court of New York ruled that defendant bank acted in "bad faith" in prosecuting a foreclosure action and ordered the bank to pay nearly $200,000 in damages to plaintiff borrower, which money would be applied to the reduction of the principal balance of the home loan. The court also prohibited the bank from collecting any additional fees from the borrower other than the principal balance.

The bank had consistently maintained that it was unable to reduce the principal due to terms of the applicable pooling and servicing agreement (PSA). But it later conceded that there were no such provisions in the PSA. The bank also disclosed portions of the PSA which specifically excluded information on the mortgages included in the agreement, despite the court's request to produce the entire document and the 155-day delay in producing it. The court found that the bank's actions violated the provisions of the New York Civil Practice Law and Rules and the Uniform Court Rules, which require homeowners and lenders to act in good faith during settlement conferences.

Bank of America v. Lucido, 2009-03769 (*N.Y. State Supreme Court, Suffolk County,* NYLJ 1202549402511 Apr. 16, 2012)

For more information, please contact Concepcion A. Montoya or your regular Hinshaw attorney.

CFPB Plans for Administration of FDCPA

On March 20, 2012, the Consumer Financial Protection Bureau (CFPB) released a report outlining its plans for the administration of the Fair Debt Collection Practices Act (FDCPA). In its report, the CFPB explains the agency's intention to establish the first federal supervision program for credit and collection industry members. As part of this initiative, the CFPB recommends that debt collectors with more than $10 million in annual receipts resulting from consumer debt collection be subject to supervision, affecting approximately four percent of debt collection firms.

Additionally, the report discusses the CFPB complaint system and the agency's intention to begin accepting debt collection complaints by end of the year. In particular, the report explains some of the Federal Trade Commission's (FTC's) concerns with the collection of time-barred debt. It also mentions coordination of regulatory and enforcement efforts with the FTC.

These plans are not final and we will continue to report on them as they are developed.

The CFPB's first annual report summarizing its activities to administer the Fair Debt Collection Practices Act

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