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Newsletters

Consumer & Class Action Litigation Newsletter - December 2015

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Eighth Circuit Affirms Dismissal of FDCPA Claim Based on Attorney's Failure to Know Truth of Information in Sworn Affidavit

Janson v. Katharyn B. Davis, LLC, 2015 WL 7253244 (8th Cir. 2015)

Defendant law firm filed a lawsuit in Missouri state court against Janson for unpaid rent and possession of a property. In support of the complaint, one of the law firm's attorneys signed an affidavit as required by state law. The case went to trial and Janson asked the attorney about the affidavit. The attorney testified that the only basis he had for swearing to the truth of the affidavit was information he had obtained from the landlord's agent. The case went to trial and a judgment was entered in favor of the landlord and against Janson. Janson then filed a federal lawsuit against the law firm, claiming that its attorney violated the Fair Debt Collection Practices Act (FDCPA) when he swore to the affidavit without knowing whether the information contained in it was true. The district court dismissed the complaint and the U.S. Court of Appeals for the Eighth Circuit affirmed, noting that Janson did not allege that the attorneys swore to facts they knew to be false or that he did not actually rent the property or owe rent.

The court also stated that even if the attorney's attestation was literally false, Janson failed to allege that he or anyone else was misled by the falsehood. The court stated, "[a]bsent an allegation that he actually did not owe rent, Janson has not plausibly alleged that the defendant's practice mislead the state court in any meaningful way."

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The court also held that the *Rooker-Feldman* doctrine did not bar Janson's FDCPA claim. The court found that although Janson questioned the attorney about the affidavit before judgment was entered in the state court proceeding, the FDCPA suit was not directed at or attacking the state court judgment that he owed rent.

For more information, please contact Jennifer W. Weller.

Amendments to TCPA for Exemption of Federal Debts

The federal budget agreement proposed amendments — which subsequently became law — to the Telephone Consumer Protection Act (TCPA) allowing collection of federal debts using automatic telephone dialing systems (ATDS) to mobile phones. Prior to the amendment, loan servicers were allowed to make ATDS calls only after the person consented to being auto-dialed and verified his or her cellphone number. This new legislation comes in the wake of the requests of federal student loan servicers, such as Navient (formerly Sallie Mae) and Nelnet, to allow them broader authority to call people whose loans are in delinquency.

The amendments include the following:

The prohibition denoted in Section (A) "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call" will include an exemption to this provision so that the prohibition applies ***"unless such call is made solely to collect a debt owed to or guaranteed by the United States*"** (emphasis added).

Under Section (B), the prohibition "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes" will contain a similar exception, such that ***the prohibition does not apply if the call "is made solely pursuant to the collection of a debt owed to or guaranteed by the United States"*** (emphasis added).

The White House supported this initiative.

For more information, please contact your Hinshaw Attroney.

FCC and FTC to Jointly Enforce Consumer Protection Issues

The Federal Communications Commission (FCC) and Federal Trade Commission (FTC) recently announced that while each has independent authority to police actions of cellphone companies and other common carriers, the agencies will now work together to enforce consumer protection issues. The stated goal of this joint effort is to avoid duplicative or inconsistent oversight. The regulators will, among other efforts, share data and investigative techniques with one another.

In the announcement, it was emphasized that working together would not in any way limit or decrease either agency's independent authority, including the FCC's regulation of activities engaged in by common carriers and by noncommon carriers in connection with common carrier services, and the FTC's regulation of noncommon carrier activities engaged in by common carriers.

For more information, please contact your Hinshaw attorney.

FDCPA Statute of Limitations Begins at the Time Debtor's Account Is Frozen

Benzemann v. Citibank, N.A., Docket No. 14-266-cv (2d Cir. Nov. 16, 2015) (J. Cabranes, Pooler and Chin)

The U.S. Court of Appeals for the Second Circuit recently reversed the U.S. District Court for the Southern District of New York by holding that the statute of limitations for purposes of the Fair Debt Collection Practices Act (FDCPA) begins to run at the time that a bank freezes a debtor's bank account, not when the collector sends a restraining notice to the bank.

A Citibank subsidiary obtained a judgment against an individual named Andrew Benzemann; plaintiff in this action was named Alexander Benzemann. On or about December 14, 2011, Citibank froze plaintiff's account based on a restraining notice issued by an attorney, defendant Todd E. Houslanger. The restraining notice was dated December 6, 2011. On December 14, 2012, plaintiff filed suit, alleging violations of the FDCPA. The district court held that the FDCPA claim as against Houslanger was time-barred because the statute of limitations began to run on December 6, 2011, the date that the restraining notice was issued as that was the last potential violation of the FDCPA by Houslanger.

In reversing, the Second Circuit stated that the district court's approach created an anomaly: "the FDCPA claim accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit." *Id.* at *8. Focusing on the principle that a cause of action accrues when injury occurs, plaintiff could not have sued Houslanger until his bank account was frozen. Moreover, the Second Circuit was concerned that plaintiff had no knowledge or notice of the restraining notice until Citibank actually froze his account. Therefore, linking the statute of limitations to the time the restraining notice was issued would improperly shorten the already limited time for a plaintiff to file suit. Distinguishing itself from other federal circuit courts that have tied the statute of limitations to the date of mailing, the Second Circuit specifically held that the last chance for Houslanger to avoid violating the FDCPA was to ask Citibank not to freeze the account. The court therefore reversed the district court's decision dismissing the FDCPA claim.

For more information, please contact Concepcion A. Montoya.

Manually Made Calls Seeking Business Information Did Not Violate TCPA

Dun & Bradstreet (D&B) is in the business of selling credit reports, marketing lists and data services to businesses. During the course of conducting its business, D&B contacted Holly Freyja's cellphone on several occasions and left prerecorded voicemails in an attempt to acquire information about the commercial services provided by Freyja's company. After receiving the calls, Freyja looked online and found that D&B made similar calls to others. In October of 2014, Freyja filed a lawsuit in the U.S. District Court for the Central District of California against D&B on a class basis alleging violations of the TCPA. (*Freyja v. Dun & Bradstreet, Inc.*, Case No. 14-cv-7831 (C.D. Cal).

Specifically, Freyja claimed that D&B violated her right to privacy by making the calls because they were made without her consent and through the use of an automatic telephone dialing system (ATDS). The proposed class of consumers was believed to be in the tens of thousands and Freyja sought $500 per TCPA violation. In defending against Freyja's claims, D&B provided testimony that the calls to Freyja were made manually, not from an ATDS. Furthermore, D&B explained that it was not calling Freyja for the purposes of marketing or selling her anything, but rather to obtain information related to her business.

The district court dismissed the case on October 14, 2015, finding undisputed testimony showing that the calls were made manually and not from an ATDS. Further, the court ruled that the calls were made to acquire information about the commercial services of Freyja's business, not for the marketing purposes as required to maintain a claim under the TCPA. The court reasoned that the TCPA bans calls to sell property, goods or services, not calls to acquire information. The court noted that Freyjia's only evidence "remotely responsive" to the question of whether the conduct rose to the level of a TCPA violation was that she answered "yes" to the question "do you believe [D&B] could have possibly been trying to sell you some type of product or service?" The court ruled that Freyja's mere belief that the company "could have possibly" been trying to sell something, especially with no further foundation, did not raise a reasonable inference that this was the case. Freyja has since appealed the district court's decision to the U.S. Court of Appeals for the Ninth Circuit.

For more information, please contact Jason L. Santos.

$59.5 Million Proposed Class Settlement

Sykes v. Mel S. Harris and Associates, 09-cv-8486

Plaintiffs proposed a $59.5 million class settlement in restitution and fees for roughly 350,000 New Yorkers in *Sykes v. Mel S. Harris and Associates*. The class action challenged thousands of default judgments that were obtained against low income New Yorkers by means of "sewer service" and "robo-signing" on consumer debts.

The debts were originally owned by JP Morgan Chase, and then were sold to Leucadia National Corporation, a multibillion dollar asset management company. Of the $59.5 million settlement, Leucadia agreed to pay $51 million, with the Mel Harris firm's insurer paying $8 million. The process server, Samserv, agreed to pay $500,000. The attorneys representing the class also sought fees exceeding $17 million.

In addition to the monetary penalties, the proposed settlement included injunctions that would prevent three attorneys from Mel Harris and Associates from acting as an attorney in any consumer debt collection proceeding. Additionally, Leucadia agreed to cease collection efforts against all class members. Defendants also agreed to assist in vacating the default judgments entered against the class members.

This settlement comes on the heels of the rules that the New York Court of Appeals implemented requiring supporting affidavits to be filed by the entity that originated the debt and supporting documentation.

For more information, please contact Jonathan D. Drews.

Massachusetts Changes Its Licensing Requirements for Collection Law Firms

On November 2, 2015, the Massachusetts Division of Banks (the "DOB" or "Division") issued a letter that declared that Massachusetts collection law firms are required to be licensed as debt collectors under Mass. Gen. Laws ch. 93, § 24. The letter was in response to correspondence from a Massachusetts collection law firm inquiring whether a firm describing itself as "overwhelmingly concentrated in the area of consumer debt collection on behalf of its client," was required to be licensed or if the "attorney-at-law" exemption applied. The DOB explained that the answer is based upon a factual analysis regarding the extent of an individual firm's debt collection work.

Mass. Gen. Laws ch. 93, § 24A prohibits any person from, directly or indirectly, engaging in the business of a debt collector without first obtaining a license from the Division. At issue, however, was the applicability of the licensing exclusion for "attorneys-at-law licensed to practice in the Commonwealth who are collecting a debt on behalf of a client" under 209 CMR 18.02. In its letter, the DOB clarified that the determination "turns on the extent of the debt collection activity conducted by the firm." The Division reasoned that the Massachusetts definition of "debt collector" includes any person "who *regularly* collects or attempts to collect, directly or indirectly, a debt owed or due or asserted to be owed or due another" (emphasis added).

Accordingly, the DOB explained that licensure is required where the law firm's "principal purpose is the collection of debts, or where the firm regularly collects or attempts to collect debts owed or asserted to be owed by another." The Division stated that it would reach its determination on a case-by-case basis and would consider various factors including, but not limited to: (1) the relative portion of the firm practice that involves the collection of debts; (2) whether, and to what extent, the firm utilizes nonattorneys to engage in debt collection activity and whether such nonattorney work is directly supervised by attorneys; and (3) the extent of the firm's debt collection work that involves collecting debts through traditional legal activities (*e.g.* filing complaints) compared to its debt collection work through traditionally nonlegal activities (*e.g.* sending letters or calling debtors).

In the letter, the DOB gives Massachusetts collection law firms six months from the date of the letter to comply with its terms, noting "the debt collector licensing requirement for law firms composed of Massachusetts licensed attorneys, as set forth in this Opinion, is a new requirement that will not be imposed retroactively on affected law firm. Furthermore, the Division recognizes that immediate compliance by affected law firms is not feasible."

Many state debt collection statutes exempt attorneys from the licensing requirements. So it will be important to stay knowledgeable on this issue in the event other policymakers consider adopting a similar position.

For more information, please contact your regular Hinshaw attorney.