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Newsletters

Consumer & Class Action Litigation Newsletter - January 2016

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Plaintiff's Attempts to Turn Alleged "Clicking" and "Dead Air" into a TCPA Violation Rejected

Norman v. AllianceOne Receivables Mgmt., Inc., No. 15-1780, 2015 WL 9286778 (7th Cir. Dec. 22, 2015)

The Seventh Circuit Court of Appeals affirmed summary judgment in favor of a debt collector in a Telephone Consumer Protection Act (TCPA) case. The Seventh Circuit in *Norman v. AllianceOne Receivables Management, Inc.*, held that the plaintiff failed to demonstrate that the debt collector called his cell phone with an automated telephone device (autodialer).

According to the Court, "[a]utodialers use computer software to dial a phone number automatically and then, once a call is answered, the software connects the call recipient to a live operator. The Act forbids this."

In summarizing the plaintiff's argument as to why he believed he was called by an autodialer, the Court stated:

[Plaintiff] cites to AllianceOne's website, which advertises that its capabilities "include" autodialers. He also swears in a declaration that when he answered calls from AllianceOne, he heard a "pause," "clicking," and "dead air." He referred the court to a guide from the Federal Communication Commission, which explains that autodialers "often" result in "hang ups" and "dead air."

The debt collector responded by submitting a "log of the calls to Norman's phone to show that he was not autodialed" and that he was called manually. According to the debt collector's Vice President, "[t]he log listed a code (the word "MAN") next to Norman's cell phone number. The Vice President testified that the code means that calls to Norman were dialed manually." The district court also held that the plaintiff's evidence was insufficient to create a fact dispute because AllianceOne's website did not describe the practice for the calls to the plaintiff and the Federal Communication Commission's (FCC) guide

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was inadmissible hearsay.

The Seventh Circuit ruled that "[n]o reasonable jury could conclude from this evidence that an autodialer called [plantiff]." First, the Court rejected plaintiff's argument that "the district court weighed evidence and did not view it in the light most favorable to him." Second, the Court rejected plaintiff's argument that the FCC's guide supported his position that he was autodialed, holding, that the "guide said only that autodialers often produce dead air; it did *not* say the converse—that dead air means that a call was autodialed. Calls are dropped or paused for many reasons; the FCC guide could therefore not tell a rational factfinder why Norman experienced dead air or a pause on his calls." (emphasis in original). Third, the court rejected plaintiff's argument that the debt collector's website supported his belief that he was called with an autodialer, holding that the website "said only that the company's capabilities include autodialers, but not that it used that capability always or even often, let alone in cases like Norman's."

For more information, please contact your Hinshaw attorney.

Eleventh Circuit Holds That Chargeback for Overpaid Commissions not a FDCPA "Debt"

Surber v. McCarthy, Burgess & Wolff, Inc., No. 15–12296, 2015 WL 9583479 (11th Cir. Dec. 31, 2015)

In *Surber v. McCarthy, Burgess & Wolff, Inc.*, the Eleventh Circuit held that the Fair Debt Collection Practices Act (FDCPA) is not triggered where the obligation does not arise out of a *transaction* entered into primarily for a personal, family or household purpose. The Eleventh Circuit affirmed the District Court's summary judgment entered in favor of a defendant collection agency because the obligation at issue was not a "debt" as defined by the FDCPA. The appellate court reiterated that Ms. Surber's obligation arose out of a commercial contractual relationship with an insurance company based upon her independent contractor relationship as an insurance agent. Accordingly, the obligation to pay back unearned commissions did not arise out of a transaction entered into primarily for personal, family, or household purposes, and was therefore not a consumer "debt" as defined by the FDCPA.

Surber sold insurance policies for an insurance company as an independent contractor, and received commissions based on the annual premiums for the policies she sold. As part of the "Agent Contract" with the insurer, Ms. Surber was paid the full commission for the policies sold upfront, but was later charged back a pro-rata portion of the commission if the insured failed to pay the premium. In 2012, the insurance company and Surber terminated their relationship, and the insurance company attempted to charge back $3,954.87 from Ms. Surber for unpaid premiums. The insurance company eventually hired a collection agency to collect that amount. After the collection agency sent a letter Ms. Surber demanding payment for the unpaid premiums, Surber sued the collection agency in a putative class action, and asserted the collection agency's dunning letters sent to her and putative class members failed to provide statutory disclosures required by the FDCPA.

The District Court determined that the transaction at issue did not arise out of a transaction entered into for personal, family, or household purposes. Rather, the District Court determined the independent contractor "Agent Contract" was commercial in nature, and did not trigger the FDCPA because it was not based upon a "debt" as defined by the FDCPA.

The Eleventh Circuit's ruling focused on the nature of the transaction giving rise to the obligation at issue. The Court categorized the agreement as having a fundamentally commercial nature, such that no reasonable jury could determine that the obligation originated from a transaction that was primarily for personal, family, or household purposes. The Court specifically disavowed Ms. Surber's argument that the obligation was a consumer debt because she *intended to use* the commissions for personal expenses. Rather, the Court held that the plain language of the FDCPA required an examination solely of the underlying transaction itself, and rejected the plaintiff-appellant Surber's argument to look past the transaction that gave rise to the obligation, and focus on how Surber *used* the money after the transaction.

This ruling affirmed on the basis that it is a plaintiff's burden to demonstrate that the obligation is a "debt" that triggers the FDCPA, and noted that the record was devoid of proper evidentiary support to create a disputed issue of material fact. The court reiterated that not all obligations are "debts" that trigger the FDCPA, and by extension, the payment of commissions and related chargebacks were commercial in nature.

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Query: Does the opinion potentially limit the ability of FDCPA defendants to challenge on an evidentiary basis whether debts are "consumer debts" when the original transaction appears to be initially for a "consumer" purpose, but subsequent use of money lent indicates a "commercial" use? It remains to be seen whether similar claims with a different evidentiary record are pursued. However, it is clear that courts and parties must focus on whether the underlying *transaction* arises out of an obligation incurred primarily for personal, family or household purposes as a threshold question to resolve a FDCPA claim.

For more information, please contact West A. Holden or your regular Hinshaw Attorney.

Rhode Island Supreme Court Concludes that Foreclosure of an HOA Lien Extinguishes a First Mortgage

Twenty Eleven, LLC v. Michael J. Botelho et al., 2015 WL (R.I. Dec. 4, 2015)

Prior to December 4, 2015, there was uncertainty over the priority a condominium association obtained with a lien for unpaid condominium assessments in accordance with the Rhode Island Condominium Act, R.I. Gen. Laws § 34-36.1-3.16 (1956). The Rhode Island Supreme Court has replaced uncertainty with a harsh reality for holders of first mortgages on condominiums in Rhode Island.

In *Botelho*, the third-party purchaser at condominium lien sale filed a complaint to quiet title against the former owner/ borrower and his mortgagee on grounds that foreclosure of the condominium lien extinguished the prior recorded mortgage. The mortgagee moved to dismiss, and the Rhode Island Superior Court agreed finding that the third-party buyer took title to the condominium subject to the mortgage because no provisions within the condominium act extinguished a first mortgagee's priority position with respect to a subsequent condominium lien foreclosure deed.

On appeal, the Rhode Island Supreme Court reversed concluding without dispute that § 34-36.1-3.16 "operates so as to create a super-priority lien for at least some portion of a condominium association's outstanding assessments." Because general principles of foreclosure law provide that liens with lower priority are extinguished in a valid foreclosure sale, when a super-priority lien is foreclosed, that foreclosure extinguishes the first mortgage. The Court further noted that the condominium act includes a 30-day right of redemption by the first mortgagee, which in effect creates a conditional foreclosure of the super-priority lien. The Court offered the redemption period as "more protection" to lenders while recognizing the draconian nature of its holding that a condominium assessment foreclosure can wipe out a prior recorded and priority security interest. The Court specifically cited to and relied upon a highly publicized decision in *SFR Investments Pool 1, LLC v. U.S. Bank*, 334 P.3d 408 (Nev. 2014), where the Nevada Supreme Court likewise concluded that an HOA lien extinguishes a first mortgage.

For more information, please contact Samuel C. Bodurtha.

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