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Newsletters

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Service Areas

Consumer Financial Services

Hinshaw Thwarts Consumer's Attempt to Expand the Definition "Debt Collector" under FDCPA

Seo v. Education Credit Management Corporation, Case No. 1:15-cv-03703, 2016 WL 521065 (N.D. Ill. Feb. 9, 2016)

Hinshaw & Culbertson LLP lawyers convinced a district court judge in the Northern District of Illinois to grant a motion for judgment on the pleadings in the collector's favor in a Fair Debt Collection Practices Act (FDCPA) lawsuit where the debtor asked the court to expand the definition of a "debt collector." Although the debtor alleged the collector violated the FDCPA regarding post-bankruptcy discharge collection efforts on a federal student loan, the court reasoned that the collector was a guaranty agency acting in a fiduciary relationship with the U.S. Department of Education (DOE), and therefore, not a "debt collector" under the FDCPA. The court acknowledged that federal student loans are not generally dischargeable in bankruptcy and are subject to post-petition interest, which continues to accrue during the pendency of the bankruptcy.

The debtor alleged that collection efforts continued following discharge in violation of the FDCPA. In moving for judgment on the pleadings, the collector maintained that the student loan had not been completely paid, that post-petition interest accrued during the bankruptcy, and that the collector was a nonprofit guaranty agency acting in a fiduciary relationship with the DOE and

therefore not a "debt collector" under Section 1692a(6)(F)(i) of the FDCPA. In defending its position, the collector argued that the district court take judicial notice of decisions from other federal courts that have held that this collector was a guaranty agency acting pursuant to its relationship with the DOE. The court took judicial notice of the other decisions and further found that, at least, post-petition interest remained due and owing on the student loan.

This ruling demonstrates that in appropriate circumstances, defendants need not incur the burden and expense of discovery in order to get to summary judgment or go through the extensive process that most courts require with that motion, and can instead ask the court to take judicial notice as a viable option. This ruling also underscores the importance of reviewing the terms that are defined by the FDCPA while assessing the viability of any claim made.

Second Circuit Affirms Denial of Class Certification in FDCPA Action for De Minimus Recovery

Gallego v. Northland Grp. Inc., No. 15-1666-CV, 2016 WL 697383 (2d Cir. Feb. 22, 2016)

Debtor brought a class action against a debt collector alleging violations of the Fair Debt Collection Practices Act (FDCPA) by sending him and other class members a collection letter that gave a call-back number but did not specify the name of the person at that number. The district court dismissed the case for lack of subject matter jurisdiction on the ground that it did not raise a colorable federal question. The district court also denied the debtor's motion for class certification.

On appeal, the U.S. Court of Appeals for the Second Circuit held that although the FDCPA claims lacked merit, they were not so frivolous that they failed to raise a colorable federal question sufficient to support federal jurisdiction. The court further concluded that the district court did not abuse its discretion in denying class certification.

As to class certification, the court found that denial of certification was within the range of permissible decisions where it appeared that the intended result of the settlement was "mass indifference, a few profiteers, and a quick fee to clever lawyers." The court drew upon the *de minimis* recovery of the putative class. Specifically, the court concluded that Fed. R. Civ. P. 23(b)(3)'s superiority requirement was not met, focusing upon the "meaningless" amount — 16.5 cents, by the court's calculation — that each putative class member would receive from the settlement if all of the estimated 100,000 class members filed a claim.

The court also found the proposed agreement reached by the parties to be inadequate. The release provided that all class members who did not affirmatively opt out of the settlement would release their claims against the debt collector, not only under the FDCPA, but also under other federal laws, "state law, New York City law (including the New York City Administrative Code), common law, territorial law, or foreign law." The court found that the absentee class members' interests would not be best served by a settlement that required them to release any and all claims relating to similar letters from the debt collector in exchange for as little as 16.5 cents — or for no money at all.

Sixth Circuit Court of Appeals Affirms "Prior Express Consent" in Health Care Collections Case

Baisden v. Credit Adjustments, Inc., No. 15-3411, 2016 WL 561735 (6th Cir. Feb. 12, 2016)

The U.S. Court of Appeals for the Sixth Circuit held that two hospital patients consented to a debt collection agency's automated calls by providing their cellphone numbers to the hospital, upholding a the U.S. District Court for the Southern District of Ohio's decision to throw out the Telephone Consumer Protection Act (TCPA) suit. Relying upon *Mais v. Gulf Coast Collections Bureau*,768 F.3d 1110 (11th Cir. 2014), the court reasoned that the patients provided prior express consent under the meaning of the law to debt collector by way of the hospital. The court stated:

> In sum, we find *Mais* persuasive and adopt its conclusion that consumers may give 'prior express consent' under the [Federal Communications Commission's] FCC's interpretations of the TCPA when they provide a cell phone number to one entity as part of a commercial transaction, which then provides the number to another related entity from which the consumer incurs a debt that is part and parcel of the reason they gave the number in the first place.

Plaintiff-patients both received automated calls from defendant third-party collector, on behalf of a medical provider. At the time of treatment, these patients filled out forms consenting to medical and surgical care, as well as a release of

information that allowed for the hospital to use their personal information for billing and payment purposes. While the debt was incurred at the hospital, an independent anesthesiology group provided anesthesiology services, the fees for which were the basis of the unpaid medical bills.

The district court granted summary judgment in favor of the debt collector, holding that the patients had given their consent to the hospital, which in turn passed to the debt collector. On appeal, the patients contended that they gave their information to the hospital, not the third party medical provider, and therefore the debt collector had no right to use their numbers. The Sixth Circuit rejected that argument, reasoning that the third party medical provider "has a significant relationship" to the hospital, patients, and most critically, the debts owed by the patients that arose from the transactions in which the patients provided their cell phone numbers.

The opinion analyzes at length all prior FCC guidance on the issue of prior express consent, including the controversial 2015 order, which will be helpful when needing to parse out the issue in briefs.

Fourth Circuit Rejects Motion to Compel Arbitration in FDCPA Putative Class Action

Hayes v. Delbert Servs. Corp., No. 15-1170, 2016 WL 386016 (4th Cir. Feb. 2, 2016)

In *Hayes v. Delbert Servs., Corp.*,the U.S. Court of Appeals for the Fourth Circuit held that an arbitration agreement between the lender, loan servicer and borrower was unenforceable. The borrower received an online payday loan from a lender owned by a member of the Cheyenne River Sioux Tribe. The loan agreements provided that disputes between the borrower and payday lender, or any assignee, would be resolved by binding arbitration. Specifically, the arbitration would be "conducted by the Cheyenne River Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement." Each agreement further provided that "[THE AGREEMENT] IS MADE PURSUANT TO A TRANSACTION INVOLVING THE INDIAN COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AND SHALL BE GOVERNED BY THE LAW OF THE CHEYENNE RIVER SIOUX TRIBE. The arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement." Another provision in each agreement stated that the arbitrator would not apply "any law other than the law of the Cheyenne River Sioux Tribe of Indians to this Agreement."

Relying upon U.S. Supreme Court precedent, the Fourth Circuit reversed the U.S. District Court for the Eastern District of Virginia's order compelling arbitration. The court held that the agreement purported to "renounce wholesale the application of any federal law to the plaintiffs' federal claims." The court reasoned that the agreement surreptitiously waived federal rights through the guise of a choice of law clause.

The court also refused to sever the arbitration clause from the agreement, reasoning that the offending provisions went to the core of the arbitration agreement. The court stated that it was "clear that one of the animating purposes of the arbitration agreement was to ensure that Western Sky and its allies could engage in lending and collection practices free from the strictures of any federal law."

For more information, please contact your Hinshaw attorney.

Eighth Circuit Concludes that Post-Judgment Actions are not Subject to the FDCPA's Venue Provision and Equitable Tolling does not Apply to FDCPA's Statute of Limitations

Hageman v. Barton, No. 14-3665, 2016 WL 1212235 (8th Cir. Mar. 29, 2016)

In *Hageman v. Barton*, the U.S. Court of Appeals for the Eighth Circuit held that registration of a foreign judgment and related garnishment proceedings are not legal actions against the consumer, and therefore, do not trigger the FDCPA's venue provision. Due in large part to the U.S. Court of Appeal for the Seventh Circuit's holding in *Suesz v. Med-1 Sols., LLC,* 757 F.3d 636 (7th Cir.), *cert. denied,* 135 S. Ct. 756, 190 L. Ed. 2d 628 (2014), there has been a recent increase in FDCPA ligation alleging violations of §1692i's venue provision, which provides:

> Any debt collector who brings *any legal action on a debt against any consumer shall* ... (2) in the case of an action not [to enforce an interest in real property securing the consumer's obligation], bring such action only in the judicial

district or similar legal entity (A) in which such consumer signed the contract sued upon; or (B) in which such consumer resides at the commencement of the action.

15 U.S.C. §1692i. Debtors have brought 1692i claims not only based upon the filing of collection lawsuits, but also the filing of post-judgment enforcement proceedings.

In November 2012, defendant collection attorney filed a collection action against plaintiff debtor in Missouri state court. On December 5, 2012, defendant obtained a default judgment. Thereafter, on March 26, 2013, the collection attorney filed the judgment in Madison County, Illinois to register the foreign judgment. Plaintiff debtor neither worked nor resided in Madison County. Instead, he worked in a different Illinois county. The creditor was located in Missouri. Finally, defendant attorney initiated garnishment proceedings, again in Madison County, Illinois. On December 4, 2013, the court entered a Wage Deduction Order authorizing deductions from the debtor's wages.

On December 19, 2013, plaintiff debtor brought an FDCPA suit pursuing claims under 1692i as well as the following theories: defendant attempted to collect interest and costs above the amounts authorized by the Missouri judgment, and defendant misrepresented himself as the attorney for plaintiff's creditor.

The Eighth Circuit further held that the *Rooker–Feldman* doctrine did not apply, reasoning that the debtor did not seek relief from the either the Missouri judgment or the Illinois garnishment order. Instead, he asserted statutory claims based upon defendant's actions in the process of obtaining this judgment and order. Therefore, the Court had jurisdiction over these federal claims.

The Eighth Circuit held that Section "1692i's venue restriction does not apply to the simple act of registering a foreign judgment in Illinois or to proceedings pursuant to Illinois law to obtain a garnishment order against a debtor's employer." The court reasoned that the FDCPA's venue provision applies only to legal actions "on a debt against any consumer."

In addressing the debtor's argument that the defendant's improper ongoing conduct following entry of the Missouri judgment tolled the FDCPA's one year statute of limitations, the court followed its earlier decision in *Mattson v. U.S. W. Comm'ns, Inc.,* 967 F.2d 259 (8th Cir.1992). There, the Eighth Circuit established that the FDCPA's statute of limitations is jurisdictional, and therefore, is not subject to equitable tolling. Consequently, the debtor's claims based upon conduct prior to the Illinois proceedings was time-barred.

This decision strengthens the defense to venue claims based upon post-judgment proceedings in Illinois courts. The Eighth Circuit also adhered to its previous holding that the FDCPA's statute of limitations is jurisdictional, despite many courts' criticism of this approach, including the U.S. Cout of Appeals for the Seventh and Ninth Circuit.

FDCPA Claims Related to Venue of State Court Collection and Garnishment Action Barred by Statute of Limitations and *Rooker-Feldman* Doctrine

Michael Marienthal v. Asset Acceptance, LLC and Wright, Lerch, & Litow, LLP, No. 1:14-1636, 2016WL795902 (SD. Ind.)

The U.S. District Court for the Southern District of Indiana granted debt collector and law firm’s motions to dismiss in a Fair Debt Collection Practices Act (FDCPA) case alleging violations based on state court collection activity. In *Michael Marienthal v. Asset Acceptance, LLC and Wright, Lerch, & Litow, LLP,* the courtheld that the debtor’s claims were barred by the statute of limitations and the *Rooker-Feldman* doctrine.

On May 23, 2011, the law firm filed a small claims collection action in Perry Township small claims court in Marion County, Indiana on behalf of the debt collector related to an unpaid credit card debt. The debtor did not reside in Perry Township or sign a contract there that formed the basis for the debt. An agreed judgment was entered on August 3, 2011, and thereafter the law firm filed a motion for proceedings supplemental on May 21, 2012. The Perry Township's small claims court entered a final order of garnishment on October 18, 2013. On November 25, 2014, Marienthal filed a motion to set aside and revoke the final order of garnishment and later withdrew the motion after filing this federal suit on October 7, 2014.

The debtor filed a three count complaint alleging several violations of the FDCPA and a state law conversion claim against the collection firm and the owner of the debt. The debtor claims a violation of the FDCPA's venue provision, §1692i. The collector and law firm moved to dismiss the §1692i claim arguing that the FDCPA's one year statute of limitations barred the §1692i claim. They moved for dismissal on the remaining claims based on the *Rooker-Feldman* doctrine.

As to his §1692i claim, plaintiff responded that the discovery rule and equitable tolling saved his claim from the applicable statute of limitations. He claimed that he was not aware that he had a cause of action based on the venue issue until the U.S. Court of Appeal for the Seventh Circuit decided *Suesz v. Med-1 Solutions* case in 2014 . 757 F.3d 636 (7th Cir. 2014).

The court rejected the debtor's arguments because he knew of the arguable FDCPA claim on May 23, 2011, when the small claims suit was filed in a township other than the one in which he resided or signed the contract giving rise to the debt. Because his federal complaint was not filed until October 7, 2014, more than two years after the statute of limitations ran, his claim was barred.

As to the remaining FDCPA claims, the court followed *Harold v. Steele*, 773 F.3d 884 (7th Cir. 2014), and held that the debtor alleged no extra judicial injury that would provide an exception to the *Rooker-Feldman* doctrine. The court also declined to exercise supplemental jurisdiction over a related state law conversion claim, dismissing the entire case. Plaintiff debtor has appealed.