



Newsletters

Consumer Law Hinsights - January 2020

January 23, 2020

Welcome to **Consumer Law Hinsights** a monthly compilation of nationwide consumer protection cases of interest to financial services and accounts receivable management companies. As a bonus, once each quarter we also include the most popular posts from our blog, [Consumer Crossroads](#), in the areas of mortgage loan servicing, debt collection, and regulatory compliance and enforcement.

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You can also expand each of the topics below to read our full analysis of the cases and blog posts covered in this edition.

Three Issues to Watch in 2020

I. Constitutional Limits of the TCPA

The U.S. Supreme Court has already granted *certiorari* in one case considering the Constitutional limits of the Telephone Consumer Protection Act (TCPA). There are two more cases in which the parties are seeking *certiorari* to further consider the issue.

In *Barr v. American Association of Political Consultants*, the petitioners have challenged the constitutionality of a 2015 exception to the TCPA's autodialer ban. The exception permits robocalls made by the government's debt collectors. In this case, political consultants challenged the law, and the trial court held that the TCPA, including the exception, was constitutional under the First Amendment despite the new content-based exception. On appeal to the U.S. Court of Appeals for the Fourth Circuit, the case was reversed, the amendment was held not constitutional, and the Fourth Circuit severed the exception from the TCPA. The U.S. filed a petition for a writ of *certiorari*, and the Supreme Court agreed to consider "whether the government-debt exception to the Telephone Consumer Protection Act of 1991's automated-call restriction violates the First Amendment, and whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute." There are two additional cases with *certiorari* pending: *Facebook v. Duguid* and *Charter Communications Inc., et al. v. Steve Gallion*. Both could further implicate the metes and bounds of the TCPA's constitutionality if *certiorari* is granted.

II. Constitutionality of the CFPB

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In March, the U.S. Supreme Court will hear oral arguments in the case of *Seila Law LLC v. CFPB*, a case that considers the constitutionality of the CFPB. In *Seila Law*, the plaintiff argues that the CFPB's structure violates the Constitution's separation of powers because it is an independent agency headed by a single Director. The plaintiff argues that because the Director exercises substantial executive power, coupled with the fact that she can be removed by the President only for cause, then the CFPB is unconstitutionally structured.

III. CFPB's Proposed Rulemaking to Implement the FDCPA to Modern Forms of Communication

Although enacted in 1977, the Fair Debt Collection Practices Act (FDCPA) has never had a detailed set of rules to illuminate how best to follow the statute. In May 2019, the CFPB issued a Notice of Proposed Rulemaking to implement the FDCPA. The rollout of the rules has been delayed, but it is anticipated that the proposed rules will offer guidance on the application of the 40 year old FDCPA to modern forms of communication, such as text messages. In addition, there are safe harbor rules for communications and guidance on "limited content" messages that will not constitute communications covered by the FDCPA.

Calls to a Reassigned Number are not Actionable under the TCPA

Wrong number cases continue to be a major driver of individual and class action TCPA litigation. The U.S. District Court for the District of Massachusetts recently joined a line of cases holding that callers have a right to reasonably rely upon the prior subscriber's consent when placing calls to a reassigned number. In the case, the plaintiff alleged that he received prerecorded calls without his consent. The calls were intended for a party whose number was reassigned after the party had given defendant consent to call. Defendant argued it was not liable under the TCPA because it was reasonably relying upon the party's consent when making the calls. Plaintiff argued reasonable reliance was not a valid defense.

In examining the issue, the court found that "[a]lthough the text of the TCPA does not provide for reasonable reliance, this Court finds persuasive the FCC's order emphasizing that the TCPA does not require the impossible of callers. It is unclear what else, if anything, [defendant] could have done to ensure the numbers of [the called parties] had not been reassigned." The case also highlighted a challenge on the class treatment of wrong party TCPA claims, observing that the competing expert reports in the case demonstrated that detecting a number reassignment is "either impossible, or at least highly unreliable." The court looked to the expert reports to underscore "the difficulty and unreliability associated with matching telephone numbers to subscribers."

The case is *Sandoe v. Bos. Sci. Corp.*, No. CV 18-11826-NMG, (D. Mass. Jan. 8, 2020).

Statute of Limitations Disclosure from Debt Buyer does not Violate the FDCPA

A debt buyer collecting on debt outside the statute of limitations included the oft used disclosure explaining: "*The law limits how long you can be sued on a debt and how long debt can appear on your credit report. Due to the age of this debt, we will not sue you for it or report payment or non-payment of it to a credit bureau.*"

The plaintiff alleged the letter violated the FDCPA in two ways: (1) the consumer argued the letter was misleading because it said defendants "will not" sue the consumer instead of saying they "cannot" sue him; and (2) the disclosure failed to explain that a partial payment or a promise to pay would restart the statute of limitations. The defendants argued the letter was neither false nor material, and was required by the CFPB and a related FTC consent order. As noted by the court, these issues are subject to much litigation and there are varying opinions on the legality of the disclosure.

Here, the U.S. District Court for the District of Colorado agreed with the defendants. First, the court found that use of the words "will not" rather than the word "cannot," in context, was not misleading. Following related authority, the district court held that the letter's disclosure concerning the age of the debt was not misleading because it "'uses basic language (1) that conveys the substance of the underlying legal concept and (2) clearly informs the consumer that the [d]efendants will not sue them based on the age of the debt.'" The court also asserted that its reasoning was bolstered by the fact that the "will not" sue language "was consented to by the FTC and CFPB, regulatory bodies with enforcement authority over the FDCPA."



Additionally, the court found that defendants were not required to disclose that a partial payment would potentially restart the statute of limitations. First, the court determined that in the state in question a payment would not have reset the limitations period. The court also observed that while some courts have required such disclosures, they have not stated what such disclosure language could or should be. Depending on a state's statute of limitations, there could be room for disagreement about the precise scope of a state's statute of limitations and how it is applied.

Finally, the court observed that the FDCPA does not require a revival disclosure, but noted that the CFPB is currently considering prescribing rules addressing such disclosures. Based on these facts and factors, the court concluded that no revival disclosure was required by the FDCPA.

The case is *Goodman v. Asset Acceptance LLC, et al.*, No. 18-cv-01667-RM-KMT (D. Colo. Dec. 20, 2019).

Consumer Crossroads Blog | Quarterly Highlights

Fifth Circuit Rules For-Profit Student Loans Are Dischargeable Without Proof of "Undue Borrower Hardship"

Many student loan borrowers, lenders, and servicers operate under the presumption that student loans are generally not dischargeable in bankruptcy, absent an "undue hardship." That notion may no longer be a bright line rule, following a recent ruling by the Fifth Circuit Court of Appeals... [>>Read more](#)

Senate Hearing Panel Suggests a Bipartisan National Data Privacy Standard Could Include a Private Right of Action

A hearing at the Senate Committee on Commerce, Science, and Transportation explored the contours for a comprehensive and bipartisan federal data privacy law. Titled "Examining Legislative Proposals to Protect Consumer Data Privacy," the hearing featured an all-female panel of experts, including two former FTC leaders, and representatives from industry, academia, and consumer rights groups... [>>Read more](#)

U.S. Supreme Court Resolves Circuit Split, Applies Occurrence Rule to FDCPA Statute of Limitations

Last year, we [reported](#) on the Supreme Court's grant of *certiorari* in *Rotkiske v. Klemm* to resolve a split in circuits on the Fair Debt Collection Practices Act's (FDCPA) statute of limitations. Recently, in an 8:1 [opinion](#) delivered by Justice Thomas, the Court concluded that the one-year statute of limitations in the FDCPA begins to run when the violation occurs, not when the violation is discovered... [>>Read more](#)