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Newsletters

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Consumer Law Hinsights is a monthly compilation of nationwide consumer protection cases of interest to financial services and accounts receivable management companies, brought to you by Hinshaw & Culbertson LLP.

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Seventh and Eleventh Circuits Scale Back Scope of TCPA in Narrow Reading of ATDS

The Seventh and Eleventh Circuits provided grammar lessons and eliminated the least incorrect options to evaluate what constitutes an automatic telephone dialing system (ATDS) under the Telephone Consumer Protection Act (TCPA). They both ultimately held that a device must be capable of storing or producing telephone numbers using a random or sequential number generator, not merely capable of storing numbers.

In *Gadelhak v. AT&T Services, Inc.*, the Seventh Circuit analyzed the language of §227(b)(1), which defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. §227(b)(1). In doing so, the court focused on grammatical aspects of the statute. Specifically, they centered on interpreting what portion of the statute is modified by the phrase "using a random or sequential number." There were four potential interpretations:

- The first interpreted "using a random or sequential number generator" to modify both the words "store" and "produce," such that "a device must be capable of performing at least one of those functions using a random or sequential number generator" to qualify as ATDS.
- The second interpreted the phrase "using a random or sequential number" as modifying only the "telephone numbers" such that it encompasses "only equipment that dials randomly or sequentially generated numbers." *Id*.
- The third, the Seventh Circuit explained, could be interpreted to mean that "using a random or sequential number" modified only the word produce, and expanding to cover any equipment that could store or dial numbers.
- Fourth and finally, the court said it could be interpreted to mean that "using a random or sequential number" under the statute "could describe the

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manner in which the telephone number are to be called, regardless of how they are stored, produced, or generated."

The Seventh Circuit eliminated the most incorrect options, and landed on the first interpretation. It explained that while the application was "imperfect," it was the least incorrect reading because it "lack[ed] the more significant problems of the other three." The court found it significant that the comma was placed before "using a random or sequential number generator," indicating the legislature intended the modifier to apply to the entire preceding clause.

The Eleventh Circuit came to a similar conclusion in *Glasser v. Hilton Grand Vacations*. After commenting that the statute is not well-drafted and scrutinizing the phrase "using a random or sequential number generator" the court found that this clause modifies both "store" and "produce." Their conclusion was supported by the fact that when two conjoined verbs ("to store or produce") share a direct object ("telephone numbers to be called"), a modifier following that object customarily modifies both verbs. The court also found that the comma separating the phrase "to store or product telephone numbers to be called" from the phrase "using a random or sequential number generator" indicates that the clause modifies both "store" and "produce."

According to the Eleventh Circuit, the expansive approach urged by the plaintiff and taken by the FCC would make every smartphone in America an auto-dialer. The court underscored that constitutional avoidance principles also support their interpretation with questions such as, "[w]ould the First Amendment allow Congress to punish every unsolicited call to a cell phone?" and "how could it be consistent with the First Amendment to make exceptions for calls with a specific content, such as the exception for calls about government debts?" The court acknowledged that such an approach goes too far.

The Seventh and Eleventh Circuit's narrow interpretation of ATDS widens the split with the Ninth Circuit's expansive interpretation in *Marks v. Crunch San Diego*, 904 F.3d 1041 (9th Cir. 2018).

The cases are *Gadelhak v. AT&T Services, Inc.*, --- F.3d ___, No. 19-1738 (7th Cir. Feb. 19, 2020) and *Glasser v. Hilton Grand Vacations*, --- F.3d ---, No. 18-14499 (11th Cir. Jan. 27, 2020).

Eleventh Circuit Eliminates Guaranty Agencies from Scope of FDCPA as They Are Not Debt Collectors

A student's loan servicer deferred her loans because she was enrolled in school part time. During the deferment, the consumer received a letter from the Pennsylvania Higher Education Assistance Agency (Agency) stating that the Agency had "'paid a default claim on your student loan(s) identified below' and was 'now the legal owner of your loan(s)'" and indicated she was "'required to pay [her] loan(s) in full immediately'" to the Agency. The consumer believed the letter was sent in error, so she did not respond. After receiving another letter, she called the Agency, which told her she did not owe anything to the Agency. She received a third letter, but believed it was part of a fake debt collection scam in light of the Agency's assurance she did not owe it any money. After garnishment notices were sent to her employer, the employer started garnishing the consumer's wages; she filed suit alleging, among other things, violations of the Fair Debt Collection Practices Act (FDCPA).

On appeal, the Eleventh Circuit observed that the question before the court was "whether a guaranty agency for federal student loans qualifies as a 'debt collector' under the [FDCPA] § 1692a(6), when it mistakenly attempts to collect a nonexistent student-loan debt." The court noted that the FDCPA excludes "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity ... is incidental to a bona fide fiduciary obligation." Additionally, the court explained it had previously held that "a guaranty agency acts 'incidental to a bona fide fiduciary obligation' when it attempts to collect a debt from a borrower who defaulted on a federal student loan."

The Eleventh Circuit noted that the plain text of the FDCPA says "the exception applies whenever a person attempts to collect any debt that is 'owed or due *or asserted to be owed or due* another' if the activity 'is incidental to a bona fide fiduciary obligation.'" (emphasis added). According to the court, if they were to apply the consumer's interpretation of the phrase "'incidental to a bona fide fiduciary obligation' it would read out of the statute the language about debts 'asserted to be owed or due another.'" Therefore, the court held that the text of the FDCPA "makes clear that a person may attempt to collect a debt 'incidental to a bona fide fiduciary obligation' whether the debt sought to be collected is 'owed or due' another or only asserted to be owed or due another.'"

The case is *Darrisaw v. Pennsylvania Higher Education Assistance Agency*, --- F.3d ---., No. 17-12113, (11th Cir. Feb. 7, 2020).

Sixth Circuit Eliminates Property Preservation Company from Scope of FDCPA as It Is Not a Debt Collector

After a non-judicial foreclosure, the bank retained a property preservation and maintenance company to secure and maintain the property. Following the sale of the property, there remained a deficiency balance. After the redemption period, the preservation company posted notices on the front entrance of the property advising the consumer of "certain rights and options that may be available" to her. The consumer never responded, the company determined that the property was vacant, and the bank instructed the company to secure the property—which it did. Given that all her personal possessions were in the house, the consumer claimed it should have been obvious to the company that the property was not vacant. The consumer sued, claiming these actions "'violated the FDCPA by dispossessing plaintiff from her home and her personal property when there was no legal right to possession'" and, specifically, violated § 1692f(6) of the FDCPA.

The Sixth Circuit observed the consumer did not argue that the company met the general definition of "debt collector," only the limited definition of "debt collector" under § 1692f(6), which provides that a "[debt collector] also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." The court explained that when the statutory redemption period ended without redemption by the consumer, the mortgage was extinguished. At that time, the consumer's rights in and to the property were also extinguished. Therefore, the court found that the company's conduct at issue occurred after the mortgage had been extinguished, and after the purchaser of the house took legal title to the property. The court determined the company was not acting to enforce a security interest, because no security interest existed and did not meet the limited definition of a debt collector under § 1692f(6).

The case is *Thompson v. Five Brothers Mortg. Co. Servs. & Securing Inc.*, --- F.3d ---, No. 19-1637 (6th Cir. Jan. 27, 2020).

Award of Attorneys' Fees Not a Debt Under FDCPA

A consumer was subject to an Arizona state court judgment arising from a home equity credit agreement. The judgment awarded attorneys' fees to the bank on two independent bases. First, was a term within the loan agreement that, "'Trustor shall pay all reasonable costs and expenses before and after judgment, including without limitation, attorneys' fees, ... incurred by Beneficiary in protecting or enforcing its rights under this Deed.'" The state court found that the bank incurred fees as a result of "'protecting or enforcing its rights under the Deed of Trust'" and ordered the consumer to pay attorneys' fees. Further, the state court held that Arizona law created an independent basis for the attorneys' fees, finding, among other actions, that the consumer's "'rambling, 36-page, 252 paragraph complaint'"—which asserted claims barred by statute—were groundless and ran afoul to Arizona's Rules of Civil Procedure. The bank attempted to collect the attorneys' fee award from the consumer, and the consumer sued alleging violations of the Fair Debt Collection Practices Act (FDCPA).

The defendant argued that the FDCPA did not apply to the attorneys' fees judgment because it was awarded as a sanction under Arizona law and because such an award does not meet the definition of a consumer debt under the FDCPA. In granting defendant's motion to dismiss, the court observed that the FDCPA defines a debt as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment." The court explained that although the term "transaction" is not defined in the FDCPA, "the consensus judicial interpretation" is that the statute is limited to "obligations to pay arising from consensual transactions, where parties negotiate or contract for consumer-related goods or services." To evaluate whether the debt arose out of a consumer transaction, the court focused its examination on the underlying obligation. In addition, the court observed that the appropriate point in time for determining the character of a financial obligation was when the obligation arose.

The court held the awarded attorneys' fees only arose after the bank was forced to enforce its rights under the loan agreement in the lawsuit. The obligation to pay the attorneys' fees was created after the state court entered judgment against the consumer, and as a result of a finding that the claims were without merit. The attorneys' fee award was not the type of consensual transaction where the parties contracted or negotiated for a consumer good or service, and it was not a debt as defined under the FDCPA.

The case is *Lynaugh v. Vincent*, No. 19-4643 (D.Ariz. Feb. 11, 2020).