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Newsletters

Consumer & Class Action Litigation Newsletter - January 2012

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Consumer & Class Action Litigation Alert* Now *Consumer & Class Action Litigation* *Newsletter

You may have noticed that the name of this publication has been changed from the *Consumer & Class Action Litigation Alert* to the *Consumer & Class Action Litigation* Newsletter. The name change better reflects the type of publication this is, namely a monthly newsletter designed to report on specific cases, legal developments, trends and other relevant news across the United States that is helpful across industry boundaries. While the publication's name has changed, the subjects covered and the quality reporting and analysis our readers have come to expect will not.

For further information or to provide any comments or suggestions, please contact the editors of the *Consumer & Class Action Litigation* Newsletter, Barbara Fernandez or your regular Hinshaw attorney.

Tenth Circuit Rejects *Foti*-Type Claim

In *Marx v. General Revenue Corp.*, ___ F.3d ___, 2011 WL 6396478 (10th Cir. 2011), the U.S. Court of Appeals for the Tenth Circuit addressed the issue of whether a fax sent to plaintiff debtor's employer violated the Fair Debt Collection Practices Act's (FDCPA's) provision against debt collector communications with third parties. The fax displayed defendant debt collector's name, logo, address and phone number and contained an "ID" number representing the debt collector's internal account number for the debtor. The form indicated that its purpose was to "verify [e]mployment" and to "[request] employment information" and contained blanks for the debtor's employer to fill in the debtor's employment status, date of hire, corporate payroll address and position, and to note whether the employment was full- or part-time.

The court held that the fax was not a "communication" under the FDCPA because it did not convey information "regarding a debt." The court noted that there had been no evidentiary showing that the debtor's employer either knew or inferred that the fax involved a debt. The court rejected the dissent's position that the fax conveyed information regarding the debt even if the third party did not know the document concerned a debt, stating, "the dissent's assertion that information regarding a debt is 'conveyed' to a third party even if the third party has no way of ascertaining that fact strikes us as totally inconsistent with, i.e., 'repugnant to,' the FDCPA's express purpose 'to eliminate abusive debt

Attorneys

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Service Areas

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collection practices.'"

Marx v. General Revenue Corp., ___ F.3d ___, 2011 WL 6396478 (10th Cir. Dec. 21, 2011)

For more information, please contact Jennifer W. Weller or your regular Hinshaw attorney.

Legislature Kills TCPA Bill

Congressman Lee Terry (R-Neb.) introduced a bill in 2011 to update the Telephone Consumer Protection Act (TCPA) to allow businesses to use assistive telecommunications technology, such as predictive dialers, to contact consumers on their wireless numbers for calls that do not constitute a solicitation, including payment reminders and third-party debt collection calls. Currently, assistive dialing technology can be used to contact cell phone numbers only if a consumer gives "prior express consent," the definition of which is narrowly construed.

Last month, Rep. Terry asked that the bill, called The Mobile Informational Call Act, not be advanced, after facing backlash over its content from constituents and consumer groups opposing the bill, who cited, among other concerns, the fear that consumers would be charged cell phone minutes for receiving "robocalls."

There is no speculation as to whether the bill will resurface, given Rep. Terry's comment that "We're driving a stake through its heart. Dead. Done. Buried." Proponents of the bill note that its failure to pass will negatively impact the ability of financial institutions, lenders and creditors to recover past due accounts receivable.

For more information, please contact your regular Hinshaw attorney.

Seventh Circuit Reverses District Court's Reduction of Attorneys' Fees Award

The U.S. Court of Appeals for the Seventh Circuit found that a district court erred in reducing plaintiff employee's $131,665.88 request for attorneys' fees in a retaliation case brought under Title VII of the Civil Rights Act of 1964, as amended, to $70,000 based in part on the existence of a contingency agreement. The Seventh Circuit noted that while a district court has authority to prevent excessive fee recovery, it is limited to determining whether the requested fees are reasonable based upon the prevailing market rate, without regard to the total amount that the plaintiff's attorneys would recover.

The appellate court held that in determining an award of attorneys' fees to the prevailing party, the district court may not reduce an attorney's hourly rate or disregard hourly-billing attorneys' third-party affidavits regarding rates charged for comparable work solely because the attorney has a contingent fee agreement with the plaintiff. The district court further erred in: (1) reducing counsel's requested hourly rate due to counsel's failure to introduce evidence of fee awards in contested cases that approached instant requested rate; and (2) taking judicial notice of the consumer price index without notifying parties that it was considering use of said formulas to resolve instant fee question.

Pickett v. Sheridan Health Care Center, No. 11-2146 (7th Cir. Dec. 15, 2011)

For more information, please contact Barbara Fernandez or your regular Hinshaw attorney.

Seventh Circuit Confirms That Fines Are Not Debts Under FDCPA

The U.S. Court of Appeals for the Seventh Circuit affirmed the dismissal of plaintiff debtor's case against defendant debt collection law firm for alleged violation of the Fair Debt Collection Practices Act (FDCPA) because the debts at issue were not "debts" as defined by the FDCPA.

The city of Chicago retained the debt collector, a law firm, to collect fines assessed against the debtor arising from a parcel of real estate. The debtor alleged in his lawsuit that the debt collector, when it was attempting to collect the debt, violated the FDCPA by misrepresenting the total amount owed, failing to validate the debt and generally harassing him. The district court granted the debt collector's motion to dismiss, in which the debt collector argued that the fines were not "debts" under the FDCPA.

The Seventh Circuit agreed, holding that the text of the FDCPA itself necessarily excludes fines from coverage. A fine is not a consensual transaction and thus is not a debt under the FDCPA. The court noted that the Federal Trade Commission also interprets the FDCPA to exclude fines from the definition of “debt”.

*Gulley v. Markoff & Kransy,*No. 10C 1807 (Dec. 22, 2011 N.D. Ill.)

For more information, please contact your regular Hinshaw attorney.

Florida Supreme Court Terminates Statewide Managed Mediation Program

Effective December 19, 2011, the Florida Supreme Court terminated the statewide managed mediation program which was established in 2009 and required all foreclosure cases involving residential homestead property to be mediated before going to final judgment. The Court noted that it had reviewed reports on the program and could not justify its continuation. No new cases may be referred; however those already in the program are to participate through completion.

Supreme Court of Florida No. AOSC11-44

For more information, please contact your regular Hinshaw attorney.

This newsletter has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.