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Newsletters

Consumer Law Hinsights - August 2020

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

Appellate Win Secured by David Schultz for Merchants Credit Clarifies Credit Reporting Standard under FDCPA

Hinshaw represented Merchants Credit Guide Co. in a win in the U.S. Court of Appeals for the Seventh Circuit in an FDCPA case that centered on a credit reporting method widely used in the credit and collections industry. After attempting to collect on outstanding bills, Merchants separately reported each of the amounts owed to the medical providers to a consumer reporting agency. Plaintiffs alleged that reporting each debt owed to a provider separately, rather than a single aggregated debt, violated FDCPA § 1692f, which prohibits "unfair or unconscionable means" to attempt to collect a debt. The appellate court affirmed the district court's dismissal, stating "[i]t is reasonable, and not at all deceptive or outrageous, for a collector to report individually debts that correspond to different charges."

David Schultz, Jennifer Weller, and Steve Swofford represented Merchants Credit Guide Co. on the successful dismissal of this case at the district court level and on appeal.

See Client Success: ACA International Supports Merchants Credit Guide Co. Win in 7th Circuit Court of Appeals to read more about this case.

Two Text Messages Not Enough for Article III Standing

According to the Eleventh Circuit, receiving only two promotional text messages is not enough to warrant a lawsuit for violations of the Telephone Consumer Protection Act (TCPA). In 2019, the U.S. Court of Appeals for the Eleventh Circuit held in *Salcedo v. Hanna* that a single text message was insufficient to show a concrete injury-in-fact as required for standing in a TCPA claim under Article III of the U.S. Constitution. The Southern District of Florida followed suit by holding that two text messages were also insufficient to show Article III standing.

Attorneys

Justin M. Penn

Service Areas

Consumer Financial Services

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As most readers likely know, the TCPA was enacted when telephone and fax machine use was substantially more expensive than it is now, and was often limited to one transaction at a time. This meant that unwanted advertisements not only led to additional costs, but could also interfere with receiving other calls or faxes, potentially leading to lost opportunities. Today, text messages are a popular modern-day method of communication that allows for the transmission of multiple messages at the same time, meaning much more limited chances for lost opportunities. Without a high cost-per-message, it is a challenge for a plaintiff to prove an injury substantial enough to afford Article III standing with only one or two texts. It remains unclear exactly how many messages—and in what period of time—will be considered minimally sufficient harm for a plaintiff to have standing. This holding could also present potential implications on class actions as it could require individual showing for each class member to demonstrate standing.

The case is *Perez v. Golden Trust Ins., Inc.*, No. 19-24157-Civ-COOKE/GOODMAN (S.D. Fla. 2020).

Ringless Voicemails are Considered Calls, and Subject to TCPA

The TCPA continues to evolve in the scope of its coverage, and a district court has ruled that it is not necessary for the phone to ring to implicate the TCPA. Specifically, the District of Nevada has added Ringless Voicemails (RVMs) to the list of communication methods that are covered by the TCPA. This means phone calls, text messages, and now RVMs, are all potentially covered under the TCPA.

The facts in this case are simple. The plaintiff began filling out a form on the defendant's website, but terminated the session before submitting his form. The defendant retained the plaintiff's phone number and left two RVMs over the next two days on the plaintiff's wireless phone. Defendant moved to dismiss and made two arguments. First, defendant alleged that it received consent from the plaintiff to call him, and that he lacked standing to bring the claims. Second, defendant argued that RVMs are not calls under the TCPA because they do not cause the phone to ring.

In evaluating whether the claims were barred because of consent, the court aligned with other courts and held that consent is an affirmative defense, and does not go to the issue of standing. More importantly, in rejecting defendant's second argument, the court explained that "RVMs are still a nuisance delivered to the recipient's phone by means of the phone number. RVMs are calls as defined by the TCPA." This means that a possible definition as to what is covered by the TCPA can arguably include any method of communication transmitted to the consumer via use of their phone number. In days to come, we will have more regarding how the class action proceeds. Furthermore, as more courts review such questions, we can hopefully expect a clearer, and more universal, method to interpreting these regulations.

The case is *Caplan v. Budget Van Lines*, No. 20-CV-130 JCM, 2020 WL 4430966 (D. Nv. July 31, 2020).

Failing to Comply with State Laws May Leave You Vulnerable to FDCPA

The District of Hawaii recently ruled that failure to register with the state of Hawaii as a collection agency was a violation of the Fair Debt Collection Practices Act (FDCPA). At least 29 states currently mandate licensure or registration of collection agencies and failing to meet local requirements can potentially leave debt collectors susceptible to litigation at the federal level.

Under the FDCPA, a debt collector "may not use any false, deceptive, or misleading representation or means in collection of any debt." The state of Hawaii recently found that communicating with a debtor without registering as a debt collector in the state was a misleading representation that violated the FDCPA.

The plaintiff was a Hawaiian resident who was sued in Hawaii for an outstanding credit card debt. Hawaii has a state law that requires any institution collecting on a debt to register with the state. Here, the defendants argued that their counsel was registered with the state, and also that their counsel was the only one communicating with the plaintiff, thus, only counsel had to be registered with the state. However, the court found that counsel was speaking on behalf of the defendant and thus counsel's communications with the plaintiff were in fact those of the defendant. Ultimately, it was found that the defendants, through their counsel, communicated with the plaintiff in an effort to collect on an outstanding debt and thus were liable for violations of the FDCPA, as well as local rules.

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If operating in multiple states, it is important to ensure the proper registrations are in place before continuing with any collection practices.

The case is *Viernes v. DNF Associates, LLC*, No. 19-00316, 2020 WL 4430968 (D. Haw. July 31, 2020).

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