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Newsletters

Consumer Law Hinsights - September 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. This edition also highlights the recently updated *50 State Guide on Student Loan Servicing Regulations* and Hinshaw's interactive tracker of state regulations related to the pandemic, along with a selection of popular posts from our blog, *Consumer Crossroads*.

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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.

Supreme Court to Determine Scope of Autodialer for TCPA

In 2017, the Telephone Consumer Protection Act (TCPA) class action filed against Facebook was dismissed. The subsequent appeal led to a reversal of the decision in 2019, as the U.S. Court of Appeals for the Ninth Circuit reaffirmed their earlier decision in *Marks v. Crunch San Diego, LLC*. In *Marks*, the court had found that the adverbial phrase only modified the verb "to produce" a grammatic construction which would mean that automatically dialing any number—whether entered or generated—would meet the requirements of the TCPA's definition of autodialer, thus violating the TCPA whenever used to communicate with consumers.

The TCPA—which restricts the unsolicited use of automated phone calls, and text messages—originally had two exceptions: (1) calls made for emergency purposes; and (2) calls made with the prior express consent of the consumer. In 2015, Congress amended the TCPA to include a third exception: calls made solely to collect on a debt owed to, or guaranteed by, the United States, which was recently held unconstitutional.

In *Duguid v. Facebook* the court held that the broad definition of an ATDS should be applied and the amended language was unconstitutional. The case has now been granted *certiorari* and will be heard by the U.S. Supreme Court in October.

In the meantime, a number of organizations have submitted briefs for and against the dueling TCPA interpretations. While some of these only discuss the constitutionality of the amendment, others are taking advantage of the opportunity to have the Supreme Court decide not just on the interpretation of the language of the TCPA, but also its legality.

Attorneys

Justin M. Penn

Service Areas

Consumer Financial Services

For more on *Facebook v. Duguid*, and the impact a ruling may have on the credit industry's future use of predictive dialers, listen to Hinshaw's John Ryan in an appearance on a Great Lakes Credit and Collection Association podcast.

How the New California Department of Financial Protection and Innovation Impacts Debt Collectors

A new bill has been approved by both chambers of the California legislature and signed into law by Governor Newsom. Starting January 1, 2022, all debt collectors operating in the state of California will be required to:

- Maintain a license
- Pay an application fee
- Undergo a criminal background check
- Include the license number in all written and digital communications with debtors
- Maintain a surety bond
- Comply with reporting requirements
- Pay the commissioner its *pro rata* share of all costs and expenses reasonably incurred during any administrative activity

The bill provides the Department of Financial Protection and Innovation—currently called the Department of Business Oversight—the authority to monitor the licensing, regulation, and oversight of debt collectors. This includes bringing civil actions or other proceedings to enforce the Consumer Financial Protection Act of 2010. The commissioner is afforded the authority to begin taking steps as early as January 1, 2021 to prepare for the management and enforcement of these changes.

Additionally, the bill creates an exemption for depository institutions. This exemption applies to those licensed under California's Financing Law, the Residential Mortgage Lending Act, or the Real Estate Law. It also includes those subject to the Rental-Purchase Act, trustees of nonjudicial foreclosures, and debt collection associated with the Student Loan Servicing Act.

Debt Collectors Not Subject to Unique Consumer Interpretations of Collection Notices

Debt collectors are not required to use the exact language of the Fair Debt Collection Practices Act (FDCPA) to comply with the law. In a recent case, the U.S. Court of Appeals for the Second Circuit found that a debt collector was not required to explicitly state that a debt can be disputed in whole or in part, following a decision in the Sixth Circuit. Effectively, a debt collector is required to notify the consumer of their right to contest a debt in order to comply with the FDCPA. The Second Circuit opined that it while it would not be a bad idea to include language indicating that a portion of a debt can be disputed by a debtor, such language was not required by the statute. Both the Second and Sixth Circuit use the "least sophisticated consumer" test in determining whether or not a debt collector's letter to a consumer violates the FDCPA. Thus the Second Circuit has agreed with the Sixth Circuit that debt collectors are not responsible for the "bizarre or idiosyncratic interpretations of collection notices."

The case is *Chaperon v. Sontag & Hyman*, PC, No. 19-4244, 2020 WL 5240609 (2d Cir. Sept. 3, 2020).

Debtors Must Show Actual Harm for Article III Standing in FDCPA Claims

The Eleventh Circuit dismissed a class action for lack of damages due to a lack of reliance on the alleged misrepresentations of the collection letters by the plaintiffs. Article III standing is required to bring a claim under the Fair Debt Collection Practice Act. To establish standing, the plaintiff must have suffered an injury caused by the defendant, and a favorable ruling must be able to resolve the injustice. The alleged risk must be particularized and concrete—for example, a plaintiff who took some action in reliance on the collection letter to their detriment.

In the Eleventh Circuit case, the plaintiffs alleged that the collection letter created a risk that unsophisticated consumers might be misled as to the nature and amount of their financial obligations. Here, the plaintiffs alleged only that such an action was possible, not that it actually happened. Further, it was also determined that the plaintiffs were not actually misled, nor was the text of the collection letter proven to create any increased risk of misrepresentation. Thus, simply claiming that someone might be misled has again been determined by the courts as insufficient to establish Article III standing.

The case is *Trichell v. Midland Credit Mgmt.*, 964 F.3d 990 (2020).

Fourth Edition of 50 State Guide on Student Loan Servicing Regulations

An important resource for financial services compliance professionals has been updated. The Fourth Edition of Hinshaw's *50 State Guide on Student Loan Servicing Regulations* is a quick reference guide and resource for student loan servicers regarding the regulations specific to the industry, along with pending legislation, litigation, and court rulings.

| Download your copy of the guide (PDF) |

Tracking State Regulators' Response to COVID-19

To assist consumer financial services lenders, servicers, and investors, Hinshaw has developed an interactive tracker of state regulations related to the COVID-19 pandemic. The tracker documents actions by various state regulators, along with the limits imposed by states on foreclosures, evictions, and debt collections, and allows users to click on any state to view applicable provision.

Consumer Crossroads Blog | Quarterly Highlights

SCOTUS Decides Federal Debt is not Exempted from TCPA, While FCC Autodialer Declaration Further Alters TCPA Landscape

With a major U.S. Supreme Court decision leading the way, recent developments continue to reshape the landscape of the Telephone Consumer Protection Act… *>>Read more*

SCOTUS Holds CFPB's Single Director Structure Unconstitutional, Leaves Open Questions on Existing Bureau Matters

The Supreme Court of the United States issued a two part decision in *Seila Law LLC v. Consumer Financial Protection Bureau*. The Court first decided, in a 5-4 decision with Chief Justice Roberts authoring the Court's opinion, that the CFPB's leadership by a single Director removable only for inefficiency, neglect, or malfeasance violates the separation of powers doctrine. The Court next decided that the Director's unconstitutional removal protection is severable from the other provisions of Dodd-Frank that establish the CFPB and define its authority. The severability holding was also authored by Roberts, but drew a 7-2 split… *>>Read more*