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Newsletters

Consumer Law Hinsights - November 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.

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CFPB Agrees: Showing Zero Balances for Interest and Fees in a Collection Letter is Not False or Misleading

In line with the Seventh Circuit decision last month in *Degroot v. Client Services*, a federal district court in the Third Circuit has held that itemizing interest and fees, even when they are $0.00, is not a violation of the Federal Debt Collection Practices Act (FDCPA). The argument by the plaintiff was the same as in other cases: namely by seeing line items for interest and fees, even though they were $0.00, he believed that the debt collector could charge him interest and fees in the future when the debt was static. Further, the plaintiff argued that the least sophisticated consumer would believe that interest and fees were accruing on the outstanding amount and thus would prioritize it over other debts. The court referred to Third Circuit precedent that requires a letter "be materially misleading to violate the FDCPA." The court further found that that the "language of the letter [was] clear," and subsequently granted the defendant's motion to dismiss.

This matter is now in front of the Third Circuit for review, and the Consumer Financial Protection Bureau (CFPB) has submitted an *amicus* brief in support of the district court's decision, citing specifically to *Degroot v. Client Services*. In its brief, the CFPB argued that by "holding that accurate itemization of interest and fees applied to a debt may by itself violate the FDCPA would discourage collectors from providing consumers with accurate and useful information."

The case is *Hopkins v. Collecto, Inc.*, Dist. Court, D. New Jersey 2020.

Ohio District Court Agrees with Louisiana Court, Finds TCPA Unenforceable Between November 2015 and July 2020

An Ohio district court granted a defendant's motion to dismiss a claim for alleged violations of the Telephone Consumer Protection Act (TCPA) on the grounds that the TCPA could not be applied during the alleged time period because it was unconstitutional. In so doing, it applied the same reasoning to dismiss a TCPA claim as a Louisiana federal district court adopted in October.

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Service Areas

Consumer Financial Services

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A little background: the TCPA was enacted in 1991 and amended by Congress in 2015 to include an exemption for "calls made solely to collect a debt owed to or guaranteed by the United States." In July of this year, the U.S. Supreme Court heard *Barr v. AAPC*, where they found that the original TCPA was content-neutral and thus constitutional, but that the 2015 exception created an unconstitutional content-based restriction on speech and subsequently struck down the amendment returning the TCPA to its original form. The question before the courts now is whether the TCPA can be enforced during the time period that it contained the unconstitutional language.

The Ohio district court found that the Supreme Court ruling was only forward looking, meaning that TCPA claims are unenforceable if they arose between when the unconstitutional amendment was adopted in 2015 and July 2020, when the Supreme Court severed the amendment. As the court explained, the "decision that the statute can be rendered constitutional by severance does not remedy any past harm—it only avoids continuing harm in the future."

Additionally, the court poetically wrote, courts cannot "wave a magic wand and make that constitutional violation disappear." Because the statute at issue was unconstitutional at the time of the alleged violations, the Ohio district court lacked jurisdiction and must dismiss the case.

The case is *Robert Lindenbaum v. Realgy, LLC, et al.*, USDC Northern District of Ohio (2020).

Charging a Fee for Payments Made Over the Phone Must be Expressly Authorized to be Lawful

A California resident brought a claim against a mortgage processor for allegedly violating the California Rosenthal Act and the Fair Debt Collection Practices Act (FDCPA) for collecting a fee for payments made over the phone. The California Rosenthal Act incorporates the federal FDCPA, which prevents debt collectors from collecting fees incidental to the principal obligation, unless authorized by contract or by law. Effectively, to prove that a violation occurred, the plaintiff must not only prove that the fee was incidental to the mortgage payment, but that the amount was neither authorized by the mortgage agreement, nor permitted by law.

The court found that the fee was clearly incidental to the principal obligation meeting the first requirement, but found uncertainty regarding the second. Defendant argued that the borrower agreed to the term because it was in the contract and it was thus permitted by law. The court, however, disagreed, finding the argument circular, and holding that the fee had to be "expressly authorized" since it was in fact incidental to the original obligation. That said, the court did grant the motion to dismiss regarding allegations that the fee was an unlawful addition to the underlying debt. The court ultimately dismissed the case allowing plaintiff an opportunity to amend.

The case is *Valerie Lembeck v. Arvest Central Mortgage Co.*, USDC Northern District of California (2020).

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