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Newsletters

Consumer Law Hinsights – December 2020

December 30, 2020

Consumer Law Hinsights is a monthly compilation of nationwide consumer protection cases of interest to financial services and accounts receivable management companies. This month, we are also highlighting popular posts from our blog, *Consumer Crossroads*.

Expand each of the topics below to read our full analyses and blog posts covered in this edition.

Eleventh Circuit Affirms Summary Judgment Win in TCPA Claim Filed Where Consent was Renewed

Hinshaw client Navient Solutions, LLC and Student Assistance Corp recently had a summary judgment win upheld by the Eleventh Circuit in a Telephone Consumer Protection Act (TCPA) case. The companies were sued by a South Florida debt defense attorney who allegedly received unconsented calls to his cell phone.

At trial, it was established that during a call with a Navient representative the plaintiff had said "no" to autodialed calls, but later, while on the same call, had submitted his written consent to receive such calls via Navient's website. The online form had included the language "[b]y providing by telephone number, I authorize SLM Corporation, Sallie Mae Bank, Navient Corporation and Navient Solutions Inc., and their respective subsidiaries, affiliates and agents, to contact me at such number using any means of communication." This language was just above the "submit" button in a font that was the same as the rest of the form.

The court stated that consent "is effective regardless of whether a party 'intended' to consent if his words or conduct are 'reasonably understood by another to be intended as consent.'" Because there was an act showing consent, the matter consented to was clear and conspicuous (in the same font as the rest of the form), and unambiguous, the court held that the consumer reconsented after his oral revocation, and upheld the district court's finding that the calls were made with the consumer's TCPA-required prior express consent. The case is *Lucoff v. Navient Solutions, LLC*, No. 19-13482 (11th Cir. 2020). It was handled by Hinshaw partners Barbara Fernandez and Dennis Lueck.

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Service Areas

Consumer Financial Services

Third Court Finds TCPA Unenforceable Between November 2015 and July 2020

On December 11, 2020, a Florida court followed Ohio and Louisiana courts and dismissed a claim for lack of jurisdiction that alleged violations of the Telephone Consumer Protection Act (TCPA), finding that the TCPA violated the First Amendment between November 2015 and July 2020.

In the complaint, plaintiff alleged that from January 2019 to October 2019, she received approximately 15 calls and voicemails to her cell phone with pre-recorded messages. She further alleged that she did not provide consent for these calls and that they caused her actual harm, including invasion of her privacy, aggravation, annoyance, intrusion on seclusion, trespass, and conversion. The defendant responded with a motion to dismiss, claiming that the U.S. Supreme Court's decision in *Barr v. American Association of Political Consultants, Inc.* left the TCPA unconstitutional and thus unenforceable during the time period when the alleged violations occurred.

Citing to both the *Lindenbaum* case heard by the Northern District of Ohio, and the *Creasy* case heard by the Eastern District of Louisiana, the court agreed that "at the time the robocalls at issue were made, the statute could not be enforced as written and a later amendment to a statute cannot be retroactively applied." Thus, the court found that since they could not enforce an unconstitutional statute, they had to dismiss the action for a lack of subject matter jurisdiction.

The case is *Hussain v. Sullivan Buick-Cadillac-GMC Truck, Inc.*, No. 5:20-cv-38-Oc-30PRL (M.D. Fla. Dec. 11, 2020).

Seventh Circuit Consistently Decides Multiple Cases Requiring a Concrete Injury in FDCPA Claims

Three cases were decided by the Seventh Circuit that consistently found the plaintiffs to lack standing in Fair Debt Collection Practices Act (FDCPA) claims because there was no concrete harm. The court found that it was not enough for an FDCPA plaintiff to simply allege a statutory violation. Rather, they had to allege, and later establish, that the statutory violation actually harmed the plaintiff, or, at the very least, that it presented an appreciable risk of harm to the underlying concrete interest that was being protected.

The first of these cases was *Brunett v. Convergent Outsourcing, Inc.* Plaintiff claimed she represented a class of individuals who were misled by the defendant's explanation that forgiveness of a debt in excess of $600 would require reporting the forgiveness to the IRS. The next case was *Gunn v. Thrasher, Buschmann & Voelkel, P.C.*, where the plaintiff alleged misrepresentation on the part of the debt collector for listing remedial efforts that, while lawful, they likely would not pursue. Lastly, there was *Larkin v. Finance System of Green Bay, Inc.*, in which plaintiffs alleged that that a recommendation that they pay their debts to maintain good credit ratings was a violation of the FDCPA.

Part of the FDCPA forbids false or misleading statements in dunning letters. However, as the Seventh Circuit laid out, concrete harm is essential to standing in order to bring such a claim. This means that an act, in response to the letter, that puts the plaintiff in a worse state than they were prior to receipt of the letter is required. For example, a claim of confusion requires that the debtor act on that confusion. In the *Brunett* case, the court offered the following examples: confusion that leads her to pay something she does not owe, or to pay a debt with interest running at a low rate when the money could have been used to pay a debt with interest running at a higher rate. But the state of confusion is not itself an injury. Even confusion that leads one to hire a lawyer does not satisfy the requirement. Intimidation is not a form of injury sufficient to satisfy the demands of standing. Similarly, a sense of indignation or aggravated annoyance is not enough for standing, as expressed by the court in the *Gunn* case.

Specifically, the injury must be concrete and particularized. Particularized means that it affects the plaintiff in a personal and individual way—the plaintiff must have personally suffered an actual injury or an imminent threat of injury. Concrete means that the injury must be *de facto*, it must actually exist, or that, it must be real, not abstract. However, it need not be tangible. Thus, concrete injury is still required in the context of statutory violations. A bare allegation that the defendant violated one of the FDCPA's procedural requirements typically won't satisfy the injury-in-fact requirement. Article III of the Constitution makes injury essential to all litigation in federal court.

The cases are *Jennifer R. Larkin and Dorean A. Sandri v. Finance System of Green Bay, Inc.*, No.: 18-C-496 & 18-C-1208 (7th Cir. 2020); *Linda Gunn and Christopher Gunn v. Thrasher, Buschmann & Voelkel, P.C.*, No.: 1:19-cv-01385-JMS-MPB (7th Cir. 2020); and *Darlene Brunett v. Convergent Outsourcing, Inc.*, No.: 19-C-0168 (7th Cir. 2020).

Supreme Court Hearing on the TCPA Update: *Facebook v. Duguid*

Oral arguments were held on December 8, 2020, by the United States Supreme Court in *Facebook v. Duguid*, which looks at the definition of an automatic telephone dialing system (ATDS) and the conflicting interpretations found by many lower courts. The definition of an ATDS is "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers." The debate is whether the definition requires both the storage/production of telephone numbers and the use of random/sequential number generators, or whether the storage/production of telephone numbers alone is sufficient.

Duguid's attorneys argued that Facebook's definition "would read the statute into oblivion," while Facebook's attorneys argued that Duguid's definition would create a "statute of impossible breadth" that would include even calls made by a cell phone. So far, the one thing parties seemed to agree on is that the statute is outdated. Enacted in 1991, and now being applied to technologies that did not exist almost 30 years ago, seemed to lead everyone to believe that it was Congress's responsibility to update the statute. Either way, we'll have to wait to see what happens in the Supreme Court.

The case is *Facebook, Inc. v. Noah Duguid, et al.*, No.: 19-511.

According to Eighth Circuit, Passive Debt Buyers May be Subject to the FDCPA

The Eighth Circuit, on December 14, 2020, elaborated on the definition of what constitutes as a debt collector subject to the FDCPA in *Reygadas v. DNF Associates, LLC*. DNF argued that they purchased the debt and hired a third party to collect on the debt, this made them a "passive" debt collector not subject to the FDCPA. Ultimately, the court found that the defendants were debt collectors by looking at the principal purpose definition. Specifically, when the foreseeable and logical consequence of hiring lawyers and debt collection agencies is to collect on debts purchased, the court found that such an act was itself evidence of purpose.

The court did clarify that any purchaser of defaulted consumer debt did not automatically qualify as a debt collector under the principal purpose definition. Specifically, buyers who act more like those who invest in municipal or commercial junk bonds would be considered purely "passive" debt buyers not subject to the FDCPA. The reason being, their principal purpose is different as it includes a wider array of activities.

The case is *Stephanie Reygadas v. DNF Associates, LLC*, No.: 19-3167 (8th Cir. 2020).

Consumer Crossroads Blog | Quarterly Highlights

New York State Passes Eviction and Foreclosure Moratorium Protecting Renters, Homeowners, and Small Landlords

On Monday, December 28, 2020, Governor Andrew Cuomo signed the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020. Among other things, this legislation extends certain residential foreclosure and eviction moratoria for renters and homeowners suffering hardship due to the COVID-19 pandemic... *>>Read more*

An Overview of California's New Voter-Approved California Privacy Rights Act

In the recent November elections, California voters approved the California Privacy Rights Act (CPRA), which significantly amends the recently enacted California Consumer Privacy Act (CCPA) and creates new obligations for covered businesses... *>> Read more*

In a Win for Mortgage Servicers, Massachusetts Supreme Court Finds Mandatory Notice of Right to Cure in Notice of Default is Not Potentially Deceptive

Massachusetts moved one step closer to resolving an ongoing debate over pre-foreclosure notices of default that started with the First Circuit's decision in *Thompson v. JPMorgan Chase Bank* back in February of 2019. Initially, the First Circuit concluded that a notice of default, which disclosed that borrowers "could still avoid foreclosure by paying the total past-due amount before a foreclosure sale," was potentially misleading because the mortgage only allowed reinstatement five days before the sale. Chase filed a petition for rehearing, joined by numerous *amici*, that demanded reconsideration of the First Circuit's decision on grounds that the potentially misleading language was in fact a mandatory disclosure under the Code of Massachusetts Regulations... *>> Read more*

CFPB Rescinds RESPA Compliance and Marketing Services Agreements Bulletin, Provides Clarity on RESPA Fee Prohibition in FAQs

The Consumer Financial Protection Bureau (CFPB) rescinded Bulletin 2015-05, RESPA Compliance and Marketing Services Agreements on October 7, 2020, stating that the bulletin did not provide the regulatory clarity necessary for compliance with the Real Estate Settlement Procedures Act (RESPA) and Regulation X. The CFPB also issued frequently asked questions (FAQs) to clarify when marketing services agreements (MSAs) are acceptable under RESPA... *>> Read more*