



Newsletters

Consumer Law Hinsights - January 2021

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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.

Expand each of the topics below to read our full analyses.

The Need for Compensable Damage to Prove Standing

The United States Supreme Court has issued a decision in *Spokeo v. Robbins*. In this Fair Credit Reporting Act (FCRA) case, the Supreme Court considered whether Congress can confer Article III standing on a plaintiff's right to bring an action based on a violation of a statute where that plaintiff has not otherwise suffered a concrete injury. The Supreme Court concluded that a plaintiff must suffer an injury-in-fact that is "concrete and particularized" to satisfy Article III standing, but it offered little guidance on what those terms mean.

Courts in the Seventh, Ninth, and Eleventh Circuits have all weighed-in on the standard. The Ninth Circuit explained that a procedural harm from a letter that allegedly failed to clearly identify the current creditor was insufficient. The Eleventh Circuit explained that a plaintiff lacks standing to bring a Fair Debt Collection Practices Act (FDCPA) case absent a showing of how the plaintiff was harmed by the allegedly violative practices—grandstanding about potential harm simply will not do. The Seventh Circuit has issued a series of decisions on FDCPA cases, setting forth the parameters of the damage threshold required to establish standing. Those cases include explanations that receiving a non-compliant letter, confusion, and annoyance alone are all insufficient to establish standing.

Hopefully district courts interpreting and applying these general principals will give some much needed clarity on the types of cases federal courts are willing to entertain.

Are Class Actions Appropriate When Class Members Lack Standing?

As courts continue to establish the necessary threshold requirements for Article III standing, another issue related to those developments are whether standing needs to be established for each class member. The U.S. Supreme Court will soon decide the issue in *Ramirez v. TransUnion*. In particular, the Supreme Court is considering whether either Article III or Federal Rule of Civil Procedure

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23 permits a damages class action when the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered. The need for a compensable actual damage could have far-reaching effects on the ability to certify class actions because it could present the need for an individualized inquiry that might thwart some class actions.

The Supreme Court granted *certiorari*— in mid-December; the parties will soon brief and argue the issue. The Supreme Court:

- term runs from the first Monday in October through the Sunday before the first Monday in October of the following year;
- typically is in recess from late June or early July until the first Monday in October; and
- hears oral arguments in cases from October through April.

Courts Still Pondering Whether the TCPA was Unconstitutional Between 2015 and 2020

In *AAPC v. Barr*, the Supreme Court determined that the Telephone Consumer Protection Act (TCPA) was unconstitutional because of its inclusion of an exemption for calls made on behalf of the government. While the crux of the Supreme Court opinion focused on how to sever the exemption that rendered the TCPA unconstitutional, there is a developing argument that because the severance did not occur until 2020—the date the *AAPC* case was decided—the TCPA was unconstitutional, and thus unenforceable, while the exemption was included in the Act. District courts in the Fifth and Sixth Circuits, and others, have adopted this reasoning, and held the TCPA was unconstitutional during the time it contained the exemption. Other courts have disagreed, holding essentially that the *AAPC* case is retroactive in its severance of the offending portion of the Act.

District courts will continue to rule on this issue, and it would not be surprising to see continued split decisions. As the cases progress through the federal circuit courts, we will get more guidance and clarity on these issues, perhaps requiring the Supreme Court to chime in again.

Supreme Court to Decide the TCPA Definition of Autodialer

Oral arguments in the United States Supreme Court were held on December 8, 2020, 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 is Congress's responsibility to update the statute. Either way, we will have to wait to see what happens in the Supreme Court.

The Biden Administration's Impact on Regulation

President Joe Biden's approach toward consumer protection and financial services regulation will clearly differ from that of former President Donald Trump. Although it is not presently clear how much will change, we anticipate seeing far more cooperation among state attorneys general—including across state lines—and coordination with federal agencies. There will also certainly be an increase in enforcement. More will become apparent as the administration replaces and hires personnel.



Early moves by the Biden Administration signal that consumer protection will be a focal point of the president's agenda. This focus—and the coordination of state's agencies—is unsurprising given his late son Beau Biden's former position as Delaware Attorney General, as well as Vice President Harris' background as California Attorney General.

One indication of potential regulatory changes is President Biden's nomination of FTC Commissioner Rohit Chopra to be the next Director of the Consumer Financial Protection Bureau. Hinshaw was quoted in [numerous national press outlets](#) regarding the significance of Chopra's nomination: we identified several potential policy preferences, including a focus on improved data collection and analysis, fair lending, and the policing of "abusive acts or practices" prohibited under the Dodd-Frank Act.

The continued impact of COVID-19 restrictions could also be affected. As we continue to monitor the developments both in commission appointments and agency activity, it will be interesting to see where the new administration focuses its attention.