



## Newsletters

### Consumer & Class Action Litigation Newsletter - February 2013

February 4, 2013

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D.C. Circuit Decision Invalidating Appointment of NLRB Members Calls Into Question Appointment of CFPB's Director

The U.S. Court of Appeals for the District of Columbia Circuit ruled on January 25, 2013, that President Obama's three recess appointments made to the National Labor Relations Board (NLRB) are unconstitutional. During the same time period, he also appointed Richard Cordray as the Consumer Financial Protection Bureau (CFPB) director. *Noel Canning v. National Labor Relations Board*, Nos. 12-1115, 12-1153 (D.C. Cir. Jan. 25, 2013). The ruling was reached unanimously.

The district court had found that the putative recess appointments were invalid and that the Recess Appointments Clause was inapplicable because the U.S. Senate was not in "recess" at the time of the putative appointments and the vacancies did not happen during the recess of the Senate. While the lawsuit only focuses on the NLRB appointments, the decision may affect a similar legal challenge to the President's appointment of Director Cordray, which is currently pending in the same circuit. *Noel Canning* may have the effect of invalidating certain CFPB actions taken after Cordray's appointment. It is expected that the ruling will be appealed to the U.S. Supreme Court.

Hinshaw & Culbertson LLP will continue to monitor this litigation and any impact it has on the industry.

*Noel Canning v. National Labor Relations Board*, Nos. 12-1115, 12-1153 (D.C. Cir. Jan. 25, 2013)

For more information, please contact [Barbara Fernandez](#) or your regular [Hinshaw attorney](#).

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## Chicago City Council Passes Ordinances on City-Level Licensing of Collection Agencies and License Revocation

On December 12, 2012, Chicago Mayor Rahm Emanuel submitted proposed ordinances to the Chicago City Council, including a debt collection agency category for regulated business licenses. The proposal followed an agreement announced earlier in December between the Consumer Financial Protection Bureau (CFPB) and the city of Chicago, the first U.S. city to sign an agreement with the CFPB.

The December 12 initiative proposed requirements on debt collectors that are unprecedented and far more stringent than as mandated by the Fair Debt Collection Practices Act (FDCPA). Among those are requirements that debt collectors provide: original proof of the debt and a copy to the consumer; written notice to the consumer outlining the debt specifics, including amounts and creditors; and new disclosures related to the consumer's rights regarding debts outside of the statute of limitations.

The Illinois Collectors Association (ICA), ACA International, DBA International, and Hinshaw worked with Mayor Emanuel and the Chicago City Council to modify the language of the final licensing amendment. Those efforts resulted in numerous revisions to the proposed ordinances, and on January 17, 2013, the Chicago City Council affirmatively passed the two amendment ordinances (city-level licensing of collection agencies, and license revocation) as referred by the Committee on License and Consumer Protection. The ordinances will take effect on July 1, 2013; accordingly, those debt collectors collecting from Chicagoans are required to have licenses by that date.

Due to the staunch advocacy of the ICA, ACA, DBA and Hinshaw, the following modifications to the ordinances were achieved:

- Language was changed so that collectors do not have to provide detailed verification of the debt with the initial letter;
- Language that designated violations of the ordinance to constitute a criminal act was removed;
- Definitions of "consumer debt," "debt collector," "debt collection" and "debtor," along with other ordinance language, was revised to more closely track the FDCPA and the Illinois Collection Agency Act;
- A requirement to retain a hard copy of all communication with the consumer was changed to an "electronic or physical" record of all "written" communications;
- A requirement to notify consumers that a debt is beyond the statute of limitations was removed.

The first amendment ordinance (i.e., city-level licensing of collection agencies), requires all debt collectors collecting debts from Chicagoans to get a Regulated Business License from the city. The license will require debt collection agencies to: follow all state and federal guidelines regarding fair debt collection practices, including prohibition of harassment or threatening behavior towards consumers; limit the hours and locations in which a debt collector may contact a consumer; and provide verification of the debt owed at the consumer's request. This ordinance also mandates that verification of the debt include: the name and address of the original creditor; the remaining balance owed; and an itemized list of any additional fees, charges, or interests placed on the debt. It will also impose a four-year wait for the issuance of another Regulated Business License if a debt collector's initial license is revoked.

The second amendment ordinance, (i.e., license revocation), has greater and potentially more dangerous ramifications for debt collectors collecting from Chicagoans. Pursuant to this ordinance, the Chicago Department of Business Affairs and Consumer Protection (BACP) will be able to initiate revocation proceedings and refuse to issue or reissue the license of specific business locations convicted within the last five years of violating the Illinois Wage Payment and Collection Act (IWPCA), the FDCPA, or any similar federal or state law regulating the payment of wages or the collection of debt. The ordinance affords due process to collectors prior to license revocation and will apply only to offenses that take place after June 1, 2013.

Although the revocation ordinance seeks to curb egregious FDCPA and/or other state and federal debt collection violations, the threshold for license revocation and refusal is low. The entire industry must be mindful of these new regulations, as the Chicago ordinances may be a harbinger of what is to come for other U.S. cities.



## City-Level Licensing of Collection Agencies Ordinance

### License Revocation Ordinance

For more information, please contact [David M. Schultz](#) or your regular [Hinshaw attorney](#).

### **CFPB Announces Sweeping New Mortgage Servicing Rules**

On January 17, 2013, the Consumer Financial Protection Bureau (CFPB) announced sweeping new rules governing the mortgage servicing industry. The rules, which will take effect in early 2014, prescribe specific timeframes for when a servicer may initiate foreclosure, including a delay period of four months before filing after the loan becomes delinquent. Servicers will also be required to have “dedicated employees” who are knowledgeable about loans in default when borrowers contact the servicer for information, and make “live contact” with a borrower within 36 days of delinquency. More changes are forthcoming, including a requirement that servicers acknowledge information requests within five days and issue a written response within 30 to 45 days.

Hinshaw will be monitoring the proposed rule changes during the next year.

For more information, please contact your regular [Hinshaw attorney](#).

### [Summary of CFPB's proposed rules governing the mortgage servicing industry](#)

### **Class Counsel Appointed Even After “Questionable Performance” in TCPA Faxblaster Case**

Finding that class counsels’ conduct gave the court “serious pause” and holding that it neither approved of nor condoned the actions of class counsel in investigating the case, the U.S. Court of Appeals for the Seventh Circuit held that class counsels’ “questionable performance” did not prevent class certification under Fed. R. Civ. P. 23. In this Telephone Consumer Protection Act (TCPA) faxblaster case, defendant had contracted with a nonparty vendor that worked with multiple businesses to send advertisements via facsimile without obtaining prior permission from the fax recipients.

Class counsel sought production from the vendor of a list of the recipients of defendant’s advertisements. The vendor complied with the production. It was disputed whether the production was confidential pursuant to protective order. However, the vendor not only produced the list of the recipients of defendant’s advertisements but also a list of all recipients of any businesses the vendor was working with, as well as the names of those businesses. Thereafter, ignoring the disputed application of the protective order, class counsel sent out allegedly improper solicitations to the recipients marked as “advertising material.” As a result of the solicitations, more than 100 additional class action lawsuits were generated. Curiously, class counsel also mailed a \$5,000 check made payable to the vendor’s counsel “in a Ramada Inn envelope” with no cover letter bearing a notation simply reading “document retrieval.” The vendor’s attorney did not accept the check and testified that he perceived the payment as a “payoff” of “questionable propriety.”

The court declined to decertify the class or dismiss the case, holding that “[n]ot any ethical breach justifies the grave option of denying class certification” and “unless the violation prejudices one of the parties or undermines the court’s ability to resolve the case justly, state bar authorities – not the court – should enforce the rules and sanction the attorney.” The court concluded that class counsels’ “lapses in professionalism” did not undermine the court’s ability to decide this case. In closing, the court emphasized its “concern over the challenged actions of” class counsel and stated that “unpunished, inappropriate attorney action results only if the litigants and fellow members of the bar fail to refer legitimate instances of attorney misconduct to the relevant bar authority for investigation” and “state bar authorities are generally better positioned to address the matter through disciplinary proceedings, rather than the courts . . .”

*Reliable Money Order, Inc. v. McKnight Sales Co., Inc.*, No. 12-2559 (7th Cir. Jan. 9, 2013)

For more information, please contact [Todd P. Stelter](#) or your regular [Hinshaw attorney](#).



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