HINSHAW

Newsletters

Consumer & Class Action Litigation Newsletter - January 2013

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City of Chicago Teams up With CFPB to Regulate Debt Collectors

On December 12, 2012, Chicago Mayor Rahm Emanuel submitted proposed ordinances to the Chicago City Council that included a debt collection agency category for regulated business licenses. The proposal follows 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.

Following is a brief overview of the new debt collection agency license category proposal:

- Requires debt collection agencies to follow all state and federal guidelines regarding collection practices.
- Gives the Chicago Department of Business Affairs and Consumer Protection authority to regulate and track debt collectors in the City of Chicago.
- Prohibits harassment or threatening behavior of consumers and the use of misleading or incorrect information regarding a potential debt.
- Limits hours and locations in which a debt collector may contact a consumer.
- Requires a debt collector to provide: (1) original proof of debt and a copy to the consumer, (2) written notice to the consumer outlining the debt specifics including amounts and creditors, and (3) new disclosures related to the consumer's rights regarding the statute of limitations.

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The proposal continues to be subject to debate. Numerous interest groups are mounting a strong lobbying effort to modify the proposal, and Hinshaw is involved in these efforts. This proposal could be the testing ground for similar such efforts around the country or at the national level. Other cities confronted with similar proposals in the coming months may look to Chicago for guidance.

City of Chicago press release announcing debt collection agency category for regulated business licenses

For further information, please contact David M. Schultz or your regular Hinshaw attorney.

Eleventh Circuit Holds That Property Management Company Exempted From FDCPA Liability

The U.S. Court of Appeals for the Eleventh Circuit recently held that the Fair Debt Collection Practices Act (FDCPA) does not apply to a management company that collects unpaid assessments on behalf of a homeowners association, as long as the collection of such assessments is not central to the management company's fiduciary obligations. Plaintiff homeowners lived in a community governed by a homeowners association, which was managed by defendant property management company (the Company). Pursuant to authority from the association's governing declarations, the Company sent a letter to the homeowners warning them that their water service would be disconnected if they failed to pay their overdue assessments. The homeowners sued, alleging that the Company was a debt collector under the FDCPA and was civilly liable under the act for threatening to terminate their water service.

Under the FDCPA, not all who collect debts are "debt collectors." One exemption is found in 15 U.S.C. § 1692a(6)(F)(i), which exempts persons or entities "collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity is incidental to a bona fide fiduciary obligation." The court looked at the nature of the Company's management agreement with the association, and concluded that: (1) the Company owed a fiduciary obligation to the association; and (2) the collection of unpaid assessments was incidental to that obligation. The court noted that the Company did much more than collect assessments, including contracting for maintenance, obtaining utilities, purchasing insurance, investigating claims, maintaining ledgers and bank accounts, and assisting the association with tax filings. As such, using the dictionary definition of "incidental," meaning "occurring as something casual or of secondary importance," it held that the Company's collection of assessments was incidental, not central, to its duties under the management agreement. Thus, the Company was exempted from the FDCPA.

Harris v. Liberty Community Management, Inc., ___ F.3d ___, 2012 WL 6604518 (11th Cir. Dec. 19, 2012)

For further information, please contact or your regular Hinshaw attorney.

Appeal Rendered Moot by Plaintiff's Acceptance of an Offer of Judgment
The district court granted summary judgment on plaintiff debtor's claim for violation of 28 U.S.C. § 1692(g). The court held that the language in defendant debt collector's dunning letter "suggested a necessity for immediate payment" in contradiction of the language providing 30 days to dispute the debt. The debt collector's motion to reconsider was also denied. The day before filing the motion for reconsideration, the debt collector submitted an offer of judgment. The offer of judgment specifically reserved the debt collector's right to appeal any orders relating to the summary judgment motions. The debtor accepted the offer after the district court denied the motion for reconsideration.

The debt collector timely filed a notice of appeal from the decision on the motion for reconsideration. The U.S. Court of Appeals for the Eleventh Circuit dismissed the appeal as moot. The court held that despite the reservations relating to appeals contained within the offer of judgment, the parties had no financial stake in the litigation and no case or controversy existed. Moreover, the Eleventh Circuit ruled that even if the appeal was successful it would not affect the district court's entry of final judgment (based on the debtor's acceptance of the offer of judgment). Because a decision on the merits of the case would be considered advisory in violation of the Constitution, the Eleventh Circuit dismissed the appeal.

Yunker v. Allianceone Receivables Management, Inc., 701 F.3d 369 (11th Cir. 2012)

For further information, please contact or your regular Hinshaw attorney.

Bankruptcy Proof of Claim Rule Change – More Consumer Information Is Required

There was a recent rule change to the Bankruptcy Rule regarding proof of claims. On December 1, 2012, Bankruptcy Rule 3001(c)(3), regarding filing proof of claim forms, was amended to require additional disclosures on a proof of claim filed in a bankruptcy proceeding. There is no guidance yet on whether the unavailability or absence of any portion of the information required by the new rule will cause the claim form to be rejected. However, the rule's language would suggest that all the information is necessary. Thus, anyone who files a proof of claim in a bankruptcy proceeding in 2013 should note the new consumer-friendly proof of claim rule.

The new Rule 3001(c)(3) requires additional information to be attached to claim forms for credit card debts and other types of consumer credit. The owner of the debt will be required to file a statement disclosing the name of the entity from whom the new owner purchased the account; the name of the entity to whom the debt was owed at the time of the account holder's last transaction; the date of the account holder's last transaction; the date of the last payment on the account; and the charge-off date of the debt. The proof of claim form, Form B10, will not contain a space for this information. Rather, the instructions for Form B10 indicates that: "You must also attach copies of documents that evidence perfection of any security interest and documents required by FRBP 3001(c) for claims based on an open-end or revolving consumer credit agreement or secured by a security interest in the debtor's principal residence."

The committee notes for the amended rule state: "Subdivision (c) is further amended to add paragraph (3). Except with respect to claims secured by a security interest in the debtor's real property (such as a home equity line of credit), paragraph (3) specifies information that must be provided in support of a claim based on an open-end or revolving consumer credit agreement (such as an agreement underlying the issuance of a credit card). Because a claim of this type may have been sold one or more times prior to the debtor's bankruptcy, the debtor may not recognize the name of the person filing the proof of claim. Disclosure of the information required by paragraph (3) will assist the debtor in associating the claim with a known account. It will also provide a basis for assessing the timeliness of the claim. The date, if any, on which the account was charged to profit and loss ("charge-off" date) under subparagraph (A)(v) should be determined in accordance with applicable standards for the classification and account management of consumer credit."

Amendments to the Federal Rules of Bankruptcy Procedure

For further information, please contact Nabil G. Foster or your regular Hinshaw attorney.

District Court Denies TCPA Class Certification Because Consent Is an Issue Requiring Individualized Inquiry

The U.S. District Court for the Southern District of Florida denied certification of a Telephone Consumer Protection Act (TCPA) class, finding that plaintiff debtor did not satisfy her burden as to commonality and predominance requirements under Fed. R. Civ. P. 23(a) and 23(b)(3), because the issue of consent is an individualized inquiry. The district court followed the reasoning of *Hicks v. Client Services, Inc.,* No. 07-61822-CIV (S.D. Fla. Dec. 11, 2008), *Gene & Gene v. Biopay,* 541 F.3d 318, 329 (5th Cir. 2008) and *Conrad v. Gen. Motors Acceptance Corp.,* 283 F.R.D. 326, 330 (N.D. Tex. 2012), all of which denied TCPA class certification, holding that consent was an issue that would have to be determined on an individual basis at trial.

The court also rejected an injunctive class under Fed. R. Civ. P. 23(b)(2) for the same reason that consent is an individualized inquiry. Notably, the court reasoned that while consent may be an element of a defense that the defendant debt collector needs to prove at trial, the debtor still bears the burden of establishing the elements necessary for class certification under Fed. R. Civ. P. 23.

Applying similar reasoning, the court also distinguished the recent case of *Meyer v. Portfolio Recovery Associates, LLC,* 696 F.3d 943 (2012), where the U.S. Court of Appeals for the Ninth Circuit found that a district court did not abuse its discretion in certifying a TCPA class. In its review of *Meyer,* the court found that because "the Ninth Circuit did not address the broader issue of whether individualized issues of consent generally preclude class certification, this case does not

persuade the Court that Plaintiff is entitled to class certification."

Balthazor v. Central Credit Services, Inc., No. 10-62435-CIV (S.D. Fla. Dec. 27, 2012)

For further information, please contact Barbara Fernandez or your regular Hinshaw attorney.

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