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Newsletters

# Consumer & Class Action Litigation Newsletter - December 2012

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## Seventh Circuit Certifies Class Against Retailer for Faulty Washing Machines

The U.S. Court of Appeals for the Seventh Circuit again considered class certification of a case against defendant retailer involving allegedly defective washing machines. The district court denied certification of claims in which plaintiff consumers sued over a design defect in certain washing machines that caused mold. However, it granted class certification for claims involving a design defect associated with the washing machines' control unit that caused the machines to stop for no legitimate reason. Both parties sought review of the certification ruling.

The Seventh Circuit first addressed the mold claims class. The district court judge had agreed with the retailer's argument that a class could not be certified because the washing machine manufacturer made several design modifications, resulting in different models being differently defective (if defective at all), thus creating individual questions that predominated over common ones. The Seventh Circuit disagreed, holding that the basic question of whether the machines were defective in permitting mold was common to the entire class, even though the answer might vary with differences in design.

The court next considered certification as to the control unit claim. Declaring that "[p]redominance is a question of efficiency", the Seventh Circuit noted that the key question was whether it is more efficient—in terms of both economy of judicial resources and expense of the litigation to the parties — to decide some issues on a class basis or all issues in separate trials. The court concluded that

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it would be more efficient to resolve the main common question of whether the control unit was indeed defective in a single proceeding than for it to be litigated in hundreds of different trials. It therefore upheld the class certification ruling for the control unit class.

*Butler v. Sears, Roebuck & Co.,* Nos. 11-8029, 12-8030 (7th Cir. Nov. 13, 2012)

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

**Second Circuit Affirms Dismissal of FDCPA Claims Against Mortgage Lender**

After a foreclosure judgment was entered against plaintiff borrower, he sued defendants, the law firm representing the lender, and the loan servicer. The borrower asserted claims for violation of the Fair Debt Collection Practices Act (FDCPA), intentional misrepresentation, and violation of the Connecticut Unfair Trade Practices Act (CUTPA). He asserted that the loan servicer's representative signed two false affidavits in the state court foreclosure proceeding. The borrower further alleged that the loan servicer had advised him to apply for a loan modification program that it knew or should have known was detrimental to his interests.

The U.S. Court of Appeals for the Second Circuit affirmed dismissal of the FDCPA claim, holding that the complaint was devoid of any allegations that the loan servicer acquired the borrower's loan subsequent to his default. The complaint thus failed to establish that AHMSI was a debt collector as that term is defined under the FDCPA.

The Court further held that borrower's vague allegations of fraud were insufficient to give rise to an inference of fraudulent intent and motive necessary to establish a claim for intentional misrepresentation. Finally, the court held that because the borrower's CUTPA claims were expressly predicated upon his claim for violation of the FDCPA and intentional misrepresentation, that claim failed as a matter of law.

The Second Circuit affirmed the lower court's refusal to allow borrower to amend his complaint. The borrower had already amended his complaint three times. The court agreed that any further amendment would be futile.

*Gabriele v. American Home Mortgage Servicing, Inc.,* ___ Fed. Appx. ___, (2nd Cir. (Conn.) Nov. 27, 2012)

For more information, please contact Andrew M. Schneiderman or your regular Hinshaw attorney.

**Fourth Circuit Holds Debt Collector's Calls to Locate Debtor Are Exempt From FDCPA Liability**

In *Worsham v. Accounts Receivable Management, Inc.,* No. 11-2390 (4th Cir. Nov. 14, 2012), defendant debt collector sought to locate plaintiff's sister-in-law. In the course of doing so, it discovered plaintiff's phone number as a possible contact for the debtor. The debt collector called plaintiff's phone number approximately 10 times. Plaintiff answered only two of those calls. Both times he heard a prerecorded message telling him to press "1" if he was "Martha" and "2" if he was not "Martha." On one of these occasions, plaintiff pressed "2" and upon hearing more prompts and options, he hung up the phone.

Plaintiff sued the debt collector, alleging violations of the Fair Debt Collection Practices Act (FDCPA) and the Maryland Telephone Consumer Protection Act (MTCPA). The U.S. Court of Appeals for the Fourth Circuit affirmed summary judgment for debt collector.

Plaintiff appealed the grant of summary judgment for debt collector on three counts under the FDCPA, alleging improper communications with third parties and failure of debt collector to provide meaningful disclosure pursuant to 15 U.S.C. § § 1692b(3), 1692c(b), and 1692d(6). Section 1692b of the FDCPA allows communication with a third party to acquire location information about a debtor, but with limitations. As to the alleged violation of 15 U.S.C. § 1692b(3) for communicating more than once with plaintiff, the court paid particular attention to the complaint, alleging that he heard "more prompts and options" after he pressed "2" to indicate that he was not Martha. The court reasoned that based on this fact, a reasonable person would believe that plaintiff's response to the call was incomplete, and accordingly, 15 U.S.C.

§ 1692b(3) allowed the debt collector to continue calling plaintiff until it reasonably believed that it had received a complete response.

As to plaintiff's claims for alleged violative communications with a third party under 15 U.S.C. § 1692c(b) and failure to provide meaningful disclosure under 15 U.S.C. § 1692d(6), the court held that both sections expressly exempt from liability calls permitted under 15 U.S.C. § 1692b. Thus, because defendant debt collector's calls were permitted under Section 1692b, those calls did not give rise to liability under 15 U.S.C. § 1692c(b) or § 1692d(6). Accordingly, the Fourth Circuit affirmed the order granting summary judgment for defendant debt collector.

*Worsham v. Accounts Receivable Management, Inc.,* No. 11-2390 (4th Cir. Nov. 14, 2012)

For more information, please contact your regular Hinshaw attorney.

**Florida District Courts Determine Collector Had Consent Under TCPA to Call Debtor**

Two Florida district courts recently granted summary judgment in favor of debt collector defendants, where plaintiff debtors claimed that the collectors did not have consent to call the cellular telephones despite the fact that debtors had provided the cellular numbers to creditor.

In *Sherone Johnson v. Credit Protection Association, LP,* No. 11-80604, slip op. (S.D. Fla. Nov. 20, 2012), the debtor claimed that debt collector violated the Telephone Consumer Protection Act (TCPA) because the debtor claimed that he gave permission to a creditor, which was a cable company, to call his cell only with respect to installation but not subsequent collection calls. The court observed that the debtor put forth no evidence that he told the creditor it could only contact him for purposes of installing his cable services when he gave his cell number. Judgment was therefore entered in defendant's favor on the TCPA claim. Hinshaw & Culbertson LLP handled this case on behalf of the debt collector.

In *Jordan v. ER Solutions, Inc.,* No. 10-CV-62409-WPD, slip op. (S.D. Fla. Oct. 18, 2012), the district court granted summary judgment in the debt collector's favor, finding that because the debtor had provided her cellular number to the creditor, the debt collector had consent to call it. The debtor argued that a modified contract with the creditor revoked the debtor's consent. The district court disagreed, concluding that the modification of the contract, even if applicable, did not revoke debtor's consent because, as pronounced by the Federal Communications Commission (FCC), the collectors' calls are treated as if the creditor made them, and the creditor had express consent to call debtor. Hinshaw also handled this case on behalf of the debt collector.

Other districts courts have similarly found that consent was given to a debt collector when the debtor provided a cellular number to the creditor. *Greene v. DirecTV, Inc.,* No. 10-C-117, slip op. (N.D. Ill. Nov. 8, 2010) (debtor consented to be contacted by potential creditors on her cell phone number when she voluntarily released her number to potential creditors); *Cavero v. Franklin Collection Srvc.,* No. 11-22630, slip op. (S.D. Fla. Jan. 31 2012) (where debtor did not dispute he provided number to creditor court granted summary judgment in favor of defendant debt collector); *Mitchem v. Illinois Collection Serv., Inc.,* No. 09-C-7274, slip op. (N.D. Ill. Jan. 20, 2012) (court concluded the record established that debtor consented to receiving calls about the medical debt on his cell phone by giving the cell phone number to a medical provider).

*Sherone Johnson v. Credit Protection Association, LP,* No. 11-80604, slip op. (S.D. Fla. Nov. 20, 2012)

*Jordan v. ER Solutions, Inc.,* No. 10-CV-62409-WPD, slip op. (S.D. Fla. Oct. 18, 2012)

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**Language in Collection Notice Did Not Constitute Material Violation of FDCPA**

Plaintiff debtor alleged violations of the Fair Debt Collection Practices Act (FDCPA) against defendant law firm for threatening to take action that cannot legally be taken. Specifically, the debtor alleged that the sentence in the collection

letter stating that judgment can be obtained against him in the state court suit "without further notice" amounted to a false representation because it was contrary to the requirements of the New York Civil Practice Law and Rules (CPLR). The law firm moved for judgment on the pleadings on the ground that the language did not constitute a "material" violation of the FDCPA.

The court examined the CPLR provisions and found that the language used by the law firm in the collection letter was "technically false." However, it did not find the language to be "material" because there was "no plausible basis to conclude" that the statement would influence an unsophisticated consumer to "pay a debt he otherwise would not pay or impair his ability to challenge the debt." Therefore, no violation of the FDCPA occurred. The law firm's motion for judgment on the pleadings was granted in its entirety.

*Broughman v. Chiari & Ilecki, LLP,* 12-cv-131 (W.D.N.Y. Nov. 16, 2012)

For more information, please contact Concepcion A. Montoya or your regular Hinshaw attorney.

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