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Newsletters

Consumer & Class Action Litigation Newsletter - December 2011

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Supreme Court Hears Oral Arguments in Two Consumer Law Cases
TCPA Jurisdiction – Mims v. Arrow Financial Services

On November 28, 2011, the U.S. Supreme Court heard oral arguments in *Mims v. Arrow Financial Services*. The Court struggled with the question of whether Congress, in creating a private right of action for consumers, limited them to suits only in state courts. At issue is whether the provision in the federal Telephone Consumer Protection Act (TCPA) creating a private cause of action that "may" be brought in state court implicitly divests federal courts of jurisdiction.

Counsel for Arrow Financial argued that the law's provision that private actions "may, if otherwise permitted" by state laws or rules shows that Congress intended state courts to be the forum for adjudicating violations of the act. Justice Antonin Scalia asked "so the state law limitations don't apply if it's a suit in federal court by an attorney general? I mean it is so weird. I can't understand that." Justice Elena Kagan noted that it is a "momentous thing" for Congress to divest federal courts of jurisdiction over a cause of action created by Congress and which has federal law as the rule of decision. "[T]his is one peculiar way of divesting those federal courts of jurisdiction," she said of Arrow Financial's argument.

Justice Stephen Breyer and some of the other justices expressed concern that permitting federal jurisdiction over what are primarily small claims would thwart Congress' intention of providing a quick, easy and cheap way for consumers to seek the act's remedies (damages of $500 per violation). Defendants could remove those actions from small claims court to federal court, said Justice Breyer, and increase the time and costs of resolving the claims.

Toward the conclusion of oral arguments, Justice Kagan noted that "all nine justices agree [the statute] is odd. . . . If it's odd and we can't figure it out, the default position seems to be federal courts have jurisdiction over federal questions."

Hinshaw filed an *amicus* brief for ACA International in *Mims*.

Constitutionality of Statutory Damages – First American Financial v. Edwards

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Service Areas

Commercial Litigation

Consumer and Class Action Defense

Consumer Financial Services

Mortgage Servicing and Lender Litigation

Regulatory and Compliance Counseling

The Supreme Court also heard oral arguments in *First American Financial v. Edwards*. Edwards sued American Financial, a title company, for statutory damages due to a violation of the anti-kickback provision in the Real Estate Settlement Practices Act (RESPA). Edwards alleged that when she purchased her home, American Financial had an ownership interest and referral arrangement with the title insurance company. Edwards did not, however, allege that she paid too much for the insurance, that the insurance was substandard, or any other particular injury in fact.

The Justices focused on whether there was an "injury in fact," versus conjectural harm, with Justice Anthony Kennedy noting that "[t]he Constitution requires an injury." Chief Justice John Roberts questioned Edwards' counsel as to whether he was arguing that: (1) Edwards had been injured by not obtaining a conflict-free referral; (2) Congress presumed that a referral tainted by a conflict caused injury; or (3) no showing of injury is required. The response from counsel was that his client was injured by violation of her right to a conflict-free title insurance purchase, and that Congress, via RESPA, had decided that no showing of injury is required when a person's right to conflict-free services is violated. Conversely, counsel for American Financial argued that the Constitution ". . . requires that a plaintiff that comes into court must have suffered an injury in fact, and Congress cannot create that injury legislatively."

While the Court may reject the broad contention that no showing of injury is required simply because Congress has provided for statutory damages, the Justices still may find credence to the theory that Congress presumed that a referral tainted by a conflict caused injury.

Hinshaw filed an *amicus* brief for NARCA in the *Edwards* case.

Rulings in Edwards and *Mims* are expected in late-Winter or Spring 2012.

Transcript of oral arguments before the U.S. Supreme Court in *Mims v. Arrow Financial Services, LLC*

Transcript of oral arguments before the U.S. Supreme Court in *First American Financial v. Edwards*

Continuing Efforts on the Hill to Modernize the TCPA

The House Energy and Commerce Subcommittee on Communications and Technology held a hearing on Friday, November 4, 2011, on H.R. 3035, the Mobile Informational Call Act of 2011. The purpose of bill is to amend the Telephone Consumer Protection Act of 1991 (TCPA) to reflect the ubiquity of mobile devices in the country and the value to consumers of receiving timely information on their mobile devices. The following people testified at the hearing: Faith Schwartz, Executive Director of HOPE NOW; Stephen A. Alterman, President of the Cargo Airline Association; Delicia Reynolds Hand, Legislative Director of the National Association of Consumer Advocates (NACA); Greg Zoeller, Attorney General of Indiana; and Michael Altschul, Senior Vice President and General Counsel of CTIA.

Representative Lee Terry (R-Neb.), who is the sponsor of the bill, signaled that he is open to adding language saying that H.R. 3035 would not preempt state laws, and to changing the language in the bill to make sure that solicitations are prohibited. Ranking Committee Member Anna Eschoo (D-Cal.) acknowledged the need to modernize the TCPA, but expressed concern about redefining "prior express consent," implying that there was a loophole for solicitations and that the current law was sufficient. Delicia Reynolds Hand opposed the bill, arguing that a consumer can carelessly give a cell phone number to a merchant and then receive endless, unwanted calls to that phone. Representative Terry took umbrage at this and asked NACA to work with him to improve the bill, which Hand agreed to do.

The bill's supporters are optimistic that it will pass. We will continue to track this legislation and provide our readers with news as to further developments.

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

Seventh Circuit Agrees Putative Class Action Is Moot if Plaintiff Is Offered Full Case Value Before Class Certification Motion is Filed

In *Damasco v. Clearwire Corporation,* the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's granting of a motion to dismiss and denial of a motion to reconsider on grounds that a complete offer of settlement made prior to the filing of a motion for class certification moots a plaintiff's claim and strips the court of subject matter jurisdiction. In doing so, the Seventh Circuit split with the U.S. Courts of Appeal for the Third, Fifth, Ninth and Tenth Circuits, which have fashioned rules allowing a plaintiff to still move to certify a class and avoid mootness even after being offered complete relief.

To avoid mooting, the Seventh Circuit instructs would-be class plaintiffs to file a motion for class certification at the same time that they file their complaint. If additional facts are needed for certification, the district court should be asked to delay its ruling to provide time for additional discovery or investigation.

Damasco v. Clearwire Corporation, , __ F.3d __, No. 10-3934 (7th Cir. Nov. 18, 2011)

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

In Florida, Standing to Foreclose Established When Plaintiff Holds Note Endorsed in Blank, Regardless of Assignment

In *Harvey v. Deutsche Bank National Trust Company*, 69 So. 3d 300 (Fla. 4th DCA 2011), the Fourth District Court of Appeals held that plaintiff bank, as holder of a note endorsed in blank, established its standing to foreclose due to its status as note holder, regardless of any recorded assignments.

The bank filed an action for mortgage foreclosure against defendant debtor, who argued that the assignment of mortgage was fraudulent because it was not filed until 20 days after the foreclosure action was filed. The judge entered summary judgment for the bank, and the debtor moved for reconsideration, arguing lack of standing and that the assignment contained questionable signatures. That motion was also denied, and the debtor appealed.

The appellate court found that summary judgment had properly been entered, as the bank had established standing from its status as the holder of the note indorsed in blank, regardless of any recorded assignments. Furthermore, the court noted that not only had the debtor failed to present any evidence to support the argument as to fraudulent signatures, but even if proven, the dispute would be between the assignor and assignee.

Harvey v. Deutsche Bank National Trust Company, 69 So. 3d 300 (Fla. 4th DCA 2011)

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Federal Court Reviews "False Name" and "Corporate Affiliation" Exceptions Under the FDCPA

The U.S. District Court for the District of Connecticut recently reviewed the "false name" and "corporate affiliation" exceptions under the Fair Debt Collection Practices Act (FDCPA) to determine whether a defendant is a debt collector for the purposes of the FDCPA in *Rogers v. Capital One Services, LLC et al,* 2011 WL 873312 (D.Conn. 2011). First, plaintiff claimed that defendant creditor was a debt collector under the "false name" exception, which provides that a creditor can be held liable under the FDCPA if it pretends to be someone else during collection of its debt. The court dismissed the complaint for plaintiff's failure to allege that the creditor was attempting to collect its own debts, and instead alleged that the debt had been transferred. Another defendant, the creditor's subsidiary debt collector, also moved to dismiss on the basis that the "corporate affiliate" exception applied. That exception provides that a debt collector may not be liable under the FDCPA if it only collects debt for the affiliate and the principal business of the affiliate is not debt collection. The court denied the subsidiary debt collector's motion to dismiss because plaintiff had adequately alleged that that party's principal business was debt collection.

Rogers v. Capital One Services, LLC et al, 2011 WL 873312 (D.Conn. 2011)

For further information, please contact your regular Hinshaw attorney.