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Newsletters

Consumer & Class Action Litigation Newsletter - November 2011

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Hinshaw Files Amicus Brief for ACA International in TCPA Case Pending Before U.S. Supreme Court

The U.S. Supreme Court has agreed to decide whether Congress stripped the federal courts of jurisdiction to decide private claims for damages under the Telephone Consumer Protection Act, 47 U.S.C. §227 (TCPA).*See Mims v. Arrow Financial Services, LLC,* No. 10-1195. The TCPA provides that a plaintiff "may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State, an action" for damages in the amount of $500 per violation or injunctive relief. Unusual among federal statutes, the TCPA authorizes consumers to file an action for damages in state courts, but does not authorize similar filings in federal courts. The federal courts of appeals are split as to whether the statute assigns exclusive jurisdiction over private TCPA claims to the state courts, or whether the federal trial courts may also decide these claims under the federal-question statute, 28 U.S.C. § 1331. *Mims* arose from a decision by the U.S. Court of Appeals for the Eleventh Circuit, which had reaffirmed that federal courts do not have jurisdiction over private TCPA claims.

The Supreme Court has agreed to decide whether a plaintiff seeking relief under this unique private right of action may bypass state court and bring suit in federal court under 28 U.S.C. § 1331. ACA International, formerly known as the American Collectors Association, asked Hinshaw to prepare an *amicus curiae* brief in support of respondent, Arrow Financial Services, LLC. Arrow and the ACA contend that Congress assigned exclusive jurisdiction over these claims to the state courts, as is reflected in the text and legislative history of the TCPA. The ACA's brief points out that the bill's sponsor, then South Carolina Senator, Ernest Hollings, had commented on the Senate floor that the states should allow consumers to file TCPA actions in small claims courts, where they can appear without a lawyer. The ACA's brief explains why TCPA claims filed in small claims courts can be resolved much more quickly, and at much less expense, than those filed in federal courts. Oral argument is set for November 28, 2011, and a ruling is expected in the first half of 2012.

Mims will significantly impact TCPA litigation. We will keep our readers advised on the results.

Amicus brief filed on ACA's behalf in *Mims v. Arrow Financial Services, LLC*

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

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Ninth Circuit Allows Class to Recover Under FDCPA and Rosenthal Act for Same Conduct
In *Gonzales v. Arrow Financial Services, LLC,* the U.S. Court of Appeals for the Ninth Circuit considered whether defendant debt collector's use of the conditional language, "if we are reporting the account, the appropriate credit bureaus will be notified this account has been settled," violated the Fair Debt Collection Practices Act (FDCPA) and the Rosenthal Act. The collection letters were sent to persons whose accounts were too old to be credit reported. The court held that although the language was conditional in nature, it violated Section 1692e(5) and Section 1692e(10) of the FDCPA because the phrase could suggest that under some circumstances the debt collector could and would report the account.

The court then addressed the issue of whether the class could recover damages under both the FDCPA and Rosenthal Act for the same conduct, namely the letter that violated the Acts. The court was split on the issue. The majority held that when the Rosenthal Act was amended in 1999, the legislature incorporated the FDCPA's remedies, and that the Rosenthal Act permits class actions. The court held that the FDCPA's cap on class recovery was not a prohibition on duplicative class recovery under state law.

The dissent found that duplicative class recovery was not permitted because the legislature adopted identical provisions of the FDCPA when it amended the Rosenthal Act. The dissent also found that construing adopted FDCPA remedy provisions to provide duplicative awards invited pre-emption because such awards undermine the statute's protective cap on statutory damages.

At trial, the jury awarded the class $225,000 out of $1 million in potential damages and awarded plaintiff $500 out of $2,000 in potential statutory damages. Hinshaw represented the debt collector at the trial and appellate levels.

Gonzales v. Arrow Financial Services, LLC, ___ F.3d ___, 2011 WL 4430844 (9th Cir. 2011)

For more information, please contact Jennifer W. Weller or your regular Hinshaw attorney.

Bank Sued in Florida for Failure to Comply With County's Foreclosure Registration Requirements
In Miami-Dade County, Florida, plaintiff foreclosure defense attorney sued defendant bank, alleging that it had failed to abide by county ordinance Section 17A-19, which became effective on July 10, 2009. Section 17A-19 provides that upon filing of a *lis pendens* or action for mortgage foreclosure, the party bringing the action shall register the dwelling unit with the Office of Neighborhood Compliance.

It is alleged that, upon notice of a violation of this section, the county may then institute a civil action to impose and recover a civil penalty, not more than $5,000 per offense. The attorney alleges that the bank failed to register the dwelling units that are the subject of its foreclosure action, and thus that the county is entitled to recover a civil penalty. Penalties sought are in excess of $1 million. Attorneys' fees in the amount of 25 percent of the total penalties recovered are also sought by the entity bringing the action. Additional lenders alleged to have violated this ordinance are also targeted.

Complaint filed in *Forclosure Assistance & Independent Research, Inc. v. Gibraltar Bank, N.A*.

For more information, please contact your regular Hinshaw attorney.

Massachusetts Court Rules That Purchasers Do Not Own Property Bought at Foreclosure Sale Later Found Invalid
In *Bevilacqua v. Rodriguez,* the Massachusetts Supreme Judicial Court (SJC) confirmed the land court's ruling that plaintiff purchaser lacked standing to maintain a try-title action against defendant mortgagor. In order to have standing to bring such a claim, a plaintiff must have both possession of and legal title to the property. The SJC ruled that the purchaser did not have legal title to the property.

A bank foreclosed on the mortgagor's mortgage in 2006 and was subsequently assigned the mortgage. The purchaser then bought the property from the bank. Approximately three years later, the land court ruled that the mortgage had to be assigned to the foreclosing entity prior to the foreclosure sale. Because the bank had not been assigned the mortgage

until after the foreclosure sale, that sale was void. Based on the voided foreclosure sale, the purchaser was not a *bona fide* purchaser and did not hold legal title to the property, and so lacked standing to bring a try-title action.

Bevilacqua v. Rodriguez, 460 Mass. 762, ___ N.E.2d ___, 2011 WL 4908845 (Mass. 2011)

For more information, please contact your regular Hinshaw attorney.

Florida Federal Court Holds Provision of Cell Phone Number to Creditor Gives Prior Express Consent to Creditor's Debt Collector

In *Romain Moise v. Credit Control Services, Inc.,* plaintiff debtor alleged that defendant debt collector violated the Telephone Consumer Protection Act (TCPA) by calling his cell phone using an automatic telephone dialing system without the debtor's prior express consent. The debt collector had been attempting to collect a debt on behalf of a medical laboratory.

It was unclear at the time of the court's opinion whether the debtor had gone directly to the lab for the tests, or whether a physician had requested the lab tests. The debt collector argued that it did not violate the TCPA because the debtor had provided prior express consent to be called on his cell phone when he provided the number to either the physician who ordered the lab work or the lab itself. The debtor contended that consent could not be imputed from physician to laboratory to debt collector because the debt collector was not in privity with the physician who obtained information from the debtor. The debtor further argued that there can never be imputed consent in a medical-debt-collection scenario because the Health Insurance Portability and Accountability Act (HIPAA) precludes a medical provider from giving a patient's personal information—here, a telephone number—to a debt collector.

The court did not address the HIPAA argument directly, but implicitly rejected it because the court determined that it was required under the Hobbs Act to follow the Federal Communications Commission's (FCC) 2008 ruling that "prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt. . . ." Following the FCC's 2008 ruling, the court held that if the debtor provided his cell phone number directly to the laboratory, that would constitute prior express consent to be called by the laboratory's third-party debt collector. The court further held, however, that if the cell phone number was given only to debtor's treating physician, who then gave the number to the laboratory, then the debtor did not provide prior express consent to the laboratory or its third-party collector.

Romain Moise v. Credit Control Services, Inc., Case No. 11-CIV-60026 (S.D. Fla. Oct. 18, 2011)

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

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