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Newsletters

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Hinshaw Files Amicus Brief on NARCA's Behalf in U.S. Supreme Court Case, Edwards v. First American Financial Corp.

The U.S. Supreme Court recently accepted certiorari in *First American Financial Corp. v. Edwards,* 610 F.3d 514 (9th Cir. 2010), *cert.* granted, 79 USLW 3344, 3705, 3710 (U.S. June 20, 2011) (No. 10-708), a Real Estate Settlement Procedures Act (RESPA) case. At issue is whether lawsuits under RESPA—which allows homebuyers to sue banks and title companies when they pay kickbacks for the closing of mortgage loans—are constitutional if the kickback does not affect the price or quality of the services provided. The implications of the case may go beyond RESPA. Specifically, the case could put into question whether other consumer statutes that provide "statutory damages" when there has been no damage are constitutional under Article III of the U.S Constitution.

National Association of Retail Collection Attorneys (NARCA) members are subject to Fair Debt Collection Practices Act (FDCPA) claims in which there has been no damage, but where statutory damages, attorneys' fees and costs are sought. An *amicus curiae* brief filed by Hinshaw on NARCA's behalf discusses the state of the law under the FDCPA, the significant increase in litigation under the Act, and how people have taken advantage of the FDCPA to generate litigation when there has been no harm.

Edwards likely will be a significant case in the consumer litigation field. We will keep our readers advised of the results.

Amicus brief filed on behalf of NARCA

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

N.J. Appellate Court Holds Class Certification Is Not a "Superior Method" of Proceeding in a Junk Fax Case

The New Jersey Appellate Division recently held that a proposed class action plaintiff could not prosecute a junk fax claim on behalf of a class. *Local Baking Products, Inc. v. Kosher Bagel Munch, Inc.,* Case No. A-3923-09T2, slip op. (N. J. July 19, 2011). Plaintiff, a recipient of an unsolicited advertising fax sent by defendant, a vendor on whose behalf the fax was sent, claimed that the fax

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violated the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. The TCPA prohibits the use of any device to send "to a telephone facsimile machine, an unsolicited advertisement. . . ." 47 U.S.C. § 227(b)(1)(C).

The subject fax was one of 4,649 sent by a third-party for the vendor's benefit as part of a "blast fax" campaign. The class stood to gain over $2.3 million in statutory damages at $500 per fax.

The dismissal of the class action was appealed on the issue of whether the proposed class raised "questions of law or fact common to the members of the class [that] predominate[d] over any questions affecting only individual members . . . and [whether] a class action [was] superior to other available methods for the fair and efficient adjudication of the controversy." The appellate court concluded that "a class action is not a superior means of adjudicating a TCPA suit." In particular, the court held that the TCPA's provision of a minimum of $500 in statutory damages per violation constituted a significant incentive for plaintiffs to file suits in small claims court and did not require the aggregation of small claims as is typically undertaken in class action litigation.

Local Baking Products, Inc. v. Kosher Bagel Munch, Inc., Case No. A-3923-09T2, slip op. (N.J. July 19, 2011)

For further information, please contact your regular Hinshaw attorney.

Eleventh Circuit Denies Class Certification to Mobile Phone Service Provider's Users for Claims Relating to Charges

In a putative class action, plaintiff customer alleged that defendant mobile phone service provider violated Florida's Deceptive and Unfair Trade Practices Act by automatically charging a monthly fee for a roadside assistance plan without the customer's authority. Users of the service provider's service were required to agree to a service agreement. Among other things, the service agreement provided that the customer agree to arbitrate all disputes and claims and that any claims be brought in an individual capacity and not as a class representative or member. The trial court dismissed the complaint based upon the arbitration clause and class action waiver.

The putative class appealed, arguing that the class action waiver was unenforceable because it would exculpate the service provider from liability under state law given that the vast majority of these small-value consumer fraud claims against the service provider would go unprosecuted unless brought as a class. The U.S. Court of Appeals for the Eleventh Circuit followed *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), in which the U.S. Supreme Court held that state law that classifies most collective-arbitration waivers in consumer contracts as unenforceable is preempted by the Federal Arbitration Act (FAA). Accordingly, the court held that to the extent Florida law would require the availability of class-wide arbitration proceedings in consumer fraud actions simply because the case involved numerous small-dollar claims by consumers against a corporation, it was inconsistent with the FAA's liberal policy of favoring arbitration, and thus was preempted by that act.

Cruz v. Cingular Wireless, LLC, n/k/a AT&T Mobility, LLC, Case No. 08-16080 (11th Cir. Aug. 11, 2011)

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

TCPA Claim Against Collection Agency Failed Because Debtor Gave TCPA Consent to Creditor

The U.S. District Court for the Northern District of Illinois recently held that a Telephone Consumer Protection Act (TCPA) plaintiff, who had submitted his cellular telephone number to an electronic payment service provider, provided prior express consent under the TCPA to receive calls on that telephone from defendant debt collector, which had attempted to collect a debt for the creditor electronic payment service provider.

When the debtor opened an account with the creditor, he provided his name and telephone number and consented to the creditor's user agreement, which contained provisions stating that by providing the creditor a telephone number (including wireless/cellular telephone), he consented to receiving autodialed and prerecorded message calls from the creditor at that number.

The court cited the Federal Communications Commission's (FCC's) 1992 ruling on prior express consent wherein the agency determined that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." Concluding that the FCC's ruling made it clear that the debt collector was, for TCPA purposes, the creditor when it called the debtor, the court granted summary judgment for the debt collector.

This case confirms that: (1) the provision of providing a telephone number to a future creditor can be used as consent to call that number in connection with collecting a debt on behalf of that debtor; (2) the collector steps into the shoes of the creditor; (3) the burden to show consent is on the collector; and (4) a court is constrained by the Hobbs Act to question FCC rulings in this area.

Diego Frausto v. IC Systems, Inc., Case No. 10 CV 1363 (N.D. Ill. Aug. 22, 2011)

For further information, please contact your regular Hinshaw attorney.

Home Owners' Loan Act of 1933 Preempts Certain State Law Claims Against Federal Savings Banks

The U.S. District Court for the District of Oregon recently dismissed plaintiff debtor's claims against defendant creditor for conversion stemming from a foreclosure sale based upon federal law preemption. The debtor had executed a deed of trust with a lender as beneficiary of the security agreement. The lender was purchased by a third party, which was then purchased by defendant creditor. The third party served the debtor with a notice of default. When the debtor applied for a loan modification, the third party advised that the foreclosure sale would not go forward during the modification review. Contrary to this assertion, the property was sold.

The debtor brought a claim for conversion based upon: (1) failure to record the assignment to the creditor; (2) issuance of an invalid notice of default; and (3) failure to honor an alleged oral representation regarding the stay of the foreclosure sale. The creditor moved to dismiss, arguing that the debtor's conversion claim was preempted by federal law—specifically, the Home Owners' Loan Act of 1933 (HOLA).

HOLA was enacted to create central regulation of federal savings and loan associations according to nationwide "best practices." The debtor argued that HOLA does not apply to foreclosure actions. The court disagreed, noting *Thomas v. OneWest Bank, FSB,* 2011 WL 867880 (D. Or. Mar. 10, 2011). In *Thomas,* the court found that HOLA preempted claims against a bank for fraud and equitable estoppel for allegedly improper interest rate adjustments. The court also noted *Parcray v. Shea Mortgage, Inc.,* 2010 WL 1659369 (E.D. Cal. Apr. 23, 2010), in which the U.S. District Court for the Eastern District of California held that HOLA preempted plaintiff's allegations that defendant was not a beneficiary under the deed of trust and that the note was unenforceable by the loan servicer.

The court in the case at issue determined that HOLA preempted each of the debtor's theories of recovery. It held that although the creditor was not a federal savings bank, the action was nonetheless governed by HOLA because the loan originated with a federal savings bank, and thus was subject to HOLA requirements. Finally, the court found that preemption did not violate the Tenth Amendment.

Tobin Copeland-Turner v. Wells Fargo Bank, N.A., et al., No. CV-11-37-HZ (D. Or. July 5, 2011)

For further information, please contact your regular Hinshaw attorney.

Evidentiary Hearing Required Before Foreclosure Judgment Set Aside, Even If Not Requested

Following entry of a final judgment of foreclosure against defendant borrower, who was not present at the hearing, the borrower moved to set aside the judgment, certificate of sale and certificate of title. He alleged that plaintiff lender's counsel had represented that the final summary judgment hearing would not go forward. The trial court granted the motion and set aside the sale and judgment.

On behalf of the lender, Hinshaw's James Wyman prosecuted an appeal of the order setting aside the sale and judgment. The Second District Court of Appeal of Florida held that the lender was entitled to an evidentiary hearing before the circuit court could set aside the final judgment, regardless of whether such hearing was requested. The court further held that the circuit court could not rely upon the parties' conflicting affidavits as a substitute for an evidentiary hearing on a motion filed under Fla. R. Civ. P. 1.540(b), citing *Avi–Isaac v. Wells Fargo Bank, N.A.,* 59 So. 3d 174 (Fla. 2d DCA 2011) ("Of course, '[n]either the submission of affidavits nor argument of counsel is sufficient to constitute an evidentiary hearing.'"). The appellate court observed that the circuit court had held a hearing but noted that it took no sworn testimony or evidence at the hearing, and instead relied solely on affidavits and/or written submissions of the parties and the arguments of counsel.

Novastar Mortgage, Inc. v. Bucknor, _ So. 3d _, 2011 WL 2936753, (Fla. 2d DCA 2011).

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

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