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Newsletters

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U.S. Supreme Court Takes Eleventh Circuit Case on TCPA Jurisdiction

On June 27, 2011, the U.S. Supreme Court granted certiorari in *Marcus Mims v. Arrow Financial Services, LLC,* Case No. 10-12077, 2010 WL 4840430 (11th Cir. 2010). The Court will decide whether the Telephone Consumer Protection Act (TCPA) provides for federal question jurisdiction under 28 U.S.C. § 1331. Hinshaw will follow this case and keep readers of this newsletter advised of any developments in the case.

U.S. Supreme Court Strengthens Existing Class Actions Requirement

In one of the most important class actions in years, the U.S. Supreme Court ruled that a proposed class of approximately 1.5 million employees should not be certified. *Wal-Mart Stores, Inc. v. Dukes,* et al. (S. Ct. June 20, 2011). The Court clarified the requirements in Fed. R. Civ. P. 23(a) and Rule 23(b), articulating points that will be helpful to defendants in consumer and other putative class actions.

Plaintiffs, current and/or former employees of defendant employer, sued the employer for injunctive and declarative relief, punitive damages, and back pay on behalf of themselves and a nationwide class of approximately 1.5 million employees. The employees' lawyers argued that the employer illegally discriminated against women in violation of Title VII of the Civil Rights Act of 1964, as amended.

Fed. R. Civ. P. 23(a)'s requirements include that there be questions of law or fact common to the class. The class members' claims must depend upon a common contention of such a nature that it is capable of class-wide resolution. The party seeking class certification must be prepared to prove that there are in fact common questions of law or fact and that the other Rule 23(a) requirements are met. A rigorous analysis of whether Rule 23(a) requirements are satisfied frequently requires some overlap with an examination of the merits of the plaintiff's underlying claim.

In resolving a Title VII claim, the crux of the inquiry is the reason for an individual's particular employment decision: without some "glue" holding the reasons for the decisions together, it would be impossible to say that an examination of all the class members' claims for relief will produce a common answer to the crucial question of "why I was disfavored." This was not a

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common question but could vary depending upon each individual employee and employment decision.

Entirely absent was that the employer operated under a general policy of discrimination. The employees' sociological expert conceded that he could not calculate the percentage of the subject employment decisions which might be determined by stereotyped thinking. Thus, the Supreme Court disregarded his testimony. The only corporate policy that the employees' evidence convincingly established was the employer's "policy" of allowing discretion by local supervisors over employment matters. However, the employees did not identify a common mode of exercising discretion that pervaded the entire company. The statistical and anecdotal evidence did not demonstrate that a commonality of issues existed. Other than the delegated discretion, the employees identified no specific employment practice, much less one that tied the approximately 1.5 million claims together. The employees provided no convincing proof of company-wide discriminatory pay and promotion policies and therefore provided no common question.

The Court also held that the employees' claims for back pay should not have been certified as a class under Fed. R. Civ. P. 23(b). Rule 23(b) allows class treatment when the party opposing the class has acted or refused to act on grounds that apply generally to the class so that injunctive or declaratory relief is appropriate to the class as a whole. Here, the claims for individualized relief (such as back pay) did not satisfy the rule. Rule 23(b) does not apply to an individualized award of monetary damages. The employer was entitled to individualized determination of each employee's eligibility for backpay, and to litigate its statutory defenses to individualized claims. The necessity of that litigation would prevent backpay from being merely "incidental" to a class-wide injunction (a traditional requisite to a Fed. R. Civ. P. 23(b)(2) class). Therefore, the class should not have been certified under Rule 23(b)(2).

Although the Supreme Court's ruling was made in the context of an employment discrimination case, its emphasis on and clarification of certain points will affect attempts to certify consumer classes against debt collectors and others. The Court emphasized a rigorous analysis of Fed. R. Civ. P. 23(a) requirements that could overlap with the merits and that plaintiffs must affirmatively demonstrate compliance with Rule 23(a)'s requirements. It discussed common questions and the common contention being capable of class-wide resolution. The Court applied its analysis to individual store manager decisions, critically assessed the plaintiffs' expert, and focused on individualized determinations in its discussion of both Fed. R. Civ. P. 23(a) and (b)(2). All of these points will be helpful to defendants in consumer law or other legal environments.

Wal-Mart Stores, Inc. v. Dukes, et al., Case No. 10-277 (S. Ct. June 20, 2011).

Borrowers Lack Standing to Challenge Alleged Fraudulent Assignments of Mortgage

In a case that Hinshaw is defending, *Fryzel v. Mortgage Electronic Registrations Systems, Inc., et. al.,* Case No. 10-cv-352-M-DLM, (Dist. R.I. June 10, 2011), Magistrate Judge David L. Martin issued a Report and Recommendation (Report) granting defendants' motion to dismiss based on plaintiff borrowers' lack of standing to challenge the assignments of mortgage placed at issue in the Complaint.

The borrowers allege that defendants do not have the right to foreclose the mortgage securing their $985,000 loan, and seek a declaratory judgment that: the assignments of mortgages utilized by defendants were invalid, the borrowers were entitled to recoupment of their mortgage payments, and defendants do not own or hold a secured claim to the property. The borrowers contend that the assignments of mortgage executed by Mortgage Electronic Registration Systems, Inc. (MERS) are invalid because: (1) MERS, as nominee for the lender, ABC Mortgage Corp., did not have authority to assign the mortgage and was never the holder of the note; (2) the assignments were outside the time provided in the trust's pooling and servicing agreement (PSA); and (3) the persons executing the assignments of mortgage were not authorized to do so. In addition, the borrowers allege that the signatures on the assignments were not authentic because they were prepared by entities under investigation by the Office of the U.S. Attorney and the State of Florida.

Defendants moved to dismiss based on the borrowers' lack of standing to challenge the assignments of mortgage because the borrowers are not parties to or intended third-party beneficiaries of the assignments of mortgages or the PSA. This is because only parties to a contract, or intended third-party beneficiaries of it, may seek to have rights declared under that contract. Here, the borrowers were not parties to the assignments of mortgages or PSA that they challenge in

their complaint.

The Report adopted defendants' arguments based on Rhode Island law, and the well-established principle that "a party to a contract does not have standing to challenge the contract's subsequent assignment." Further, Rhode Island's title-clearing statute does not provide plaintiffs with standing to sue. Rather it ". . . serves as the legal basis for a plaintiff who already has standing to obtain declaratory relief." Finally, the Report rejected the borrowers' argument that if the Court accepted defendants' arguments on standing "it 'will destroy the fabric of American jurisprudence by allowing fraud to go unchecked and undefended.'" The Report also rejected the borrowers' claim that defendants' arguments were "abhorrent," noting that "absent from plaintiffs' filings is any acknowledgement of the apparently undisputed fact that they have been in default since April 2009 on the $985,000 loan they obtained to purchase their residence . . . which they continue to occupy. " The Report also states, "Given these circumstances, plaintiffs' castigation of defendants' position as 'abhorrent' strikes the Court as a case of the pot calling the kettle black."

Borrowers' counsel has filed an objection to the Report. Hinshaw will continue to pursue dismissal based on the borrowers' lack of standing to obtain a declaration as to assignments of mortgage and PSA to which the borrowers are not parties.

Fryzel, et al. v. Mortgage Electronic Registration Systems, Inc., et al., Case No. 10-cv-352-M-DLM, (Dist. R.I. June 10, 2011).

Class Arbitration Waiver Update: Hinshaw Persuades Supreme Court To Vacate Another Decision That Declared A Class Arbitration Waiver Unconscionable

In another victory for businesses seeking to enforce class action or class arbitration waivers in their contracts, including their contracts with consumers, the U.S. Supreme Court vacated the decision of the U.S. Court of Appeals for the Second Circuit in *Fensterstock v. Affiliated Computer Services, Inc.,* 611 F.3d 124 (2d Cir. 2010). The Second Circuit had there declared a class arbitration waiver in a promissory note to be unconscionable under California law. The Supreme Court remanded the case to the Second Circuit for further consideration in light of its decision, rendered earlier this term, in *AT&T Mobility LLC v. Concepcion,* 563 U.S. __ (2011). Hinshaw's Edward K. Lenci and Joel D. Bertocchi represented Affiliated Computer Services, Inc. (ACS), a Xerox company

In *Fensterstock*, plaintiff, a New York attorney, brought a class action lawsuit in the U.S. District Court for the Southern District of New York against his lender and its loan servicer, ACS, with respect to his consolidation student loan. The attorney plaintiff claimed he was charged "hidden" penalties. ACS moved to compel arbitration under the Federal Arbitration Act (FAA), citing the promissory note's arbitration provisions, which included a broad waiver of the right to pursue either a class action lawsuit or a class arbitration. The district court denied the motion to compel arbitration, finding that the class arbitration waiver was unconscionable under California's "*Discover Bank* rule" (*see Discover Bank v. Superior Court,* 36 Cal. 4th 148 (2005)). The Second Circuit affirmed.

ACS filed a petition for certiorari in January 2011, asserting that the FAA preempts the Discover Bank rule. On June 13, 2011, the U.S. Supreme Court issued the following order: "The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *AT&T Mobility LLC v. Concepcion,* 563 U.S. ___ (2011)."

The Supreme Court had issued almost identical order in May 2011 in a case on appeal from the U.S. Court of Appeals for the Third Circuit, *Litman v. Cellco Partnership d/b/a Verizon Wireless*, 2010 WL 2017665 (3d Cir. 2010). The Third Circuit had there applied New Jersey law to find a class arbitration waiver unconscionable.

These developments highlight the importance of the Supreme Court's decision in *AT&T Mobilit*y where the Court held, 5-4, that the FAA preempts the *Discover Bank* rule. Based on the order in *Litman*, any state's rule requiring the voidance of class arbitration waivers in consumer contracts stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress in enacting the FAA.

Removal Under CAFA Proper Where Recovery Exceeding $5 Million Not Legally Impossible
The U.S. Court of Appeals for the Seventh Circuit recently held that removal under the Class Action Fairness Act (CAFA), 28 U.S.C. §1453(c)(1), was proper where the defendant met the amount in controversy requirement by establishing that a potential recovery exceeding the $5 million threshold was not legally impossible.

Plaintiff employees filed a putative class action in Illinois state court alleging that defendant, their employer, had violated the Illinois Minimum Wage Law, 820 ILCS 105/12(a). The employees claimed that the employer had not compensated its employees for work performed before and after their shifts.

The employer removed the action to federal court on the basis of jurisdiction under CAFA. The only contested issue was whether the requisite amount in controversy for removal to federal court had been met. The employer included compensatory damages, a 2 percent statutory penalty on backpay, costs and attorneys' fees in its calculations. The employer estimated the amount in controversy to be $5,244,082.14, which consisted of $3,801,204.07 in potential backpay damages and $1,442,878.07 in statutory penalties.

The District Court disputed the employer's calculation of the statutory penalty, estimating the amount in controversy to be $4,994,448.07—approximately $5,552 short of the $5 million requirement. It found that the employer had used an incorrect multiplier for each year's damages and did not apply the correct date that the statutory penalty began to accrue. The District Court concluded that the employees' attorneys' fees did not push the amount in controversy over the $5 million mark, as the work for filing the complaint was minimal.

The Seventh Circuit reversed, holding that jurisdiction under CAFA was proper because the employer's calculation of the amount in controversy was not legally impossible. The Appellate Court further held that the District Court erred in finding that the employees' attorneys' fees did not exceed $5,552. Because attorneys' fees incurred up to the time of removal could be included in calculating the amount in controversy, it was plausible that the employees' legal fees for preliminary work in a class action suit could exceed $5,552. Had the District Court so found, the amount in controversy would have exceeded the $5 million requirement for CAFA jurisdiction. As such, the Seventh Circuit held that removal under CAFA was proper, the requisite amount in controversy having been met.

ABM Security Services, Inc. v. Tyrone Davis, et al., __ F.3d __, 2011 WL 2417104 (7th Cir. June 16, 2011).

Lesher: One Step Too Far? Third Circuit Rejects the "Greco" Disclaimer in FDCPA Case

Plaintiff debtor challenged defendant law firm's use of two debt collection correspondences, claiming they were unfair and deceptive in violation of Section 1692e of the Fair Debt Collection Practices Act (FDCPA). *See*15 U.S.C. § 1692e. The debtor specifically took issue with the law firm's attorney disclaimer on the back of the correspondences which indicated that "[a]t this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account. " The debtor claimed that the placement and context of the statement misled him to believe that an attorney was involved in collecting his debt, and that the attorney could, and would, take legal action against him. The District Court agreed that the letters violated Section 1692e, and granted the debtor's motion for summary judgment. The U.S. Court of Appeals for the Third Circuit affirmed. The Third Circuit determined that the correspondences were unfair and deceptive insofar as they could cause the least sophisticated debtor to reasonably believe that an attorney had reviewed his file and determined that he was a candidate for legal action. Although the use of this disclaimer was deemed not misleading by the U.S. Court of Appeals for the Second Circuit in *Greco v. Trauner*, *Cohen & Thomas, LLP*, 412 F. 3d 360 (2d Cir. 2005), the Third Circuit held that the disclaimer "[did] little to clarify the [] [l]aw [f]irm's role in collecting the debt because it completely contradicts the message sent on the front of the letters—that the creditor retained a law firm to collect the debt." Furthermore, unlike the letter in *Greco*, the disclaimer here was printed on the back of the letter, not the front, thereby further contributing to its deceptiveness.

In *Gonzales v. Kay*, 577 F. 3d 600 (5th Cir. 2009), the reasoning of which was relied upon by the Third Circuit in the case at issue, the U.S. Court of Appeals for the Fifth Circuit considered the legality of the exact disclaimer at issue in the underlying matter. The Court opined that there were three categories of letters: (1) those that are not deceptive based on the language and placement of a disclaimer; (2) those at the other end of the spectrum that do not contain any disclaimer

regarding an attorney's involvement; and (3) those in the middle that include contradictory messages, which present closer calls. The Fifth Circuit held that the disclaimer at issue in *Gonzales* fell into the third category of letters (close call), and remanded the matter to the District Court for further consideration. The Third Circuit seems to have taken the reasoning of *Gonzales*one step further by holding that the placement and use of the disclaimer on the back of a collection letter is unfair and deceptive as a matter of law, thereby presumably falling into the second category of cases established by *Gonzales*—those that clearly violate the FDCPA as a matter of law.

The dissent in *Lesher* adopted the reasoning of the dissent in *Gonzales*. Specifically, Judge Kent Amos Jordan opined that the foregoing disclaimer was not unfair and deceptive insofar as it did not contain one word of "legalese." Furthermore, it is unreasonable to presume that the least sophisticated debtor would not follow the express instructions on the front of the letter advising that there were further important notices on the back (including the disclaimer at issue).

Darwin Lesher v. Law Offices of Mitchell N. Kay, P.C. et al., Case. No. 10-3194 (3rd Cir. June 21, 2011).

Court Rejects TCPA Claim Absent Evidence That Manual Calls to Cell Phones Were Made Using Equipment With "Capacity to Autodial"

In *Dobbin v. Wells Fargo,* No. 10-268, Slip. Op. (N.D. Ill. June 14, 2011), plaintiffs conceded that the calls placed to their cell phones were manually dialed, using desk phones. However, they argued that the Telephone Consumer Protection Act (TCPA) prohibits even manually dialed calls to a cell phone made "using" "equipment which has the capacity to autodial," and that because defendant had equipment with the capacity to autodial, the calls at issue violated the TCPA. Defendant conceded that it had such equipment.

In support of their claim, plaintiffs offered the declaration of a telecommunications technology consultant who concluded that "the desk phones are part of the predictive dialer system" because: (1) the desk phones were physically connected to the equipment which had the capacity to autodial; (2) for manual calls, the desk phone "still maintained connectivity" to the autodial equipment; and (3) for a collector to make use of the autodial equipment, the collector was required to have a desk phone. Despite taking the consultant's rationales as true, the Court found that plaintiffs offered no evidence that the desk phones were connected to the autodial equipment when the manual calls were placed to their cell phones. In fact, plaintiffs conceded that the phones could be used independently of the autodial technology, and, therefore, such evidence was necessary. Thus, the Court granted summary judgment in favor of defendant.

Dobbin v. Wells Fargo, No. 10-268, Slip. Op. (N.D. Ill. June 14, 2011).

Upcoming Program on New Technology and the Fair Debt Collections Practices Act

David M. Schultz, the chair of Hinshaw's Consumer and Class Action Litigation group, will be speaking at an August 17, 2011, audio conference entitled "New Technology and the Fair Debt Collections Practices Act." For more details and to register, please visit: http://www.lorman.com/teleconference/teleconference.php?sku=388240 or call 1-866-352-9539. To receive 20 percent off the registration fee, use priority code 15800 and discount code F2716129.