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Newsletters

Consumer & Class Action Litigation Newsletter - September 2012

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Single Publication of Class Action Settlement Notice Insufficient to Satisfy Due Process

The U.S. Court of Appeals for the Second Circuit held that plaintiff consumer did not receive the required due process rights to adequate notice and an opportunity to opt out of a class action. In *Hecht v. United Collection Bureau, Inc.,* the consumer claimed that a prior judgment in a class action, *Gravina v. United Collection Bureau, Inc.,* No. 09 Civ. 4816 (E.D.N.Y. Nov. 29, 2010), did not bar her claim because a single notice published in *USA Today* was not adequate notice.

To determine whether the due process protection was applicable pursuant to Fed. R. Civ. P. 23, the court first examined whether Gravina was "predominantly" for money damages. The court looked closely at the complaint, the stipulation of settlement, and the settlement order in that case before holding that the absence of injunctive relief supported the conclusion that the action was primarily for monetary damages. Absent class members were therefore entitled to due process protections.

The court then analyzed whether a single publication in a national newspaper was sufficient for due process purposes. The court held that where the identities of the class members are unascertainable, notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The court agreed with the consumer that defendant debt collector failed to undertake "a more extensive notification campaign – including electronic media, local publications, and the like – that would have been more than a 'mere gesture' exemplified by the one-time *USA Today* notice." Thus, notice by publication in *Gravina* was inadequate. Accordingly, the consumer in *Hecht* was not barred by *res judicata.*The Second Circuit reversed a dismissal of the action and remanded for further proceedings.

Hecht v. United Collection Bureau, Inc., Docket No. 11-1327 (2d Cir. Aug. 17, 2012)

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

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CFPB Releases Its Procedures for Examining Consumer Reporting Companies

The Consumer Financial Protection Bureau (CFPB) has released the procedures it intends to use in examining credit bureaus and other consumer reporting companies. These procedures are allegedly a "field guide" for CFPB examiners. This coincides with media reports and indications on the CFPB website that is hiring investigators to perform surveillance on the industry.

Per a CFPB press release, the field guide has been developed to "ensure that all companies are held to the same standards." The CFPB indicates that its force of examiners will be determining whether consumer reporting companies are complying with requirements of federal consumer financial laws, including: (1) whether reporting companies have reasonable procedures in place to ensure accuracy of information about consumers that appears in their reports; (2) whether reporting companies are conducting reasonable investigations when consumers dispute the accuracy or completeness of their files, and whether the systems, procedures and policies used by the company for tracking, handling, investigating and resolving consumer inquiries, disputes and complaints are appropriate; (3) whether reporting companies disclose to consumers their file information and credit scores when required to do so, and whether companies have trained personnel to explain the information in their disclosures to consumers; and (4) whether companies are taking adequate protections to prevent identity theft.

The CFPB has stated that the field guide is an important step in streamlining the process for determining whether enforcement actions will be brought "to address harm to consumers."

CFPB Examination Procedures for Credit Bureaus and Other Consumer Reporting Companies

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

Eleventh Circuit Holds Settlement Offers That Fail to Allow Judgments Do Not Moot FDCPA Claims
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Three separate Fair Debt Collection Practices Act (FDCPA) cases were filed by plaintiff consumers, who only sought statutory damages under the act. Defendant debt collectors offered to pay consumers $1,001, plus reasonable attorneys' fees and costs to be determined by the court. The consumers rejected the offers. The debt collectors moved to dismiss for lack of subject matter jurisdiction, arguing that the consumers were offered the maximum amount recoverable and no longer had a stake in the litigation. The district court dismissed all three cases.

The U.S. Court of Appeals for the Eleventh Circuit reversed. The court held that the offers did not moot the claims because the complaints contained a prayer for relief for a judgment but the offers did not provide for entry of a judgment. The court reasoned that a judgment is more preferable than an offer of payment because a court can enforce the judgment. Notably, the court stated that the actual tender of the money, which occurred in one of the consolidated cases, did not change its decision.

*Zinni v. ER Solutions, Inc.,*Nos. 11–12413, 11–12931, 11–12937 (11th Cir. Aug. 27, 2012)

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

Plaintiffs Maintain Standing to Appeal Decertification of Classes Because of Their Interest in an Incentive Award

In a case addressing standing, incentive awards and adequate class representatives, the U.S. Court of Appeals for the Seventh Circuit held that individual plaintiffs had standing to appeal the decertification of the classes because of their interest in an incentive award.

Plaintiff employees brought a class and collective action suit against defendant employers to enforce the Fair Labor Standards Act and parallel state laws. The district judge certified but later decertified several classes. The lawsuits were settled but reserved the employees a right to appeal the decertification order. The employees appealed, and the employers asked the Seventh Circuit to dismiss the appeal because the employees had suffered no injury as a result of the denial of certification. The settlement agreement provided for the employees to receive an incentive award for their services as class representatives, the reward being contingent upon certification of the class. The employees argued that such an award gave them a tangible financial stake in getting the denial of class certification revoked and so entitled them

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to appeal that denial.

The Seventh Circuit agreed and held that the employees had standing to appeal the decertification. The court explained that a settling plaintiff would be an adequate class representative if there were no significant conflicts of interest and the prospect of an incentive award was sufficient to motivate him or her to assume the "modest risks" of a class representative and discharge the "modest duties" of the position fully. An important motivating factor is that if the class action suit fails, no incentive award will be made, while if the suit succeeds, in part at least as a result of the representative's "strenuous efforts," the incentive award may be larger the larger the settlement or judgment is.

Thus, serious thought must be given before entering into a settlement agreement with a reservation to appeal. Such a reservation may result in prolonging the resolution of the suit, at last as to the settling plaintiffs, if not as to the entire class action.

Espenscheid v. DirectSat USA, LLC, 2012 WL 3156326 (7th Cir. Aug. 6, 2012)

For more information, please contact your regular Hinshaw attorney.

Recent Litigation on Time-Barred Debt Collection

In *McMahon v. LVNV Funding, LLC,*plaintiff debtor pursued the following theory: (1) defendant debt collector's collection correspondences seeking to collect time-barred debts and offering a settlement of those debts for a reduced amount were misleading because debt collectors have no cognizable claim to recover the debts; and (2) the debt collector's collection correspondences offering "settlements" of time-barred debts implied "a colorable obligation to pay these debts." The debtor argued that the "settlements" being offered implied a legal obligation to pay, and the failure to disclose that the debt was time-barred added to the debtor's confusion as to whether the debt could be sued upon.

The debt collector moved to dismiss. The court granted the motion to dismiss class claims but denied the motion to dismiss the debtor's individual claims. As to class claims, the court reasoned that a dunning letter sent on a time-barred debt is not deceptive unless it threatens litigation, citing to Seventh Circuit precedent in support. See *Murray v. CCB Credit Serv., Inc.,* 2004 WL 2943656 (N.D. Ill. Dec. 15, 2004); *Walker v. Cash Flow Consultants,*200 F.R.D. 613, 615 (N.D. Ill 2001). The debtor individually claimed that he had requested validation of his debt, and that the debt collector's response to his request — which provided the date that the debt collector purchased the debt, not when the debtor had incurred the debt — was deceptive. The court declined to dismiss these claims, reasoning that such validation could mislead the unsophisticated consumer into believing the debt was recent. Of note, the debtor moved to reconsider denial of his class claims, and the court denied the motion. However, the court granted the debtor leave to replead his class claims and stated in dicta that an offer of "settlement" may deceive the unsophisticated consumer into believing that there is a legally enforceable obligation to pay the debt.

McMahon v. LVNV Funding, LLC, No. 12-1410, 2012 WL 2597933 (N.D. Ill. July 5, 2012)

McMahon v. LVNV Funding, LLC, No. 12-1410, 2012 WL 3307011 (N.D. Ill. Aug. 13, 2012) – motion to reconsider denied.

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