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Newsletters

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Supreme Court Holds Arbitration Clauses Barring Class Actions Not Unconscionable

Plaintiff customers purchased services from defendant telephone company. The services were advertised as including free phones. A dispute arose when the customers were charged sales tax based on the phones' retail value. The customers sued, and their complaint was later consolidated with a putative class action alleging that the telephone company had engaged in false advertising and fraud by charging sales tax on phones they had advertised as free. In March 2008, the telephone company moved to compel arbitration. The customers argued that the arbitration agreement was unconscionable and unlawful under California law because it disallowed class action proceedings. The U.S. District Court for the Southern District of California denied the telephone company's motion, and the U.S. Court of Appeals for the Ninth Circuit affirmed, stating that under *Discover Bank v. Superior Court,* 36 Cal. 4th 148, 113 P. 3d 1100 (2005), the arbitration agreement was unconscionable because it disallowed class actions.

The Supreme Court, in a 5-4 decision, reversed, holding "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." The Court further held that, "[t]he overarching purpose of the FAA, evident in the text of §§2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." The Court concluded that because California's*Discover Bank* rule "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress," it is "preempted by the FAA."

This case is an important victory for those seeking to enforce arbitration clauses. The Court firmly decided that disallowing class actions under an arbitration agreement does not make the agreement unconscionable. However, the fight is likely not over yet. U.S. Sens. Al Franken (D-Minn.), Richard Blumenthal (D-Conn.) and Rep. Hank Johnson (D-Ga.) have stated their intention to introduce legislation that would "restore consumers' rights to seek justice in the courts." Hinshaw & Culbertson LLP will continue to provide updates on this vital issue.

AT & T Mobility v. Concepion et ux., No. 09-893, Slip op. (U.S. S.Ct. Apr. 27, 2011).

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Third Circuit Holds That Attempt to Collect Time-Barred Debt Not a Violation of FDCPA or FCRA

In *Huertas v. Galaxy Asset Management,* 2011 WL 1361568 (3rd Cir. April 11, 2011), the U.S. Court of Appeals for the Third Circuit held that a debt collector's letter attempting to collect a time-barred debt did not violate the Fair Debt Collection Practices Act (FDCPA). Furthermore, the Court found that the debt obligation was not extinguished by the statute of limitations and that the debt collector did not violate the Fair Credit Reporting Act (FCRA) when it pulled the consumer's credit report in connection with the debt.

The case arose out of a debt that plaintiff debtor had incurred with defendant creditor that was subsequently transferred to defendant successor creditor. A debt collector attempted to collect the debt even though the six-year statute of limitations period had elapsed. The debtor sued, alleging, among other things, violations of the FDCPA and FCRA. The creditor and debt collector moved for summary judgment. The District Court held that the running of the statute of limitations made the debt unenforceable, but did not extinguish it.

On appeal, the debtor argued that the District Court erred in its finding that the running of the limitations period did not extinguish plaintiff's debt. The Third Circuit found that, "[the debtor's] debt obligation is not extinguished by the expiration of the statute of limitations, even though the debt is ultimately unenforceable in a court of law." Furthermore, the Court held that the FDCPA permits a debt collector to "seek voluntary repayment of the time-barred debt so long as the debt collector does not initiate or threaten legal action in connection with its debt collections efforts." The debt collector's attempts to collect the debt here did not threaten legal action and, therefore, did not violate the FDCPA. Additionally, the Court held that the debt collector had not violated the FCRA because it sought the debtor's credit report in connection with a credit account that the debtor had opened. For these reasons, the Third Circuit affirmed the lower court's rulings dismissing the debtor's claims.

Huertas v. Galaxy Asset Management, No. 10-2532, 2011 WL 1361568 (3d Cir. Apr. 11, 2011).

On Remand from U.S. Supreme Court, *Jerman v. Carlisle* District Court Refuses to Award Additional Damages to Plaintiff and Class

The U.S. Supreme Court, in its landmark decision in *Jerman v. Carlisle,* 130 S. Ct. 1605 (2010), held that the bona fide error defense to the Fair Debt Collection Practices Act (FDCPA) does not apply to a violation of the act resulting from a debt collector's incorrect interpretation of the FDCPA's legal requirements. Upon the Court's remand to the District Court, both parties moved for summary judgment. Plaintiff borrower moved for summary judgment as to the merits of her underlying claim, and as to the amount of statutory damages to be awarded to the borrower and the class under Section 1692k(a)(2)(B) of the FDCPA. Defendants, a law firm and one of its attorneys, moved for partial summary judgment on the basis that neither the borrower nor her class was entitled to an award of additional damages under the FDCPA.

The Court first determined that the borrower was entitled to summary judgment on the merits of her claim because this issue was decided in the borrower's favor by the District Court and was not raised on appeal. Next, the Court addressed the borrower's claim that she and the class were entitled to the maximum amount of statutory damages under the Act: $1,000 to the borrower and one percent of the debt collector's net worth, $13,052.35, to the class. Defendants asserted that the Court should not award damages to the borrower and the class.

Pursuant to Section 1692k(b)(2) of the FDCPA, the Court considered the following factors: (1) the frequency and persistence of noncompliance by the debt collector; (2) the nature of such noncompliance; (3) the resources of the debt collector; (4) the number of persons adversely affected; and (5) the extent to which the debt collector's noncompliance was intentional. The Court held that factors 1, 4, and 5 weighed in defendants' favor, factor 3 weighed in the borrower's favor, and factor 2 was neutral. Because the "factors tilt[ed] in defendants' favor," the Court granted summary judgment on behalf of defendants. Thus, the Court refused to award additional damages to the borrower and the class.

Notably, the Court refused to accept the borrower's argument that the amount of letters sent—4,211—supported a determination that defendants' noncompliance was frequent and persistent. Rather, the Court reasoned that in a class action, "frequency" cannot carry the same meaning as "the number of persons adversely affected." Further, each class member only received one notice. Therefore, factor 1 weighed in defendants' favor.

Further, in considering the borrower's argument that awarding the maximum amount of statutory damages here was reasonable given the purpose of the FDCPA and the minimal amount ($3) to each class member, the Court agreed with defendants that the issue was not whether the "amount" within the ranges specified by the FDCPA was reasonable, but whether the borrower proved the right to *any* damages under the statutory factors. The Court refused to consider "reasonableness" as a factor in its determination because the FDCPA did not provide for the same.

Jerman v. Carlisle, No. 06-1397, 2011 WL 1434679 (N.D. Ohio Apr. 14, 2011).

Borrower's Motion for Preliminary Injunction to Prevent Foreclosure Denied for Lack of Standing

Borrowers sought to enjoin a law firm from filing foreclosure actions against them and a class due to the law firm's alleged lack of standing to pursue foreclosures on behalf of its clients. The borrowers also sought to enjoin a sheriff's sale scheduled to occur on April 11, 2011, because the assignments of mortgage that the law firm's clients relied on were allegedly executed by persons not authorized to sign on behalf of the assigning lender and were fraudulent. The borrowers further claimed the law firm submitted affidavits in support of the foreclosures not based upon personal knowledge and drafted assignments of mortgage to securitized trusts in violation of the pooling and servicing agreements (PSAs) that the trusts had filed with the Securities and Exchange Commission.

In moving for a preliminary injunction, the borrowers claimed that the law firm prosecuting the mortgage foreclosures violated the Fair Debt Collection Practices Act (FDCPA) and the Ohio Consumer Protection Act. They alleged that the law firm sought to file foreclosure lawsuits on behalf of clients who lacked proper standing to sue due to allegedly fraudulent assignments of mortgage, and that its employees had executed assignments of mortgages from the Mortgage Electronic Registration System (MERS) to its clients without authorization.

The Court held that the borrowers failed to satisfy the standing requirements of Article III of the U.S. Constitution. In so doing, the Court reviewed Article III's requirements and determined that the borrowers lacked standing to pursue their claims challenging the assignments of mortgage relied upon by the law firm to pursue foreclosure actions of its clients. First, none of the individuals whose homes were due to be sold were actually parties to the suit and there was no allegation or evidence that the named plaintiffs would be affected by the sale of the homes. Second, the Court concluded that the plaintiffs, who were ". . . not parties to the assignments that are challenged — or seemingly connected in any way to the assigned note — are unable to challenge the chain of title" and it is generally accepted law that a litigant who is not a party to an assignment lacks standing to challenge it. The Court further found that the borrowers did not submit sufficient evidence in support of each individual who claimed he or she was entitled to relief and provided no evidence indicating that they could prove their case at trial. Accordingly, even if plaintiffs had standing to bring the claims, they failed to establish that they had a likelihood of succeeding on the merits of the claims, that they would suffer irreparable harm if the injunction were denied, that the foreclosing entities would not be harmed if the injunction were to issue, or that the public interest would be advanced by granting their motion.

The decision strengthens recent decisions holding that borrowers lack standing to challenge assignments of mortgage to a foreclosing entity or that entity's alleged failure to comply with a PSA because the borrower does not have standing to bring the claim. It also provides a defense to such challenges based on "robo-signing," lack of authorization or other alleged defects in the foreclosing entity's "paperwork." *See Livonia Properties Holdings, LLC v. 12840-12976 Farmington Road Holdings, LLC,* 717 F. Supp. 2d 724-737 (E.D. Mich. 2010); *Bridge v. Aames Capital Corp.,* 2010 WL 3834059 at *3-6 (N.D. Ohio Sept. 29, 2010).

Turner v. Lerner, Sampson & Rothfuss, No. 1:11-CV-00056, Slip Copy, 2011 WL 1357451 (N.D. Ohio Apr. 11, 2011).

Wisconsin District Court Holds Collection Calls to Land Line Exempt From TCPA

The U.S. District Court for the Western District of Wisconsin recently dismissed putative class claims brought pursuant to the Telephone Consumer Protection Act (TCPA), holding that collection calls to landlines are exempt from the TCPA. The claims were brought by two plaintiffs, both of whom claimed that their relatives had incurred debts on which they defaulted. The debts were eventually referred to a debt collector, who called plaintiffs at their home numbers. Plaintiffs alleged that the debt collector violated the TCPA by making calls to their homes and using an artificial or prerecorded voice to deliver a message without their prior express consent. The Court explained that even assuming that the facts asserted by plaintiffs were true, the Federal Communications Commission has specifically determined that calls made with a commercial purpose that do not include an advertisement are exempt from the TCPA.

Patricia Tollefson v. SRA Associates, Inc., No. 1:10-CV-00594 (W.D. Wis. Apr. 26, 2011).