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Newsletters

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U.S. Supreme Court Declines to Review Sixth Circuit Ruling That Held Aggressive Subprime Lending Does Not Constitute a Public Nuisance

On March 21, 2011, the U.S. Supreme Court denied the city of Cleveland's request for certiorari review in an action brought against 22 Wall Street mortgage firms. The city sued the lenders, alleging that their financing of subprime mortgages was a public nuisance that led to a foreclosure crisis in Cleveland and devastated the municipality's neighborhoods and economy. The city sought damages for the increased expenses it incurred as a result of the foreclosure crisis, such as increased expenditures for fire and police protection, maintenance and demolition costs, and decreased tax revenues caused by the decline in housing values. The city alleged that the thousands of foreclosed homes became eyesores, fire hazards, and easy prey for looters and drug dealers looking for places to conduct business. The city further contended that its unique economic plight and stagnant housing market made mass foreclosures the foreseeable and inevitable result of the subprime housing financing provided by the lenders. The city asserted that the lenders knew about these unique issues yet proceeded to finance subprime mortgages at an increased rate and ignored loans that made no economic sense.

The trial court dismissed the claim and found that the city failed to show proximate causation between the lenders' conduct and the city's damages. The U.S. Court of Appeals for the Sixth Circuit affirmed, and the appeal to the U.S. Supreme Court followed. The city is currently engaged in state court litigation involving similar allegations against new defendants and some affiliates of the original defendants.

City of Cleveland, Ohio v. Ameriquest Mortgage Securities, Inc., et al., No. 10-915 (Mar. 21, 2011).

Seventh Circuit Holds FDCPA Does Not Apply to Communications That Might Mislead a Court

A debt collector sued in state court to collect a debt and attached to its complaint an exhibit that, according to the subject consumer, resembled a credit card statement listing the balance owed by the debtor and placing the debt collector in the place of the issuer. After the debt collector voluntarily dismissed that case, the debtor sued the debt collector in federal court. The debtor claimed that the attachment to the collection lawsuit violated the Fair Debt Collection Practices Act (FDCPA) because it was never actually mailed to the

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debtor. He further claimed that by attaching the document, the debt collector intended to mislead the state court judge in the collection lawsuit to believe that the attachment had been sent to the debtor and not objected to, thus allegedly assisting the debt collector in obtaining a default judgment on an account stated theory. The District Court granted summary judgment for the debt collector, and the debtor appealed.

Hinshaw & Culbertson LLP defended the case before the U.S. Court of Appeals for the Seventh Circuit. The Court held that the FDCPA's scope does not cover communications directed towards state court judges such as the attachment to the collection lawsuit. This ruling is especially significant because the U.S. Courts of Appeal for the Sixth and Ninth Circuits have decided otherwise.

O'Rourke v. Palisades Acquisition XVI, LLC, et al., No. 10-1376, ___F.3d___, 2011 WL 905815 (Mar. 17, 2011 7th Cir.).

Consent to Fax Contacts by Listing in Directory and Class Representative's Lack of Credibility Dooms TCPA Class Action Claim

A manufacturer of metal building components sent approximately 500,000 faxes advertising its product. A civil engineering firm received one of the "blast faxes" and/or "junk faxes." The manufacturer had obtained the engineering firm's fax number from the Blue Book, the construction industry's "yellow pages." The engineering firm filed a class action lawsuit against the manufacturer under the Telephone Consumer Protection Act (TCPA), alleging that the manufacturer had sent unsolicited fax advertisements. The manufacturer disputed class certification, arguing there was consent based on the Blue Book listing. However, the trial court certified the class.

The U.S. Court of Appeals for the Seventh Circuit reversed the class certification and remanded the case back to the trial court. The Seventh Circuit reasoned that the engineering firm was an inadequate class representative because when the firm listed in the Blue Book, it signed an agreement that users could communicate with it by fax. Also, the Court noted the engineering firm's website contained its fax number next to the phrase "Contact Us." The Court noted testimony on behalf of the engineering firm that the firm had not authorized the fax number's use in the Blue Book listing, despite the firm's having signed the contact agreement. But the Court found that testimony not to be credible. These factors led the Court to conclude that the engineering firm would be an inadequate class representative.

This case underscores the importance of having more than just a directory listing or website contact information before deciding to advertise by fax. While a class member's credibility is always at issue as to adequacy, this case demonstrates that courts will more likely be persuaded by evidence attacking the class representative's credibility on matters that are material, such as consent.

CE Design Limited v. King Architectural Metals, Inc., ___F.3d___, 2011 WL 938900 (Mar. 18, 2011 7th Cir. 2011).

Motion to Dismiss Bars Plaintiff's Backdoor *Foti* Claim Under Florida Law

Hinshaw recently successfully defended a debt collector against multiple claims brought in state court under the Florida Consumer Collection Practices Act (FCCPA), Fla. Stat. § 559.77. Plaintiff debtor contended that the debt collector had violated Fla. Stat. § 559.72(9) by allegedly failing to identify itself when it left voicemail messages in attempting to collect on an unpaid, outstanding account balance. Section 559.72(9) provides that in collecting consumer debts, no person shall (1) claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate, or (2) assert the existence of some other legal right when such person knows that the right does not exist. The FCCPA expressly requires identification only after it has been requested by a debtor (and it could not have been requested in this case as only voicemail messages were left), pursuant to Fla. Stat. § 559.72(15). But the debtor alleged that the federal Fair Debt Collection Practices Act (FDCPA) was violated by the alleged failure to identify and, consequently, that Fla. Stat. § 559.72 (9) was also violated because the debt collector had attempted to assert a right that did not exist.

The debt collector moved to dismiss, arguing that (1) the debtor was essentially attempting to "back door" a Foti claim, (2) Fla. Stat. § 559.72(15) was the statutory provision governing identification, and (3) assuming arguendo the debtor's allegations to be true, the debt collector had not violated the FCCPA. The debt collector further contended that in construing various statutory provisions, one could not be read in a way to render another meaningless. In this case, finding a FCCPA violation for allegedly failing to make identification without it first being requested by the debtor would render Fla. Stat. § 559.72(15) meaningless. The trial court agreed and dismissed the complaint. This case highlights the

differences in state and federal consumer-related statutes and the importance of ensuring compliance with both.

James Read v. GC Services, L.P., No. 10-006493-CO-40 (Pinellas County, Fla.).