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Newsletters

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Hinshaw Defeats *Foti* Class Certification Motion—Materiality Upheld as Relevant to Certification of*Foti* Class Claim

Hinshaw & Culbertson LLP recently successfully defeated a motion for class certification of a *Foti* issue in the U.S. District Court for the Central District of Illinois. The court ruled that plaintiff's proposed class action failed to satisfy Fed. R. Civ. P 23(b)(3) because issues of individual proof would predominate over class issues. Thus, class certification was improper. Specifically, the court stated that "all of [defendant's] correspondences to [plaintiff] and the putative class members will have to be examined to determine if [defendant's] voicemails are actionable. Individuals who received correspondences in addition to an offending voicemail will not necessarily have legitimate FDCPA claims since proximate cause may be lacking. Every correspondence will have to be analyzed before such a decision can be made. As such, it appears that questions affecting individual class members will predominate questions affecting the class."

Plaintiff moved to reconsider the denial of the class certification, but the court denied that motion *sua sponte*. The court noted that "central to [defendant's] Response was a line of cases which held that immaterial violations of the FDCPA were not actionable" and that "[plaintiff] made inadequate, conclusory statements tracking Rule 23's language, but that was not enough to show that class certification was proper."

Plaintiff's counsel has indicated that plaintiff intends to appeal this issue at the conclusion of the case.

Hutton v. C.B. Accounts, Inc., 10-cv-3052 (C.D. Ill. 2010).

The Court's Order Denying Plaintiff's Motion for Class Certification

The Court's Order Denying Plaintiff's Motion to Reconsider the Court's Order Denying Plaintiff's Motion for Class Certification

For further information, please contact Nabil G. Foster or your regular Hinshaw attorney.

Servicer's Alleged Failure to Honor HAMP Trial Modification Plans Can Form Basis for Common Law Breach of Contract Claim

Attorneys

Maura K. McKelvey

Todd P. Stelter

Service Areas

Commercial Litigation

Consumer and Class Action Defense

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In *Durmic v. J.P. Morgan Chase Bank, N.A.,* borrowers claimed that they were persuaded by a servicer to participate in the Home Affordable Modification Program (HAMP), wherein they were required to submit proof of current income, make representations regarding their finances, and make three monthly payments pursuant to a Home Affordable Modification Trial Period Plan (TPP). The borrowers claimed that they satisfied those requirements, but that the servicer never offered them a permanent modification as promised.

The borrowers sued the servicer based on its alleged violation of the TPP modification agreement. Their claims included breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel and violation of the Massachusetts consumer protection statute (Mass. Gen. Laws ch. 93A). The borrowers sought certification of a class of all Massachusetts borrowers who had entered into a TPP with the servicer, as well as a permanent injunction enjoining the servicer from foreclosing on their mortgages or the mortgages of any member of the proposed class. They further sought an order requiring the servicer to "appropriately train" its employees to perform their "duties" under the HAMP; an order for specific performance of the servicer's alleged contractual obligations under the TPP; and actual or statutory damages, multiple damages, and attorneys' fees and costs. The servicer moved to dismiss all claims based on lack of a valid contract.

The court rejected the servicer's argument that no consideration existed for the TPPs, holding that the borrowers met the requirements described above in the first paragraph. By complying with the TPP requirements, the borrowers provided valid "consideration" because it can consist of "a legal detriment to the promisee that entails even the slightest trouble or inconvenience." The court also rejected the following arguments that were proposed by the servicer: (1) that the borrowers failed to allege cognizable damages (because, the court held, at the motion to dismiss stage plaintiffs "are not required to specifically plead general damages"), and (2) that the TPP is not a valid contract (because, the court held, it constitutes, at most, a contingent agreement in the future). Further, the court specifically declined to accept the servicer's argument that the borrowers' claims attempted an "end-run around" the HAMP's lack of a private right of action by bringing claims based in common law breach of contract.

The court denied the borrowers' motion for preliminary injunction on behalf of the class. But it deferred judgment on the motion to dismiss the Chapter 93A count and the issue of class certification.

The court's finding that consideration existed for the TPP will limit servicers' defenses to HAMP-based claims, and will likely result in additional litigation costs and exposure related to the modification process. It is ironic that the TPP form utilized by the servicers was a Fannie Mae/Freddie Mac "Uniform Instrument" and that servicers' reasoning for declining to offer a permanent modification generally results because they must adhere to the HAMP guidelines. Further, the court's deferral of the class certification issue is concerning because it leaves open the possibility of a class being certified.

Durmic v. J.P. Morgan Chase Bank, N.A., No. 10-CV-10380-RGS, 2010 WL 4825632 (D. Mass. Nov. 24, 2010).

For further information, please contact Maura K. McKelvey or your regular Hinshaw attorney.

Plaintiff "Grasping at Straws": *Miller v. McCalla* "Safe Harbor" Disclaimer in a Settlement Offer Letter Does Not Violate the FDCPA

The U.S. District Court for the Eastern District of New York recently granted defendant's motion to dismiss a claim challenging the use of the *Miller v. McCalla* safe harbor language. *Golubeva v. GC Services, LP*, 10 Civ. 2137 (E.D.N.Y. Dec. 29, 2010). Plaintiff alleged violations of 15 U.S.C. § 1692e and 1692e(10), contending that use of the U.S. Court of Appeals for the Seventh Circuit's *Miller v. McCalla* "safe harbor" language in a debt collection letter which offered a 70 percent settlement violated the Fair Debt Collection Practices Act (FDCPA). The court held that using the disclaimer and offering a settlement in the same letter does not automatically constitute a violation and that there was nothing deceptive about doing both.

Plaintiff also alleged that the lack of a stated expiration date in the settlement offer created a violation. The court held that absent a stated expiration date, the power to accept an offer terminates after the lapse of a reasonable time. Furthermore, the court noted that courts are more inclined to find that a settlement offer is deceptive where it contains a specific termination date rather than omits it. In closing, the court had strong words "Plaintiff is essentially seeking to use defendant's attempts at full disclosure against it, by grasping at straws to find any possible language that could be

confusing and arguing an FDCPA violation. This statute was not designed to provide monetary awards to creative plaintiffs, or to require debt collectors to disclaim away every possible term and interpretation."

Golubeva v. GC Services, LP, 10 Civ. 2137 (E.D.N.Y. Dec. 29, 2010).

For further information, please contact Todd P. Stelter or your regular Hinshaw attorney.

Seller of Online Good Found to Be a Consumer as Defined by the FDCPA

An individual sold his personal laptop online to a buyer who paid the seller through an e-commerce processing website. The processing company then sent the buyer's funds to the seller. Thereafter, the processing company learned that the buyer's payment was fraudulent and attempted to collect the amount that it had sent to the seller. When the seller refused to send the funds back to the processing company, the company sent the account to a collection company.

The seller sued the collection company for violating the Fair Debt Collection Practices Act (FDCPA) and Florida consumer laws. The collection company moved to dismiss, arguing that the seller was not a "consumer" under the FDCPA because the sale of his laptop was a commercial transaction and that the money it sought to collect was not a "debt."

The court held that the seller was a "consumer" of the e-commerce company's services. Furthermore, the court stated that "as long as the transaction creates an obligation to pay, a debt is created." Thus, the court held that the subject transaction constituted a debt because the seller utilized the processing company's services and, according to the terms of the transaction, the seller was contractually obligated to repay the money. The court also rejected the collection company's argument that the debt was not for "personal, family or household purposes" because the item sold was a personal laptop. Finding also that the definition of "debt" under Florida consumer law was identical to that under the FDCPA, the court held that the same reasoning therefore applied to the claims of violations of Florida consumer laws.

A seller of goods is typically not considered a consumer under the FDCPA. However, collection companies should realize that even if it appears that they are trying to collect from such a seller, if the debt arises from the seller entering into an agreement with a third-party, the court may find the seller to be a consumer of those services. It is important to understand the nature of the underlying debt to determine if what appears to be a commercial account may actually be a consumer account. Collectors should be on the lookout for situations where the debtor is a *seller* who incurred the debt to a third-party company that helped him or her conduct a commercial transaction because, as this court found, the debtor may be a consumer of the third-party's services.

Oppenheim v. IC System, Inc., 627 F.3d 833 (11th Cir. 2010).

For further information, please contact your regular Hinshaw attorney.

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