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Newsletters

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U.S. Supreme Court to Review Class Action Standards

The U.S. Supreme Court will review the question of whether the certification of a class affirmed by the U.S. Court of Appeals for the Ninth Circuit under Fed. R. Civ. P. 23(b)(2) was consistent with Fed. R. Civ. P.23(a). This review very well may result in an opinion clarifying what a court must do to certify a class in consumer, debt collection and other areas of law.

Fed. R. Civ. P. 23(a) basically provides that a court may certify a class only if the class is so numerous that joinder of all members is impractical; there are questions of law or fact common to the class; the claims or defenses of representative parties are typical of the claims or defenses of the class; and the representative parties can fairly and adequately protect the interest of the class. Fed. R. Civ. P. 23(b)(2) requires a showing that the party opposing the class acted or refused to act on grounds generally applicable to the class so that final injunctive relief is appropriate, respecting the class as a whole.

The case involved female employees who alleged that under Title VII of the Civil Rights Act of 1964, as amended, their employer, a retailer, engaged in sexual discrimination. Plaintiffs sought injunctive and declaratory relief, back pay and punitive damages. Plaintiffs moved to certify a nationwide class of women who had been subjected to various allegedly discriminatory pay and promotion policies.

The Ninth Circuit affirmed the district court's finding that plaintiffs provided evidence—in the form of factual evidence, expert opinion and statistical evidence—sufficient to support their contention that significant factual and legal questions were common to all class members. The Ninth Circuit also found that plaintiffs' claims and representatives were sufficiently typical. Thus, plaintiffs were adequate representatives under Fed. R. Civ. P. 23(a).

The Ninth Circuit then analyzed Fed. R. Civ. P. 23(b)(2). The court stated that to be certified under Fed. R. Civ. P. 23(b)(2), the class must seek only monetary damage that is not superior in strength, influence or authority to injunctive and declaratory relief.

The requests for back pay did not undermine plaintiffs' claim that injunctive or declaratory relief predominated. The court stated, however, that the monetary relief may predominate with respect to plaintiffs' punitive damages claim, and

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that the district court abused its discretion by certifying the punitive damages claims under Fed. R. Civ. P. 23(b)(2) without first analyzing whether certification of a claim for punitive damages rendered any final relief predominately related to monetary damages.

After its review, the U.S. Supreme Court may publish an opinion clarifying the standards for certifying a class. This will affect class actions not only as to debt collection law, but also employment law.

Wal-Mart Stores, Inc. v. Dukes, 2010 WL 3358931 (U.S. Sup. Ct. Dec. 6, 2010); *Dukes v. Wal-Mark Stores, Inc.,* 603 F.3d 571 (9th Cir. 2010).

TARP Not a Defense to Foreclosure Action

In Wachovia Bank, N.A. v. Lone Pine, Inc., 2010 WL 2553880 (N.D. Ga. 2010), a federal district court in Georgia dismissed an affirmative defense based on a bank's receipt of Troubled Asset Relief Program (TARP) funds. The court granted the bank's motion for judgment on the pleadings on defendants' TARP-based affirmative defense because the TARP does not contain a private right of action and defendants may not assert it as an affirmative defense to a plaintiff's claim under a defaulted note.

Based in part on the holding in *Wachovia Bank, N.A.,* a Florida court in Saxon *Mortgage Services, Inc., v. Jonal Steinmetz,* Case No. 51-2009-CA-2375-WS (Fla. Sixth Cir., Pasco County, 2009), recently granted plaintiff's motion to strike a borrower's affirmative defense in a foreclosure action. Plaintiff had alleged a failure to comply with the TARP loss-mitigation requirements. The court agreed with plaintiff that the TARP does not provide a private right of action to individual borrowers against lenders. It consequently ruled that as a matter of law a private right of action does not exist under the TARP as part of the Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201 *et seq*. Therefore, defendant could not allege an affirmative defense based on the TARP. The court's order was pending as of the publication date of this issue of the*Consumer & Class Action Litigation Alert*.

Hinshaw Defense Victory: FDCPA Overshadowing Claim Knocked out on Motion to Dismiss—Complaint Filed by High Filer

Hinshaw & Culbertson LLP recently successfully defended a client accused of violating the Fair Debt Collection Practices Act (FDCPA). Counsel for plaintiff in the matter was a high filer of FDCPA complaints in jurisdictions across the United States.

Plaintiff alleged that defendant's initial validation letter violated 15 U.S.C. § 1692g(b), which states, in pertinent part, that any communications during the 30-day validation period may not "overshadow" the disclosure of the consumer's right to dispute the debt or to request the name and address of the original creditor. Specifically, plaintiff alleged that, "the size, structure and placement of these statements [directing the debtor to view the back of the letter] obscured, obfuscated, and overshadowed the disclosures required by 15 U.S.C. § 1692g(a) during the thirty-day dispute period, and further acted to chill the exercise of Plaintiff's rights contained in said disclosures."

The court held that while plaintiff's complaint was sufficiently pled under Fed. R. Civ. P. 8, it did not sufficiently state a claim for relief that was plausible on its face. The court based its ruling on the following: (1) other courts have found that stating the required validation notice on the back of a collection letter does not violate the FDCPA; (2) an unpublished U.S. Court of Appeals for the Tenth Circuit decision which held that even the least sophisticated consumer who received two pieces of paper in the same envelope would sufficiently examine the entire contents of the envelope and uncover the enclosed validation notice, was compelling; and (3) the front of the letter unmistakably directed plaintiff to read the disclosures on the back. Thus, the court dismissed the complaint. Notably, it did so with prejudice.

Osborne v. RJM Acquisitions Funding LLC, No. 10-653, slip op. (W.D. Okla. Dec. 1, 2010).

Summary of the Case Law on "Call Volume" Cases Under the FDCPA

Several federal district courts have recently addressed the issue of "intent" within the context of Fair Debt Collection Practices Act (FDCPA) call volume cases. The FDCPA forbids collectors from "causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number." 15 U.S.C. § 1692d(5).

The courts are split in their willingness to find an "intent to harass" based solely on the amount of calls placed by the collector in a given time period. Some courts have ruled in favor of the plaintiff in such cases, holding that the volume of calls was sufficient to prove intent to harass. Others have held in favor of the defendant, finding that the amount of calls did not constitute harassment. A few courts have denied summary judgment to both sides, holding that whether the call volume rose to the level of an intention to harass was a question for the jury. While the decisions vary, the following factors seem to be consistently considered by the courts in these cases: (1) how many times the plaintiff answered; (2) the peculiarities of the plaintiff bringing the suit; (3) how many times a day the collector called; and (4) whether there was a request to cease. Some of the cases in which courts were asked to find an "intent to harass" based solely on the amount of calls placed by the collector in a given time period are summarized below.

In Favor of Plaintiff

Sanchez v. Client Services, 520 F. Supp. 2d 1149 (N.D. Cal. Oct. 29, 2007)—summary judgment for plaintiff where the collector placed 54 calls over a timeframe of 6 months, with 12 calls in one month, 6 calls in one day, and 25 voice messages.

Kuhn v. Account Control, 865 F. Supp. 1443 (D. Nev. Oct. 7, 1994)—summary judgment for plaintiff where six calls were placed within a 24-minute period.

In Favor of Defendant

Tucker v. CBE Group, Inc., 710 F. Supp. 2d 1301 (M.D. Fla. May 5, 2010)—the court granted defendant's motion for summary judgment and held that 57 calls made to a nondebtor (never more than seven times a day) was not a violation of the FDCPA. Plaintiff never spoke to defendant, never requested that defendant cease calling and knew that the calls were not directed to him. Also, defendant never called back on the same day after leaving a message. Therefore, the court concluded that the intent was to reach the debtor and not to harass plaintiff.

Katz v. Capital One, 2010 WL 1039850, *3 (E.D. Va. Mar. 18, 2010)—summary judgment for defendant where the collector never received a cease and desist letter and did not call more than twice a day. The court held that to determine whether a violation occurred, the court must analyze not only the amount of calls but also the "pattern of calls." If the plaintiff fails to establish any indicia of an unacceptable pattern of calls, then there is no violation for harassment. The court found for defendant in this case because it never called plaintiff right after plaintiff hung up, there were no back-to-back calls, the calls were not made at inconvenient times and defendant never received plaintiff's request to cease calling.

Arteaga v. Asset Acceptance L.L.C., 2010 WL 3310259 (E.D. Cal. Aug. 23, 2010)—summary judgment in favor of defendant, which had made 18 calls to plaintiff over the course of five months. The court held that there was no violation because defendant never called plaintiff after she hung up, did not call plaintiff multiple times a day, did not call plaintiff after she made a request to cease, and did not call plaintiff or her family or friends at odd hours.

Meadows v. Franklin, 2010 WL 2605048 (N.D. Ala. June 25, 2010)—summary judgment for defendant and against a nondebtor plaintiff where the collector placed 200 to 300 calls over 2.5 years. The court ruled in favor of defendant because "a handful of calls" a week, when the vast majority of the calls were not answered, did not constitute a violation. The nondebtor plaintiff admitted that she only answered a few times, and that she knew the calls were not for her.

Saltzman v. I.C. Sys., Inc., 2009 WL 2190359, *7 (E.D. Mich. Sept. 30, 2009)—summary judgment for defendant where only one in five calls were answered. The court held that this ratio showed a difficulty in reaching plaintiff rather than an intent to harass.

Jiminez v. Accounts Receivable, Inc., Case No. CV-09-9070 (C.D. Cal. Nov. 15, 2010)—summary judgment for defendant where the collector placed 69 calls in just over three months.

Question of Fact

Basset v. I.C. Sys., Inc., 715 F. Supp. 2d 803 (N.D. Ill. June 1, 2010)—whether 31 calls in 12 days qualified as harassment was a question for the jury as plaintiff stated that he felt abused.

Krapf v. Nationwide Credit Inc., 2010 WL 2025323, *4 (C.D. Cal. May 21, 2010)—defendant's motion for summary judgment was denied as the question of whether more than 180 calls in a single month qualified as harassment was one for the jury. The court allowed the case to go to the jury because some of the calls were separated by a matter of minutes.

Akalwadi v. Risk Management Alternatives, 336 F. Supp. 2d 492 (D. Md. Sept. 22, 2004)—whether 28 calls over the course of two months qualified as harassment was a question for the jury.

Joseph v. J.J. Macintyre, 238 F. Supp. 2d 1158 (N.D. Cal. Dec. 12 2002)—whether 200 calls over the course of 1.5 years qualified as harassment was a question for the jury. On three different days, defendant attempted to telephone plaintiff after having spoken with her on the same day. Plaintiff had been contacted on the same day after she requested that the calls cease. On two other occasions, defendant telephoned plaintiff on the same day after she had hung up on it.

Conclusion

The district courts have not shown much consistency in this area of law. However, taking note of the factors noted above that are consistently considered by the courts in these cases will likely prove helpful in crafting a persuasive argument that a client's call volume to a debtor, on its own, is not sufficient to prove an intent to harass.