Consumer Law Hinsights

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Consumer Law Hinsights is a monthly compilation of nationwide consumer protection cases of interest to financial services and accounts receivable management companies, brought to you by Hinshaw & Culbertson LLP.

Eleventh Circuit Rejects Denial of Class Certification on Post-discharge Motion Statements

Plaintiffs obtained and defaulted on a mortgage, and a foreclosure action was filed. Plaintiffs then filed for bankruptcy and received a discharge order relieving plaintiffs from personal liability on the mortgage. Despite the discharge, the debt collector continued sending plaintiffs monthly mortgage statements that appeared to seek payment on the debt. Plaintiffs sued the debt collector and sought to certify claims pursuant to the FDCPA and its Florida counterpart, the FCCPA. Plaintiffs alleged that the servicer made false, deceptive, and misleading representations by sending mortgage statements and attempting to collect on mortgage debts after consumers received a discharge in bankruptcy.

The district court denied class certification, explaining that the debt collector had a defense that the Bankruptcy Code precluded or preempted the FDCPA and FCCPA. The district court explained that there were individual inquiries that predominated over issues common to the putative class. The district court explained that the class, which plaintiffs sought to certify, included both borrowers who vacated their homes and borrowers who remained in their homes, and that those borrower categories involved different exceptions under the Bankruptcy Code to determine the scope of the discharge. Certifying the putative class would therefore require individualized inquiries "for every class member to determine whether the § 524(j) exception applied, and if so, whether the Bankruptcy Code precluded and/or preempted the FDCPA and FCCPA." Accordingly, the court denied class certification.

On appeal, the Eleventh Circuit disagreed and ruled it was wrong to classify the preclusion/preemption defense as an individualized issue. The Eleventh Circuit instead found that the district court improperly disregarded plaintiffs' allegation that the debt collector violated discharge injunctions even when it sent mortgage statements to class members who vacated their homes, because § 524(a) provides that discharge orders bar any act to collect a discharged debt. The court found that the legal question at issue—whether the Bankruptcy Code precludes or displaces any remedy available under the FDCPA and FCCPA for a claim that a creditor engaged in false or deceptive conduct by attempting to collect a debt in violation of a discharge injunction—applies to all class members and thus is common.

The court went on to explain that it was not expressing an opinion on whether the preclusion/preemption defense had merit, and the court acknowledged, but did not weigh in on, an existing circuit split.

The case is *Sellers v. Rushmore Loan Mgmt. Servs., LLC, --- F.3d --- (11th Cir. Oct. 29, 2019)*.

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Convenience Fee Held to Be Permissible "Pass-through" Collection Cost

A consumer was sent multiple letters seeking to collect upon an unpaid medical debt. The letters offered multiple payment options, one of which was online with a credit card. The online payment option included the addition of a convenience fee, while other options (like mailing a check) did not add the fee. The plaintiff opted to make an online payment that was broken down into two categories: a $40.22 "subtotal," and a $3.00 "Service Fee." Plaintiff then brought a class action against the debt collector alleging various violations of the Fair Debt Collection Practices Act and state law claiming the service fee was false, misleading and an unfair collection practice.

Plaintiff claimed that the convenience fee was "incidental to the principal obligation" and thus, prohibited by Section 1692f(1) of the FDCPA because it was not permitted by the contract or state law. The court explained that the record was not appropriate to determine if the convenience fee was incidental to the debt, but in any event, it was permitted as a collection cost under the contract as a pass-through cost. The court concluded that, "[r]easonable collection costs may include pass-through costs" as anticipated by the agreement between the consumer and the creditor.

The court's decision focused on the fact that the debt collector did not profit from the convenience fee. The court explained that the debt collector was not collecting an incidental obligation, and instead intended to pass through a cost incurred to a credit card provider for which the debt collector does not realize a profit. The court therefore concluded that the "exception excluding pass-through fees from the FDCPA's definition of 'collection' applies" in this case. This case should help provide some guidance on the permissibility of collecting convenience fees as a measure of collection costs for debt collectors when contractually allowed.

The case is *Alleman v. Collection Professionals, Inc.*, No. 1:17-CV-9294, (N.D.Ill. Oct. 29, 2019).

Collection Professionals, Inc., was represented by Hinshaw in the case.

Read the ACA Daily report on this decision

Courts Rule that Identity of Debt Collector is Clear in Collection Letters

Courts in two recent cases brought under Section 1692g of the FDCPA found that the collections letters properly identified to whom the debt was owed, and were not confusing.

The first case reported below is one that Hinshaw won on a motion for judgment on the pleadings.

In *Glass v. Afni, Inc.,* a debt collector sent a letter to collect on a defaulted loan. The letter, for purposes of identifying the loan, referred to three separate entities: the original creditor, the creditor, and the servicer. The plaintiff argued that without an explanation about the relationship among the named entities and without an identification using the words "current creditor," the collection letter was confusing and did not clearly identify the entity to whom the debt was owed. The Southern District of Indiana looked to the plain language of the letter, and explained:

> The only reasonable interpretation of the collection letter is that "the name of the creditor to whom the debt is owed"−as required by 15 U.S.C. § 1692g(a)(2)−is Affirm Operational Loans III Trust. Although the letter does not use the phrase "current creditor," the letter identifies the original creditor as Cross River Bank and identifies the only other creditor as Affirm Operational Loans III

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> Trust. The "basic logical deduction[] and inference[]" from the letter is that the only other listed creditor is the current creditor….The FDCPA does not require the explicit use of the phrase "current creditor." Afni's debt collection letter contains no internal contradictions or inconsistencies as to the debt owed or the creditor. Furthermore, the collection letter does not use other terms such as "client," "owner," "assignee," or "transferee" that could lead to confusion about the name of the creditor to whom the debt is owed.

Accordingly, the court granted Afni's motion for judgment on the pleadings. The ruling should assist debt collectors not only on this issue, but also when plaintiffs claim that the FDCPA has requirements to include magic words such as "current creditor" when the plain meaning of the statement is apparent on the face of the letter.

The case is *Glass v. Afni, Inc.*, No. 18-cv-03990 (S.D. Ind. 2019). Read the ACA Daily report on this decision.

In *Lugo v. Forster & Garbus,* a New York court also found that proper identification of the entity to whom the debt is owed does not require the use of magic words such as "current creditor." In *Lugo*, a law firm's first letter to the plaintiff identified the law firm as the sender of the letter by placing its name in the upper right corner. The letter then listed the names of attorneys associated with the law firm. The letter referred to the subject of the letter as "Re: Barclays Bank Delaware." The body of the letter stated, "Please contact our office upon receipt of this letter with regard to the above matter ... Please note that we are required, under federal law, to advise you that we are debt collectors[.]" Finally at the end of the letter it states, "Make check payable to: [the law firm] as attorneys" and again states "Re: Barclays Bank Delaware."

The court looked to the letter as a whole, and found that, "…the [least sophisticated consumer] would understand that Barclays Bank Delaware is both the source and the current owner of the debt. The only other entity mentioned in the letter was [the law firm], which is clearly defined as debt collector and 'as attorneys.'"

The case is *Lugo v. Forster & Garbus, LLP*, No. 19-cv-0145ARRCLP (E.D.N.Y. Oct. 21, 2019).

Plaintiff Lacks Standing to Challenge False Statement on Website Unrelated to Debt Collection

In a growing area of litigation, a plaintiff brought a lawsuit based on statements made on a debt collector's website. The plaintiff claimed that the website was false and misleading because it falsely implied that the debt collector made corporate contributions to charitable organizations, including the American Red Cross, Susan G. Kommen's Race for the Cure, and Habitat for Humanity.

The debt collector argued that the consumer did not have standing to bring these claims because the claims do not constitute debt collection activity regarding the consumer. The court agreed with the debt collector stating that, "even if [the debt collector's] involvement with those organizations is fictitious, [the consumer] herself has not suffered perceptible harm by those claims." This sound reasoning can apply to many innocuous statements on a debt collector's website that do not give rise to a violation.

The case is *Rojas v. Tolteca Enterprises, Inc.*, No. 19-cv-00775-JRN (W.D. Tex. Oct. 9, 2019).

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Consumer Law Regulatory Insights: CFPB Symposia Series on Section 1701 of the Dodd-Frank Act

On November 6, 2019, the CFPB hosted a symposium on Dodd-Frank Section 1701 which, when implemented, will require financial institutions to collect, report, and make public certain information concerning credit applications made by women-owned, minority-owned, and small businesses. >>Read More

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