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Consumer & Class Action Litigation Newsletter - October 2013 Edition

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Repeated Disclosure as Debt Collector Not Needed According to New York District Court

In *Majerowitz v. Stephen Einstein & Associates, P.C.*, 2013 WL 4432240 (E.D.N.Y. Aug. 15, 2013), the U.S. District Court for the Eastern District of New York held plaintiff's case frivolous and found that defendant's voicemails omitting a mini-Miranda disclosure did not violate Section 1692e(11) of the Fair Debt Collection Practices Act (FDCPA). The debtor/plaintiff incurred a debt on a Citibank account, which was referred to a law firm for collection. In response to a communication from defendant law firm, the plaintiff called the law firm's office, and heard a recorded message, which stated the law firm's name, that it was a debt collector attempting to collect a debt and any information obtained would be used for that purpose.

The plaintiff negotiated a settlement with a representative of the law firm, and the representative agreed to call the debtor back in an hour to confirm settlement. An hour later, another representative from the law firm called the plaintiff and left a voicemail, stating that she was from the law firm, acknowledging plaintiff's prior conversation with the firm, and providing a reference number and call back number. Another similar voicemail was left for the plaintiff the following day. The plaintiff later failed to submit his first settlement payment. A representative of the law firm left three more voicemails for him similar to those previously left. The plaintiff then sued the law firm for violating § 1692e(11) and alleged that it failed to disclose that it was a debt collector in every communication with him as required under the statute. Both parties filed cross-motions for summary judgment pursuant to Rule 56, and both parties moved for an award of reasonable attorneys' fees.

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The Eastern District of New York found the plaintiff's complaint not only meritless, but also frivolous. In light of the facts, the court concluded that even the most gullible consumer would know that the law firm was a debt collector attempting to collect a debt. The court found there was no requirement that defendant repeatedly add after its name that it was a debt collector. Defendant debt collector satisfied the §1692e(11) notice requirement both in Recording 1 and the letter confirming settlement, and clearly stated its name in the voicemail messages left for the debtor.

The Court also granted awarded the law firm its attorneys' fees, finding that the action was brought in bad faith, based upon its determination that the plaintiff was a not a "least sophisticated consumer," and therefore not the type of consumer the FDCPA was designed to protect.

Majerowitz v. Stephen Einstein & Assocs., 12 Civ. 4592 (ILG)(RLM)(E.D.N.Y. Aug. 15, 2013)

For more information, please contact your regular Hinshaw attorney.

Indiana District Court Found Maximum FDCPA Statutory Damage Recovery Per Proceeding Not Per Violation Or Per Defendant

Good news for FDCPA defendants came out of the Southern District of Indiana recently when it held that under the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.* (FDCPA), a plaintiff is entitled to $1,000 per action in statutory damages, not per defendant. In *Green v. Monarch Recovery Management, Inc. et al*., 13 CV 00418 (S.D.Ind. Sept. 16, 2013), the debtor brought FDCPA claims against two debt collectors. In relevant part, she alleged that the collectors sent her a collection letter directly after notification that she retained counsel. The defendant debt collectors tendered an offer of judgment to the debtor, in which they offered her $1,000 in statutory damages. The debtor contended that $1,000 in statutory damages was insufficient to moot the statutory claims because there were two named collectors, and so she was entitled to $2,000 in statutory damages. The court disagreed and held that, "it appears that the $100 to $1,000 range for statutory damages is per suit rather than per transaction." The court reasoned that because the debtor based her FDCPA claims against the collectors on a single collection letter, the injury was indivisible, and the maximum statutory damages recoverable was $1,000 total.

Green v. Monarch Recovery Management, Inc., et al., No. 1:13-cv-00418-SEB-MJD (S.D.Ind. September 16, 2013)

For more information, please contact your regular Hinshaw attorney.

Northern District of Alabama Attempts to Narrow TCPA Definition of ATDS

In *Hunt v. 21st Mortgage Corp.*, the plaintiff pursued TCPA claims against defendant debt collector, alleging that it used an "automatic telephone dialing system" to place calls to him and that it made "numerous calls by illegal prerecorded messages." During discovery, plaintiff sought to inspect the collector's facilities, including "the facilities wherein [it] performs collections operations," "all telephones and telephone systems used in the collection of accounts," "any computer systems and/or software used," and "any equipment mentioned in or referred to by Defendant in its responses to Plaintiff's discovery or otherwise." The Court forced the collector to comply with this request, despite its objections that it no longer used automatic dialing software but instead only

made manual calls. The Court found that collector's previous phone system may be in the "phone closet" but was still discoverable because the plaintiff claimed that the phone system used to call him was at least capable of automatic dialing.

The court discussed the TCPA definition of an "automatic telephone dialing system" (ATDS), holding that the system must have the present capacity, at the time the calls were being made, "to store or produce and call numbers from a number generator" to meet this definition. The court acknowledged that while a defendant can be liable whenever it has such a system even if it does not make use of the automatic dialing capacity, it cannot be held liable if substantial modification or alteration of the system would be required to achieve that capacity.

The court attempted to narrow the definition of ATDS by requiring that the phone system in question have the capacity to "store or produce and call numbers from a number generator" at the time the alleged calls were made and by holding that a system which must be substantially altered to achieve this capacity is not liable under the TCPA. The case is noteworthy in light of the jurisdiction it is in — the Northern District of Alabama, which sits in the Eleventh Circuit where the *Mais v. Gulf Coast Collection Bureau, Inc.* case is on appeal.

Hunt v. 21st Mortgage Corp., 2013 WL 5230061 (N.D. Ala. Sept. 17, 2013)

For more information, please contact your regular Hinshaw attorney.

Litigious *Pro Se* Mortgage Foreclosure Defendants Fined by Illinois Appellate Court to Deter Similar Conduct by Future Litigants

Comparing the *pro se* defendants' strategy to "paper terrorism," the Illinois Appellate Court First District recently affirmed the judgments of a foreclosure court, which found in favor of the mortgage lender and granted the lender its attorneys' fees. The court also separately directed defendants to show cause why a joint and several fine of $10,000 under Illinois Supreme Court Rule 375 should not be imposed. The court stated that "[b]ecause of the growing number of these cases, we issue this opinion to provide guidance to the many courts confronted with similar matters." After summarizing a lengthy procedural history, the court rejected all of defendants' arguments. The court described the often seen and commonly plead "Show Me the Note" standing defense as a tactic that "does not work in Illinois." In applying sanctions, the court noted that "[a]lthough defendants papered the record with voluminous pleadings, nowhere do they actually deny that they had a valid loan secured by property they own, which they failed to pay, and which requires the property to be sold to pay the debt."

The court continued:

> "[W]e have explained why virtually every one of their arguments is abjectly frivolous and/or presented in such a confusing manner, perhaps deliberately so, to make it as laborious as possible to resolve them. These tactics often appear in courts hearing debt cases, generated by defendants engaging in an organized program

> of filing frivolous pleadings, lawsuits, and claims in an effort to harass judges, creditors, and even court staff."

In explaining why a non-dischargeable fine was necessary, the court stated that an award of attorneys' fees to the lender "may be merely a Pyrrhic victory for it since defendants apparently have insufficient funds to pay them and might discharge them through bankruptcy."

In closing, the court held that:

> "[t]he tactics employed by defendants in this case caused the expenditure of significant time and resources not only by the court below, but by the judges, law clerks, librarians and clerk's office of this court. By imposing a fine in this case, we seek not only to deter similar conduct by future litigants, but to provide some measure of compensation for the public fisc for that needless expenditure."

Parkway Bank and Trust Company v. Korzen et al., 2013 IL App (1st) 130380

For more information, please contact Todd P. Stelter

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Related People

Barbara Fernandez

Partner in Charge of Miami Office

305-428-5031

David M. Schultz

Partner

312-704-3527

Todd P. Stelter

Partner

312-704-3966

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