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Consumer Finance Class Actions: Pursuing or Defending FDCPA, FCRA and TCPA Claims

Guidance From Spokeo, Campbell-Ewald, Tyson Foods and Other Recent Cases for Obtaining Favorable Results During Class Certification and Settlement

THURSDAY, JUNE 2, 2016

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10**.

3rd. Cir. TCPA Ruling Restricts ATDS but Gives Nod to 'Potential Capacity'

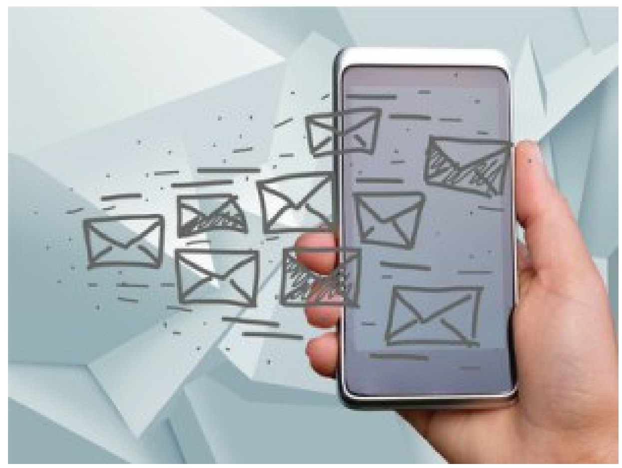
consumerfsblog.com/2015/10/3rd-cir-tcpa-ruling-restricts-atds-but-gives-nod-to-potential-capacity/
Donald Maurice

In an Oct. 23 ruling, the Third Circuit Court of Appeals offered a mixed opinion that has the effect of both limiting and expanding the interpretation of automatic telephone dialing systems (ATDS), which can trigger a claim under the federal Telephone Consumer Protection Act. While the ruling poses increased risk for businesses that use dialers to contact customers, it also offers guidance on what can be done to reduce that risk.

The **opinion**, *Dominiguez, et. al v. Yahoo, Inc*., is not precedential, meaning courts within the Third Circuit (New Jersey, Delaware, Pennsylvania and U.S. Virgin Islands) are not obligated to follow it.

You've Got Mail!

When Bill Dominguez purchased a new cellular phone, he received a new telephone number. He also began to receive text messages each time an email was received in a Yahoo email account. But those text messages were not intended for Dominguez. It happens that the telephone number Dominguez received was reassigned from a previous subscriber. The text messages were from the previous subscriber's email account.



Dominguez contacted Yahoo and tried to put an end to the text messages, but it didn't work. He reached out to the Federal Communications Commission (which has rulemaking and enforcement authority under the TCPA) which contacted Yahoo, but the texts continued. Dominique filed complaints with both the FCC and the Federal Trade Commission, but the texts continued.

In all, Dominquez says he received 27,809 text messages over 17 months. He filed a lawsuit alleging the text messages violated the TCPA. Even as an individual claim if all 27,809 text messages were made in violation of the TCPA, Dominguez would stand to recover anywhere from $13,904,500 to as much as $41,713,500. It all depends on whether the texts were willful. It doesn't help that the opinion notes that when Dominiguez spoke with Yahoo he was told "the company could not stop the messages and that, as far as Yahoo was concerned, the [telephone] number would always belong to the previous owner." It only gets worse. Dominquez is also seeking class certification.

The Good News – ATDS Definition Limited

The TCPA regulates the use of, among other things, what it defines as "automatic telephone dialing systems." It prohibits the use of an ATDS to dial "any telephone number assigned to a . . . cellular telephone service . . ." unless the call is made for "emergency purposes" or "with the prior express consent of the called party."

It defines an ATDS as "equipment that has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator; and . . . to dial such numbers." Yahoo's position (according to the decision) is that an ATDS must have a "random or sequential number generator," and the equipment it used to send text messages did not generate telephone numbers. Instead, it sent the texts from a compiled list of numbers.

The opinion rejected a crafty interpretation Dominguez posited. He argued that “sequential” under the definition of ATDS can mean either that numbers are dialed “in numerical sequence,” or that the equipment “dials non-sequential numbers in a sequential manner (i.e., by placing them in a queue and dialing them one at a time).” In rejecting this argument, the Third Circuit looked to the recent 2015 FCC TCPA Declaratory Rulings, finding they “hold that an autodialer must be able to store or produce numbers that themselves are randomly or sequentially generated ‘even if [the autodialer is] not presently used for that purpose.’ ” That means “the phrase [random or sequential number generator] refers to the numbers themselves rather than the manner in which they are dialed.” The FCC did not “read out” the requirement that an ATDS have capacity to be a “random or sequential number generator,” according to the opinion.

It’s good news. The 2015 FCC Declaratory Rulings, as the opinion notes, are “hardly a model of clarity,” and the concern among business was that the rulings’ ambiguities would allow courts to adopt interpretations expanding the scope of an ATDS. Not so here. In fact, it supports a core argument the defense bar and certain courts have adopted – an ATDS must have the capacity “to store or produce telephone numbers to be called, using a random or sequential number generator; and . . . to dial such numbers.”

The Bad News – ‘Potential Capacity’ Can Make an ATDS

Even if your equipment does not have the present capacity to store or produce numbers that are randomly or sequentially generated and dial them, if it has the “potential capacity” to do so, it can still be an ATDS. And that is what went sideways here for Yahoo. The evidence the company offered, in the opinion of its expert, was that Yahoo’s text messaging system “did not have the capacity to store or produce numbers to be called, using a random or sequential number generator, and to call those numbers.” The court rejected the opinion as “conclusory,” and “begs the question of what is meant by the word ‘capacity.’ ”

The Third Circuit remanded the case to the trial court to explore the question of whether Yahoo’s equipment has the “potential” capacity to store or produce telephone numbers using a random or sequential number generator and dial them.

Equipment and Capacity Considerations

Our webinar, *Dialing Into the FCC’s TCPA Declaratory Rulings,* takes a close look at the 2015 TCPA Declaratory Rulings, including analysis of “potential capacity” and considerations to address TCPA risk posed by equipment. If “potential capacity” includes the potential to store or produce randomly or sequentially generated telephone numbers and dial them, this ruling (if other courts adopt it), may remove some of the concerns expressed in the webinar – mainly that the ability to dial from a list of numbers alone can make an ATDS.

You can register for this free webinar **here.**

11th Cir. Finds No Irreconcilable Conflict Between FDCPA and Bankruptcy Code

Brent Yarborough

In a much-anticipated follow-up to its 2014 decision in *Crawford v. LVNV Funding, LLC*, 738 F.3d 1254 (11th Cir. 2014), the U.S. Court of Appeals for the Eleventh Circuit recently held that there is no irreconcilable conflict between the federal Fair Debt Collection Practices Act (FDCPA) and the Bankruptcy Code.

In so ruling, the Court reversed the dismissal of two FDCPA cases filed against debt buyers that submitted proofs of claim on debts that were subject to a statute of limitations defense.

A copy of the opinion in *Johnson v. Midland Funding LLC and Brock v. Resurgent Capital Services, L.P.* is available at: **Link to Opinion**.

As you may recall, in its 2014 decision in *Crawford*, the Eleventh Circuit held that a debt collector violates the FDCPA when it files a proof of claim in a bankruptcy case on a debt that it knows to be "time-barred." But the panel in *Crawford* did not consider whether the Bankruptcy Code preempts or displaces the FDCPA "when creditors misbehave in bankruptcy." *Crawford* at 1262, n. 7.

The action at hand arose from two appeals from the United States District Court for the Southern District of Alabama. The underlying lawsuits concerned FDCPA claims filed against debt buyers that filed proofs of claim in the plaintiffs' Chapter 13 bankruptcy cases. The proofs of claim related to debts that, if sued upon, would have been subject to a statute-of-limitations defense based on Alabama's six-year limitation period. The District Court dismissed both cases based on a finding that the Eleventh Circuit's decision in *Crawford* placed the FDCPA and the Bankruptcy Code in irreconcilable conflict such that there was an implied repeal of the FDCPA by the Code.

The Eleventh Circuit recognized that a creditor is permitted to file a proof of claim on a debt subject to a statute-of-limitations defense, and the Court pointed out that when the "bankruptcy process is working as intended," a time-barred proof of claim will not be paid by the bankruptcy estate. The Court also noted that just because creditors are permitted to file proofs of claim on debts that are subject to a statute-of-limitations defense, they are not free from all of the consequences of filing these claims.

The Eleventh Circuit noted that creditors who meet the FDCPA's definition of "debt collector" are a "narrow subset of the universe of creditors who might file proofs of claim in a Chapter 13 bankruptcy." Under the FDCPA, debt collectors are prohibited from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. §1692e. In addition, debt collectors may not use any "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. §1692f.

The Court reiterated its holding in *Crawford* that a debt collector's filing of a proof of claim on a "time-barred" debt violates the FDCPA.

The Eleventh Circuit disagreed with the District Court's finding that an "irreconcilable conflict" between the Bankruptcy Code and the FDCPA amounted to an implied repeal of the FDCPA by the Code.

Instead, the Eleventh Circuit held that the FDCPA and the Bankruptcy Code can be construed together in a way that allows them to coexist.

According to the Eleventh Circuit, the Bankruptcy Code and the FDCPA provide different tiers of sanctions for creditor misbehavior in bankruptcy. Under the Bankruptcy Code, a bankruptcy trustee can object to any time-barred proof of claim and the bankruptcy court will deny payment of the claim if it finds that the objection is proper. In addition, a bankruptcy court has the power to sanction a party for misbehavior that is more severe.

The Eleventh Circuit explained that the FDCPA, rather than conflicting with the Bankruptcy Code, provides an additional layer of protection from a particular type of creditor – i.e., a debt collector. The Court pointed out that although the Bankruptcy Code permits the filing of a proof of claim on a debt subject to a limitations defense, it does not require it.

Also, the Court noted, a debt collector may still file a proof of claim on a debt that it knows is beyond the applicable limitations period, so long as it is willing to subject itself to a potential action under the FDCPA. The Court compared this to a frivolous lawsuit, ruling that nothing prohibits the filing of a frivolous lawsuit, but the filer will be subject to sanctions.

On the other hand, the Eleventh Circuit held, the debt collector who unintentionally or in good faith files a proof of claim on a debt subject to a limitations defense may find safe harbor in the FDCPA's bona fide error defense.

How Spokeo May Limit Consumer Financial Services Litigation

consumerfsblog.com/2016/05/how-spokeo-may-limit-consumer-financial-services-litigation/
Donald Maurice

Yesterday's decision from the U.S. Supreme Court in *Spokeo v. Robins* should bolster the defense of companies subject to several federal consumer protection statutes. The ruling addresses lawsuits that claim an injury created solely by the violation of a federal statute and require the plaintiff to demonstrate not only that the statute was violated, but that the plaintiff herself suffered harm.

The opinion does not go as far as many in the consumer financial services industry would have liked (not all injuries must be "tangible"), but it does close the door on civil lawsuits many have faced. The opinion was authored by Justice Alito, with a separate concurring opinion by Justice Thomas. Justice Ginsburg authored a dissent and was joined in the dissent by Justice Sotomayor.

A copy of the opinion is available here: **Link to Opinion.**

Standing and 'Injury in Fact'

The decision concerns "standing" – whether a person can bring a lawsuit in a federal court. Standing, as the Court wrote, requires three elements: first, an injury in fact; second that the injury is "fairly traceable" to the conduct of the defendant at issue; and last, that the conduct can be likely redressed by the court.

Robins claimed Spokeo compiled a report about him that contained false information in violation of the Fair Credit Reporting Act (FCRA). The trial court dismissed his case finding Robins lacked standing because he had no tangible harm — he did not allege the information compiled by Spokeo lead to, for example, the denial of a job or credit. The Ninth Circuit Court of Appeals reversed and held that the statutory violation was enough to allow Robins his day in court; first, because his claims were associated with a violation of protections afforded to him by the FCRA and, second, because his lawsuit addressed the handling of his own credit information, and these concerns are "individualized."

Yesterday's decision addressed whether Robins met the first element of standing – whether he had alleged an injury in fact under the FCRA. This requires pleading harm to a "legally protected interest" that is "concrete and particularized." The harm cannot be hypothetical or conjectural; it must be "actual or imminent." The Court held that while Robins may have pleaded a violation of a legally protected interest under FCRA that was particular harm to him, he did not plead any actual or imminent harm stemming from the alleged FCRA violation. Simply stated, all Robins alleged was a technical violation of the FCRA, which he did not allege caused him any harm beyond a hypothetical or speculative harm.

Requires a "Concrete" Injury to Assert a Claim

In the context of a statutory violation of the FCRA, one could assert like Robins did, that a credit reporting agency's compilation of false information certainly does demonstrate a violation of a legally protected interest. That, after all, is a purpose of the FCRA: to promote and protect the accuracy of information reported. The harm was also "particularized." Robins' claim concerned the handling of his information and he filed a lawsuit seeking relief to redress the wrong done in the compilation and dissemination of that information.

The problem for Robins, and now for many who seek to assert similar lawsuits, is that all of this did not lead to any "concrete" injury. The Ninth Circuit's decision focused only on whether the harm was particularized to Robins. It did not evaluate, the Court wrote, whether the harm was "'real' and not 'abstract.' "

Concrete Harms Not Always Tangible

The opinion points out that there are some statutory violations whose transgression can itself cause a particularized and concrete harm. An example provided is a decision where the Federal Election Commission denied a group of voters information "that Congress had decided to make public." The violation was of a certain statutory right (mandatory access to specific information) that, in and of itself, constituted a sufficient injury in fact (denial of access to the information). In such cases, a person need not identify any "additional harm" other than the harm Congress identified in the statute.

Robins' case is different. While the FCRA imposes procedures that must be followed in order to curb the reporting of inaccurate information, not all inaccuracies result in a real harm. The mere fact there is an inaccuracy is not itself a sufficient, concrete harm. Although the information concerning Robins was alleged to be false and in violation of the FCRA, Robins did not point to any actual or imminent harm to him stemming from Spokeo's conduct. "A violation of one of the FCRA's procedural requirements may result in no harm," wrote Justice Alito in the Court's opinion. "An example that comes readily to mind," the opinion continues, "is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm."

The decision does not close the door on Robins' case. "We take no position as to whether the Ninth Circuit's ultimate conclusion—that Robins adequately alleged an injury in fact—was correct," the Court concluded. The Ninth Circuit's analysis supporting its decision was flawed, the Court held, and because it did not examine whether the injury was "concrete," the Court directed the Ninth Circuit to reexamine the case once more using its *Spokeo* analysis.

Curbs on FCRA, FDCPA, EFTA and TILA Lawsuits

The decision has immediate impact on FCRA claims alleging the reporting and furnishing of information. A failure to simply follow FCRA procedures will likely not withstand a *Spokeo* analysis absent pleading an actual harm.

The impact on Fair Debt Collection Practices Act (FDCPA) claims may be extraordinary. In determining whether a communication is false or misleading in violation of the FDCPA, courts have looked to whether the communication would violate a hypothetical "least sophisticated" or "unsophisticated" consumer. Several courts of appeals have defined the standard as an evaluation of how an imaginary consumer, who is gullible and naïve, would view the letter. As the Third Circuit Court of Appeals recently put it, "[t]he standard is an objective one, meaning that the specific plaintiff need not prove that she was actually confused or misled, only that the objective least sophisticated debtor would be." While the standard may have some life left in it, the belief that the plaintiff herself need not demonstrate she has been harmed would be contrary to *Spokeo.* FDCPA lawsuits alleging false and deceptive communications may well be required to plead the plaintiff herself suffered some "particularized and concrete" injury that is "actual" or "imminent."

Businesses facing claims under the federal Electronic Fund Transfers Act (EFTA) and Truth in Lending Act (TILA) could also benefit from *Spokeo.* The EFTA and TILA, like the FCRA, impose procedures on companies providing financial services to consumers. However a failure to follow these procedures does not always result in an actual or imminent harm, especially if courts find the statutes do not themselves define the harm.

TCPA Impact Less Clear

Many cases involving the Telephone Consumer Protection Act (TCPA) have been put on hold pending the Court's decision. *Spokeo's* impact is certainly positive in that the demonstration of some actual or imminent harm will be necessary to allow standing to sue. But expect plaintiffs to focus on the opinion's language concerning Congress' ability to pass a law that both provides a statutory protection and, in doing so, identifies the harm, which is protected by the right.

Impact on Class Actions

Spokeo has benefits to those defending class claims under these statutes. Even if the plaintiff can demonstrate a particularized and concrete injury that is actual or imminent, that same harm injury may not easily carry over to the class. The injury may be so unique to the class representative's individual circumstances that even if the defendant's conduct violated the statute, persons who do not share similar or specialized circumstances are not harmed.

State Court Litigation Option

The Court's decision is limited to standing in federal courts. Many of the federal laws impacted, such as the FDCPA, TCPA, FCRA and EFTA, can also be brought in state courts. It will be up to each state to decide whether their courts can hear claims where there is no actual or imminent harm (tangible or statutorily identified) to the plaintiff. Comments from Justice Breyer during the *Spokeo* oral argument touched on states having "public action" statutes that allow persons to bring claims for statutory violations even where they have suffered no injury.

Moving Ahead with *Spokeo*

While *Spokeo* does not require only real, tangible harms in all cases, it does limit a wide array of claims and makes clear that not all alleged statutory violations are accompanied by a cognizable, statutory harm. Expect *Spokeo* to quickly make its way into consumer financial services litigation. The next few months should see several trial court decisions that will flesh out whether certain statutory protections themselves identify harms sufficient alone for standing or whether those violations require additional, real world harms. Also, because a lack of standing can be raised at any time during the life of a case, several appeals courts may right now be looking at *Spokeo's* application to matters before them.

More FDCPA Uncertainty When Collecting Interest on Purchased Debt

consumerfsblog.com/2015/06/more-fdcpa-uncertainty-when-collecting-interest-on-purchased-debt/
Donald Maurice

We expect certainty in the law, especially when it comes to a commercial transaction. A valid and enforceable contract should not become unenforceable simply because it was sold. And worse, it should not be unlawful for the buyer to enforce the purchased contract.

But that is the decision of the U.S. Court of Appeals for the Second Circuit in ***Madden v. Midland***. The facts are not remarkable. Ms. Madden applied for and received a credit card from Bank of America, a national bank. Bank of America transferred her account to FIA Card Services, also a national bank, who issued her a change in terms agreement applying Delaware law.

The National Bank Act and State Usury Law

The National Bank Act allows national banks to export the lawful rates of interest of their home state to a foreign jurisdiction – regardless of what interest rate ceilings (called usury laws) the foreign state imposes. So here, Ms. Madden's agreement allowed FIA to charge interest of 27 percent per annum, which was permitted by Delaware law.

Madden defaulted on her credit card debt and approximately $5,000 was "charged-off" as uncollectable. FIA sold the debt to Midland. Midland asked Madden to pay the charged-off balance, plus the agreed to annual interest of 27 percent that had accrued since its purchase. Madden's response was to file a putative class action complaint alleging that because New York's usury law capped annual interest at 25 percent, Midland's effort to collect the agreed 27 percent annual interest violated the Fair Debt Collection Practices Act (FDCPA).

Midland fought the allegation, relying on well-settled law that because the credit card agreement provided for a lawful interest rate in the hands of FIA, it was lawful for Midland to collect the valid, agreed upon rate. The trial court agreed and dismissed Madden's case.

Legal Today – Illegal Tomorrow

Madden appealed the decision. The Second Circuit recognized that the National Bank Act expressly allows national banks to "charge on any loan … interest at the rate allowed by the laws of the State, Territory, or District where the bank is located." *See* 12 U.S.C. § 85. The Act also "provide[s] the exclusive cause of action" for usury claims against national banks and thus preempts claims under state usury laws.

This would seem to favor Midland because, as the assignee of a national bank, it should receive the benefit of the National Bank Act, deem the loan legal and recover interest at the rate allowed by Delaware, the state where the assignor bank is headquartered.

Not so, said the Second Circuit, reasoning that, while under certain circumstances preemption under the National Bank Act could be extended to entities that are not national banks, in order for this exception to apply the state law at issue must "significantly interfere with a national bank's ability to exercise its power under the Act." For example, the U.S. Supreme Court has held that operating subsidiaries and agents of national banks are entitled to National Bank Act preemption. Thus, the Court noted, in most of the cases where the National Bank Act has been extended to a non-national bank entity, the non-bank entity was acting on behalf of a national bank in the process of conducting the bank's business. It concluded that if the national bank did not retain an ownership interest, the National Bank Act ceased to be effective against the contract.

Under the Court's rationale, charging an illegal rate of interest is permissible so long as the entity charging the illegal rate is a national bank or a person collecting interest for a national bank. The National Bank Act, under this reading, preempts a state from enforcing its usury law as long as the contract remains in the hands of a national bank.

Other Circuits Disagree

Two decisions from the Eighth Circuit Court of Appeals appear to conflict. In *Krispin v. May Department Stores*, 218 F. 3d 919 (8th Cir. 2000), the Eighth Circuit applied the National Bank Act to preempt state law usury claims against a department store chain (that was not a national bank) which issued credit cards and later assigned the accounts to a wholly-owned national bank. The key here was that the account assignment to the national bank caused the bank, and not the store, to be the originator of the account.

In *Phipps v. FDIC*, 417 F.3d 1006 (8th Cir. 2005), the plaintiffs sued under Missouri law to recover a "finder's fee" paid to a non-bank entity upon the sale of mortgage loans. The court held that the fees constituted "interest" under the National Bank Act and held that the originating bank, not the assignee, was the real party in interest and the claims were preempted.

The Second Circuit distinguished these decisions on the basis that a national bank always retained some interest in the credit account. Others would say that the Eighth Circuit's decisions focus on the credit account at its origination, so that if the National Bank Act made the credit account valid at the time of origination, it continues to remain valid and enforceable.

Decision Can Devalue Purchased Debt

One of the purposes of the National Bank Act is to prevent the application of state law which would "significantly interfere" with the operations of a national bank. It is well-settled that state usury laws pose such interference. The Second Circuit acknowledged that its decision might decrease the value of portfolios, but that devaluation does not "significantly interfere" with the operation of a national bank.

Others would disagree. The Office of the Comptroller of the Currency, which regulates national banks, notes that debt sales can turn "nonperforming assets into immediate cash proceeds" while "reducing the use of internal resources to collect delinquent accounts." OCC Bulletin 2014-37, Risk Management Guidance (August 4, 2014).

Application Beyond the Second Circuit

The decision applies to litigation of the issue in federal courts within the Second Circuit (New York, Connecticut, Vermont and Puerto Rico). It impacts debt purchased from national banks where the rate of interest exceeds the state usury interest rate. The decision only addressed interest charged when the debt was acquired by the non-bank debt buying company.

Other laws provide exceptions to state usury interest rates. These laws are not addressed by the decision.

It is expected the decision will be used in FDCPA litigation outside the Second Circuit. It remains to be seen whether courts beyond the Second Circuit will adopt the decision. We will touch on this decision in our June 18 webinar, Collecting Statutory Prejudgment Interest – The FDCPA Risks.

QR Codes Mean FDCPA Trouble Says PA Federal Court

consumerfsblog.com/2015/07/qr-codes-mean-fdcpa-trouble-says-pa-federal-court/
Donald Maurice

A QR code visible on the face of an envelope embedded with an account number violates the Fair Debt Collection Practices Act, according to a recent decision from the United States District Court for the Middle District of Pennsylvania.

A QR or "Quick Response" code is a type of bar code that can contain any sort of information. But the information is not visible, instead the QR code looks more like a jumble of black and white lines or boxes. You can't do much with a QR code unless you have a device that can read the code.

QR Codes Make Debtors 'Susceptible to Privacy Intrusions'

In ***Styer v Professional Medical Management, Inc.,*** the court granted summary judgment to the plaintiff, finding that a QR code on an envelope that when read using a decoder would reveal the debtor's name, address and account number, violates § 1692f(8) of the FDCPA because it exposed to the public information about Styer's "financial predicament." Section 1692f(8) prohibits a debt collector from using "any language or symbol, other than the debt collector's address" and its business name, "if such name does not indicate that he is in the debt collection business."

Some courts have refused to find liability under § 1692f(8) where a symbol does not suggest the letter is seeking to collect a debt or otherwise threaten or humiliate the debtor — sometimes called the "benign language exception." But here, the court wrote, the QR code is not benign because even though the debtor's name, address and account number are encoded, the information is still accessible and "susceptible to privacy intrusions."

Expansive Reading of FDCPA

Last year, in *Douglass v. Convergent,* the Third Circuit Court of Appeals decided that a debtor's account number visible on the face of a debt collection letter violated § 1692f(8). *Styer* expands the holding to QR codes containing such information because they too have "the potential to cause harm to a consumer" and that harm exists when an account number is disclosed to the public and "there for the taking."

If you could decode the *Styer* QR code, here's what you would see:

ONFIRI10,#K#02-12402280-[redacted]4408-2-NCOA, Monica Styer, 12 Tuttle St., Simpson, PA, 184071322129,45,0

Neither *Douglass* nor *Styer* had any evidence demonstrating that an account number could cause such harm. Absent such evidence, it makes more sense to read *Styer* and *Douglass* as going beyond the FDCPA's prohibition against the use of certain symbols and markings on envelopes to instead impose liability where a debt collection account number appears on the face of the envelope, either in plain sight or embedded in a bar code.

Looking at the envelope in *Styer,* it is hard to accept how the QR code harassed or threatened Monica Styer. And using a decoder, it remains equally implausible that this jumble of letters and numbers — ONFIRI10,#K#02-

12402280-[redacted]4408-2-NCOA — would indicate to anyone the purpose behind the communication.

Perhaps recognizing this flaw, *Douglass* and *Styer* focus more on the "potential" harm that the incomprehensible string of numbers and letters could possibly cause if they got into the wrong hands. But no evidence has yet to be presented demonstrating how this information could lead to identity theft or a privacy intrusion. Plainly visible on any envelope will be a debt collector's return address and even a debt collector's name ("if such name does not indicate that he is in the debt collection business"). A quick Internet search against that information can tell anyone a lot more about the sender of a letter in far less time and effort.

Not all courts share the belief that these numbers and letters indicate a debt collection purpose behind the letter or invade a debtor's privacy, describing the claim as an "unreasonable and peculiar interpretation." As another court recently wrote, "the fact that many people, entities, and organizations abhor disclosure of personal information without permission does not mean the FDCPA creates a cause of action for such disclosure."

But these decisions offer little protection for debt collectors whose letters become the subject of a complaint in the Third Circuit.

SCOTUS Holds Unaccepted Offer of Judgment Does Not Moot Class Actions

consumerfsblog.com/2016/01/scotus-holds-unaccepted-offer-of-judgment-does-not-moot-class-actions/
Andrew Williamson

The Supreme Court of the United States recently held that a class action defendant cannot "pick off" the named plaintiff and thereby render the case moot by simply offering full relief by way of settlement offer or offer of judgment under Federal Rule of Civil Procedure 68.

However, as the majority acknowledges, the Court also left open the question of what happens when a defendant actually tenders full relief to the named plaintiff, thus potentially leaving class action defendants an alternative weapon to cost-effectively defeat class claims.

A copy of the opinion in *Campbell-Ewald Co. v. Gomez* is available at: **Link to Opinion**.

The defendant in this class action case was a nationwide advertising and marketing company. Beginning in 2000, the defendant contracted with the United States Navy to develop and implement a national marketing campaign. The defendant proposed sending text messages to "young adults" to encourage them to learn more about the Navy. The Navy approved the proposal on the condition that the defendant would only send messages to individuals who "opted in" to receipt of marketing solicitations on topics that included service in the Navy.

The text message read:

"Destined for something big? Do it in the Navy. Get a career. An education. And a chance to serve a greater cause. For a FREE Navy video call…" and provided a phone number for recipients to call.

The defendant also contracted with a third party to generate a list of cell phone numbers geared toward the Navy's 18-24 "target audience" who had also supposedly "consented to receiving solicitations by text message." The defendant then sent the message to more than 100,000 recipients in 2006.

The putative class plaintiff alleged that he never consented to receiving the message he received, and that by sending him the message, the defendant violated the federal Telephone Consumer Protection Act (TCPA). He filed a class action complaint on behalf of a purported nationwide class of consumers who had received the defendant's text message, but had not consented to receipt of the message.

As you may recall, the TCPA prohibits any person, absent prior express consent, from making any non-emergency call or text "using any automatic telephone dialing system…to any telephone number assigned to a paging service [or] cellular telephone service." Id. at § 227(b)(1)(A)(iii). The Court noted that it is well established that a "text message to a cellular telephone…qualifies as a 'call' within the compass of §227(b)(1)(A)(iii)."

In addition, the TCPA authorizes a private right of action, and a plaintiff in such an action may recover his or her "actual monetary loss" or $500 for each violation, whichever is greater. Id. at § 227(b)(3). A plaintiff may also recover treble damages if "the defendant willfully or knowingly" violates the TCPA.

Prior to an agreed upon deadline for the plaintiff to file a motion for class certification, the defendant proposed a settlement for $1,503 per message "for the May 2006 text message and any other text message" that the plaintiff could show he received, thus exceeding the plaintiff's treble damages claim. The settlement offer did not include attorney’s fees because as you also may recall, the “TCPA does not provide for an attorney-fee award.” The plaintiff rejected the offer.

Pursuant to Federal Rule of Civil Procedure 68, the defendant then filed an offer of judgment reciting the offer terms. Subsequently, the defendant moved to dismiss the case under Federal Rule of Civil Procedure (12)(b)(1) for lack of subject matter jurisdiction. The defendant argued that its offer “mooted” the plaintiff’s individual claim “by providing him with complete relief.” And, it argued that because he “had not moved for class certification before his claim became moot…the putative class claims also became moot.”

The District Court for the Central District of California denied the defendant’s motion. However, the defendant later filed a motion for summary judgment essentially asserting that it was entitled to sovereign immunity because it was acting on behalf of the Navy. The District Court granted that motion.

However, the U.S. Court of Appeals for the Ninth Circuit reversed. It held that the defendant was not entitled to sovereign immunity because, although it was acting on behalf of the Navy, it had exceeded its authority (as an independent contractor) by sending a text message to someone who had allegedly not consented to receipt and who was also well outside the Navy’s “target audience.” The Ninth Circuit also “agreed that…[the plaintiff’s] case remained live” despite the Rule 68 offer of judgment.

Beginning its analysis with Article III of the Constitution, the Supreme Court noted that it is well established that the “cases” and “controversies” requirement “demand[s] that an actual controversy…be extant at all stages of review, not merely at the time the complaint is filed.” Further, the Court explained that a “case becomes moot, however, only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” Thus, as “long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.”

Applying this framework to the plaintiff’s Rule 68 offer of judgment in this case, the Court held that under “basic principles of contract law” the “Rule 68 offer of judgment, once rejected had no continuing efficacy.” Accordingly, the Court held that “with no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset.”

Moreover, the Court held that Rule 68 “hardly supports the argument that an unaccepted settlement offer can moot a complaint.” Turning to Rule 68 itself, the Court held that because the rule provides that an offer “is considered withdrawn if not accepted within 14 days of its service,” once the offer expired, the plaintiff “remained emptyhanded” and therefore although the defendant had “offered” to provide him with full and complete relief, no such relief had actually been provided. Thus, the Court held an actual case and controversy remained live following the rejection and expiration of the Rule 68 Offer.

The Supreme Court held that, “[i]n sum, an unaccepted settlement offer or offer of judgment does not moot a plaintiff’s case, so the District Court retained jurisdiction to adjudicate…[the] complaint. That ruling suffices to decide this case.”

The Court continued:

“We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff’s individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount. That question is appropriately reserved for a case in which it is not hypothetical.”

Accordingly, a majority of the Court affirmed the judgment of the Ninth Circuit.

As Chief Justice Roberts noted in a vigorous dissent criticizing the majority opinion:

“The good news is that this case is limited to its facts. The majority holds that an offer of complete relief is insufficient to moot a case. The majority does not say that payment of complete relief leads to the same result. For aught that appears, the majority's analysis may have come out differently if…[the defendant] had deposited the offered funds with the District Court. This Court leaves that question for another day — assuming there are other plaintiffs out there who, [like this one]…won't take 'yes' for an answer."

Supreme Court Holds Law Firms' Use of AG Letterhead Does Not Raise 'Specter of Consumer Confusion'

consumerfsblog.com/2016/05/supreme-court-holds-law-firms-use-of-ag-letterhead-does-not-raise-specter-of-consumer-confusion/

Eric Rosenkoetter

In a unanimous decision yesterday, the U.S. Supreme Court held that attorneys retained as independent contractors by the Ohio Attorney General to collect debts owed to the state do not violate the federal Fair Debt Collection Practices Act (FDCPA) when sending collection letters on Attorney General letterhead.

In so ruling, the Court noted that the FDCPA "bars debt collectors from deceiving or misleading consumers; it does not protect consumers from fearing the actual consequences of their debts."

Authored by Justice Ginsburg, a copy of the opinion in *Sheriff v. Gillie* is available here: **Link to Opinion**.

Under Ohio law, debts owed to the state are certified to the Attorney General's Office ("AGO") for collection or other disposition, and the law authorizes the AGO to retain outside attorneys, under the designation of "Special Counsel," to engage in collection activities on its behalf. The Special Counsel are required to use official AGO letterhead when sending dunning letters.

Sixth Circuit Finds No State Officer Exclusion from FDCPA

In 2012, two law firms that had been retained as Special Counsel sent collection letters to the respondents. The letters were on AGO letterhead and explained that the firms were "Outside Counsel" or "Special Counsel" to the AGO. In 2013, the respondents filed a putative class action against the law firms alleging multiple violations of the FDCPA.

The District Court granted summary judgment in favor of the law firms, finding: (1) the law firms were acting as "officers" within the meaning of 15 U.S.C. § 1692a(6)(C), which excludes from the FDCPA "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties"; and (2) the letters were not materially false or misleading.

On appeal, the Sixth Circuit determined the "officer" exclusion was inapplicable to the law firms because of their status as independent contractors and remanded the case on the question of whether the letters could be misleading to the least sophisticated consumer.

Supreme Court Reverses – Accurate Letters Do Not Violate FDCPA

The U.S. Supreme Court granted a Petition for Writ of Certiorari on Dec. 11, 2015, and heard oral arguments on March 29, 2016.

In reversing the decision of the Sixth Circuit, the Supreme Court declined to decide whether the FDCPA's "officer" exclusion applied to the law firms. Nevertheless, the Court did determine that even if it were assumed, for the sake of argument, that the law firms were "debt collectors" under the FDCPA, their use of the AGO letterhead accurately conveyed that they were acting on behalf of the Attorney General and did not, therefore, violate the FDCPA.

During oral argument, the respondents acknowledged that use of the following statement in a letter, in lieu of letterhead and in bold typeface, would not violate §1692e's prohibition of false, deceptive or misleading statements: "We write to you as special counsel to the Attorney General who has authorized us to collect a debt you owe to [the State or an instrumentality thereof]." The Court reasoned "it would make scant sense to rank as unlawful use of a letterhead conveying the very same message, particularly in view of the inclusion of special counsel's separate contact information and the conspicuous notation that the letter is sent by a debt collector."

Continuing, the Court found use of the letterhead could not violate §1692e(9) which prohibits, in part, letters that falsely represent they are authorized, issued or approved by a state official. "Special counsel create no false impression in doing just what they have been instructed to do. . . use of the Attorney General's letterhead conveys on whose authority special counsel writes to the debtor."

Similarly, the Court found no violation of §1692e(14), which requires use of the debt collector's true name in all communications, since the letters identified the AGO as being primarily responsible for collecting the debt and explained the nature of Special Counsels' relationship to the AGO.

The Court was unconvinced by the Sixth Circuit's "specter of consumer confusion," noting that consumers who believed the letters to be a scam contacted the AGO which, in response, assured them the letters were authentic. The Supreme Court saw benefit in consumers' use of official channels to verify the letters' legitimacy.

Implied Risk of Further Action OK Under FDCPA, If True

The Court also countered the Sixth Circuit's belief that use of the AGO letterhead carried a "risk of intimidation" that might lead consumers to believe the failure to pay might lead to more severe consequences. "This impression is not false; the State does have enforcement powers beyond those afforded private creditors." The Court concluded this analysis with a noteworthy quote: "In other words, §1692e bars debt collectors from deceiving or misleading consumers; it does not protect consumers from fearing the actual consequences of their debts."

FDCPA Cannot Interfere With a State's 'Core Sovereign Function'

Addressing the principle of federalism, the Court saw no reason to interpret the FDCPA in a manner that would interfere with Ohio's "core sovereign function" of collecting debts owed to it and the manner arranged for doing so. While this issue was only lightly briefed by petitioners and respondents, it was one of the main issues addressed in the amicus curiae brief of the State of Michigan and 11 other states, filed by the states' respective Attorneys General.

The States' brief also noted that at least 31 states statutorily allow Attorney General delegation of duties to special counsel, and it identified 11 states that specifically provide for Attorney General delegation of debt collection.

On behalf of the United States, the U.S. Solicitor General filed an amicus curiae brief with counsel for the Consumer Financial Protection Bureau. The irony of this was not lost as the Reply Brief for Eric Jones and the Law Office of Eric A. Jones, LLC noted in a footnote that "Richard Cordray, who now serves as the director of the CFPB, previously served as the Ohio Attorney General from 2009-2011, when Special Counsel were used to protect the state's bottom line."