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Consumer Financial Services *Newsletter*

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A Flawed Class Definition – Court Grants Defendant's Motion to Strike Consumer's Proposed Class

***Cholly v. The Uptain Group.*, et al, 1:15-cv-05030**

In *Cholly v. The Uptain Group Inc., et al*, the defendant debt collector moved to dismiss the plaintiff consumer's putative class action complaint and strike the consumer's proposed class. Although the U.S. District Court for the Northern District of Illinois (Eastern Division) declined to dismiss consumer's complaint pursuant to the *Spokeo, Inc. v. Robbins* decision, the court dismissed the consumer's class allegations, constituting a significant victory for the debt collector.

In her complaint, the consumer alleged that the debt collector called her using an automatic telephone dialing system ("ATDS"). During the phone call, the consumer told the debt collector to stop calling her and that she was filing for bankruptcy. The consumer further alleged that, thereafter, the debt collector continued to contact her using an ATDS, in violation of the Telephone Consumer Protection Act ("TCPA").

Relying on *Spokeo*, the debt collector alleged that the consumer failed to demonstrate that she suffered a concrete harm and therefore lacked standing to bring the action pursuant to Article III of the U.S. Constitution. The court denied the debt collector's motion to dismiss, holding that the alleged violations of the TCPA gave rise to a concrete injury as required by Article III. The Court reasoned that all unsolicited calls prohibited by § 227 of the TCPA "invade the privacy and disturb the solitude of their recipients," thereby causing a concrete harm even if there are no allegations of tangible harm.

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Hinshaw's Consumer and Class Action Litigation group effectively and efficiently defends individual and class action litigation across the United States. We routinely represent financial institutions in defending claims involving the FDCPA, TCPA, and FCRA, as well as state law claims. We have expertise in the latest industry trends and regularly advise clients on the impact of state and federal regulatory agencies, including the Consumer Financial Protection Bureau.

Hinshaw's national Mortgage Servicing and Lender Litigation practice provides sophisticated and extensive legal services to these businesses across the United States. We routinely defend banks, lenders, investors, servicers and trustees in mortgage-related litigation filed in state and federal district as well as bankruptcy courts.

The court, however, granted the debt collector's motion to strike the proposed class. In her complaint, the consumer defined the proposed class, in part, as persons contacted by the debt collector who had not given express consent to be contacted. The court held that the consumer could not be a class representative because her claims were not typical of the purported class. The court explained that plaintiff consumer had given the debt collector express permission to contact her, in contrast to the proposed class of people who never gave express consent. Similarly, with respect to a proposed subclass of persons who directly informed the debt collector to stop calling them, the court held that the plaintiff consumer could not maintain the subclass. Individual inquiries within the subclass would predominate over questions of law and fact affecting all members of the class.

This decision further clarifies the application of *Spokeo* and limits exposure of debt collectors with respect to TCPA claims in class actions by narrowly reading a plaintiff's proposed class.

For more information, please contact **Melissa C. Bruynell** or your regular Hinshaw Attorney.

New York Federal Court Rules Debtors Need Not Allege Injury When Claiming FDCPA Violation

***Bautz v. ARS National Servicers, Inc.*, 2:16-cv-00768**

According to a federal judge in the Eastern District of New York, a debtor sufficiently demonstrated a "concrete" injury to meet the Constitution's standing requirements, even though she did not allege a specific harm. In *Bautz v. ARS National Services, Inc.*, a borrower alleged that a debt collector's letter offering a lower amount to settle a debt violated the FDCPA. The borrower alleged that the letter included misleading language indicating that any debt forgiveness would be reported to the IRS. The debt collector sought to dismiss the complaint for lack of standing because the debtor did not allege any actual harm.

By way of background, the Supreme Court in *Spokeo* held that when a statutory violation is "substantive," merely alleging the violation demonstrates a "concrete injury" that meets the "injury-in-fact" requirement of Article III of the Constitution. According to the court in *Bautz*, simply alleging the Section 1692e violation conferred standing. The court explained that the letter presented a "risk of real harm" to debtors' rights to be free from abusive debt collection practices—the interest identified by Congress in enacting the FDCPA. In analyzing Section 1692e, the court found

that Congress created an enforceable right to receive truthful information. The debt collector's statement regarding IRS reporting may have impacted how the debtor would approach the offer to settle the debt—even if the debtor did not allege this or any actual harm.

Although the court's decision is limited to one provision of the FDCPA, it noted that most post-*Spokeo* decisions have found that false, deceptive, or misleading representations establish a concrete substantive injury, precluding debtors' need to allege actual harm. This decision creates uncertainty about how courts will determine whether plaintiffs have met the standing requirement, as a case-by-case determination will often be needed. However, it also suggests that alleged FDCPA violations regarding representations will be considered substantive and can be sufficiently pled by debtors without alleging actual harm.

For more information, please contact **Jordan S. O'Donnell** or your regular Hinshaw Attorney.

Offer of Judgment Renders Plaintiff's Class Claims Moot

***Wright v. Calumet City, Illinois*, 16-cv-2219**

Key Takeaways: (1) Be very clear in your rule 68 offer; and (2) Get the class representative to accept the offer of judgment.

The Seventh Circuit, in *Wright v. Calumet City, Illinois*, addressed the issue of whether Plaintiff's acceptance of an offer of judgment eliminates any personal stake in Plaintiff's claim. Although *Wright* does not involve a TCPA or FDCPA dispute, the principal issue is Article III standing. There, Wright alleged that Calumet City violated his Fourth and Fifth Amendment rights after an arrest. Wright sought certification of two classes. The court denied both classes because joinder was not impracticable. Following the denial of Wright's two classes, Calumet City made an offer of judgment pursuant to Federal Rule of Civil Procedure 68. The offer read:

> [T]he Defendant Calumet City, Illinois, agrees to allow Plaintiff Marquise Wright to take a judgment against it, comprised of ***$5,000.00 to Plaintiff for all claims brought under this lawsuit***, inclusive of attorney's fees and costs to date accrued in pursuing this action on Plaintiff's behalf, but excluding all attorneys' fees and costs accrued in pursuing this lawsuit as a class action.

Wright accepted the City's offer of judgment without qualification. Following his acceptance, Wright appealed the denial of one of the two classes.

In its analysis of whether Wright had standing, the court looked to Supreme Court case *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. at 663 (2016) and Seventh Circuit case *Espenscheid v. Directsat USA, LLC,* 688 F.3d 872 (7th Cir. 2012) for guidance. Both *Campbell* and *Espenscheid* address the issue of standing after Defendant makes an offer of judgment. *Campbell* held that "an unaccepted settlement offer or offer of judgment does not moot plaintiff's case." *Espenscheid*, on the other hand, demonstrates how a plaintiff is able to maintain a stake in a case or controversy after accepting an offer of judgment. There, plaintiff included a provision in the agreement that plaintiff sought an incentive award for plaintiff's services as class representative, contingent on certification of the class. According to the court, Wright was no longer "an aggrieved person with a personal stake in the case or controversy." The court looked to the plain language of the offer, which read "$5,000.00 to Plaintiff for all claims brought under this lawsuit." The court determined that settlement involved the individual claim *and* the class claim. By accepting the offer of judgment without qualification, Wright accepted the offer as full redress.

For more information, please contact **Brittney N. Cato** or your regular Hinshaw Attorney.

About Hinshaw

Hinshaw & Culbertson LLP is a national law firm with approximately 500 attorneys providing coordinated legal services across the United States and in London. Hinshaw lawyers partner with businesses, governmental entities and individuals to help them effectively address legal challenges and seize opportunities. Founded in 1934, the firm represents clients in complex litigation and in regulatory and transactional matters.

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