

Dunning Letters as to Time-Barred Debt Can Violate FDCPA

Mar 28 2014

Posted By: David I. Cisar

Practice Area: Banking and Commercial Finance

The United States Court of Appeals for the Seventh Circuit (Wisconsin, Illinois, Indiana) has recently ruled that collection or "dunning" letters sent after the expiration of the applicable statute of limitations violate the Fair Debt Collection Practices Act ("FDCPA") unless they also disclose that the debt may be time-barred.

15 U.S.C. § 1692e and § 1692f of the FDCPA prohibit debt collectors from making "any false, deceptive, or misleading representation or means in connection with the collection of any debt" (which includes a false representation of the character, amount, or legal status of any debt), and from using any "unfair or unconscionable means to collect or attempt to collect any debt." The dunning letters at issue in the consolidated appeals *McMahon v. LVNV Funding, LLC* and *Delgado v. Capital Management Services* were sent many years after the applicable statutes of limitations for the debts had expired, meaning that the recipients had an "ironclad" defense to collection. Neither letter disclosed this fact. Both letters contained offers to settle the debt at less than the full amount owed.

In considering whether the letters violated the FDCPA, the Seventh Circuit faced competing interpretations of how the FDCPA's prohibition on false and misleading statements applies to the collection of time-barred debts. The Third Circuit (Delaware, New Jersey, Pennsylvania, Virgin Islands) and Eighth Circuit (Missouri, Arkansas, Iowa, Minnesota, North Dakota, South Dakota, Nebraska) Courts of Appeal have both held that sending dunning letters for time-barred debts does not violate the FDCPA unless the letter includes a threat of litigation. Conversely, government agencies including the Federal Trade Commission ("FTC") assert that sending dunning letters for time-barred debt could deceive a consumer because a) most consumers do not understand that their rights or the defense to a lawsuit that is available to them if the debt is time-barred, and b) partial payment on a time-barred debt may actually revive the entire debt in some states.

The Seventh Circuit held that, for debt barred by the applicable statute of limitation, "if the debt collector uses language in its dunning letter that would mislead an unsophisticated consumer into believing that the debt is legally enforceable...the collector has violated the FDCPA" because such a letter misrepresents the status of the debt. To reach this conclusion, the Court utilized the "unsophisticated consumer" standard used in the Seventh Circuit with respect to claims made under § 1692e and § 1692f and favored the FTC's position with respect to the collection of time-barred debts. Notably breaking from the Third and Eighth Circuits, the Court found that the letters violated the FDCPA despite the fact that neither of the letters at issue threatened litigation.

Implications

Collecting old debt is difficult; the longer the debt remains outstanding the less likely it is that it will be paid. This decision has added a new element of risk to collecting old debts – the greater possibility of an FDCPA violation if the dunning letter relates to time-barred debt.

The Seventh Circuit noted that it is not "automatically improper for a debt collector to seek repayment of time-barred debts" because "some people might consider full debt re-payment a moral obligation...." However, dunning letters that contain offers to settle time-barred debt (as did the letters here) or that contain threats of litigation as to time-barred debt (as in the Third and Eighth Circuit cases) would mislead unsophisticated consumers as to the legal status of the debt and violate the FDCPA.

Therefore, debt collectors and creditors need to be more careful in how they pursue collection of old debts. If there is any question as to whether the debt may be time-barred, the Seventh Circuit suggested that a collection letter may not violate the FDCPA if "general language" is included that advises as to the possibility that the debt is time-barred. While this may seem counter-productive, the alternative is to verify that the debt is not time-barred before sending a dunning letter, which may require an earlier legal review.

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