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FTC ISSUES POLICY STATEMENT ON COLLECTING DECEDENT'S DEBTS

The Federal Trade Commission recently issued a final Statement of Policy Regarding Communications in Connection with the Collection of Decedent's Debts. 76 Fed. Reg. 44915 (July 27, 2011); see our November 10, 2010 Alert. The Statement provides guidance to consumers, debt collectors, and creditors concerning how the FTC will enforce the law in connection with the collection of the debts of deceased debtors.

In discussing its final Statement, the FTC noted that when the FDCPA was drafted that most estates were settled through formal probate, which included the appointment of an "executor" or "administrator," the terms used in Section 805 of the FDCPA. Today, the FTC explained, most estates do not go through formal probate and thus no executor or administrator may be appointed. As a result, some collectors attempt to recover by cold-calling or sending letters to relatives in an attempt to find someone who may be responsible for resolving the decedent's debts. Once such persons are located, collectors often will try to discuss the decedent's assets and obligations in an attempt to recover payment either from the estate or from a relative's own assets. Alternatively, creditors and collectors may initiate formal probate of the estate in order to collect on a debt. Actions, the FTC noted, that often result in additional legal, accounting and professional expenses for the estate.

A number of commenters interpreted the proposed Statement to suggest non-enforcement of the FDCPA with respect to the collection of a deceased's debts, or permission to use deceptive, unfair, or abusive practices in collecting those debts. Such interpretations, the FTC says, are incorrect, as the FDCPA applies to the conduct of third-party collectors who seek to recover on deceased accounts. Any argument that the debt of a deceased person is not subject to the FDCPA because it is not of a "natural person" is incorrect. For purposes of the FDCPA, the critical time for determining the status of a debt is when the obligation arises, not when the debt is placed for collection.

Under the final Statement debt collectors:

- May communicate with either those individuals specified in Section 805(b) and (d) of the FDCPA or an individual who has

the authority to pay the decedent's debts out of the assets of the decedent's estate.

- May include in location communications a general reference to paying the "outstanding bills" of the decedent out of the estate's assets, but cannot make any other references to the decedent's debts or provide any information about the specific debts at issue.
- Must comply with the FDCPA and Section 5 of the FTCA in communicating with a person who has authority to pay the decedent's debts, including not making contact at unusual times or places, not using inappropriate leading questions when trying to determine the person's authority and not misleading the person about personal liability for the decedent's debts.

FTC Commissioner Julie Brill issued a concurring statement in which she warned about aggressive FTC enforcement action, along with possible Consumer Financial Protection Bureau intervention, in the event debt collectors go beyond the limitations discussed in the final Statement. □

✧ *Mike Tomkies and Margaret Stolar*

COURT FINDS DEBT BUYER'S EVIDENCE INSUFFICIENT FOR SUMMARY JUDGMENT

The Superior Court of New Jersey recently held that when suing to collect on a credit card account, the creditor must present the same evidence required for a default judgment, which, in the credit card context, includes setting forth the previous balance and identifying all transactions and credits (including the periodic rates, the balance on which the finance charge is computed, any other charges, the closing date of the billing cycle and the new balance). *LVNV Funding, LLC v. Colvell*, 2011 WL 2682826 (N.J. Super. A.D. July 12, 2011).

The case involved the attempted collection of a credit card debt that had been purchased by LVNV. The purchase involved a transfer of all ownership rights, including the right to collect the balances owed, plus any interest accrued at the rate specified. When demand for payments went unanswered, LVNV sued on the debt. LVNV filed a motion for summary judgment to which was attached a copy of a

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computer-generated report that was to contain Colvell's personal information, balances, credits and payments, current balance, finance charge rate and APR. The form, however, failed to list any transactions or billing cycle information and listed the finance charge and APR as zero. Despite Colvell's opposition to the motion, the trial court granted summary judgment in favor of LVNV.

On appeal, the court ruled that the defendant would need to satisfy the state law rule governing default judgments. Although not strictly applicable, the court determined the rule provides a guide to the proofs necessary to grant summary judgment in a credit card collection matter. Because LVNV's computer-generated report did not meet these requirements, the court reversed. *See also Cach, LLC v. Kulas*, 2011 WL 2473637 (Me. June 23, 2011) (denying assignee's motion for summary judgment on credit card account where only support for motion was a naked bank officer's affidavit that collector had received the account from the bank, with no supporting bank documents or records, or affidavits regarding the authenticity of any non-original copies, attached).

This case serves as a reminder to collectors of the need to be vigilant in their review of state law requirements in order to avoid unnecessary impediments to the collection of lawful debts owed them or creditors on whose behalf they are seeking to collect. □

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