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ALERT

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ELEVENTH CIRCUIT FINDS PURCHASER OF DEFAULTED DEBT NOT TO BE A "DEBT COLLECTOR" UNDER FDCPA

The United States Court of Appeals for the Eleventh Circuit recently affirmed that a person who does not otherwise meet the requirements of Section 1692a(6) of the federal Fair Debt Collection Practices Act is not a "debt collector" under the FDCPA, even where the consumer's debt was in default at the time the person acquired it. *Davidson v. Capital One Bank*, 2015 WL 4994733 (11th Cir. Aug. 21, 2015).

Davidson involved a class action lawsuit against Capital One Bank claiming that Capital One's state court activities violated the FDCPA. Capital One had acquired approximately $28B of credit card accounts, of which over $1B were delinquent or in default at the time of acquisition. One of the acquired accounts belonged to Davidson who had been sued by the original creditor and with whom the original creditor had agreed to a settlement of $500. After Capital One acquired Davidson's account it sued him in state court claiming $1,149.96, the original amount of delinquency on Davidson's account. Davidson alleged that Capital One's complaint against him falsely stated the amount of Davidson's debt (which he argued had been reduced to $500), and that the affidavit used by Capital One was "mass produced," "robo-signed" and not based on personal knowledge.

Capital One moved to dismiss the complaint arguing that it was not a "debt collector" for purposes of the FDCPA because it regularly collected debts owed to it and not debts "owed or due another." The district court agreed with Capital One, rejecting Davidson's argument that all companies that regularly purchase and collect defaulted consumer debts are regulated by the FDCPA. The district court found that to qualify as a debt collector under the FDCPA, Capital One had to either (i) "regularly" collect or attempt to collect on debts "owed or due another" or (ii) the principal purpose of Capital One's business had to be "the collection of any debts." Finding that Capital One did not satisfy either requirement, the district court dismissed the case. On appeal, the Court affirmed.

Davidson accused Capital One of multiple violations of Section 1692e, which generally prohibits a debt collector from using any false, deceptive, or misleading representation or means in connection with the collection of any debt. The parties agreed that Section 1692e applies to "debt collectors," but, disagreed as to whether Capital One was a debt collector under the FDCPA. To assess Davidson's complaint, the Court determined that it first had to resolve the parties' dispute with respect to the meaning of the term "debt collector."

Section 1692a(6) of the FDCPA provides that a "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. The definition includes several exclusions (in Section 1692a(6)(A)-(F)), including one at (F)(iii) for any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity concerns a debt which was not in default at the time it was obtained by such person.

Creditors, unlike debt collectors, typically are not subject to the FDCPA. Section 1692a(4) provides that "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that the person receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another. Also, notwithstanding the exclusion provided by Section 1692a(6)(F), the term "debt collector" includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.

Davidson's position was that the distinction between creditors and debt collectors is based on the default status of the debt. Considering the Section 1692a(6)(F)(iii) exclusion, Davidson argued that an entity that does not originate a debt, but acquires it from another, is deemed either a creditor or a debt collector depending on the default status of the debt at the time it was acquired. The Court was not persuaded by this argument, saying that Section 1692a(6)(F)'s exclusions do not obviate the substantive requirements of Section 1692a(6)'s definition of "debt collector."

Where a person does not fall within the Section 1692a(6) exclusions, the person is not deemed a "debt collector" as a matter of course. Before a person can qualify as a "debt collector," the Court said, the person must satisfy the FDCPA's substantive requirements

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in Section 1692a(6). The person must be (i) any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or (ii) any person who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. (Neither party suggested that the creditor collecting its own debt under another name portion of the definition of "debt collector" was applicable and that portion of the definition was not considered by the Court.) The statutory definition of "debt collector," the Court noted, in contrast to the exclusion at Section 1692a(6)(F)(iii), applies without regard to the default status of the underlying debt. Section 1692a(6)(F)(iii), when read in its statutory context, rather than in isolation, the Court said, reveals itself to be nothing more than a single exclusion for a certain group of persons from a statutory definition that Davidson urges the Court to ignore. Davidson, the Court concluded, cannot use Section 1692a(6)(F)(iii) to bring entities that do not otherwise meet the definition of "debt collector" within the ambit of the FDCPA solely because the debt on which they seek to collect was in default at the time they acquired it.

The Court explained that Davidson's misunderstanding of Section 1692a(6)(F)(iii) also hinders the second definition of "debt collector" in Section 1692a(6) (*i.e.,* any person who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another), which the Court noted was the focus of Davidson's appeal (as distinct from the first definition involving "principal purpose"). Davidson's interpretation makes sense, the Court noted, only if it rewrites the statute to read "regularly collects or attempts to collect, directly or indirectly, debts *originally* owed or due or asserted to be *originally* owed or due another."

Presuming that Congress said what it meant and meant what it said, the Court rejected Davidson's argument that a non-originating debt holder is a "debt collector" under the FDCPA solely because the debt was in default at the time it was acquired. Instead, the Court found that a person who does not otherwise meet the requirements of Section 1692a(6) is not a "debt collector" under the FDCPA, even where the consumer's debt was in default at the time the person acquired it. In making its finding, the Court also noted its disagreement with Davidson's argument that its holding creates a loophole for entities that regularly acquire and pursue collection of defaulted debts to avoid the FDCPA even though they are engaged in debt collection. Where "principal purpose" is plausibly alleged, the Court stated, the entity described in Davidson's hypothetical will not escape regulation. And, even if such loophole is found to exist, the Court further stated, it is up to Congress and not the Court, to close it. ❑

✧ *Mike Tomkies and Margaret Stolar*