DREHER TOMKIES LLP ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

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SIXTH CIRCUIT FINDS "SETTLEMENT OFFER" ON TIME-BARRED DEBT POTENTIALLY MISLEADING

The United States Court of Appeals for the Sixth Circuit recently held that a debt collector may have violated the federal Fair Debt Collection Practices Act when it made a settlement offer to a debtor without disclosing that the statute of limitations on the debt had run. *Buchanan v. Northland Group, Inc.,* 2015 WL 149528 (6th Cir. Jan. 13, 2015).

Buchanan involved a class action lawsuit against a debt collector claiming that a "settlement letter" sent to the debtor falsely implied that the debt collector could enforce the debt in court and therefore was misleading and in violation of the FDCPA. The debt collector filed a motion to dismiss. The debtor opposed the motion, arguing that whether the settlement letter was misleading was a question of fact and seeking discovery. The district court rejected the debtor's discovery request and granted the debt collector's motion to dismiss, finding that the settlement letter as a matter of law was not misleading. On appeal, the Sixth Circuit reversed and remanded.

The settlement letter stated the past due account balance amount and the settlement offer amount. It also stated, among other things, that the current creditor was willing to reduce the balance by offering the debtor a "settlement." Upon receipt and clearance of the settlement amount, the letter stated, the account would be satisfied and closed and a settlement letter would be issued. What the letter did not disclose was that under Michigan law (i) the six-year statute of limitations had run on the debt, which would have provided a complete defense to any lawsuit to recover the debt, and (ii) a partial payment on a time-barred debt (for example, if the debtor had paid some amount less than the offered settlement) restarts the statute of limitations.

In reaching its conclusion, the Sixth Circuit first noted that it agreed with the debt collector (and the district court) on two aspects of its argument. First, that under Michigan law, a debt remains valid even after the statute of limitations has run. Thus, a debt collector is free to inform a debtor that the debt still requires payment and to allow satisfaction of the debt at a discount. And, second, the court agreed that a settlement offer by itself is not a threat of litigation. Despite the court's agreement with the debt collector on these issues, it disagreed with the district court's dismissal for three reasons:

First, the determination of whether something is "misleading" typically is a question of fact that should be left to a jury. Particularly at the pleading stage, the court observed, the bar is to be set low to proceed from pleading to discovery. Second, the debtor's evidence supporting her claim was sufficiently plausible to deserve a proper showing in court. The Federal Trade Commission and Consumer Financial Protection Bureau, both of which filed as *amici curiae* in support of the debtor, currently are studying the issue of time-barred debts, including debtors' understandings with respect to the collection of such debts. For the court to conclude that the debtor's theory was implausible would amount to declaring the agencies' efforts a waste of time, something the court indicated it was not willing to do. Finally, the court concluded, the debtor offered a plausible theory of deception and confusion.

As to whether the actual settlement letter sent by the debt collector was itself misleading, the court also sided with the debtor. In examining the various definitions of "settle" or "settlement," the court again found it plausible that a "settlement offer" falsely implies that the underlying debt is enforceable in court. Additionally, an unsophisticated debtor who could not pay the entire amount of the settlement offer may nonetheless assume that some payment is better than none. Such an assumption would be wrong, however, as under Michigan law, partial payment of the debt restarts the statute of limitations. Such an understanding, the court concluded, surely would be beyond the knowledge of most people, whether sophisticated or not.

The Sixth Circuit rejected the debt collector's assertion that its conclusion was at odds with other circuits in the cases of *Huertas v. Galaxy Asset Mgmt.,* 641 F. 3d 28 (3rd Cir. 2011) [*see* our *Alert* dated April 20, 2011] and *Freyermuth v. Credit Bureau Servs., Inc.,* 248 F.3d 767 (8th Cir. 2001) and emphasized that its decision is in line with the recent ruling in *McMahon v. LVNV Funding, LLC,* 744F.3d 1010 (7th Cir. 2014) [*see* our *Alert* dated March 18, 2014].

Finally, with respect to the debt collector's concern that the Sixth Circuit's ruling will require debt collectors to give legal advice regarding the statute of limitations to each debtor, the court noted that collectors easily could include general language about the statute of limitations without the necessity of providing legal advice.

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Judge Kethledge dissented based on the implausibility of the debtor's reading of an offer to settle as misleading. The fact that the debtor received dunning letters for years without a lawsuit ever having been brought, along with the fact that the letter said nothing about a lawsuit, should have made the letter less threatening, not more, he noted. And, concluding that the word "settlement" somehow caused an unsophisticated consumer to believe that she would be sued on the debt, to him seemed implausible.

On February 10, 2015, the defendant filed a petition for rehearing or rehearing *en banc* on the ability of the district court to apply the "unsophisticated consumer" standard in the context of a motion for summary judgment or dismissal and whether the panel's decisions conflicted with decisions in the Third and Eight Circuits.

As we have noted before, the statute of limitations issue in debt collection has received a lot of attention over the past several years. As the Sixth Circuit mentioned, the CFPB is studying the issue as part of much anticipated issuance of regulations governing debt collection. In a report just published, the National Consumer Law Center has called for an outright ban on the collection of time-barred debts. ❑

✧ *Mike Tomkies and Margaret Stolar*