



November 8, 2016

U.S. SUPREME COURT TO HEAR TIME-BARRED DEBT CASE

In October, the U.S. Supreme Court agreed to hear a case involving debt buyers that knowingly filed proofs of claim on time-barred debts in Chapter 13 bankruptcies. The Supreme Court will address the following questions:

- (1) Whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding violates the federal Fair Debt Collection Practices Act ("FDCPA").
- (2) Whether the Bankruptcy Code ("Code"), which governs the filing of proofs of claim in bankruptcy, precludes the application of the FDCPA to the filing of an accurate proof of claim for an unextinguished time-barred debt.

The court will address these questions in a review of *Johnson v. Midland Funding*, a case from the U.S. Court of Appeals for the Eleventh Circuit, which held that a debt buyer engaged in a deceptive act in violation of the FDCPA by knowingly filing a proof of claim for a time-barred debt. 823 F.3d 1334 (11th Cir. 2016). The Eleventh Circuit applied a "least-sophisticated consumer" standard to determine that the debt buyer's conduct was deceptive.

The Seventh Circuit and Eighth Circuit disagree with the Eleventh Circuit, creating a circuit split ripe for the Supreme Court's review. Applying a "competent attorney" standard to evaluate the debt buyer's conduct, the Seventh Circuit recently concluded that filing a proof of claim on a time-barred debt did not violate the FDCPA. See ALERT of Aug. 25, 2016 for more details on *Owens v. LVNV Funding LLC*.

In *Johnson*, the Eleventh Circuit held that the Code did not preclude a FDCPA claim. The Eleventh Circuit overturned a district court decision, that found an "irreconcilable conflict" between (i) the right of a creditor to file a proof of claim under the Code and (ii) the prohibition on filing a proof of claim on a time-barred debt under the FDCPA. The district court concluded that the later-enacted Code impliedly repealed the earlier-enacted FDCPA and thus, precluded liability under the FDCPA for debt collectors who accurately filed proof of claims on time-barred debt. The Eleventh Circuit determined that the Code and FDCPA can co-exist based on the different protections and the different scopes of the statutes.

The Supreme Court's ruling is expected by July 2017. □

✧ *Mike Tomkies and Susan Manship Seaman*

CFPB ENTERS INTO CONSENT ORDER OVER COLLECTION PRACTICES

A federal credit union agreed to pay \$28.5 million to the Consumer Financial Protection Bureau ("CFPB") for allegedly engaging in deceptive and unfair acts or practices in connection with its collection activities. The credit union's members are primarily servicemembers.

The credit union made the following statements in its collection letters and calls: if a consumer did not pay its delinquent or overdraw account: (i) the credit union would take legal action against the consumer, (ii) the credit union would contact the consumer's military commanding officer about the delinquency, (iii) the consumer would find it difficult or impossible to obtain additional credit or (iv) the consumer could "repair" his or her credit by contacting the credit union.

According to the CFPB, these representations were deceptive because the credit union (i) seldom took legal action against non-paying consumers, (ii) did not intend to contact the consumer's commanding officer, (iii) could not substantiate its claim regarding a consumer's creditworthiness or ability to obtain alternative financing and (iv) did not offer credit repair services. The CFPB also asserted that the credit union lacked the authority to contact a consumer's commanding officer insofar as the consumer's consent to contact his or her commanding officer was (i) "buried" in print in the account agreement, (ii) non-negotiable and (iii) not bargained for by the consumer.

After a consumer became delinquent, the credit union also allegedly froze the consumer's electronic account access and disabled certain electronic services, including debit or ATM cards and online account access. These services were reinstated once consumers settled their debt or made repayment arrangements with the credit union. Members allegedly did not receive adequate notice of the potential account freeze and service suspension. The CFPB stated that the credit union engaged in unfair acts or practices by freezing consumers' account in connection with delinquent or overdrawn accounts.

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This consent order serves as a reminder that collection policies, procedures and letters must reflect actual collection practices and legal authority and that critical consents should be conspicuously obtained. ☐

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“SUNSET” REVIEW REPORT OF COLORADO’S FDCPA SUBMITTED TO GENERAL ASSEMBLY

The Colorado Department of Regulatory Agencies (“Department”) submitted a report to the Colorado General Assembly (“Assembly”) recommending that the Assembly extend the Colorado Fair Debt Collection Practices Act (“CFDCPA”) for 11 more years. The CFDCPA is set to expire on September 1, 2019.

The CFDCPA requires the Department to perform a “sunset” review of whether the CFDCPA is needed to protect the public. The Department concluded that the CFDCPA is needed, even though the CFDCPA tracks the federal Fair Debt Collection Practices Act, because the Federal Trade Commission has limited resources to enforce the federal FDCPA nationwide. In the Department’s view, the CFDCPA is necessary to maximize protections for Colorado citizens.

In its report, the Department also recommended that the Assembly:

- Clarify expectations regarding debt selling and buying;
- Remove “arising out of a transaction” from the definition of “debt;”
- Clarify that the statute of limitations for enforcement actions under the CFDCPA is four years;
- Eliminate the Collection Agency Board, an advisory board to the administrator of the CFDCPA;
- Allow consumers that have monetary judgments against a collection agency to access the collection agency’s surety bond funds; and
- Require the administrator of the CFDCPA to track license disqualifications based on criminal history.

We will continue to track developments under the CFDCPA. ☐

✧ *Mike Tomkies and Susan Manship Seaman*

ACA REVISES CODE OF CONDUCT FOR MEMBERS

The Association of Credit and Collections Professionals (“ACA”) International has revised its Code of Conduct (“Code”), which all members agree to follow as a condition of membership. ACA members include third-party collection agencies, law firms, asset buying companies, creditors and vendor affiliates.

The existing Code contains detailed and specific restrictions on members’ conduct. To modernize the Code and make the Code flexible for future regulatory developments, the ACA revised the Code to set forth guiding principles that represent minimum standards for members’ conduct.

The revisions become effective on November 12. The revised Code will be included in our Debt Collection Digest. ☐

✧ *Mike Tomkies and Susan Manship Seaman*

DEALING WITH MULTISTATE DEBT COLLECTION COMPLIANCE? We publish an easy-to-use reference that compiles state and federal laws governing debt collection practices. Our DEBT COLLECTION DIGEST is organized topically, includes the federal Fair Debt Collection Practices Act and Commentary for easy cross-reference, and covers autodialer and monitoring and recording statutes. **Contact us for details.**