DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

October 18, 2023

HYBRID FDCPA/FRCA CODE DISPUTE LAWSUITS REQUIRE COMPANIES TO STAY A STEP AHEAD

A recent trend in consumer lawsuits has furnishers of credit reports under fire for Metro 2 code usage. The trend sees a consumer with a creative consumer advocate start by disputing a debt with a creditor or debt collector; the creditor or debt collector, as the furnisher, will then report an "XB" to the credit reporting agencies to indicate that the consumer has disputed the account information with the furnisher directly. Next, the creditor or debt collector will proceed with an investigation and report a code of "XH" at the conclusion of the investigation. The "XH" indicates that the account was previously in dispute and the furnisher has concluded the investigation. From there, the consumer will file lawsuit through the Fair Credit Reporting Act ("FCRA"), the Fair Debt Collection Practices Act ("FDCPA"), or through the two together, against the furnisher alleging that the furnisher failed to report that the account remains disputed once the investigation was completed. The consumer then argues that the furnishers should report the code "XC" indicating the investigation is complete and that the consumer disagrees with the result. Generally, courts have rejected the argument that a creditor or debt collector should automatically know that a consumer continues to dispute the debt upon the conclusion of the investigation. Without a consumer notifying the furnisher that the account is still disputed, the furnisher cannot know whether the code should be reported as "XC." Other related theories of action under the FCRA include failing to conduct mandatory reinvestigations and failing to correct inaccurate or incomplete information.

Under any theory of liability, a consumer must prove that damages occurred as a result of the furnisher's action (or inaction). Common defenses to FCRA claims include: the statute of limitations; standing (where a consumer suffers no harm); and definitions (where a plaintiff does not meet the definition of "consumer," the defendant does not meet the definition of "consumer reporting agency," or the inaccurate "credit report" is not a "consumer report" under the FCRA).

Creditors and debt collectors, as furnishers, need to remain aware of novel actions and, if possible, stay a step ahead with sound, consumer-mindful policies and procedures. Furnishers should have policies in place for investigations and responses for direct consumer disputes that comply with the FCRA and FDCPA requirements. Furnishers should avoid fueling consumer advocate actions by settling these disputes where there is a strong defense.

We continue to monitor trends in FCRA and FDCPA litigation and are available to discuss strategies for preventing and mitigating litigation risks. ❑

✧ *Michael Tomkies, Elizabeth Anstaett and Kim Tomkies*

MOTION TO DISMISS CFPB LAWSUIT AGAINST DEBT BUYERS DENIED

The Consumer Financial Protection Bureau ("CFPB") filed a lawsuit against three debt buying companies and three individuals who are owners and/or officers of the debt buying companies in early 2022 based on alleged violations of the federal Consumer Financial Protection Act ("CFPA") and the Fair Debt Collection Practices Act ("FDCPA"). *Consumer Fin. Prot. Bureau v. Manseth*, No. 22-CV-29-LJV, 2023 WL 5400235 (W.D.N.Y. Aug. 22, 2023). The defendants purchased defaulted consumer debt and then placed the debt with, or sold the debt to, debt collection companies that, according to the CFPB, "used threats and misrepresentations to coerce payments from consumers." The CFPB is attempting to hold the defendants vicariously liable for the alleged violations based on substantial assistance and alleged failure to prevent or address the deceptive collection tactics utilized by third-party debt collectors with whom the defendants had contracted or to whom the defendants sold consumer debts. The court, in denying the motion to dismiss, held that the debt buying companies and their owners and/or officers can be held liable through substantial assistance liability under the CFPA and vicariously for unfair or deceptive acts under the CFPA. The court also held that a company that is a "debt collector" under the FDCPA can be held vicariously liable for FDCPA violations committed by another debt collector in connection with collecting debts on the company's behalf.

The CFPB and the bank regulators have made it clear that principals can be held responsible for the actions of their agents, including third party agents, notwithstanding efforts to establish arm's-length, independent contractor relationships. *See, e.g., Driscol v. Household Credit Servs.,* No. 92-7267 (34th Tex. Dist. Ct., Jury Verdict, Aug. 23, 1995 (jury verdict holding Household liable for

Darrell L. Dreher
ddreher@dltlaw.com

Elizabeth L. Anstaett
eanstaett@dltlaw.com

Mercedes C. Ramsey
mramsey@dltlaw.com

Susan L. Ostrander
sostrander@dltlaw.com

2750 HUNTINGTON CENTER
41 S. HIGH STREET
COLUMBUS, OHIO 43215
TELEPHONE: (614) 628-8000 FACSIMILE: (614) 628-1600
WWW.DLTLAW.COM

Michael C. Tomkies
mtomkies@dltlaw.com

Judith M. Scheiderer
jscheiderer@dltlaw.com

Robin R. De Leo
robin@deher-la.com

actions of hired collection agency; $9 million awarded in punitive damages, $2 million awarded in actual damages for violations of Texas Debt Collection Practices Act); *Household Credit Servs. v. Driscol*, 989 S.W. 2d 72 (Tex. App. 1998); (Texas Court of Appeals confirmed creditor's liability for agency's actions, but reduced award to approximately $1.5 million). If notified of a potential violation, failure to take prompt corrective action (potential including severing the relationship) can lead to claims of effective ratification by a principal of an agent's actions.

A creditor or debt owner may have a contractual claim for breach or indemnification under its contract with an agent for the reimbursement of economic losses, but, as the principal, a creditor or debt owner still bears ultimate responsibility (and regulatory and reputational risk). Proper prior due diligence of potential agents and vendors, careful contracting for services, ongoing monitoring and oversight of relationships and swift action if/when issues arise, are key to avoiding and minimizing potential liability and loss. The federal banking regulators, by way of example, have sought consent orders against large banks for debt collection-related violations and have even required the renegotiation of existing contracts with vendors. *See, e.g.,* our ALERTS of Feb. 17, 2021; May 17, 2021; Sept. 24, 2013; and July 17, 2015.

Creditors, principal servicers and debt owners should carefully review their policies, procedures and contracts with regard to third party agents to manage these risks. We can assist! . ❑

✧ *Michael Tomkies, Elizabeth Anstaett and Kim Tomkies*

LOOKING FOR A MARKETING AND PRIVACY COMPLIANCE RESOURCE? We publish an easy-to-use reference, our MARKETING AND PRIVACY DIGEST, that compiles the state laws governing financial privacy, fair credit reporting, telemarketing/automatic dialing and announcing devices, telephone monitoring and recording, electronic signatures and restrictions on the use of social security numbers by financial service providers. Creditors, marketers and servicers should find this resource invaluable to marketing and privacy program development and regulatory compliance. ***Contact us for details.***

DEALING WITH MULTISTATE DEBT COLLECTION COMPLIANCE? We routinely advise on collection-related activities and the regulated activities of creditors, third party debt collectors, debt buyers and loan servicers. We also 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 ADAD and monitoring and recording statutes. ***Contact us for details.***