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Newsletters

Consumer & Class Action Litigation Newsletter - September 2014

September 18, 2014

Water and Sewer Charges in NY are Not Debts Under FDCPA But are Akin to Property Taxes

Boyd v. J.E. Robert Co., Inc., No. 12-4422-cv, 2014 WL 4211078 (2d Cir. Aug. 27, 2014)

The Second Circuit ruled that a party foreclosing on liens for mandatory water and sewer charges could collect attorneys' fees and costs, despite those fees and costs being unauthorized pursuant to the Fair Debt Collection Practices Act (FDCPA), because the charges are not "debts" as defined by the FDCPA. In *Boyd*, two individuals living in Brooklyn, New York, commenced a putative class action in relation to the foreclosure of water and sewer liens. N.Y. Admin. Code § 11-335 allows a "plaintiff in an action to foreclose a tax lien . . . [to] recover reasonable attorney's fees for maintaining such action." The FDCPA, however, generally prohibits the "collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. 1692f(1). After the lienholders added attorneys' fees to the debt in connection with collection of those liens, the plaintiffs alleged that the lienholders violated the FDCPA. The District Court disagreed and granted summary judgment in favor of the defendants. The Second Circuit affirmed the District Court's finding that water and sewer charges are not debts as defined under the FDCPA, but rather, are akin to property tax liens not covered by the FDCPA.

In New York City, a failure to pay property taxes, water and sewer charges, and other municipal charges give rise to a lien on that property. In this instance, the City sold the liens to various trusts, which then retained a servicer to foreclose on those liens. The FDCPA claims related to the attorneys' fees and costs

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assessed in connection with the foreclosure action. The issue presented to the Second Circuit was whether sewer and water liens meet the definition of "debt" under the FDCPA. The FDCPA defines "Debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a *transaction* . . . ." in which the subject of the transaction are primarily for personal, family or household purposes. 2014 WL 4211078, at *2 (citing 15 U.S.C. 1692a(5)) (emphasis supplied by court).

The Second Circuit concluded that:

New York City water and sewer charges also do not involve "debt" under the FDCPA. Rather, the relationship between plaintiffs and the City with respect to such charges is akin to "tax payer and taxing authority," and "does not encompass that type of *pro tanto* exchange which the statutory definition envisages."

Id. at *2 (quoting *Beggs v. Rossi*, 145 F.3d 511, 512 (2d Cir. 1998) (holding that municipal taxes levied automatically do not involve a transaction as defined by the FDCPA)). Therefore, the Second Circuit upheld the District Court's grant of summary judgment in favor of the defendants. (Plaintiffs' remaining state and common law claims were dismissed for lack of subject matter jurisdiction.)

In reaching its decision, the Second Circuit appeared to focus on three qualities of the liens, namely that the water and sewer services are mandatory, automatic, and incidental to land ownership. Thus, the services were not bargained for by the property owner, and therefore, do not constitute a transaction for purposes of the FDCPA. However, this determination could be interpreted differently given different circumstances and locations (perhaps even within New York) depending upon the nature of the services bring supplied. In fact, the Second Circuit noted that the Third Circuit reached the opposite conclusion with respect to municipal water and sewer services in Pennsylvania. In distinguishing this (non-binding) decision, the Second Circuit noted that the character of the water and sewer charges — pursuant to which the property owner had *requested* water and sewer services — contrasted to those charges levied on the plaintiffs in *Boyd* (even though at least one of the plaintiff's water charges varied with usage). Accordingly, this ruling, although significant, may only provide a narrow exception to the application of the FDCPA.

Sixth Circuit Holds State Law Violations May Constitute FDCPA Violations under 1692f and 1692e(5)

Currier v. First Resolution Investment Corp., 2014 WL 3882745 (6th Cir. Aug. 8, 2014)

Plaintiff brought FDCPA claims against First Resolution Investment (First Resolution) alleging violations due to the filing of an invalid judgment lien against Plaintiff's home. Plaintiff alleged that First Resolution sued her in Kentucky state court to collect a charged-off credit card debt. After Plaintiff's counsel failed to appear at a hearing on October 1, 2012, the Kentucky state court issued a default judgment against Plaintiff. On October 5, 2012, Plaintiff filed a motion to vacate the default judgment alleging that she had a complete statute of limitations defense. Before Plaintiff's motion to vacate was decided, First Resolution filed a judgment lien against Plaintiff's home on October 8, 2012. On October 29, 2012, Plaintiff's motion to vacate the default judgment was granted. Despite this ruling, First Resolution did not release the lien until November 5, 2012. Plaintiff alleged that because the judgment lien never became final due to her pending motion to vacate, First Resolution violated the FDCPA when it placed an invalid lien against her home. The district court dismissed Plaintiff's complaint on the grounds that a violation of state law is not a *per se* violation of the FDCPA and held that the invalid lien posed no threat to Plaintiff.

On appeal, the Sixth Circuit reversed the district court's ruling and held that First Resolution violated FDCPA sections 1692f (prohibiting "unfair or unconscionable means to collect or attempt to collect" a debt) and section 1692e(5) (prohibiting "threat[ening] to take any action that cannot legally be taken or that is not intended to be taken"). With respect to section 1692f, the Sixth Circuit held that the judgment lien was invalid when filed given the pending motion to vacate and improperly encumbered Plaintiff's home which was neither fair nor equitable and therefore violated the FDCPA. With regard to section 1692e(5), the 6th Circuit held that the conduct of filing and maintaining an invalid lien upon Plaintiff's home was a threat to take action which First Resolution was not legally authorized to do. Finally, the Sixth Circuit dismissed First Resolution's defenses. First Resolution argued that a state law violation is not a *per se* violation of the FDCPA and that, even if it was, it could not be liable under the *bona fide* error defense. In rejecting these arguments, the Sixth Circuit held that even though Congress did not intend every violation of state law to also constitute a violation of the FDCPA, this did not mean that a violation of state law can never *also* be a violation of the FDCPA and found that the

complaint stated a claim for relief.

The Court held further that First Resolution was not entitled to the *bona fide* error defense because it failed to release the invalid lien when it became aware of Plaintiff's motion and the order vacating the default judgment. The Sixth Circuit also rejected the *bona fide* error defense because First Resolution failed to allege that it maintained any procedures to avoid the error at issue.

Third Circuit Holds that Visibility of Internal Account Number Through Window of Mailing Envelope Violates FDCPA

Douglass v. Convergent Outsourcing, No. 13-3588, 2014 WL 4235570 (3rd Cir. Aug. 28, 2014)

The U.S. Court of Appeals for the Third Circuit held that a third party collection agency violated the FDCPA when an account number it had created and assigned to an outstanding balance was visible through the transparent window of an envelope used to mail correspondence to a debtor. The account number appeared above the name and mailing address of the debtor, but was not the account number that the original creditor had used for the subject account. Rather, it was a separate series of characters, which was solely used by the collection agency.

The plaintiff commenced suit as a class action alleging unlawful debt collection activity under the FDCPA's section 1692f (8), which prohibits the use of any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mail, except that a debt collector may use its business name if it does not indicate debt collection business. Although the account number that the collection agency assigned the subject debt was not printed on the mailing envelope, the appellate court ruled that section 1692f(8)'s prohibition on language and symbols applies to markings that are visible through a transparent window of an envelope. According to the Third Circuit, Congress' intent when drafting section 1692f(8) was to screen from public view information pertinent to debt collection, which, as the court reasoned, includes account numbers.

The collection agency's primary defense was that section 1692f(8) could not be interpreted literally because that would lead to absurd results. The defendant argued that when read literally, the statute would prohibit a collection agency from including, for example, the name and mailing address of the debtor on the mailing envelope or from appearing through it. According to the collection agency, section 1692f(8) should be read to include a "benign language" exception that would allow for markings on an envelope so long as they do not suggest the letter's purpose of debt collection or to humiliate or threaten the debtor.

Ultimately, the Third Circuit rejected the benign language defense reasoning that the disclosure of an account number that could be seen by anyone handling the mail was not benign. Key in the court's decision was its concern for protecting the privacy of debtors and the court concluding that one of the core purposes of the FDCPA was to protect against invasion of privacy. According to the court, the FDCPA proscribes activity that has the potential to identify a debtor or her debt.

What the Third Circuit failed to explain was how displaying a series of characters through an envelope that was not the actual account number used by the creditor could reasonably risk an invasion of privacy when the mailing envelope had no markings or indications that debt collection was at issue. This ruling should, however, show that from a "best practices" prospective, it is best to limit the information that can be seen on or through a mailing envelope to what is absolutely necessary for correspondence to be delivered to the debtor via the mail.

Southern District of Indiana Rules That Indiana Uniform Consumer Credit Code Does Not Require an Out-of-State Debt Buyer to Obtain a License

Scheetz v. PYOD LLC, 2014 WL 3489715 (N.D.Ind. July 15, 2014)

The Plaintiff/Debtor filed a class action lawsuit against the Defendant/an out-of-state debt buyer and its affiliated companies. Plaintiff alleged that Defendants violated the Fair Debt Collection Practices Act (FDCPA) and the Indiana Deceptive Consumer Sales Act (IDCSA) because Defendants hired a law firm to file lawsuits in the name of the debt buyer without the debt buyer having an IUCCC license.

The Court dismissed Plaintiff's original class action complaint because the Court found that based upon its interpretation of the IUCCC and the interpretation of the IUCCC by the agency in charge of enforcing it, out-of-state debt buyers are not required to obtain a license under the IUCCC. However, the Court allowed Plaintiff to file an amended complaint.

After Plaintiff filed an amended class action complaint, Defendants again moved to dismiss Plaintiff's class action complaint. Defendants argued that Plaintiff's amended class action complaint amounted to nothing more than a motion to reconsider and the Court agreed. Further, the Court held that Plaintiff adds nothing to her amended complaint or her briefs that would cause the Court to reconsider its earlier opinion. Additionally, the Court noted that the Indiana Appellate Court agreed with this Court's previous opinion. Thus, the Court dismissed Plaintiff's amended complaint with prejudice and no appeal was filed.