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Consumer Financial Services Newsletter - July 2016

July 27, 2016

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Eighth Circuit Holds That Filing Accurate Proof of Claim on Time-Barred Debt Does Not Violate the FDCPA

Nelson v. Midland Credit Mgmt., Inc., No. 15-2984, 2016 WL 3672073 *1 (8th Cir. July 11, 2016)

On July 11, 2016, the United States Court of Appeals for the Eighth Circuit split from other circuit courts and issued a precedential decision holding that the filing of a proof of claim on a time-barred debt in a consumer bankruptcy action did not violate the Fair Debt Collection Practices Act (FDCPA). In *Nelson*, the debtor defaulted on a consumer debt in November 2006 and filed for Chapter 13 bankruptcy relief in February 2015. The creditor filed a proof of claim in the bankruptcy court for the amount of the debt. The consumer objected to the proof of claim on the basis that it was time-barred. The bankruptcy court agreed with the consumer and disallowed the claim.

The consumer subsequently commenced suit against the creditor, alleging that it violated **15 U.S.C. §§ 1692d, 1692e and 1692f of** the FDCPA by filing a proof of claim on a time-barred debt in his bankruptcy proceeding. The district court held that the FDCPA was not implicated and granted the creditor's motion to dismiss for failure to state a claim.

On appeal, the consumer urged the Court to extend the rule against actual or threatened litigation on time-barred debts to bankruptcy claims. The Eighth Circuit, however, rejected the extension of the FDCPA to time-barred proofs of claim, holding that "[a]n accurate and complete proof of claim on a time-barred debt is not false, deceptive, misleading, unfair, or unconscionable under the FDCPA." *Nelson*, No. 15-2984, 2016 WL 3672073 *1, *2. In so holding, the Court noted that bankruptcy debtors are aided by trustees acting in a fiduciary

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capacity and that defending a lawsuit to recover a time-barred debt is more burdensome than objecting to a time-barred proof of claim. The Court recognized such protections already afforded to debtors in bankruptcy against harassment and deception, which it held satisfies the relevant concerns of the FDCPA, thus finding that " '[t]here is no need to supplement the remedies afforded by bankruptcy itself.'"

The issue of filing proofs of claim on time-barred debts has received inconsistent treatment in the circuit courts. As a result of the split in circuit court decisions, this issue may be ripe for review by the United States Supreme Court to resolve the inconsistent application of the FDCPA.

Unanswered Calls Constitute "Communications" for Purposes of Establishing Liability Under Massachusetts Fair Debt Collection Practices Act

Brent Watkins v. Glenn Associates, Inc., 2016 WL 3224784 at *1 (Mass. Super. Jun. 10, 2016)

In *Watkins*, the debtor received four telephone calls in a two-day period, all of which went unanswered, but successfully connected to the debtor's voicemail system. No messages were left. The debtor sued the collection agency who placed the calls under the Massachusetts Fair Debt Collection Practices Act based upon his alleged receipt of an excess of two calls in a seven-day period. The Massachusetts Attorney General regulations provide that it is "an unfair and deceptive act or practice for a creditor to…initiate a communication with any debtor via telephone…in excess of two such communications in each seven-day period." 940 CMR 7.04(1)(f). The crux of the dispute focused on what it means to "initiate a communication." The collection agency argued that unanswered calls do not constitute communications because a communication requires a successful transmittal of information.

The Court held that the unanswered calls constituted "communications" for purposes of imposing liability under the regulation. First, it noted that under the regulation, a "communication" is defined as "conveying information directly or indirectly to any person." Thus, "repeatedly calling Mr. Watkin's cell phone from a number identified as belonging to Glenn Associates indirectly conveyed to Mr. Watkins its demand that he speak with him again even without Glenn Associates leaving a voicemail." Moreover, the Court held that the attorney general guidance explains that "unsuccessful attempts by a creditor to reach a debtor via telephone may not constitute initiation of a communication if the creditor is truly unable to reach the debtor or to leave a message for the debtor." However, since the collection agency was able to leave a message for plaintiff, it was not "truly unable to reach the debtor." The Court explained that if a creditor is in fact able to leave a message for the debtor, it cannot circumvent the law on excessive "initiation of communication" merely by choosing not to leave a voicemail.

This is the first and only decision interpreting this regulation. Although it is not binding authority, it may have the practical effect of altering the manner in which debtors may be called in Massachusetts, and may affect the manner in which caller identification is used in connection with communicating with debtors.

Minnesota's Automatic Dialing Statute: You May Be Liable for Calling a Wrong Number

All debt collectors and others who call Minnesota telephone lines using a prerecorded or synthesized voice message with an auto dialer should know about the Minnesota Automatic Dialing-Announcing Devices statute, Minn. Stat. § 325E.26, *et seq.* (ADAD Act).

In short, the Minnesota statute provides that if you call a Minnesota telephone line — residential or cell — using an auto dialer, without prior express consent, and without a current business relationship, and you use a prerecorded voice, you could be liable for actual damages, and attorneys' fees.

Under the ADAD Act, connecting to a Minnesota telephone line using an automatic dialing-announcing device (ADAD) is generally prohibited, unless:

> (1) the subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message; or (2) the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered.

Minn. Stat. § 325E.27(a) (2016). The only relevant exception is for "messages to subscribers with whom the caller has a current business or personal relationship." Minn. Stat. § 325E.27(b). Although the statute seems to have been aimed at curbing use of an ADAD by telemarketers, the statutory language is not limited and applies to all callers.

The result? A debt collector who dials a wrong number in Minnesota and uses an ADAD without first obtaining the subscriber's consent through a live operator may be liable under the statute.

Although litigation over the ADAD Act has been limited to the Minnesota Attorney General, the ADAD Act provides for a private right of action. *See* Minn. Stat. § 325E.31. Importantly, private citizens may only pursue private claims under the Minnesota ADAD Act through Minnesota's Private Attorney General Statute, which limits actions to those that benefit the public. *See Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000).

If a plaintiff is successful in a lawsuit under the ADAD Act, he/she may "recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court." Minn. Stat. § 8.31(3)(a).