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CFPB AND FTC DEBT COLLECTION UPDATE



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CFPB and FTC Debt Collection Update

By Jonathan L. Pompan and Makalia A. Griffith

Given the historic nature of the Consumer Financial Protection Bureau's (CFPB) notice of proposed rulemaking interpreting the Fair Debt Collection Practices Act (FDCPA), there was not as much attention at the end of 2019 to other areas of federal regulatory activity. Yet, in 2019, the CFPB and the Federal Trade Commission (FTC) continued their use of enforcement to regulate debt buyers and debt collectors. And, the CFPB continued to supervise and examine debt collectors and furnishers, and publish research on topics of relevance to the industry.

CFPB ENFORCEMENT AND LITIGATION

HIGHLIGHTS

The CFPB brought several new public enforcement actions involving debt collection and continued litigation in other cases that were filed previously.

CFPB v. Seila Law LLC: In May 2019, the Ninth Circuit affirmed a district court decision holding that the for-cause removal provision of the CFPA was constitutionally permissible. Seila argued that because the CFPB was unconstitutional, the agency lacked statutory authority to issue the CIDs (Civil Investigative Demand). The CID requested information pertaining to whether Seila Law violated the Telemarketing Sales Rule, and whether debt relief providers or lead generators were engaging in unlawful acts or practices. The U.S. Supreme Court granted certiorari in October 2019 and added the question: if the CFPB is found unconstitutional on the basis of the separation of powers, can the President's authority to remove the CFPB Director "for cause" be severed from the Dodd-Frank Act? The parties will argue the case on March 3, 2020.

CFPB v. FCO Holding, Inc., et al.: On September 25, 2019, the CFPB filed suit against FCO Holding, Inc., its subsidiaries and owner. The complaint alleged that the entities failed to maintain reasonable policies and procedures regarding the accuracy and integrity of the information furnished to consumer reporting agencies, failed to conduct reasonable investigations or any investigation of certain consumer disputes, and furnished disputed information without investigating the accuracy of the information. The CFPB sought remedies including an injunction, a civil monetary penalty, damages, redress to injured consumers, and disgorgement for unjust compensation. The court has yet to rule on the defendants' motion to dismiss or stay the proceedings pending the outcome of Seila Law.

CFPB v. Forster & Garbus, LLP: On May 17, 2019, the CFPB filed suit against Forster & Garbus, LLP, a New York debt collection law firm, alleging that it filed collection lawsuits without investigating the alleged facts and that the lawsuits included the names and signatures of attorneys although those attorneys were not "meaningfully" involved in preparing, reviewing, or filing the suits. The CFPB sought an injunction, damages, a civil monetary penalty, redress to injured consumers, and disgorgement for unjust compensation. In October, the court stayed the case pending the outcome of Seila Law.

CFPB and the N.Y. Attorney General Settle with Debt Collection Group: On July 25, 2019, the CFPB and the New York Attorney General filed proposed settlements with a New York-based group of debt collectors and individuals. The settlements stem from a 2016 civil action, which alleged that the defendants purchased millions of dollars of consumer debt, misrepresented to consumers that they owed sums they did not owe or had no legal collection rights, threatened consumers with

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and enforcement officers. Under the proposed settlement, all parties will be banned from the debt collection industry and will be required to pay penalties ranging from \$6 million to \$60 million. However, full payment would be suspended subject to a \$1 civil money penalty to the CFPB and \$10,000 for consumer redress.

In the Matter of Financial Credit Service, Inc. d/b/a Asset Recovery Associates: On August 28, 2019, the CFPB announced a consent order with Asset Recovery Associates, Inc. (ARA). As described in the consent order, the CFPB found that ARA allegedly violated the FDCPA by threatening consumers with arrests, liens, and garnishments; representing that non-attorney company employees were attorneys; and representing that consumers' credit reports would be negatively affected if they did not pay the debts although ARA does not report consumer debts to credit-reporting agencies. The consent order requires ARA to institute a Compliance Plan, provide at least \$36,800 in restitution to affected consumers, pay a \$200,000 civil money penalty to the CFPB, and record all consumer calls.

In re Fair Collections and Outsourcing, Inc. et al.: The CFPB granted in part and denied in part an April 2019 petition by Fair Collections and Outsourcing, Inc. and Fair Collections and Outsourcing of New England, Inc. (FCO) to set aside or modify a CID. Since November 2018, the CFPB has issued CIDs seeking information related to FCO's debt collection and credit reporting activities. FCO argued that the CID should be set aside because the CFPB's statutory structure is unconstitutional, the notification of purpose is insufficient, and the CFPB's investigation into its conduct was unfair. The CFPB modified the CID but rejected FCO's arguments that the CID should be set aside on constitutional grounds and that the CID was issued in bad faith. FCO was given 10 days to comply with the order.

CFPB AMICUS BRIEFS

In 2019, the CFPB filed amicus curiae (friend of the court) briefs in the following cases involving debt collection topics:

Bender v. Elmore & Throop, P.C. (4th Cir.): Consumer debt collection practices

The issue presented was whether the one-year limitations period for a private FDCPA claim begins from the date the first violation occurs or whether subsequent violations of the same

tion that an action to enforce liability under the FDCPA may be brought within one year of when “the violation” occurs rather than one year of when the first violation occurs, and that the statute of limitations runs separately for violation of the act. While the court's holding agreed with this interpretation, this case is under appeal.

Rotkiske v. Klemm (S. Ct): Consumer debt collection practices

The issue presented was whether the “discovery rule” applies to the one-year statute of limitations under the FDCPA. The CFPB took the position that the “discovery rule” does not apply and that the one-year limitations period begins to run when the violation occurs rather than when the plaintiff discovers the violation or should discover the violation. The Court's holding agreed with this interpretation.

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Wiley v. Notte & Kreyling, P.C. (11th Cir.): Consumer debt collection practices

The issue presented was whether a debt collector engages in a deceptive practice under the FDCPA when it tells consumers that they must notify the creditor rather than the debt collector that the debt is disputed. The CFPB took the position that under the FDCPA, validation notices must

instruct consumers to notify the debt collector, not the creditor, to properly dispute a debt. Because any other instruction might mislead consumers, it is deceptive under the FDCPA. The litigation is ongoing.

Preston v. Midland Credit Management (7th Cir.): Consumer debt collection practices

In this case, the court invited the CFPB to file an amicus brief addressing whether a benign language exception exists to the FDCPA's prohibition against debt collectors' use of any language or symbol other than the debt collector's address on an envelope when communicating with a consumer. And if the prohibition does exist, does the phrase “TIME SENSITIVE DOCUMENT” fall within that exception? The CFPB took the position that a benign language exception does not exist and that in addition to the debt collector's address, a debt collector may use the business name on the envelope if the name does not reveal it is from a debt collection business. The CFPB also emphasized that if the court were to carve out a benign language exemption, then whether the phrase “TIME SENSITIVE DOCUMENT” would fall within that exception would be a question of fact. The litigation is ongoing.

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The CFPB took the position that an action to enforce liability under the FDCPA may be brought within one year of when “the violation” occurs rather than one year of when the first violation occurs, and that the statute of limitations runs separately for violation of the act.

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MARKET SNAPSHOT

The CFPB also continued its practice of issuing reports on the debt collection market. In 2019, the CFPB published a Market Snapshot update that provided an overview of two types of third-party debt collections tradelines reflected on consumer credit reports. Using data collected from 2004 to 2018, the Market Snapshot report found that 78% of total third-party debt collections tradelines were for non-financial debt, such as medical, telecommunications, or utilities debt, and that as of the second quarter of 2018, more than one in four consumers included in the sample had at least one debt in collections by third-party debt collectors.

FTC ENFORCEMENT ACTIONS

The FTC continued to file claims against unlawful debt collection practices, including attempts to collect debts that do not exist or are not owed to the debt collector, and claims against the use of aggressive debt collection tactics.

FTC v. GAFS Group, LLC, et al.: The FTC entered into a stipulated consent order with four remaining defendants and nine companies controlled by the defendants. As described in the consent order, the FTC found that defendants violated the FTC Act and the FDCPA Act by engaging in deceptive, abusive, and unfair debt collection practices. Under the proposed settlements, all parties are banned from the debt collection industry, and from misleading customers and misrepresenting to customers that they are attorneys. The settlement requires the defendants to pay \$25.5 million, most of which was suspended due to the defendants' inability to pay. In May 2019, four other defendants agreed to settle charges arising from the same claims.

FTC v. Global Processing Solutions, LLC, et al.: In 2019, the FTC resolved all claims against a group of 13 corporate and individual defendants and mailed refund checks in September 2019 totaling more than \$516,000 to 3,977 consumers affected by the defendants' conduct. The 2017 complaint alleged that the businesses engaged in false claims that consumers owed debts, committed a crime by owing said debts, threatened legal action or threatened to garnish their wages, collected on debts already paid or that the defendants had no authority to collect, contacted third parties including consumers' families and employers, and failed to provide consumers with required notices and disclaimers. The parties are now banned from the debt collection business, buying or selling debt; prohibited from misrepresentations regarding any financial products and services; and must properly dispose of consumers' personal financial information. In total, the settlements required the defendants to pay a \$3,462,664 judgment that will be partially suspended, due to the defendants' inability to pay.

PROPOSED RULE WITH REQUEST FOR PUBLIC COMMENT DEBT COLLECTION PRACTICES (REGULATION F)

In 2019, the CFPB continued rulemaking activities with a request for comment on a Notice of Proposed Rulemaking to amend Regulation F, which implements the FDCPA. The CFPB is currently reviewing comments to the proposed rulemaking. In 2020, the CFPB plans to issue a Supplemental Notice of Proposed Rulemaking on time-barred consumer debt disclosures, and its "Final Rule" addressing third party debt collection practices.

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By necessity, this article provides only general summaries based on CFPB and FTC materials, but not exhaustive treatments of the agencies' activities related to debt collection in 2019.

The opinions expressed are those of the authors and are not intended to represent the views of their firm or clients.



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