TIME BARRED FORECLOSURES DO NOT FORM BASIS FOR FDCPA/FCCPA LAWSUITS OUTSIDE BANKRUPTCY CONTEXT

In an order issued today, Judge Dalton of the Middle District of Florida held that in a non-bankruptcy context, allegations that collection of a mortgage debt is barred by the statute of limitations do not form a "plausible basis" for claims under the Fair Debt Collection Practices Act, the Florida Consumer Collection Practices Act, or the Declaratory Judgment Act.

In *Garrison v. Caliber Home Loans, Inc.*, Case No. 6:16-cv-978-Orl-37DCI (Order, Jan. 10, 2017), the plaintiff brought counts under five consumer protection laws, including the FDCPA and FCCPA, as well as for a declaratory judgment. In support of her FDCPA, FCCPA, and declaratory judgment counts, the plaintiff alleged that the defendant, the current servicer of her mortgage loan, had attempted to collect a debt that was time-barred. The plaintiff had defaulted on her mortgage in 2009, and while the mortgagee had filed a foreclosure action against her, it voluntarily dismissed the foreclosure in 2014.

The plaintiff took the position that because more than five years had passed since her default, at least a portion of the debt that she owed could not be recovered under Florida's five-year statute of limitations on foreclosure. According to the plaintiff's theory, the defendant servicer violated the FDCPA and FCCPA when it sent mortgage statements advising her of her past due amount and the length of time that she had been delinquent and seeking to collect the amount due, which was based on her initial default in 2009. The plaintiff also sought judicial declarations that: (1) the subject debt was unenforceable, and (2) the amount of the debt that the servicer claimed to be due was overstated because it included amounts beyond the five-year statute of limitations.

The Court determined that by basing her claims on the statute of limitations, the plaintiff was making an "impermissible attempt to bootstrap an affirmative defense into an affirmative cause of action." The Court considered the defendant's arguments that the statute of limitations is a defense, not an affirmative cause of action, does not terminate a lien or extinguish a claim, and cannot be applied before legal action is brought to enforce a loan to be "persuasive and well-founded."

As the Court acknowledged, the FTC has published a document advising consumers that it is unlawful for a debt collector to "sue you *or threaten to sue you on a time-barred claim*." However, it also noted that the FTC publication includes

statements that seem inconsistent with this advice, such as noting that the statute of limitations to collect a debt is usually different from the seven-year time period for reporting a debt to credit bureaus; that debt collectors are allowed to contact consumers about time-barred claims but must be truthful if asked whether the debt is beyond the statute of limitations; and that the "decision to pay a time-barred debt is up to [the consumer]." In light of these inconsistencies within the FTC publication, the Court determined that the publication was not sufficiently supportive of the plaintiff's claims.

The Court also distinguished two Eleventh Circuit cases on which the plaintiff relied—*Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1844 (2015), and *Johnson v. Midland Funding, LLC*, 823 F.3d 1334 (11th Cir. 2016), *cert. granted*, 137 S. Ct. 326 (2016)—on the basis that they are unique to the bankruptcy context. As the Court noted, *Crawford* and *Johnson* do not address non-judicial debt collection activity of a partially time-barred claim. Rather, "for reasons peculiar to bankruptcy proceedings," the *Crawford* and *Johnson* provide that a bankruptcy debtor may file an FDCPA adversary proceeding if a creditor files a proof of claim on a debt that has become "entirely unenforceable" under the statute of limitations. Thus, the Court determined that *Crawford* and *Johnson* did not control the circumstances before it, as the statute of limitations did not bar the defendant servicer from collecting at least the portion of the debt that had accrued at least within the last five years, and as the servicer was not attempting to collect the debt by filing a proof of claim in bankruptcy.

Additionally, the Court rejected *Sanchez v. Rushmore Loan Management Services, Inc.*, No. 8:15-cv-2714-T-30UAM, 2016 WL 3126515 (M.D. Fla. June 3, 2016), which provided that a dunning letter that failed to exclude amounts more than five years past due from the total amount sought was sufficient to establish at the pleading stage that the letter "may have been deceptive or misleading to the least sophisticated consumer." The Court reasoned that *Sanchez*had been based on an unpublished state court decision, *Collazo v. HSBC Bank USA, N.A.*, No. 3D14-2208, 2016 WL 1445419 (Fla. 3d DCA Apr. 13, 2016), that had since been withdrawn.

Thus, in light of the fact that Florida's statute of limitations did not extinguish the servicer's ability to collect on the mortgage debt, and the FTC publication and cases cited by the plaintiff were distinguishable or unpersuasive, the Court held that the statute of limitations "should be raised—if at all—as an affirmative defense to an actual collection or foreclosure action," rather than as grounds for an

affirmative cause of action under the FDCPA, FCCPA, or Declaratory Judgment Act.

The full *Garrison* order can be viewed here.

The post Allegedly Time-Barred Foreclosures Do Not Form Basis for FDCPA/FCCPA Lawsuits Outside Bankruptcy Context appeared first on Burr & Forman.