ATTEMPTS TO COLLECT TIME-BARRED DEBT PROVIDE FERTILE GROUND FOR FDCPA VIOLATIONS IN THE FIFTH CIRCUIT

In *Daugherty v. Convergent Outsourcing, Inc.*, the Fifth Circuit Court of Appeals held that a collection letter that is silent as to litigation, but which offers to “settle” a time-barred debt without acknowledging that such debt is judicially unenforceable, can be sufficiently deceptive or misleading as to violate the Fair Debt Collection Practices Act (“FDCPA”).

According to her complaint, Roxanne Daugherty accumulated $12,824.24 in credit card debt. After Daugherty defaulted on the debt, LVNV Funding, L.L.C. (“LVNV”) purchased the debt from Daugherty’s creditor. LVNV then hired Convergent Outsourcing, Inc. (“Convergent”) to collect the debt on LVNV’s behalf. At the time of collection, the principal and interest owed on Daugherty’s debt had increased to $32,205.91. After the statute of limitations on collection of the debt had expired, Convergent sent Daugherty a collection letter. The collection letter did not threaten litigation, but instead offered to “settle” the debt through various payment “opportunities” including: (1) a “Lump Sum Settlement Offer of 10%” requiring a single payment of $3,240.59; (2) a “Settlement Offer of 25% & Pay Over 3 Months” requiring three payments of $2,700.49; or (3) “Spread Your Payments Over 12 Months” requiring monthly payments of $2,700.49 over the course of a year.

In response to the letter, Daugherty filed suit against Convergent and LVNV, alleging violations of the FDCPA. According to the complaint, Convergent and LVNV—both “debt collectors” as defined by the FDCPA violated the FDCPA by using false, deceptive, or misleading representations or means in connection with the collection of Daugherty’s debt and further violated the FDCPA by using unfair or unconscionable means to collect the debt. Specifically, Daugherty complained that Convergent’s collection letter failed to disclose (1) that the debt was not judicially enforceable; (2) that settling the debt through a 10% payment would trigger tax liability for Daugherty, and (3) that a partial payment would revive the entire debt. Daugherty sought statutory damages in the amount of $1,000 and attorneys’ fees and costs.

The FDCPA prohibits the use of any false, deceptive, or misleading representation or means in connection with the collection of any debt. Prohibited practices include falsely representing the character, amount, or legal status of any debt and threatening to take any action that cannot be legally taken. Debt collectors are further prohibited from using unfair or unconscionable means to collect or attempt
to collect any debt. When evaluating whether a collection letter violates the FDCPA, courts view the letter from the perspective of an unsophisticated consumer who is neither shrewd nor experienced in dealing with creditors. Based on the facts alleged by Daugherty, the Fifth Circuit held that a collection letter seeking payment on a time-barred debt (without disclosing its unenforceability) but offering “settlement” and inviting partial payment (without disclosing the possible pitfalls) could constitute a violation of the FDCPA.

In attempting to avoid FDCPA violations, debt collectors must be aware that federal courts have reached different opinions in cases involving collection letters similar to the one at issue in Daugherty. In particular, there is a split in circuits as to whether a collection letter offering “settlement” of a time-barred debt can violate the FDCPA if the debt collection letter does not disclose the debt’s unenforceability or expressly threaten litigation. The Third and Eighth Circuits have stated that in the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid. On the other hand, like the Fifth Circuit, the Sixth and Seventh Circuits have held that collection letters offering to settle time-barred debts without disclosing the status of the debt can be misleading and therefore violate the FDCPA even if they do not expressly threaten litigation. The table below details the states in the Third, Fifth, Sixth, Seventh and Eighth Circuits. Debt collectors must be aware of where they are collecting debts and conduct themselves in accordance with current federal rulings in order to avoid FDCPA violations.

Please click here to view the table.