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Property Preservation Company Avoids the "Debt Collector" Label in Seventh Circuit Case

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In a significant victory for property preservation companies, the Seventh Circuit affirmed in *Schlaf v. Safeguard Property, LLC*, --- F.3d ----, No. 17-2811, 2018 WL 3803800 (7th Cir. Aug. 10, 2018) that Safeguard Property, LLC was not a debt collector under the Fair Debt Collection Practices Act (FDCPA) because its property preservation activities were "too attenuated" from the debt collection activities of its client, Green Tree Servicing, LLC.

Factual and Procedural Background

Andrew and Wendy Schlaf brought suit against Safeguard under the FDCPA on behalf of themselves and a putative class. The Schlafs asserted that their loan servicer, Green Tree, authorized Safeguard to conduct property preservation efforts, including monthly inspections of their property, after their default. These inspections typically included, among other things, determining occupancy status of the residence and cutting the grass. During those inspections, a Safeguard representative left a door hanger on the outside doorknob requesting that the Schlafs contact Green Tree. The Schlafs claimed that Safeguard violated the FDCPA because it never made the requisite disclosures required by sections 1692g, and the initial door hanger it left failed to include the language required by 1692e(11).

Safeguard moved to dismiss, arguing that it is not a debt collector. The United States District Court for the Northern District of Illinois denied that motion. But with additional facts, the District Court granted Safeguard's subsequent motion for summary judgment on the same grounds. The Schlafs appealed to the Seventh Circuit.

Legal Analysis

The Seventh Circuit began its analysis with the language of the statute. A debt collector is "any person who uses any instrumentality of interest commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). These two categories are known as the "principal purpose" and "regularly collects" definitions. Both the Schlafs and Safeguard focused on the "regularly collects" definition, and specifically whether Safeguard regularly, albeit indirectly, collects debts or attempts to collect debts owed to another (in this case, Green Tree).

Rejecting the Schlafs' argument, the Seventh Circuit concluded that Safeguard's use of door hangers was not even indirect debt collection activity. Rather, Safeguard's role was "more akin to that of a messenger than as an indirect facilitator of debt collection."

Expanding the issue, the Seventh Circuit also addressed whether the door hangers were communications sent in connection with the collection of a debt. The Seventh Circuit employs a common-sense analysis, focusing on whether there is a demand for payment, the nature of the parties' relationship, whether that relationship arose out of the defaulted debt, and the purpose and context of the communication. Because Safeguard's door hangers did not demand payment and did not identify the debt, the Seventh Circuit concluded that they were "left in connection with property preservation, not debt collection."

The Seventh Circuit found further support for its position in Third and Ninth Circuit decisions in which those courts found that entities ***were*** engaged in indirect debt collection activities. In *Romine v. Diversified Collection Services, Inc.*, 155 F.3d 1142 (9th Cir. 1998), the Ninth Circuit held that Western Union was a debt collector when it advertised "Talking Telegrams" to aid debt collectors in contacting delinquent debtors. The Ninth Circuit concluded that the explicit purpose of the "Talking Telegram" was to assist in debt collection. In contrast, Safeguard's activities are further removed from the actual debt collection process; Safeguard provides information that may be marginally helpful to Green Tree in its debt collection efforts, but the Department of Housing and Urban Development regulations require Green Tree to determine occupancy status and "[w]hether to commence collection efforts and the nature of those collection efforts remained exclusively in the hands of Green Tree."

Siwulec v. J.M. Adjustment Services, LLC, 465 F. App'x 200 (3d Cir. 2012) involved a third-party that delivered letters from lenders to delinquent consumers seeking information to assist in resolving past-due balances. The agency instructed its representatives to both urge the debtors to call the creditor in front of the representatives and gather information directly. The Third Circuit concluded that these activities qualified as debt collection activities. Here, the Seventh Circuit concluded, "Safeguard does not deliver any communications that contain information about the debt or past due payments, does not collect homeowners' contact information, and does not 'urge alleged debtors, in person, to call the creditor while they watched.'"

Concluding its analysis, the Seventh Circuit acknowledged that the case law was not particularly "robust" and "what constitutes 'indirect' debt collection will have to be determined on a case-by-case basis."

Ramifications

The *Schlaf* decision represents a significant victory for property preservation companies, who have become an increasingly popular target for FDCPA lawsuits. On what appears to be an issue of first impression in the Seventh Circuit, the court provided strong cover for those entities to argue that they are not debt collectors. While the Seventh Circuit's conclusion indicates that litigation is likely to continue on this topic and debt collectors can still face other types of liability in connection with property preservation, this decision should at least stem the tide of debt collection lawsuits against property preservation entities in the Seventh Circuit. Property preservation companies would also be wise to properly train their representatives as to the limited role they are performing, as this decision suggests that more aggressive property preservation efforts run the risk of crossing the line into at least indirect debt collection.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors.

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