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Seventh Circuit Encourages Gamesmanship In Debt Disputes

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The United States District Court for the Northern District of Illinois has recently issued several decisions unfavorable to debt collectors, including *McMahon v. LVNV Funding, LLC*, 12 C 1410, 2018 WL 1316736 (N.D. Ill. Mar. 14, 2018) and *Pierre v. Midland Credit Management, Inc.*, 1:16-cv-02895, 2018 723278 (N.D. Ill. Feb. 5, 2018). On May 2, 2018, the Seventh Circuit Court of Appeals followed suit in *Evans v. Portfolio Recovery Associates, LLC*, 17-1773, 17-1860, 17-1866, 17-2622, 17-2756, 18-1374, 2018 WL 2035315 (7th Cir. May 2, 2018).

Factual and Procedural Background

Evans was a consolidated appeal of four district court decisions granting summary judgment to consumers on their Fair Debt Collection Practices Act (FDCPA) claims. In each case, the consumer defaulted on credit card debt, Portfolio Recovery Associates (PRA) purchased the debt, and PRA sent a debt validation letter to the consumer. Each consumer sought advice from Debtors Legal Clinic (DLC), and a DLC attorney faxed PRA separate letters stating:

> This letter is concerning the above referenced debt.
>
> Debtors Legal Clinic is a non-profit legal services organization that advises senior citizens, veterans, and low-income individuals whose income is protected by law of their rights under various state and federal statutes. Our clinic represents the above referenced client for purposes of enforcing their rights pursuant to all applicable debt collection laws.
>
> This client regrets not being able to pay, however, at this time they are insolvent, as their monthly expenses exceed the amount of income they receive, and the amount reported is not accurate. If their circumstances should change, we will be in touch.
>
> Our office represents this client with respect to any and all debts you seek to collect, now or in the future, until notified otherwise by our office. As legal representative for this client, all communication must be through our office, please do not contact them directly.
>
> If you wish to discuss this matter, please contact our office directly at [phone number] to speak with the attorney assigned to the matter, Andrew Finko.

PRA admitted to receiving and reviewing the letters, but when reporting to the consumer reporting agencies (CRAs) it did not denote the debts as disputed. PRA did not denote the debts as disputed because, given the language and context of the letters, it did not consider the letters to dispute the validity of the debt.

In each of the four cases, the district court judge granted summary judgment to the consumers. The Seventh Circuit consolidated the cases for a single appeal, addressing four issues: (1) the consumers' Article III standing; (2) whether the letters disputed the debt per §1692e(8) of the FDCPA; (3) whether any FDCPA violation was material; and (4) whether PRA had a bona fide error defense.

Analysis: The Seventh Circuit Affirms

1. The consumers have Article III standing because the FDCPA violation created a "real risk of financial harm."

The Seventh Circuit began its analysis with the Article III standing arguments. PRA relied on *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) and argued that the consumers were not harmed by the FDCPA violation and thus lacked standing under Article III.

Following the recent trend, the Seventh Circuit rejected that argument. The court noted that a statutory violation constitutes an injury-in-fact when the violation creates "risk of real harm." The court concluded that because PRA failed to report the debt as disputed, the consumers faced the "real risk of financial harm" arising from inaccurate credit reporting and the potential that their credit scores could be lowered.

2. The DLC letters amounted to debt disputes under the FDCPA.

The Seventh Circuit next addressed whether the subject letters actually disputed the debt. Section 1692e(8) states that the "failure to communicate that a disputed debt is disputed" is a violation of the FDCPA.

The court latched onto the language in the letters that "the amount reported is not accurate." The court held that "[w]hen plaintiffs said 'the amount reported it not accurate,' they 'call[ed] into question' the amount PRA claims they owed—in other words, they *disputed* the debt. There is simply no other way to interpret this language."

PRA and amicus curiae, the Association of Credit and Collection Professionals, argued that § 1692e(8) should be interpreted consistently with § 1692g(b) of the FDCPA or § 1681s-2 of the Fair Credit Reporting Act (FCRA), which have more robust and stringent debt-dispute requirements and procedures. The court rejected that argument and concluded that those were "different provision[s] with different requirements" that needed to be read independently. Consequently, the consumer need only dispute the debt to trigger the creditor's obligation under § 1692e(8); it is irrelevant whether that dispute is "valid or even reasonable."

Notably, the Seventh Circuit did not address the interplay between the purported debt dispute and immediately preceding language in the consumers' letters, which stated that "this client regrets not being able to pay, however, at this time they are insolvent, as their monthly expenses exceed the amount of income they receive…."

3. Failure to report a disputed debt is always "material."

The next issue—whether this FDCPA violation was "material"—was an issue of first impression in the Seventh Circuit. On this question, the court found the Eighth Circuit's decision in *Wilhelm v. Credico, Inc.*, 519 F.3d 416 (8th Cir. 2008) to be persuasive and held that "the failure to inform a credit reporting agency that the debtor disputed his or her debt will *always* have influence on the debtors, as this information will be used to determine the debtor's credit score."

4. A mistake of law does not support a *bona fide* error defense.

The final issue was the validity of PRA's *bona fide* error defense. The Seventh Circuit rejected PRA's argument out of hand, finding that PRA did not report the debt as disputed because it did not believe that the consumers' letters amounted to a valid dispute under § 1692e(8). This was an error of law, and "a defendant can invoke the *bona fide* error defense only if it claims it made an error of *fact*, not an error of *law*."

Ramifications: The Seventh Circuit Endorses Gamesmanship

The Seventh Circuit's decision in Evans has some important legal ramifications. The Seventh Circuit has continued to eviscerate *Spokeo* with respect to FDCPA claims by holding that the "risk of harm" provides Article III standing, and then evaluating the risk of harm to consumers generally, rather than digging into specifics on the actual consumers who are bringing the FDCPA claims. The court did not explain, for instance, how these specific consumers, who were allegedly insolvent, would be harmed by PRA's failure to report their unpaid credit card debt as disputed.

Had the Eighth Circuit not already issued the Wilhelm decision, the Seventh Circuit's adoption of a bright-line rule that the failure to report a debt as disputed is ***always*** material would have been surprising. Certainly the disputing of a debt can be material and perhaps often is material. That said, the facts of this case at least suggest that a debt dispute may be immaterial, either because it is unlikely to have any bearing on the specific consumer's credit score or because the consumer is not going to seek credit or employment in the foreseeable future.

But beyond the specific legal rulings, the Seventh Circuit's decision is notable for the message it sends: gamesmanship works. The letters sent by DLC appear to be intentionally ambiguous. In the key passage, the letters start by stating "[t]his client regrets not being able to pay, however, at this time they are insolvent, as their monthly expenses exceed the amount of income they receive…." This language implies that the debt is valid but circumstances make payment impossible. But then the letters go on to state that the "amount reported is not accurate." They do not explain how the amount reported is inaccurate or provide information to support the claimed inaccuracy. The letters also do not use the word "dispute." Instead, the purported dispute language is slipped into the same sentence in which the consumers seemingly acknowledged the debt and the obligation to pay. There is a downside to that ambiguity, however. By not including the basis for the dispute or any supporting documentation, the consumers forego a potentially viable claim under § 1681s-2 of the FCRA.

In any event, by holding that the failure to report the debt as disputed in response to this type of letter is a material violation of the FDCPA, the Seventh Circuit is encouraging ambiguous debt dispute letters. It is also encouraging frivolous letters. There is no downside to the consumer from disputing the debt, even if the debt is accurate. Once the consumer asserts that the amount is inaccurate, the debt collector must report the debt as disputed, no questions asked. If the debt collector complies, then the consumer gets the economic benefit of the debt being denoted as disputed on the consumer report. And if the debt collector does not comply, then the Seventh Circuit has handed the consumer and his/her lawyer an FDCPA claim with statutory damages and attorneys' fees, even in the absence of any tangible injury to the consumer.

Nevertheless, debt collectors operate in the world that is, and the *Evans* decision means that debt collectors need to thoroughly scrutinize communications for any hint of a dispute as to the validity of the debt. Debt collectors should err on the side of caution and report any such debts as disputed to the CRAs.

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

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