Ryan M. Holz and Douglas R. Sargent on

Pierre v. Midland Credit: Three Significant Lessons for Debt Collectors

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The U.S. District Court for the Northern District of Illinois recently found it deceptive for a debt collector to seek payment on time-barred debts without also informing the debtors that if they made a payment on the debt (or promised to make a payment), they could potentially lose the protections provided by the statute of limitations. The authors of this article explain the decision and its far-reaching implications for the debt-collection industry.

On February 5, 2018, debt collectors took a significant defeat in the U.S. District Court for the Northern District of Illinois in *Pierre v. Midland Credit Management, Inc.*[1] Judge Henry D. Leinenweber entered summary judgment in favor of Pierre and a class of similarly situated individuals on a claim under the Fair Debt Collection Practices Act ("FDCPA"), finding that Midland Credit Management, Inc.'s ("Midland") efforts to collect on a time-barred debt were deceptive as a matter of law. Specifically, Judge Leinenweber found it deceptive for Midland to seek payment on time-barred debts without also informing the debtors that if they made a payment on the debt (or promised to make a payment), they could potentially lose the protections provided by the statute of limitations. This decision—effectively imposing an affirmative duty on debt collectors to explain potential legal consequences to debtors—has far-reaching implications for the debt-collection industry.

BACKGROUND

Pierre defaulted on credit card debt in early 2008. By September 2015, the statute of limitations had run on any collection action on that debt. Nevertheless, on September 2, 2015, Midland, acting as a debt collector, sent Pierre a dunning letter. The letter informed Pierre that $7,578.57 was past due but she had been "pre-approved" for a discount program with three options: (1) 40 percent off the balance if paid by October 2, 2015; (2) 20 percent off the balance if paid in 12 monthly installments; and (3) payment options as low as $50 per month. The letter included a disclosure stating:

> The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it, we will not report it to any credit reporting agency, and payment or non-payment of this debt will not affect your credit score.

Pierre brought suit under the FDCPA on behalf of herself and a class of similarly situated individuals, claiming that Midland's correspondence was, among other things, deceptive in violation of 15 U.S.C. § 1692e(10). Judge Leinenweber certified a class containing all persons with Illinois addresses to whom Midland sent correspondence containing the above disclosure between March 7, 2015 and March 7, 2016. Pierre then moved on behalf of herself and the class for summary judgment on liability.

1 1:16-cv-02895.

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LEGAL ANALYSIS

To establish a claim under the FDCPA, a plaintiff must establish that

(1) she is a consumer;

(2) the debt arises from a transaction entered for personal, family, or household purposes;

(3) the defendant is a debt collector; and

(4) the defendant has violated the FDCPA.

Here, Judge Leinenweber concluded that the only disputed question was whether Midland's communication violated the FDCPA, specifically Section 1692e(10).

It is a violation of Section 1692e(10) if the correspondence in question is materially misleading from the perspective of an unsophisticated consumer, i.e. a consumer who is "uninformed, naïve and trusting, but possesses rudimentary knowledge about the financial world, is wise enough to read collection notices with added care, possesses reasonable intelligence, and is capable of making basic logical deductions and inferences." Whether collection language is confusing is an objective test. It is the plaintiff 's burden to establish that the misleading language is material.

Pierre raised a variety of arguments in support of her contention that Midland's letter was deceptive, but Judge Leinenweber latched on to one. Pierre contended that because the statute of limitations had run on the debt, she faced no legal ramifications for failing to pay that debt. That protection could be lost, however, because under Illinois law, making a partial payment or promising to repay a time-barred debt could revive the statute of limitations. Pierre contended that because Midland did not affirmatively advise her about the possibility that the statute of limitations could be revived, its letter was misleading as a matter of law.

Midland, in turn, raised a variety of counterarguments. Its primary argument was that nothing in the FDCPA requires a debt collector to warn of the potential revival of the statute of limitations. In support, Midland relied on *Boedicker v. Midland Credit Management, Inc.*,[2] where the U.S. District Court for the District of Kansas had agreed with Midland and awarded it summary judgment.

Judge Leinenweber acknowledged *Boedicker* but found it unconvincing in light of *Pantoja v. Portfolio Recovery Assocs., LLC*.[3] There, the Northern District had found a similar dunning letter deceptive because the debt collector, by indicating that it would not sue to collect the debt, at least suggested that it was seeking to collect a legally enforceable debt and could sue to collect the debt if it so chose. The Northern District also noted that "a consumer, sophisticated or otherwise, likely [would not] know that a partial payment would reset the limitations period, making that consumer vulnerable to

2 227 F. Supp. 3d 1235 (D. Kan. 2016)
3 78 F. Supp. 3d 743 (N.D. Ill. 2015), *aff'd*, 852 F.3d 679 (7th Cir. 2017)

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a suit on the full amount." The U.S. Court of Appeals for the Seventh Circuit subsequently affirmed the Northern District, concluding the dunning letter was deceptive because it did not disclose to the recipient that partial payment or a promise to repay could revive the statute of limitations and because it did not make clear that the law prohibited a suit to collect the time-barred debt.

Midland also argued that its interactions with various administrative agencies supported its position. Specifically, Midland pointed to "proposals under consideration" at the Consumer Financial Protection Bureau ("CFPB") that suggested warning about revival may be more confusing to consumers, a consent order entered between Midland and the CFPB that mandated that Midland use the disclosure language contained in Pierre's letter, and a Federal Trade Commission ("FTC") consent decree that did not require a revival warning. Judge Leinenweber rejected Midland's argument, finding that the FTC and CFPB consent decrees were not entitled to any deference in the face of Seventh Circuit authority.

Midland raised several additional arguments that were summarily rejected. It contended that the deceptive language was not material because its internal policy prohibited reviving the statute of limitations. Judge Leinenweber rejected that argument because Midland's policies could change or Midland could sell the debt to another collector with different policies. Midland also asserted that Illinois law regarding revival was uncertain, thus making an accurate disclaimer regarding revival difficult. Judge Leinenweber rejected this also, concluding that the lack of clarity in Illinois law did not exempt a debt collector from warning the consumer about the danger of revival.

Judge Leinenweber also briefly addressed materiality, rejecting Midland's argument that the deception was immaterial because Pierre never made any payment. Materiality does not depend on whether the consumer acted in response to the communication, but whether the deceptive material has the ability to influence the consumer. Judge Leinenweber concluded, with little analysis, that Midland's letter had the ability to influence Pierre and thus was materially misleading as a matter of law.

Interestingly, while Judge Leinenweber addressed materiality, he did not discuss the concrete injury requirement for Article III standing, which has taken prominence following the U.S. Supreme Court's decision in *Spokeo, Inc. v. Robins*.[4] Although most courts have found that FDCPA violations provide the necessary concrete injury to satisfy Article III, Pierre never paid or promised to pay anything in response to Midland's letter. As such, the nature of her concrete injury is unclear.

THE RAMIFICATIONS OF THE *PIERRE* DECISION

There are three significant lessons that debt collectors should draw from Judge Leinenweber's decision in *Pierre*.

First, if the law prohibits the debt collector from taking an action, the debt collector must make that clear in its communication. It is not acceptable to say that you "will not" do something that you "cannot" do. This should be simple enough for debt collectors to follow going forward.

4 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016).

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Second, debt collectors have an obligation to warn consumer debtors about the potential legal ramifications of their actions in response to dunning letters. This is more difficult to define in practice and raises more questions than answers. How far does this obligation extend? How should debt collectors deal with conflicting or unclear issues of law (such as Illinois law regarding revival of the statute of limitations)? Judge Leinenweber's holding could be read expansively and thus represents a significant threat to debt collectors.

Third, debt collectors cannot rely on their agreements with the CFPB or the FTC. Here, Midland entered into a consent decree with the CFPB that required use of the exact disclosure language contained in the dunning letter. Yet in the Seventh Circuit, complying with that consent decree means violating the FDCPA. It is not clear what a debt collector like Midland is expected to do in that situation. Again, the *Pierre* decision creates significant confusion and represents a significant threat to debt collectors.

It is likely that *Pierre* will be appealed to the Seventh Circuit, and perhaps the Seventh Circuit will provide additional clarity. But for the time being, debt collectors must be aware of *Pierre* and consider whether their debt collection communications need to be modified, at least in the Seventh Circuit states of Illinois, Indiana, and Wisconsin.

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About the Author(s).

Ryan M. Holz is a partner in Locke Lord LLP's Business Litigation and Consumer Finance practice groups, representing financial institutions in individual and class action lawsuits arising under state and federal consumer protection statutes.

Douglas R. Sargent, a partner in the firm's Litigation Department and a member of the Class Action, Consumer Finance, and Business Litigation & Dispute Resolution practice groups, focuses primarily on the representation of financial institutions and companies in both state and federal courts, as well as in arbitrations.

The authors may be reached at rholz@lockelord.com and dsargent@lockelord.com, respectively.

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