Summary of Panel Discussions at October 2007 FTC Workshop on Debt Collection Issues

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9:10 - 10:45am

Locating the Correct Consumer and Determining the Correct Amount Owed

A policy issue that will significantly impact locating the correct consumer is the use of social security numbers to link two consumers with the same name. There is recent legislation in Minnesota and several bills pending in Congress that would restrict the use of social security numbers for skiptracing purposes. Michael C. Lamb, Vice President and Chief Counsel, LexisNexis Risk Information & Analytics Group, Inc. contended that this would be anti-consumer. "If we could not use social security numbers…the data will be less accurate; there will be more wrong party contact."

Robin R. Pruitt, Senior Vice President & General Counsel, Encore Capital Group, Inc., a debt buyer, echoed the need for social security numbers to ensure that the correct person is being contacted. "What we want to do is connect the right person and his social security number with the right address and phone number so that we can contact them about the right debt," he stated.

Another key issue that will most likely become more important in the future is the use of cell phone numbers and e-mail addresses in debt collection and skiptracing. Mr. Lamb opined that "I don't think those will be readily used as a source of contact though it's a very consumer-friendly source of contact."

Thomas Haag, President and Chief Executive Officer, State Collection Service, Inc. pointed out that the post office has become rather particular about how mail is addressed. It is not unusual for mail to be returned even if addressed with a good street address but no apartment number or a bad zip code. He calls these "inadvertent skips" and it is important that collectors are aware because the consumer may say that he or she has never received the bill because the address may have been incomplete.

James R. Sheeran, General Counsel, Tidewater Finance Company pointed out that sometimes having past addresses can be useful to confirm that the consumer is the correct debtor. "If five years ago they bought something and put down a particular address on their application, and it shows up in going back five years that they lived at that address, it's more likely to be the correct person," he said.

Mr. Lamb reported that much of the data they retrieve is from public sources but sometimes they obtain information from non-public sources as well. They will get credit header data, which includes name, address and telephone number.

Lauren Saunders, Managing Attorney, National Consumer Law Center cautioned that credit bureau data may be inaccurate. For example, there may be Gonzales spelled with an S or a Z. The middle initial could be wrong or different. Despite these red flags, collection efforts continue even when the consumer says, "It isn't me."

Mr. Sheeran said they methodically attempt to determine if the person is the correct consumer. "It goes through starting with the name and spelling, date of birth, address, prior addresses, and the last four digits of the social security number. If they match, of course there is verification. The more difficult

problem comes about when someone has been the victim of identify theft."

Verifying the amount owed is usually a function of documentation. Debt buyer contracts typically require the seller to provide documents necessary to resolve disputes when required during a dispute. Upon a second or third sale of the portfolio, industry practice would be to negotiate the right to go back up the chain of title and obtain that data and documentation. However, the reality is that it is often difficult to obtain that data upon a second or third sales.

Ms. Saunders stated that the debt collector must have certain information before beginning collection efforts, including at a "core minimum":

- Proof of indebtedness by the consumer
- Signed contract
- Date the debt was incurred
- Date of last payment
- Identify of original credit as known to the consumer
- Amount of principal
- Itemization of all interest, fees or other charges added by original credit and subsequent holders
- Chain of title as the debt is sold

She believes that additional information should be provided before a debt can be sold or assigned, including:

- Any defenses to the debt
- All related communications
- Any validation requests and responses
- Any settlements that have been reached
- Whether the debt is beyond the statute of limitations
- Whether the consumer has been represented by an attorney and the attorney contact information
- Whether the consumer has informed the collector that a time or place is inconvenient for communication
- Whether the debt has been discharged or listed in bankruptcy
- Any illness or disability claim by the consumer
- Any known or claimed violation of the FDCPA

Mr. Haag reported that the ACA recently changed its Code of Ethics to require that if a member of the ACA receives a written request for verification from the consumer and the member cannot provide verification, the member will cease all collection efforts, request removal of the item from the consumer's credit report or report the item disputed to the appropriate credit reporting agency. Panel members who represent consumers countered that the request should not be required to be in writing.

Gina Calabrese, Associate Director, Elder Law Clinic, St. John's University School of Law noted that the elderly are not as adept at disputing debts. Her experience has been that collectors don't give up trying to collect from them even when they know that the money is exempt and often even when the Elder Law Clinic becomes involved. Even when debt collectors or debt buyers pursue the collection through the courts, evidence is woefully lacking. "I have been to court with collection attorneys who have nothing more than a print-out with them, an internal computer print out with the name of a debtor and the amount owed," she reported.

She contended that the proper approach is "if you don't have the information available when you need it, then stop your collection efforts until you have it." She went on to state, "there's a core of

information you need to have and have access to before you can collect a debt. And before you walk into court you better have it all in your briefcase."

11:00 am - 12:15 pm

Credit Reporting and Debt Collection: Key Concerns

The question of when an account is considered disputed under the Fair Credit Reporting Act was the initial issue discussed by this panel.

April A. Breslaw, Acting Associate Director, Division of Supervision and Consumer Protection, Federal Deposit Insurance Corporation said there is a dispute when there is a question about whether information is accurate. Michael C. Tormey, Co-Chairman, The Advantage Group stated that at his company, whether the dispute is in writing or not, they will cease reporting it because they can no longer verity the accuracy or completeness of the data. "When we receive a dispute and the company we represent does not have adequate information to support that dispute, we close and return the debt. We will not continue to pursue it," he said.

Donald W. Redmond, Corporate Counsel, Portfolio Recovery Associates said rarely is there a question of whether something is disputed or not. "It’s also been my experience when people dispute a debt, they’re generally vehement about it."

Eric J. Ellman, Vice President and Counsel, Consumer Data Industry Association noted that one-third of all consumer contact with credit bureaus are results of credit repair and a significantly high percentages of those disputes are from credit repair outfits continueing to pound and pound on those accounts in hope they will beat the data furnisher into submission to have that information removed from the file. He stated that the FRB and FTC data showed that 95 percent of disputes are handled to the satisfaction of the consumer. He reported that of the 44 percent of consumers who submitted data in writing, about 85 percent submitted only a standardized form or letter. "It’s clear that very few disputes in fact involve extensive data from consumers," he claimed.

Ian B. Lyngklip, Esq., Lyngklip & Associates Consumer Law Center, PLC said that debt collectors are not acknowledging or taking appropriate action to mark debts as disputed. He also pointed out that there is a far higher standard for verification under the FCRA than there is under the FDCPA. He also noted that he sees credit reporting continuing after a consumer has disputed the debt and sought validation. Another problem he sees is when data is reported and there has been a dispute, that although it may be contrary to the industry standard, many furnishers of data are not reporting those disputes.

An issue that generated heated exchange was the multiple reporting of a single debt collection account. This is the practice of assigning a new account number each time a debt is placed into the hands of a different debt collector or debt buyer. Those representing the debt collection or credit reporting industries stated that it was not industry standard to do so. Furthermore, it isn’t in their best interest to do so because in addition to being furnishers of credit information, they are users and it makes the job of locating consumers harder where there are multiple account numbers. Some representing consumer interests contended that although this may not be industry standard, it nonetheless happens with great frequency.

Another issue that generated heated discussion was that of "rigging a debt." This is the practice of changing the date of first delinquency on a debt. That date is crucial under the law determines when negative information about a consumer need no longer be reported. Again, those in the debt collection and credit reporting side of the table stated that it is not industry standard to "rig a debt." Some representing consumers admitted that this isn’t an industry-wide problem, but "we do see some of the same market players doing this over and over again."

Rebecca E. Kuehn, Assistant Director, Division of Privacy and Identity Protection of the FTC, and

moderator for this session, posited a proposal being floated that would prohibit reporting on a debt until after the 30 day notice period has expired. Mr. Redmond responded that it would be a bad idea for the credit economy overall. "Our credit economy depends on accurate reporting. If people have debts that aren't showing up on credit reports, that's not accurate," he said. Credit reporting is "about being able to make future credit granters be able to make good decisions based on accurate information," he went on to say. Mr. Tormey added that he felt it would have a further chilling effect on the housing market, particularly in the C and D level paper where marginal buyers are trying to get into the housing market.

Mr. Lyngklip however contended that those representing consumers frequently see a practice known as "parking the debt" on the consumer's report. Debt collectors report the debt but never send the validation notice. If the validation notice is not send, the debt stays "parked" on the report for a very long time. According to Mr. Lyngklip, this typically happens with a small debt that isn't even worth the cost of a stamp. However, when the consumer applies for credit years down the road it is discovered and often the consumer needs to pay off this seemingly small amount in order to obtain the larger amount of credit to for example, refinance a home loan.

1:15 - 2:30 pm

Debt Collection Litigation: Current Issues

The first topic discussed by this panel related to Garnishment of federally protected funds

Adam J. Olshan, Esq., Howard Lee Schiff, P.C. appeared as past president of NARCA. He noted that because post judgment interrogatories are very seldom returned by consumers, the attorneys are not likely to know whether funds in bank accounts are exempt funds. He also pointed out that just because a judgment defendant is eligible for exempt funds as elderly or disabled doesn't mean they don't also have funds that are attachable. Mr. Olshan pointed out that when it does happen and the consumer lets the attorney know and demonstrates that those funds are exempt, generally the attorneys will release the funds right away and not go to a hearing.

Robert J. Hobbs, Deputy Director, National Consumer Law Center noted that the problem may not even be that consumers with exempt funds are losing those funds through garnishment. Rather, the funds may be frozen for a couple of weeks until the consumer can obtain a release. "I think if there's one grandmother out there who is losing all of her assets for two weeks, that's one too many," Hobbs stated.

Manuel H. Newburger, Esq., Barron, Newburger, Sinsley & Wier PLLC, on behalf of the Commercial Law League of America, noted that in all the time he has defended attorneys in FDCPA matters, he had exactly one case where a lawyer was accused of garnishing exempt funds.

Lynn Drysdale, Esq., Jacksonville Area Legal Aid, Inc. pointed out that typically these matters are handled by mill firms that are not paying attention to individual cases. When a consumer does file an affidavit to unfreeze the accounts, these firms will contend that the funds are not protected and require the consumer to appear at a hearing.

In response to a question, Steven D. Fritts, Associate Director, Division of Supervision and Consumer Protection, Federal Deposit Insurance Corporation said the option of just not honoring the orders is rather complex. There are three reasons:

- The bank may not know whether the funds are exempt
- The funds may be co-mingled
- The Order may on its face be unclear as to the scope

Mr. Olshen said that if the attorney knows that the funds are exempt, those should not be intentionally attached. However, if it is unclear, the attorney has an obligation to ask the judgment debtor for more information. At this point, the burden shifts to the consumer to provide that information.

The panel turned its attention to litigation to collect on time barred debt. Mr. Hobbs noted that as debt gets older, they are less susceptible to proof. Further, this is a country of hope and opportunity rather than a place of perpetual despair. "People should be paying their debts but people also need at certain points fresh start or they are simply pressed down so hard that they give up hope," he said.

Ms. Drysdale said she sees three problems with lawsuits on time-barred debts:

- Difficulty of providing proof of payment or other defenses
- Time encourages adding "junk fees" to the original debt
- Greater chance of suing the wrong person

Mr. Olshen noted that every prudent collection attorney in the country reviews the file so as to do his or her best not to sue on a time-barred debt. Ms. Drysdale pointed out that the mill firms do not have the time or attorney hours to review the files for each case that they are filing. Mr. Newburger pointed out that it is not proper to bring the lawsuit and let the consumer raise the statute of limitations as an affirmative defense.

Nonetheless there are bad actors in the field. The question was raised of whether the FDCPA needs to be amended to further deal with those bad actors or is the state attorney regulatory agencies and rules sufficient. The lawyers on the panel pointed out that they risk their license to practice and thus their livelihood and this is quite a deterrent. Mr. Newburger pointed out that the judges before whom an attorney practices go a long way as an important check on the system.

Meaningful review by attorneys was discussed. The general feeling was that the attorney will look at the information sent electronically by the clients and will ensure that there is at least a primafacia case to go forward - the name of the original creditor, original account number, an open date or last payment/charge off date. The amount of time and information varies according to type of debt. A bad check collection will take significantly less time and documentation than a mortgage foreclosure matter. The attorney also must rely on the information provided by the client and supervise the work done by the support staff, putting in place procedures to ensure that suits filed are correct.

Attorneys will file a number of lawsuits and drop any lawsuit in which a consumer has actually contested the allegations alleged. Those representing consumer interests tended to feel that this was improper or gave the appearance of impropriety. On the other hand, debt collection attorneys pointed out that if there is a bona fide dispute filed by the debtor, the client must make a business decision as to whether to invest the additional funds necessary to pursue the case including possibly sending a witness to court.

The final issue discussed by this panel raised some disagreement as well. Roger S. Haydock, Managing Director, National Arbitration Forum, LLC reviewed the process for mandatory arbitration. He pointed out that it is generally a faster, easier and cheaper process. No pure default decisions are allowable. However, Mr. Hobbs referred to a study reported about the National Arbitration Forum experience by California consumers and noted that the arbitration proceedings are like "a secret court." He noted that because they are supported by filing fees and MBNA represents 90 percent of their income that could result in bias. Consumer representatives claimed that there were fees the consumer must pay up front in order to go through the process. Mr. Haydock stated that "as a former legal services lawyer…they're virtually plain wrong on everything they said. There's no secret hearings, a party can ask for a transcript. People can be present for that. There are no mandatory response fees by consumers. The cost is capped to consumers."

2:45 - 3:45 pm

Pivotal Issues and Proposed Solutions: Next Steps

The final panel of the day took a look at what changes might be necessary in the law and in the public or private enforcement scheme.

Rozanne M. Andersen, General Counsel and Vice President, ACA International reiterated the ACA desire for pre-emption of state laws by the FDCPA. She also suggested that there be a cure opportunity when a problem is alleged by a consumer. Finally, she suggested that in addition to the law allowing consumers to establish the time and place of communication, consumers should be allowed to designate the method as well.

Richard Riese, Director, Center for Regulatory Compliance, American Bankers Association called for "communication convenience" so that consumers can designate the means by which they want to communicate. Steps should also be taken to establish agreed upon elements relating to credit validation, specifically debtor identification and debt amounts. Finally, there needs to be greater clarity about the exemption of mortgage servicers from the FDCPA.

Margot Saunders, Of Counsel, National Consumer Law Center called for every first communication from a debt collector to the consumer should include in it the name of the original creditor, the principle of the debt and itemization of fees and interest. In addition the collection should only proceed if the collector has reasonably determined that the previous verification requests have been satisfied. The collection should not proceed if the collector has determined or can determine that the statue of limitations bars the debt. Finally, the remedies need to be updated. They are currently 30 years old and statutory damages must be increased and injunctive relief added to deal with continued bad faith violations by some collectors.

Laura Udis, Administrator, Colorado Collection Agency Board called for an amendment to the FDCPA so that consumers obtain in writing notice of their right to cease communication. There should also be better verification of a debt. Finally, there should be an obligation on the part of the collector to transmit communication down the line as debt is sold or reassigned so that the consumer does not need to provide the same information each time a new collector makes contact.

Cynthia R. White, Executive Director, National Association of Retail Collection Attorneys reiterated the NARCA position that it seeks a litigation exemption. Another thing that is important to NARCA members is Safe Harbor letters. Further, the FDCPA needs to be amended to identify means of communication to the debtor that makes it more likely they will respond so as to avoid having to go to court to resolve the claim.

Gary E. Wood, President, Collins Financial Services, Inc., and President, DBA International is seeking improved communication opportunities as well. In addition, he believes that there needs to be more research to develop more empirical data about the industry. He called for an increase in the budget of the FTC so it can do more in its enforcement role resulting in a reduction of private rights of action, which leads in turn to more state court decisions that are often in conflict with each other.

Peggy L. Twohig, Associate Director, Division of Financial Practices, Federal Trade Commission, moderated the panel and attempted to identify a general consensus around a basic set of information that should exist when a debt is collected by a third party or sold to a third party.

Members of the panel noted that not all debt is the same. Credit card debt may have a different set of core information available than automobile indebtedness or healthcare claims. There was a general agreement that the core information needs to make sense, be cost effective, has to be meaningful to the consumer and has to survive. There was also some consensus that cell phones could be an appropriate communication means but only if the consumer agrees and only when the collection process began rather than when the contract is created. However, the "devil is in the details" and some suggested that smaller, less formal gatherings might be valuable to attempt to work out those details.

Some of those representing consumers expressed vehement opposition to FDCPA preemption of state laws because there are many state laws that go farther than the FDCPA. So, if federal preemption is sought, the starting place is the best state law.

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