What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR

Caren Enloe leads Smith Debnam' s consumer financial services litigation and compliance group. In her practice, she defends consumer financial service providers and members of the collection industry in state and federal court, as well as in regulatory matters involving a variety of consumer protection laws. Caren also advises fintech companies, law firms, and collection agencies regarding an array of consumer finance issues. An active writer and speaker, Caren currently serves as chair of the Debt Collection Practices and Bankruptcy subcommittee for the American Bar Association's Consumer Financial Services Committee. She is also a member of the Defense Bar for the National Creditors Bar Association, the North Carolina State Chair for ACA International's Member Attorney Program and a member of the Bank Counsel Committee of the North Carolina Bankers Association. Most recently, she was elected to the Governing Committee for the Conference on Consumer Finance Law. In 2018, Caren was named one of the "20 Most Powerful Women in Collections" by *Collection Advisor*, a national trade publication. Caren oversees a blog titled: Consumer Financial Services Litigation and Compliance dedicated to consumer financial services and has

Third Circuit Holds Settlement Offer on Time-Barred Debt States Plausible FDCPA Claim

March 22, 2018 | by

The Third Circuit refined its position as to whether collection of time-barred debt may violate the FDCPA where the communication involves an offer to settle. In doing so, the Court joined the Fifth, Sixth and Seventh Circuits in holding that, even absent a threat of litigation, offers to settle time-barred debts could mislead the least sophisticated consumer.

In *Tatis v. Allied Interstate, LLC,* 2018 U.S. App. LEXIS 3238 (3rd Cir. Feb. 12, 2018), the debt collector sent a letter that read:

> [The creditor] is willing to accept payment in the amount of $128.99 in settlement of this debt. You can take advantage of this settlement offer if we receive payment of this amount or if you make another mutually acceptable payment arrangement within 40 days.
>
> *Tatis* at *1-2.

Tatis filed suit asserting that the letter violated section 1692e of the FDCPA. Specifically, the consumer alleged that the word "settlement" meant she had a legal obligation to pay the debt and was a false, deceptive or misleading representation or means to collect a debt. Allied's motion to dismiss was granted by the district court which relied on prior Third Circuit precedent, *Huertas v. Galaxy Asset Management,* 641 F.3d 28 (3rd Cir. 2011). The district court held that "an attempt to collect a time-barred debt does not violate the FDCPA unless it is accompanied by the threat of legal action." *Id. a*t *3.

On appeal, the issue before the Court was "whether collection letters may run afoul of the FDCPA by misleading or deceiving debtors into believing they have a legal obligation to repay time-barred debts even when the letters do not threaten legal action." *Id.* at *8. The Court held they may.

At the outset, the Court distinguished its prior opinion in *Huertas* by noting the language

been published in a number of publications including the Journal of Taxation and Regulation of Financial Institutions, California State Bar Business Law News, Banking and Financial Services Policy Report and Carolina Banker.

in that letter did not refer to a settlement. Instead, in *Huertas*, the debt collector informed Huertas that his debt had been reassigned and requested that he contact the agency "to resolve the issue." The Court concluded that *Huertas* "stands for the proposition that debt collectors do not violate 15 U.S.C. §1692e(2)(A) when they seek voluntary repayment of stale debts so long as they do not threaten or take legal action." *Id*. at *7.

The Court then rejected Allied's argument that because the letter did not threaten legal action, there was no violation of the statute. Joining the Fifth, Sixth and Seventh Circuits, the Court was persuaded by the fact that major dictionaries include within the meaning of "settle" and "settlement" a definition that refers to the conclusion and/or avoidance of a lawsuit. The Court noted that section 1692e contains three distinct categories of prohibited conduct: false, misleading and deceptive representations and noted that "misleading" representations can include more than falsehoods. Refusing to provide a narrow interpretation of the FDCPA, the Court declined to require an actual threat of litigation. Instead, the Court held that "[b]ecause the words "settlement" and "settlement offer" could connote litigation, the least-sophisticated debtor could be misled into thinking Allied could legally enforce the debt." *Id.* at *13.

For what it's worth, the Court then attempted to step back from its decision by stating the following:

- "We reiterate what we said both in *Huertas* and elsewhere: standing alone, settlement offers and attempts to obtain voluntary repayments of stale debts do not necessarily constitute deceptive or misleading practices."
- "Nor do we impose any specific mandates on the language debt collectors must use, such as requiring them to explicitly disclose that the statute of limitations has run."
- "We do not, therefore, hold that the use of the word "settlement" is misleading as a matter of federal law."

SO, WHAT ARE THE TAKEAWAYS?

- The use of words like settle and settlement are increasingly thorny in the context of time-barred debt;
- A reminder as to context (both procedural and factual):
  - *Tatis* involved a reversal of a motion to dismiss. The Court's holding should be viewed in context: that the debtor plausibly stated a claim under Rule 12 – nothing more.
  - The Court also makes clear that the letter must be read in context. Plausibly, there are circumstances where the use of words 'settle' and 'settlement' might, in context, not be misleading.

mail@smithdebnamlaw.com

4601 Six Forks Road, Suite 400
Raleigh, NC 27609

Phone: 919.250.2000
Fax: 919.250.2100

Suite 120C
Charleston, SC 29401

Phone: 843.714.2530
Fax: 843.714.2541