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Compliance Concerns Surrounding Purchase and Sale Agreements

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In the May 2010 issue of *the Paper*, the first of three articles was published focusing on purchase and sale agreement issues. The first article provided an overview of purchase and sale agreements and discussed the importance of properly structuring a bill of sale. This article explores external liability factors asset buyers face under federal and state regulations.

FDCPA Liability

Over the last few years, the asset buying industry has been the target of a number of actions filed asserting violations of the Fair Debt Collection Practices Act (FDCPA). Most of the actions were classified as either harassment or misrepresentation of debt.

"The factual contention made in these cases is that the debt buyer or attorney knew when they filed the collection action they would be unable to prove liability because of documentation problems or inability to prove ownership of the debt," said John Chiles, Esq. with Burr & Forman LLP in Birmingham, Ala.

By in large, the asset buying industry and the attorneys representing them have prevailed in these types of FDCPA cases.

"The courts have concluded that even though the asset buyer is ultimately unable to connect the dots and prove ownership, that's not an obligation the asset buyer has when suit is filed," Chiles said. "The ultimate inability to prove the case does not, in itself, establish liability under the FDCPA."

Examples of court decisions showing little support for FDCPA liability based on lack of documentation or chain of title when pursuing litigation against a consumer:

- *Harvey v. Great Seneca*, 453 F.3d 324 (6th Cir. 2006) – Filing lawsuit without proof of ownership or ability to prove debt is not per se harassment.
- *Nickoloff v. Wolpoff & Abramson, LLP*, 511 F. Supp. 2d 1043 (C.D. Cal. 2007) – Concerning potential flaws in chain of title, the court stated that "[a] collector does not violate the FDCPA merely because it files a lawsuit without immediate means of proving a debt."
- *Clark v. Unifund CCR*, No. 07cv0266, 2007 WL 1258113 (W.D. Pa. Apr. 30, 2007) – Filing of a debt collection lawsuit without the immediate means of proving the debt does not have the natural consequence of harassing, abusing or oppressing a consumer.
- *Pack v. Unifund CCR*, No. 8:07-cv-1562-T-27EAJ, 2008 WL 686800 (M.D. Fla. Mar. 13, 2008) – Merely filing a lawsuit is not harassment under §806 of the FDCPA.

State Trends in Liability

Although court decisions interpreting the FDCPA have concluded an asset buyer's failure to immediately prove a debt when filing a lawsuit does not necessarily rise to an FDCPA violation, legislation has been proposed in various states that impose certain requirements that must be met when filing a lawsuit to collect a debt. As a result, it is critical debt collectors and asset buyers must be mindful of state laws and regulations that may mandate heightened requirements for filing collection lawsuits.

"North Carolina is at this point the most far reaching and stringent state with respect to the impact on debt collectors and asset buyers in particular," said Chiles.

Effective Oct. 1, 2009, North Carolina's "Consumer Economic Protection Act of 2009," singles out asset buyers for special

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requirements and restrictions on various aspects of the debt collection process.

Documentation

The North Carolina legislation includes various unfair practices provisions. Liability is imposed not only for attempts to collect time-barred debt, but also for attempting to collect debts for which there is no valid documentation. Under the new law, it is an unfair practice for an asset buyer – or collection agency acting on behalf of an asset buyer – to bring suit or initiate arbitration against a consumer or otherwise attempt to collect a debt from a consumer without (1) valid documentation the debt buyer is the owner of the specific debt instrument or account at issue, and (2) reasonable verification of the amount of the debt allegedly owed by the consumer.

According to the law, reasonable verification includes: (1) documentation of the name of the original creditor; (2) the name and address of the consumer as appearing in the original creditor's records; (3) the original consumer account number; (4) a copy of the contract or other document evidencing the consumer debt; and (5) an itemized accounting of the amount claimed to be owed, including all fees and charges.

Requirements to File Suit

Another unfair practice provision set forth in the Act requires asset buyers filing litigation against a consumer to provide additional information with the complaint or claim evidencing proof of the debt, including evidence regarding the original debt and chain of title. This includes a copy of the contract or other writing evidencing the original debt and containing the consumer's signature.

With respect to materials evidencing chain of title, a copy of the assignment or other writing establishing the asset buyer is the owner of the debt must be attached to the claim.

"If the debt has been assigned more than once, than each assignment or other writing evidencing transfer of ownership must be attached to establish an unbroken chain of ownership," Chiles said.

All materials documenting chain of title must also include the original account number of the debt purchased and clearly show the consumer's name is associated with the account number.

Attorney's Fees

The North Carolina statute states an attorney representing an asset buyer or party holding an assignment to a debt cannot obtain an award of attorney's fees from the court unless evidence is presented regarding the original debt and chain of title.

"The application of this legislation is pretty apparent," Chiles said. "In order to recover on a collection action, the complaint must contain copies of the assignment and each intervening assignment. Essentially the industry is put to the task, at least in this state, of creating transfer documents that are clear and complete and comprehensive as part of the package used to attempt to collect the liabilities in court."

It is difficult to know to what extent these particular requirements will be introduced or considered in other states.

"In other industries, the most stringent regulation has a tendency to control what the industry does," Chiles said. "I feel the industry will be under pressure to adopt the type of comprehensive documentation of ownership that the North Carolina act requires."

Look for the last article in the July issue of *the Paper* on the defense issues surrounding purchase and sale agreements.

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