No. 13-2030

In The United States Court of Appeals For The Seventh Circuit

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Juanita Delgado,
individually and on behalf of a class,
Plaintiff,

v.

Capital Management Services, LP,
CMS General Partner LLC, and CMS Group, Inc.,
Defendants-Appellees.

On Appeal from the United States District Court
For the Central District of Illinois
Hon. Sara Darrow

Case No. 12-cv-04057

Brief of Amici Curiae Federal Trade Commission and Consumer Financial Protection Bureau Supporting Affirmance

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Interest of Amici Curiae

The Federal Trade Commission, an agency of the United States, files this brief pursuant to Federal Rule of Appellate Procedure 29(a), and in response to the Court's May 28, 2013 order inviting the Commission's filing. The FTC is the federal agency with principal responsibility for protecting consumers from deceptive or unfair trade practices, which include violations of the Fair Debt Collection Practices Act ("FDCPA"). 15 U.S.C. § 1692*l*(a). The Commission has closely studied the debt-collection industry, and seeks to inform the Court regarding the Commission's reports and recommendations on debt collection, including the consumer protection issues raised by the collection of time-barred debts and their implications for the FDCPA.

The Commission is joined in this brief by the Consumer Financial Protection Bureau. The Bureau is charged with "regulat[ing] the offering and provision of consumer financial products and services under Federal consumer financial law," which includes the FDCPA. 12 U.S.C. § 5481(12), (14). The FDCPA authorizes the Bureau to enforce the FDCPA, 15 U.S.C. § 1692*l*(b)(6), and generally to "prescribe rules with respect to the collection of debts by debt collectors," 15 U.S.C.

§ 1692*l*(d). The Bureau thus has an interest in the Court's resolution of the issues presented in this case.

Introduction

The Federal Trade Commission is committed to protecting consumers from false, misleading, or deceptive debt-collection practices. In recent years, the Commission has actively sought to identify consumer protection problems and potential solutions in the debt-collection industry, and it has published several reports on the subject.[1] The Commission also uses its enforcement authority under the FTC Act and the Fair Debt Collection Practices Act ("FDCPA") to stop debt collection practices that violate those statutes. The Dodd-Frank Act, enacted in 2010, granted the Consumer Financial Protection Bureau similar authority to take action—under Dodd-Frank and the FDCPA—against unlawful debt-collection practices.

The debt collector in this case sent plaintiff a dunning letter with a limited-time offer to settle a debt upon which the statute of limitations had expired. Plaintiff filed a class-action complaint, contending that the letter violated, *inter alia*, the FDCPA's prohibition on the use of "any false, deceptive, or misleading representation or

[1] *See* FTC, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (July 2010), http://1.usa.gov/buF50z ("*Broken System*"); FTC, *The Structure and Practices of the Debt Buying Industry* (Jan. 2013), http://1.usa.gov/Z0EjxZ ("*Structure & Practices*"); FTC, *Collecting Consumer Debts: The Challenges of Change* (Feb. 2009), http://1.usa.gov/3ZLwb ("*Challenges*").

means in connection with the collection of any debt." 15 U.S.C. § 1692*e*. The debt collector moved to dismiss, arguing that, as a matter of law, the letter could not have violated the FDCPA because it was not an explicit or implied threat to sue.

Several courts have held—and the Commission and the Bureau agree—that a collector who sues or threatens suit on a time-barred debt violates the FDCPA. But actual or threatened litigation is not a *necessary* predicate for an FDCPA violation in the context of time-barred debt. Rather, a debt collector violates the statute whenever its communications tend to deceive or mislead "unsophisticated consumers," whom the FDCPA was enacted to protect. Depending on the circumstances, a time-limited settlement offer could plausibly mislead an unsophisticated consumer to believe a debt is enforceable in court even if the offer is unaccompanied by any clearly implied threat of litigation. The district court thus correctly denied the motion to dismiss. Given the procedural posture of this case, however, the Commission and the Bureau take no position on the ultimate merits of plaintiff's claims.

Statement

A. The Federal Enforcement Role And Interest In Debt Collection Practices.

The FTC receives more consumer complaints about debt collectors than about any other single industry. *Structure & Practices*, *supra* n.1 at i. Since 2007, the Commission has led an effort to identify issues and propose reforms for the industry, seeking the views of industry representatives, consumer advocates, private attorneys, judges, academics, and others through a series of public forums, roundtables, and workshops. In 2009, the Commission issued a comprehensive report with findings, conclusions, and recommendations concerning consumer protection issues related to debt collection. *See Challenges*, *supra* n.1 at i–ix. The Commission continued its study of the industry with a series of public roundtables and an invitation for public comments in 2009, issuing a second report in July, 2010. *See Broken System*, *supra* n.1 at i–vi. The Commission also conducted and published a study of the debt-buying industry, the growth of which it had concluded was the "most significant change in the debt collection business in recent years." *See Structure & Practices* at i–v.

Each of the Commission's reports recognized the potential that consumers will be misled when debt collectors seek payment on time-barred debt. *See Broken System* at ii, 25–26, 28; *Structure & Practices* at 46–48; *Challenges* at 62–64. The Commission determined that debt collectors violate the law not only if they sue or threaten to sue on expired debts, but also "if they engage in deception in collecting on" such debts. *Broken System* at 23; *Structure & Practices* at 46. The Commission concluded that in many circumstances, attempts to collect on a time-barred debt may create the misleading impression that the collector can legally file suit on the debt, and in such circumstances collectors would need to make clear disclosures to avoid creating the misimpression. *See Broken System* at 26, 28.

The FTC also plays an important role as one of the agencies, along with the Bureau, primarily responsible for enforcement of the FDCPA. A violation of the FDCPA is "deemed an unfair or deceptive act or practice in violation of the [FTC] Act," and the Commission may enforce FDCPA violations as if they were violations "of a Federal Trade Commission trade regulation rule." 15 U.S.C. § 1692*l*(a). The Commission enforces the FDCPA through original suits for injunctive

and equitable monetary relief under Section 13(b) of the FTC Act. 15 U.S.C. § 53(b). The Commission may also address deceptive debt collection practices under Section 5(b) of the FTC Act, 15 U.S.C. § 45(b).[2]

Courts have found the Commission's "accumulated expertise" persuasive regarding "the expectations and beliefs of the public, especially where the alleged deception results from an omission of information instead of a statement." *Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1145 (9th Cir. 1978); *see also*, *e.g.*, *Bridge v. Ocwen Fed. Bank*, 681 F.3d 355, 361 (6th Cir. 2012) (finding FTC Staff Commentary on the FDCPA "instructive"); *Dunham v. Portfolio Recovery Assocs.*, 663 F.3d 997, 1002 (8th Cir. 2011) ("[W]e have found [the FTC's] Staff Commentary [on the FDCPA] persuasive in the past.").

B. Facts And Procedural History.

This case arises from the district court's denial of a motion to dismiss the class-action complaint brought by Juanita Delgado against

[2] Pursuant to the Dodd-Frank Act, the Bureau may bring an administrative proceeding or judicial action to enforce the FDCPA and may seek various legal and equitable remedies as well as civil monetary penalties for violations. *See* 12 U.S.C. §§ 5563-5565.

a debt collection agency, Capital Management Services, LP, and two affiliated companies. (Mem. Op. & Order 1–2.)

In 2012, Capital sent Ms. Delgado a letter seeking to collect $2,404.13 purportedly owed on a credit card. (*Id.*) The letter offered a "settlement" of the debt, stating that Capital "is authorized to accept less than the full balance due as settlement of the above account." (*Id.*) The letter also stated, "The settlement amount of $721.24, which represents 30% of the amount presently owed, is due in our office no later than forty-five (45) days after receiving this notice," and represented that Capital "is not obligated to renew this offer." (*Id.*) The parties agree that, though Capital's letter did not say so, the statute of limitations for filing an action to collect the debt had run. (*Id.* at 3.)

Ms. Delgado's class-action complaint alleges that the letter violates the FDCPA, 15 U.S.C. §§ 1692*e* & 1692*f*, because the failure to disclose that the debt was time-barred, together with Capital's offer to settle, amounted to a misleading representation that the debt could be legally enforced. (*Id.*) Capital moved to dismiss the complaint, arguing that the FDCPA does not expressly require debt collectors to disclose

that a debt is time-barred, and that its letter did not explicitly or implicitly threaten litigation. (*Id.* at 6–7.)

The district court denied the motion. In analyzing the statutory issues, the court considered the FTC's *Broken System* and *Structure & Practices* reports, *supra* n.1, as well as the complaint and settlement in *United States v. Asset Acceptance LLC*, No. 8:12-cv-182-T-27 (M.D. Fla.), involving allegations that certain attempts to collect on time-barred debts without disclosing that they were time-barred violated the FDCPA. (*Id.* at 7–10.) According to the district court, "the FTC does not view the affirmative threat of litigation as a necessary element for a consumer to be deceived or misled by a dunning letter that seeks to collect on a stale debt. Rather, taking collection action on a time-barred debt may be considered deceptive, thus necessitating the need for . . . disclosures to consumers regarding the age of their debts and the consequences of making payments on them." (*Id.* at 10.)

The court found this position "persuasive," stating that "absent disclosures to consumers as to the age of their debt, the legal enforceability of it, and the consequences of making a payment on it, it is plausible that dunning letters seeking collection on time-barred debts

may mislead and deceive unsophisticated consumers." (*Id.* at 10–11.) With regard to the specific letter sent to Ms. Delgado, the court "found it plausible that an unsophisticated consumer could be deceived into believing that the offer of settlement implies a legally enforceable obligation to pay the debt." (*Id.*) Accordingly, the court concluded that Ms. "Delgado has stated plausible claims for relief" under the FDCPA. (*Id.* at 13.)

The court certified its decision for interlocutory review, and on May 28, 2013, this Court issued an order inviting the Commission to file an amicus brief.

Argument

I. The FDCPA and Time-Barred Debt.

The FDCPA prohibits, among other things, the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692*e*.[3] Section 1692*e* contains a nonexclusive list of prohibited practices. These include making a false representation of "the character, amount, or legal status of any debt," threatening "to take any action that cannot legally be taken or that is

[3] Ms. Delgado's complaint alleged violations of both Sections 1692*e* and 1692*f*, prohibiting "unfair or unconscionable" debt collection practices. This brief focuses on misleading or deceptive conduct under Section 1692*e*.

not intended to be taken," and "using any false or deceptive means to collect or attempt to collect any debt." 15 U.S.C. §§ 1692*e*(2)(A); 1692*e*(5); 1692*e*(10). The latter prohibition is "particularly broad and encompasses virtually every violation, including those not covered by the other subsections." FTC, *Staff Commentary on the Fair Debt Collection Practices Act*, 53 Fed. Reg. 50097, 50105 (Dec. 13, 1988). Under this subsection, "[a] debt collector may not [*inter alia*] mislead the consumer as to the legal consequences of the consumer's actions." *Id.* at 50106.

A. The Legal Standard.

"The Fair Debt Collection Practices Act is an extraordinarily broad statute. Congress addressed itself to what it considered to be a widespread problem, and to remedy that problem it crafted a broad statute." *Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir. 1992); *see also O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938, 941 (7th Cir. 2011) (Section 1692*e* "is broadly written."). Courts thus "apply the Act broadly according to its terms." *Bridge*, 681 F.3d at 362.

In assessing whether a debt collector's communications are misleading or deceptive under the FDCPA, this Court looks to whether

an "unsophisticated consumer"[4] would be misled or deceived. *Williams v. OSI Educ. Servs.*, 505 F.3d 675, 678 (7th Cir. 2007). In this Court, "[t]o learn how an unsophisticated reader reacts to a letter, the judge may need to receive evidence." *Walker v. Nat'l Recovery, Inc.*, 200 F.3d 500, 501 (7th Cir. 1999). A debt collector's communication need not contain overtly false statements to be misleading or deceptive; for example, omissions may also deceive. *Kimber v. Federal Fin. Corp.*, 668 F. Supp. 1480, 1489 (M.D. Ala. 1987) ("[I]n order to be deceptive a representation need not be expressed and it need not be obvious to everyone.").

In determining whether conduct is deceptive under the FDCPA, the Commission's interpretation of deception under Section 5 of the FTC Act is instructive. *See*, *e.g.*, *FTC v. Check Investors, Inc.*, 502 F.3d 159, 174 (3d Cir. 2007); *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979) ("The deceptive acts or practices forbidden by the [FTC] Act include those used in the collection of debts."). As the

[4] Other Circuits apply a "least sophisticated consumer" standard. *E.g.*, *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993) (collecting cases). This Court has stated that the difference in terminology is "a distinction without much of a practical difference in application." *Avila v. Rubin*, 84 F.3d 222, 227 (7th Cir. 1996). To the extent there is any difference, the complaint in this case states a claim under either standard. *Cf. Peter v. GC Servs. L.P.*, 310 F.3d 344, 349 n.5 (5th Cir. 2002).

Commission has explained, "it can be deceptive to tell only half the truth, and to omit the rest." *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1984 FTC LEXIS 2, at *240 (1984). This occurs, for example, "where a seller fails to disclose qualifying information necessary to prevent one of his affirmative statements from creating a misleading impression." *Id.* It can also "be deceptive . . . to simply remain silent . . . under circumstances that constitute an implied but false representation." *Id.* at 241. Such implied representations can arise from, for example, "the circumstances of a specific transaction, or they may be based on ordinary consumer expectations." *Id.*

To avoid misleading consumers, sellers and debt collectors alike may be required to correct consumers' misimpressions even if they did not directly create, or only partially created, the misimpression. The Commission has thus held that advertisers may be held liable for deception where, by failing to correct misimpressions, their ads "capitalize on preexisting consumer beliefs." *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 1994 FTC LEXIS 196, at *36 n.1 (1994); *see also Simeon*, 579 F.2d at 1145 (affirming Commission holding that seller's "failure to disclose" certain details of its weight loss program, combined

with consumers' preexisting misimpressions, "render[ed]the [seller's] advertisement deceptive"); *In re Peacock Buick*, 86 F.T.C. 1532, 1555 (1975), *aff'd mem.*, 553 F.2d 97 (4th Cir. 1977) ("[D]eception can result from the setting in which a sale is made and the expectations of the [borrower]—whether intent to deceive exists or not.").

B. In a Range of Circumstances, Collecting Or Attempting To Collect Time-Barred Debt Violates The FDCPA.

Statutes of limitation reflect a legislative judgment that failing to put a defendant on notice to defend against a suit within a specified period is "unjust." *United States v. Kubrick*, 444 U.S. 111, 117 (1979). This is because "'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *Id.* (quoting *R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)). Statutes of limitation "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence." *Id.* The limitations period also provides a bright line for debt holders and consumers, signifying a time when "no further legal action to collect on a debt is permitted." *Challenges* at 63. The running of the statute thus works to the benefit of consumers who owe

debts that become stale. Yet the applicable state statutes of limitation can be "variable and complex, and [are] generally not understood by consumers." *Broken System* at 2, 26.

In most states, the expiration of the statute of limitations on a debt does not extinguish the debt.[5] *Structure & Practices* at 45. In other words, the running of the statute "does not prohibit the collector from using non-litigation means" to collect the debt, so long as those efforts do not run afoul of the prohibitions in the FDCPA and other laws. *Broken System* at 22–23. Moreover, consumers may choose for moral or other reasons to pay their debts even when they know those debts are time-barred. *Id.* at 23 n.103.

Accordingly, in some circumstances "a debt collector may seek voluntary payment of a time-barred debt" without violating the FDCPA, even if the communication is silent as to the statute of limitations.[6] *Wallace v. Capital One Bank*, 168 F. Supp. 2d 526, 528 (D. Md. 2001).

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[5] Two exceptions are Mississippi and Wisconsin, where the expiration of the statute of limitations does extinguish the debt. Miss. Code Ann. § 15-1-3; Wis. Stat. Ann. § 893.05.

[6] The Commission disagrees with Ms. Delgado's contention (Delgado Br. at 8-10) that the Commission's complaint in *Asset Acceptance* stands for the proposition that every effort to collect a time-barred debt without a disclosure is deceptive. The complaint leaves open the possibility that in other circumstances attempts to collect on time-barred debt might not create the misleading impression that the debt is legally enforceable in court.

However, the "contact between a debt collector and a debtor" will violate the FDCPA if it explicitly or implicitly "represent[s] that the debt collector can sue on the debt" or otherwise violates the FDCPA's prohibitions. *See id.*; *Kimber*, 668 F. Supp. at 1489.

1. Suing or threatening to sue on a time-barred debt violates the FDCPA.

The Commission and the Bureau agree with the many cases holding that threatening to sue on a time-barred debt violates the FDCPA. *E.g.*, *Kimber*, 668 F. Supp. at 1480; *Basile v. Blatt, Hasenmiller, Liebsker & Moore LLC*, 632 F. Supp. 2d 842, 845 (N.D. Ill. 2009) (collecting cases). Threats to sue (and actual lawsuits) misrepresent the legal status of time-barred debt—violating 15 U.S.C. § 1692*e*(2)(A)—by implying that the collector "can legally prevail" in a lawsuit. *E.g.*, *Kimber*, 668 F. Supp. at 1488. For similar reasons, filing or threatening suit also violates both Section 1692*e*(5) as an improper threat and Section 1692*e*(10) as a deceptive means of collecting an expired debt.

As most courts have found, an implicit threat is sufficient to violate the statute. *E.g.*, *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 33 (3d Cir. 2011) (looking to whether letter "explicitly or implicitly

threaten[ed] litigation"); *Rawson v. Source Receivables Mgmt.*, 2012 U.S. Dist. LEXIS 125205, at *5 (N.D. Ill. 2012) (threatening "further collection efforts" sufficient); *Stepney v. Outsourcing Solutions, Inc.*, 1997 U.S. Dist. LEXIS 18264, at *1, *5 (N.D. Ill. 1997) (threatening "further collection action").

2. Attempts to collect time-barred debt may also violate the FDCPA or trigger an obligation to disclose in circumstances other than actual or threatened litigation.

Although an implicit threat is a *sufficient* condition of a statutory violation in this context, it is not also a *necessary* condition. That point is the subject of some confusion in the case law. Though there is wide agreement that actual or threatened lawsuits on stale debts violate the FDCPA, a number of courts have inartfully described this principle as if it sets the outer limit on FDCPA liability in time-barred debt cases. For example, in *Freyermuth v. Credit Bureau Services,* the Eighth Circuit stated that "in the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid." 248 F.3d 767 (8th Cir. 2001). The Third Circuit has similarly stated that a plaintiff's "FDCPA claim hinges on whether [the debt collector's] letter

threatened litigation." *Huertas*, 641 F.3d at 28. Other courts have used comparable language. *E.g.*, *Walker v. Cash Flow Consultants, Inc.*, 200 F.R.D. 613, 616 (N.D. Ill. 2001) ("[I]n order to survive a motion to dismiss, a defendant's attempt to collect on a time-barred debt must be accompanied by actual litigation or a threat, either explicit or implicit, of future litigation.").

The Appellants' brief in this case collects many such decisions (*see* Opening Br. 6–7). But most of those cases involved the claim that *any* attempt to collect a stale debt without telling the consumer it is time-barred violates the FDCPA. *E.g.*, *Huertas*, 641 F.3d at 32–33; *Walker*, 200 F.R.D. at 616 ("[I]t is [not] a violation of the FDCPA to merely attempt to collect a time-barred debt."). In rejecting that broad claim, these courts did not consider that some attempts to collect stale debts—unaccompanied by any threat of suit—may be misleading in other ways.

In fact, some such attempts clearly are unlawful. Under its plain terms, a debt collector violates the Act by (among other things) misrepresenting the "character, amount, or legal status" of a debt; or by using any other "false representation or deceptive means" to collect the debt. 15 U.S.C. §§ 1692*e*(2)(A), 1692*e*(10). The "critical issue" is not

simply whether there has been an actual or threatened lawsuit, but whether the unsophisticated consumer would be misled or deceived by the debt collector's conduct. *Stepney*, 1997 U.S. Dist. LEXIS 18264, at *13; *see Structure & Practices* at 46–47 (Efforts to collect time-barred debt that "convey or imply to consumers that the collectors could sue them if they do not pay" are "false or misleading."); *Broken System* at 26. Suing and threatening to sue on a time-barred debt are two specific examples of conduct that qualifies. But they are not the only ones.

In a related context, the Commission has concluded that consumers can be misled or deceived when debt collectors seek partial payments on stale debt. *Broken System* at 27–28; *Structure & Practices* at 47. In most states, a partial payment restarts the statute of limitations for the entire amount of the debt. *Structure & Practices* at 47 & n.195 (collecting cases). The Commission observed that "consumers do not expect" that a partial payment "will have the serious, adverse consequence of starting a new statute of limitations." *Broken System* at 28.

Accordingly, the Commission concluded that a debt collector's solicitation of a partial payment on a time barred debt—implying,

incorrectly, that the payment will *reduce* the consumer's legal obligation—can "create a misleading impression as to the consequences of making [a] payment," thereby violating the FDCPA, 15 U.S.C. § 1692*e*. *Id.* at 28. The Commission stated that "[t]o avoid creating a misleading impression, collectors would need to disclose clearly and prominently to consumers prior to requesting or accepting such payments that (1) the collector cannot sue to collect the debt and (2) providing a partial payment would revive the collector's ability to sue to collect the balance." *Id.*

In sum, the debt collector need not make an overt threat or a false or misleading representation about the debt to violate the FDCPA. Rather, the court must consider a practice's effect on unsophisticated consumers from their perspective—for example, in light of circumstances such as their prior collections experience and any preexisting misconceptions. In particular, it will often be relevant that most consumers do not know or understand their legal rights with respect to time-barred debt. *See Broken System* at 2, 26; *Kimber*, 668 F. Supp. 1480, 1486–88 ("[F]ew unsophisticated consumers would be aware that a statute of limitations could be used to defend against

lawsuits based on stale debts," and "would unwittingly acquiesce to such lawsuits."). In some circumstances, a debt collector may be required to make affirmative disclosures in order to avoid misleading consumers.

II. The District Court Properly Denied The Motion To Dismiss.

To survive a motion to dismiss, Ms. Delgado's "complaint must 'state a claim to relief that is plausible on its face,' which in turn requires sufficient factual allegations to permit the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Engel v. Buchan*, 710 F.3d 698, 709 (7th Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A court draws all reasonable inferences in favor of the plaintiff. *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 820 (7th Cir. 2009).

Whether a debt collector's letter is false, deceptive, or misleading requires "a fact-bound determination of how an unsophisticated consumer would perceive the letter." *McMillan v. Collection Professionals, Inc.*, 455 F.3d 754, 759 (7th Cir. 2006). Accordingly, district courts should "act with great restraint" when ruling on a motion

to dismiss a complaint brought under Sections 1692*e* and 1692*f* of the FDCPA. *Id.* at 759.

Here, the question before the district court was whether Capital's letter could plausibly mislead an unsophisticated consumer to believe that her debt was enforceable in court. As noted, Capital's dunning letter included an offer of "settlement," a 45-day deadline for payment of the "settlement amount," and a representation that the company "is not obligated to renew this offer." (Mem. Op. & Order 2.) Under the circumstances, the district court properly denied the motion to dismiss. But because Ms. Delgado has not moved for judgment on the pleadings, this Court need not decide—and the Commission and the Bureau take no position on—whether "an FDCPA violation is so 'clearly' evident" that judgment should be granted to her without further factual development. *Cf. Durkin v. Equifax Check Servs.*, 406 F.3d 410, 415 (7th Cir. 2005).

This Court's opinion in *Evory v. RJM Acquisitions* helps guide the motion-to-dismiss inquiry. 505 F.3d 769, 775–76 (7th Cir. 2007). In *Evory*, the question was whether apparently time-limited offers to settle at a discount would mislead an unsophisticated consumer to believe

that the offer represents the only "chance to settle their debt for less than the full amount." *Id.* at 775. After determining that an appropriate disclosure could prevent consumers from being misled, the Court looked to whether a settlement offer without any disclosures would be deceptive. *Id.* at 776. The Court found a "potential for deception of the unsophisticated in those offers," which could be shown by extrinsic evidence. *Id.*[7]

Here, as in *Evory*, the collector's offer of "settlement" has at least "the potential for deception." 505 F.3d at 776. An unsophisticated consumer may well have a preexisting belief that "settlement" and litigation are mutually exclusive options, such that rejecting a formal offer of "settlement" will result in a lawsuit. *Cf. Stouffer Foods*, 118 F.T.C. 746, 1994 FTC LEXIS 196, at *36 n.1.

Moreover, Capital's 45-day deadline for paying "[t]he settlement amount," combined with its admonition that "[w]e are not obligated" to renew the settlement offer, may also have contributed to an unsophisticated consumer's impression that litigation could follow

[7] This is not to say, of course, that extrinsic evidence is required to show a violation in all FDCPA cases. *See Avila*, 84 F.3d at 226-227; *Durkin*, 406 F.3d at 415.

rejection of that offer.[8] The deadline, for example, could imply that failure to pay by that date would result in litigation. In short, Capital's failure to include "qualifying information necessary to prevent [the settlement offer] from creating a misleading impression" could therefore be deceptive. *Cf. Int'l Harvester*, 104 F.T.C. 949, 1984 FTC LEXIS 2, at *240.[9]

In sum, because the letter could plausibly mislead an unsophisticated consumer to believe that a time-barred debt could be enforced through litigation, the district court properly denied the motion to dismiss.

Conclusion

The district court's denial of the motion to dismiss should be affirmed.

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[8] The letter's disclaimer that "We are not obligated to renew this offer" may have been inspired by *Evory,* in which the Court suggested that language as a "safe harbor" to address the possibility that unsophisticated consumers would be misled about the potential for future discounts. 205 F.3d at 776. When the underlying debt is time-barred, however, that language, in the absence of additional disclosures regarding the legal status of the debt, could strengthen the impression that a lawsuit would follow if the debtor did not pay the deadline.

[9] Even if Capital were correct (it is not) that "an implied threat of litigation" is a necessary condition for FDCPA liability (Br. 6), this case might satisfy that condition.

Respectfully submitted,

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Dated: August 14, 2013

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7) in that it contains 4,709 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirement of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook.

Dated: August 14, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2013 I filed and served the foregoing with the Court's appellate CM-ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 14, 2013

/s/ Theodore (Jack) Metzler

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