PROTECTING CONSUMERS IN DEBT COLLECTION PROCEEDINGS, P094806

WHEN: **AUGUST 5 AND 6, 2009**

LOCATION: **THORNE AUDITORIUM, NORTHWESTERN LAW SCHOOL**

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SUBMITTED ELECTRONICALLY BY ASSET ACCEPTANCE, LLC ON JULY 31, 2009

I. INTRODUCTION

Asset Acceptance, LLC ("Asset") is a leading purchaser and collector of charged-off debt, with roots in the practice of purchasing delinquent receivables dating back more than 45 years. Asset's collection efforts include mailing letters and calling consumers. Only after those efforts fail, either as a result of being unable to negotiate a mutually acceptable settlement or the consumer refuses to discuss the account, will Asset resort to litigation (or arbitration but only if required by contract) to the extent Asset's internal guidelines allow for the suit and Asset and its attorneys, either in-house or retained, believe the applicable statutes of limitations has not expired.

Asset recognizes and applauds the Federal Trade Commission's ("FTC") desire to conduct these roundtable discussions on litigation and arbitration. Asset is uniquely situated and informed on these issues because Asset litigates in virtually all the states either through its employed or retained attorneys. We welcome a healthy dialogue on these largely state regulated issues.

II. DEFAULT JUDGMENTS

Default judgments serve a valid and useful purpose by providing an efficient and inexpensive means of adjudicating meritorious cases the defendant chooses not to contest. Default judgments eliminate the need for costly litigation and lighten the load of already clogged state court dockets, thereby allowing court personnel to move contested cases through the system more efficiently.

The entry of default judgments is controlled by the court rules in each state. Many states require a two-step process before the court enters a judgment. The courts first require notification (i.e., service of the complaint) of the lawsuit and then the courts themselves typically notify the defaulted defendant of the entry of default for failing to appear and warn that a judgment may be entered if no response is filed. The current rules provide ample protection to the defendant and no tinkering is required. The rules should (and most do) apply equally to all plaintiffs. There is no need to implement special rules to heighten the requirements for collection actions. If the states modify any of their rules,

which Asset believes is not necessary, they should be changed for all litigants, not only those collecting debt.

To the extent more default judgments are entered in collection actions than other litigation, valid reasons exist for this discrepancy. Asset, like many other debt collectors, does not rush to sue consumers. Lawsuits (and arbitrations) take time, cost money and are inherently unpredictable. Asset works hard to reach its consumers and arrive at a mutually acceptable resolution through non-judicial means. To the extent consumers respond to our non-judicial means of collections, many accounts settle. Valid disputes raised by consumers result in the account being closed. The majority of accounts that thus remain ripe for suit (or arbitration) are those where the consumer owes the money and no valid defenses exist. By the time we sue, there is no valid dispute on the account, the consumer has stopped making voluntary payments and either refuses to pay or ignores us, believing we will not pursue our legal remedies. Requiring more time and effort by plaintiffs and the court to litigate these types of cases to judgment without the appearance of a defendant will only increase the cost of litigation, which ultimately will be charged to defaulted defendants, and further clog the state court dockets.

III. SERVICE OF PROCESS

No changes are required with respect to service of process. The states know best whether their rules protect their citizens to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950). We litigate in most states and see no need for any change. Like with any industry or business, isolated instances of misconduct may exist. The rules should not be changed to address isolated actors or circumstances. Those actors can be punished in other ways that do not affect or require those who follow the rules to change their ways.

IV. STATUTES OF LIMITATION

Asset does not (nor do we know of any creditors or other debt buyers who) intentionally or knowingly file suits after the expiration of the applicable statutes of

limitation. Although the statute of limitations is an affirmative defense that must be raised by the defendant or it is waived, it is improper to knowingly file time-barred suits and wait to see if it is pled. Asset has rigorous procedures and policies in place to only file suits before (and thus prevent suits from being filed after) the expiration of the applicable statutes of limitation. Those policies and procedures have been upheld in various courts as prudent and reasonable for purposes of the bona fide error defense under the Fair Debt Collection Practices Act ("FDCPA").

No additional federal or state regulatory measures are needed to address whether collection suits are being filed after the expiration of the statute of limitations. Debt collectors are already singled out in this area. The FDCPA and many state statutes **already** place debts collectors in the unique, disadvantaged and unconstitutional position of being held liable for exercising their first amendment right to petition by filing lawsuits that are not "objectively baseless" and pursued for no reason other than to recover unpaid debts. Professional Real Estate Investors, Inc., v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61 (1993).

Ample additional safeguards exist within the judicial system. Suits can be filed only by attorneys who are licensed and regulated by their respective states. Attorneys simply are not going to risk their license, livelihood, credibility and reputation by intentionally suing on time-barred debts. State court judges are a close-knit group and attorneys know that their indiscretions in one court travel with them to other courts.

It is our impression that the majority of suits claiming debt collectors sued on time-barred debts concern intricate legal issues upon which there is no or relatively little guidance provided by the Courts. For instance, the application of choice of law provisions, both contractually and statutory, to determine which statute of limitations applies, has been heavily litigated the last few years. This could potentially implicate the statutes of limitation in the states where the consumer resides, where the transaction occurred, where payment is due, where the consumer made the decision not to pay, or where the creditor is based, assuming yet another jurisdiction is not designated in the contract. Consumers also claim suits have been filed after the applicable statute of limitations based on an oral contract, even though the suit was, in fact, based on a written

contract/credit card agreement. The issue of whether credit card debt is subject to a written or oral contract statute of limitations (to the extent a state has such separate statutes of limitation) has been decided in some, but not all, jurisdictions.

The calculation of the date by when suit must be filed to be timely is, admittedly, not a science. This problem is not unique to the collection industry; it is true for all litigants. The expiration of the statute of limitations is an affirmative defense for the very reason the defendant/consumer may have more knowledge as to its application and thus discovery is needed to determine not only the appropriate statute of limitations but whether it has expired. Factual issues, including but not limited to the consumer's residence, where and when payments were made and how they were made could affect whether the statute of limitations has been tolled, revived, refreshed or when it commenced.

For these reasons, there is no need for additional regulation to deter the filing of time-barred lawsuits.[1]

V. PRIMA FACIE COLLECTION CASE AND EVIDENTIARY BURDENS

State law controls the content of a complaint. Most court rules require "notice pleading" (i.e., enough facts to reasonably inform the adverse party of the nature of the claims he or she is called upon to defend) and do not contain a heightened requirement for collection complaints or complaints filed by debt buyers.

These facts notwithstanding many judges have usurped these rules by imposing heightened and more stringent filing and evidentiary requirements **only** on debt buyers or for collection complaints. Many of these courts essentially require debt collectors to be

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[1] It is unclear why the Agenda for the Roundtable Discussion includes whether collectors should be required to affirmatively disclose to consumers that they have no legal obligation to pay a debt that is beyond the statute of limitations. The Roundtable focuses on litigation and arbitration only; the 2007 FTC workshop focused on collecting time-barred debt through non-judicial means. In any event, as numerous commentators and submissions made clear in 2007 and in recent submissions to the Attorney General in New Mexico, such a disclosure is not warranted, may constitute the unauthorized practice of law and could expose debt collectors to FDCPA liability and subject consumers to greater confusion.

ready for trial in order to commence an action or obtain a default judgment, even though, with respect to the latter, the very same court rules require the court to find that the defendant has admitted all the allegations in the complaint by not defending. For example, in order to obtain a judgment, the requirements vary from:

- An affidavit from the creditor or debt owner attesting to the ownership and amount of the debt in question;
- Copies of final statements which have been sent to the debtor;
- Copies of a charge-off statement and a statement showing activity;
- Copies of all statements showing the account from a -0- balance to the amount of the charge-off;
- Copies of a signed application (even in instances where the account was established over either the internet or phone); or
- A document from the seller showing the defendant's account was acquired as part of the bill of sale or assignment at issue.

The same inconsistency and heightened standard for debt buyers exists regarding the admissibility of evidence. Once again, even though the rules of evidence are the same for all litigants, there appear to be tougher rules for debt buyers or debt collectors as opposed to other plaintiffs. For instance, the rulings vary from:

- The extreme of requiring a qualified representative of the original creditor to be present and testify in order to introduce account information generated by that creditor;
- A certification from the original creditor suffices to allow the introduction of the original creditor's account information;
- The more reasonable, logical and legally correct requirement of treating the records of the original creditor as the business records of the debt buyer where the debt buyer proffers the appropriate witness and the required testimony.

There is no legitimate basis for creating special rules for debt buyers or debt collectors. The state court rules govern the litigation process and related evidentiary requirements. Although the inconsistent approaches described above are unfortunate, they typically result from court rulings that can be rectified through the state court

appellate system or the state court legislatures. Federal intervention is not appropriate at this time

VI. GARNISHMENT

Garnishment is the last recourse of creditors after other options for voluntary collection of the account have been exhausted. At the time of an initial garnishment of a bank account a creditor almost always has no information as to the source of the funds in the account. Very few consumers respond to post-judgment discovery on this subject. Only after the debtor claims an objection does the creditor have the opportunity to inquire as to the source. In many instances a debtor will co-mingle exempt and non-exempt funds within the same account. It is then up to a court to decide which funds are or are not exempt.

We believe that creditors do not make additional garnishment attempts after learning that funds are exempt as it will lead to a waste of court costs. Most, like us, release the garnishment. Additionally, many states have either passed or are considering passing laws which both codify the exemptions (state and federal) and prohibit the garnished financial institutions from withholding exempt funds.

VII. ARBITRATION

As a debt purchaser, we must honor the contracts between the original creditor and the consumer. We thus arbitrate when contractually required to do so. We prefer not to arbitrate, however. Although arbitration does often allow for more interaction with the consumers in an effort to understand each other's positions and resolve differences, it increases the cost of litigation, in part, because the award must still be confirmed in court. Recent events, including the decisions of the National Arbitration Forum and American Arbitration Association to stop accepting new filings, stand to have a significant effect on original creditors, consumers, debt purchasers, and state court dockets. We look forward to a lively discussion regarding arbitration on day two of the Roundtable.

VIII. CONCLUSION

Asset looks forward to attending the Roundtable and working with the industry, the FTC, consumer advocates and state court administrators, judges and legislators on these important issues to the Nation's economy.

Asset Acceptance, LLC

By: _____

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