Debt Buyer Loses Round Two in FDCPA Class Action Case

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http://www.insidearm.com/daily/debt-buying-topics/debt-buying/debt-buyer-loses-round-two-in-fdcpa-class-action-case/

In what appears to be the case that won't go away, a debt buyer is dealt another blow by the U.S. Court of Appeals for the Seventh Circuit.

In March of 2014 insideARM published an excellent **article (http://www.insidearm.com/opinion/court-ruling-impact-debt-collection-settlements-are-dead-long-live-litigation/)** by Joann Needleman regarding the case *McMahon v. LVNV Funding* et al, 2014 U.S. App. LEXIS 4592 (7th Cir., 2014). (*The article was a reprint of post that originally appeared on the* ***Consumer Financial Services Blog*** *(http://consumerfsblog.com/).*)

That original opinion held that a letter from a non-attorney debt collector on a time barred debt was false, deceptive, and misleading because it used the word "settlement."

The case made its way back to the Seventh Circuit Court of Appeals on a separate issue. On December 8, 2015 the Court of Appeals issued another **opinion (http://www.insidearm.com/wp-content/uploads/McMahon-v.-LVNV-II.pdf?279849)**, this time on the appeal of a district court decision denying plaintiff's request for class action certification.

Following the order from the first appeal McMahon moved the district court for class certification. He described his proposed class as follows:

(a) all individuals in Illinois (b) to whom LVNV ... (c) sent a letter seeking to collect a debt that referred to a "settlement" (d) which debt was (i) a credit card debt on which the last payment had been made more than five years prior to the letter, or (ii) a debt arising out of the sale of goods (including gas) on which the last payment had been made more than four years prior to the letter (e) which letter was sent on or after February 28, 2011 and on or before March 19, 2012, (f) where the individual after receipt of the letter, (i) made a payment, (ii) filed suit, or (iii) responded by requesting verification or contesting the debt.

The district court was satisfied that the proposed class met the numerosity, commonality, typicality, and adequacy requirements of Federal Rule of Civil Procedure 23(a) for class action proceeding. But it concluded that the class nonetheless could not be certified, because of what it saw as a failure to meet the requirements of Rule 23(b)(3).

In particular, the court held that issues common to the class did not predominate over issues affecting individual class members. It based this conclusion on the fact that the proposed class includes persons seeking actual damages—namely, those who paid a part of the debt after receiving a dunning letter—and that the case therefore eventually would involve issues of individual causation and damages. The court stated that even if "the amount of damages due each class member is 'capable of ministerial determination,' causation, *i.e.*, determining whether class members paid the debt because of the letter, out of moral compulsion, or for some other reason, is not." And given that the proposed class was estimated to have 3,000 members, the court continued, "the individual issues will dwarf the issues common to the class, making this case unsuitable for class certification."

McMahon moved the district court for reconsideration of the order denying class certification, but his motion was denied. He then filed his petition for interlocutory review.

Editor's Note: An interlocutory appeal is an appeal of a specific ruling by a trial court, asking an appellate court to review a significant aspect of a case before the trial has concluded. This type of appeal is an extraordinary action as courts prefer a case proceed to conclusion on its merits and do not like to break up litigation into multiple parts.

The court of appeals disagreed with the trial court and remanded the case back down to the district court……again.

The appellate court wrote: "[T]he need for individual damages determinations does not, in and of itself, require denial of [a] motion for certification. It is well established that, if a case requires determinations of individual issues of causation and damages, a court may "bifurcate the case into a liability phase and a damages phase. ("[A] class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed."

insideARM Perspective

This case has twice generated opinions that impact the ARM industry.

The first opinion addressed the troublesome issue of "settlement" language in letters from a non-attorney on out-of-stat accounts.

The second opinion may have an even more dramatic impact. The Seventh Circuit logic could be viewed as a new standard for class action certification in scenarios where members of a potential class are not homogeneous. The Court of Appeals rejected the well-reasoned opinion of the Honorable Jorge L. Alonso, District Court Judge.