Banking and Finance Law Daily Wrap Up, DEBT COLLECTION—7th Cir.: Debt collectors who fail to report disputed debts may be defaming consumers, (Feb. 3, 2022)

Banking and Finance Law Daily Wrap Up

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By Justin Marcus Smith, J.D.

While the failure to report that consumers had disputed their respective debts was found to be generally defamatory, one of the two debt collectors did not take reasonable steps to enjoy "safe harbor" treatment under the FDCPA.

In a consolidated appeal pertaining to the Fair Debt Collection Practices Act (FDCPA), the U.S. Court of Appeals for the Seventh Circuit affirmed summary judgment for the prevailing debt-collector defendant in one of the two cases brought by consumers but not the other. The FDCPA ordinarily requires debt collectors to report to the credit bureaus instances of consumers disputing their debt. The appealing consumers argued that the collectors were not entitled to a "bona fide error" defense in their failure to comply with the FDCPA's "disputed debt" reporting requirement; therefore, the debt collectors should not enjoy the relevant "safe harbor" exception under the FDCPA. Applying *de novo* review to the facts, the Seventh Circuit found one of the two debt collectors had a reasonable procedure in place to avoid errors so as to qualify for the safe harbor; however, the other did not. Notably, the reviewing court reasoned that the recent holding in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) meant that the reporting omissions were fundamentally defamatory in nature at common law. In general, similar errors are capable of causing sufficient concrete defamatory injury for the consumers to enjoy Article III standing, even without later publication to fourth parties (*Ewing v. MED-1 Solutions, LLC*; *Webster v. Receivables Performance Management, LLC*, Feb. 2, 2022, Sykes, D.).

Background. In the two fact patterns on appeal, the consumer-appellants had sued their respective debt collectors for actual and statutory damages related to the debt collectors' respective failures, under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692e(8), to tell the credit reporting bureaus that these consumers had disputed their alleged debts. The debt collectors variously misplaced or ignored the consumers' written notices.

In both instances, the district courts below held that the debt collectors' respective reporting failures under 15 U.S.C. § 1692e(8) were bona fide errors under 15 U.S.C. § 1692k(c); accordingly, the district courts granted summary judgment to the debt collectors. On appeal, the consumer-appellants argued that the debt collectors' actions were not bona fide errors. The Seventh Circuit consolidated the two cases for decision.

Standing. On appeal, the debt collectors asserted a threshold standing defense under the recent holding in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021); any risk of future harm consumers faced due to the debt collectors' errors or omissions was insufficiently concrete to sue for damages. *TransUnion* was decided while these appeals were pending.

The reviewing court reasoned that the debt collectors were relying on *TransUnion* as though these appeals were about defamation. The debt collectors contended the consumers did not suffer concrete harm because third-party credit bureaus had not, in turn, published bad information about the debtors to fourth-party potential creditors.

The reviewing court called the debt collectors' argument a "red herring" because all the consumers would need to show, then, was that the debt collectors had disseminated false information about them to third-party credit bureaus. *TransUnion* did not require publication to fourth parties. The reviewing court found instead that *TransUnion* required analyzing whether a 15 U.S.C. § 1692e(8) FDCPA injury was close to a harm traditionally recognized at common law or in American history. The reviewing court found clear statutory violations: the debt

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collectors failed to tell the credit bureaus that the consumers disputed their alleged debts. Although Congress intended the FDCPA to combat abusive debt collection practices, "a statutory violation alone does not make an injury concrete." The reviewing court therefore resorted, as the *TransUnion* court had, to searching for a harm analogue at common law.

The reviewing court found the common law analogue to 15 U.S.C. § 1692e(8) in the common law of defamation. The Consumers had shown publication through evidence of dissemination to third parties, *i.e.*, the credit bureaus. Again, *TransUnion* only required dissemination to third parties, not further publication to fourth parties. Here, the reviewing court found that the Debt Collectors disseminated false reports about the consumers to a third-party credit bureau. This was more than a mere mechanical transmitted because the omitted consumer dispute information wound up omitted from the consumers' credit reports and probably also affected their credit ratings. That was enough to show that the credit bureau understood the significance of the reports, and that, in turn, was enough to show that the consumers had suffered intangible, reputational injury sufficiently concrete to confer Article III standing.

Merits. The district courts below had found in each respective Consumer case that the Debt Collector had committed bona fide errors and thus enjoyed safe harbor under 15 U.S.C. § 1692k(c). The reviewing court reviewed the two decisions below *de novo*. The Consumers argued that the Debt Collectors failed to satisfy the third element of the bona fide error defense—namely, that the Debt Collectors did not take reasonable precautions to avoid their errors.

The Seventh Circuit found, in the Ewing matter, that the district court below had correctly determined that the Debt Collector had a "reasonably adapted" procedure in place. An employee had made a simple mistake in failing to follow the procedure in only the one instance in question. The bona fide error defense therefore applied to the Ewing matter. The federal appellate court affirmed Ewing.

However, the Seventh Circuit disagreed with the district court finding in the Webster matter. That Debt Collector was unreasonable in having decided, without notice, to stop checking its electronic fax inbox while continuing to send fax receipt confirmations to consumers. The Debt Collector did not have a proper procedure in place to qualify for the safe harbor of having made a bona fide error. The reviewing court reversed and remanded Webster.

The cases are Nos. 21-1276 and 21-1299.

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Companies: Med-1 Solutions LLC; Receivables Performance Management, LLC

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