Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Lessons From CFPB's Latest Debt Collection Settlement

Law360, New York (July 15, 2015, 10:34 AM ET) --

Nancy R. Thomas

On Wednesday, July 8, the Consumer Financial Protection Bureau announced its latest — and largest — settlement of claims of unfair and deceptive debt collection practices. The Office of the Comptroller of the Currency and 47 state attorneys general all were part of the overall settlement. The numbers are significant: $50 million in restitution and $166 million in penalties. The injunctive relief is extensive, with pages and pages of requirements that extend for several years even though the credit card issuer stopped the practices at issue nearly two years ago. Although the alleged unfair, deceptive, or abusive acts and practices (UDAAP) violations do not plow new ground, the injunctive relief provisions provide a road map to debt sellers and debt collectors on what the regulators view as best practices. They also put regulated entities on notice that debt collection remains high on the enforcement agenda.

The Claims

The consent order details allegations regarding two primary areas: debt sales and collection litigation. On debt sales, the CFPB alleged that the sale of debts the credit card issuer knew or should have known were unenforceable, and the selling of debts with inaccurate or inadequate evidence that the stated amount of the debts were owed, constitute unfair practices. The CFPB also alleged that the credit card issuer knowingly or recklessly provided substantial assistance to the deceptive acts of debt collectors that purchased and then attempted to collect the unsubstantiated, inaccurate and/or unenforceable debts.

On the debt litigation claims, the CFPB alleged that "robosigning" of sworn statements to support collection lawsuits was both an unfair and a deceptive practice. But the CFPB went even further, alleging failure to provide notice to consumers and courts that judgments were obtained based on sworn statements that were "robosigned" constitutes an unfair practice, as does failure to remediate alleged miscalculation of amounts owed that were incorporated into erroneous judgments.

The OCC consent order also alleges failure to ensure Servicemembers Civil Relief Act compliance in collections litigation and failure to sufficiently oversee outside counsel and other third parties who handled sworn-document and debt collection litigation services on the credit card issuer's behalf.

The credit card issuer neither admitted nor denied liability for these allegations.

Restitution and Correction of Alleged Errors

The consent order requires the credit card issuer to develop a redress plan to distribute restitution, which must be approved by "the appropriate prudential regulatory authorities." The issuer also must provide semiannual reports of implementation.

The consent order requires restitution to consumers against whom collections litigation was pending at any time between January 2009 and June 30, 2014, including a cash refund of 125 percent of any amount paid in excess of the account balance. Although the credit card issuer must provide redress of $50 million, this includes all amounts paid on collections litigation cases before the consent order was entered. The consent order further recognizes that restitution may be less than $50 million, in which case the credit card issuer must pay the remaining amount to the CFPB and the state AGs as a penalty.

In addition to providing restitution, the credit card issuer must abandon collection on more than 500,000 accounts forwarded for litigation between 2009 and 2014, terminate pending litigation filed during that period, and request that any judgments obtained during that time not be reported to consumer reporting agencies so they will not appear on the consumers' credit reports.

The Go-Forward "Conduct Provisions"

The consent order requires the credit card issuer to comply with detailed requirements for debt sales and debt collection litigation at least until January 2020. On debt sales, these provisions include requirements that the credit card issuer:

- Bar debt buyers from reselling accounts, except selling accounts back to the issuer;
- Provide account-level documentation to debt buyers confirming that debts are accurate and enforceable and, for a period of three years after selling a debt, provide agreements, statements and dispute records upon request;
- Notify consumers when their debt is sold and make certain critical information (e.g., debt amount, identity of the purchaser) available free of charge; and
- Retire "zombie debts" (e.g., debts with inadequate documentation, debts charged off for more than three years) from sale or collection entirely.

On collection litigation, the credit card issuer is required to:

- Ensure declarations are signed by hand by a bank official or agent with direct knowledge of the contents and review of company records; and

- Submit documentation evidencing certain details of the debt (e.g., date of the last payment, amount of debt owed, itemized post-charge-off interest and fees) to support complaints initiating collection litigation.

Takeaways

Continued Focus on First-Party Debt Collectors and Increased Creditor Accountability. In July 2013, the CFPB issued Bulletin 2013-07 putting regulated entities on notice that it would use its UDAAP authority to target first-party debt collection practices. The CFPB then issued an advanced notice of proposed rulemaking seeking input on extending coverage of the Fair Debt Collection Practices Act to creditors and on debt sale practices, including the kinds of information provided and retained by debt sellers and the kind of additional information available to debt buyers relating to the debt. We have seen consent orders challenging similar practices involving much smaller players, as well as major attention focused on alleged "robosigning" in the mortgage space. But this consent order appears to be the opening salvo against major credit card issuers and possibly other first-party debt collectors for claims involving debt sales and collection litigation. The CFPB relied, in part, on its "substantial assistance" authority in holding the credit card issuer responsible for the actions of debt buyers. The CFPB's allegations here may provide a template for private plaintiffs asserting new theories against both originators of consumer credit and the entities that collect the resulting debt. In addition, the injunctive relief provisions in this consent order may anticipate what we can expect to see when the CFPB issues its debt collection rules at the end of the year.

Regulated Entities May Be Facing Significant Legacy Liability for Past Practices. The CFPB acknowledges that the credit card issuer stopped the challenged debt sale practices in 2011 and stopped collecting on debt in 2013. The credit card issuer entered into a previous consent order with the OCC addressing the same practices and paid more than $50 million in restitution as a result of that order. But this history did not stop the CFPB, the OCC or the state AGs from pursuing the challenged practices further, even though the consent order recognizes that the credit card issuer may have already provided restitution to a significant number of consumers.

Rule-Making by Enforcement with Another Consent Order Road Map. A lengthy section of the consent order lays out detailed requirements for debt sales and debt collection court filings. Director Richard Cordray didn't pull any punches in telling regulated entities that this consent order reflects the CFPB's expectations: "Our action today puts debt sellers, debt buyers, and third-party collectors on notice that they are all responsible for following the law and must perform their due diligence when collecting debts." Similarly, the Iowa AG stated his view that these debt collection issues are pervasive in the industry and that he intends to pursue similar actions against other companies.

The restitution and other injunctive relief provisions shed some light on the CFPB's views on what constitutes sufficient remediation for debt sale or debt collection deficiencies. Of note, the consent order requires repayment of 25 percent more than any amount paid that exceeded the account balance. It also requires the credit card issuer to request corrections to credit reporting to address possible harm to credit scores resulting from the alleged collection practices.

Cooperation Among State and Federal Actors Continues and Appears to Cause Significant Delays in Resolving Enforcement Matters. The OCC began investigating the practices at issue in the consent order in 2011. We don't know when the CFPB and the state AGs came on board. But we can say that, not surprisingly, cooperation among the federal and state actors appears to have extended the investigation and ultimate resolution of these claims. Although the consent order includes a release from the CFPB of all potential liability for claims involving collection litigation and debt sales, the credit card issuer can't put these legacy practices entirely behind it. The California and Mississippi AGs continue to litigate their suits against the credit card issuer challenging the same practices.

—By Nancy R. Thomas, Jessica Kaufman and Ryan J. Richardson, Morrison & Foerster LLP

Nancy Thomas is a partner in Morrison & Foerster's Los Angeles office. Jessica Kaufman is an associate in the firm's New York office. Ryan Richardson is an associate in Washington, D.C.