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The CFPB's latest meaningful attorney involvement lawsuit sends some strange messages

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Last Friday, the CFPB announced that it had filed yet another meaningful attorney involvement lawsuit against a debt collection law firm – Forster & Garbus, P.C. It's notable enough that the Bureau continues to pursue these cases (even while proposing a "safe harbor" for meaningful attorney involvement in its proposed debt collection rules), but there are a number of very notable – and troubling – things about this particular case.

The primary thrust of the CFPB's allegations was that the law firm filed lawsuits without receiving or reviewing underlying account-level documentation, or other documentation like debt sale agreements to debt buyers. This probably comes as no surprise to most observers in this area, since the CFPB entered into consent orders with two law firms in December 2015 and April 2016, both of which required the law firms to possess, and review, "original account-level documentation" before filing a lawsuit against a consumer. But the really strange thing about the Forster lawsuit is that the relevant period identified in the complaint is from 2014 through 2016. In other words, it appears that the CFPB is attempting to hold the law firm responsible for not having complied with the two previous consent orders for a period of nearly two years before the first of those consent orders was entered into.

The relevant time period in the complaint also suggests that the Bureau did not find evidence of lack of meaningful attorney involvement after 2016. In addition to the potential statute of limitations problems involved in bringing such stale claims (the FDCPA has a one-year limitations period, and Dodd-Frank borrows that limitations period for UDAAP claims based on an FDCPA violation), it also raises the policy question of why the Bureau would use enforcement – which its leadership has stated would be a "last resort" – in a case where the alleged violation ceased occurring more than two years ago.

But there's something else really unusual – and disappointing – about the new complaint. One section alleges that the law firm collected debts on behalf of clients who had entered into consent orders with the CFPB related to debt collection, and that the firm therefore should have been more attentive to understanding the basis for the debts it was collecting. But in this section, the CFPB mischaracterizes two of its own consent orders, taking them out of context in a way that is, to say the least, surprising.

One order was against a large bank that acquired a portfolio of student loans from another bank, and the CFPB found in a consent order that the acquiring bank became a “debt collector” under the FDCPA because some of the acquired accounts were “in default” at the time the portfolio transfer occurred. This finding was, of course, overruled by the U.S. Supreme Court’s decision in *Henson v. Santander Consumer USA*. It seems strange that the Bureau would cite this consent order in its allegations, highlighting its own previous error of law, and especially since this aspect of its prior consent order had nothing to do with the accuracy of account information.

In another series of allegations in the new complaint, the Bureau notes that one of the law firm’s bank clients has entered into a consent order with the Bureau because it had “falsified court documents filed in debt-collection cases in New Jersey state courts.” But those of us who remember those cases recall that the Bureau’s press release about that consent order recited that the bank’s outside counsel had falsified the documents; and that the bank itself had discovered the conduct by its outside counsel, informed the court, and voluntarily remediated affected consumers’ accounts. Indeed, the Bureau specifically stated that no civil monetary penalty was being imposed on the bank because of this conduct. But as retold in the Forster complaint, this consent order should have been some kind of warning sign to the law firm that the bank’s account records were suspect. This is, at the least, a significant mischaracterization of the underlying consent order.

The takeaway from the Forster complaint seems to be that the CFPB still has a high level of motivation to bring meaningful attorney involvement cases, even though it litigated and lost such a case last year, and even when the facts are stale and the premise on which the lawsuit is based includes “warning signs” like the ones detailed above. It makes us wonder what kind of “safe harbor” the Bureau is really offering in section 18(g) of its proposed debt collection rules.

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