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Pay Up! Current Developments in FDCPA/FCCPA Cases

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FDCPA/FCCPA: A Sword and a Shield

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Help Your Clients Take Their Lives Back From Student Loans

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How would you like to get paid thousands of dollars from the opposing side for settling your client's student loans for 10-25% on the dollar?

The consumer laws (FDCPA, FCCPA and TCPA) provide several tools to help your bankruptcy clients who have non-dischargeable student loans reduce their debt to a manageable and sustainable level with an end in sight.

Student loan debt has now surpassed 1.3 Trillion dollars for roughly 44 million borrowers. Millions of borrowers are in seemingly unending forbearance and deferment with the balances continuing to grow with interest capitalizing. After 5 years or more years of non-payment due to unemployment or other hardship, the debt may be creeping up on double the original principal balance, leading many debtors to feel the situation is hopeless. It is very difficult to discharge student loan debt in bankruptcy so it will follow them the rest of their lives. Many who can make payments are making payments as high as $750-$1,000 on private student loans and not making a dent due to the interest accrual. These debtors have a decision to make. Do they want to continue making that payment potentially for the rest of their lives? Such a high payment and high debt load could increase costs or decrease availability of other loans, such as car or home loans. Defaulting on a student loan will naturally harm a debtor's credit, but sometimes it may be the best way out of an impossible situation.

Once a client defaults on a student loan, the loan will be placed into collection. Student loans are consumer debts and become subject to applicable consumer protection statutes such as the FDCPA, TCPA, and in Florida, the Unfair and Deceptive Trade Practices Act ("FUDTPA") and the FCCPA. Any violations can be used to negotiate to reduce the debt and obtain better repayment terms for the balance. Most of our cases involve multiple violations that link in several laws allowing for higher damages and attorney's fees. But even a simple violation will allow you to escalate the file to someone with more settlement authority. We typically will file a lawsuit, rather than send a demand letter for an increased response rate and to be taken more seriously with higher recoveries for our clients.

Consumer law violations can occur for both federal and private loans. Private debt collectors are often hired to collect federal loans. The Department of Education ("DOE") has turned over almost all of its federal student loans to private collection agencies. There is no question that student loan debt falls under the definition of debts provided by the FDCPA. There may be a question as to whether the party is a debt collector as noted below.

Available remedies to collect on a private or federal student loan are unique and often misunderstood. But a misunderstanding about the status of the law is not a defense to the FDCPA. The FDCPA is a strict liability statute. Collectors often inadequately train their collection personnel as to when they are to stop calling, and what options may be available to the debtors.

Collectors often misrepresent the exact nature of these remedies when they send collection letters which then result in false or misleading information being transmitted to the debtors.

Application of FDCPA to student loan collection activities:

Generally: Congress enacted the FDCPA in order to eliminate "the use of abusive, deceptive, and unfair debt collection practices" and "to protect consumers against debt collection abuses." 15 U.S.C. §§ 1692(a), (e). The Act thereby regulates the collection of "debts" by "debt collectors" by dictating, *inter alia,* the type and frequency of the contacts that a debt collector can make with a debtor. *See* 15 U.S.C. §§ 1692a, 1692c; *see also* Pelfrey v. Educ. Credit Mgmt. Corp., 71 F. Supp. 2d 1161, 1165 (N.D. Ala. 1999), *aff'd* 208 F.3d 945 (11th Cir. 2000) (per curiam). A violation of any of the prohibited activities listed in the FDPCA gives rise to a private cause of action. *See* 15 U.S.C. § 1692k.

Independent third party debt collectors and attorneys are covered by the FDCPA: See Cliff v. Payco Gen. Am. Credits, Inc., 363 F.3d 1113, 1123-24 (11th Cir. 2004) (noting Secretary of Education's expressed view that third-party debt collectors acting on behalf of guaranty agencies to collect federal student loans come within the FDCPA). Only officers or employees of the United States or any State are exempt from the FDCPA. Navient, for instance, is an independent private corporation that services and collects both private and federal student loans.

Secondary market lenders and servicing agencies: The FDCPA applies to collection agencies and attorneys. If a lender has not yet turned an FFEL loan over to the guarantor or a school is collecting on a Perkins loan and using its own in house staff to collect, the FDCPA does not apply. Further, the FDCPA only applies if the third-party collector obtained the debt after it had gone into default. In 2010, the Direct Loan program was established (eliminating all new FFEL loans) and the Department of Education hires both private and non-profit companies to service the loans.

Default for federal loans begins after the 270 day delinquency period: In most cases, a debt goes into default the minute it is not paid, however there is an unusually long period of delinquency for *federal* student loans (270 days) before they go into default. The Federal Trade Commission's official staff commentary on the FDCPA lends support to the argument that delinquency is the same as default and such a meaning would be consistent with the FDCPA. Courts, however, have determined that the date of default for purposes of the FDCPA is the same as the student loan regulations. Brannan v. United Student Aid Funds, 94 F.3d 1260, 1262 n. 3 (9th Cir. 1996).

FCCPA: The FCCPA applies not only to debt collectors, but to any "person". F.S. §559.72. Therefore, there is no need to prove that the creditor or loan servicer acquired or began servicing the debt prior to the debtor defaulting, unlike the FDCPA.

HEA preemption: The key is whether a collector can comply with both the HEA and debt collection laws simultaneously. If so, there should be no conflict with the FDCPA and no preemption of state laws. Cliff v. Payco Gen. Am. Credits, Inc., 363 F.3d 1113 (11th Cir. 2004).

Although there is no express or implied private right of action under the HEA, a violation of HEA can, at times, give rise to a private cause of action under the FDCPA. Bennett v. Premiere Credit of North America, LLC et al., No. 12-12859 (11th Cir. 2013).

What to look for: frequent areas of violations:

Auto dialer telephone call violations under the TCPA: A consumer can ***verbally*** revoke consent to call his or her cellular phone. *See* Osorio v. State Farm, F.S.B., 746 F.3d 1242 (11th Cir. 2014). Damages are $500 and up to $1,500 (if willful) per call to a cell phone. There is no separate recovery of attorney's fees, so it is good to combine this if possible with a violation under the FDCPA/FCCPA for recovery of attorney's fees.

Calls after a cease and desist under the FDCPA: The FDCPA provides consumers with the ability to inform a debt collector to cease all communications relating to the collection of the debt. 15 U.S.C. § 1692c(c) states that a consumer may send ***written*** notice to cease communications in connection with the collection of the debt or may send written notice that the consumer refuses to pay a debt. Upon written notification, the debt collector must cease communication with the consumer, except, (1) to advise the consumer that the debt collector's further efforts are being terminated; (2) notify the consumer that the debt collector or creditor may invoke specific remedies which are ordinarily invoked by such debt collector or creditor; (3) where applicable, notify the consumer that the debt collector or creditor intends to invoke a specific remedy. So basically, they may contact the consumer one last time after the cease and desist to state one of the above items.

Calls to family members/third parties: Section 15 U.S.C. § 1692c(b) prohibits a debt collector from communicating with any third party regarding the collection of the debt. Section 805(d) grants permission to speak with a spouse regarding the debt and to the debtor's attorney. A debt collector may call and speak with a third party one time in an effort to locate the debtor.

Time of day calls: Section 15 U.S. C. § 1692c(a)(1) prohibits "a debt collector from communicating with a consumer in connection with a debt in any unusual time, place or at time and place known or should be known to be inconvenient for the consumer, unless the collector obtains the prior consent of the consumer or the express permission of the court." A debt collector is prohibited from calling a consumer between 8 a.m. and 9 p.m. in the consumer's time zone. The collector must honor a consumer's oral request to contact them at certain times and locations.

Calls to an employer: A debt collector's calls to a consumer's place of employment is prohibited if the consumer has orally advised the collector not to call at that time or if the debt collector knows or has reason to know that the consumer's employer prohibits such calls.

Collection of a debt after the SOL has run: Unlike federal student loans, private student loans are limited by a state statute of limitations that is often provided in the promissory

note. Once raised by affirmative defense, it becomes the burden of the student loan company to show that this statute was extended or tolled via a signed forbearance or deferment agreement.

Mini-Miranda Disclosure/Voice mails: The FDCPA requires the initial communication contain the following phrase: "This is an attempt to collect a debt and any information obtained shall be used for that purpose." Thereafter, the debt collector must identify that the communication is from a debt collector in all subsequent communications. In Foti v. NCO Fin. Sys, Inc., 424 F.Supp.2d 643(S.D. N.Y. 2006), the Court held that the agency's failure to include language informing the consumer that the communication was from a debt collector violated the FDCPA. The Middle District of Florida has found FDCPA violations in reliance on the Foti decision. See: Belin v. Litton Loan Servicing, L.P., 2006 WL 1992410 (M.D. Fla. 2006).

Failure to identify the debt collector: Making false, misleading, or deceptive representations in collecting debts, such as language that imply that letters carry legal authority or are from the government are an FDCPA violation. 15 U.S.C. § 1692e(1), (4), (9), (10) and (13).

Claiming or threatening a legal right that does not exist: Misleading a debtor about their rights concerning the garnishment process would fall under this. It is very common for a borrower to be told inaccurate information about repayment options that help borrowers get out of default. They may claim that payments must be made before a consolidation can occur. Or they may require a good faith payment before the borrower can apply to rehabilitate a loan. They may require a higher rehab payment than the regulations permit as a reasonable and affordable payment. Arroyo v. Solomon & Solomon, 2001 WL 1590520 (E.D. N.Y. Nov. 16, 2001) (defendant's motion for summary judgment denied in case alleging that, among other FDCPA violations, defendants demanded payments in amount more than borrower could reasonably afford).

Dunning letters threatening that the Department will garnish their wages without "legal action", imply that the debtor will receive no notice before the wage garnishment and that there will be no opportunity to contest the validity of the student loan or to present defenses. Cliff v. Payco Gen. Am. Credits, Inc., 363 F.3d 1113 (11th Cir. 2004) (allowing student loan borrowers to proceed with claims under state and federal debt laws against collection agency for falsely representing claim, amount, or status of debt, falsely representing or implying that non-payment would result in garnishment, and failing to provide pre-garnishment hearing).

Falsely representing the character, amount or legal status of a debt or of services rendered or compensation owed: In a 2014 study, the U.S. Government Accountability Office ("GAO") found that the Department's oversight of its collection agencies was insufficient. Common errors included the rehabilitation program such as: 1) failing to explain the rehabilitation provisions such as the one time opportunity to rehabilitate a loan, 2) that payments must be made within 20 days of the due date to be considered on time, 3) that 9 out of 10 monthly payments must be made, 4) that methods exist to establish a

reasonable and affordable payment beside the standard IBR payment; 5) continuing to push for loan rehabilitation when borrowers state they are unemployed and unable to make payments; and 6) providing false or misleading information about a down payment or debit card being required. See U.S. Gov't Accountability Office, Federal Student Loans: Better Oversight Could Improve Defaulted Loan Rehabilitation 23 (Mar. 2014).

Calls to consumers represented by counsel: The FDCPA provides that a debt collector must cease communications with the consumer once it is notified that the consumer is represented by an attorney. If the attorney "fails to respond within a reasonable period of time to a communication from the debt collector," the debt collector may again contact the consumer. It is not clear what period of time will be deemed reasonable.

Unfair practices and unauthorized charges: Misstating collection fees or recovery of certain costs and fees are also common violations. *See* United States v. Baker, 2013 WL 4804532 (M.D. Fla. Sept. 9, 2013).

False sense of urgency: Debt collectors should avoid the use of arbitrary deadlines or words such as imperative, immediate, urgent or similar adjectives in any written or verbal communications with consumers. The FDCPA strictly prohibits debt collectors from misleading consumers by falsely implying that the outstanding balance must be paid by creating a false sense of urgency. See 15 U.S.C. § 1692e.

Claiming to be an attorney: Several cases have prohibited the use of attorney letterhead by collection agencies when there is evidence that the attorney had no "meaningful involvement" in the actual review and collection of the account. Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996). Also if attorney letterhead was used, or reference made regarding referral to a law firm, this may put a consumer on notice that his account status has changed which may create a false sense of urgency.

Government affiliation: The FDCPA prohibits debt collectors from misleading consumers that the debt collector is affiliated with a governmental agency or department. See U.S.C. § 1692e(1). See Brider v. Nationwide Credit, 1998 U.S. Dist. LEXIS 22535 (N.D. Ill. June 24, 1998) (denying motion to dismiss of a collector whose collection letter had large bold heading "U.S. Department of Education"). See also Peter v. GC Serv., L.P., 310 F.3d 344 (5th Cir. 2002) (debt collector's use of a Department of Education return address on a student loan collection letter violated the Fair Debt Collection Practices Act).

30 day validation disclosure: If consumer timely disputes the validity of the debt, a debt collector must cease collection efforts until such verification is provided to the consumer. The word "verification" is not defined under the FDCPA and is determined on a case by case basis. Generally, verification is provided in the form of a signed written agreement between the consumer and creditor, billing statements, invoices etc. A simple one page summary should not suffice.

Exceptions/Defenses:

Bona-Fide error: For a debt collector to rely on the affirmative defense of bona-fide error it must prove 1) that the violation was unintentional; and that 2) the collector maintains procedures reasonably adapted to avoid such violations. Such procedures must be regularly maintained and re-visited to avoid errors. In Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, P.A. ___ U.S. ___, 130 S.Ct. 1605, 78 USLW 4301 (Apr. 21, 2010), the Supreme Court concluded that the defense did not apply to a collector's mistaken interpretation of the law, even if the interpretation was reasonable and reached in good faith.

State agencies: State agencies will likely be exempted under the FDCPA's exclusion of state employees. 15 U.S.C. § 1692a(6)(C). However, a number of state agencies have switched from state agencies to private or have formed separate subsidiaries. A list of state guaranty agencies is available on the Department of Education's website at www.ed.gov.

Bona-fide fiduciary/Bona-fide escrow arrangement: Some courts have exempted non-profit and private guaranty agencies such as Bennett v. Premier Credit of N. Am., 504 Fed. Appx. 872 (11th Cir. 2013); Freeman v. Great Lakes Educ. Loan Servs., 2013 WL 2355541 (N.D. Fla. 2013); Pelfrey v. Educational Credit Mgmt. Corp., 71 F. Supp. 2d 1161 (N.D. Ala. 1999), *aff'd*, 208 F. 3d 945 (11th Cir. 2000).

Counter argument: collection activities are not incidental to agency's fiduciary duty and therefore agency did not fall within FDCPA exception. Gruen v. Edfund, 2009 WL 2136785 (N.D. Cal. 2009).

Damages:

Actual Damages Available under the FDCPA and FCCPA – add other state torts for recovery of punitive damages. In some of the more egregious cases, actual and punitive damages are also available. The FDCPA provides for statutory damages of $1,000, actual damages and attorney's fees. In a case where punitive damages are sought additional causes of action should be considered to allow for punitive damages such as malicious prosecution, negligence, negligent or intentional infliction of emotional distress, intrusion upon seclusion etc.

Authority regarding proving actual damages: "Violations of the FDCPA, by their very nature, (e.g. abusive, deceptive or unfair debt collection practices), are those kinds of actions which may be expected to cause emotional distress." Crossley v. Lieberman, 90 B.R. 682 (E.D. PA 1988); Littles v. Lieberman, 75 B.R. 240 (E.D. PA 1987); Howze v. Romano, 1994 U.S. Dist. LEXS 20547 (D. De. 1994); Teng v. Metropolitan, 851 F. Supp. 61, 68-9 (E.D. N.Y. 1994); McNally v. Client Services, 2008 U.S. Dist. LEXIS 50456 (W.D. PA 2008).

Lay testimony alone can support actual damages. Dawson v. Washington Mutual Bank, F.A., 390 F.3d 1139, 1149-1151 (9th Cir. 2004); Passantino v. Johnson and Johnson, 212 F.3d 493 (9th Cir. 2000). A lay witness can testify to common illnesses, the existence or treatment, and to nervousness, worry and anxiety. Bynum v. Cavalry Portfolio Servs., LLC, 2006 U.S. Dist. LEXIS 21290 (N.D. OK 2006). Plaintiff can testify as to seizures, anxiety and stress as well as that a

doctor told patient to avoid stress. Strom v. National Enterprise Systems, Inc., 2011 U.S. Dist. LEXIS 33659 (W.D. NY 2011).

Standard of Review:

Least sophisticated consumer standard. "Claims under § 1692d should be viewed from the perspective of a consumer whose circumstances makes him relatively more susceptible to harassment, oppression, or abuse." Holland v. Bureau of Collection, 801 F. Supp. 2d 1340 (M.D. Fl. 2011), citing Jeter v. Credit Bureau, 760 F.2d 1168 (11th Cir. 1985). The Seventh Circuit has rejected this standard and has created the "unsophisticated consumer standard." This test is similar to the "least sophisticated consumer" however, it allows for the admission of objective reasonableness.

FDCPA verdicts:

Goodin v. Bank of America, 2015 U.S. Dist. LEXIS 81318 (M.D. FL June 23, 2015) ($100,000 emotional distress ($50,000 each for husband and wife), and $100,000 punitive damages.

Portfolio Recovery Associates v. Mejia, 2015 Mo. Cir. LEXIS 1 (Jackson County, MO November 4, 2015 ($82 million punitive damages, $250,000 compensatory).

Finch v. LVNV (Baltimore County, MD May 2016), $38 million verdict, garnishing wages in violation of Maryland law.

Yazzie v. Farrel and Seldin, 10-CV-292 (D. N.M. July 21, 2011) ($1.26 million in actual and punitive damages).

Fausto v. Credigy, 07-05658 JW, Docket #408 (N.D. Cal., April 3, 2009) ($100,000 actual damages, $400,000 punitive damages).

FDCPA arbitration awards:

Haas v. Citibank, N.A., Case No. 1110016112 (August 27, 2014) (an arbitrator awarded $377,000, consisting of $50,000 emotional distress, $200,000 punitive damages, $125,000 TCPA damages, $2,000 statutory damages, under the FDCPA, TCPA and common law. There were 250 calls, half of which were in violation of the TCPA.

Orellana v. Adir International, LLC, JAMS Ref # 1220051893 (Los Angeles, Cal. Apr., 5, 2016) (an arbitrator awarded $270,000, including $50,000 emotional distress and $100,000 punitive damages, plus attorney's fees and costs, under the FDCPA and related law, for a debt collectors failing to cease, despite the fact the debt was owed.

Ancheta v. Verizon Wireless, Case No. 1110016197 (July 24, 2015) (an arbitrator awarded $209,500, consisting of $102,500 under the TCPA - trebling emotional damages for each call after

defendant's records showed it was told to stop calling - $75,000 emotional distress, $30,000 under California's identity theft act, and other statutory damages).

Class Actions:

Widespread complaints about student loan collection activities are leading to more litigation and more class actions.

Class Action damages: In the event that a plaintiff seeks class certification for a particular alleged violation, the FDCPA may award each named class member up to $1,000 in statutory damages, plus up to $500,000 or one percent of the debt collector's net worth whichever is less.

Alexander v. Coast Prof'l Inc., 2014 WL 4413598 (E.D. Pa. Sept. 5, 2014) (granting motion for class certification in FDCPA case challenging collector's calculation of "reasonable and affordable" payments for loan rehabilitation).

Stinson v. Delta Mgmt. Assocs., Inc. ___ F. Supp. 2d ___ 2014 WL 3893209 (S.D. Ohio Aug. 8, 2014) (approving class settlement in case alleging collection letters contained false or misleading information about loan rehabilitation).

Vu v. Diversified Collection Servs., 293 F.R.D. 343 (E.D. N.Y. 2013) (certifying class on claims relating to misrepresentation in thirty-day validation notice);

FLORIDA CONSUMER COLLECTION PRACTICES ACT – SENDING OF MONTHLY STATEMENTS AFTER NOTIFICATION THAT CONSUMER IS REPRESENTED BY AN ATTORNEY

Section 559.72(18), Florida Statutes, part of the Florida Consumer Collection Practices Act (the "FCCPA"), prohibits creditors from communicating directly with a consumer regarding a debt, if the creditor knows the consumer is represented by an attorney with respect to that debt. The issue confronted by lenders is whether sending monthly credit card billing statements required by the Truth in Lending Act (the "TILA") and Regulation Z is a communication that violates the FCCPA. Neither the Florida Supreme Court, nor any of the Florida District Courts of Appeal, have addressed the issue. There are six[1] Florida trial court cases dealing directly with the issue of monthly billing statements, all from Florida county courts, which is the most inferior of the Florida courts, having jurisdiction over civil matters where there is no more than $15,000 at issue. The consumer prevailed in four of those cases and the lender prevailed in two of the cases. Three of the cases in which the consumer prevailed were all before the same county judge. There are also three additional Florida trial court cases dealing with communications between creditors and represented debtors, but the communication at issue was something other than a monthly billing statement. Finally, there are seven federal cases from Florida district and bankruptcy courts dealing with communications under the FCCPA, three of which involved monthly billing statements as the form of communication. These cases are summarized below.

I. Florida trial court billing statement cases

A. Cases holding that billing statements violate the FCCPA

Carey v. Green Tree Servicing, 23 Fla. L. Weekly Supp. 151a (County Court, 5th Judicial Circuit, Hernando County, July 2, 2015) – the trial court granted the plaintiff's motion to strike one of the lender's affirmative defenses which stated that 12 CFR § 1026.41 (Regulation Z) required the lender to send monthly statements to the plaintiff and therefore preempted plaintiffs' claims that the lender was precluded by § 559.72(18), Fla. Stat. from sending monthly statements. The trial court struck the lender's affirmative defense stating that the affirmative defense was "not an accurate statement of the law."

Carey v. Everbank, 23 Fla. L. Weekly Supp. 583b, (County Court, 5th Judicial Circuit, Hernando County, October 21, 2015) – the case was before the court on cross-motions for summary judgment. The trial court denied both summary judgment motions but also prohibited the lender from arguing at trial that Regulation Z preempts § 559.72(18), Fla. Stat. or otherwise acts as a bar to the plaintiffs' claims, related to the lender sending monthly mortgage statements directly to the plaintiffs. The order states, "The Court finds that Fla. Stat. 559.72(18) is not

[1] Our research located six Florida trial court cases; however since Florida trial court orders are not routinely submitted by the courts for publication as are appellate opinions, there may be additional cases that simply are not published. The majority of the cases we located were published in the Florida Law Weekly Supplement which is a digest of Florida circuit and county court orders. However, such orders are only published by Florida Law Weekly Supplement if an attorney or other party submits a copy of the order for publication, so the universe of orders published by the Supplement is limited.

preempted by 12 CFR 1026.41 and that simultaneous compliance with both 12 CFR 1026.41 and Fla. Stat. 559.72(18) can be achieved by sending the monthly mortgage statements required by 12 CFR 1026.41 to legal counsel for a consumer."

Maura v. Carrington Mortgage Services, LLC, 23 Fla. L. Weekly Supp. 754a (County Court, 5th Judicial Circuit, Hernando County, December 14, 2015) – the case was before the court on the plaintiff's motion to strike the lender's affirmative defenses or in the alternative, motion for more definite statement. The court struck the lender's affirmative defense that it was required by Regulation Z to send the mortgage statement at issue to the plaintiff and Regulation Z preempted § 559.72(18), Fla. Stat. because the lender could comply with both laws by sending the monthly mortgage statements to plaintiff's counsel.

Note: the same county judge issued the orders in all of the above cases and the same attorney represented the plaintiffs in each case.

Clark v. Statebridge Co., LLC, 22 Fla. L. Weekly Supp. 602a (County Court, 6th Judicial Circuit, Pasco County, Oct. 15, 2014) – Creditor sent a monthly mortgage statement to the consumer and the consumer sued alleging a violation of the FCCPA. The creditor filed a motion to dismiss arguing that it is required by TILA and Regulation Z to send monthly statements directly to the consumer and, as a result, TILA and Regulation Z preempts the FCCPA. The court rejected this argument holding that the FCCPA was not preempted because the creditor could comply with both TILA and the FCCPA by sending the monthly statements to the consumer's attorney. The court denied the creditor's motion to dismiss.

B. Cases holding that billing statements do not violate the FCCPA

Vanecek v. Discover Financial Services, LLC, 2015 WL 6775633 (County Court, Seventeenth Judicial Circuit, Broward County, April 28, 2015) – this case was before the court on the lender's motion for summary judgment on plaintiff's statement of claim for alleged violations of the FCCPA for sending her monthly statements when the lender knew she was represented by an attorney. The court entered final judgment for the lender holding that the monthly statements were not an attempt to collect a debt, but rather an informational disclosure required by TILA. The court also stated that the FCCPA cannot preclude the delivery of a statement required by TILA and any application of the FCCPA to preclude these statements would be preempted by TILA.

Havey v. Discover Financial Services, LLC, 2015 WL 6965138 (County Court, Twelfth Judicial Circuit, Manatee County, October 22, 2015) – this case is identical to the *Vaneck* case. The case was before the court on the lender's motion for summary judgment on plaintiff's statement of claim that lender had violated the FCCPA by sending her periodic credit card statements when the lender knew she was represented by an attorney. Citing to *Vanecek*, the court held that the monthly statements were not an attempt to collect a debt, but instead were,

> . . . informational disclosures required to be delivered directly to the consumer by the federal Truth in Lending Act. *See* 15 U.S.C. § 1637(b). Furthermore, as a state law, the FCCPA cannot preclude the delivery of a periodic credit card statement to the consumer that is required to be sent by federal law. Any application of the FCCPA

> which contradicts these requirements of federal law is preempted by the Truth in Lending Act's preemption clause. *See* 15 U.S.C. § 1610(a)(1).

2015 WL 6965138 at *1.

II. Florida trial court cases not specifically involving billing statements

A. Cases holding that a violation of the FCCPA occurred

Forbes v. Merrick Bank Corp., Slip Op., Case No. 2015-CV-75-A-O (Circuit Court, 9th Judicial Circuit, Orange County, January 15, 2016) – the case was before the circuit court in its appellate capacity, reviewing an order of the county court granting a lender's motion to dismiss a complaint for violation of the Florida Consumer Collection Practices Act. The lender sent an email to a consumer, informing the consumer of the lender's "account restructure program" which would allow the consumer to pay off his debt to the lender at a lower interest rate with lower fees. The consumer sued alleging a violation of the FCCPA because he had previously advised the lender that he was represented by an attorney in connection with the debt and the lender's email was a violation. The lender moved to dismiss the complaint which the county court granted. The circuit court reversed the county court's order using the "least-sophisticated consumer standard" finding that such a consumer could think that the email was sent to collect a debt. The court explained,

> We cannot say as a matter of law, drawing all inferences in [plaintiff's] favor, as we must on a motion to dismiss, that the least-sophisticated consumer would think that the email was not sent to collect a debt. The information in the email is: you owe us this money; here's how you can repay it. The FCCPA prohibits creditors from contacting debtors to try and collect the debt when they are represented by attorneys, which is exactly what the complaint in this case alleges.

The circuit court reversed the dismissal of the complaint and remanded it to the county court for further proceedings.

Liquori v. Bank of America, N.A., 23 Fla. L. Weekly Supp. 754b (County Court, 5th Judicial Circuit, Hernando County, December 15, 2015) – the case was before the court on the lender's motion to dismiss and motion to strike jury trial demand. The lender argued that the unspecified communications were not a violation of the Florida Consumer Collection Practices Act because they were required by federal law and federal law preempts the state statute. The court rejected that argument stating that "Defendant may comply with both federal and state law by providing any communication to the debtor's attorney." This order was entered by the same county judge that also heard the *Carey v. Green Tree Servicing*, *Carey v. Everbank* and *Maura v. Carrington Mortgage Services* cases summarized above.

B. Cases holding that a violation of the FCCPA did not occur

Hurtubise v. PNC Bank, N.A., 22 Fla. L. Weekly Supp. 782a (Fla. 6th Jud. Cir. Ct., Jan. 5, 2015) – this case was before the circuit court acting in its appellate capacity to review an order on summary judgment by the county court. The lender sent two written notices to the debtor after she retained an attorney, one a generic advertisement for a workshop to assist homeowners in saving their property from foreclosure which contained no personally identifying information and the second a letter providing contact information at the lender for questions relating to loss mitigation. The latter was required by federal law under the Home Affordable Modification Program ("HAMP"). The debtor sued alleging a violation of § 559.72(18), Fla. Stat., the provision of the Florida Consumer Practices Act which prohibits a lender from directly contacting a debtor in connection with collecting a debt, once the debtor has retained counsel. The Pasco County court granted the lender's motion for summary judgment holding that the communications were not an attempt to collect a debt and was required by federal law. On appeal to the circuit court, the court affirmed the county court's grant of summary judgment to the lender stating that the trial court property determined that the "animating purpose" of the communications was not to collect a debt and therefore did not violate the FCCPA. The circuit court also noted that the trial court correctly found no violation of the FCCPA for the second communication sent pursuant to HAMP where the communication was required by federal law.

III. Florida federal court billing statement cases

Note: the court held that the creditor violated the FCCPA in each of these cases.

Kelliher v. Target Nat. Bank, 826 F. Supp. 2d 1324 (M.D. Fla. 2011) (Hernandez-Covington, J.) – after the consumer retained counsel, lender sent him monthly credit card statements that, in addition to the information required by TILA and Regulation Z, also included debt collection language regarding the consumer's overdue account. The consumer filed suit alleging violations of the FDCPA and FCCPA, specifically the prohibition against direct contact with a consumer who has retained counsel. The lender filed a motion to dismiss asserting that federal law required it to send monthly billing statements and that state law could not prohibit or penalize compliance with federal law. The court held that the consumer had asserted a claim sufficient to survive a motion to dismiss because the monthly billing statements contained more than what is required under TILA and Reg. Z, specifically the debt collection language. The court indicated that the lender could comply with federal law without violating the FCCPA by simply not including the debt collection language, implying that a basic monthly statement containing only the minimum required information would not violate FCCPA.

Leahy-Fernandez v. Bayview Loan Servicing, LLC, 2016 WL 409633 (M.D. Fla. Feb. 3, 2016) (Hernandez-Covington, J.) – plaintiff had a mortgage that was serviced by Bayview. Plaintiff filed a Chapter 13 bankruptcy case and surrendered the property securing the mortgage through the bankruptcy. Plaintiff received a bankruptcy discharge of her personal liability for the mortgage debt. During and after the plaintiff's bankruptcy case, Bayview continued to send monthly billing statements to the plaintiff. Plaintiff's bankruptcy counsel instructed Bayview to cease communications with the plaintiff because he represented her in connection with the debt. However, Bayview continued to send monthly billing statements directly to the plaintiff. Plaintiff sued alleging violations of both the federal Fair Debt Collection Practices Act ("FDCPA") and the

Florida Consumer Collection Practices Act ("FCCPA"), including among other things, § 559.72(18), Fla. Stat. Bayview filed a motion to dismiss arguing, among other things, that TILA and Regulation Z preempted the FCCPA because Bayview was required to send monthly statements to the plaintiff by TILA and Regulation Z. The court rejected this argument citing to the commentary accompanying Regulation Z which specifically states that monthly statements are not required for any portion of a mortgage debt that has been discharged in a bankruptcy case. Thus, TILA and Regulation Z did not compel Bayview to send monthly statements to the plaintiff such that Bayview could comply with both Regulation Z and the FCCPA. Bayview also argued that the monthly statements were not an attempt to collect a debt and therefore did not violate the FDCPA and the FCCPA. The court also rejected this argument because each monthly statement listed a total amount due, provided a payment coupon for payments to be sent, discussed additional payment options and provided that a fee would be charged if payment was not received by a certain date. Therefore, the court denied Bayview's motion to dismiss on the grounds that there was no attempt to collect a debt by sending the monthly statements. In its opinion, the court cited to an unpublished 11th Circuit opinion in *Pinson v. Albertelli,* 618 Fed. Appx. 551 (11th Cir. July 9, 2015) in which the court dealt with letters sent by a law firm which allegedly violated the FDCPA and the FCCPA. In connection with determining whether the letters were sent in connection with a collection of a debt, the Eleventh Circuit stated, "A demand for payment need not be express; there may be an implicit demand for payment where the letter states the amount of the debt, describes how the debt may be paid, provides the phone number and address to send payment, and expressly states that the letter is for the purpose of collecting a debt." 618 Fed. Appx. At 553. Citing to *Pinson* the court held that the monthly statements were an attempt to collect a debt. This opinion is by the same judge who issued the *Kelliher v. Target Nat. Bank* opinion in which she stated that a creditor would not violate the FCCPA if it sent monthly statements to the consumer containing nothing more than is required by TILA. However, in this case, the judge seems to have reversed that position because there is no mention in the opinion that the billing statement at issue contained express debt collection language.

Patton v. Ocwen Loan Servicing, LLC, 2011 WL 1706889 (M.D. Fla. 2011) – defendant, Ocwen, was the servicer of plaintiff's mortgage. Among other things, plaintiff sued alleging a violation of subsection 18 of the FCCPA because Ocwen sent him a monthly mortgage statement after he notified them that he had retained counsel. The court rejected Ocwen's argument that the statement was for informational purposes only and therefore not an attempt to collect a debt, holding that on the defendant's motion to dismiss and viewed in the light most favorable to the plaintiff, the billing statements could be construed as an attempt to collect a debt and were therefore a violation of the FCCPA. The court noted that the statement contained messages indicating that the past due amount was due immediately, included a payment coupon with payment address and other reminders about the past due account balance.

IV. Florida federal court cases not specifically involving billing statements

Note: the courts held that no violation of the FCCPA occurred for the communication at issue in three of the four following cases, although the courts found violations of the FCCPA for other actions by the creditors. These three cases re summarized first.

Williams v. Educational Credit Mgmt. Corp., 88 F. Supp. 3d 1338 (M.D. Fla. Feb. 26, 2015) – the lender attempted to collect a defaulted student loan from the wrong person – an

individual with the same name as the borrower but who was not the borrower on the loan. The plaintiff contacted the lender herself to try to clear up the matter and retained counsel to do so. The lender continued to send collection communications to the plaintiff after she retained counsel. Plaintiff filed suit under both the FDCPA and FCCPA, including subsection 18, the retention of counsel provision. The lender filed a motion to dismiss claiming that the FCCPA was preempted by the federal Higher Education Act which contains requirements for the collection of defaulted student loans. The court examined each of the plaintiff's claims under the FCCPA and held that certain provisions were preempted by federal law, but others were not. One of the provisions the court held was preempted by federal law was subsection (18), the retention of counsel provision. The court noted that federal law required notices to be sent directly to the borrower, which conflicted with the FCCPA's prohibition against contacting a debtor represented by counsel. Accordingly, the court held that § 559.72(18), Fla. Stat. is preempted by federal law.

Bohringer v. Bayview Loan Servicing, LLC, 2015 WL 6561419 (S.D. Fla. Sept. 10, 2015) – the plaintiffs had a mortgage loan at the time they filed a Chapter 13 bankruptcy case. The mortgage was not included in their Chapter 13 Plan and they continued to pay the prior lender, Bank of America, outside of the bankruptcy. The plaintiffs were current in their payments. Their loan was then transferred to Bayview for servicing. Bayview sent correspondence indicating that the plaintiffs were behind in their payments. Plaintiffs notified Bayview that they were current in their payments and also requested that Bayview send them monthly billing statements because they had not received any from Bayview. Bayview responded with a letter stating that it could not send monthly statements because the plaintiffs were in bankruptcy and noted the next due date and amount of their mortgage payment. Bayview's records continued to show that plaintiffs were delinquent in their mortgage payments. The plaintiffs sued for violations of the FDCPA and FCCPA. Among other things, the court held that the letter from Bayview in response to the plaintiffs' request for monthly statements did not violate the FDCPA and FCCPA because it was not sent in connection with the collection of a debt. The court found the letter at issue was more in the nature of a statement of account and that "Statements of account are not debt collection activity; rather, they are normal incidents of loan servicing." 2015 WL at *10 *citing to Goodin v. Bank of America, N.A.*, 114 F. Supp. 3d 1197 (M.D. Fla. June 23, 2015).

Goodin v. Bank of America, N.A., 114 F. Supp. 3d 1197 (M.D. Fla. June 23, 2015) – the case was before the court after a bench trial. The consumers filed suit against the bank under both the federal Fair Debt Collection Practices Act and the Florida Consumer Collection Practices Act for the bank's mishandling of their loan during and subsequent to their bankruptcy case. The court ultimately found that the bank had violated both Acts due to the bank's actions in mishandling the loan, but also held that certain of the bank's communications did not violate the FDCPA and FCCPA because they were not sent for the animating purpose of debt collection. In holding that an account statement sent to the plaintiffs did not violate the FDCPA, the court stated, "A regular bank statement sent only for informational purposes is also not an action in connection with the collection of a debt." 114 F. Supp. 3d at 1206 *citing Helman v. Udren Law Offices, P.C.*, 85 F. Supp. 3d 1319, 1327 (S.D. Fla. 2014).

In re Runyan, 530 B.R. 801 (Bankr. M.D. Fla. May 8, 2015) – the Chapter 7 trustee of debtors' bankruptcy case filed an adversary complaint against Green Tree Servicing, LLC alleging that its collection efforts against the debtors violated the FCCPA and the Telephone Consumer

Protection Act. Green Tree serviced the debtors' mortgage and after the debtors defaulted, Green Tree initiated collection efforts including telephone calls and mailing collection notices, even after debtors notified Green Tree that they were represented by counsel in connection with the debt. The court held that Green Tree had violated the FCCPA because the FCCPA expressly prohibits a creditor from contacting a debtor directly once the creditor knows the debtor is represented by counsel and Green Tree's corporate representative admitted at trial that Green Tree contacted the debtors after it knew they were represented by counsel. The opinion implies that any contact with a debtor after notification that the debtor is represented by an attorney violates the FCCPA, regardless of the nature of the communication. The court stated, "[D]etermining whether a debt collector impermissibly communicated with a represented debtor is more easily discernable: either it did or it did not." 530 B.R. at 805. In addition to numerous phone calls, Green Tree also sent billing statements and collection notices to the debtors on a "near monthly basis." The opinion does not address the argument that the billing statements are required by TILA and Regulation Z, so either Green Tree did not make that argument or the court ignored it.

V. Outside Florida

In a case decided under California law, which contains an express exception for billing statements to the no communication with represented debtors rule, the court held that no violation of the California version of the FCCPA occurred. In dicta, the court went onto opine that sending monthly statements to a debtor's attorney, rather than to the consumer directly, did not comply with TILA and Regulation Z. In *Marcotte v. General Elec. Cap. Servc., Inc.*, 709 F. Supp. 2d 994 (S.D. Cal. 2010) the creditor sent billing statements to the consumer after the consumer notified the creditor that he was represented by counsel. Consumer sued alleging a violation of the California Fair Debt Collection Practices Act (CFDCPA). The court held that sending the billing statements to the consumer did not violate the CFDCPA because the Act contained an express exemption to the prohibition against direct contact with a represented consumer for "statements of account" which is what the billing statement was. The court held that even though the CFDCPA incorporated the federal FDCPA, which does not contain an exemption for statements of account, the court would not construe the CFDCPA to preclude sending the statements to consumers. Part of the court's reasoning was that TILA and Reg. Z require creditors to send billing statements to consumers and sending the statements to the consumer's attorney would not comply with TILA and Reg. Z, since they require statements be sent to a consumer which is defined as a "natural person." The court reviewed the official commentary to Reg. Z which states that an attorney and his or her client are considered to be the same person with regard to a particular transaction. However, the court held that this official commentary did not support sending statements to the attorney because consumer is defined as a "natural person" and the commentary only uses the word "person." Additionally, the court cited to the statement in the commentary that an attorney and client are the same in regards to a particular transaction, but with open ended credit card accounts, there are multiple transactions on the account and the attorney may not represent the client in regards to all of them.

VI. Does sending monthly statements to the consumer's attorney comply with TILA?

TILA and Regulation Z require that periodic billing statements be provided to the "consumer." "Consumer" is defined for purposes of Reg. Z as, "a cardholder or natural person to whom consumer credit is offered." 12 CFR § 226.2(11). "Cardholder" is defined as, "a natural person to whom a credit card is issued for consumer credit purposes . . . ." 12 CFR § 226.2(8). "Person is defined as "a natural person or an organization, including a corporation, partnership . . . ." 12 CFR § 226.2(22).

In the Official Commentary[2] to the definition of "person" in Reg. Z, 12 CFR § 226.2(22), the Consumer Financial Protection Bureau states that "An attorney and his or her client are considered to be the same person for purposes of this part when the attorney is acting within the scope of the attorney-client relationship with regard to a particular transaction." This lends support to the argument that sending billing statements to the consumer's attorney complies with TILA and Reg. Z.

The Florida county courts in *Clark v. Statebridge Co.*, *Carey v. Everbank, Liquori v. Bank of America, N.A* and *Maura v. Carrington Mortgage Services, LLC* all stated in their orders that the creditor could comply with TILA and the FCCPA by sending the monthly statements to the consumer's attorney. However, the issue of whether this actually complies with TILA and Regulation Z may or may not have been argued and briefed before the court.

The only case to address the issue directly is the *Marcotte v. General Elec. Cap. Servc., Inc.* from the Southern District of California. The court's analysis of the issue is included in the summary above.

In a recent case from the 11th Circuit, *Bishop v. Ross, Earle, Bonan, P.A.*, Slip. Op., Case No.: 15-12585 (11th Cir. March 25, 2016), the court held that a communication to a consumer's attorney was an "indirect communication" to the consumer client sufficient to trigger the Fair Debt Collection Practices Act. The court cited to the prohibition against direct contact with a represented consumer to support its holding. However, whether sending billing statements to a consumer's attorney complies with TILA and Reg. Z was not the issue in this case.

VII. Conclusion

Given the fact that many courts in Florida have found that sending monthly billing notices to a consumer does violate the FCCPA, it appears the safer course of action is for lenders to send a consumer's monthly statement to the consumer's attorney, once the lender is notified that the consumer is represented by counsel in connection with the debt. Four Florida trial court orders have stated that mailing the statements to the attorney allows the creditor to comply with both the FCCPA and TILA. The only court to expressly hold that sending monthly statements to the

[2] The preface to the CFPB's Official Commentary states, "This commentary is the vehicle by which the Bureau of Consumer Financial Protection issues official interpretations of Regulation Z. Good faith compliance with this commentary affords protection from liability under section 130(f) of the Truth in Lending Act. Section 130(f) (15 U.S.C. 1640) protects creditors from civil liability for any act done or omitted in good faith in conformity with any interpretation issued by a duly authorized official or employee of the Bureau of Consumer Financial Protection."

consumer's attorney does not comply with TILA and Regulation Z is the one federal case from California which, of course, is not binding on a Florida court.

Are Informational Statements Discharge Violations?

Carmen Dellutri

Debtors and their attorneys need to be on the lookout for violations of the discharge injunction. Debtor's Attorneys need to educate their clients about the potential for creditors to violate the discharge. If a creditor or a debt collector violates the injunction, the Debtor's attorney will need to know how to handle the matter effectively.

The Creditors try to make light of their violations, by alleging that it was a mere technical violation or there was no intention to violate the law because it was just "a computer malfunction". In my opinion, these arguments are beginning to fall on deaf ears as the Bankruptcy Judges and District Court Judges are now demanding solid proof in the form of affidavits from the corporate clients, rather than letting the Creditor's attorney just keep telling stories at the podium.

More debtor's attorneys are starting to pursue these violations on behalf of their clients. When I first started practicing bankruptcy law almost 20 years ago, I would just write a letter telling the creditor to stop pursing the client. Well I slowly realized this was just an exercise in futility, and that I would be writing letters until my hand fell off. (Yes, I still write letters). We live in a different world where the Creditors are not afraid of being sanctioned anymore because they are making too much money breaking the law.

As more Debtor's attorneys pursue these claims and become more organized, the playing field is being leveled. Creditors are no longer able to hide these violations from the Debtor's attorneys like they used to. For example, I can put a post on a list-serve full of debtor's attorneys nationwide and request information about Creditor XYZs collection practices and get five responses in less than an hour from

outstanding attorneys across the nation who have either sued Creditor XYZ, settled with XYZ or have a similar situation right now. This access to information is powerful for the astute attorney looking to protect his client's rights.

Additionally, these resources provide the Debtor's attorney with damaging information to present to the Bankruptcy Judge about the Creditor's common business practices. For the Debtor, it amounts to higher damage awards. Damage awards that are commensurate with the actual damage done and not just nuisance value settlements. The more egregious the behavior, the more that the Creditor will want to shield itself and the behavior from the public forum of a courtroom.

If more Debtor's Attorneys educate their clients about violations of Discharge, then, more debtors will be able to purse the creditors for their illegal and egregious behavior. Logically, the converse of this statement must also be true. If more creditors and debt collectors are being sanctioned for their illegal behavior, then these creditors and debt collectors will conform to accepted standards of collecting debt and give up their evil ways so they can avoid being sanctioned. Let's not be naive. Collecting debts is big business. Creditors and debt collectors are making money. So, why not bend the rules a little bit. Chances are they are not going to get caught, and, if they do, so what, they pay a little fine and some attorney's fees and they go right back to collecting consumer debts. Quite frankly, I don't know if they will ever change their evil ways.

I do know that as long as there is big money to be made collecting discharged debt, there will be men and women with MBA's from the top schools who make lots of money figuring out new and inventive ways to collect on that debt with as little risk as possible. Each and every day we see new and ingenious ways to collect on discharged debt.

So, how do you get these cases?

Simple: You ask your clients for them.

As part of your closing file process, you either meet with the client or send them a letter explaining the discharge. Before you explain the discharge, tell them one of your stories. Here is a portion of a letter we use.

Dear Client:

Congratulations on receiving your Discharge.

Before I tell you the good news about your discharge, I have some other news to break to you first. If you are thinking it's bad news, actually, it's not. I hope I didn't get your blood pressure up. It's about creditors and debt collectors who choose to ignore your bankruptcy discharge. I know what you are thinking. You are saying to yourself: Wait a minute, you told me that when my case is over no-one will be able to contact me and try to collect on these debts. You told me that I wouldn't have to worry about creditors, and that I would get a fresh start. Isn't that what you told me? Yes, it is what I told you. While your case is technically over when the Court closes your case, from time to time you may continue to hear from some of your unscrupulous creditors, and this is not a bad thing. Let me explain:

The collection of bankrupt debt, similar to yours, is a huge business that no-one really likes to talk about. You must be wondering why any company or person would purchase discharged debt and try to collect on it? That is an excellent question. The answer is simple. It's all about the money. If you think about it, if there was no money to be made in the purchase and collection of discharged debt, no one would be doing it. But, I am here to tell you that it's a huge market. So, there are companies out there that are intentionally purchasing this debt, knowing that they cannot collect on it, and guess what, they ty to collect on it.

Now, you may be thinking, well, what does that have to do with me, I haven't been bothered by anyone. Again, great question. I don't want you to worry about this happening, and it may never happen to you. But, the chances are it will, and if it does happen to you, I want you to be prepared. Here's why.

Congress has already provided a remedy for this problem in the bankruptcy code, and if you are harassed by a creditor or a debt collector after you receive your bankruptcy discharge, we need to take action. The entire purpose of the bankruptcy code is to give you a fresh start. The Bankruptcy Judges, the Trustees and even I are part of this judicial process, and we have an affirmative duty to protect the process. So, when a debt collector either intentionally or negligently plays fast and loose with the rules, it degrades the integrity of the entire process. So, here is the game plan for when this happens to you:

I need for you to remember that Bankruptcy Judges are Federal Judges who take their orders pretty seriously. So, when a debt collector intentionally violates a Federal Judge's Court Order, there should be repercussions, Right? So, the first questions is: What happens when a creditor takes some action in violation of the

Bankruptcy Judge's Discharge Order? Several things can happen. First, you can do nothing. If you choose this option, guess what, nothing will happen, and the Creditor will perform the same stunt on the next person until someone takes action. Second, you can immediately write down all the details of the contact or save the debt collection letter and contact me to discuss if the actions taken by the creditor are illegal and whether we should pursue the creditor for a violation of the Bankruptcy Judge's Discharge Order or sue the creditor for an illegal debt collection action.

Depending upon how egregious the Creditor's actions and depending upon which Court we pursue an action, you may be entitled to money damages in the form of actual and/or statutory damages. The best part is that the Bankruptcy Judge will usually require that the unscrupulous Creditor to pay your attorney's fees for you.

Some consumer bankruptcy attorneys have been pursuing these types of claims for years, and other attorneys are just getting started in this niche practice. Either way, these consumer violations, if handled properly, can lead to very good results for the client and attorney. The Client may receive statutory damages or actual damages in the hundreds or thousands of dollars. The attorney should be able to recover his legal fees and something better, pattern and practice evidence. Pattern and practice evidence gives the attorney an edge the next time the same creditor repeats its bad behavior.

You may be wondering why I am so persistent about this: Imagine an attorney who strives to put more money back in his clients' pockets than he takes for his services. That is our goal in every case we handle. If you paid us $XXX for your bankruptcy, we want to put $ 3 times XXX back in your pocket, and we have done so many many times in the past. We want to protect the integrity of the bankruptcy process, we want to protect your discharge, and we want to protect your fresh start. Quite simply: It's the right thing to do for your clients. Isn't that why you hired us as your Attorneys? Isn't this the type of attorney that you want working for you?

Let me tell you a little story. A few years ago, my client named Danielle (who is by the way a very sweet woman) filed bankruptcy and received her discharge. A big Creditor was one of the creditors who we listed in her bankruptcy schedules. We also listed four (4) collection agencies that big Creditor hired to collect the debt. I felt comfortable that with that type of notice, and I naively thought we would never hear from big Creditor again. Boy was I wrong, two years after the Bankruptcy Judge's Discharge Order, big Creditor, once again, assigned/hired a new debt collector to try and collect.

Danielle was horrified that big Creditor was trying to collect the debt again, so she called me. Danielle did what every past client does in this situation. She laid into me saying: "You said they can't do this". I sat there and smiled. I agreed with everything she was saying, and I asked her one question: Do you trust me? She said: "Of course I do." So, we immediately sued big Creditor and the debt collector. The case was settled shortly thereafter, and Danielle was very happy with the settlement which netted her four times (4X) more than she paid in attorney's fees to file the bankruptcy case. Of course, big Creditor admitted no liability and disputed all allegations of wrongdoing.

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United States District Court,
M.D. Florida,
Fort Myers Division.

Arlene Roth, Plaintiff,
v.
Nationstar Mortgage, LLC, Defendant.

Case No: 2:15-cv-783-FtM-29MRM
|
Signed 07/01/2016

OPINION AND ORDER

JOHN E. STEELE, SENIOR UNITED STATES DISTRICT JUDGE

*1 This matter comes before the Court on Defendant Nationstar's Motion to Dismiss for Failure to State a Claim (Doc. #12) filed on January 19, 2016. Plaintiff filed a Response (Doc. #16) on February 22, 2016. For the reasons stated below, Nationstar's Motion to Dismiss is denied.

I.

On December 14, 2015, Plaintiff Arlene Roth (Plaintiff) filed a five-count Complaint (Doc. #1) against Defendant Nationstar Mortgage, LLC (Nationstar) alleging violations of Section 559.72(9) of the Florida Consumer Collection Practices Act (FCCPA), Fla. Stat. § 559.55 et seq., Sections 1692e(2)(A), 1692e(10), and 1692f of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 et seq., and a private settlement agreement. The claims are based on a communication Nationstar sent Plaintiff on November 18, 2015 (the Informational Statement or Statement) (Doc. #1-5), which Plaintiff alleges was sent for the improper purpose of collecting on a mortgage debt for which her personal liability had been discharged in bankruptcy. Plaintiff also argues that, by mailing the Statement directly to her, rather than to her attorney, Nationstar materially breached a settlement agreement from the parties' previous lawsuit, also alleging improper attempts to collect on the mortgage debt. [1]

Nationstar's Motion to Dismiss for Failure to State a Claim (Motion to Dismiss) contends that all claims should be dismissed because: 1) Plaintiff cannot state a claim under either the FCCPA or the FDCPA since, as a matter of law, the Informational Statement does not constitute a communication sent for debt-collection purposes; 2) Section 524 of the Bankruptcy Code preempts Plaintiff's statutory claims; and 3) the Truth in Lending Act (TILA) also preempts Plaintiff's claims.

In Response, Plaintiff argues that applicable case law adequately supports her claim that the Informational Statement was sent for debt-collection purposes. [2] She contends further that Nationstar's preemption arguments have been rejected by numerous district courts and circuit courts of appeals. Finally, she claims that she has sufficiently pled her breach of contract claim.

II.

Federal Rule of Civil Procedure 8(a) requires a complaint to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In evaluating a Rule 12(b)(6) motion seeking to dismiss a complaint for failing to comply with Rule 8(a), the Court must accept as true all factual allegations in the complaint and "construe them in the light most favorable to the plaintiff." Baloco ex rel. Tapia v. Drummond Co., 640 F.3d 1338, 1345 (11th Cir. 2011). However, mere "[l]egal conclusions without adequate factual support are entitled to no assumption of truth." Mamani v. Berzain, 654 F.3d 1148, 1153 (11th Cir. 2011) (citations omitted).

*2 To avoid dismissal under Rule 12(b)(6), the complaint must contain sufficient factual allegations to "raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). To do so requires "enough facts to state a claim to relief that is plausible on its face." Id. at 570. This plausibility pleading obligation demands "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. at 555 (citation omitted); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); Chaparro v. Carnival Corp., 693 F.3d 1333, 1337 (11th Cir. 2012) ("Factual allegations that are

merely consistent with a defendant's liability fall short of being facially plausible." (citation omitted)). Instead, the complaint must contain enough factual allegations as to the material elements of each claim to permit the Court to determine – or at least infer – that those elements are satisfied, or, in layman's terms, that the plaintiff has suffered a redressable harm for which the defendant may be liable.

III.

A. Plaintiff's FDCPA Claims (Counts II-IV)

The FDCPA seeks "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C.A. § 1692. To that end, debt collectors are prohibited, *inter alia*, from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. § 1692e, and from employing "unfair or unconscionable means to collect or attempt to collect any debt." Id. § 1692f. "A demand for immediate payment while a debtor is in bankruptcy (or after the debt's discharge) is 'false' in the sense that it asserts that money is due, although, because of the... discharge injunction (11 U.S.C. § 524), it is not." Randolph v. IMBS, Inc., 368 F.3d 726, 728 (7th Cir. 2004). A post-discharge demand for payment is thus "presumptively wrongful under the [FDCPA]." Id.

Plaintiff contends that Nationstar violated the FDCPA when it sent the Informational Statement in an attempt to collect on a debt it knew had already been discharged in Plaintiff's bankruptcy proceeding. "[I]n order to state a plausible FDCPA claim under § 1692e[and 1692f,] a plaintiff must allege, among other things, (1) that the defendant is a "debt collector" and (2) that the challenged conduct is related to debt collection." Reese v. Ellis, Painter, Ratterree & Adams, LLP, 678 F.3d 1211, 1216 (11th Cir. 2012). Although Nationstar does not concede that it is a "debt collector" under the FDCPA and reserves the right to later contest that characterization, the issue currently before this Court is whether the Complaint adequately alleges that the Informational Statement is "related to debt collection." [3]

Not all communications that a creditor sends a debtor regarding a discharged debt are "related to debt collection." Although the FDCPA does not expressly set forth what constitutes collection-related activity, the Eleventh Circuit has held that "if a communication conveys information about a debt and its aim is at least in part to induce the debtor to pay, it falls within the scope of the Act." Caceres v. McCalla Raymer, LLC, 755 F.3d 1299, 1302 (11th Cir. 2014) (citing Romea v. Heiberger & Assocs., 163 F.3d 111, 116 (2d Cir. 1998)). Stated differently, a communication comes within the purview of the FDCPA where it is made with "an animating purpose of...induc[ing] payment by the debtor." Dyer v. Select Portfolio Servicing, Inc., 108 F. Supp. 3d 1278, 1281 (M.D. Fla. 2015) (quoting Grden v. Leikin Ingber & Winters PC, 643 F.3d 169, 173 (6th Cir. 2011) (citations omitted)).

*3 The issue of whether a particular communication's animating purpose is to induce a debtor to pay is determined through the eyes of the "least sophisticated consumer." [4] See Caceres, 755 F.3d at 1303; LeBlanc, 601 F.3d at 1193, 1201. In making this determination, the district court must "look to the language of the [communication] in question, specifically to statements that demand payment[and] discuss additional fees if payment is not tendered." Pinson v. Albertelli Law Partners LLC, 618 Fed.Appx. 551, 553 (11th Cir. 2015) (per curiam) (citations omitted). The key question is whether "the least sophisticated consumer," reading such language in its entirety, would believe that the sender was attempting to induce payment on a debt.

"Obviously communications that expressly demand payment will almost certainly have [an animating] purpose" of "induc[ing] payment by the debtor." Grden, 643 F.3d at 173 (citations omitted). A demand for payment can also be implicitly made. Pinson, 618 Fed.Appx. at 553-54; see also Gburek v. Litton Loan Servicing LP, 614 F.3d 380, 385 (7th Cir. 2010) ("[T]he absence of a demand for payment is just one of several factors that come into play in the commonsense inquiry of whether a communication from a debt collector is made in connection with the collection of any debt."). In determining whether a communication seeks to induce payment by way of an implicit demand, courts consider, among other factors, whether the communication "states the amount of the debt, describes how the debt may be paid, [and] provides the phone number and address to [which to] send payment." Pinson, 618 Fed.Appx. at 553; see also Dyer, 108 F. Supp. 3d at 1282 (granting motion to dismiss where "none of the letters discussed specifics

of the underlying debt, such as the terms of payment or deadlines").

Turning to the Informational Statement at issue, the Court is convinced that the Complaint sufficiently alleges that the Statement constitutes an attempt to collect a debt.[5] Viewing the cumulative effect of the Statement's language from the perspective of the least sophisticated consumer, it is in fact difficult to conceive of any credible reason for Nationstar to send the Informational Statement *other than* to pressure Plaintiff into making payments on the mortgage debt for which her personal liability had already been discharged.[6] It is true that the Informational Statement does not expressly state that it is "a communication sent for the purpose of collecting a debt." But, as just discussed, this absence is not dispositive. The Statement lists the total amount due, contains a payment due date, states that a late fee will be charged for an untimely payment, gives six possible payment methods, and separates out from the total amount due the amount of fees and charges previously assessed. That is not all. The Statement contains an "Important Messages" box advising Plaintiff that her "escrow account has a negative balance," and expressly "recommend[ing she] make additional payments" to avoid "an increase in [her] monthly escrow payment."[7] There is also a detachable "payment coupon," which states the total amount due and recalculates the amount due for a late payment.[8]

*4 The Court's conclusion is amply supported by case law. The Pinson court determined that two letters "contained an implicit demand for payment, because they stated the amount of the debt, described how the debt could be paid, and informed [the plaintiff] how he could tender payment." 618 Fed.Appx. at 554. In Leahy-Fernandez v. Bayview Loan Servicing, LLC, mortgage statements were deemed communications sent in an attempt to collect a debt where they listed a total amount due, contained a payment coupon, mentioned other payment options, and stated that a fee would be charged for late payments. ___ F. Supp. 3d ____, No. 8:15-CV-2380-T-33TGW, 2016 WL 409633, at *6 (M.D. Fla. Feb. 3, 2016). Similarly, in Patton v. Ocwen Loan Servicing, LLC, the plaintiff sufficiently alleged that the defendant's written communication attempted to collect a debt, despite the presence of "for informational purposes only" language, because the statement included a due date, the past due amount, a payment address, and a detachable payment coupon. No. 6:11-CV-445-ORL-19, 2011 WL 1706889, at *5 (M.D. Fla. May 5, 2011); see also Goodin v. Bank of Am., N.A., 114 F. Supp. 3d 1197, 1206 & n.10 (M.D. Fla. 2015) (letters containing payment instructions, a due date, and an amount due had animating purpose of encouraging payment despite being labeled "FOR INFORMATION PURPOSES" and containing disclaimer language).

Nationstar argues that the Informational Statement cannot be considered an attempt to collect a debt, since it contains a disclaimer paragraph, which reads as follows:

> This statement is sent for informational purposes only and is not intended as an attempt to collect, assess, or recover a discharged debt from you, or as a demand for payment from any individual protected by the United States Bankruptcy Code. If this account is active or has been discharged in a bankruptcy proceeding, be advised this communication is for informational purposes only and is not an attempt to collect a debt. Please note, however, that Nationstar reserves the right to exercise its legal rights, including but not limited to foreclosure of its lien interest.

(Doc. #1-5.) This disclaimer, however, "is insufficient to shield [Nationstar] as a matter of law from liability at this stage of the litigation." Leahy-Fernandez, 2016 WL 409633, at *6 (citations omitted). Just because a disclaimer says that the communication " 'is not an attempt to collect a debt,' does not make that true, especially in view of indications on the face of the document that the communication is intended to obtain money and is connected to a present or former obligation to pay an indebtedness." Donnelly-Tovar v. Select Portfolio Servicing, Inc., 945 F. Supp. 2d 1037, 1048 (D. Neb. 2013). The Informational Statement does contain such indications, including an "Important Message" *recommending* that Plaintiff make payments to reduce her negative escrow balance (i.e. threatening consequences for non-payment). Further, Nationstar's boilerplate, hypothetical disclaimer

language[9] is immediately followed by a "however" clause reserving Nationstar's right to pursue legal remedies against the recipient. It is thus plausible (if not probable) that the least sophisticated consumer reading the disclaimer would *not* understand that she could refrain from making payments without incurring additional fees or exposing herself to future legal action. Rather, she would feasibly be induced to make payments to avoid those repercussions.

In sum, the Court finds that the Complaint plausibly alleges that the Informational Statement was sent to induce payment on Plaintiff's mortgage debt. As "no attempt to collect a debt" is Nationstar's sole argument for dismissal for failure to state a claim, the request to dismiss is denied.

B. Plaintiff's FCCPA Claim (Count I)

***5** The Complaint also alleges that the Informational Statement violates Section 559.72(9) of the FCCPA, which states that no person shall "[c]laim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate, or assert the existence of some other legal right when such person knows that the right does not exist." Specifically, Plaintiff claims that Nationstar violated this provision by "sending the Informational Statement to Plaintiff in an attempt to enforce debt [sic] that had been discharged in Plaintiff's bankruptcy and was thus no longer legally owed to Defendant." (Doc. #1, ¶ 29).

For Plaintiff to succeed with this attempt-to-enforce theory, a discharged debt must be considered a debt that is "not legitimate" under the FCCPA. Neither Nationstar's Motion nor Plaintiff's Response adequately addresses this issue. In support of the argument that Plaintiff fails to state a claim under Section 559.72(9), Nationstar does contend that her "mortgage was not extinguished by the discharge, and [thus] Nationstar's post-discharge actions were permissible by law." (Doc. #12, p. 7.) Nationstar appears to presume, then, that because a mortgage is not extinguished by a bankruptcy discharge, the mortgage remains a "legitimate debt." In response, Plaintiff "reiterates the arguments made...in support of her" FDCPA claims (Doc. #16, p. 13) and stresses that "[i]n the event of any inconsistency between any provision of this part and any provision of the federal act, the provision which is more protective of the consumer or debtor shall prevail." (Id. p. 14 (quoting Fla. Stat. § 559.552)).

Although the Court agrees that a bankruptcy discharge does not extinguish the debt itself, the cases cited in Nationstar's Motion do not address whether a debt that survives bankruptcy is a "legitimate debt" for collection purposes under the FCCPA. Nationstar has thus failed to carry its burden of showing that dismissal for failure to state a claim is warranted. Moreover, there is some authority for the proposition that "that although [a] mortgage lien survive[s] the discharge, the debt as against [the debtor] personally is no longer legitimate and, thus, attempts to collect from her personally violate Section 559.72(9)." Leahy-Fernandez, 2016 WL 409633, at *7 (M.D. Fla. Feb. 3, 2016). Accordingly, and because "[t]he FCCPA unequivocally states its goal [is] to provide the consumer with the most protection possible under either the state or federal statute," LeBlanc, 601 F.3d at 1192, the Court denies Nationstar's request to dismiss Plaintiff's FCCPA action for failure to state a claim.

C. Implied Repeal/Statutory Preemption

Nationstar also seeks dismissal of Plaintiff's FDCPA and FCCPA claims on the ground that they are preempted under (or impliedly repealed by[10]) Section 524 of the United States Bankruptcy Code and TILA/Regulation Z. The Court finds neither argument convincing.

(1) The Bankruptcy Code

At the time Nationstar filed its Motion to Dismiss, the Eleventh Circuit had expressly declined to address "[w]hether the Code 'preempts' the FDCPA when creditors misbehave in bankruptcy." Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1262 (11th Cir. 2014), cert. denied, 135 S. Ct. 1844, 191 L.Ed. 2d 724 (2015)). That question has since been answered. In Johnson v. Midland Funding, LLC, the Eleventh Circuit joined the Second,[11] Third,[12] and Seventh[13] Circuits in finding "no irreconcilable conflict" between the Code and the FDCPA, since the two "can be read together in a coherent way." ___ F. 3d ____, No. 15-11240, 2016 WL 2996372, at *3 (11th Cir. May 24, 2016).

***6** Crawford held that a debt collector violates the FDCPA by filing a proof of claim it knows is stale (time-barred) in a bankruptcy proceeding. 758 F.3d at 1262.

Applying Crawford, the Johnson district court concluded that, because the Bankruptcy Code *allows* creditors to file stale proofs of claim in bankruptcy proceedings, the Code and the FDCPA irreconcilably conflict, and "the later-enacted Code impliedly repeal[s] the earlier-enacted FDCPA." Johnson, 2016 WL 2996372, at *4. In reversing the district court, the Eleventh Circuit stressed that repeal by implication due to an irreconcilable conflict is appropriate only where there is "some sort of 'positive repugnancy' between the statutes at issue" that makes coexistence impossible. Id. (citing J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 143–44 (2001)). No such "positive repugnancy" exists between the FDCPA and the Code, the Circuit Court concluded, because "[t]he FDCPA and the Code differ in their scopes, goals, and coverage, and can be construed together in a way that allows them to coexist....[They] can be reconciled because they provide different protections and reach different actors." Id. at *5. In particular, the Code applies to all "creditors," whereas "the FDCPA dictates the behavior of only 'debt collectors' **both within and outside of bankruptcy**." Id. (emphasis added).

But Johnson does not end the implied-repeal/preemption issue. "Even though the Bankruptcy Code does not impliedly repeal all FDCPA provisions to remedy conduct that violates the discharge injunction, it might impliedly repeal some specific provisions invoked to remedy such conduct." Garfield, 811 F.3d at 92. The second question, then, is whether the specific "FDCPA claim [asserted] raises a direct conflict between the Code or Rules and the FDCPA, or whether both can be enforced." Simon, 732 F.3d at 274.

Nationstar's argument in this respect is that because redress for violations of a bankruptcy discharge order may (allegedly) be sought only through a contempt action, allowing Plaintiff to "manufacture" private FDCPA and FCCPA claims based on the same conduct circumvents the Code's remedial scheme, thereby creating an irreconcilable conflict. Even assuming violations of a bankruptcy discharge order cannot be redressed through a private action in bankruptcy court (a claim for which Nationstar has cited no Eleventh Circuit authority), it seems clear that, if there is no irreconcilable conflict when a debt collector "open[s] himself up to a potential lawsuit for an FDCPA violation" by acting in a way the Bankruptcy Code permits, Johnson, 2016 WL 2996372, at *6, then the fact that a debt collector can be sued in a private action under the FDCPA but not under the Code likewise presents no irreconcilable conflict. The Code and the FDCPA simply provide different remedies. See id. ("The FDCPA easily lies over the top of the Code's regime, so as to provide an additional layer of protection against a particular kind of creditor."). Indeed, before Johnson was decided, numerous courts had already rejected the "conflicting remedies" position that Nationstar advances. E.g., Leahy-Fernandez, 2016 WL 409633, at *3; Bacelli v. MFP, Inc., 729 F. Supp. 2d 1328, 1336 (M.D. Fla. 2010); Gamble v. Fradkin & Weber, P.A., 846 F. Supp. 2d 377, 382 (D. Md. 2012).

"This same rationale can be logically extended to the FCCPA. A debt collector can comply simultaneously with the FCCPA and the Bankruptcy Code." Hernandez v. Dyck-O'Neal, Inc., No. 3:14-CV-1124-J-32JBT, 2015 WL 2094263, at *4 (M.D. Fla. May 5, 2015). Like the Hernandez court, this Court fails to see how "a debtor's choice to pursue the remedies provided under the FCCPA [would] stand as an obstacle to the objectives of the Bankruptcy Code," id., and particularly *after* a discharge has already occurred in bankruptcy. See Lapointe v. Bank of Am., N.A., No. 8:15-CV-1402-T-26EAJ, 2015 WL 10097518, at *3 (M.D. Fla. Aug. 26, 2015); see also Leahy-Fernandez, 2016 WL 409633, at *4. Accordingly, the Court rejects Nationstar's contention that the Bankruptcy Code bars Plaintiff's FDCPA and FCCPA claims.

(2) TILA/Regulation Z

*7 Nationstar also argues that Plaintiff's claims are preempted under TILA, 15 U.S.C. § 1601 et seq., as implemented through "Regulation Z," 12 C.F.R. § 1026.1. Among other things, TILA requires a mortgage loan servicer to "transmit to the obligor, for each billing cycle, a statement setting forth" several pieces of information, including "the amount of the principal obligation under the mortgage" and a "description of any late payment fees." 15 U.S.C.A. § 1638(f)(1). Nationstar contends that since Plaintiff's FDCPA and FCCPA claims are based on Nationstar's sending the Informational Statement, and since TILA/Regulation Z required (or at least permitted) Nationstar to send the Statement, there is an irreconcilable conflict, barring Plaintiff's claims.

The Court again disagrees. TILA did not oblige Nationstar to send Plaintiff the Informational Statement.[14] The Bureau of Consumer Financial

Protection has clarified that a periodic statement is not required for mortgage debts discharged in bankruptcy proceedings.[15] Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 FR 62993-01. Because sending Plaintiff a periodic statement was permissive, not required, Johnson is instructive. Like a debt collector who chooses to file a stale claim in a bankruptcy proceeding, a debt collector who elects to send a periodic statement regarding a discharged debt exposes itself to a lawsuit under the FDCPA and the FCCPA. This creates no irreconcilable difference. See Leahy-Fernandez, 2016 WL 409633, at *3, 5. Accordingly, TILA does not require dismissal of Plaintiff's statutory claims.[16]

Accordingly, it is hereby

ORDERED:

Nationstar's Motion to Dismiss for Failure to State a Claim (Doc. #12) is **DENIED.**

DONE and ORDERED at Fort Myers, Florida, this 1st day of July, 2016.

All Citations

Slip Copy, 2016 WL 3570991

Footnotes

1 Plaintiff claims that Nationstar has a history of sending her these types of statements post-bankruptcy. (Doc. #1, ¶¶ 13, 16.)

2 Specifically, the Complaint alleges that the Informational Statement is an attempt to collect a debt because it "includes an amount due, a payment due date, and most notably, a tear-off [payment] coupon." (Id. ¶ 20.)

3 In other words, the question is whether the Informational Statement constitutes a "dunning letter." See LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1189 n.7 (11th Cir. 2010) (per curiam) ("Since 'dunning' means 'to make persistent demands upon [another] for payment,' a 'dunning letter' may be considered as simply another name for a letter of collection." (alteration in original) (citation omitted)).

4 Nevertheless, "[c]ourts have interpreted the least sophisticated consumer standard in a way that protects debt collectors from liability for unreasonable misinterpretations." Tucker v. CBE Grp., Inc., 710 F. Supp. 2d 1301, 1305 (M.D. Fla. 2010).

5 The Court acknowledges that the Bankruptcy Judge presiding over the parties' related bankruptcy action orally ruled that the Informational Statement was not an attempt to collect a debt. (Doc. #18-1.)

6 Even if Nationstar did aim to provide Plaintiff with information, the Statement may also be seen as an attempt to collect a debt. Pinson, 618 Fed.Appx. at 553; see also Caceres, 755 F.3d at 1302 ("[A] communication can have more than one purpose.").

7 That the Statement alludes to "repercussions if payment [i]s not tendered" substantially undercuts Nationstar's argument that the Statement was only intended to provide information. Pinson, 618 Fed.Appx. at 554; see also Goodson v. Bank of Am., N.A., 600 Fed.Appx. 422, 431 (6th Cir. 2015) (courts should consider whether the communication "threaten[s] consequences" for non-payment).

8 Although the coupon is titled "Voluntary Payment Coupon," the Statement mentions six possible payment methods. The word "voluntary" could easily be taken to mean that *using* the coupon to pay was voluntary, not that any payment whatsoever was optional.

9 The disclaimer instead could have stated that Nationstar was aware Plaintiff's mortgage debt *had been* discharged in bankruptcy and, as a result, Plaintiff had no personal obligation to repay the debt and could not be pressured to do so. See In re Nordlund, 494 B.R. 507, 516-17 (Bankr. E.D. Cal. 2011); In re Jones, No. 08-05439-AJM-7, 2009 WL 5842122, at *1 (Bankr. S.D. Ind. Nov. 25, 2009). The Informational Statement also could have specified that the attached payment coupon was included as a "courtesy." Id.

10 "One federal statute does not preempt another. When two federal statutes address the same subject in different ways, the right question is whether one implicitly repeals the other...." Randolph, 368 F.3d at 730.

11 Garfield v. Ocwen Loan Servicing, LLC, 811 F.3d 86, 91 (2d Cir. 2016).

12 Simon v. FIA Card Servs., N.A., 732 F.3d 259, 274, 278 (3d Cir. 2013).

13 Randolph, 368 F.3d at 732.

14 Even if Nationstar mistakenly believed TILA required it to send Plaintiff a periodic statement, it "could [have] compl[ied] with federal law without potentially running afoul of the FCCPA [and the FDCPA] by not including" extraneous material in the Information Statement. Kelliher v. Target Nat. Bank, 826 F. Supp. 2d 1324, 1329 (M.D. Fla. 2011). Instead, Nationstar inserted an "Important Message" recommending additional escrow payments and attached a payment coupon.

15 The clarification was, in fact, provided in response to questions "about how to reconcile the periodic statement requirements... with various bankruptcy law requirements" and "concerns that bankruptcy courts[ ]...may find servicers in violation of an automatic stay or discharge injunction if [they] provide a periodic statement." Amendments to the 2013 Mortgage Rules, 78 FR 62993-01.

16 The Motion also seeks dismissal of Plaintiff's breach of contract claim (Count V) under TILA. Not only has the Court already rejected the argument that TILA required Nationstar to send the Informational Statement, Nationstar's argument is misdirected. Plaintiff's claim is not based on the mere fact that Nationstar sent the Informational Statement, but rather, on Nationstar's sending the Statement directly to Plaintiff, not her lawyer, in violation of a material term in the parties' settlement agreement. Nationstar's Motion does not address this. Nationstar's request for dismissal is thus denied.

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