

COLLECTION ACTIONS – DEBT BUYERS, DEBT SELLERS & THEIR LAWYERS

Dave Angle & Matt Wilson, Feb. 8, 2012, Boone County Bar Assoc. Presentation

I. Intro

A. Compare to non-consumer debt cases – what if potential client came to you and proposed to pay you to:

1. *evict a commercial tenant* but (1) had no proof of lease; (2) no evidence pc owned building or was authorized agent for owner; and (3) pc would not tell you where the building was or allow you to investigate pc's claim of entitlement to evict; or
2. *sue for patent infringement regarding a manufacturing process* but had no evidence that pc ever created or improved the process.

B. Rhetorical – obvious answer for 100% of the audience is we would refuse to file a lawsuit on behalf of this pc without additional facts to support the claim.

1. Rules require more investigation:

- a. By presenting and maintaining a claim, an attorney or party is certifying that to the best of the person's knowledge, information, and belief, formed **after an inquiry reasonable under the circumstances**, that the allegations and other factual contentions have evidentiary support.

Missouri Rules of Civil Procedure, Rule 55.03(c)(3)

- b. The claim, defense, request, demand, objection, contention, or argument is not presented or maintained for any improper purpose (such as seeking to obtain a judgment on debt not owed or beyond the statute of limitation);

Missouri Rules of Civil Procedure, Rule 55.03(c)(1)

- c. A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous...

Missouri Rules of Professional Conduct, Rule 4-3.1

2. Equally important, our role in society so demands.

II. Sale of Accounts

- A. “The same portfolio is sold to multiple buyers; the seller doesn’t actually own the portfolio up for sale; half the accounts are out of statute; accounts are rife with erroneous information; access to documentation is limited or nonexistent.”

Corinna C. Petry, *Do Your Homework; Dangers often lay hidden in secondary market debt portfolio offerings. Here are lessons from the market pros that novices can use to avoid nasty surprises*, *Collections & Credit Risk*, Mar. 2007, at 24.

- B. “A leading association of debt buyers, DBA International (“DBA”), acknowledged that it is common for a debt buyer to receive only a computerized summary of the creditor’s business records when it purchases a portfolio”

Collecting Consumer Debts: The Challenges of Change: A Federal Trade Commission Workshop Report (February 2009)

- C. “The Court is aware of how the market for the sale of debt currently works, where large sums of defaulted debt are purchased, by a small number of firms, for between .04 and .06 cents on the dollar...the simple fact that the proof required to obtain a judgment in the creditor's favor is lacking, usually as a result of poor record keeping on the part of the creditor...”

MBNA America Bank, N.A. v. Nelson, 15 Misc. 3d 1148A; 841 N.Y.S.2d 826 (N.Y.Civ. Ct. 2007)

D. Sale documents – typical language

1. “assigns...all rights, title, and interest of seller in certain receivables, judgments, or evidence of debt described in data file” (bill of sale)
2. “data file” is a list of names and purported balances
3. “as is”; “with all faults”; “without representation or warranty”
4. “Buyer expressly understands that Seller will not provide Buyer with any documentation relating to any account including without limitation any application, agreement, billing statement, notice correspondence, documents supporting a deficiency balance, or consumer information which relates to an Account, regardless of whether such documents are in Seller’s possession or could be obtained from a third party. Buyer has taken such absence of documents into account in determining whether, and at what price, to purchase the accounts.”

5. “Buyer shall not contact any Prior Owner for any purpose relating to any Account...Buyer must not refer, for any reason, any Borrower with an inquiry, or any other Account issues to Seller or a Prior Owner.”

E. Seller accuracy – original credit card and/or debt buyer resale

1. Affidavits attesting to account “accuracy” - Chase and Linda Almonte
 - a. “Hardly, if ever, was anything verified.”
 - b. “They would sign the affidavits in these meetings without looking at any accounts at all.”
 - c. “Not once did I **ever** see one of the notaries present or an account looked up in the systems by...anyone prior to signing.”
(emphasis in original)
 - d. “The processor would then Fed Ex them back to the attorney or law firm to be utilized to obtain judgment against the consumer in a lawsuit.”
 - e. “During my tenure at Chase bank, I witnessed bank executives and employees routinely destroy, via shredding and other means, information and communications taken from consumers rather than incorporate that information into the consumer’s credit card file. The type of documents I witnessed destroyed included, but were not necessarily limited to, bankruptcy notices and other bankruptcy documents and communications, proof of payment by the consumer, and letters from debt settlement companies.”
2. “...robo-signing and fraud are rampant in this industry, and that the debt buyers who pursue these claims often lack proof necessary to show that they own the debt, and often lack proof even that a debt was ever owed in the first place.”

The One Hundred Billion Dollar Problem in Small Claims Court: Robosigning and Lack of Proof in Debt Buyer Cases, Peter A. Holland, Journal of Business and Technology Law, Vol.6, page 259, 2011

F. So what?

1. “. . . In papers filed with the court, the agency charged that as much as 80 percent of the money CAMCO collects comes from consumers who never owed the original debt in the first place... CAMCO buys old debt lists that frequently contain no documentation about the original debt and in many cases

no Social Security Number for the original debtor. CAMCO makes efforts to find people with the same name in the same geographic area and tries to collect the debt from them – whether or not they are the actual debtor.”

FTC press release, Dec. 8, 2004, <http://www.ftc.gov/opa/2004/12/camco.shtm>
(emphasis added)

2. “The FTC charges that NCO reported accounts using later-than actual delinquency dates. Reporting later-than-actual dates may cause negative information to remain in a consumer’s credit file beyond the seven-year reporting period permitted by the FCRA for most information. When this occurs, consumers’ credit scores may be lowered, possibly resulting in their rejection for credit or their having to pay a higher interest rate.”

FTC press release, May 13, 2004,
<http://www.ftc.gov/opa/2004/05/ncogroup.shtm>

3. Debt buyer American Acceptance alleges that a debt broker sold debts it did not own.

American Acceptance Co. v. Goldberg, No. 2:08-CV-9 JVB, (N.D.Ind. May 14, 2008)

4. Multiple debt buyers sue same consumer on same alleged debt.

Wood v. M&J Recovery LLC, No. CV 05-5564 (E.D.N.Y. Apr. 2, 2007)

5. FTC issues 2010 report outlining numerous, continuing violations

Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration, Federal Trade Commission, July 2010
<http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>

6. Maryland Div. of Finance issues cease and desist against debt buyer LVNV identifying the myriad of abuses that occur.

Summary Order to Cease and Desist and Summary Suspension of Collection Agency Licenses, *In the Matter of LVNV Funding LLC, et al.*, Case no. DFR-FY2012-012, Maryland Commissioner of Financial Regulation, Oct. 25, 2011
<http://dflr.maryland.gov/finance/consumers/pdf/lvnc&d.pdf>

III. Securitization of Accounts

A. Credit card companies “securitize” credit card receivables, where the payment stream is transferred to third parties with “servicing” retained by the originator.

1. Not Asset Backed Securities – bonds/certificates backed by credit card receivables
2. Set Up
 - a. credit card co. – SPE – trust (cc = servicer) — bottom tranche typically retained
 - b. multiple issuances or series are issued and added to a master trust
 - c. master trust issues payments to each series of certificate holders
 - d. i.e., each series holds undivided interest in master trust proceeds
 - e. Receivables, not the accounts are sold. CC co retains “ownership” of the account and can change terms, etc.
 - f. Revolving maturity
 - g. PSA – repurchase obligations; assignment and re-assignment
 - h. Servicer retains fees (late fees, over limit fees)

B. So what?

1. Real party in interest/indispensable party
 - a. Account owned by entity suing?
 - b. Consumer settles or tries case against non-owner, will still face a nonparty regardless of outcome
 - c. Same for consumer claims and defenses
2. Default, servicer cancels account, charge off, sold to debt buyer
 - a. repurchase by cc co before sale?
 - b. Whose interest is debt buyer purchasing? (servicer, trust, before contract cancellation or after)

- c. assignment and purchase documents; trust documents; original consumer contract; amendments MUST be produced to demonstrate entitlement to principal, interest, fees, attorney fees - an assignee acquires no greater rights than the assignor had at the time of the assignment *Centennial State Bank v. S.E.K. Construction Co., Inc.*, 518 S.W.2d 143, 147 (Mo.App.1974).
- d. splitting a chose in action generally prohibited *Webtser v. Sterling Fin. Co.*, 173 S.W.2d 928 (Mo. 1943)

IV. MO Cases & Developments

A. Business Records

1. *C&W Asset Acquisition, LLC v. Somogyi*, 136 S.W.3d 134 (Mo. App. S.D. 2004)
 - a. affidavit from employee of debt buyer “servicer” claiming to authenticate loan sale agreement, credit card agreement, and data of consumer account;
 - b. form of servicer affidavit substantially complied with §490.692 RSMo;
 - c. accepting records from two separate entities and claiming to be the custodian does not satisfy §490.680.

2. *Asset Acceptance v. Lodge*, 325 S.W.3d 525 (Mo. App. E.D. 2010)
 - a. debt buyer witness testified he was familiar with how consumer debt records were prepared in the industry and identified debt sale documents as well as credit card check at issue (issued from original creditor);
 - b. records inadmissible – debt buyer witness had no knowledge of how records were prepared or when the records were prepared; holding another entities records in debt buyer file not sufficient under §490.680
 - c. *citing Zundel v. Bommarito*, 778 S.W.2d 954, 958 (Mo.App. E.D.1989) (“prepared elsewhere...merely received and held in a file”)

3. *Cach, LLC v. Askew*, Mo. Supreme Court, No. 91780, 1/17/12
 - a. employee of debt buyer parent company who received “bank training with most of the major banks” could not authenticate records generated by several other entities;
 - b. debt buyer Plaintiff CACH, LLC has no employees;
 - c. employee of SquareTwo Financial attempted to authenticate summary records generated by Providian National Bank, sold to WaMu, sold to Worldwide Asset Company, and then sold to CACH; trial court admitted testimony under business records statute.
 - d. Held: Trial court erred in admitting testimony because witness was not records custodian of relevant companies. CACH did not prove valid assignment and thus did not have standing to sue. Judgment against Defendant reversed.

B. AG MMPA cases

1. Debt buyer conduct not “in connection with” sale
 - a. *State of Missouri ex rel. Koster v. Professional Debt Management, LLC*, 351 S.W.3d 668 (Mo. App. E.D. 2011)
 - b. *State of Missouri ex rel. Koster v. Portfolio Recovery Associates, LLC*, 351 S.W.3d 661 (Mo. App. E.D. 2011)
2. MMPA prohibits deceptive or unfair conduct whether it occurs “before, during, or after the sale” §407.020(1) RSMo
3. Different results
 - a. *Huffman v. Credit Union of Texas*, 2011 WL 5008309 (W.D.Mo. 2011) (auto finance company’s debt collection tactics subject to MMPA);
 - b. *Gibbons v. Nuckolls*, 216 S.W.3d 667 (Mo. banc 2007) (MMPA not limited to direct seller; privity not required)