Consumer Finance Monitor (Season 3, Episode 17): A Close Look at the CFPB's Supplemental Proposal Requiring Disclosures by Debt Collectors for Time-Barred Debts

Speakers: Chris Willis and Stefanie Jackman

Chris Willis:

Welcome to the Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. I'm your host Chris Willis, the practice group leader of Ballard Spahr's consumer financial services litigation group and I'll be moderating today's program.

Chris Willis:

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Chris Willis:

Now, today I'm joined by my partner Stefanie Jackman, who is one of the leading experts on the world of debt collection regulations in the country. We're here to talk about the most recent episode in the CFPB's rule making with respect to debt collection. That rulemaking, of course, kicked off with a large notice of proposed rulemaking in May 2019, so almost a year ago. The CFPB said, in that rulemaking release, that it would issue a supplemental release about any potential disclosures that it may require in connection with the collection of time-barred debt, that is debt for which the statute of limitations has run. Today, Stefanie and I are going to be talking about that supplemental proposal.

Chris Willis:

Stefanie, bring us up to speed. What has happened with the CFPB and its proposal, as it relates to disclosures with time-barred debt?

Stefanie Jackman:

Yeah, sure. As everyone, I think, was expecting after we saw the NPRM that came out last year on this, the Bureau told us it would be likely soliciting additional feedback on the issue of time-barred debt and it did that. Keeping with its promise, the Bureau has proposed an additional supplemental notice of proposed rulemaking that focuses only on time-barred debt, and in some ways I think that there are a lot of aspects of what the Bureau put out in its SNPRM that are favorable to the industry. But, that doesn't mean there aren't still some challenges.

Stefanie Jackman:

A few things that are favorable is, in contrast to some of the prior statements we had heard, for instance back in the SBREFA process, I think that was 2016 or so. The Bureau is not proposing to bar collections on time-barred debt. First and foremost ...

I don't know that I ever thought that the Bureau would go that far, but it certainly was something that had been discussed. It would have proposed something like what we already see in Mississippi, Wisconsin, and for debts that are purchased, North Carolina's statutes of limitation, that state upon the expiration of the statute, the debt is extinguished and no collections, let alone legal action, no collections whatsoever can happen on those accounts. That's good news, because I think that would have been a really significant impact to many segments of the industry, and potentially as well the credit cycle.

Stefanie Jackman:

Additionally, the Bureau is not going to propose, at least for now, that a determination that a debt is time-barred is binding on subsequent collection agencies, debt buyers, et cetera. Instead, the Bureau is allowing each entity to make its own determination on that, and not be bound by a prior determination with which it might disagree. Now of course, there can be challenges with that and that's one of the things that we have to think about. There's obviously a risk of litigation if a collection agency sends communications to a consumer disclosing that they are time-barred, because the Bureau is proposing a 50 state, nationwide series of disclosures that must be given when accounts are past the applicable statute of limitations. It can be a really complicated analysis, for anybody who has tried to do it. First, you have to figure out what state's law applies, and then you have to figure out what type of debt you're dealing with because there can be different statues. You have to look at if there's borrowing statutes in the state. It can be very challenging.

Stefanie Jackman:

But, if you determine the account is time-barred, give the required disclosures, and then later the account is recalled and placed somewhere else who thinks, actually, your determination is not correct and doesn't give those disclosures, my expectation is both of you could face questions from consumers, and possibly their attorneys, maybe lawsuits, about whether or not you were correct, and what that meant, and how it confused a consumer one way or another.

Stefanie Jackman:

Going to the disclosures they're requiring, there's a series of them. The Bureau is attempting to propose disclosures that would reflect varying state laws. Some states have specific requirements, others do not. Some states give a right to revive a debt upon a written promise to pay or a payment by the consumer, others do not. The Bureau, I think in proposing these four disclosures, is attempting to do the best it thinks that it can to give direction, to give safe harbors, to give clear guidance. But the problem is, Chris, I fear we will find it is not in practice anywhere near as clear as the Bureau would hope it to be.

Chris Willis:

Stefanie, you noted that one of the disclosures that's going to be required by the proposed rule is a description of the circumstances under state law of when a statute of limitations could be revived or extended, by a partial payment or a promise to pay. How is that different from the way the Bureau originally intended to deal with the revival issue, as set forth in the SBREFA outline from 2016?

Stefanie Jackman:

Well you raised a good point, Chris, because originally the Bureau had at least suggested the possibility that it would essentially preempt state law on that issue, and say that debts couldn't be revived. So another thing that is ... I'm hesitant to call it good, but what I would say at least is not that black and white, is whether or not agencies, and creditors, and debt purchasers can still determine whether or not they want to attempt to grapple with revival rights that exist under state law, they're not going to be preempted.

Stefanie Jackman:

Now, the reason I'm saying whether they want to deal with it or not is in the interim, a number of people in the industry, certainly not all, but a number have decided to take the perspective that once the statute has run that notwithstanding a legal right to exercise revival, they don't. It's just a business decision they've made. Thinking about some of the complications that can arise when you are communicating with consumers, attempting to advise them as to the impact of a written promise to pay or an actual payment under state law, with regard to what it might let them do on the debt, namely allow them to now use the courts and legal action again, where they couldn't before, to collect the debt. It might be a challenge that, in the current environment, people just aren't really lining up to take. I mean, we'll have to wait and see. The Bureau certainly is attempting to give some proposals that you could use, disclosures you could use, to try to avoid those issues. But even on their face, some of those are already causing conversation in the industry.

Stefanie Jackman:

For instance, one of them is the law limits how long you can be sued for a debt. But then it says, "If you do nothing or speak to us about this debt, we will not sue you to collect it." This is because the debt is too old. "But if you make a payment, then we can sue you to collect it." Well, it's confusing. If you do nothing, or speak to us about the debt, we won't sue you. Right there, in attempting to advise the consumer about the fact that, in this particular state, if you make a payment we can sue you to collect it, I am confused as a barred attorney. Wait a minute. Is that going to happen? Do I do nothing? If I call you, is it dangerous? I'm confused.

Stefanie Jackman:

So, some of the industry participants are already questioning, when we're supposed to be thinking about how to write these types of communications in a way that the least sophisticated consumer, somebody with ... I think that you've heard talk about different grade level reading ability. That's confusing, to me. Are you even going to even want to mess with having to give it? Are there ways you can avoid giving it? Do you have to still say that the law in this state would say, "Upon the making of a payment, I can sue you to collect it," if your company policy is going to be you just don't do that, to try to avoid these issues? None of that is clear right now.

Chris Willis:

Stefanie, you mentioned earlier that there are some complications associated with determining what the actual statute of limitations is, based on things like the existence of borrowing statutes that may point to another state's law, or other factors associated with the account. What kind of leeway is there for a debt collector to make a mistake in that regard, and still be in compliance with the CFPB's proposed rule? Or, is it is strict liability standard?

Stefanie Jackman:

Well, that's a good question. The Bureau is not proposing a strict liability standard, they are proposing a know or should know standard for determining whether a debt is time-barred. But without further guidance, I think in effect, that will almost operate as if it was strict liability. Meaning if you get it wrong, you're looking at, likely, a lawsuit. And there is no current guidance on what would be reasonable, under this know or should know standard.

Stefanie Jackman:

For instance, thinking about what we encounter already with the TCPA and other things is how do we figure out where our consumer resides, right? Just for purposes of knowing if it's within the timezone we can call them. Say you have an account where the consumer has a zip code in one area, but an area code in another. Am I reasonable, if I just look to one of those? How do I determine what state this consumer resides in? I don't know, there's no proposals on that one way or the other. Am I reasonable if I assume both? What happens, though, if both states, and this will often happen, have different requirements here? Who do I comply with?

Stefanie Jackman:

There's FDCPA case law right now that says if you give the most conservative disclosure you can imagine ... Companies have done this, and they've gotten sued for it. You're basically telling a consumer, in all 50 states, "Listen, your debt is time-barred. If you pay me or make a written promise to pay, that might revive my ability to sue you." They send that out thinking, "Okay, this is operational, this is as protective of the consumer as possible, this works, it's manageable." They're getting sued for misleading the consumer under the FDCPA in states where that's not actually the law, that a written promise to pay would not revive it, that doesn't exist. Or, a promise to pay would not revive it, so that gets complicated.

Stefanie Jackman:

Then, let's throw in some more fun detail. What if you haven't had any contact with this consumer in some time? You're relying on records that the creditor gave you, or the prior agency, or whomever last connected with them, perhaps some time has passed. What if they've moved? What if you don't find out until you've already started reaching out to them, they live somewhere else? Okay, well you could argue, "Well, how could I have known that?" What if you'd done a post office address search? What if you'd skip traced? What if you'd done an search? It's just completely unclear what is reasonable in trying to understand should you know, did you know, and applying the standards.

Stefanie Jackman:

It's one of the things that I think many in the industry are going to be asking for. I'm certainly, in the comment letters I'm involved in, agitating for a request from the Bureau that we can at least be deemed to have acted reasonably by using the consumer's last known zip code. Until we have actual knowledge they don't live elsewhere, that we're reasonable and haven't violated the FDCPA if it turns out they don't live there, and as a result a debt is time-barred, or the disclosure that should have been given is different because of state law. And, that means we don't have to do all of these scrubs and searches, that aren't always reliable, in advance.

Chris Willis:

You mentioned the know or should know standard. And assuming the CFPB stays with that, would it be purely the province of the CFPB in the future to determine, under a given set of facts, what know or should have known means? Or, is that something that's likely to be the subject of private litigation?

Stefanie Jackman:

Well, I think right now it's going to be entirely the subject of private litigation, unless the Bureau decides to give some contours and I don't know that they will do that.

Stefanie Jackman:

You raise a really good point, Chris, because just a couple of weeks ago, a decision came down from a Maryland Federal District Court, it's called Jennings versus Dynamic Recovery Solutions. Where the court there, instead of finding that the defendant who did a very thorough analysis, determined where the consumer lives, because that's usually what's driving the decision about what state laws apply when you're making collection communications, and engaging in collection efforts. But, the court ended up enforcing a contractual choice of law provision. After determining well, is this a procedural or substantive issue? As a result, applied the contractual choice of law issue, which really was less protective under state law of the consumer, applied a different statute of limitations with different requirements. And then, found that there was an FDCPA violation as a result, or at least a potential FDCPA violation as a result.

Stefanie Jackman:

Even assuming we can figure out what state the consumer lives in, what state applies, there's absolutely nothing that gives guidance to courts on should you be looking at contractual choice of law clauses, how do those come into play. Courts are going to engage in a different state-by-state choice of law analysis, and really I just see it to be a very challenging environment to operate in, from a compliance standpoint.

Chris Willis:

Well, and I think anybody who's been involved in the debt collection industry, or the legal side of it at least, knows that any issue that gets litigated in private FDCPA litigation will produce a mass of completely inconsistent decisions from every different court in the country. I mean, we've seen that with so many issues ranging from validation notices, to time-barred debt disclosures, to 1099C disclosures, et cetera.

Chris Willis:

Stefanie, you mentioned some of the comment letters that you're working on. Can you give our audience some insight into the industry's reaction to the supplemental proposed rule with regard to these time-barred debt disclosures? What will the industry be saying, when comments are due in connection with this proposal?

Stefanie Jackman:

Yeah. From what I'm seeing, I think you're going to see a number of letters. By the way, they're in light of current happenings, there have been several requests from the industry already for at least a 30, I think there was also a 60 day extension request. The CFPB has not, at least as of the time that we're recording this podcast, formally granted any of those. But, I think it's likely we're going to see an extension. Right now, the responses would be due on May 4th, the day before Cinco de Mayo, so it makes it easy to remember. But, I think that's going to change and we're probably looking at least 30 days, so the first week of June, possibly later because of the COVID-19 issues.

Stefanie Jackman:

But when those letters get submitted, the industry is going to raise issues around the know or should know standard, and what you have to do in order to be able to take advantage of that standard that is supposed to be providing some level of defense. You're going to see questions about and requests for guidance on how to determine, more definitively, what statute of limitations applies, what state law applies. You're going to see requests for tweaking of these disclosures, because of what I flagged earlier. That some of them, as worded, are confusing and certainly at risk of being confusing to the least sophisticated consumer.

Stefanie Jackman:

In addition to the "if you don't call me or call me, if you do nothing or contact me" part. There's also statements about "the collection agency will not sue you." Well, the collection agency usually isn't going to be the one suing you anyways. It's the creditor, or the owner of the debt. So there's some discomfort around that, and a fear that that will be something that's misleading or deceptive under the FDCPA's least sophisticated consumer standard, and I think with good reason, so you're going to see discussion around that.

Stefanie Jackman:

So when a state law already sets a specific disclosure that needs to be given, can the Bureau just say, "Complying with that state law's disclosure is sufficient, and you don't also have to give another one?" They're not saying that right now, they're specifically contemplating that you give two, which seems confusing and certainly redundant.

Stefanie Jackman:

You're also seeing some discussion about the proposal to give disclosures to consumers during the first right party contact. If that right party contact is verbal, then you also have to do it in the validation letter. If the account wasn't time-barred when you first contacted the consumer, but going forward becomes time-barred, you have to give the disclosure at that time. If you do it in writing but then talk to the consumer before the consumer could have received what you sent in writing, you have to give a verbal disclosure. There's lots of confusion about, wait a minute. What do I have to give and when? When is it sufficient? So I think you're going to see the industry ask for a verbal disclosure alone if that is the first communication to be sufficient, just like we currently have under the FDCPA, which is you can give a validation notice verbally. It doesn't mean that's what most of the industry does, but you can. And if you do that, you don't necessarily have to send a follow-up one in writing. Although like I said, that isn't current industry practice.

Stefanie Jackman:

But, there's just a lot of confusion, and I think a lot of duplication and ambiguity that the industry is going to try to get some contouring around, to try to reduce the number of lawsuits that they are fearing they will face.

Chris Willis:

Got it. In terms of logistics and next steps moving forward, how do you anticipate that this supplemental proposal will fit in with finalizing the proposed larger debt collection rule that came out in May 2019? Are we going to see a final rule that covers everything, including both of these things? Or, are we going to get one and then the other? What's your view on that?

Stefanie Jackman:

Well notwithstanding COVID-19 and its disruption, I still think you're going to see these combined back together. And candidly, I hope you do because the Bureau appears to be moving, with the larger rule, in the direction of trying as clearly as it thinks is necessary to make a definitive statement that it is a third party rule only. So combining these back together helps to reduce concern that the time-barred debt might apply to creditors more broadly than other reforms that the Bureau is putting in place, with respect to the FDCPA.

Stefanie Jackman:

I also think it just aligns with the history of this rulemaking, these started together. They separated because according to what the Bureau said last May, that it needed more information in comment on this particular issue. I continue to believe these will come back together. Yes, the current environment might delay the publication of the final rule, but I don't know that it would cause them to be published separately because the other rulemaking has been in process for some time, and I think these were always contemplated in this way. A 30 day, or even a 60 day extension on the time-barred debt SNPRM doesn't seem likely to materially slow it down, such that these have to be separated.

Chris Willis:

Okay. Well thanks a lot, Stefanie, and thanks for being on the podcast today and sharing your insights into this very important issue for basically all creditors, and all debt collectors. And thanks to our listeners, for tuning in today.

Chris Willis:

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