

Sixth Circuit: Debt Buyer Cannot State Prejudgment Interest Owed for Period After Debt Charged Off

While charging off a debt does not extinguish the consumer's obligation,¹ card issuers often have a voluntary policy of not charging interest on a debt for the period after a charge-off, in part because this may eliminate their obligation to continue sending out periodic statements. If the creditor has waived the right to such interest, a debt buyer assignee cannot seek such interest either.²

Debt Buyer's Statement That Prejudgment Interest Owed Results in FDCPA Liability

At least one debt buyer has sought to evade this prohibition by seeking not contract interest after the charge-off, but statutory prejudgment interest. The Sixth Circuit on October 24 has just ruled that filing a complaint stating that demanding prejudgment interest is owed in this context violates the FDCPA.³

Interpreting Kentucky's usury statute,⁴ the Sixth Circuit found that the original credit agreement had replaced the statutory prejudgment interest rate with the interest rate specified in the credit card contract. The court ruled that, under Kentucky law, the statutory prejudgment interest rate was not revived when the original creditor waived its right to collect interest at the contract rate, saying the creditor "cannot recover the right it bargained away simply because it later chose to waive the right for which it bargained."

A debt buyer cannot acquire a right to statutory interest that its assignor did not possess. While under Kentucky law prejudgment interest may be awarded by Kentucky courts in certain cases as a matter of equity, the Sixth Circuit distinguished the debt buyer's complaint—noting that the debt buyer asserted its entitlement to prejudgment interest as a factual matter rather than including a request for interest in the prayer for relief.

Holding that the FDCPA applies to claims made in a state court collection suit and that the content of the debt buyer's complaint, like any alleged FDCPA violation, must be viewed from the standpoint of the least sophisticated consumer, the court found violations of §§ 1692e(2)⁵ and 1692f(1)⁶ to be adequately alleged. Noting that the Sixth Circuit had previously concluded that complaints and other court filings may constitute threats under the FDCPA, the court also concluded that the least sophisticated consumer could take the debt buyer's statement that it was entitled to prejudgment interest as a "threat" under § 1692e(5).⁷

¹ See National Consumer Law Center, *Collection Actions* § 5.2.3.4 (3d ed. 2014), *updated at* www.nclc.org/library

² See *McDonald v. Asset Acceptance LLC*, 2013 WL 4028947 (E.D. Mich. Aug. 7, 2013). See also National Consumer Law Center, *Collection Actions* § 5.2.3.5 (3d ed. 2014), *updated at* www.nclc.org/library.

³ *Stratton v. Portfolio Recovery Associates, LLC*, 2014 WL 5394517, at *10 (6th Cir. Oct. 24, 2014)

⁴ Ky. Rev. Stat. § 360.010(1).

⁵ 15 U.S.C.A. § 1692e(2) ("The false representation of – (A) the character, amount, or legal status of any debt").

⁶ 15 U.S.C.A. § 1692f(1) ("The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.").

⁷ 15 U.S.C.A. § 1692e(5) ("The threat to take any action that cannot legally be taken or that is not intended to be taken.").

The Dissent

A dissent in the Sixth Circuit decision argued that the interpretation of the Kentucky usury law was an issue of first impression and that it was unfair to find an FDCPA violation where the debt buyer was relying on a reasonable interpretation of an ambiguous statute that had yet to be interpreted by any court. The dissent also argued that complaints should be excluded from “threat” liability under the FDCPA because this provision does not apply to completed acts. The dissent also argued that the distinction between asking the court to award prejudgment interest and filing a claim for a fixed amount of prejudgment interest makes no sense under Kentucky’s usury law and conflicts with previous court decisions.