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Alborzian v JPMorgan Chase Bank

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- **Borrower may sue junior lienholder for trying to collect no-longer-enforceable debt if its collection efforts inaccurately imply that debt is still enforceable.**

Alborzian v JPMorgan Chase Bank (2015) 235 CA4th 29

Plaintiffs took out two loans to buy their home in 2005, each secured by a deed of trust. The senior lienholder subsequently foreclosed on the property, but the proceeds from the sale were not enough to pay off the loan of the junior lienholder (Chase). Former CC §580b (Stats 2012, ch 64, §1) barred Chase from enforcing the loan. Chase nonetheless sent two dunning letters to plaintiffs, offering to "settle" a "debt" plaintiffs "owe" by giving them two short "'window[s] of opportunity'" that, if missed, would leave them with "fewer options" and subject them to "accelerat[ion]" of the loan and continued "calls and efforts to collect the amount owed." The first letter stated that it was not "an attempt to collect a debt or to impose personal liability" "[t]o the extent [plaintiffs'] obligation was discharged." Chase and its debt collector also made debt collection calls to plaintiffs.

Plaintiffs sued Chase and its debt collector, alleging that defendants' letters and calls were misleading for implying that the debt was still owed, in violation of the Rosenthal Fair Debt Collection Practices Act (Rosenthal Act) (CC §§1788–1788.33), the Unfair Competition Law (UCL) (Bus & P C §§17200–17210), and the Fair Debt Collection Practices Act (FDCPA) (15 USC §§1692–1692p). The trial court sustained defendants' demurrers and plaintiffs appealed.

The court of appeal reversed, holding that Chase's dunning letters violated the FDCPA and hence also the Rosenthal Act and the UCL (which incorporate the FDCPA's standards). Chase was barred from enforcing its loan under CC §580b. For loans executed on or after January 1, 2013, §580b (Stats 2013, ch 65, §2) also prohibits any "collection" of a legally unenforceable debt. For loans executed before January 2013, like plaintiffs' loan, the junior lienholder is not barred from trying to get a borrower to pay off the loan balance voluntarily but remains liable for any other law it violates while doing so. See former CC §580b (Stats 2012, ch 64, §1).

Deceptive collection efforts violate the FDCPA. Deception is judged from the perspective of an "unsavvy consumer" and is present when a debt collection letter can be reasonably read to have two or more different meanings, one of which is inaccurate. The silent but unmistakable premise of Chase's dunning letters was that plaintiffs' debt was still valid and owing, *i.e.*, enforceable. At best, the letters were ambiguous. Chase could have eliminated the ambiguity by disclosing that the debt was no longer enforceable and that it was only seeking voluntary repayment of its unenforceable debt, but it failed to do so. Language in the debt collection letters could reasonably be interpreted to imply that Chase would take action it had no intention or ability to undertake—a deception sufficient to survive a demurrer on an FDCPA claim.

THE EDITOR'S TAKE: The decision was hardly surprising, given that CCP §580b itself now says that no deficiency shall be "owed or collected" (rather than just "lie") on a purchase money loan made after 2012. Clearly, if the legislature could bar deficiencies on purchase money paper, as it did in the 1930s, it could further bar attempts to collect on it, as it did two years ago when amending the statute.

This decision adds that pre-2013 notes are protected against deceptive collection efforts, which include implying that the debts are collectible, and that exculpatory disclaimers in the dunning notices are not likely to eliminate the deception. The holder of a sold-out junior purchase money note probably has to state—in bold print, and at the very beginning of her demand letter—that the debt she seeks to collect may well be unenforceable.

The decision does not advise about two other features that would be useful for creditors (and debtors) to know about:

How the other recent amendment to §580b (that purchase money uncollectibility does not apply to the extra money generated in a refinance of the original loan) affects collection efforts by a sold-out junior; and

How a transferee of mortgage paper avoids getting into debt collection trouble when the loan turns out to be purchase money.

As to those, I have questions but not answers.

In refinances, since new funds added to an old loan are not purchase money for §580b purposes, a sold-out junior's note is not entirely worthless. Does that mean that its holder can make attempts to collect some of its debt without violating the debt collection acts as long as its letters are cautiously written? The new Act admonishes a creditor to apply partial payments first to the old protected loan before applying it to the new (nonpurchase-money) component; must it make the same distinction in its dunning letters?

In secondary market transactions, transferees of notes often cannot tell, just by looking at the documents, whether the loan is secured by a purchase-money or nonpurchase-money mortgage (or perhaps whether it is secured at all). Will ignorance be a defense in debt collection cases? Can buyers of such paper get their sellers to provide representations and warranties that cover this perilous topic? Will that do any good?—*Roger Bernhardt*