

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

)	
FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	Civil Action
)	No. 1:08-CV-01976-BBM-RGV
COMPUCREDIT CORP., <i>et al.</i>,)	
)	
Defendants.)	
)	

**PLAINTIFF’S OPPOSITION TO DEFENDANT JEFFERSON CAPITAL’S
MOTION TO DISMISS**

TABLE OF CONTENTS

- I. INTRODUCTION..... 1
- II. STATEMENT OF FACTS. 2
- III. THE FTC DOES NOT FACE A ONE-YEAR STATUTE OF LIMITATIONS UNDER THE FDCPA. 5
 - A. Under the Plain Words of the FDCPA, No Limitation Period Applies to the FTC’s Action..... 6
 - B. The FDCPA’s Legislative History Demonstrates That Congress Did Not Intend To Limit FTC Enforcement Actions To One Year..... 12
 - C. The FTC’s Interpretation of the FDCPA is Subject to Deference. . . 14
- IV . THE FTC AND THIS COURT HAVE JURISDICTION OVER JEFFERSON CAPITAL. 16
 - A. The FTC Has Jurisdiction Over Jefferson Capital Pursuant to the FTC Act..... 16
 - B. There Is No Separate Administrative Action By the FDIC Against Jefferson Capital. 20
- V. CONCLUSION..... 22

TABLE OF AUTHORITIES

CASES

Capital One Bank (USA), N.A., v. Darrell V. McGraw, Jr.,
2008 U.S. Dist LEXIS 48952 (S.D. W.

Mattox v. FTC,
752 F.2d 116 (5th Cir. 1985)..... 15

McGregor v. Chierico,
206 F.3d 1378 (11th Cir. 2000)..... 7

Moore v. Equifax Info. Serv. LLC,
333 F. Supp. 2d 1360 (N.D. Ga. 2004). 8

Stewart v. Slaughter,
165 F.R.D. 696 (M.D. Ga. 1996).. 8

United States v. ACB Sales & Service, Inc.,
No. 80-251, slip op. (D. Ariz. Apr. 11, 1985)..... 9

United States v. Blake,
751 F. Supp. 951 (W.D. Okla. 1990).. 10

United States v. Building Inspector of Am., Inc.,
894 F. Supp. 507 (D. Mass. 1995)..... 8

United States v. Central Adjustment Bureau, Inc.,
No. CA-3-80-1671-R, slip op. (N.D. Tex. Oct. 22, 1981). 9

United States v. Landmark Financial Services, Inc.,
612 F. Supp. 623 (D. Md. 1985). 15

United States v. Payco American Corp.,
No. 93-C-801, slip op. (E.D. Wis. Jan. 14, 1994). 9, 10

United States v. Payco American Corp.,
No. 93-C-801, slip op. (E.D. Wis. Feb. 23, 1994)..... 9, 11

United States v. Prochnow,
2006 U.S. Dist. LEXIS 92895 (N.D. Ga. Dec. 21, 2006)..... 8

Waller v. Fricks,
2008 U.S. Dist. LEXIS 41664 (M.D. Ga. May 28, 2008)..... 8

Young v. Community Nutrition Institute,
476 U.S. 974 (1986). 15

STATUTES

12 U.S.C. § 1818(i)(1)..... 20, 21

12 U.S.C. § 1861 *et seq.* 18

15 U.S.C. § 45(a)..... 1, 2

15 U.S.C. § 45(a)(2).. 16

15 U.S.C. § 45(m)(1)(A). 10

15 U.S.C. § 53(b)..... 7, 20

15 U.S.C. § 1601 *et seq.* 10

15 U.S.C. § 1607(c)..... 11

15 U.S.C. § 1640(e)..... 11

15 U.S.C. § 1691 *et seq.* 10

15 U.S.C. § 1691c(c). 11

15 U.S.C. § 1691e(f). 11

15 U.S.C. § 1692 *et seq.*..... 1

15 U.S.C. § 1692d. 3

15 U.S.C. § 1692e(10)..... 2

15 U.S.C. § 1692k(a)..... 6

15 U.S.C. § 1692k(d)..... 6

15 U.S.C. § 1692l..... 6

15 U.S.C. § 1692l(a). 7

28 U.S.C. § 2462. § 2)(. 8BT533.0400606.6000TD9.24000.0000TD(.....)TjT

I. INTRODUCTION

The Federal Trade Commission's ("FTC") Complaint properly states a claim for which monetary and injunctive relief may be granted. The FTC, therefore, opposes Jefferson Capital's motion to dismiss, pursuant to Rule 12(b)(6), all claims seeking monetary relief for violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, as alleged in Counts V and VI of the Complaint, that occurred prior to June 10, 2007. The FTC also opposes Jefferson Capital's motion to dismiss, pursuant to Rule 12(b)(1), Count IV of the Complaint.

Counts V and VI of the Complaint properly seek injunctive and equitable monetary relief under the FDCPA for injury to consumers that occurred prior to June 10, 2007. Jefferson Capital incorrectly asserts that the FTC's action is subject to a one-year statute of limitations. In fact, the FTC faces no such time bar.

Count IV of the Complaint also properly seeks injunctive and equitable monetary relief against Jefferson Capital and its co-defendant and parent company CompuCredit Corporation for engaging, separately and as a common enterprise, in deceptive acts or practices in violation of Section 5(a) of the Federal Trade

¹ In considering a motion to dismiss for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6), the Court must “view the allegations of the complaint in the light most favorable to the plaintiffs, consider the allegations of the complaint as true, and accept all reasonable inferences that may be drawn from the allegations.”

and other creditors. (Complaint ¶ 96.) Count VI of the Complaint alleges that Jefferson Capital, in connection with the collection of debts on behalf of itself, CompuCredit, and other creditors, violated Section 806 of the FDCPA, 15 U.S.C. § 1692d, by engaging “in conduct the natural consequence of which is to harass, oppress, or abuse consumers.” (Complaint ¶ 97.)

Jefferson Capital is a Georgia limited liability company that is a wholly-owned subsidiary of CompuCredit. (*Id.* ¶ 6.) Since at least 2001, CompuCredit has marketed general purpose Visa credit cards under several brand names, including “Aspire” Visa cards and “Majestic” Visa cards. (*Id.* ¶¶ 14, 16.) Jefferson Capital has marketed the “Majestic” Visa card with CompuCredit since approximately 2004. (*Id.* ¶¶ 59, 62.) CompuCredit has the sole and exclusive right to solicit certain credit card applications, including for “Majestic.” (*Id.* ¶¶ 12, 59.) Jefferson Capital and CompuCredit have acted as a common enterprise in connection with the marketing of the “Majestic” Visa cards and the collection of defaulted “Aspire” credit card receivables. (*Id.* ¶ 7.) CompuCredit and Jefferson Capital are incorporated at the same address and at relevant times have shared common officers, and CompuCredit has formulated, directed, controlled or had authority to control, or participate in the acts and practices of Jefferson Capital. (*Id.* ¶ 8.) They have marketed the “Majestic” Visa credit card and other financial

however, are governed by provisions of the FTC Act and are not subject to this time bar. Thus, its motion should be dismissed.

A. Under the Plain Words of the FDCPA, No Limitation Period Applies to the FTC's Action

This action is not barred by any statute of limitations, notwithstanding Jefferson Capital's improper assertions. Jefferson Capital argues that the statute of limitations for the FTC's action is one year pursuant to Section 813(d) of the FDCPA, 15 U.S.C. § 1692k(d). (Def. Mem. Supp. Mot. Dismiss at 3.) Although Section 813(d) does impose a one-year limitations period for "[a]n action to enforce any liability created by this title [the FDCPA]," this provision relates to consumers' private right of action under Section 813(a), *id.* § 1692k(a), and has no relevance to law enforcement actions brought by the FTC. Rather, Section 814 of the FDCPA, 15 U.S.C. § 1692l, under which the FTC is proceeding here (*See* Complaint ¶ 1), governs law enforcement actions such as this and provides the basis for determining the applicable statute of limitations. Section 814 provides, in relevant part:

Compliance with this title shall be enforced by the [Federal Trade] Commission.... For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act, *a violation of this title shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Commission under the Federal Trade Commission Act are available to the Commission*

to enforce compliance by any person with this title, irrespective of whet

Section 13(b) of the FTC Act contains no statute of limitation. *See United States v. Prochnow*, 2006 U.S. Dist. LEXIS 92895, at *24 (N.D. Ga. Dec. 21, 2006) (citing to previous slip opinion dated August 21, 2003 at 5-7 (copy attached as Ex. 1) (holding that three year statute of limitations applicable for rule and

The courts had no reason to consider and did not address the limitations period applicable to government actions to enforce the FDCPA under Section 814, and thus these cases bear no relevance here.

Courts that have faced the issue of the *FTC's* (rather than individual consumer's) statute of limitations under the FDCPA have read the plain words of the FDCPA and concluded that the one year limitation period in Section 813(d) is not applicable to FTC actions. For example, in *United States v. Central Adjustment Bureau, Inc.*, No. CA-3-80-1671-R, slip op. at 1 (N.D. Tex. Oct. 22, 1981) (copy attached as Ex. 3), the court rejected the de

³ These cases involved actions by the government for civil penalties under Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), rather than, as here, equitable monetary relief under

1691c(c) (ECOA); 15 U.S.C. § 1607(c) (TILA), and another section that provides a limitations period for other kinds of actions, such as suits by consumers to collect monetary damages for statutory violations. 15 U.S.C. § 1691e(f) (ECOA); 15 U.S.C. § 1640(e) (TILA). Jefferson Capital argues that be

Thus, consistent with the courts' decisions in *Payco*, *ACB Sales & Service* and *Central Adjustment Bureau*, this Court should reject Jeis C

S. Rep. No. 382, 95th Cong., 1st Sess. 5 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1699-1700.

Section 814, on the other hand, deals not with a debt collector's "civil liability" to a consumer for violations of the Act, but rather with the FTC's power to enforce the Act as the agency charged with its administration. As the legislative history explains:

Administrative enforcement

This legislation is enforced administratively primarily by the Federal Trade Commission....

All enforcement agencies are authorized to utilize all their functions and powers to enforce compliance. The Federal Trade Commission is authorized to treat violations of the act as violations of a trade regulation rule, which empowers the Commission to obtain restraining orders and seek fines in federal district court.

S. Rep. No. 382, 95th Cong., 1st Sess. 5 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1700.

Thus, if the FDCPA were not clear enough on its face, its legislative history removes any possible doubt that Congress intended the one-year statute of limitations to apply only to private actions by consumers to collect damages. As to FTC actions to enforce the FDCPA, all powers afforded the FTC under the FTC Act apply – including the power to obtain injunctive and equitable monetary relief without time bar.

C. The FTC’s Interpretation of the FDCPA is Subject to Deference

The FTC’s position is not novel. Rather it is the FTC’s long-standing position that the one-year statute of limitations in Section 813 does not apply to enforcement actions under Section 814. In 1988, after notice and public comment, the FTC issued its Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act. 53 Fed. Reg. 50,097 (Dec. 13, 1988). With respect to Section 813, the Commentary states that “[t]he section’s one year statute of limitations applies only to private lawsuits, not to actions brought by a government agency.” *Id.* at 50,109. The Eleventh Circuit, as it relied on the Official Staff Commentary on the FDCPA, observed that “[a]lthough the FTC’s construction of the FDCPA is not binding on the courts, because the FTC is entrusted with administering the FDCPA, its interpretation should be accorded considerable weight.” *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1372 n.2 (11th Cir. 1998) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

As the Court noted in *Chevron*, “[w]e have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.” *Chevron*, 467 U.S. at 844. The Court further instructed that, in reviewing an agency’s interpretation of its

statute, “[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” *Id.* at 843 n.11. Instead, if the agency’s interpretation is “a reasonable one,” it is to be followed by the court. *Id.* at 845. *See also Young v. Community Nutrition Institute*, 476 U.S. 974, 981 (1986) (finding that the FDA’s interpretation of a statute it administered to be sufficiently rational to preclude a court from substituting its judgment for that of the FDA). Lower courts have consistently applied the *Chevron* standard to FTC interpretations of statutes committed to it. *See, e.g., FTC v. Evans Products Co.*, 775 F.2d 1084, 1086 (9th Cir. 1985); *Mattox v. FTC*, 752 F.2d 116, 123-24 (5th Cir. 1985); *United States v. Landmark Financial Services, Inc.*, 612 F. Supp. 623, 629 (D. Md. 1985).

Applying the principles set out in *Chevron* to the statute of limitations argument raised by Jefferson Capital’s motion to dismiss, the inescapable conclusion is that the FTC’s construction of the FDCPA – that FTC enforcement actions under the FDCPA are governed by the FTC Act and thus are subject only to any statutes of limitations applicable to that Act – is permissible and should be upheld.

CompuCredit's Motion to Dismiss, contrary to CompuCredit's assertions, the "bank" exemption in the FTC Act applies only to actual banks. (*See* FTC Opp'n CompuCredit Mot. Dismiss at 9-13.) The exemption does *not* extend to all companies

activities and communications [and] . . . collections.” *Id.* at *3, *30. Capital One relied on COSI to “carry out its banking functions.” *Id.* at* 29. The West Virginia Attorney General sought to serve subpoenas on Capital One and COSI as part of an investigation under West Virginia state law for “‘unfair or deceptive acts or practices relating to marketing, advertising, servicing, including debt collection, and issuing of credit cards and related services.’” *Id.* at *3. The Court found that while the West Virginia Attorney General’s investigation of Capital One was prohibited by the National Bank Act (“NBA”), the NBA did not extend “to agents of national banks carrying out banking activities at the behest of those banks.” *Id.* at *27. Thus, the Court found that the NBA did not apply to COSI, reasoning that “[w]ere I to extend [NBA] protections [sic] third-party corporations such as COSI, the term ‘national bank’ would not [sic] longer mean ‘national bank.’ Rather, it would mean ‘national bank and any entity that can find a way to graft itself, remora-like, to a national bank.’” *Id.* at *43-44.

CompuCredit’s relationship with banks issuing credit cards is similar to COSI’s relationship with Capital One. Therefore, *Capital One* supports the conclusion that CompuCredit, a non-bank that is purportedly engaging in “banking activities,” is subject to FTC jurisdiction. Jefferson Capital is even one step further removed, and provides no factual argument to suggest otherwise.

Thus, because Sections 5 and 13(b) of the FTC Act gives the FTC full jurisdiction to enforce the FTC Act against Jefferson Capital, and the BSCA does not deprive the FTC of that jurisdiction, Jefferson Capital's motion to dismiss should be denied.

B. There Is No Separate Administrative Action By the FDIC Against Jefferson Capital

The FDIC has not instituted any administrative proceeding against Jefferson Capital. Nevertheless, Jefferson Capital, by joining CompuCredit's motion, asserts that 12 U.S.C. § 1818(i)(1) divests this Court of jurisdiction over Jefferson Capital. Such a result is nonsensical.

Even if one accepts CompuCredit's interpretation that Section 1818(i)(1) divests the Court of jurisdiction over it, that interpretation does not support a finding that the Court does not have jurisdiction over Jefferson Capital. The FTC brings this action under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which empowers this Court to enter injunctive and other equitable relief against those found violating the FTC Act or any other law enforced by the FTC. As described in Section IV of the FTC's Opposition to CompuCredit's Motion to Dismiss, a plain reading of 12 U.S.C. § 1818(i)(1) demonstrates that it has no effect on the Court's jurisdiction over CompuCredit or any entity facing a parallel federal

banking agency proceeding. (*See* FTC's Opp'n CompuCredit Mot. Dismiss at 27-
 29). not

When 12 U.S.C. § 1818 is read in its entirety, it is readily apparent that Section 1818(i)(1) is an anti-injunction provision that only limits attacks on federal banking agency administrative proceedings or orders, it does not serve as a complete bar to the exercise of federal district court jurisdiction whenever a parallel FDIC proceeding exists. Now, Jefferson Capital is apparently claiming that Section 1818(i)(1) not only bars federal court jurisdiction when a parallel banking agency proceeding exists against a party, but also bars federal court jurisdiction against a company when a parallel banking agency proceedings exists against that company's parent company. This extension of Section 1818(i)(1) is supported by neither the language of the statute, the case law, nor common sense.⁵

Further, it is difficult to imagine how Jefferson Capital can argue in good faith that there is a risk of a parallel proceeding causing insubstantial harm to the bank.

⁵ Moreover, applying Jefferson Capital's argument to its logical conclusion, the FTC could never bring an FDCPA action against any non-bank, third-party debt collector who happens to collect credit card debt, because the bank issuing the credit card may already be, or may one day be, subject to a federal banking agency proceeding. Certainly, Congress would not have intended to create *sub silentio* such an exception to the FDCPA.

that the Court needs to abandon jurisdiction over the FTC's action because the FTC and FDIC are prosecuting identical and duplicative cases. The fact that the FTC's action includes claims against Jefferson Capital while the FDIC's does not is yet another example of how the FDIC and FTC actions are distinct.

In sum, the FTC and this Court undoubtedly have jurisdiction over this case and Jefferson Capital's meritless motion should be denied.

V. CONCLUSION

Accordingly, for the reasons set forth herein, the FTC respectfully requests that this Court deny Jefferson C

Dated: September 5, 2008

Respectfully submitted,

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LOCAL RULE 7.1(D) CERTIFICATION

The undersigned hereby certifies, pursuant to Local Rule 7.1(D), that **PLAINTIFF'S OPPOSITION TO DEFENDANT JEFFERSON CAPITAL'S MOTION TO DISMISS** has been prepared using Times New Roman 14 point type.

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CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2008, I electronically filed **PLAINTIFF'S OPPOSITION TO DEFENDANT JEFFERSON CAPITAL'S MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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