DEBT COLLECTION

STUDENT LOAN NOT DISCHARGED IN BANKRUPTCY DESPITE FACT THAT DEBTOR MIGHT NOT BE ABLE TO MAINTAIN MINIMAL STANDARD OF LIVING

Goulet v. Educational Credit Management Corp., 284 F.3d 773 (7th Cir. 2002).

FACTS: Jon P. Goulet filed for Chapter 7 bankruptcy and, pursuant to an adversary proceeding, sought to discharge his government-guaranteed educational loans owed to the defendant, Educational Credit Management Corporation ("ECMC"), a not-for-profit organization that administers guaranteed student loans. After a hearing on the merits, the bankruptcy court concluded that the student loans would impose an "undue hardship" on Goulet under 11 U.S.C. § 523(a)(8), and therefore entered an order discharging the loans. ECMC appealed to the district court, which reversed the decision of the bankruptcy court.

The bankruptcy court made the following findings of fact. Goulet, is 55 years old, lives with his mother in Eau Claire, Wisconsin. He has an 11-year old son and owes $228 per month in child support. His mother generally supports him by paying one half of the support payment from her own income. She does not charge Goulet for rent.

Goulet has a bachelor's degree in history from Regis University in Denver Colorado. He worked various jobs in Denver including bartending and restaurant management. He eventually moved back to Eau Claire and became a life insurance agent. For a few years, he made a steady, comfortable living and his income ranged from approximately $20,000 to $30,000.

Goulet's insurance license was revoked due to a charge of insurance fraud. He was also arrested for felony possession of cocaine, with intent to deliver. After attending out-patient counseling, he worked as a bouncer and bartender. Goulet went back to school, attending the University of Wisconsin-Stout and completing all the required courses for a master's in psychology. However, he did not obtain his degree because he failed to complete a statistical analysis for his thesis.

Goulet was employed as a real estate agent for Edina Realty at the time of the district court proceeding. His income for the year 2000 was $1,490.00 and his monthly expenses, excluding his child support obligation, are approximately $492.00 (or $5,904.00 annually).

While attending graduate school at UW-Stout, Goulet obtained 21 student loans totaling, with accrued interest, approximately $76,000.00. When his first payment was due, in September 1994, Goulet requested and received a forbearance agreement on the loans. He also timely requested and received additional forbearance agreements when subsequent payments became due, the last in May 2000. At that time, ECMC stopped granting forbearances and Goulet subsequently filed his petition for bankruptcy, seeking relief from the debt. Goulet never made a single payment on his student loan.

After considering the foregoing facts and circumstances, the bankruptcy court, applying the Seventh Circuit's test for "undue hardship," determined that Goulet did not have the money to make payments, that his inability to pay would persist for the significant future, and that he had made a good faith effort to repay the debt. The court thereby discharged Goulet's student loans. ECMC appealed the bankruptcy court's decision and the federal district court reversed. Goulet appealed.

HOLDING: Affirmed.

REASONING: The court had to determine whether Goulet established that he would suffer "undue hardship" if his student loans were not discharged. Student loans are not dischargeable in bankruptcy unless they constitute an "undue hardship" on the debtor. *See, 11 U.S.C. § 523(a)(8)*. The Bankruptcy Code does not define "undue hardship," but the Seventh Circuit has adopted the Second Circuit's three-prong Brunner test for evaluating such a claim. *See*, *Brunner v. New York State Higher Education Servicing. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987); *Matter of Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993). Under this test the debtor must demonstrate: (1) that he cannot maintain, based on current income and expenses, a minimal standard of living for himself and his dependents if forced to repay the loans; (2) that additional circumstances indicate that the state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans. *Roberson*, 999 F.2d at 1135 (adopting test from *Brunner*, 831 F.2d at 396). The debtor has the burden of establishing each element of the test by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991). If the debtor fails to establish any one of the elements, the test has not been met and the court need not continue with the inquiry. *Roberson*, 999 F.2d at 1135. The court asks whether Goulet's circumstances meet that test, a question of law subject to de novo review. The court agrees to "accept the bankruptcy court's findings of fact, with the exception of those that are erroneous, and place the burden on [the debtor] to establish that his circumstances warrant discharge of his loans."

In examining the first *Brunner* prong, Goulet's financial condition, both parties agree that Goulet cannot maintain, based on his current income and expenses, a minimal standard of living for himself. At the time of the bankruptcy hearing, Goulet's yearly expenses, without factoring in his student loan debt, were approximately $5,904.00. This amount easily exceeds his most recent annual income of $1,490.00. Therefore the court determines that, he has clearly established the first prong of the *Brunner* test.

Turning to the second prong, the court looks at whether additional circumstances exist indicating that

Goulet's state of affairs is likely to persist for a significant portion of the repayment period. The court stated in *Roberson* that this second prong "imputes to the meaning of 'undue hardship' a requirement that the debtor show his dire financial condition is likely to exist for a significant portion of the repayment period....Accordingly, the discharge ability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment." *Roberson*, 999 F.2d at 1135-36. This requires evidence "of additional, exceptional circumstances, strongly suggestive of continuing inability to repay over an extended period of time..." In *Roberson*, the court listed substantial barriers as psychiatric problems, lack of usable job skills and severely limited education.

Here, Goulet contended that his age, the enormous amount of his debt, his abuse problems and his felony conviction create substantial barriers to his ability to repay his student loans. He argued that amortization of a $76,000.00 debt over 20 years, accruing interest at 9% per year, would require him to pay over $600 per month, and that this would be impossible to do without imposing an undue hardship upon him. The bankruptcy court accepted this argument and determined that Goulet's inability to pay would persist, stating that "the evidence is absolutely clear, based on his past history, that it will persist; because during the whole decade of the 90's we see that he hasn't had the capacity to make these payments."

The court of appeals, however, did not believe that the bankruptcy court clearly erred in its factual findings, but rather conclude that it erred, as a matter of law, in holding that Goulet's circumstances rise to the level of those "additional, exceptional circumstances" necessary to satisfy the second prong of the *Brunner* "undue hardship" test. The court concludes that Goulet's contention that his alcoholism and felony conviction make it impossible for him to find work is unpersuasive. By his own admission, these circumstances predated his attendance at UW-Stout and his acceptance of the responsibility of these student loans. By returning to graduate school at the age of 45 and voluntarily assuming the debt, Goulet must have believed that he had future earnings potential. The court recognizes that Goulet had serious problems, but it was reluctant to label these pre-loan problems "additional, exceptional circumstances" so as to constitute "undue hardship" for purposes of 11 U.S.C. § 523(a)(8). The record did not show that Goulet lacks the capacity to work only that he does not seem anxious to do so. Under these circumstances, the court concludes that Goulet's condition has not reached the "certainty of hopelessness" that would lead the court to find that his condition is likely to persist for a significant portion of the repayment period.

The court concludes that Goulet's contention that his alcoholism and felony conviction make it impossible for him to find work is unpersuasive.

Finally, the court turns to the third prong of the *Brunner* test and examines whether Goulet had made a good faith effort to repay the outstanding loans. This factor recognizes that "[w]ith the receipt of a government-guaranteed education, the student assumes an obligation to make a good faith effort to repay those loans, as measured by his or her efforts to obtain employment, maximize income and minimize expenses." *Roberson*, 999 F.2d at 1136. In concluding that Goulet had established this element, the bankruptcy court reasons that he always sought, in a timely manner, to defer his loan payments and never let the loans lapse into default. The court notes that although it is hard to see good faith in paying nothing when obtaining payment deferrals, there was no need to resolve this question, given the court's conclusion that Goulet has not established that his financial condition is likely to persist as required by the second prong of the *Brunner* test.

In sum, the court concludes that Goulet had not demonstrated that the repayment of his student loans would constitute an "undue hardship" under 11 U.S.C. § 523(a)(8*)* and, therefore, the court affirms the district court's decision that the debt is nondischargeable.

FIVE MILLION DOLLAR WRONGFUL DEBT COLLECTION AWARD UPHELD

Greenpoint Credit Corp. v. Perez, ____ S.W.3d ____ (Tex. App.—San Antonio 2002).

FACTS: An employee of Greenpoint Credit Corp. ("Greenpoint"), a finance company, made a demanding phone call to Ninfa Perez ("Perez"). The substance of the phone call was that Perez was behind on her mobile home payments and that she must pay or face the consequences; however, Perez did not own a mobile home. The employee called Perez again stating that if payment was not made on the mobile home a sheriff's deputy was going to come and put her in jail. Perez, for fear of being arrested, went to the sheriff's office to turn herself in. The sheriff then called Greenpoint and told them that Perez did not own a mobile home. A field representative was later sent to Perez's home to investigate the case. Perez continued to deny owning a mobile home or signing a contract to purchase a mobile home. Although there was evidence that Greenpoint had the wrong person, they sued for conversion and various other offenses. Perez filed a counterclaim against Greenpoint asserting causes of action for violations of the Texas Debt Collection Act. The jury found Perez suffered $5,000,000 in damages. Greenpoint appealed claiming the jury's award of damages was excessive.

HOLDING: Affirmed.

REASONING: If sufficient probative evidence exists supporting the jury's verdict, the reviewing court is not entitled to substitute its judgment for that of the jury. *J.*

Wigglesworth Co. v. Peeples, 985 S.W.2d 659, 666 (Tex. App.—Fort Worth 1999, pet. denied). In addition, because personal injury damages are unliquidated and incapable of measurement by any certain standard, the jury has broad discretion in fixing the amount of the award. The court finds that this was an extremely traumatic event for Perez, due in part to her advancing age, history of anxiety, and education level. Perez's doctor testified that her physical injuries of skin sores and heart palpitations were a result of her contact with Greenpoint. As the problems were continuing at the time of the trial, the jury could have reasonably inferred that they would extend into the future. Because the jury has broad discretion to determine the proper amount of compensation and enough probative evidence existed to support the jury's award, the damage award of $5,000,000 is affirmed.

AMBIGUOUS OFFER OF SETTLEMENT UNDER FDCPA DEEMED NOT TO INCLUDE ATTORNEYS FEES

Hennessy v. Daniels Law Office, 270 F.3d 551 (8th Cir. 2001).

FACTS: Plaintiff Hennessy filed suit against Defendant Daniels Law Office ("Daniels") alleging violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, in relation to the collection of a student loan. Daniels tendered an offer of judgment for $1,000 that Hennessy accepted and the court entered judgment. Hennessy subsequently moved for attorney's fees but the court denied the motion because the offer of judgment included attorney's fees as an element of damages. Hennessy appealed.
HOLDING: Reversed.
REASONING: The issue is whether Daniels' offer of judgment includes attorney's fees. The plain language of the FDCPA does not say that an offer of judgment includes attorney's fees, rather the statute provides for attorney's fees in addition to damages. *See* 15. U.S.C. § 1692k(a). Daniels' offer stated that it offered "judgment in the amount of $1,000." However, the word "judgment," standing alone can be ambiguous as to whether attorney's fees are included. *Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390, 392 (7th Cir. 1999). Contract interpretation rules can help because an offer of judgment is generally treated as an offer to make a contract. In this case, an offer was made and unambiguously accepted, thus an enforceable agreement formed. The problem centers on the ambiguous term "judgment" within the enforceable agreement. Contract interpretation rules, however, construe the meaning of ambiguous terms against the drafter absent parol evidence. Daniels drafted the offer but fails to provide extrinsic evidence to clarify the meaning of the offer. Accordingly, the court construes the contract ambiguity against Daniels and holds that Daniels is liable for attorney's fees.

SECTION 1091a ELIMINATES ALL LIMITATIONS DEFENSES FOR COLLECTION OF STUDENT DEBTS

SECTION 1091a ELIMINATES THE EQUITABLE DEFENSE OF LACHES

United States v. Lawrence, 276 F.3d 193 (5th Cir. 2001).

FACTS: Robert Lawrence ("Lawrence") appeals a summary judgment for the United States in its suit to enforce four promissory notes. From 1975 to 1978, Lawrence executed four promissory notes totaling $9,500 to obtain student loans, and these notes were assigned to the United States Department of Education. Lawrence defaulted on these loans in 1980. In 2000, the United States sued to collect on the debt. Lawrence's answer raised the defense of laches, however, the district court refused to apply the affirmative defense and granted summary judgment for the United States.
HOLDING: Affirmed.
REASONING: Lawrence argues that the district court erred when it refused to apply the defense of laches. However, 20 U.S.C. § 1091a, by its plain language, negates any limitations defense in actions by the Attorney General to gather repayment of student loans. Furthermore, several other circuits have held that § 1091a negates any limitations defense. *See, e.g., Millard v. U.S. Aid Funds*, 66 F.3d 252, 252 (9th Cir. 1995); *United States v. Glockson*, 998 F.2d 896, 897 (11th Cir. 1993). The court follows those circuits and concludes that § 1091a eliminates all limitations defenses for collection of student debts. In addition, § 1091a also extends to eliminate the equitable defense of laches.

MISLEADING OR CONFUSING LETTER MAY VIOLATE FDCPA

DeSantis v. Computer Credit, Inc., 269 F.3d 159 (2d Cir. 2001).

FACTS: Michael D. DeSantis, on behalf of John B. DeSantis, Sr. ("DeSantis"), sued Computer Credit, Inc. ("CCI"), alleging that a letter sent to DeSantis from CCI violated the FDCPA. The letter referred to a debt apparently owed to Dr. Jeffrey A. Stahl ("Stahl") in the amount of $319.50. Stahl referred the debt to CCI. CCI generated the letter at issue. The letter, in pertinent part, stated that Stahl insisted on payment or a valid reason for failure to make payment. In the absence of a valid reason for failure to make payment, it said to contact Stahl to settle the matter. The district court granted CCI's motion to dismiss the action for failure to state a claim upon which relief can be granted. The court found the letter did not contradict the information required by the FDCPA. This appeal followed.
HOLDING: Judgment of district court vacated and case remanded.
REASONING: The FDCPA requires that a consumer be

notified of several options, including that if they dispute the debt, they may notify the debt collector within thirty days, and until the debt is verified and a copy of that verification is sent to the consumer, debt collection attempts shall desist. 15 U.S.C. § 1692g (a)(4). The FDCPA can be violated in two ways: failure to convey the information required by the FDCPA, or conveying that information in a confusing way. If the information "is reasonably susceptible to an inaccurate reading," the FDCPA has been violated. *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34 (2d Cir. 1996); *see also Savino v. Computer Credit, Inc.*, 164 F.3d 81,85 (2d Cir. 1998).

The determination of whether a debt collector conveyed the requisite material in a confusing manner is judged by "an objective standard, measured by how the 'least sophisticated consumer' would interpret the notice." *Russell*, 74 F.3d at 34. The unsophisticated consumer is to be protected against confusion in whatever form it takes. *Bartlett v. Heibl*, 128 F.3d 497, 500 (7th Cir. 1997). Because the letter from CCI asked DeSantis to either provide payment or a valid reason for failure to pay, and it did not clearly state that the debt may be disputed, the court suggests that claimant DeSantis did state a claim upon which relief could be granted. An unsophisticated consumer might conclude that verification of the debt would only occur when the consumer supplied a valid reason for nonpayment. Such nondisclosure is in conflict with the FDCPA.

LAWYER WHO "RENTS" HIS LETTERHEAD TO A COLLECTION AGENCY VIOLATES THE FDCPA

Boyd v. Wexler, 275 F.3d 642 (7th Cir. 2001).

FACTS: The defendant, attorney Norman Wexler ("Wexler"), serves as a debt collector for his clients. As such, Wexler sent the plaintiffs dunning letters under a letterhead signed "Wexler & Wexler." Plaintiffs brought suit, claiming that no lawyer in fact reviewed the letters before they were mailed in violation of the FDCPA, 15 U.S.C. § 1692 *et seq*. Wexler moved for summary judgment and supported the motion with his own affidavit, which stated that a lawyer reviews every collection letter before it is sent, and that he himself reviewed the plaintiffs' files before sending the collection letters at issue. The district judge granted summary judgment for Wexler, characterizing his affidavit as "uncontradicted and unrefuted." Plaintiffs appealed.
HOLDING: Reversed.
REASONING: The FDCPA forbids a debt collector from using any false, deceptive, or misleading representation or means in connection with the collection of any debt, including the false representation or implication that any individual is an attorney or that communication is from an attorney. *See* 15 U.S.C. § 1692e. A lawyer who merely rents his letterhead to a collection agency violates the FDCPA. In such a case the lawyer is allowing the collection agency to impersonate him. *See* 15 U.S.C. § 1692j(a). Thus, a lawyer who, like Wexler, is a debt collector violates the FDCPA if he sends a dunning letter that he has not reviewed, because his lawyer's letterhead falsely implies that he has reviewed the creditor's claim. Here, pretrial discovery revealed that, on average, Wexler's firm sends out 51,718 pieces of mail per month, the overwhelming majority of which are collection letters. Furthermore, Wexler's firm consists of three lawyers, making it highly implausible that the extreme volume of mail sent out by Wexler & Wexler receives review by an attorney. A reasonable juror could infer from the evidence that Wexler violated the FDCPA by rubber stamping his client's demand for payment, thereby misrepresenting to the recipients of his dunning letters that a lawyer had made a minimally responsible determination that there was probable cause to believe that the recipient actually owed the amount claimed by the creditor. Therefore, the district court erred in granting summary judgment in favor of Wexler.

DEBT COLLECTOR IS BARRED BY FDCPA FROM THREATENING TO SUE ON DEBT IT KNOWS TO BE BARRED BY LIMITATIONS

DEBT COLLECTOR MAY SEEK VOLUNTARY PAYMENT OF A TIME-BARRED DEBT

Wallace v. Capital One Bank, et al., 168 F.Supp.2d 526 (D. Md. 2001).

FACTS: Denita Wallace ("Wallace") brought a class action under the FDCPA, against Capital One Bank ("Bank"), Capital One Financial Corp., and the Westmoreland Agency ("Westmoreland"). Defendants moved to dismiss for failure to state a claim under Fed.R.Civ.P 12(b)(6).

After Wallace defaulted on a debt she owed, Bank purchased the debt, and assigned it to Westmoreland for collection. In accordance with 15 U.S.C. § 1692g, Westmoreland sent Wallace two collection letters containing debt validation notices. Wallace alleges the letters violated the FDCPA because they failed to state that the debt was time-barred.
HOLDING: Dismissed for failure to state a claim under Fed.R.Civ.P. 12(b)(6).
REASONING: The FDCPA states "a debt collector may not use any false, deceptive, or misleading representation or meanings in collection of a debt." 15 U.S.C. § 1692e. Additionally, it provides that "[t]he false representation of the character, amount, or legal status of a debt" is a violation of the FDCPA. These provisions have been interpreted to prohibit a debt collector from threatening to sue on a debt that it knows to be barred by limitations. *Kimber v. Fed. Fin. Corp.*, 668 F.Supp. 1480, 1488-90 (M.D. Ala. 1987). However, *Kimber* is distinguishable from the present case because the letters that Bank sent to Wallace did not threaten a collection action.

On similar facts, other courts have found there to be no violation of the FDCPA. *See Shorty v. Capital One Bank*, 90 F.Supp.2d 1330, 1331-33 (D.N.M.2000). This case proceeds from the premise that where a limitations statute does not extinguish the debt but only provides a defense against collection, a debt collector may seek voluntary

payment of a time-barred debt. *Shorty*, 90 F.Supp.2d at 1332. Therefore, further contact between a debt collector and a debtor about a time-barred bad debt is not necessarily an affirmative representation that the debt collector can sue on the debt.

Wallace argues that Bank's purpose in not disclosing the fact that enforcement of the debt is time-barred is to induce the debtor to make partial payment or acknowledge the existence of the debt which revives the debt. Wallace correctly points out that a debt collector's conduct is to be measured under the FDCPA by a "least sophisticated consumer" standard. He further argues that in order to prevent a debt validation notice from being misleading or deceptive, it must affirmatively disclose that enforcement of the debt is time-barred unless revived by partial payment or acknowledgment. In instances where a debt validation notice is silent on the time-barred nature of the debt, and is utilized as the catalyst to prompt the debtor's response resulting in revival, the notice would be part of a course of collection conduct that was deceptive. However, a notice that is silent on the time-barred nature of the debt and fails to inform the debtor that any partial payment or acknowledgment would result in revival of the debt is not itself violative of § 1692e.

Based on the holding in *Shorty*, such a letter in and of itself is consistent with seeking nothing more than a voluntary payment. Therefore, unless it is alleged that a debt collector has engaged in a course of conduct that tricks a debtor into waiving his legal right to assert a limitations defense, no violation of the FDCPA occurs solely because a debt validation notice is silent on the time-bar issue.

BANKRUPTCY CODE § 524 PRECLUDES CAUSE OF ACTION UNDER FDCPA

Walls v. Wells Fargo Bank, 276 F.3d 502 (9th Cir. 2002).

FACTS: On September 24, 1997, Donna M. Walls ("Walls"), voluntarily filed bankruptcy under Chapter 7 of Title 11 of the United States Code. Included in her bankruptcy petition was an $118,000 debt owed to Wells Fargo Bank ("Bank"), secured by her home. Walls was able to keep her home by taking advantage of the "ride through" policy allowed by *In re Parker*, 139 F.3d 668, 672-73 (9th Cir. 1998). A ride through permits debtors to delay the decision of redeeming the property or reaffirming the debt, as long as the debtor is current on their loan payments and continues timely payments. Bank retained the lien on Walls' property and could foreclose if she stopped making payments. Some time later, Walls did stop making payments and Bank foreclosed on the property.

Walls argued that because her debts were discharged and Bank did not reaffirm the debt, she was protected under the discharge injunction of § 524(a)(2) and (c). Section 524(a)(2) states that a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." According to Walls, Bank continued to collect monthly payments before discharge but after the automatic stay and also after discharge. Walls further contended that the collection methods of Bank were unconscionable under 15 U.S.C. § 1962(c). Bank responded by moving to dismiss for failure to state a claim upon which relief can be granted. Walls countered, claiming § 524 of the Bankruptcy Code can be brought as a private action in light of § 105(a) of the Bankruptcy Code. Section 105(a) allows "the court to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

The district court held that in drafting § 524 of the Bankruptcy Code the legislature did not intend for their to be a private right of action. Therefore, the court dismissed both of Walls' claims that Bank violated the Bankruptcy Code, 11 U.S.C. § 524 (c), and the Fair Debt Collections Practices Act, 15 U.S.C. § 1962(c).

HOLDING: Affirmed.

REASONING: The court finds that Walls' reliance on the *Bessette* case was improper and that Congress did not intend to allow a § 524 claim to be brought as a private right of action. In the *Bessette* case, the court held that § 105 does not itself create a private right of action, but that "it does provide a bankruptcy court with statutory contempt powers in addition to whatever inherent contempt powers the court may have." *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439 (1st Cir. 2000). The court states that the case at bar is not an appeal based on contempt proceedings from a bankruptcy court and is, therefore, fundamentally distinct from the *Bessette* case.

A notice that is silent on the time-barred nature of the debt and fails to inform the debtor that any partial payment or acknowledgment would result in revival of the debt is not itself violative of § 1692e.

The court holds that the purpose of § 524 is to enjoin the collection of discharged debt, and the traditional remedy for a violation of this sort is a contempt proceeding. Buttressing their argument, the court points out that on the day § 524 of the Bankruptcy Code was amended, § 362 of the Bankruptcy Code was also amended. In the amendment to § 362 Congress explicitly wrote in a private right of action. The court holds that because Congress wrote in the private right of action for § 362 and not for § 524, they did not intend § 524 to include a private right of action.

Walls is not allowed to bring a private right of action for her claim under the FDCPA because the court holds to allow the claim would permit Walls to bring her private right of action under § 524 "through the back door."