FILING LAWSUIT WITHOUT IMMEDIATE MEANS OF PROVING DEBT DOES NOT VIOLATE FDCPA

Harvey v. Great Seneca Fin. Corp., 453 F.3d 324 (6th Cir. 2006).

FACTS: In January of 2004, Javitch filed a "Complaint for Money" to collect a debt that Wendelyn Harvey ("Harvey") allegedly owed Seneca. The complaint alleged that Harvey owed Seneca a total of $12,765.72 on two separate accounts. Seneca claimed that "[a]lthough due demand has been made, [Harvey] has failed to liquidate the balance due and owing."

Harvey filed suit in January of 2005, alleging violations of both the FDCPA and the OCSPA. She claimed that Seneca and Javitch filed "a lawsuit to collect a purported debt without the means of proving the existence of the debt, the amount of the debt, or that Seneca owned the debt." Harvey contended in her complaint that Seneca's filing of a state-court collection action knowing that it "had no documentation" to prove the debt constituted a deceptive, unfair, and unconscionable debt-collection practice. She specifically cited violations of 15 U.S.C. § 1692d, that prohibits conduct that has the consequence of harassing, oppressing, and abusing a debtor, and 15 U.S.C. § 1692e(10), which forbids using deceptive means to collect a debt. The district court held that Harvey's allegations failed to state a claim under the FDCPA. It then declined to exercise supplemental jurisdiction over Harvey's OCSPA claim once her federal claim had been dismissed.

HOLDING: Affirmed.

REASONING: The court reasoned that Harvey's allegation that the debt collector and law firm had violated Fair Debt Collection Practices Act (FDCPA) by filing a debt-collection suit "without the means of proving the existence," amount, or ownership of the debt, stated only the claim that, at time of filing, collector and law firm lacked means of proving their debt-collection claim. The court reasoned that Harvey's inference that collector and law firm had no means of ever proving their claim was not warranted by the complaint. Fair Debt Collection Practices Act, § 802 et seq., 15 U.S.C.A. § 1692 et seq. The court further stated that Seneca and Javitch did not implicitly represent by filing the Complaint for Money that they had in hand the means to prove Seneca's claims. Rule 11 of the Federal Rules of Civil Procedure does not require attorneys to ensure that their client can prove its case before filing. Instead, the Rule mandates only that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. Proc.11(B)(3). Harvey did not allege in her complaint that Seneca and Javitch failed to undertake a reasonable investigation into whether or not Harvey's debt existed; rather, she essentially focused on the contention that Seneca and Javitch did not presently possess the means of proving that debt.

TEXAS BUSINESS AND COMMERCE CODE

TEXAS BUSINESS AND COMMERCE CODE SECTION 3.420 PREEMPTS ANY COMMON LAW THEORY OF RECOVERY THAT ALLOWS A PLAINTIFF TO EXCEED THE STATED AMOUNT OF LIABILITY

AMX Enterprises, Inc. v. Bank One, N.A., 196 S.W.3d 202 (Tex. App.—Houston [1st Dist.] 2006).

FACTS: Homeowners Raymond and Tobey Willie, on behalf of themselves and their mortgage company, CIT Group, contracted with AMX Enterprises ("AMX") for mold remediation services in the amount of $60,978, less $1,500 in deductions. After AMX fully performed, the Willies' insurer, Safeco Lloyds Insurance Company ("Safeco"), issued three checks on September 30, 2002, each payable to "Raymond Willie & Tobey Willie & Citi Group & AMX Enterprise." All three checks were endorsed by the Willies and sent to CIT Group with instructions for CIT to endorse them and forward on to AMX. CIT Group instead presented the checks for deposit at Bank One, who presented the checks to the drawee bank and ultimately deposited the funds into CIT Group's interest bearing account.

In December 2002, Safeco issued an additional four settlement checks to the Willies, to be used to rebuild the Willies' home. The Willies forwarded these checks to CIT Group, who again deposited them into their Bank One account. Following this, CIT Group issued checks payable to "Raymond Willie III & Breckenridge Luxury Homes." AMX made a written claim for $59,478.00 against Bank One in May, 2003, and when that proved unsuccessful, filed suit in June against the Willies, Bank One and CIT Group, claiming among other things, breach of contract as per the Willies, and statutory conversion as per Bank One. While the lawsuit was pending, the Willies paid AMX $60,978.00. Bank One then filed a motion for summary judgment, contending that AMX had been paid in full, and, therefore, the listed causes of action were preempted by the Texas Business and Commerce Code. In June 2004, the trial court granted Bank One's motion for summary judgment. AMX appealed the decision.

HOLDNG: Affirmed.

REASONING: The appellate court found that Business and Commerce Code Section 3.420 did indeed preempt AMX from collecting from Bank One. Section 3.420 specifically provides the measure of damages that can be recovered in a statutory conversion claim; the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument. While principles of common law and equity may *supplement* provisions of the Code, they may not *supplant* its provisions, or the purposes or policies those provisions reflect, unless a specific Code provision provides otherwise, and further, the Code preempts principals at common law and equity that are

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inconsistent with its provisions, purposes or policies. Tex. Bus. & Com. Code Ann. § 1.103, cmt. 2. Thus, any common law theory of recovery that allows a plaintiff to exceed the maximum amount of liability as stated in Section 3.420 is preempted. The appellate court found that AMX's interest in the instrument deposited by CIT Group was $59,478, and AMX recovered more than that amount from the Willies. Although the court agreed that AMX's claim against the Willies for breach of contract was technically different from their cause of action against Bank One for conversion, both causes of action were based on AMX's right to recover for the temporary loss of $59,478, which resulted in a single injury to AMX. Thus, under the Business and Commerce Code Section 3.420(b), AMX is precluded from recovering the same loss under different theories against different parties.

ARBITRATION

ARBITRATION CLAUSE APPLIES RETROACTIVELY TO SUBSCRIBER CLAIMS

Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006).

FACTS: Boston area residents Masterman, Pinella, Rogers and Kristian ("Subscribers") subscribed for cable services through Comcast predecessor companies from 1987 through 1999, respectively. Subscribers, in two complaints, alleged the prices paid for services delivered were inflated as a result of anticompetitive practices on the part of Comcast and AT&T Broadband, Comcast's predecessor-in-interest. Subscribers' complaints alleged that Comcast had been consolidating its hold on the market through agreements to swap or exchange cable television assets ("swap agreements"). Swap agreements allegedly violate antitrust laws because through them, cable providers can divide and allocate markets, leaving a subscriber with only one choice for a provider in his or her location. When Subscribers first subscribed for cable services, none of their service agreements contained arbitration provisions. In 2001, Comcast began including an arbitration provision in the terms and conditions governing the relationship between Comcast and its subscribers. These terms and conditions were contained, in part, in notices informing subscribers at the time of cable installation, and at least annually thereafter, of the terms and conditions governing their subscriptions. Comcast included the Policies & Practices with each Boston area subscriber's invoice as a billing stuffer during the November 2001 billing cycle. The arbitration provision mailed in 2002 appeared, at first blush, substantially different from that mailed in 2001. The arbitration provision mailed in 2003 was unchanged from the 2002 provision. Comcast filed motions to compel arbitration pursuant to the 2002/2003 agreements. Subscribers argued that the actions giving rise to the complaints occurred before the existence of the arbitration agreements at issue in this case.

The district court agreed with Subscribers, holding the arbitration agreements did not have retroactive effect, and did not apply to the state antitrust claims at issue. The district court, in parsing the language of the agreements, found that the agreements referred to specific services under the particular subscriber agreement at issue, and did not refer to services provided in a general sense. Because the 2002/2003 agreements were not phrased like the agreements in any of the cases it cited, the district court found the ambiguity of the agreements should be interpreted against Comcast in light of the policy of construing adhesion contracts strictly against the drafter. The district court expressly found that the arbitration agreements were contracts of adhesion. Finally, the district court also held that a statute of limitations clause included in the 2002/2003 agreements would act as a waiver of all disputes arising one-year prior to the execution of that agreement. The court stated that such a waiver was a significant departure from prior agreements because prior agreements did not even include an arbitration provision.

HOLDING: Reversed.

REASONING: The court evaluated the lower court's denial of Comcast's motion to compel *de novo*, and also stated that upon review the court is not wedded to the lower court's rationale, but may affirm its order on any independent ground made manifest in the record. In disagreeing with the lower court, the first circuit concluded that the district court ignored a large number of cases where arbitration agreements contained language specifically excluding retroactive effect. These cases concerned agreements that unmistakably limited arbitration to what was covered by the agreements.

The provisions at issue did not contain such exclusionary language, and when read most naturally were not as limited in scope as interpreted by the district court. In effect, the district court's reading added words of limitation to the agreement. Moreover, contrary to the district court's finding, the 2002/2003 arbitration agreements did not effect a substantial change in the terms governing a potential arbitral proceeding between Comcast and Subscribers. The 2001 provision included a limitations period identical to the one found in the 2002/2003 provision. The 2001 provision also explicitly contained language that addressed retroactivity in language, with the main difference between it and the 2002/2003 provision being that certain provisions were located in different sections. The district court, therefore, drew the wrong conclusion because it did not incorporate the 2001 agreement into its analysis. The district court incorrectly relied on the state contract principle requiring contracts of adhesion to be construed strictly against the drafter. Given the strong federal policy of resolving any doubts concerning arbitrability in favor of arbitration, any ambiguity created by the change in language from 2001 to 2002/2003 should be resolved in favor of finding arbitrability. While the federal policy favoring arbitration does not totally displace ordinary rules of contract interpretation, the presumption does apply to the resolution of scope questions. Scope questions arise when the parties have a contract that provides for arbitration of some issues and it is unclear whether a specific dispute falls within that contract. In arguing that their antitrust claims do not fall within the scope of the arbitration agreements as a result of non-retroactivity, Subscribers are raising a scope question calling for the application of the presumption