DEBT COLLECTION

INJUNCTIVE RELIEF PURSUANT TO THE TEXAS DEBT COLLECTION ACT DOES NOT REQUIRE PROOF OF IRREPARABLE INJURY

Maruader Corp. v. Beall, --- S.W.3d ----, 2009 WL 4199329 (Tex.App.-Dallas)

FACTS: Marauder Corp. ("Marauder") is a collection agency based in California. In 2004, a Marauder employee contacted Stacey Beall ("Beall") at work concerning a debt. The employee told Beall that if she failed to pay a debt by the end of the day Beall would be arrested, her office would be shut down, and the computers confiscated. Beall spoke with the employee two times in one day. There was no further contact. Beall was upset by the phone calls but she never sought any treatment as a result of her distress.

Beall sued Marauder alleging various violations of the Texas Debt Collection Act (TDCA). She sought both actual damages and injunctive relief. The jury found that Marauder violated the TDCA but that Beall did not suffer any damages as a result of those violations. The jury did award $3,000 in additional damages under the Texas Deceptive Trade Practices Act (DTPA). The jury also awarded $14,000 in attorney's fees. Following post-trial motions, the trial court rendered a judgment awarding $100 for the TDCA violation, $300.00 in additional damages under the DTPA, $14,000 in attorney's fees through trial, plus additional attorney's fees for appeals. The trial court also granted Beall injunctive relief.

In this timely appeal, Marauder contended the trial court erred in granting the injunction because Beall failed to meet the requirements for injunctive relief. Specifically, Marauder asserts Beall failed to show a probable, imminent, and irreparable injury. Marauder relied upon a provision in the TDCA to support its contention that equitable requirements for an injunction still apply. That provision provided that "[t]his chapter does not affect or alter a remedy at law or in equity otherwise available to a debtor, creditor, governmental entity, or other legal entity." Tex. Fin.Code Ann. § 392.404(b) (Vernon 2006).

HOLDING: Affirmed in part, Reversed in part and Remanded.

REASONING: The court found the provision Marauder relied upon was inapplicable because it addressed remedies available outside of the TDCA. Beall, by contrast, sought injunctive relief through the TDCA's provision allowing such relief to a debtor.

Moreover, Marauder's position was contrary to the law. Where a statute provides for a right to an injunction for a violation, a party does not have to establish the general equitable principles for a temporary injunction. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 298, 210 (Tex.2002); *Republic Ins. Co. v. O'Donnell Motor Co.*, 289 S.W. 1064, 1066 (Tex.Civ.App.-Dallas 1926, no writ). When an applicant relied upon a statutory source for injunctive relief, the statute's express language supersedes the common law injunctive relief elements such as imminent harm or irreparable injury and lack of an adequate remedy at law. *West v. State*, 212 S.W.3d 513, 519 (Tex.App.-Austin 2006, no pet.).

Therefore, the court held that injunctive relief pursuant to the TDCA did not require proof of irreparable injury and overruled Marauder's first issue. In light of their disposition of Marauder's first issue, they did need not to address its second issue concerning Beall's failure to plead and prove an irreparable injury.

STATE DEBT COLLECTION LAW IS NOT UNCONSTITUTIONAL WHEN APPLIED TO A LAW FIRM

Pepper v. Routh Crabtree, APC, --- P.3d ----, 2009 WL 3924933 Al., 2009

FACTS: Robin Pepper ("Pepper") sued an Anchorage debt collection agency and its lawyers ("Routh Crabtree"), claiming that they violated Alaska's Unfair Trade Practices and Consumer Protection Act ("UTPA") when they: (1) sued Pepper in state district court without first sending a written demand, (2) misrepresented to the court that Pepper was competent, and (3) applied for default judgment without first informing Pepper's attorney. The superior court granted the defendants' motion to dismiss for failure to state a claim, reasoning that the Noerr-Pennington doctrine required the court to strictly construe the UTPA to avoid burdening conduct protected by the petition clauses of the United States and Alaska Constitutions.

HOLDING: Reversed and Remanded.

REASONING: The court reasoned it would be difficult to see how subjecting Routh Crabtree to UTPA liability for engaging in the conduct alleged here would chill its First Amendment right to petition the government for redress. Pepper was not challenging Routh Crabtree's rights to send pre-litigation demand letters, file suit to collect overdue money, seek default judgment against defendants who fail to appear or answer on time, or litigate its claims fully, consistent with well-known procedural, substantive, and ethical requirements. Her complaint only sought to hold Routh Crabtree to account if the manner in which it allegedly undertook these activities was unfair, deceptive, and in violation of the UTPA. Allowing Pepper to pursue her UTPA claims may have created additional incentives for Routh Crabtree to ensure that a compliant demand had been made, to ascertain the truth of its competency allegations, and to inform the debtor's known counsel of Routh Crabtree's intention to seek default judgment. Routh Crabtree had not persuasively demonstrated that Pepper's UTPA claims would, if successful, unduly restrict Routh Crabtree's right to petition the government for redress of grievances. Pepper's claims would appear to burden Routh Crabtree's petitioning activities no more than our rules of professional conduct or standards of practice already do. As Pepper contended, "no debt collector has a legitimate interest in pursuing collection litigation without notifying debtors,

Her complaint only sought to hold Routh Crabtree to account if the manner in which it allegedly undertook these activities was unfair, deceptive, and in violation of the UTPA.

or in seeking to default incompetent debtors without notice to their lawyers or guardians."

Moreover, courts applying the federal counterpart of the UTPA, the Fair Debt Collection Practices Act (FDCPA), have not held that applying this statute to state court pleadings would burden petitioning rights. For example, in *Berg v. Blatt*, Slip Copy, 2009 WL 901011 (N.D.Ill.), the United States District Court for the Northern District of Illinois declined to rely on the *Noerr-Pennington* doctrine to protect false representations in debt-collection complaints because it was "not persuaded that imposing FDCPA standards of accuracy and fairness on a state court filing constituted any genuine burden." That court held that the FDCPA "explicitly barred exactly this kind of speech in debt collection letters and other communications and extending this bar to state court filings did not run afoul of the *Noerr-Pennington* doctrine's goal of protecting the First Amendment right to petition the courts for redress."

PHONE MESSAGE VIOLATED FAIR DEBT COLLECTION PRACTICES ACT

Edwards v. Niagara Credit Solutions, Inc., 584 F.3d 1350 (11th Cir. 2009).

FACTS: Brenda Edwards owed money to the Consumer Shopping Network. Her past due account was assigned to Niagara Credit Solutions, Inc. for collection. Niagara is a debt collection agency subject to the provisions of the Fair Debt Collection Practices Act, 15 U.S.C. §1692, et seq. It attempts to collect debts by sending letters and making phone calls to debtors.

As part of its collection efforts, Niagara left over a dozen messages on Edwards' answering machine from July through October 2007. In September 2007, Niagara left a pre-recorded message on her machine stating: "This is an important message for Edwards Brenda. [sic] Please return this message at 1-800-381-0416, between the hours of 8 a.m. and 9 p.m. eastern standard time. It is important that you reach our office." The next month Niagara left another message on her answering machine: "This message is intended for Brenda Edwards. Please contact Jennifer [last name not clear] at 1-800-381-0416, my extension is 220. When returning my call have your file number available, it's 1250740."

At the time of those events Niagara had a well-defined policy about messages that it left on debtors' answering machines. That policy was to: leave a message asking the debtor to call back about an important matter; provide Niagara's phone number; supply the real first name of the person calling on behalf of Niagara; and give any reference number assigned to the account. Niagara purposefully left out of the messages any information disclosing that they were from Niagara Credit Solutions, Inc. or a debt collector or that the call had been made for the purpose of collecting a debt.

The Fair Debt Collection Practices Act specifically requires that a debt collector disclose in all communications with a debtor that the message is from a debt collector. See 15 U.S.C. §1692e(11). Niagara deliberately chose not to comply with that requirement because it feared that doing so would risk violating another provision of the Act, which generally forbids an agency from communicating about the debt with a third party. See 15 U.S.C. §1692c(b). It was concerned that answering machine messages might be played by or within the hearing of a family member or roommate, who would then know that a collection agency was calling the debtor.

In September 2007 Edwards filed a complaint against Niagara alleging that the messages it left on her answering machine violated §1692e(11) of the Fair Debt Collection Practices Act, as well as §1692d(6) (requiring meaningful disclosure of the caller's identity). She sought an award of statutory damages, costs, and attorney's fees and moved for summary judgment. Niagara asserted a number of defenses, including the bona fide error defense contained in §1692k(c). The district court granted summary judgment in favor of Edwards after concluding, among other things, that the messages Niagara left violated §1692d(6) and §1692e(11) and that the bona fide error defense did not apply. Niagara conceded that the messages it left violated §1692e(11) and is only challenging the district court's conclusion that it is not protected by the bona fide error defense. The issue before the court was whether a debt collector is entitled to the bona fide error defense when it intentionally violates one provision of the Act in order to avoid the risk of violating another provision.

HOLDING: Affirmed.

REASONING: The court analyzed the bona fide error defense, found in 15 U.S.C. §1692k(c). The court reasoned that a debt collector asserting the bona fide error defense must show by a preponderance of the evidence that its violation of the Act: (1) was not intentional; (2) was a bona fide error; and (3) occurred despite the maintenance of procedures reasonably adapted to avoid any such error.

The court held that Niagara could not make the first required showing. Section 1692e(11) requires a debt collector "to disclose in subsequent communications that the communication is from a debt collector." 15 U.S.C.§ 1692e(11). The court noted that by its own admission, Niagara deliberately decided not to disclose in the messages it left that the caller was a debt collector. The court held that this failure to disclose was intentional.

It was not reasonable for Niagara to violate §1692e(11) of the Fair Debt Collection Practices Act with every message it left in order to avoid the possibility that some of those messages might lead to a violation of §1692c(b).

The court held that Niagara also failed to meet the second requirement of the bona fide error defense, which is that the violation actually be a "bona fide" error. Niagara claimed it was concerned that disclosing that the call was from a debt collector could result in a violation of 15 U.S.C. §1692c(b), which prohibits a debt collector from communicating with third parties about the consumer's debt. Niagara feared that leaving a message on a debtor's machine stating that it was from a debt collector calling to collect a debt might be viewed as a violation of §1692c(b) if the message were overheard by or played in the presence of someone other than the debtor, such as a family member or roommate. The court declined to decide whether that concern is well-grounded in the law. Even if there would be a violation of §1692c(b) in those circumstances, involving fewer than all of the

messages left on answering machines, the court held that Niagara's violation of §1692e(11) with every message it left cannot be said to be a bona fide error.

The court explained that as used in the Act, "bona fide" means that the error resulting in a violation was "made in good faith; a genuine mistake, as opposed to a contrived mistake." The court held that it was not reasonable for Niagara to violate §1692e(11) of the Fair Debt Collection Practices Act with every message it left in order to avoid the possibility that some of those messages might lead to a violation of §1692c(b).

Niagara complained that if it is not permitted to leave out of its answering machine messages the disclosure required by §1692e(11), the result will be that it cannot leave any messages on answering machines. The court explained that Niagara's assertion assumes an answering machine message that includes the disclosure required by §1692e(11), if heard by a third party, would violate §1692c(b). The court did not decide this issue, but acknowledged that even if Niagara's assumption is correct, the answer is that the Act does not guarantee a debt collector the right to leave answering machine messages. Because Niagara failed to meet either of the first two requirements of the bona fide error defense of §1692k(c), the court did not decide whether it also failed to meet the third one, which requires the maintenance of procedures reasonably designed to avoid the violation of the Act. The court affirmed the summary judgment against Niagara.

CLASS ACTION ALLEGING VIOLATION OF FAIR DEBT COLLECTION PRACTICES ACT PROPERLY CERTIFIED AS CLASS ACTION DESPITE DE MINIMUS RECOVERY FOR CLASS MEMBERS

Hicks v. Client Services, Inc., 257 F.R.D. 699 (S.D. Fla. 2009).

FACTS: Debtors brought a putative class action against Client Services, Inc. ("Client Services") alleging violation of the Fair Debt Collection Practices Act ("FDCPA"). Client Services moved to decertify the class on the basis of *de minimis* individual recovery.
HOLDING: Denied.
REASONING: Client Services argued that the maximum amount each member of the class could receive would be a maximum of $1.24, but that if each class member brought their own actions, they could potentially recover as much as $1,000 under the FDCPA. Therefore, Client Services requested that the court grant its motion for decertification of the class. The plaintiffs cited several cases that have held that *de minimis* recovery does not prevent class certification of FDCPA claims.

The court found that the reasoning of the cases supporting an FDCPA class action despite de minimis recovery by the class members to be more persuasive. The court considered whether the class members would be aware of their rights, would be aware that litigation would permit recovery beyond attorney's fees, and would be willing to pursue the litigation independently. The court explained that although the statutory provisions create an incentive for victims of unfair debt collection to litigate, class members may not understand the provisions well enough to know that it may be financially worthwhile to spend the time and effort to litigate these matters. Further the court noted that decertifying this class could theoretically create an incentive for debt collectors to use unfair practices as widely as possible, in order to prevent a class action from being certified. Creating larger number of class members lowers the amount of recovery per member. Therefore, the court found that the class action was the superior method of adjudication and denied the request for decertification.

LAW FIRM VIOLATED FAIR DEBT ACT

Miller v. Upton, Cohen & Slamowitz, ____F.Supp.2d.____ (E.D.N.Y. 2009).

FACTS: In early 2000, Arthur Miller purchased clothing at a department store, Lord & Taylor, using the store's credit card. Miller later defaulted on that debt and shortly thereafter, began receiving debt-collection calls from the Lord & Taylor's in-house debt collection personnel. Two months later, Miller sent the Lord & Taylor a letter disputing debt amount and a settlement offer of $750 to which Lord & Taylor never responded. Lord & Taylor's outside counsel, Wolpoff & Abramson, L.L.P. ("Wolpoff") then sent Miller a debt-collection letter seeking repayment of the debt. After no response from Miller, Wolpoff sent another letter. After the second letter from Wolpoff, Miller responded with a letter directly to Wolpoff disputing the debt amount and renewed his offer of $750 to settle the debt. Wolpoff responded with a third debt-collection letter which included an authorized settlement for 80% of the outstanding balance alleged (an amount of $1,294.51). After receiving no response, Wolpoff commenced legal action against Miller.

Because Miller was a New York resident, Wolpoff referred the matter to his New York counsel Upton, Cohen & Slamowitz ("UCS"). UCS then sent a debt collection letter to Miller and filed a collect action against Miller alleging breach of contract and for attorneys' fees. Miller and Lord & Taylor then resolved their debt dispute through settlement, but Miller alleged that USC's conduct in the issuance of the debt-collection letter and the filing of a legal action against him violated the provisions of the Fair Debt Collection Practices Act ("FDCPA"). Miller claimed that despite attorney review conveyed by one of the partner's signature on the debt-collection letter and court pleadings, neither the debt-collection letter nor the pleadings were subjected to any meaningful investigation to determine the validity of the debt as required by the FDCPA. UCS argued that its actions were adequate for FDCPA purposes because Wolpoff had already reviewed the validity of the debt, so UCS did not have to conduct a thorough subsequent review. UCS also argued that its own procedures were sufficient for FDCPA purposes.
HOLDING: Judgment for Miller.
REASONING: The court looked to whether meaningful attorney review was conducted regarding Miller's debt by Wolpoff, and whether UCS could reasonably rely on Wolpoff's previous efforts as to avoid liability under the FDCPA.

Pursuant to Wolpoff's practice, Miller's file was initially reviewed by non-attorney personnel and then subjected to various third-party screening services. After these two processes, Abramson, an attorney at Wolpoff's, personally reviewed Miller's file and indicated his review with an electronic notation in Miller's file. Abramson testified that his decision to issue debt-collection letters was based on his review of the complete data file provided by Lord & Taylor and his personal confidence in the reliability and accuracy of that information. However, after Wolpoff decided

to take legal action against Miller, UCS did not receive the more comprehensive information contained in Wolpoff's own file due to software constraints. UCS also did not have access to Lord & Taylor's file, which included, among other things, the credit card agreement, Miller's correspondence, and Lord & Taylor's internal collection efforts. Instead all UCS received was basic information regarding Miller such as his address, telephone number, and social security number. UCS asserts that it had a strong working relationship with Wolpoff and had confidence in Wolpoff's initial review because it was familiar with Wolpoff's review process. However, the court noted that at the time the attorney for UCS signed the collection letter, he did not have access to any relevant information regarding the validity of the debt other than Miller's most basic information provided by Wolpoff. Also, to the extent that Miller's file was physically reviewed by UCS personnel, those persons were non-attorneys. The debt-collection letter sent to Miller, although it bore the signature of an attorney, was drafted by non-attorney personnel.

The FDCPA prohibits the practice of "false representation or implication that any individual is an attorney or that any communication is from an attorney." Although the letter sent to Miller by UCS was literally "from" an attorney, the court required some degree of attorney involvement before a letter will be considered "from an attorney" within the meaning of the FDCPA. The court concluded that UCS's review practices and commencement of legal action were inadequate for FDCPA purposes because evidence presented at trial indicated the lack of independent attorney judgment in connection with Miller's file. Because UCS failed to fall within the FDCPA, the court held that all communications with Miller by UCS are rendered misleading. Furthermore, the court rejected UCS's reliance upon Wolpoff's review, reasoning that to allow attorneys to rely on another's prior review would absolve an attorney's professional obligation to review debt-matters independently.

CONSUMER CREDIT

BANK DID NOT VIOLATE TRUTH IN LENDING ACT BY INCREASING APR RETROACTIVELY

Shaner v. Chase Bank U.S.A, N.A., 587 F.3d 488 (1st Cir. (Ma.) 2009).

FACTS: Jessica Shaner ("Shaner") filed a class action against Chase Bank USA, N.A. ("Chase") in Massachusetts Superior Court, which Chase later removed to federal district court. The class included all persons with Massachusetts billing addresses on their Chase consumer credit card accounts for which interest rates on outstanding balances were retroactively increased "without warning or advance notice" from July 30, 2003, onward. Shaner's complaint did not dispute that "retroactive" adjustments were consistent with the language of the credit card agreement; rather, the complaint alleged that it was unlawful, primarily based on a reading of Federal Reserve Board regulations. Shaner's complaint accused Chase of violating the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 et seq. (2006), by failing to provide notice of a rate increase on or before the effective date of the increase.

On Chase's motion to dismiss, the district court sided with Chase and concluded that the Federal Reserve Board's TILA regulations, as read by the Board itself, did not require Chase to provide advance notice when it made end-of-month adjustments apply from the start of the month where the agreement so permitted.

Shaner appealed from the adverse judgment and this court reviewed the motion to dismiss de novo, accepting as true the factual allegations Shaner pleaded in this complaint. Two subsections of the TILA regulations were of importance. Section 226.9(c)(1) and section 226.9(c)(2), 12 C.F.R. § 226.9(c)(1), (2) (2003). Shaner and Chase disputed the meaning behind these two subsections and whether they stipulated that notice be required.

HOLDING: Affirmed.

REASONING: Recent revisions to TILA and its notice regulations that tightened disclosure restrictions on the banks, have resolved the TILA question as to future transactions in favor of Shaner. The new statute and regulations by their terms, however, did not take effect until August 2009 and Shaner did not claim that the new restrictions apply to transactions, such as hers, that occurred prior to the new statute.

The court noted that this issue had been considered by the Federal Reserve Board, and that: "It is the Board's position that at the time of the transactions at issue in this case, Regulation Z did not require a change-in-terms notice to be provided when a creditor increased a rate to a figure at or below the maximum allowed by the contract in the event of default."

FAIR CREDIT REPORTING ACT DOES NOT REQUIRE ACTUAL DAMAGES

Beaudry v. Telecheck Serv. Inc., 579 F.3d 702 (6th Cir. 2009).

FACTS: Cheryl Beaudry ("Beaudry") filed a class action suit against Telecheck Services and others ("defendants") alleging violations of the federal Fair Credit Reporting Act ("FCRA"). Specifically, the complaint alleged that defendants – a group of foreign corporations who provide check-verification services – failed to account for a 2002 change in the numbering used by the Tennessee driver's license system. This failure lead systems to reflect incorrectly that many Tennessee consumers were first-time check-writers. The complaint alleged the defendants' actions constituted a willful failure to provide accurate information and entitled the class members to declaratory relief, injunctive relief, statutory damages, punitive damages, attorney's fees, costs and expenses. The defendants filed a motion to dismiss on the grounds that Beaudry's complaint failed to allege that she had suffered actual damages. The district court dismissed the class action, holding that Beaudry had not alleged any injury and that the statute does not authorize courts to grant injunctive relief. Beaudry appealed.