DEBT COLLECTION

SPANISH SENTENCE IN COLLECTION LETTER GIVES RISE TO CLAIM UNDER FDCPA

Ehrich v. I.C. System, Inc., 681 F. Supp. 2d 265 (E.D.N.Y. 2010)

FACTS: Plaintiffs David Ehrich and Camille Weiss ("Plaintiffs") received identical debt collection letters from the defendant I.C. System, Inc. ("I.C. System"). Plaintiffs did not dispute the validity of the debt nor did they contend that the main text of the letter violated the Fair Debt Collection Practices Act ("FDCPA"). However, Plaintiffs claim that a single Spanish sentence contained in the letter overshadowed the English notice and encouraged Spanish-speaking consumers to call I.C. Systems directly, thereby waiving their rights to notice. As such, Plaintiffs brought this putative class action against I.C. System, alleging that their debt collection letter violated the FDCPA notice provision. I.C. System moved for summary judgment.
HOLDING: Denied.
REASONING: Under § 1692g of the FDCPA, no communication may overshadow or convey in a confusing or contradictory fashion the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor. In evaluating claimed FDCPA violations, courts apply an objective standard, measured by how the least sophisticated consumer would interpret the notice received from the debt collector. The goal is to protect the naïve and credulous from abusive debt collection practices. The court held that Spanish-speaking consumers fall into the objective category of the least sophisticated consumer.

The FDCPA notice was ambiguous to the Spanish-speaking consumers.

The court then analyzed whether the inclusion of the Spanish sentence overshadowed the properly provided notice in the rest of the letter. When a debt collection letter unambiguously provides the required FDCPA notice and merely supplements it with a phone number, there is no § 1692g violation. The court held that in the present case, the FDCPA notice was ambiguous to the Spanish-speaking consumers. If the Spanish-speaking consumer was unable to read the properly provided notice in English, he was left uncertain as to his rights and options. The inclusion of the phone number encouraged the Spanish-speaking consumer to call and potentially waive his rights to challenge the validity of the debt. The court held that it overshadowed the notice even for the Spanish-speaking consumer with a basic proficiency in English, since the eyes of the Spanish-speaking consumer would naturally gravitate to the one Spanish sentence.

The court held that while I.C. System technically complied with the FDCPA, they did not sufficiently meet the statutory requirement of clear conveyance of the notice. If I.C. System deemed it necessary to provide the sentence in Spanish, then the English notice was clearly not sufficient to inform those Spanish-speaking consumers who did not speak English (and perhaps even indicates that Spanish-speaking consumers were actually being targeted by I.C. System). For these reasons, the court denied I.C. System's motion for summary judgment.

SUPREME COURT RULES THAT THE BONA FIDE ERROR DEFENSE IN FDCPA DOES NOT APPLY TO A VIOLATION RESULTING FROM A DEBT COLLECTOR'S MISTAKEN INTERPRETATION OF THE LEGAL REQUIREMENTS OF THE FDCPA

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605 (U.S. 2010)

FACTS: Debtor Karen L. Jerman brought action against debt collector Carlisle, McNellie, Rini, Kramer & Ulrich LPA, alleging violations of the federal Fair Debt Collection Practices Act and the Ohio Consumer Sales Practices Act. Law firm Carlisle filed suit in Ohio state court on behalf of a mortgage company to foreclose a mortgage on real property owned by Jerman. The complaint included a notice that the mortgage debt would be assumed valid unless Jerman disputed it in writing. Jerman's lawyer sent a letter disputing the debt, and, when the mortgage company acknowledged that the debt had in fact been paid, Carlisle withdrew the suit. Jerman then filed this action, contending that by sending the notice requiring her to dispute the debt in writing, Carlisle had violated § 1692g(1) of the FDCPA, which governs the contents of notices to debtors. The United States District Court for the Northern District of Ohio granted debt collector's motion for summary judgment under § 1692k(c)'s "bona fide error" defense. Jerman appealed. The United States Court of Appeals for the Sixth Circuit affirmed, holding that the § 1692k(c) defense is not limited to clerical or factual errors, but extends to mistakes of law. Certiorari was granted.
HOLDING: Reversed and remanded.
REASONING: The FDCPA, 15 U.S.C. § 1692 *et seq.*, imposes civil liability on "debt collector[s]" for certain prohibited debt collection practices. A debt collector who "fails to comply with an [FDCPA] provision… with respect to any person is liable to such person" for "actual damage[s]," costs, "a reasonable attorney's fee as determined by the court," and statutory "additional damages." §1692k(a). In addition, violations of the FDCPA are deemed unfair or deceptive acts or practices under the Federal Trade Commission Act, § 41 *et seq.*, which is enforced by the Federal Trade Commission. A debt collector who acts with "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is [prohibited under the FDCPA]" is subject to civil penalties enforced by the FTC. §§ 45(m)(1)(A), (C). A debt collector is not liable in any action brought under the FDCPA, however, if it "shows by a preponderance of evidence that

the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." § 1692k(c).

Ignorance of the law will not excuse any person, either civilly or criminally.

The court held that the bona fide error defense in §1692k(c) does not apply to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA, citing the "common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." *Barlow v. United States*, 7 Pet. 404, 411, 8 L.Ed. 728 (1833) (opinion for the Court by Story, J.). When Congress intends to provide a mistake-of-law defense to civil liability, it does so more explicitly. The court held that Congress did not confine liability under the FDCPA to "willful" violations, a term more often understood in the civil context to excuse mistakes of law. See, *e.g., Trans World Airlines, Inc. v. Thurston* , 469 U.S. 111, 125-126, 105 S.Ct. 613, 83 (1985).

STUDENT LOAN DEBT CAN BE CONSIDERED PRIOR TO DISCHARGE

In re Cassim, 594 F.3d 432 (6th Cir. 2010)

FACTS: Appellee Jennifer Cassim filed for Chapter 13 bankruptcy and simultaneously commenced a proceeding to discharge her student loan debt owed to Appellant Educational Credit Management Corporation ("Educational Credit"). Cassim argued that her debt to Educational Credit was dischargeable based on "under hardship" pursuant to 11 U.S.C. §523(a)(8). Educational Credit then filed a motion to dismiss Cassim's undue hardship claim for lack of subject matter jurisdiction, arguing that Cassim's student loan debt was not "ripe" for review yet because Cassim had yet to receive a general discharge under 11 U.S.C. §1328. The bankruptcy court denied Educational Credit's motion and entered judgment providing for discharge of Cassim's student loan debt upon the entry of a general discharge. Educational Credit appealed to the United States Bankruptcy Appellate Panel, which affirmed the decision. Educational Credit then appealed to the Sixth Circuit.

HOLDING: Affirmed.

REASONING: Whether a claim is constitutionally ripe for adjudication is a question of law that is reviewed de novo. The ripeness doctrine has developed to ensure that courts decide only existing controversies, and not hypothetical questions or possibilities. The bankruptcy court found that a rigid time period for filing a determination of dischargeability of student loans should not be adhered to when such time restrictions are absent from the Bankruptcy Code and Bankruptcy Rules. Educational Credit's contention on appeal was that a student loan dischargeability claim is never ripe until a debtor receives a general discharge. The reasoning behind Educational Credit's argument was that if a debtor does not complete a Chapter 13 plan, a determination that student loan debt is dischargeable becomes moot and any hearing that took place would have been unnecessary, thus it is constitutionally "unripe."

The court found that resolution of Cassim's relief from her student loan obligation was material to the goal of Chapter 13 in providing a debtor a "fresh start" because the student loan constituted a substantial part of her overall debt. Thus the student loan debt could not be viewed as hypothetical. In support of the finding that the resolution of Cassim's student loan obligation was not hypothetical prior to a general discharge, the court also pointed out that the bankruptcy court's confirmation of Cassim's plan was premised on finding that she would complete the plan. Moreover, Educational Credit failed to show any evidence to suggest that Cassim was incapable of completing the Chapter 13 plan or that she was unlikely to receive a general discharge.

LAW FIRM VIOLATED FAIR DEBT COLLECTION PRACTICES ACT

Ellis v. Solomon & Solomon, P.C., 591 F.3d 130 (2nd Cir. 2010)

FACTS: Consumer plaintiff Janet Ellis was delinquent on her Citibank credit card. Citibank referred Ellis' account to Solomon & Solomon, P.C. ("Solomon") for collection. Solomon sent Ellis a letter titled "Validation Notice" informing her that she must notify their office within 30 days of receipt in order to dispute the validity of the debt, otherwise the debt would be assumed valid. Ellis acknowledged receipt of the letter and did not dispute the debt. Solomon then sued Ellis for collection of the debt. Ellis was served with the summons and complaint two weeks before the 30 days of the validation period was due, without any notification that her right to dispute the validity of the debt continued.

In response, Ellis filed suit against Solomon alleging violation of the Fair Debt Collection Practices Act ("FDCPA") in the course of their efforts to collect the debt. Both parties moved for summary judgment. The District Court granted Ellis' summary judgment on her claim that the defendants violated § 1692g of the FDCPA by serving her with the summons and complaint during the validation period. The district court's reasoning in granting Ellis' summary judgment rested on the fact that Solomon failed to inform Ellis that the validation period was still in effect even after the filing of a lawsuit for collection. The failure to inform Ellis of her still existing rights within the validation period was held by the District Court to "overshadow" the earlier notice of Ellis' rights as a consumer. Solomon appealed.

HOLDING: Affirmed.

REASONING: FDCPA § 1692g Validation of Debts was enacted to eliminate the problem of debt collectors "dunning" the wrong person or attempting to collect debts which the consumer has already paid. Unless set forth in the debt collector's original communication, the debt collector must send the consumer a written "validation notice" informing the consumer of the details of the debt, and that the consumer has 30 days after receipt of notice to

dispute the validity of the debt or it would otherwise be deemed valid. However, the validation period is not a grace period and the debt collector is allowed to demand or take action to continue collection activity in the absence of a dispute notice. While debt collectors may continue collection activities during the validation period, the Second Circuit has held that activities during the validation period may not "overshadow" or "contradict" the validation notice. In its 2006 amendment of the FDCPA, Congress adopted and codified the Second Circuit's approach in § 1692g(b).

Whether collection activities or communication within the validation period overshadow or are inconsistent with a validation notice is determined by the "least sophisticated consumer" standard. A collection activity or communication violtates the FDCPA if it would make the "least sophisticated consumer" uncertain as to his rights. The court found that there was a real potential for confusion when a consumer is served with a lawsuit during the validation period without some explanation as to the relationship between the suit and the provisions in the validation notice. Under this scenario, the court found that the "least sophisticated consumer" may conclude that being taken to court will trump any out-of-court rights she had. The court affirmed, holding that a validation notice is overshadowed where a debt collector serves a consumer with process initiating a lawsuit during the validation period, but fails to clarify that commencement of the lawsuit has no effect on the information conveyed in the validation notice.

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DEBT COLLECTOR MAY VIOLATE FEDERAL LAW BY FAILING TO REGISTER WITH STATE

LeBlanc v. Unifund CCR Partners, 601 F.3d 1185 (11th Cir. 2010)

FACTS: Plaintiff Joseph LeBlanc received a letter from Unifund informing him that Unifund had purchased LeBlanc's charged off debt from Bank One. In the letter, Unifund represented itself as a creditor and threatened legal action if LeBlanc failed to dispute or settle the debt. After Unifund filed suit against him in Florida state court, LeBlanc filed suit in Federal district court, alleging multiple violations of the Fair Debt Collection Practices Act (FDCPA) and Florida Consumer Collection Practices Act (FCCPA). The parties filed cross-motions for summary judgment. The district court granted Unifund's motion on all of the FCCPA claims and granted LeBlanc partial summary judgment under two provisions of the FDCPA, specifically §§ 1692e(5) and 1692f. The district court opined that Unifund violated the FDCPA because Unifund failed to register as an "out-of-state consumer collection agency" with the State of Florida, as required by the FCCPA. The district court held that Unifund could not legally sue Leblanc to collect the debt without first registering with Florida's Office of Financial Regulation as required by Section 559.553 of the FCCPA.

HOLDING: Reversed and remanded.

REASONING: The court first decided whether the FCCPA required Unifund to register with the state as an "out-of-state consumer collection agency." It was undisputed that Unifund was a "debt collector" seeking to recover from LeBlanc on an outstanding "consumer debt." In addition, in light of the state court lawsuit Unifund brought to recover on the debt, the court summarily rejected Unifund's contention that it was not engaged in "collection activity" with regards to LeBlanc. Unifund argued that it was not subject to the FCCPA's registration requirement as an "out-of-state consumer debt collector" for various reasons. The court held that pursuant to the statutory definition, the business activities of an "out-of-state consumer debt collector" must involve both "collecting or attempting to collect consumer debt ..." and "soliciting consumer debt accounts for collection from creditors who have a business presence within [Florida]." FLA. STAT. § 559.55(8). The court held that Unifund's business activities clearly involved "collecting or attempting to collect consumer debt" from debtors located within Florida by means of interstate communication originating from outside of the state. The court held that the letter sent by Unifund to Leblanc expressly stated its purpose as an attempt to collect a debt. In addition, the letter originated from outside the State of Florida and was sent via interstate communication, namely, the U.S. Mails.

Although Unifund claimed that it did not engage in "soliciting consumer debt accounts," the court held that the record evidence supported the opposite conclusion. The court stated that although the statute does not define "soliciting," the term "solicitation" is defined by Black's Law Dictionary as "[t]he act or an instance of requesting or seeking to obtain something; a request or petition" or "an attempt or effort to gain business." Accordingly, the court found that Unifund "solicits" consumer debt accounts.

The court then analyzed LeBlanc's claim that Unifund violated Section 1692f of the FDCPA. Section 1692f prohibits a debt collector from "using unfair or unconscionable means to collect or attempt to collect any debt." LeBlanc argued that Unifund's non-compliance with the registration requirement of the FCCPA constituted "unfair or unconscionable" means.

Unifund argued that failure to register under § 559.555 of the FCCPA cannot sustain the cause of action since it does not constitute a "means" for purposes of LeBlanc's § 1692f claim. The court held that the proper inquiry is not whether failure to register constitutes a "means," but whether Unifund's failure to register makes the chosen means "unfair or unconscionable." The court held that the letter sent by Unifund to Leblanc was the designated "means" of attempting to collect a consumer debt. Therefore, the court held, Unifund's lack of registration with the State of Florida was an appropriate consideration in deciding whether Unifund's "means" of collection were "unfair or unconscionable." The court held that whether Unifund's letter constituted an "unfair or unconscionable means to ... attempt to collect a debt" for purposes of § 1692f was a jury question.