RECENT DEVELOPMENTS

DEBT COLLECTION

TELEPHONE MESSAGE MAY VIOLATE FDCPA

Zortman v. J.C. Christensen & Assocs., Inc., Civil No. 10-3086 (JNE/FLN) (D. Minn. Apr. 29, 2011).

FACTS: Plaintiff Christina Zortman ("Zortman") incurred a consumer debt with Chase Bank USA N.A. with a Kohl's Department Stores credit card. The debt became delinquent and was transferred or assigned to J.C. Christensen & Associates, Inc. ("JCC"). In an attempt to collect the debt, JCC left multiple messages for Zortman on her home and cellular voicemail systems. The outgoing messages on the voicemail systems did not identify occupants or potential listeners. Zortman filed suit against JCC alleging a violation of the Fair Debt Collection Practices Act ("FDCPA") Zortman specifically alleged that JCC violated 15 U.S.C. § 1692c(b) (2006) when it left messages on Zortman's voicemail systems that were heard by her children. JCC argued that Zortman had no claim because JCC did not purposefully or deliberately disclose the debt information to a third party. The court conducted a hearing in January 2011.
HOLDING: Denied.
REASONING: To find that an FDCPA violation has occurred, deliberate or purposeful intent to disclose information to a third party is required. JCC argued that the release of the plaintiff's debt information met the disclosure requirements set out in 15 U.S.C. §§ 1692d(6) and 1692e(11), which state a debt collector must disclose that "the debt collector is attempting to collect a debt and any information obtained will be used for that purpose." Relying on Mark v. J.C. Christensen & Assoc., Inc., Civil No. 09–100 (ADM/SRN), (D.Minn. Aug. 4, 2009), JCC argued that because the messages left on Plaintiff's answering machine complied with the disclosure requirements, the messages were also in full compliance with § 1692c(b) and were not purposeful or deliberate violations. The court disagreed.

The court reasoned that even if the messages complied with disclosure requirements, this did not mean the messages were not in violation of the FDCPA's third party disclosure rule. The court stated the language from *Mark* about purposeful and deliberate intent was dictum and found no such requirement in the statute. The court determined the plain language of § 1692(c)(b) does not require a purposeful or deliberate intent to make the disclosure of a debt. JCC argued that the word "communicate" in the statute denotes intent, and that the court should interpret the statute has having an intent requirement. However, the court found no such requirement because communication can be made intentionally or unintentionally. Additionally, because the FDCPA is a strict liability statute, reading in an intent requirement would defeat the purpose of the statute.

The plain language of § 1692(c)(b) does not require a purposeful or deliberate intent to make the disclosure of a debt.

The court relied on *Owens v. Brachfeld* and *Berg v. Merchants Ass'n*., which held that inadvertent disclosures to third parties through an answering machine or voicemail message were violations of section 1692c(b). In this case, JCC left messages on systems associated with two of Zortman's contact numbers. Neither voicemail system identified who might actually listen to messages left on the systems. Under these circumstances, the pleadings allow the conclusion that JCC had reason to expect that someone other than Zortman would hear the voicemail messages. This is sufficient to satisfy any state of mind requirement that might be set forth by section 1692c(b) of the FDCPA. Because the FDCPA is a strict liability statute that explicitly includes an intent element when required, a plaintiff need not plead deliberate or purposeful disclosure to third parties to state a claim under section 1692c(b). The court concluded that Zortman had pleaded an actionable claim.

A DEBT COLLECTOR'S VERIFICATION NOTICE MUST INCLUDE WRITING REQUIREMENT

Bicking v. Law Offices of Rubenstein & Cogan, ___ F. Supp. 2d ___ (E.D. Va. 2011).

FACTS: In an attempt to collect on debt referrals, the Law Offices of Rubenstein & Cogan ("R&C" or "Defendants") sent demand letters to Jason L. Bicking and Cathleen B. Mauro ("Plaintiffs"), advising them, respectively, that their Discover and FIA Card Services Accounts had been referred to R&C for collection, Each letter stated that if the account was not in dispute, payment was expected. The included verification notice informed plaintiffs that any notice of dispute or request for information pertaining to the original creditor "must be received within thirty days." Plaintiffs filed a putative class action alleging that the verification notice failed to inform the consumer that such disputes and requests must be received in writing pursuant to the Fair Debt Collection Practices Act ("FDCPA"), sections 1692g(a)(4) and (5) and 1692(e)(10). Plaintiffs sought damages against R&C and its owners in their personal capacities. Defendants filed a motion to dismiss, contending that the verification notice clearly informed plaintiffs of their rights, and that plaintiffs failed to allege any false representations or deceptive means in violation of Section 1692(e)(10).
HOLDING: Motion to dismiss denied.
REASONING: Plaintiffs argued that Defendants' verification notice violated 15 U.S.C. § 1692g subsections (a)(4) and (5) because it failed to state that requests under those subsections *must* be in writing. Defendants countered that the notice was sufficient because it "clearly informed [plaintiffs] of their right to notify R&C of disputes or obtain the name of the original creditor." R&C drew on *Talbott v. GC Servs. Ltd. P'ship*, to argue that the letter did not constitute a violation as alleged because a violation of § 1692 (e)(10) required more egregious conduct. 53 F.Supp.2d 846 (W.D. Va. 1999). Examples given were where the letter issued falsely threatened legal action or threatened to make immediate marks against a credit report.

The court disagreed with R&C's interpretation and determined the plain meaning of § 1692g is that debtors can trigger the rights under subsection (a)(4) and (a)(5) *only* through written dispute. Without notifying debtors of this requirement,

R&C were in violation of the statute. Defendants asserted that the failure to include the "in writing" requirement set out by the FDCPA actually expanded Plaintiffs' rights by not limiting disputes to written notifications. The problem with the assertion of an expansion of rights was that if a consumer contested a debt orally rather than in writing, the consumer would inadvertently lose the protections set forth in the FDCPA, and the debt collection agency would be under no obligation to verify the debt and cease all collection efforts. The court noted that if the least sophisticated consumer would be deceived, the letter could be a violation; and, in this instance, the failure to include the "in writing" requirement could easily deceive the least sophisticated debtor into believing that oral notice is statutorily sufficient. The consumer could therefore unknowingly forfeit his or her rights under subsections (a)(4) and (5) of 1692g.

MERS CANNOT FORECLOSE IF IT DOESN'T HAVE UNDERLYING NOTE

Bank of N.Y. v. Silverberg, 926 N.Y.S.2d 532 (App. Div. 2011).

FACTS: In October 2006, Stephen and Fredrica Silverberg ("Defendants") borrowed $450,000 from Countrywide Home Loans, Inc. ("Countrywide") to purchase a home. The loan was secured by a mortgage that referred to Mortgage Electronic Registration Systems, Inc. ("MERS") as the mortgagee for the purpose of recording, and provided that the underlying promissory note was in favor of Countrywide. In April 2007, Defendants executed a second mortgage on the property. Both the initial and second mortgage documents contained a section entitled "Borrower's Transfer to Lender of Rights in the Property," which stated that MERS held only legal title to the rights granted by the Defendants in the security instrument. It gave MERS the right to exercise all of the rights granted to Countrywide, including the rights to foreclose and sell the property. In addition, it gave MERS the right to "take any action required of [Countrywide] including, but not limited to, releasing and canceling [the security instrument]."

After executing the second mortgage, Defendants merged the two prior notes and mortgages into one loan obligation ("consolidation agreement") in favor of MERS, as mortgagee and nominee of Countrywide. Countrywide was the named lender and note holder. The consolidation agreement, as with the prior mortgages, recited that MERS was "acting solely as a nominee for [Countrywide] and [Countrywide's] successors and assigns . . . ." It stated that for the purposes of recording the agreement, MERS was the mortgagee of record. However, Countrywide was not a party to the consolidation agreement.In December 2007, Defendants defaulted on the consolidation agreement.

In April 2008, by way of a "corrected assignment of mortgage," MERS, as Countrywide's nominee, assigned the consolidation agreement to the Bank of New York ("Plaintiff"). In May of 2008, Plaintiff commenced a mortgage foreclosure action against Defendants. Defendants moved to dismiss the complaint against them for lack of standing. The lower court denied the Defendants' motion, concluding that prior to the commencement of the action, MERS, as Countrywide's nominee and on Countrywide's behalf, assigned the mortgages described in the consolidation agreement. It determined that Plaintiff was the owner of the "consolidated Note and Mortgage." Thus, Bank of New York was the proper party to commence the action.

HOLDING: Reversed.

REASONING: MERS was created in 1993 by several large participants in the mortgage industry intending to streamline the mortgage process by using electronic commerce to eliminate paper. MERS does not lend money, receive payments on promissory notes, or service loans by collecting loan payments. MERS members agree to appoint MERS to act as their common agent on all mortgages they register in the MERS system. They identify MERS as nominee and mortgagee for its members' successors and assignees; MERS therefore remains the mortgagee of record in local recording offices regardless of how many times the mortgage is transferred. It is not, however, the true owner of the note.

In a mortgage foreclosure action, a plaintiff has standing where it is the holder or assignee of the subject mortgage *and* the holder or assignee of the underlying note at the time the action is commenced. Generally, once a promissory note is tendered to and accepted by an assignee, the mortgage passes *as an incident to the note*. "[A] mortgage given to secure notes is an incident to the latter and stands or falls with them." *Weaver Hardware Co. v. Solomovitz,* 139 N.E. 353, 356 (1923). Contrarily, if a mortgage is transferred without the debt, it is a nullity – no interest is acquired by the transfer of the mortgage standing alone. A "mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation." *FGB Realty Advisors, Inc. v. Parisi*, 265 A.D.2d 297, 298 (N.Y. App. Div. 1999). Therefore, one who has not demonstrated a right to the debt cannot pursue the foreclosure of a mortgage.

The consolidation agreement, to which Countrywide was not a party, purported to merge the two prior notes and mortgages into one loan obligation. The court noted that the consolidation agreement gave MERS the right to assign the mortgages themselves; it did not specifically give MERS the right to assign the underlying notes. Therefore, assigning the notes was beyond MERS's authority as nominee or agent of Countrywide. In addition, the language in both the initial mortgage and the second mortgage that granted MERS the right to foreclose was superseded by the consolidation agreement. The court stressed the critical requirement that the foreclosing party be both the holder or assignee of the subject mortgage, *and* the holder or assignee of the underlying note at the time the action is commenced. Because MERS was never the lawful holder or assignee of the notes described and identified in the consolidation agreement, the court determined MERS was without authority to assign the power to foreclose to the Plaintiff. Thus, the Bank of New York lacked standing to foreclose.

The consolidation agreement gave MERS the right to assign the mortgages themselves; it did not specifically give MERS the right to assign the underlying notes.

IGNORING LAW CAN RESULT IN WILLFUL VIOLATION OF FAIR CREDIT REPORTING ACT

Holman v. Experian Info. Solutions, Inc., ___ P.3d ___ (N.D. Cal. 2011).

FACTS: Roane Holman ("Holman" or "Plaintiff") alleged that in August of 2009, law enforcement personnel had his car towed by Big Guys Towing ("Big Guys"). Holman failed to pay Big Guys for the associated costs of towing and storage of his car. Big Guys sold Holman's car and sought to recover from him the difference between the car's sale price and the remaining amount owed for the towing and storage services. Big Guys retained Finex to collect the remainder of the debt from Holman. In September 2009, pursuant to its subscription with Experian, Finex obtained Holman's credit report. Holman asserted that Finex violated the FCRA by obtaining a consumer credit report without a permissible purpose. He also charged Experian with a willful violation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, alleging that it furnished his credit report in the absence of a permissible purpose. Experian filed, and Finex joined, a motion to dismiss Holman's claim for a willful violation of the FCRA.
HOLDING: Motion to dismiss denied.
REASONING: The FCRA limits the purposes for which consumer reporting agencies may disclose credit reports. 15 U.S.C. § 1681b. One such purpose is in the case of a willful violation of the statute. In order to prove a willful violation, a consumer must show that the reporting agency violated the FCRA either knowingly or recklessly. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007). Experian asserted that in September 2009, no authority clearly established that it was impermissible under the FCRA to furnish consumer credit reports for use in the collection of towing-related debt. Instead, Experian asserted, it was an open question whether section 1861b(a)(3)(A) permitted it to furnish Plaintiff's credit report to recover his towing-related debt. Thus, Experian argued, Holman could not state a claim for a willful violation of the FCRA. The court noted, that at the time Experian furnished Finex with Holman's credit report, it was involved in an appeal of another lawsuit with the same facts. In *Pintos v. Pac. Creditors Ass'n*, the district court granted Experian's motion for summary judgment, finding that it was permissible to furnish Maria Pintos's credit report for the purpose of collecting her towing-related debt. No. C 03-5471 CW (N.D. Cal. Apr. 13, 2011). Pintos appealed, resulting in two opinions by the Ninth Circuit, which – albeit through different reasoning – came to the same conclusion: collection of a towing-related debt did not provide a permissible purpose to obtain or furnish a credit report because it did not constitute "a transaction initiated by [the consumer]." *Pintos v. Pac. Creditors Ass'n*, 565 F.3d 1106, 1114 (9th Cir. 2009). The court also noted a Seventh Circuit precedent that came to the same conclusion.

Experian argued that the law was still unsettled because it was awaiting the decisions of the petitions for rehearing en banc and for a writ of certiorari in the United States Supreme Court. Therefore, it reasoned, the use of credit reports to collect towing-related debts was still debatable in September 2009. However, the court found that once precedential decisions are published, they are binding for the purpose of stare decisis. The second-in-time April 2009 *Pintos* decision indicated that Experian's practices were unlawful. By not changing its practices and furnishing Holman's credit report to Finex after the appellate court found such a disclosure to be improper was a risk of violating the law substantially greater than the risk associated with a reading that was merely careless. The court found that under the FCRA, Experian's willful disregard of the law and failure to change its practice could have constituted a willful violation of the statute. Thus, court denied Experian's motion to dismiss Holman's claim for a willful violation of the FCRA.

DEBT COLLECTOR MAY ATTEMPT TO COLLECT TIME-BARRED DEBT

Huertas v. Galaxy Asset Mgmt., 641 F.3d 28 (3rd Cir. 2011).

FACTS: Hector Huertas ("Huertas" or "Plaintiff") brought suit in which he alleged that Asset Management Professionals ("AMP") and Galaxy Asset Management ("Galaxy" or with AMP, "Defendants") violated the Fair Debt Collection Practices Act ("FDCPA") by sending him a letter in an attempt to collect a time-barred debt. Under New Jersey law, the six-year statute of limitations had run prior to the date the Defendants sent the collection letter. The defendants moved to dismiss Huertas's claims against them pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim. The district court granted the motion and Huertas appealed.
HOLDING: Affirmed.
REASONING: The court explained that under New Jersey law, Huertas's debt obligation was not extinguished by the expiration of the statute of limitations, as he contended. Although he had a complete legal defense against paying the debt, he still owed it. The statute of limitation merely rendered the debt unenforceable, but it did not invalidate it. Although this was a matter of first impression,, the court cited a number of cases to the effect that when a statute of limitations runs its course, only the remedy is barred, not the common law right. *R.A.C. v. P.J.S. Jr.*, 927 A.2d 97, 106 (2007). However, the court also agreed with the majority of other jurisdictions regarding the limitations placed upon debt collectors who attempt to collect time-barred debts. Those jurisdictions held that the FDCPA permits a debt collector to seek voluntary repayment of a time-barred debt as long as the debt collector does not initiate or threaten legal action in connection with the debt collection. *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001). This conclusion is derived from the FDCPA, which prohibits a debt collector from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt, including falsely representing the character, amount, or legal status of any debt." 15 U.S.C. § 1692e(2)(A).

The court, therefore, determined that Huertas's FDCPA claim depended on whether the letter sent to him by the debt collectors threatened litigation. The letter indicated that Huertas's account was reassigned, requested that Huertas call "to resolve this issue," included a privacy notice informing him that Galaxy would be accessing his private consumer information, and, as required by 15 U.S.C. § 1692g(a), indicated that if Huertas did not dispute the debt within thirty days of receiving the letter, AMP would assume the debt was valid. At the bottom, the letter stated, in bold capital letters, "THIS IS AN ATTEMPT TO COLLECT

A DEBT." Analyzing from the perspective of the least sophisticated debtor, the court concluded that the letter in no way explicitly or implicitly threatened litigation and could not be interpreted to contain a threat of litigation. Finding no violation by the debt collectors, the court affirmed the district court's dismissal.

LANDLORD'S AGENT IS NOT A DEBT COLLECTOR

Carter v. AMC, LLC, 645 F.3d 840 (7th Cir. 2011).

FACTS: Plaintiff, Geaniece Carter, rented an apartment in a building managed by Defendant, AMC, LLC ("AMC"), on behalf of the property's owner, Jackson Square Properties. AMC filed suit in state court to evict Carter. The trial court entered an eviction order, but the appellate court reversed because AMC had not given proper notice. Acting on the opinion of one of the appellate judges that AMC also had violated the Fair Debt Collection Practices Act ("FDCPA"), Carter filed the present federal suit seeking damages for such violation. Carter contended that AMC violated the FDCPA in two ways: by telling a credit bureau that she owed rent without informing it that she disputed that position, and by misrepresenting the status of the debt during the state litigation. The United States District Court for the Northern District of Illinois considered AMC as the owner of the apartment building, placing it outside the scope of the FDCPA, and granted AMC's motion to dismiss. Carter appealed.
HOLDING: Affirmed.
REASONING: The appellate court affirmed the district court's order, but on different grounds. FDCPA § 1692a(6) defines a debt collector as one who regularly collects, or attempts to collect, "debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692(a)(6). An entity that tries to collect money owed itself is outside the FDCPA. It was this reasoning that led the federal district judge to dismiss Carter's complaint: as AMC owned the property, it was not a debt collector because it was collecting a debt for itself. The appellate court found that while the district court's legal analysis was correct, the factual assumption was incorrect. AMC did not own Riverstone Apartments – the court found that the federal judge incorrectly relied on Carter's complaint to find that AMC owned the property. Instead, the court found that AMC was an agent that collected money for the owner, Jackson Square Properties.

The court acknowledged that as the lessor's agent, AMC could potentially be a debt collector within the definition of section 1692a(6). However, not all agents are debt collectors. The Act also excludes any person who tries to collect a debt that "was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii). The court concluded that although one usually "obtains" a debt by purchasing it, a servicing agent "obtains" a debt in the sense that it acquires the authority to collect the money on behalf of another. The court found that AMC "obtained" an interest in Carter's debt to Jackson Square Properties when it became the latter's agent – which occurred before Carter got behind in her rent – a fact that court mentioned was debatable. Therefore, AMC was not a debt collector and did not owe Carter any duties under the FDCPA.

BANKRUPTCY

BANKRUPTCY CASE DISMISSED BECAUSE OF ABUSE OF BANKRUPTCY PROCESS

Calhoun v. U.S. Tr., ___ F.3d ___ (4th Cir. 2011).

FACTS: The Calhouns lived on a 3.5 acre property in Jackson, South Carolina with no dependents. They received a total of $8,772 in monthly income, all of which was paid to Mr. Calhoun through Social Security and retirement benefits. After an unsuccessful attempt to sell their home, the Calhouns decided to renovate it, with the intention of staying. The renovation cost them over $130,000. Mr. Calhoun had converted one of his retirement accounts to an IRA; the Calhouns planned to use those investments to supplement their income. The Calhouns' funds were unexpectedly reduced during the economic downturn. After incurring debt with a second mortgage and five credit cards, the Calhouns entered into a payment plan with a credit management company. The plan required monthly payments of $2,638, which they made for twenty-two months. However, the Calhouns became discouraged because the payment plan did not leave them any additional money in their budget for emergencies; they subsequently filed for Chapter 7 bankruptcy to discharge the remaining $106,707 of their debt.

The bankruptcy court dismissed their petition on grounds of abuse, and the district court affirmed.
HOLDING: Affirmed.
REASONING: Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and amended Section 707(b) of the Bankruptcy Code with the intent of relaxing the standard for dismissing a petition brought under Chapter 7 and characterized as abusive. Specifically, the standard for dismissal under section 707(b) was changed from "substantial abuse" to simply "abuse." 11 U.S.C. § 707(b)(1). The court found that an essential element to the BAPCPA is the "means test," a formula that screens a debtor's income and expenses to determine whether the debtor is able to repay his debt. When the debtor's income exceeds the "highest median family income of the applicable State for a family of the same number or fewer individuals," the means test is applied to create a rebuttable presumption of abuse. A court can presume abuse on the part of above-income debtors and dismiss their case on that basis. The court noted that the means test is not conclusive, the presump-

When the debtor's income exceeds the "highest median family income of the applicable State for a family of the same number or fewer individuals," the means test is applied to create a rebuttable presumption of abuse.