DEBT COLLECTION

FDCPA REQUIRES DEBT BE OWED OR DUE TO SOMEONE OTHER THAN THE COLLECTOR

Schlegel v. Wells Fargo Bank, N.A., 720 F.3d 1204 (9th Cir. 2013).

FACTS: Appellants, John and Carol Schlegel fell behind on their home mortgage payments and filed a petition for bankruptcy. The loan was reassigned to appellee, Wells Fargo Bank, N.A. ("Wells Fargo"), which offered a loan modification extending the Schlegels' mortgage term to 40 years with the bankruptcy court's approval. The Schlegels did not miss any subsequent payments. Wells Fargo failed to update its records and erroneously sent the Schlegels a default notice threatening acceleration and possible foreclosure if payment was not received a month later. The Schlegels called Wells Fargo regarding the letter and were told no modification agreement was in effect.

After receiving no satisfactory explanation for the bank's failure to acknowledge their loan modification, the Schlegels filed suit, requesting relief under the Fair Debt Collection Practices Act (FDCPA) and Equal Credit Opportunity Act (ECOA). One week after filing, Wells Fargo again threatened foreclosure proceedings unless full payment was received. After the fifth notice, Wells Fargo acknowledged the modification agreement and the incorrect default notices. The District Court dismissed the complaint for failure to state a claim. The Schlegels appealed.
HOLDING: Affirmed in part, reversed in part, and remanded.
REASONING: First, the court noted that a debt collector under the FDCPA is an entity (1) that used any instrumentality of interstate commerce for the principal purpose of debt collection; or (2) that regularly collected or attempted to collect, directly or indirectly, debts owed. The court found that Wells Fargo did not meet the first definition and addressed the validity of the second definition. It found here was no factual basis that Wells Fargo regularly collected debts owed to an entity other than Wells Fargo. Because Wells Fargo was not principally engaged in collecting debt, the court held that Wells Fargo did not fall under the definition of a debt collector, and dismissed the FDCPA claim.

Second, under the ECOA, when a creditor takes adverse action, such as a revocation of credit, the debtor is entitled to a statement of reasons for the action under the statute's notice requirement. The appellate court concurred with the Schlegels' rationale that Wells Fargo's acceleration of their mortgage debt constituted a revocation of credit under the ECOA, and that such credit revocation was to be considered as adverse even when undertaken in a mistaken and/or unenforceable context. Even though the default notices did not alter the loan modification agreement and had no binding effect, the letters *prima facie* revoked the prior agreement. Because both parties concurred that Wells Fargo sent no valid adverse action notice, its failure to adhere to ECOA requisites was sufficient to survive the bank's original motion to dismiss. The dismissal of the ECOA claim was reversed and remanded.

MERS WAS NOT A DEBT COLLECTOR UNDER THE FDCPA

McLaughlin v. Chase Home Fin. LLC, 519 F. App'x 904 (6th Cir. 2013).

FACTS: Appellant, John McLaughlin, obtained a property loan and granted the first appellee, Mortgage Electronic Registration Systems (MERS), a mortgage in the property as security for the loan. When McLaughlin defaulted, the bank foreclosed on the property. McLaughlin filed suit against MERS alleging FDCPA violations. MERS moved to dismiss the complaint contending that it was not a debt collector according to the FDCPA. The district court granted the motion. McLaughlin appealed.
HOLDING: Affirmed.
REASONING: The FDCPA excludes from the definition of "debt collector" any "person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity [. . .] concerns a debt which was not in default at the time it was obtained by such person." In order for a party to fall under the category of debt collector, the party must have received the rights to collect on the debt after default. MERS was not a debt collector because it "obtained" the right to collect when McLaughlin granted MERS the mortgage as security for the property loan at a time when the debt was not in default.

ATTORNEY DID NOT "REGULARLY" ENGAGE IN DEBT COLLECTON FOR PURPOSES OF FDCPA

James v. Wadas, 724 F.3d 1312 (10th Cir. 2013).

FACTS: Defendant, Wadas, was hired as an attorney in a debt collection action against plaintiff, James. Wadas improperly tried to collect attorney's fees as part of the collection effort. James sued for violations of the Fair Debt Collection Practices Act (FDCPA). The district court granted summary judgment in favor of Wadas after determining that the attorney was not a debt collector under the FDCPA because the attorney did not "regularly" engage in debt collection activities. James appealed.

The court defined "regularly" as "fixed and certain intervals, regular in point in time" [. . .] "in accordance with some consistent or periodical rule or practice."

HOLDING: Affirmed.
REASONING: Under the FDCPA, debt collection status exists when: (1) engaging in debt collection as the principal purpose of business, or (2) engaging in debt collection "regularly." The court defined "regularly" as "fixed and certain intervals, regular in point in time" [. . .] "in accordance with some consistent or periodical rule or practice." A person may regularly render debt collection services, even if these services are not a principal purpose of the business. Indeed, if the volume of a person's debt collection services is great enough, it is irrelevant

that these services only amount to a small fraction of the total business.

The determination of whether or not debt collection occurred regularly was found to be on a case-by-case basis in light of certain factors. These factors included: (1) the absolute number of debt collection communications issued, and/or collection-related litigation matters pursued over the relevant periods; (2) the frequency of such communications and/or litigation activity, including whether any patterns of such activity are discernible; (3) whether the entity has personnel specifically assigned to work on debt collection activity; (4) whether the entity has systems or contractors in place to facilitate such activity; and (5) whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the lawyer or firm to assist in the collection of outstanding consumer debt obligations.

In light of these factors, the court found that Wadas's debt collection activity was minimal because Wadas engaged in only six to eight debt collection cases out of a total of 1,789 over the course of a decade. Furthermore, although Wadas had an ongoing business relationship with a creditor, it did not provide any significant business. Lastly, Wadas did not have any personnel or systems specifically assigned to work on debt collection.

LETTER SENT BY ATTORNEY IN BANKRUPTCY PROCEEDING WAS A COMMUNICATION UNDER FDCPA

BANKRUPTCY CODE DOES NOT PRECLUDE FDCPA CLAIMS

Simon v. FIA Card Servs. N.A., 732 F.3d 259 (3rd Cir. 2013).

FACTS: Appellants, Stacey and Robert Simon, filed for bankruptcy identifying a debt owed to appellee, FIA Card Services, N.A. FIA's attorneys sent the Simons' bankruptcy counsel a letter containing FIA's intent to challenge the ability to discharge the debt and a Notice of Examination, subpoenaing the Simons to a proceeding.

The Simons filed a motion in bankruptcy court to quash the Notice of Examination, alleging improper compliance with subpoena requirements. The court granted the motion. The Simons also filed an adversary proceeding under the FDCPA against FIA. The District Court granted FIA's motion to dismiss, holding: (1) the Simons did not state claims under the FDCPA; and (2) the Bankruptcy Code precluded the FDCPA claims. Simons appealed.

The court held that express demand for payment is unnecessary for a communication to constitute an attempt to collect a debt, so long as the communication conveyed information about a debt.

HOLDING: Reversed and remanded.

REASONING: In response to FIA's argument that no communication to collect a debt occurred because the letter did not demand payment, the court held that express demand for payment is unnecessary for a communication to constitute an attempt to collect a debt, so long as the communication conveyed information about a debt.

The court then addressed whether the FDCPA claims were precluded by the Bankruptcy Code. Looking to fellow circuits for guidance, the court adopted the Seventh Circuit's view that the proper inquiry was whether the claims raised a direct conflict between the Bankruptcy Code and FDCPA. If no conflict was found, no preclusion of FDCPA claims under the Bankruptcy Code or Rules occurred.