DEBT COLLECTION

WHETHER ATTORNEY REGULARLY ENGAGES IN DEBT COLLECTION ACTIVITIES MUST BE ASSESSED IN LIGHT OF FACTORS BEARING ON ISSUE OF REGULARITY, NOT INCOME

Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56 (2nd Cir. 2004).

FACTS: In 1992 Sarah Goldstein leased an apartment from Stahl York Avenue Co ("Stahl"). Beginning in 1996 a number of disputes arose between Goldstein and Stahl concerning alleged lease violations and rent arrears. The law firm of Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti ("Hutton") represented Stahl regarding these matters, and in 1997 a state court action commenced by Stahl ended in a settlement that addressed subletting and alteration issues. Since the settlement did not address back rent issues, Hutton prepared and caused Goldstein to be served with a three day notice demanding that all outstanding rent be paid within three days, or possession of the apartment be relinquished within that period, and threatened summary dispossession proceedings in the event of noncompliance. One week later Hutton commenced a summary proceeding that was later settled.

After the summary proceeding was commenced, Goldstein filed a complaint against Hutton under the Fair Debt Collection Practices Act ("FDCPA"). Goldstein's amended complaint alleged that Hutton's notice: 1) failed to include a 30-day validation notice; 2) failed to disclose that Hutton was attempting to collect a debt and that any information obtained would be used for that purpose; and 3) contained threats to take actions that could not legally be taken or were not intended to be taken. Hutton moved for summary judgment, arguing that its conduct, in the context of the parties' dealings, did not violate the FDCPA, and that it was not a "debt collector" within the meaning of the FDCPA. The district court granted Hutton's motion on the latter ground.

HOLDING: Judgment vacated and case remanded.

REASONING: The FDCPA establishes two alternative predicates for "debt collector" status: 1) engaging in such activity as the "principal purpose" of the entity's business; and 2) "regularly" engaging in such activity. Using the second predicate, the district court based its determination that Hutton was not a debt collector on the fact that the revenue derived from its debt collection activity was extremely small (0.05% of total revenue over a one-year period). The court also relied on the fact that Hutton did not advertise itself as being in the debt collection business or as maintaining a specialty in debt collection and there was a lack of evidence showing that Hutton represented traditional debt collection agencies.

The Court of Appeals noted that while the factors considered by the lower court were not irrelevant to a regularity inquiry, these factors were more pertinent to the first prong of the debt collector definition (debt collection as a principal business) than to the question of whether Hutton engaged regularly in debt collection. The Court listed several factors that could be used in a regularity analysis, but emphasized that the listed factors were illustrative and not exclusive. These factors included: 1) the absolute number of debt collection communications issued, and/or collection-related litigation matters pursued, over the relevant period(s); 2) the frequency of such communications and/or litigation activity, including whether any patterns of such activity were discernable; 3) whether the entity had personnel specifically assigned to work on debt collection activity; 4) whether the entity had systems or contractors in place to facilitate such activity; and 5) whether the activity was undertaken in connection with ongoing client relationships with entities that had retained the lawyer or firm to assist in the collection of outstanding consumer debt obligations.

The record showed that Hutton had issued 145 three-day notices within a 12-month period, with more than 10 notices issued in each of at least 7 calendar months within that period. Also, 140 of these notices were issued on behalf of entities whose name included the word "Stahl." The Court felt that these facts were evidence of activity on a large scale and of a repetitive nature within an ongoing relationship. The Court held that such facts could support a determination that Hutton's debt collection practices were regular. Since a genuine issue of material fact had been raised, summary judgment was not proper inasmuch as Hutton's motion for summary judgment was predicated on the issue of debt collector status.

COLLECTION OF UNPAID SEWER BILLS COVERED BY FAIR DEBT ACT

Keauhou Master Homeowners Ass'n v. County of Hawaii, 87 P.3d 883 (Haw. 2004).

FACTS: Defendant-appellee Watanabe, Ing & Kawashima ("WIK"), is the representative of Keauhou Community Services, Inc. ("KCS"), the provider of wastewater treatment services to Keauhou Master Homeowners Association, Inc. residents. WIK sent 325 letters, including statements for wastewater services, to the homeowners stating that with the exception of the present month, all of the fees for services were past due and that a 1% late fee had been assessed on outstanding balances. WIK threatened to disconnect service, to refer the accounts to a collection agency, and/or to obtain a judgment against the homeowners. The homeowners had been withholding payments pending the appeal of their lawsuit against KCS, to whom sewer services had been transferred from the County.

In the underlying lawsuit, KCS filed a Motion for Summary Judgment, asserting that the unpaid sewer charges at issue did not involve the extension of credit and therefore did not fall within the definition of transactions that Congress intended to regulate through the Fair Debt Collection Practices

Act ("FDCPA"). The Circuit Court granted the motion and the homeowners appealed.
HOLDING: Motion vacated.
REASONING: The court relied on the reasoning in Pollice v. National Tax Funding, L.P., 225 F.3d 379, 400-03 (3d Cir. 2000), holding that pursuant to 15 U.S.C. § 1692a(5), "sewer obligations meet the definition of 'debt'" for purposes of the FDCPA. The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment. 15 U.S.C. § 1692a(5).

In addressing the question whether sewer obligations constitute "debts" for purposes of the FDCPA, the Pollice court reasoned that the homeowner's obligations constituted "debts" from the time they initially were owed to the government entities and continued that status after their assignment to [the limited partnership]. The homeowners had an obligation to pay the debts from the time they arose out of the transaction, the subject of which was "services… primarily for personal, family, or household purposes." Based on the holding and reasoning in Pollice, the court found that the sewer bills were covered by the FDCPA.

BANKRUPTCY CODE DOES NOT PREEMPT NOR REPEAL THE FDCPA

Randolph v. IMBS, Inc., 368 F.3d 726 (7th Cir. 2004).

FACTS: This decision concerns three cases consolidated on appeal. All cases involved claims that debt collectors violated the Fair Dept Collection Practices Act ("FDCPA") by sending collection letters after debtors had filed for bankruptcy protection. The court used only one case as an illustration: When Cheryl Alexander filed for Chapter 13 bankruptcy, she owed her dentist $1,125. Two years after Alexander's plan was confirmed, the dentist died and his office hired Unlimited Progress, Inc. to collect old accounts, including Alexander's. Unlimited Progress sent her two dunning letters, the first she ignored and the next she relayed to her attorney. After the attorney informed Unlimited Progress about the Chapter 13 preceding it closed its file and never again contacted Alexander. Alexander then filed suit under the FDCPA.
Alexander claimed that Unlimited Progress had falsely represented that she was required to pay the bill immediately and had violated the FDCPA by directly writing to her even though she was represented by counsel. In all three cases, the district courts held that remedies under the Bankruptcy Code ("Code") were the only recourse against post bankruptcy debt collection efforts and that the Code trumps the FDCPA when they deal with the same subject, even if the two statutes are inconsistent.
HOLDING: Vacated and remanded.
REASONING: When two federal statutes address the same subject in different ways, the correct question is whether one implicitly repeals the other. There must be either irreconcilable conflict between the two statutes or a clearly expressed legislative decision that one replaces the other. The arguments in this case were not based on the theory that the Code displaces the FDCPA, but rather on the operational differences between the statutes. The court contended that these differences do not add up to irreconcilable conflict. Instead, the two statutes overlap, and if the plaintiff shows a more serious transgression" e.g. a willful violation" then more substantial sanctions, such as punitive damages are available. The court stated that it would be better to recognize that the statutes overlap, each with coverage that the other lacks. The Code covers all persons, not just debt collectors, and all activities in bankruptcy; the FDCPA covers all activities by debt collectors, not just those affecting debtors in bankruptcy. Overlapping statutes do not repeal each other by implication; as long as consumers and debt collectors can comply with both, then courts may enforce both.

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The Supreme Court has held that both old and new remedial systems may be enforced according to their terms, despite the substantial differences, because the standards for implied repeal have not been satisfied. Humana Inc. v. Forsyth, 525 U.S. 299, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999). Accordingly, the Court concluded that the Code does not impliedly repeal the FDCPA any more than the latter act implicitly repeals itself. To say that the Code applies is to eliminate all control of negligent falsehoods. Permitting remedies for negligent falsehoods would not contradict any portion of the code, which therefore cannot be deemed to have repealed or curtailed FDCPA section 1692e(2)(A) by implication.

FDCPA DOES NOT PRECLUDE DEBT COLLECTOR FROM FILING A LIEN AT THE SAME TIME IT SENDS A DEMAND LETTER TO CONSUMER

Shimek v. Weissman, Nowack, Curry, & Wilco, P.C., 374 F.3d 1011 (11th Cir. 2004).

FACTS: On May 16, 2002, Defendant Weissman, Nowak, Curry & Wilco, P.C. ("Weissman") mailed an equitable lien to the Cobb County, Ga. Court Clerk to secure Shimek's debt of $260 for unpaid assessments and fees owed to his homeowner's association. On that same day Weissman mailed a dunning letter to Shimek notifying him of the debt and lien. On May 28, 2002, Shimek requested verification of the debt and paid the $260 under protest. Shimek then sued Weissman alleging that it violated several provisions of the Fair Debt Collection Practices Act ("FDCPA"). The first issue was whether a debt collector's filing of a lien with the Court Clerk at the same time it sent a demand letter to a consumer, all prior to that consumer requesting verification of the debt, violated the FDCPA. The United States District Court for the Northern District of Georgia entered summary judgment in favor of Weissman and

Shimek appealed.
HOLDING: Affirmed.
REASONING: Shimek argued that Weissman violated sections 1692f and 1692g(b) of the FDCPA. Section 15 U.S.C. §1692f states that a "debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." Section 1692g(b) then states: "Disputed debts: If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt…is disputed… the debt collector shall cease collection of the debt…until the debt collector obtains verification of the debt or a copy of a judgment, or…a copy of such verification or judgment…is mailed to the consumer by the debt collector."

Under Georgia law, the filing of a lien by a creditor is a necessary step for securing payment of a debt. Country Greens Village One Owner's Ass'n. Inc. v. Meyers, 281 S.E.2d 346, 348-49 (1981). The debt collector is free to file a lawsuit prior to the consumer's request for verification of the debt. Sprouse v. City Credits Co., 126 F.Supp.2d 1083, 1088-89 (S.D.Ohio 2000).

Filing a lien is a legally permissible method for securing a debt under Georgia law and without identification of something more, it cannot be deceptive under the plain meaning of § 1692g(b). CBS Inc., v. Prime Time 24 Joint Venture, 245 F.3d 1217, 1228 (11th Cir.2001). A debt collector's contemporaneous filing of a lien with the Clerk of a Court and the sending of a dun letter to a consumer prior to the consumer requesting verification of that debt does not violate the FDCPA.

DEBTOR WHO FILED FOR BANKRUPTCY SHORTLY AFTER MOVING TO A NEW STATE CAN APPLY THE HOMESTEAD EXEMPTION FROM THEIR FORMER STATE TO THEIR NEW HOME

In re Drenttel, 309 B.R. 320 (B.A.P. 8th Cir. 2004).

FACTS: Debtor-appellants moved from Minnesota to Arizona where they purchased a home for $181,682. A month later they filed a Chapter 7 bankruptcy petition in Minnesota. They claimed their new home in Arizona was exempt by applying a Minnesota homestead exemption. The Chapter 7 trustee objected to this claim of exemption and the bankruptcy court sustained the objection. Debtors appealed.
HOLDING: Reversed.
REASONING: The court held that while property interests are created and defined by state law, federal interests trump if it creates a different result. The Minnesota homestead exemption permits debtors to claim an exemption of up to $200,000 for a home occupied as a dwelling place. The plain language of the statute does not require the dwelling to be in Minnesota. At the time of filing, the Arizona homestead exemption only exempted up to $100,000. 28 U.S.C. § 1408, prohibited the debtors from filing in Arizona by limiting venue to the state where a debtor lived for the majority of the preceding 180 days (in this case Minnesota). The Bankruptcy Code, 11 U.S.C. §522(b)(2), also disqualified the Arizona exemption by providing that debtors may only exempt property according to the law of the state in which they have lived for 91 of the preceding 180 days, (again Minnesota). The court held that in order to protect Federal interests and prevent forum shopping the Minnesota exemption must be applied.
The court also held that under principles of comity, a court will apply its own state's laws to determine exemptions, unless another state has a dominate interest. Arizona did not have a dominate interest over Minnesota in enforcing its bankruptcy laws. Minnesota courts hold that exemption statutes should be liberally construed in favor of the debtor. Although Minnesota's homestead exemption does not provide for its extraterritorial effects, Minnesota has a strong public policy in favor of liberal construction of exemption laws in favor of debtor. Therefore, when a debtor has just moved, the public policy should provide the debtor with the option of the exemptions. The court also held that since the debtors incurred their debt while living in Minnesota, their creditors were presumed to be aware of the state's exemption rights. Allowing the Minnesota exemption put both debtor and creditor in the position they were in at the time the debt incurred.

STATEMENT THAT INTEREST MAY BE ADDED DOES NOT VIOLATE FDCPA

PUFFING DOES NOT VIOLATE FDCPA

Taylor v. Cavalry Inv., L.L.C., 365 F.3d 572 (7th Cir. 2004).

FACTS: The Court consolidated two similarly situated cases regarding complaints of aggressive debt-collection practices under the Fair Debt Collection Practices Act, 15 U.S.C. §1692 et seq. Section 1692g(a)(1) requires, among other things, that any dunning letter sent by a debt collector state "the amount of the debt" that he is trying to collect. In the first underlying case the defendant sent the plaintiffs a letter setting forth the amounts of the "PRINCIPAL BAL," "INTEREST OWING," and "TOTAL BAL DUE". The letter additionally stated that, "if applicable, your account may have or will accrue interest at a rate specified in your contractual agreement with the original creditor." Plaintiffs submitted affidavits to the district court that this language confused them about the amount of the debt that defendants were attempting to collect. Notwithstanding, the district court granted summary judgment for the defendant.

In the other underlying case, the plaintiffs made the same allegation with the additional contention that the phrase "act now to satisfy this debt" confused them by obscuring the debtor's statutory entitlement to a 30-day period in which to dispute the debt and by doing so, to compel the debt collector to verify it. Summary judgment was again granted to the defendant. Plaintiffs in both underlying cases appealed the court's motion for summary judgment.
HOLDING: Affirmed.
REASONING: A dunning letter must state the amount of the debt sufficiently clear that the recipient is unlikely to misunderstand it. Chuway v. National Action Fin. Services Inc., 362 F.3d 944, 946-47 (7th Cir. 2004). The benchmark for this test is the understanding of an unsophisticated debtor. Id. A debtor cannot create a triable issue just by submitting an affidavit in which he says that he misunderstood the dunning letter. If it is apparent from the reading of the letter that not even "a significant fraction of the population" would be misled by the

letter, the court should reject it without requiring evidence beyond the letter itself. The court ruled that the Defendant's letters were not confusing. The additional statements were clear statements of a truism. The court further ruled that the phrase "Act now to satisfy this debt" amounted to no more than puffing, in the sense of rhetoric designed to create a mood rather than to convey concrete information or misinformation. The court further stated that "it is perfectly obvious to even the dimmest debtor that the debt collector would very much like him to pay the amount demanded straight off, sparing the debt collector any further expense." Summary judgment was appropriate.

The court further ruled that the phrase "Act now to satisfy this debt" amounted to no more than puffing, in the sense of rhetoric designed to create a mood rather than to convey concrete information or misinformation.

A CHAPTER 7 DEBTOR CAN KEEP HIS CAR AND CONTINUE TO MAKE REGULAR PAYMENTS UNDER THE LOAN AGREEMENT WITHOUT REAFFIRMING THE DEBT

In re Price, 370 F. 3d 362 (3rd Cir. 2004).

FACTS: Michael and Christine Price filed a petition for relief under Chapter 7 on December 11, 2001. On their bankruptcy schedules, the Prices listed two loans owed to the Delaware Police Credit Union ("Credit Union"), which were secured by liens on their two cars. Along with their petition, they filed a "Statement of Intention with Respect to Secured Debt" which indicated that they intended to continue regular payments to the Credit Union on the two loans and keep the cars in their possession while doing so.

Later, the Credit Union advised the Prices that their only alternative in connection with the retention of the cars was to exercise one of the options stated in section 521(2) of the Bankruptcy Code: (1) surrender their vehicles; or (2) if they wished to retain the vehicles, redeem the collateral by making a lump sum payment; or (3) enter into a formal reaffirmation agreement. The Prices relied on their Statement of Intention and took no further action other than making the regular payments on the vehicle loans. They continued to keep the payments current throughout the Chapter 7 proceeding. On February 21, 2002, the Credit Union filed a motion to "Compel Debtors to Elect to Surrender, Redeem, or Reaffirm Secured Debt".

On June 25, 2002, the United States Bankruptcy Court for the District of Delaware granted the Credit Union's motion, and on April 1, 2003, the United States District Court for the District of Delaware affirmed the order. The Prices appealed the District Court's decision.

HOLDING: Reversed.

REASONING: The Bankruptcy Code requires debtors to file a "statement of intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property." 11 U.S.C. § 521(2)(A). It is clear that debtors must inform the bankruptcy court whether they intend to retain or surrender collateral, but the options available in order to retain property, however, are complicated by the phrase "if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property." Those words could merely indicate that the three options (exemption, redemption, and reaffirmation) are relevant when a debtor intends to retain and not applicable when a debtor chooses to surrender the collateral. If so, then section 521(2)(A) sets out an exhaustive set of retention options. "If applicable" could also mean, "if" the debtor wishes to choose any of the three options that follow on its heels, i.e., when redemption, reaffirmation, and exemption "apply", that intention must be specifically stated. If this latter construction is correct, then section 521(2)(A) leaves available other methods of retention, such as by keeping the loan current.

Section 521(2)(C) provides that "nothing in the subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title." Here, Congress has directed that courts afford debtors the rights provided elsewhere in the Code, specifically mandating not to read section 521(A) or (B) as impinging on the substantive rights guaranteed by other provisions. Therefore, when viewed as a whole, the Bankruptcy Code allows debtors to retain collateral, and keep current on their loans, so long as that collateral is adequately protected. As long as the creditor is adequately protected, i.e., the debtor is not harming the collateral and its value is being maintained (ideally, through the making of regular payments), the substantive provisions of the Bankruptcy Code, and the notice provisions of section 521(2), do not give the secured creditor a right to take any action whatsoever. Thus, if permitted to keep their cars and honor their agreements with their creditors, the Prices would be availing themselves of rights guaranteed by the Code.