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Owner of Joint Checking Account Protected Against Deceptive Collection Practices

by Margaret M. Ogarek

In ***Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997)**, the United States Court of Appeals for the Seventh Circuit, in a case of first impression, affirmed the application of the Fair Debt Collection Practices Act ("FDCPA" or "the Act") 15 U.S.C. § 1692 (West 1997) to third-party collectors of dishonored checks. In expanding the reach of the FDCPA, the Seventh Circuit rejected Defendant's assertion that the FDCPA only covers debts "arising from an offer or extension of credit."

Plaintiff Argued Collection Agent's Letter Violated the FDCPA

Joe Arsenault wrote a $156.94 check from a joint checking account to pay for groceries at a local supermarket. Arsenault and Plaintiff, Teri L. Bass, owned the account. The check bounced, and the grocery store hired Defendant Stolper, Koritzinsky, Brewster & Neider, S.C. ("SKBN") to collect payment from Arsenault. In its attempt to collect the grocery bill from Arsenault, SKBN mailed three collection letters addressed solely to Arsenault. However, Arsenault did not respond to these letters. Subsequently, Defendant Kathy Leschensky, an employee of SKBN, wrote and mailed a fourth letter addressed to both Arsenault and Bass. Leschensky claimed in the letter that, "'she drafted and filed lawsuits in collection matters, and that she would [refrain from such action] . . . if Bass or Arsenault would make arrangements to pay."

In response to the letter, Plaintiff initiated proceedings for damages based on Leschensky's failure to conform the fourth collection letter to the requirements established by the FDCPA. Specifically, Plaintiffs alleged that Leschensky misrepresented herself as an attorney and failed to include certain language required by the FDCPA regarding her purpose for writing the letter.

The district court granted Plaintiffs' motion for summary judgment. The court held that the FDCPA applied to third parties collecting on dishonored checks, and the fourth collection letter sent to Plaintiffs violated the FDCPA. On appeal, Defendants did not contest that their collection practices violated the FDCPA. They only argued that a dishonored check did not constitute a "debt" according to the FDCPA and thus, they were not subject to the FDCPA's requirements.

FDCPA Enacted to Remedy Debt Collector Abuse

On September 20, 1977, President Carter signed the FDCPA as an amendment to the Consumer Credit Protection Act ("CCPA") 15 U.S.C. § 1601 (West 1997). The purpose of the amendment is to protect unwitting consumers from "abusive, deceptive, and unfair debt collection practices, including threats of violence, use of obscene language, certain contacts with acquaintances of the consumer, late night phone calls, and simulated legal process." The FDCPA prohibits these practices in the collection of "debts." Since the FDCPA does not classify all forms of obligations as "debts," the issue before the appellate court was whether the payment obligation created by a dishonored check created a "debt" within the purview of the FDCPA.

Defendants Contended Checks Were Not Debts Covered by the FDCPA

Defendants argued that only transactions involving an "offer or extension of credit" result in debt regulated by the FDCPA. Further, Defendants argued that checks did not constitute an offer or extension of credit, and as such, collection practices on dishonored checks were not governed by the FDCPA. Plaintiff rebutted this argument, contending that neither the language nor the legislative history of the FDCPA supported Defendants' argument that only debts involving an extension of credit were within the purview of the statute.

Court Relied on Plain-Meaning Reading of the Statute

The court began its analysis by examining the statutory definition of debt. The FDCPA defines a debt as:

> 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.

The court found no language in the FDCPA's definition of debt that supported Defendants' argument that an extension of credit was required to constitute a debt under the statute. To the contrary, the court stated that there was a "complete lack of textual support in the Act for . . . [Defendants'] argument."

In reaching this conclusion, the court first looked to the phrase "any obligation to pay." The court found this definition unambiguous and stated that "such absolute language" could not be construed to encompass only a certain type of obligation. The court concluded that according to the statutory language, "as long as a transaction creates an obligation to pay, a debt is created." Furthermore, since "transaction" is not otherwise defined in the statute, the court, following rules of statutory construction, afforded transaction its "ordinary meaning." This ordinary meaning of transaction is broad and not limited to only credit transactions as Defendants had argued. Because of the statute's lack of ambiguity, the court "was powerless to rewrite the Act's definition of 'debt'" and therefore held that an extension of credit was not required for an obligation to be a "debt" under the statute.

Court Seeks Further Support for its Decision

Even though the court reached its holding half-way through its opinion, basing its decision on a plain-meaning reading of the FDCPA, the court examined other sources to garner support for its holding.

First, the court examined case law from the Third Circuit. Defendants relied upon *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3d Cir. 1987), to support their contention that debt under the statute required an extension of credit. In *Zimmerman*, the court held that a cable company's demand of payment for the use of allegedly pirated cable television stations did not meet the requirements of debt collection under the FDCPA. In reaching this decision, the *Zimmerman* court concluded, without discussion, that the definition of debt under the FDCPA is the same as the definition of debt under the other subchapters of the CCPA: debt is an extension of credit to a consumer.

The court in the instant case rejected the *Zimmerman* court's definition of debt and chose to "respectfully part ways" with the Third Circuit. The Seventh Circuit criticized the Third Circuit's failure to consider the plain language of the statute or the statute's legislative history. Further, the court dismissed the Third Circuit's (and the Defendants') reliance on the FDCPA's codification within the CCPA in defining debt, stating "Congress'[s] choice of statutory structure as evidence of intent is unnecessary given the Act's clear textual definition of the term 'debt.'" Also, the FDCPA is a "self-contained, functionally complete act" with its own definitions and purposes and requires no cross-referencing to other chapters of the CCPA. For these reasons, the court in the instant case found the *Zimmerman* decision unpersuasive.

In addition to considering the plain language of the FDCPA and discounting the *Zimmerman* case, the court also found support for its holding from legislative history. Specifically, the Act's history showed that Congress considered this very issue and rejected a more restrictive definition of debt. In addition, several debaters in the House of Representatives and Senate hearings recognized that a dishonored check created a debt. Based on Congress's consideration of this issue, the court refused to believe that Congress's decision to exclude "credit extension" as part of the definition of debt was an accident. Finally, the legislative history also contained a clear statement of intent on the issue: "[t]he committee intends that the term 'debt' include[s] consumer obligations paid by check or other non-credit consumer obligations." For these reasons, the court found support for its holding that for debts to fall within the purview of the FDCPA, no extension of credit is required.

Court Rejected Defendants' Final Argument

At the end of the court's opinion, the Court discussed the arguments Defendants raised "in their final attempt to excuse their prohibited collection practices." Specifically, Defendants argued that dishonored checks are not debts under the FDCPA because a dishonored check is a "criminal and tortious act, not a consumer credit transactions [sic]." The court found that not all dishonored checks are fraudulent, and therefore, rejected Defendants' contention that these checks are not covered by the statute.

Because the Court rejected

Defendants' fraud argument, it did not need to address whether fraudulent intent of the check writer should make a difference in the outcome of this case. Specifically, the court did not decide whether a fraud exception existed or whether such an exception would remove dishonored check collections from the purview of the statute. Nevertheless, the court expressed strong disapproval for a fraud exception as a violation of the spirit of the FDCPA. "The Act's singular focus is on curbing abusive and deceptive collection practices, not abusive and deceptive consumer payment practices." The court noted that current legal redresses sufficiently remedy debtor fraud, and spurned the creation of a judicial exception that "selectively gives a green light to the very abuses proscribed by the Act."

Judge Bauer Dissented

In his dissent, Judge Bauer was unconvinced that the seller's acceptance of a check constituted a creditor-debtor relationship. In the absence of such a credit relationship, Plaintiff should not enjoy the FDCPA's protections. In addition, Judge Bauer contended that the majority understated the reasoning of *Zimmerman*, stating that a seller who accepts a check in a "goods-for-money" transaction consents to receiving nothing less than money. Judge Bauer explained that the debtor who provided a dishonored check paralleled the thief involved in shoplifting because the debtor removed the consent element from the transaction. Accordingly, a dishonored check should not be afforded the protection of the FDCPA.

Editor's Note

Recently, in ***Charles v. Lundgren & Assoc.***, 119 F.3d 739 (9th Cir. 1997), the Ninth Circuit agreed with the Seventh Circuit that a bad check constitutes a debt under the FDCPA. Citing *Bass v. Stolper, Koritzinsky, Brewster & Neider*, the court stated "we agree with its conclusion that, because 'an offer or extension of credit is not required for payment obligation to constitute a 'debt' under the FDCPA,' the FDCPA governs the collection of dishonored checks."

Federal Tobacco Labeling Laws do not Preempt State Law Requiring Additive and Nicotine Disclosure

by Irene Kowalczyk

In ***Philip Morris, Inc. v. Harshbarger, Nos. 97-8022, 97-8023, 1997 WL 458881 (1st Cir. Aug. 18, 1997)***, the Court of Appeals for the First Circuit affirmed the district court's ruling that neither the Federal Cigarette Labeling and Advertising Act, as amended (the "FCLAA"), 15 U.S.C. §§ 1331-41, nor the Comprehensive Smokeless Tobacco Health Education Act of 1986 (the "Smokeless Tobacco Act"), 15 U.S.C. §§ 4401-08, preempts the Massachusetts Disclosure Act (the "Disclosure Act"), MASS. GEN. LAWS CH. 94, § 307B. The court held that the federal statutes do not expressly or impliedly preempt the state statute, which requires cigarette and smokeless tobacco manufacturers to make certain disclosures to the public health department.

Preemption analysis is based on the Supremacy Clause of the United States Constitution, which invalidates state laws in conflict with federal laws. Generally, federal law does not supersede the states' police powers unless federal preemption is Congress's intent is "clear and manifest." Congressional intent may be either expressed in the federal statute's language or implied in its purpose. If there is no explicit preemption language, the federal act