Loyola Consumer Law Review

Volume 7 | Issue 1 Article 11

1994

Fair Debt Collection Practices Act Awards Limited

Judith Gorske

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Recommended Citation

Judith Gorske *Fair Debt Collection Practices Act Awards Limited*, 7 Loy. Consumer L. Rev. 34 (1994).
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that since the lighter performed in a manner consistent with the expectation of the ordinary consumer, it was not unreasonably dangerous and Bic was not strictly liable.

Todd next argued that the consumer contemplation test should consider the expectation of the foreseeable user, instead of only the ordinary consumer. For purposes of the appeal, Bic had conceded that children were foreseeable users of its lighter. Therefore, Todd contended that the court improperly granted summary judgment because it failed to include children in its consumer contemplation test analysis.

Turning to this issue, the Circuit Court declared that Illinois law clearly indicates that the applicable standard in the consumer contemplation test is the expectation of the ordinary consumer. The Seventh Circuit reasoned that children, unlike ordinary consumers, do not possess the knowledge common to the community, and as a result, their expectations are inappropriate for consideration in the consumer contemplation test. In addition, the court warned that allowing such a standard would result in absolute liability for manufacturers because children do not perceive the dangers that are inherent in every product. For these reasons, the court concluded that it is inappropriate to consider the expectations of the foreseeable user in the consumer contemplation test.

Test not always applicable

Todd then argued that the district court's failure to consider the risk–utility test, in addition to the consumer contemplation test, mandated reversal of the summary judgment. He insisted that the lighter might be unreasonably dangerous under either test. Under the risk–utility test, a product is unreasonably dangerous, even when it meets consumer expectations, if: (1) the defective design is excessively dangerous and preventable; and (2) the risk of danger in the design outweighs the benefits.

The Seventh Circuit observed that, in certain cases, the Illinois Supreme Court has adopted the risk–utility test. However, in such situations, the product in controversy was complex and the risk it presented was not obvious. In the case at hand, it found the lighter was a simple and obviously dangerous product. The Circuit Court held that the risk–utility test would not apply to a simple but obviously dangerous product because it was unlikely that the Illinois Supreme Court would apply the test to such a product.

The Circuit Court then addressed two final issues: (1) whether the warning was adequate; and (2) whether the manufacturer was negligent. It affirmed the District Court's holding that the warning was adequate. The court also found that Bic was not negligent because the product was not unreasonably dangerous. Therefore, Bic did not breach its duty to produce a reasonably safe product. In so finding, the Circuit Court concluded that an ordinary disposable cigarette lighter is not unreasonably dangerous so as to warrant holding its manufacturer negligent or strictly liable.

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Fair Debt Collection Practices Act awards limited

By Judith Gorske

In *Wright v. Finance Serv. of Norwalk, Inc.*, 22 F.3d 647 (6th Cir. 1994), the Sixth U.S. Circuit Court of Appeals held that the executor of a decedent's estate had standing to sue a debt collection agency under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 to 1692*o*, for violations involving letters sent by the agency to the decedent. The court also held that Section 1692k(a)(2)(A) of the FDCPA limits additional damages to $1,000 per proceeding.

Gladys Finch died in October,1989. After her death, Finance Service of Norwalk (Finance Service), a debt–collection agency, sent Finch 14 letters attempting to collect $112 for an allegedly overdue medical bill. Betty Wright, acting as executor for the estate, notified Finance Service of Finch's death. The agency then discontinued its correspondence.

Wright then filed a complaint against Finance Service in the U.S. District Court for the Northern District of Ohio, alleging a total of 30 FDCPA violations contained within the 14 letters Finance Service had sent Finch. Subsequently, both parties moved for partial summary judgment. Wright sought partial summary judgment on the issue of the 30 alleged FDCPA violations. Finance Service moved for partial summary judgment on the issue of Wright's standing to bring suit on Finch's behalf. In addition, Finance Service sought a ruling *in limine* limiting Wright's recovery to $1,000 for damages in excess of actual losses, costs, and fees.

In ruling on the motions, the District Court partially granted Wright's motion for summary judgment, finding Finance Service liable for 14 FDCPA violations. It denied Finance Service's motion for summary judgment on the issue of Wright's standing, allowing her to bring suit on behalf of Finch's estate. Finally, the court granted Finance Service's motion *in limine*, and limited additional damages to $1,000 per proceeding.

Wright appealed the District Court's decision limiting her damages to the Sixth U.S. Circuit Court of Appeals, contending that she was entitled to collect $1,000 for each separate FDCPA violation. Finance Service, in turn, cross-appealed the district court's determination that Wright had standing to bring the suit. A divided panel of the appellate court affirmed Wright's standing to bring suit on behalf of the decedent's estate, but reversed the lower court's decision limiting additional damages. The panel's decision was vacated and a rehearing *en banc* was granted by order.

Executor may sue debt collection agency

The Sixth Circuit initially addressed the issue of whether Wright had standing to bring suit on behalf of Finch's estate. In its analysis, the court turned to the statutory language in question. Specifically, it focused on 15 U.S.C. § 1692k(a), which provides that "any debt collector who fails to comply with any provision...with respect to any person is liable to such person." The Circuit Court determined that the phrase "with respect to any person" included persons such as Wright, who "stand in the shoes of the debtor." Moreover, the court noted that 15 U.S.C. § 1692k(e) prohibited a debt collector from using "any false, deceptive, or misleading misrepresentation...in connection with the collection of any debt." It recognized that this provision could be violated even if a debt collection practice did not offend the alleged debtor herself. Taking the plain language of the FDCPA, together with its stated purpose and legislative history, the Sixth Circuit affirmed the District Court's ruling on the issue of standing. In so doing, it held that Wright, as the executor of the estate, was entitled to bring suit for the FDCPA violations.

Additional damages limited to $1,000

The Circuit Court then turned its attention to the issue of whether additional damages should be limited to $1,000 per proceeding rather than per violation. It first examined the language of 15 U.S.C. §1692k(a)(2)(A), which states that additional damages may not exceed $1,000 "in the case of any action by any individual." The court found nothing in the plain statutory language, legislative history, or other sections of the FDCPA to suggest that Congress intended to limit additional damages to $1,000 per violation rather than per proceeding.

Furthermore, the Sixth Circuit noted that Section 1692k(a)(2)(A) required the court to consider the frequency and persistence of noncompliance in any action. According to the court, this requirement reflected Congress' anticipation of repeated violations as the subject of a single action or proceeding. The Circuit Court also found support for this statutory interpretation in Section 1692k(a)(2)(B), which limits the amount of additional damages in class actions to "the lesser of $500,000 or 1 per centum of the net worth of the debt collector." In conclusion, the court declared that it would be incongruous to provide a limitation on class actions without a corresponding cap on individual recovery of damages. The discrepancy would permit an individual plaintiff to "recover more in damages than a similarly situated plaintiff representing a class of claimants."

Although limiting a plaintiff's additional damages to $1,000 per proceeding, rather than per violation, appears to minimize the statute's deterrent value in preventing debt collection abuses, the court observed that other provisions in the statute acted as sufficient deterrence. For example, provisions such as Sections 1692(a)(1) and 1692(a)(3)allow a plaintiff to recover actual damages, court costs, and attorney's fees in their entirety. Accordingly, the Sixth Circuit held that Wright's recovery for additional damages was limited to $1,000 per proceeding, rather than $1,000 per violation.

Disagreement over entitlement to sue

Judge Kennedy delivered a separate opinion. While he concurred with the decision limiting recovery for damages per proceeding, he dissented from court's holding that an executor or executor representing an estate had standing to bring a FDCPA action. In particular, he disputed the majority's interpretation of the phrase "any person" as found in Section 1692k(a), contending that the term consumer referred to any natural person obligated or allegedly obligated to pay a debt. As Wright had brought action as decedent's executor, Judge Kennedy suggested that the real party interest was that of the estate. Therefore, the executor had no standing to bring suit since the letters were not attempts to collect the debt of a consumer, as required under Section 1692a(3).

Furthermore, Judge Kennedy noted that Section 1692c(d), which governs debt collection communications, expanded the definition of "consumer" to include the consumer's executor. This specific inclusion of "executor" in Section 1692c(d) implied that an executor was not otherwise considered a consumer. Additionally, the FDCPA was designed to protect consumers from abusive debt collection practices which contribute to problems such as marital instability, job loss, personal bankruptcies and invasion of privacy. Because such problems did not exist in the present case, Judge Kennedy concluded that the statute had been misapplied.

Dissent criticizes limit

In a separate dissenting opinion, Judge Jones rejected the majority's imposition of a per proceeding rather than a per violation limit. He disagreed with the majority's interpretation that the language "in the case of any action" found in Section 1692k(a)(2)(A) required a per proceeding limitation. Judge Jones stated that the language merely distinguished between the statute's treatment of individual actions from class actions. Furthermore, he contended that the FDCPA's purpose and history suggested that the $1,000 limit should be applied to each violation. He concluded that to find otherwise would frustrate the FDCPA's broadly stated goal to remedy debt collection abuse, discourage consumers from pursuing fdcpa claims, and encourage debt collectors, having engaged in an initial violation, to continue abusive practices.

Lessees' rights spelled out

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Turning again to the statutory provision in question, the Seventh Circuit found that the statute's language plainly requires the lessor to identify all warranties from the manufacturers. It found the statements contained in the disputed lease to offer no information as to the nature of the manufacturer warranties provided to the lessees. The circuit court concluded that the lease did not meet the statutory requirement and reversed as a matter of law.

In sum, the United States Court of Appeals for the Seventh Circuit found that a cause of action under the Illinois Consumer Fraud Act accrues when an automobile lessee knows or reasonably should have known that the lessor misrepresented its rights and liabilities to the lessee. Moreover, it held that a lessee must demonstrate standing in order to seek a declaratory judgment on whether an early termination provision violates state law. However, the same standing standard is not required when a lessee brings suit contending inadequate disclosure of the contract's termination formula and warranty under the federal Consumer Leasing Act.

Utility expenses may not be split

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Finally, the court held that even though a public policy violation could support a finding of an unfair business practice, the Castruccios' actions violated no Maryland public policy.

A breach of the covenant of quiet enjoyment involves failure to provide something that goes to the essence of what a landlord is supposed to provide. Under this covenant, a landlord is liable to her tenant for the difference between what she should provide and what she has provided.

With this in mind, Legg asserted that the Castruccios breached the covenant of quiet enjoyment in several ways. First, she contended that they interfered with her use of her own apartment by burdening her with another tenant's utility usage. Second, she contended that they failed to reimburse her for the upstairs tenants' delinquent payments. Third, she contended that they failed to take action against Papilon and Harcourt when they became aware of the delinquency. Moreover, Legg alleged that the Castruccios had the power to take such action because their lease agreement with the upstairs tenants included a provision that the they split the utility bills with Legg.

In ruling on the issue, the court acknowledged that a landlord may breach the covenant of quiet enjoyment if the conduct of one tenant impedes another tenant's use of her premises, and the landlord has legal authority to control the impeding tenant's conduct, but does nothing. Using an analogy to Legg's situation, the court concluded that when a landlord burdens one tenant with liability for another tenant's utility usage, the liable tenant had no prior knowledge of that burden, and did not consent to it, the landlord breaches the covenant. It so holding, the court reasoned that such conduct interferes with the liable tenant's use of her premises. Since Legg was burdened in this way, the Castruccios breached the covenant of quiet enjoyment.

However, the court also found that Legg clearly waived her right to recover when she accepted payment from the upstairs tenants for their share of the utilities. Nevertheless, it suggested that Legg might overcome this waiver if she could demonstrate that she had complained to the Castruccios and that they failed to take appropriate action within a reasonable period of time.

Finally, the court also found that the trial judge was "clearly erroneous" in concluding that the Castruccios did not have any legal authority to evict the upstairs tenants for failing to pay their share. The facts were undisputed that the Castruccios had an agreement with the upstairs tenants for partial payment of Legg's utility bills.

Case remanded

The appellate court remanded the case to the circuit court to determine if and when Legg actually complained to the Castruccios. It stated that a cause of action for breach of the covenant of quiet enjoyment entitled Legg to damages accrued only after she complained to the Castruccios. Moreover, the Castruccios were entitled to sufficient time to correct the breach. Thus, if Legg never actually complained to the Castruccios, she could not overcome her waiver of her right to recover.

False advertising rules clarified

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the plaintiff, the *Waits* court held that the Lanham Act protects both competitors and noncompetitors who have been injured commercially by the "deceptive and misleading use of the marks." This was the case in *Smith.* However, in cases such as *Halicki*, where the claim involves false advertising as to a product's quality, the Lanham Act protects only those plaintiffs who allege that the false advertising amounted to unfair competition, *i.e.*, competitors with a commercial interest at stake. The Ninth Circuit found that the Lanham Act protects the interests of noncompetitors only in cases where a trademark violation is alleged.

Standard adopted

In continuing its analysis, the Third Circuit proceeded to review its own jurisdictional case law. The court noted its own sharp criticism of the Second Circuit's reasoning in *Colligan.* In *Thorn v. Reliance Van Co., Inc.*, 736 F.2d 929 (3d Cir. 1984), the Third Circuit had reversed the district court's dismissal of a case in which an investor of a trucking company sued a competitor under Section 43(a) for false advertising in the yellow pages. The plaintiff claimed that the false advertising contributed to the trucking company's bankruptcy. The Circuit Court distinguished the case from *Colligan*, finding that in the former, the noncompetitor plaintiff sought standing as an investor, not as a consumer. The court, interpreting the plain language of the Lanham Act, rejected *Colligan's* holding Section 43(a) only according standing to direct competitors.

In so doing, the court relied on the reasoning in *Smith*, finding that a party had standing under Section 43(a) if that party had a "reasonable interest to be protected against false advertising." In *Thorn,* the court found that the investor had a reasonable commercial interest in the company.

Moreover, the court determined that the investor had alleged a "sufficient direct injury" as a result of the false advertising, giving the investor standing to bring a Section 43(a) claim. In so ruling, the *Thorn* court granted standing to bring a Section 43(a) claim to those plaintiffs with a commercial interest in the cause of action. The court declared that "consumers fell outside the range of reasonable interests contemplated as protected by the false advertising prong" of the Lanham Act. It concluded that the "commercial interest" limitation would prevent consumers from flooding the federal courts. The Third Circuit found that the plaintiffs in the consolodated cases were consumers with no commercial interest. Thus, it concluded that the plaintiffs were not protected under the Lanham Act.

Consumers excluded

The court also rejected the appellants' argument that the 1988 revision of the Lanham Act expanded its scope to protect consumer interests. In its review, the court found no evidence to suggest that Congress intended to protect consumer interests through the Lanham Act. While the recognizing the need to protect consumers from false advertising, the court declared that the proper remedy for such actions did not lie in the Lanham Act; rather, state courts, which allow consumers to pursue statutory or common law tort claims for misrepresentation, offer more appropriate remedies. In addition, the court noted that Congress vested the Federal Trade Commission with the authority to act as a "watch–dog" of consumer interests.

The Third Circuit concluded that Congress created the Lanham Act to regulate commerce and to protect commercial interests from false advertising and unfair competition. Case law and legislative history clearly indicate that consumers as a class are not protected by the Lanham Act. The court declared that only Congress could properly expand the protected class covered by Section 43(a).

Lighter liability limited by court

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Dissenting from the majority opinion, Judge Cudahy argued that both the consumer contemplation test and the risk–utility test could be properly applied to the case at hand. He noted that the purpose of strict liability is to place the economic risk on the party who is best able to bear the cost—usually the manufacturer. Although this could result in absolute liability in almost all cases involving children, this is a risk that the manufacturer must bear because certain products will inevitably injure children.

Furthermore, Judge Cudahy suggested that while this is not the course that all states have followed, Illinois has clearly chosen to place the economic risk on the manufacturer. Therefore, he found that both the consumer contemplation and the risk–utility tests are applicable. He concluded that summary judgment should not have been granted and that it was a factual matter to determine whether the lighter was unreasonably dangerous.

Writing in dissent, Judge Flaum noted that as a federal court sitting in diversity, the Seventh Circuit is required to apply the strict liability laws of the state of Illinois. He noted that the court is not permitted to decide cases based on what it speculates to be the best rule or course. Rather, it must make its determinations consistent with the applicable state law.

Judge Flaum declared that Illinois law requires a federal court to apply the risk–utility test in products liability cases. He also contended that the Seventh Circuit's inquiry should have rested with that rule of law. He further maintained that since the Illinois Supreme Court had announced no limitation on the application of the test, it should be applied in the current case to determine whether the lighter is unreasonably dangerous.

Judge Ripple, in his dissenting opinion, declared that the Seventh Circuit opinion has no significance other than to decide the case before it. It has precedential value only if another district court in the Seventh Circuit is faced with a case involving a disposable lighter.

Judge Ripple considered the court's decision to hear the case *en banc* a waste of time, implying that it was improper in this case. He noted that such a rehearing should only be granted when consideration by the full court is necessary to secure or maintain uniformity in its decisions or when the proceeding involves a question of exceptional importance to the administration of justice. Judge Ripple concluded that since this case did not involve either of these situations, but rather, only a limited issue of state law, the order granting the rehearing *en banc* should be vacated.

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