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Supreme Court restricts attorneys' actions as debt collectors

by David Weissman

In *Heintz v. Jenkins*, 115 S. Ct. 1489 (1995), the United States Supreme Court held that the term "debt collector" as used in the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o (1988 ed. and Supp. V) applies to a lawyer who regularly tries to collect consumer debts through litigation. This decision allows a debtor to bring an action against her creditor's attorney for engaging in misleading, abusive, or unfair practices.

Plaintiff alleges violation of Fair Debt Collection Practices Act

Plaintiff Darlene Jenkins brought this suit against attorney George Heintz and his firm for alleged violations of the Fair Debt Collection Practices Act ("Act"). Jenkins had defaulted on a car loan from the Gainer Bank. Heintz was a lawyer at the firm that represented the bank in its action to recover the balance due on the loan. He wrote a letter to Jenkins' lawyer claiming that Jenkins owed the bank \$4,173 for insurance on the car. The bank had purchased this insurance on its own, because Jenkins had broken her promise to keep the vehicle insured.

While Jenkins conceded that she had agreed to keep the car insured, she maintained that the loan agreement specified coverage only for loss or damage. The substitute policy procured by the bank, she

argued, covered not only loss and damage but also insured the bank against her failure to repay the loan. Jenkins thus claimed that Heintz's letter violated the Act by attempting to collect money not "authorized by the agreement creating the debt," and by making a "false representation of . . . the . . . amount . . . of any debt." 15 U.S.C. §§ 1692f(1), 1692e(2)(A).

The United States District Court for the Northern District of Illinois dismissed Jenkins' suit for failure to state a claim, holding that the Act does not apply to lawyers attempting to collect debts through litigation. The Court of Appeals for the Seventh Circuit reversed, ruling that the Act does apply to litigating lawyers. *Jenkins v. Heintz*, 25 F.3d 536 (1994). Because the Seventh Circuit's decision conflicted with a Sixth Circuit opinion (*see Green v. Hocking*, 9 F.3d 18 (1993)), the United States Supreme Court granted certiorari to settle this issue. In an unanimous decision, the Supreme Court sided with the Seventh Circuit, holding that the Act does apply to attorneys litigating debt collection disputes.

Court looks to plain language, revision of Act

The Court based its decision on two factors: 1) the Act's current definition of "debt collector"; and 2) the congressional repeal of the Act's exemption for lawyers.

First, the Act defines a "debt collector" as one who "regularly collect[s] or attempt[s] to collect, directly or indirectly, [consumer] debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Looking at the plain language of the statute, the Court determined that a lawyer who regularly attempts to collect consumer debts through litigation clearly falls within this definition.

Additionally, in 1986 Congress revised an earlier version of the statute. The earlier version, enacted in 1977, defined "debt collector" so as to expressly exempt lawyers from liability under the Act. Specifically, the 1977 statute exempted "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." Pub.L. 95-109, § 803(6)(F). The 1986 revision completely repealed this attorney exemption. The Court thus reasoned that Congress must have intended for all lawyers to be subject to the Act when it revised the statute, since Congress did not replace the exemption with a narrower exemption for litigating attorneys.

Defendant argues for implied attorney exemption

Defendant Heintz nevertheless asserted that the Court should *imply* an exemption in the Act for attorneys litigating debt-collection cases, including settlements. He

based this assertion on three arguments, each of which the Court rejected.

First, Heintz argued that applying the Act to litigating attorneys would create results not intended by Congress. For example, the Act prohibits a debt collector from communicating with a debtor upon the debtor's request. Heintz argued that a litigating attorney would thus be restricted from filing a lawsuit against a nonconsenting debtor, since this process involves communication. The Court, however, rejected this argument. It looked to other language in the Act that creates an exception to this restriction for communications notifying the consumer that the debt collector intends to pursue a certain remedy. The Court applied this same reasoning to other possible "anomalous" results Heintz pointed to, finding that various statutory language resolved such conflicts.

Second, Heintz argued that a statement made by Congressman Frank Annunzio, a sponsor of the

1986 amendment that repealed the lawyer exemption, indicated that the Act still would not apply to litigating attorneys. However, the Court did not find Heintz's argument persuasive. The Court looked again to the plain language of the Act, and found nothing to indicate any exemption for attorneys. In addition, the Court pointed out that some Congressmen had expressed concern when repealing the lawyer's exemption, and had proposed alternative language excluding litigation activities. However, this language was not enacted. Furthermore, Annunzio's statement was made *after* the statute became law. Thus, the Court reasoned, it could not have been relied upon by other legislators when voting on the Act.

Finally, Heintz called the Court's attention to a "Commentary" on the Act written by the Federal Trade Commission's staff. This Commentary stated that the Act does not apply to attorneys or law firms whose practice is limited to "legal activities" (as opposed to "tradi-

tional debt collection activities"). The Court, however, refused to assign significant weight to this statement, because the Commentary itself did not purport to be "binding on the Commission or the public." Also, the Court emphasized that neither the Act nor any other authority indicates that Congress intended to allow the FTC to create such an exception to the Act's coverage, particularly an exception so clearly outside of the express language of the statute.

Court resolves circuit split

Having rejected each of Heintz's arguments, the Supreme Court resolved the split between the Sixth and Seventh Circuits by holding that the Act applies to attorneys who are regularly involved in consumer-debt-collection activities, including litigation. Thus the Court affirmed the opinion of the Seventh Circuit, which reversed and remanded the decision of the district court.