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Eliminating Abusive Collection Practices by Third Parties Under the Federal Fair Debt Collection Practices Act

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The court noted that Parman could not offer a cooperative unit to an outsider unless a tenant refused to purchase her shares and did not stay in the building as a rent stabilized tenant. Because the tenants could remain without buying into the cooperative, Parman had to offer the cooperative units at substantially less than their market value. Therefore, the court held that Parman did not have substantial economic power in the tying product market.

Anticompetitive Effects in the Tied Market. Owners Corp. offered testimony that the cooperative agreement precluded other businesses from bidding on the services provided under the commercial leases. The court stated, however, that the agreement must affect an "appreciable" number of buyers in the tied market, thus foreclosing a substantial volume of commerce from competition. In this case, the leases pertained to commercial, garage, laundry and management services in only one building. The court held that any effect the sale had on the vast market for these services was minuscule. Additionally, the court recognized that before the cooperative conversion Parman owned the building and provided the management services, thereby precluding other vendors of management services. After the conversion, Parman continued to provide these services and, therefore, the agreement did not *diminish* competition in the tied market. Therefore, the court rejected Owners Corp.'s Sherman Act antitrust claim.

Unconscionability Claim

The court next considered whether including the commercial leases in the conversion plain was unconscionable. In order to establish an unconscionability claim under New York law, the plaintiff must establish two elements: first, that one of the parties lacked any meaningful choice; and second, that the contract terms were unreasonably favorable to the other party. Addressing the first prong of the unconscionability test, the court concluded that the tenants exercised a meaningful choice because they formed a tenants association, were represented by legal counsel, engaged in negotiations over several months and entered into the cooperative agreements aware of the disadvantageous leases. Also, because the plan was a non-eviction conversion, the tenants were not compelled to purchase their units but could have remained in the building indefinitely as rent stabilized tenants. Moreover, because the tenants purchased their units significantly below market value, the court did not consider them victims of an unconscionable contract.

Regarding the second prong of the unconscionability test, the court concluded that the commercial leases were not unreasonably favorable to Parman when considered in light of the agreement as a whole. When there was an eviction clause in the plan, the tenants signed the No-Buy Agreements. However, after the eviction clause was removed, the tenants rescinded their No-Buy Agreements. The court reasoned that if the tenants believed the commercial leases were so disadvantageous as to make the entire plan inequitable, the tenants would not have rescinded their No-Buy Agreements. Therefore, the court also rejected Owners Corp.'s unconscionability claim.

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Eliminating Abusive Collection Practices by Third Parties Under the Federal Fair Debt Collection Practices Act

Recently, the Supreme Court of Wyoming ruled on the applicability of the federal Fair Debt Collection Practices Act ("FDCPA" or "Act"), 15 U.S.C. §§ 1692 to 1692o (1989), to a Wyoming collection agency collecting a check upon which the drawer had stopped payment. In ***Johnson v. Statewide Collections, Inc.,*** 778 P.2d 93 (Wyo. 1989), the court held that the collection agency violated the FDCPA by failing to properly verify the alleged debt after the consumer indicated that he disputed the debt, by asserting an amount due that the agency was not entitled to recover, and by contacting the debtor when the agency was, or should have been, aware that the debtor was represented by an attorney. The court also held, however, that the collection agency did not violate the FDCPA by using its "doing business as" name in its letters to the debtor, or by failing to advise the debtor that it had returned the dishonored check to the retail store.

Background

On November 11, 1986, Freddie Johnson ("Johnson") purchased a shotgun from a retail store for $129.99 and paid for it by check. Johnson later discovered that the shotgun was defective. He returned the shotgun to the store and requested a refund. The store employee accepted the shotgun but refused to return Johnson's check. Johnson contacted his bank and stopped payment on the check. When Johnson's bank returned the check to the store, the store sent the check to Statewide Collections, Inc. (doing business as "Check-Rite") for collection.

Johnson attempted to resolve the matter by contacting the store, but the store referred him to CheckRite. When Johnson contacted CheckRite, he was referred back to the store and told that he must contact the store with any problems he had with the merchandise or his check.

On November 21, CheckRite sent a "Return Check Notice" to Johnson demanding that he pay $144.99 directly to CheckRite. The amount demanded included a $15 "service charge" in addition to the merchandise price. Johnson immediately contacted his attorney who wrote a letter to the store stating that Johnson disputed the alleged debt. A copy of the attorney's letter was sent to CheckRite.

After receiving the letter from Johnson's attorney, CheckRite sent a second notice directly to Johnson. This notice demanded

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that Johnson pay $148.16 by January 8, 1988, or the amount due would increase to $293.15 thereafter. CheckRite never sent Johnson verification of the debt, and neither the store nor CheckRite corresponded with Johnson's attorney.

CheckRite did contact the store after it received the letter from Johnson's attorney and the store told CheckRite that it wanted the collection pursued. The store later decided not to pursue collection. CheckRite returned the check to the store but never advised Johnson or his attorney of this fact.

County and District Court Decisions

Johnson initiated this action in the County Court of Natrona County, Wyoming, alleging that CheckRite had violated the FDCPA, and alleging damages of $738 plus court costs. Because the claimed amount of damages was less than $750, Johnson proceeded pursuant to sections 1-21-201 to -205, Wyo. Stat. Ann. (1989), which provide the procedure for small claims cases. The county court ruled in favor of Johnson and CheckRite appealed the county court's ruling to the district court. The district court reversed the county court's decision and dismissed all of Johnson's claims. Johnson subsequently filed a Petition for Writ of Certiorari to the Wyoming Supreme Court, and the court consented to hear the case.

The Wyoming Supreme Court's Decision

Jurisdiction over Small Claims Cases. The court first determined a threshold question of whether the district court had jurisdiction to review a case brought pursuant to the small claims statutes. Johnson argued that no statutory authority expressly authorized such review, and that the informal procedure for the adjudication of small claims division cases assumed that no appeal would follow. CheckRite countered that a small claims case is no different from any other case within the civil jurisdiction of a county court, and that the district court has the inherent power to review county court decisions.

The Wyoming Supreme Court noted that appeals from courts of limited jurisdiction, such as a county court, are specifically authorized by section 5-2-119 of the Wyoming statutes. Wyo. Stat. Ann. § 5-2-119 (1989). Johnson argued that the statute did not provide jurisdiction over the "small claims division" of the county court. The court held, however, that the statutes governing small claims cases merely established a simplified procedure for bringing small claims cases and did not create a separate small claims court. Therefore, the district court did not require a specific statutory grant of authority to review small claims cases.

Verifying a Disputed Debt. Johnson alleged that CheckRite had violated section 1692g(b) of the FDCPA by failing to send him a verification of the alleged debt after he had notified CheckRite that he disputed the debt. Section 1692g(b) provides that when a debt collector receives written notification that the consumer disputes the debt, the debt collector must stop collection proceedings until the debt collector obtains verification of the debt and mails a copy of it to the consumer.

The court held that CheckRite had violated the plain meaning of section 1692g(b). On December 3, 1987, Johnson's attorney advised CheckRite, in writing, that Johnson disputed the debt. CheckRite, however, never sent a verification of the debt to either Johnson or his attorney.

CheckRite argued that the purpose of section 1692g(b) is simply to inform the consumer of the basis of the claim being collected and that section 1692g(b) does not apply where the alleged debtor had other notice of the debt. The court held that the requirements of section 1692g(b) apply even if the consumer had adequate prior notice of the alleged debt. Moreover, the court stated that an oral verification is not sufficient. The court determined that because the statute requires that a copy of the verification be mailed to the consumer, the statute implicitly requires that the verification be in writing.

Attempting to Collect an Excessive Amount. Johnson also alleged that CheckRite violated section 1692f(1) of the FDCPA by attempting to collect more from Johnson than the Act or the parties' agreement permitted. The FDCPA allows debt collectors to demand double the original check amount. CheckRite's second notice, however, demanded $293.15, more than double the amount of the check, if the amount claimed was not paid before January 8, 1988.

CheckRite admitted that the amount it had attempted to collect was too large. CheckRite argued, however, that its conduct did not violate the FDCPA because the overcharge resulted from an inadvertent clerical error. Under section 1692k(c) of the FDCPA, a violation is excusable if the debt collector shows "that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error." 15 U.S.C. § 1692k(c). The court held that section 1692k(c) is an affirmative defense and therefore requires that the debt collector demonstrate that it maintained procedures to avoid inadvertent clerical errors. The court found no evidence in the record that CheckRite had adopted any procedures to avoid such an error.

Failing to Communicate Solely with Attorney. Johnson alleged that CheckRite also violated section 1692c(a)(2) of the FDCPA. Section 1692c(a)(2) provides that "a debt collector may not communicate with a consumer in connection with the collection of any debt . . . if the debt collector knows the

consumer is represented by an attorney . . . ." 15 U.S.C. § 1692c(a)(2).

CheckRite admitted that it communicated with Johnson after it had received notice that he was represented by an attorney. CheckRite argued that under section 1-1-115(b) of the Wyoming statutes, it was required to send notice of the dishonored check directly to the consumer. CheckRite also argued that this type of "formal" communication was not the type of communication prohibited by section 1692c(a)(2). The court rejected this argument because the FDCPA did not provide an exception for "formal" communications. Thus, the court held that the second notice should have been sent to Johnson's attorney, and the direct communication with Johnson was an additional violation of the FDCPA.

Using a "Doing Business As" Name. The court rejected Johnson's allegation that CheckRite violated section 1692e(14) of the FDCPA by sending the initial demand letter without advising him of its true name ("Statewide Collections, Inc.") or that it was using a "doing business as" name ("CheckRite"). Section 1692e(14) expressly prohibits a debt collector from deceiving or misleading a debtor by using any name other than its true business name in its collection activities. The court noted that Statewide Collections, Inc. was a franchisee of CheckRite, Ltd. and was licensed with the Wyoming State Collection Agency Board as "Statewide Collections, Inc., d/b/a CheckRite." Therefore, CheckRite constituted part of Statewide Collections' true business name for the purposes of the FDCPA.

Collecting on Behalf of Another. Johnson also argued that CheckRite violated section 1692j of the FDCPA because CheckRite failed to notify Johnson that it was no longer the true holder of the check which allegedly created the debt. Section 1692j prohibits any action which would mislead the consumer to believe that someone other than the creditor is attempting to collect the debt. The court rejected Johnson's argument because CheckRite never attempted to mislead Johnson into believing that it was collecting the debt on its own behalf. Rather, it was obvious that CheckRite was collecting the debt for the retail merchant. Therefore, the court held that CheckRite did not violate section 1692j of the FDCPA.

The court reversed the district court's decision and reinstated the county court's judgment.

Joseph J. Morford

Supreme Court of New Jersey Holds Delaware Chemical Company Subject to the Jurisdiction of the Board of Public Utility Commissioners

The Supreme Court of New Jersey has held that a chemical company with a limited market is a public utility subject to regulation by the Board of Public Utility Commissioners. ***Petition of South Jersey Gas Co.,*** 561 A.2d 561 (N.J. 1989). The court found that the company's contract to supply methane-rich fuel to a large industrial user, coupled with the company's extensive efforts to market the gas to other industrial users, met the New Jersey legislature's definition of "public utility."

Background

SunOlin Oil Company ("SunOlin") operated a chemical plant in Claymont, Delaware, that converted oil refinery by-products into industrial gases. This process produced methane-rich fuel ("MRF"). MRF is an alternative energy source to natural gas and is generally suitable for industrial but not residential uses.

B.F. Goodrich Company ("Goodrich") manufactured its products in Pedricktown, New Jersey. Until 1986, Goodrich used natural gas in its manufacturing process. This natural gas was supplied by South Jersey Natural Gas ("South Jersey"), a regulated public utility that served approximately 180,000 residential, industrial, and commercial customers in seven southern counties of New Jersey. Sixteen industrial customers represented approximately twenty percent of South Jersey's total sales.

In July of 1983, Goodrich contacted SunOlin after Goodrich unsuccessfully attempted to enter into an arrangement with South Jersey for a long term supply of natural gas. SunOlin offered to sell MRF to Goodrich as an alternative to natural gas. However, SunOlin subsequently concluded that a contract with Goodrich would not be profitable and the transaction was never completed. By the fall of 1985, SunOlin was able to deliver MRF to Goodrich using a previously unavailable pipeline. SunOlin again made an offer to sell MRF to Goodrich. Goodrich estimated that it could save $18,000 per month by converting to MRF. SunOlin viewed the potential contract with Goodrich as an opportunity to expand the market for MRF.

While the contract with Goodrich was being negotiated, SunOlin contacted other potential industrial customers, such as E.I. Dupont Nemours and Company, Mobil Oil Research, Monsanto Chemical Company, Shell Oil Company, Allied Chemical and Atlantic City Electric Company, in an effort to sell MRF. However, no other agreements to sell MRF were ever reached.

In late 1986, SunOlin and Goodrich reached a preliminary agreement. Goodrich subsequently notified South Jersey that it intended to terminate its contract for natural gas as of March 1, 1987. On February 13, 1987, South Jersey commenced proceedings with the Board of Public Utility Commissioners ("the BPU"), the agency authorized to regulate New Jersey utilities. South Jersey sought a preliminary restraining order to prohibit SunOlin from selling and delivering MRF to Goodrich.

Administrative Proceedings

In March 1987, the BPU transferred South Jersey's petition to the Office of Administrative Law

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