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Right to Jury Trial Found Under the Fair Debt Collection Practices Act

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conclusion: the legislature intended the Carmack Amendment to provide uniformity in the rules and regulations for common carriers and predictability in determining the extent of liability for lost or damaged cargo. Thus, the Seventh Circuit denied recovery of punitive damages under the Carmack Amendment, claiming that such an award would displace the Amendment's purpose.

Carmack Amendment Does Not Absolutely Preempt State Law and Common Law Claims

Seventh Circuit precedent held that the Carmack Amendment preempts "state and common law remedies . . . where goods are damaged or lost in interstate commerce." *Hughes v. United Van Lines, Inc.*, 829 F.2d 1407 (7th Cir. 1987). Following this precedent, the Seventh Circuit held that the Carmack Amendment preempted Plaintiffs' claims for breach of contract for a common carrier and willful and wanton misconduct because the alleged damages in these claims stemmed from the damages to Slavin's property

already covered by the Carmack Amendment. The Seventh Circuit also held that the Carmack Amendment preempted the Illinois Consumer Fraud and Deceptive Business Practices Act, although some states do not hold such claims preempted. In so holding, the Seventh Circuit deferred to the only Illinois appellate court to consider the issue. The Illinois appellate court in *Nowakowski v. American Red Ball Transit Co.*, 288 Ill. App. 3d 348 (1997) found that the Illinois Consumer Fraud and Deceptive Business Practices Act is preempted by the Carmack Amendment.

Nevertheless, the Seventh Circuit determined that the Carmack Amendment did not preempt all of Plaintiffs' state law claims. The Seventh Circuit found that Plaintiffs' intentional infliction of emotional distress claim was not preempted by the Carmack Amendment because that claim reflects a separate and independent harm. In addition, the court, relying on previous First Circuit and Seventh Circuit decisions, also recognized that the Carmack Amendment did not preempt state law claims that were separate from the "actual loss of or damage to

cargo." See *Rini v. United Van Lines, Inc.*, 104 F.3d 502 (1st Cir. 1997); *North American Van Lines, Inc. v. Pinkerton Security Sys., Inc.*, 89 F.3d 452 (7th Cir. 1996); and *Hughes v. United Van Lines, Inc.*, 829 F.2d 1407 (7th Cir. 1987).

Court Rejected United's Cross-Appeal

Finally, the Seventh Circuit addressed United's cross-appeal where United alleged that the \$7,050 jury award was a "non-economic" amount, and that the Carmack Amendment strictly prohibited the recovery of "non-economic" damages. The court disagreed. The jury in this case had heard expert testimony from both sides as to the potential value of the photographs. Further, the jury instructions specifically prohibited the jury from considering "fanciful or sentimental value" in assessing the economic damages. The court found that the jury acted within these boundaries in awarding Plaintiffs \$7,050. This award was economic and not based on "non-economic" factors such as sentiment.

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Right to Jury Trial Found Under the Fair Debt Collection Practices Act

By Heather Ann Miller

In *Kobs v. Arrow Service Bureau, Inc.*, 134 F.3d 893 (7th Cir. 1998), the United States Court of Appeals for the Seventh Circuit held that a jury may determine the statutory additional damages provision of the Fair Debt Collection Practices Act

("FDCPA"), 15 U.S.C. §1692k(a)(2)(A).

Collection Agency's Conduct: Within Or Beyond the Law?

Plaintiffs, Ron and Stacie Kobs ("Plaintiffs"), brought suit against

Defendant, Arrow Service Bureau, Inc. ("Arrow"), alleging that Arrow violated Plaintiffs' rights under the FDCPA when it attempted to collect a debt allegedly owed by Plaintiffs to American TV. Arrow, a debt collection agency, had previously purchased debts owed to American

TV. Following an initial collection letter to Plaintiffs' former address, Arrow contacted Plaintiffs by telephone. Plaintiffs stated that they no longer resided at the address to which Arrow sent its initial letter. Arrow then sent the letter to the Plaintiffs' correct address.

During January 1996, after Plaintiffs received their initial collection letter from Arrow, Mrs. Kobs received more than five calls from Arrow, and Mr. Kobs received between one and three calls. These calls continued even though Plaintiffs informed Arrow that a credit bureau report confirmed no balance was due by Plaintiffs to American TV. Plaintiffs claim that Sharon Tobias, an Arrow employee who made the majority of calls to Plaintiffs' residence, was "rude and disrespectful."

Plaintiffs eventually hired an attorney and notified Arrow of this fact in a subsequent telephone call. In violation of its own policy against directly contacting consumers who were represented by counsel, Arrow continued calling Plaintiffs' home demanding payment. On April 22, 1996, weeks after Plaintiffs informed Arrow that they had retained an attorney and requested Arrow to direct its communications to him, Arrow sent a letter threatening to sue Plaintiffs if they failed to contact Arrow or mail a payment within seven days. Although Plaintiffs failed to respond to Arrow's threat, Arrow did not file suit. Arrow finally contacted Plaintiffs' attorney three months after being informed of Plaintiffs' representation. However, in a subsequent call to Plaintiffs on May 8, 1996, Tobias indicated that, after speaking with Plaintiffs' attorney, she felt the attorney had no knowledge of Plaintiffs' case.

Subsequently, the Plaintiffs brought suit under several theories of unlawful collection practices which violated the FDCPA. Specifically, the suit alleged: (1) that Arrow failed "to provide the requisite statutory validation and dispute notice within five days of its initial communication with the [Plaintiffs] in violation of §1692g(a);" (2) that Arrow negated its validation notice to the Plaintiffs by the language it used on the notice's reverse side in violation of §1692g(a); (3) that Arrow's telephone calls harassed Plaintiffs in violation of §1692d; (4) that Arrow's communication with Plaintiffs after receiving notice that they had legal representation violated §1692c(a)(2); (5) that Arrow violated §1692e(10) by threatening litigation which it had no intention of pursuing; (6) that Arrow's letter, which threatened litigation if the bill was not paid in seven days, violated §1692e(10); (7) that Arrow's failure to communicate the conditions for property exemptions violated §1692e(10); and (8) that Arrow's claim that Plaintiffs' attorney had no knowledge of their case constituted harassment and deception in violation of §1692d and 1692e(10).

The district court granted Arrow's pre-trial motion that a judge, rather than a jury, determine what statutory additional damages, if any, should be granted. In addition, the court denied Plaintiffs' request that the court use a special verdict form in determining the amount of these damages.

A jury found Arrow liable under the FDCPA for violating the Kob's FDCPA rights and awarded Mrs. Kobs \$1,500 in actual damages. The judge then awarded Mr. Kobs \$100 in statutory damages pursuant to

§1692(a)(2)(A). Mrs. Kobs received no statutory damages, and Mr. Kobs received no actual damages. The Plaintiffs' appealed the verdict based on the judge's decision to bifurcate the damages determination between the jury and the judge.

Seventh Circuit Analyzed §1692k(a)(2) of the FDCPA

Initially, the Seventh Circuit noted that only one federal appellate court had previously addressed whether §1692k(a)(2)(A) of the FDCPA provided for a jury trial to determine statutory damages. In *Sibley v. Fulton DeKalb Collection Service*, 677 F.2d 830 (11th Cir. 1982), the Eleventh Circuit answered this issue in the affirmative. In so holding, the court stated that statutory causes of action provide a right to a jury trial in two instances, namely: (1) where Congress provides for a jury trial as a part of a specific statutory provision; or (2) where the statutory provision is of a type usually enforced in an action at law.

The *Sibley* court construed the language of §1692k(a)(2)(A), providing for "such additional damages as the court may allow, but not exceeding \$1,000," as meaning that the parties are entitled to trial by either judge or jury. The court relied on previous decisions which construed similar statutory provisions. *See Sibley*, 677 F.2d at 832. Furthermore, the *Sibley* court found that this interpretation of the FDCPA avoided any possibility of serious constitutional issues that could be raised under the Seventh Amendment if the Act was construed to prohibit a jury trial. Based on the *Sibley* court's reasoning, the Seventh Circuit rejected Arrow's original contention

that statutory damages must only be determined by a judge.

The *Sibley* court had also questioned how rights under the FDCPA were decided historically, either at law by a jury or in equity by a judge, to determine whether the Seventh Amendment mandated a jury trial. *See Sibley*, 677 F.2d at 833. The court in that case concluded that rights under the FDCPA were similar to tort actions for monetary relief. Historically, courts of law decided such an action and request for relief. Due to the nature of the action and the relief sought, the *Sibley* court held that the language of 1692k(a)(2), allowing statutory damages to be determined by the “court,” encompassed trial by jury under the Seventh Amendment.

Seventh Circuit Applied Sibley and Other Precedent

The Seventh Circuit found the factual distinction between *Sibley*, where a single trier of fact decided actual and statutory damages, and the present case, where the jury awarded actual damages and the judge awarded statutory damages, insignificant. The Seventh Circuit interpreted the holding in *Sibley*, which failed to distinguish actual damages from statutory damages, to mean “that a party is entitled to a jury trial for all damages under the

FDCPA.”

The Seventh Circuit also relied on the Fourth Circuit’s decision in *Barber v. Kimbrell’s, Inc.*, 577 F.2d 216 (4th Cir. 1978). In *Barber*, the Fourth Circuit held that a jury should determine the issue of statutory damages under a provision of the Truth in Lending Act (“TILA”), 15 U.S.C. §1640(a). Based on the interpretation of the analogous provision in *Barber*, the Seventh Circuit stated “that statutory damages, standing alone, should be submitted to the jury.”

The Seventh Circuit noted that the TILA and the FDCPA both provide for actual and statutory damages for the “prevailing consumer.” Moreover, the Fourth Circuit’s holding relied on the Supreme Court’s unanimous decision in *Curtis v. Loether*, 415 U.S. 189 (1974), which upheld the defendant’s right to a jury trial in an action for actual and punitive damages brought under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601-3631. In *Curtis*, the Supreme Court held that a civil rights action could be tried by a jury because it sounded in tort and sought the type of relief traditionally awarded at law. Likewise, the Fourth Circuit held that a TILA action sounded in tort and requested a form of relief — monetary damages — traditional to a court of law, thus providing for a

trial by jury. *See Barber*, 577 F.2d at 225.

Section 1692k(a)(2) Provides for a Jury Trial

The Seventh Circuit adopted the *Sibley* court’s interpretation of the word “court” in §1692k(a)(2)(A) holding that the FDCPA provides for a jury trial. In addition, the Seventh Circuit concluded that *Barber* resolved any ambiguity over whether a jury should decide the issue of statutory damages standing alone. In this regard, the court noted the similarity in the damages provisions under the TILA and the FDCPA as well as the nature of these actions, which historically would be decided at law and thus would fall within the protection of the Seventh Amendment. Because the trial judge, not the jury, decided the issue of statutory damages in the present case, the Seventh Circuit reversed and remanded the case to the district court to allow a jury to consider the amount of statutory damages, if any, to award Plaintiffs for Arrow’s violations of the FDCPA.

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