

1993

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Recommended Citation

Brian K. Wydajewski *Facsimile of Attorney's Signature on Mass Mailing Violates the Fair Debt Collection Practices Act*, 6 Loy. Consumer L. Rev. 20 (1993).

Available at: <http://lawcommons.luc.edu/lclr/vol6/iss1/6>

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Recent Cases

Facsimile of Attorney's Signature On Mass Mailing Violates the Fair Debt Collection Practices Act

In *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993), the Court of Appeals for the Second Circuit held that a mass-produced collection letter bearing a facsimile of an attorney's signature constituted a false and misleading communication in violation of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. Section 1692-1692p (1993), where the attorney failed to personally review the debtor's file or correspondence prior to sending the letter. The Second Circuit awarded the maximum statutory damages to the complaining debtor for the violation.

The Threatening Letters

NCB Collection Services (NCB) collected debts on behalf of American Family Publishers (Publishers), an organization that sells magazine subscriptions. In an attempt to collect on Publishers' delinquent accounts, NCB's part-time general counsel, Philip D. Jackson, authorized the issuance of collection letters which NCB sent to approximately one million debtors each year through a computerized mass-mailing. If the debtor failed to respond to the initial mailing, the computer generated additional letters on a predetermined schedule. Furthermore, no employee of NCB reviewed individual debtor files until the debtor responded to the agency's demand for payment.

During a two-month period in late 1990 and early 1991, Christ Clomon received six collection letters from NCB regarding a \$9.42 debt she owed to Publishers. The first letter Clomon received contained NCB's logo and the name of an NCB account supervisor. The subsequent letters, however, were

sent on Jackson's letterhead which identified him as an attorney, and bore a facsimile of his signature, using the title "General Counsel, NCB Collection Services." Each letter also contained a variety of threatening statements such as "[a]cting as General Counsel for NCB Collection Services, I have told them that they can lawfully undertake collection activity to collect your debt . . ." and "[b]ecause of your failure to make any effort to pay your lawful debt . . . we may find it necessary to recommend to your creditor that appropriate action be taken to satisfy your debt."

In response to the collection letters, Clomon filed a complaint in the United States District Court for the District of Connecticut. She alleged that Jackson had violated the FDCPA by authorizing NCB to issue the collection letters she had received. Specifically, Clomon contended that the letters contained false and misleading information in violation of FDCPA Section 1692e.

After denying Jackson's motion for judgment on the pleadings, the district court granted Clomon's motion for summary judgment. The court held that Jackson had violated FDCPA Section 1692e(3) which prohibited "the false representation or implication that any individual is an attorney or that any communication is from an attorney." According to the district court, the letters Jackson approved falsely implied that he had been retained by NCB for the purpose of collecting a particular person's debt. Despite the absence of any actual damages, the district court also granted Clomon's motion for \$1,000 in "additional damages" under FDCPA Section 1692k. Jackson appealed the district court's ruling, contending that: (1) the court erred in finding that the letters violated FDCPA Section 1692e(3), and (2) the court's award of "additional damages" was an abuse of its discretion.

The "Least Sophisticated Consumer" Standard

Under FDCPA Section 1692e, Congress established a general prohibition against the use of "false, deceptive, or misleading representation or means in connection with the collection of any debt." Furthermore, Congress identified sixteen specific practices which fall under Section 1692e's ban. However, as evidence of the statute's broad scope, a debt collection practice can fail to fall within any of the sixteen subsections of Section 1692e and still be a violation of the statute.

In determining whether an actual collection practice violates the statute, the courts have typically employed the "least sophisticated consumer" standard, which purports to ensure that the FDCPA protects all consumers regardless of their level of sophistication. Under the standard, the courts have evaluated the deceptiveness of a collection practice from the standpoint of consumers with "below-average sophistication or intelligence [because they] are especially vulnerable to fraudulent schemes." Although originally rooted in the consumer protection laws traditionally used by the courts, the "least sophisticated consumer" standard took its modern form through the courts' use of the Federal Trade Commission Act in interpreting the FDCPA. Subsequently, the courts have employed the standard to protect consumers in a variety of ways. Using this standard, courts have found that collection notices containing language that "overshadows" or "contradicts" other language informing consumers of their rights to be in violation of the FDCPA. Additionally, the courts have used the "least sophisticated consumer" standard to hold collection notices misleading where they use formats or typefaces which tend to obscure important information contained in the notice. Finally, the courts have also interpreted the standard to find that collection notices are decep-

tive if they are open to more than one reasonable interpretation, one of which is inaccurate.

In formulating and applying the standard, the courts have been careful to preserve the concept of reasonableness in the debtor's interpretation of a collection notice. By rejecting unreasonable interpretations, the courts have ensured that the "least sophisticated consumer" standard meets its dual purposes of ensuring the protection of all consumers, while also protecting debt collectors from unwarranted liabilities.

Jackson Challenges the Inaccuracies of the Collection Letters

In challenging the district court's finding that the collection letters violated FDCPA Section 1692e(3), Jackson initially argued that the letters' "overstatement" of the degree of his involvement in the collection process did not violate the subsection or any other provision of the statute because he was an attorney and the letters were actually from him. However, the Second Circuit rejected this argument by recognizing the broad scope of Section 1692e and noting the possibility of upholding the lower court's decision even if the facts of the case failed to establish a violation of a specific subsection of the statute. Consequently, the court found that the district court properly concluded that the collection notices specifically violated Section 1692e(3), as well as Section 1692e(10).

Initially, the court found that NCB's use of Jackson's letterhead and facsimile signature on the letters was sufficient to convince the "least sophisticated consumer" that she was in direct contact with an attorney, when actually she was not. Accordingly, the court found the letters to be false and misleading in violation of Section 1692e(3).

Furthermore, the court found the "least sophisticated consumer" would believe that Jackson was personally involved in her case because of the letter's language. Because Jackson was not involved in the daily operations of the debt collection process, the court held that he had violated Section

1692e(10) which prohibited "the use of any false representation or deceptive means to collect" a debt from a consumer.

Finally, despite recognizing the need for mass mailings in the debt collection industry, the Second Circuit reiterated the necessity for mass mailings to conform to FDCPA mandates. The court noted that most mass mailings containing facsimiles of an attorney's signature would violate Section 1692e if the attorney was not directly involved in the collection of an individual's debt.

Unintentional Acts, Good Faith, and the Award of "Additional Damages"

Jackson also objected to the lower court's award of \$1,000 of "additional damages" to Clomon by arguing that the award was an abuse of the district court's discretion. In support of his challenge, Jackson argued that his non-compliance with Section 1692e was unintentional and in "good faith." Moreover, Jackson contended that he approved of the collection letters in reliance upon the "authoritative interpretations" of the Federal Trade Commission (FTC) and the district court's decision in *Howe v. Reader's Digest Ass'n, Inc.*, 686 F. Supp. 461 (S.D.N.Y. 1988). However, the Second Circuit found Jackson's arguments unpersuasive.

Initially, the court rejected Jackson's "good faith" argument by pointing to the language of FDCPA Section 1692e which clearly banned the type of letter that Jackson had authorized for NCB's use. The court also found that the FTC's receipt of the letters without disapproving of their content was not evidence of the FTC's authoritative interpretation and approval of the letters. Despite acknowledging that Publishers sent copies of Jackson's letters to the FTC as part of an unrelated investigation of Publisher's compliance with the FDCPA, the court placed weight on Jackson's admission during a deposition that the FTC routinely received copies of collection letters without evaluating the lawfulness of those letters. Consequently, the court admon-

ished Jackson for his claimed ignorance of the well-established practices of the FTC.

Finally, the Second Circuit rejected Jackson's interpretation of *Howe*. Although the Second Circuit recognized the *Howe* court's holding that a debt collector could rely on creditor's records in determining whether to send collection letters, the court found that nothing in the *Howe* decision released an attorney from making a determination about a debtor's account prior to sending a collection letter bearing the attorney's signature. The Second Circuit concluded that *Howe* did not release any debt collector from the requirements of FDCPA Section 1692e. ♦

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Consumer Demand and Product Utility Weigh In Product Liability Action Based On Defective Product Theory

In *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496 (8th Cir. 1993), the United States Court of Appeals for the Eighth Circuit held that in order for a plaintiff to recover punitive damages, he must show that a defendant's conduct was outrageous or indifferent to consumer safety. The court also found that in a strict liability case, the jury should make the ultimate determination as to whether a product is unreasonably dangerous. Furthermore, a defendant is entitled to a jury instruction on the defense of contributory fault if the defendant shows that the plaintiff had general knowledge that the product presented a risk of causing the injury in question. Finally, the court concluded that to admit evidence of other accidents at trial, the facts and circumstances of the other accidents must be substantially similar to the current case facts.