CONSUMER CREDIT

CUSTOMER CAN SUE OVER FORGED CONVENIENCE CHECKS UNDER FCRA

Meyer v. F.I.A. Card Services, N.A., ____ F.Supp.2d ____ (D.Minn. 2011).

FACTS: Nancy Meyer was a victim of fraud when her live-in fiancé, Jason Clark, stole convenience checks from two of her F.I.A. issued credit cards and forged her signature to cash the stolen checks. The accounts at issue were opened in 2000 and 2003, but at the time the fraudulent activity began, Meyer had not used the accounts in several years. Clark's scheme consisted of intercepting the checks at the couple's shared home, writing the checks out for cash, signing Meyer's name, and depositing the checks into Meyer's account. Clark pretended the deposited checks came from his own income. Clark would then ask Meyer to write him checks to cover his bills. In addition, he asked Meyer for checks in various amounts that he claimed were for paying contractors for a business he was allegedly starting. He filled in the "pay to the order" line himself, and instead of paying the fictitious contractors, he made payments to cover his tracks.

It was required to conduct a reasonable investigation to determine whether the disputed information could be verified.

Meyer learned of the charges in 2008 when FIA called her to inquire about the past-due status of the two accounts. After realizing Clark had been defrauding her, she contacted FIA and informed them she was the victim of fraud. FIA denied her claim of fraud on the basis that the checks had been deposited into her own account. FIA reported the accounts to credit reporting agencies ("CRAs") as delinquent. Meyer disputed the accounts and FIA subsequently marked the bills as "in dispute," checked Meyer's identity information, and called her bank to verify that the checks had been deposited into her account. FIA then classified Meyer's claim as not being fraudulent and reported this to the CRAs. Meyer sent another dispute letter to the CRAs, and the CRAs requested that FIA check the signatures on the checks for possible forgery. FIA did not check the signatures as requested or conduct any further investigation, but followed the exact same procedure as before. Meyers filed a complaint, alleging FIA violated the Fair Credit Reporting Act by failing to conduct a reasonable investigation of her fraud claim. FIA moved for summary judgment.

HOLDING: Motion Denied.

REASONING: Pursuant to Section 1681s-2 of the FCRA, once FIA received notice of Meyer's dispute from a CRA, it was required to conduct a reasonable investigation to determine whether the disputed information could be verified. "The reasonableness of the investigation depends on the facts of the case, most importantly the CRA's description of the dispute in its notice." *Gorman v. Wolpoff & Abramson, LLP,* 584 F.3d 1147, 1160 (9th Cir. 2009).

The evidence indicated that Meyers informed FIA four times of potential fraud on her account, and, despite the multiple notices of fraud, the FIA conducted its standard investigation and went no further. The court found FIA's review of its records cursory and called into question the reasonableness of the investigation: "FIA did not check for forgery, despite clear evidence that it had notice of fraud, and specific requests from the CRAs to check for forgery." The court determined that Meyer's claim should survive a motion for summary judgment because the jury could find FIA's investigation unreasonable given the facts of the case.

DEBT COLLECTION

COMMUNICATION DIRECTED TO CONSUMER'S ATTORNEY IS ACTIONABLE UNDER FDCPA

Allen v. LaSalle Bank, 629 F.3d 364 (3rd Cir. 2011).

FACTS: Dorothy Rhue Allen purchased a home and failed to make the last payment of her mortgage. She was declared in default and Fein, Such, Kahn & Shepard, P.C. law firm ("FSKS"), brought a mortgage foreclosure action against Allen on behalf of the bank LaSalle Bank, N.A. FSKS sent a letter to Allen's attorney that contained overcharges in fees as well as the remaining balance on the principal. Allen claimed this communication violated the Fair Debt Collection Practices Act, which prohibits debt collectors from using unconscionable means to collect debt. FSKS asserted that the communication between a debt collector and a consumer's attorney is not covered under the FDCPA. The U.S. District Court for the District of New Jersey granted the law firm's motion to dismiss.

HOLDING: Vacated and Remanded.

REASONING: The purpose in enacting the FDCPA was to eliminate abusive debt collection practices. A debt collector may not use unfair or unconscionable means to collect or attempt to collect debt, and attorneys are regarded as debt collectors when they collect consumer debts through litigation regularly. The scope of the FDCPA is broad and applies regardless of to whom the communication was directed. A violation of the FDCPA exists even without proof of intent. A communication is defined under the statute as the conveying of information regarding a debt directly or indirectly to any person through any medium. The court held that communication to a consumer's attorney is an indirect communication to the consumer. Therefore, the communication should be analyzed from the perspective of a competent attorney.

PHONE BILLS DEBTS SUBJECT TO TEXAS 4-YEAR STATUTE OF LIMITATIONS

Castro v. Collecto, 634 F.3d 779 (5th Cir. 2011).

FACTS: Consumers filed a class action lawsuit against debt collection companies, alleging that they violated the Fair Debt Collection Practices Act ("FDCPA") by sending letters that allegedly threatened to sue on approximately three-year-old debts, as to which the applicable statue of limitations had already elapsed. The plaintiffs argued that the Federal Communications Act ("FCA") applied, which had a two-year statute of limitations. The defendants argued that a four-year statute of limitations under Texas law applied. If the two-year limitations period did apply, the plaintiffs argued that the defendants violated the FDCPA's prohibition on using "any false, deceptive, or misleading representations or means in connection with the collection of any debt" including "the threat to take any action that cannot legally be taken." The district court held that 47 U.S.C. § 415(a) sets a two-year limitations period for actions by "carriers" to recover charges, and that § 415(a) preempts any state statute of limitations. However, the district court also held that § 415(a) did not apply to the plaintiffs' debts. The district court stated that § 415(a) applied only to actions at law by carriers attempting to recover their lawful charges, which was interpreted to refer to "tariff" based charges. The district court also held that § 415(a) did not preempt statute of limitations under state law for actions regarding matters that were in this case, namely billing practices and disputes.
HOLDING: Affirmed.
REASONING: The threshold question was whether the four-year Texas statute of limitations or the two-year federal statute of limitations applied to the plaintiffs' debts. This was a question of preemption: whether Congress intended for the outcome of its policy decisions to replace that of a state legislature. The appellate court held that because Congress did not make it clear that it intended § 415(a) to preempt state statutes of limitations with regards to debt collection actions that are at issue in this case, § 415(a) did not apply to plaintiffs' debts. The Texas four-year statute of limitations applied.

The court began its analysis with the assumption that the police powers of states were not to be superseded by the Federal Act unless Congress made it clear and manifest that their purpose was to do so. The court then looked to the language of § 415(a) and found ambiguity as to the meaning of the term "lawful charges." Whether the statute of limitations was two years or four years depended on whether "lawful charges" included only tariffed charges or both tariffed charges and non-tariffed charges. Because there was ambiguity and no "clear and manifest purpose of Congress", the court held that Congress did not intend to preempt the "historic police powers of the states." Therefore, the debt collection companies did not violate the FDCPA because they did not threaten to sue on a time barred debt.

COURT DISCUSSES FDCPA ATTORNEY FEE AWARD

Hepsen v. Christensen & Assocs., Inc., 394 Fed. Appx. 597 (11th Cir. 2010).

FACTS: Ahmet Hepsen brought a suit against J.C. Christensen and Associates, Inc. under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692. Hepsen received only $500 in statutory damages out of the $3500 in total damages he sought. Because Hepsen prevailed, he filed a motion for an award of attorneys' fees under the FDCPA. Hepsen requested $54,273.50 in attorneys' fees for 165.5 hours of work—calculated at an hourly rate of $350. Notwithstanding Hepsen's request, the presiding magistrate judge awarded him $22,638.15. The magistrate judge's reduced figure came after considering the reasonableness of the rate and hours worked. She further reduced the fee award by ten percent in light of the outcome of the case. She determined the reasonable hourly rate was $300, and reduced the billable hours by fifty percent. The magistrate judge believed the hours to be excessive, the time entries to be vague, and the billing for co-counsel's service to be unnecessary.

Excessive, redundant, or otherwise unnecessary hours should be excluded from the amount claimed.

HOLDING: Affirmed.
REASONING: The court defined a reasonable hourly rate as "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988). In order to show a fee is reasonable, satisfactory evidence that goes beyond mere affidavits must be produced. The court ruled that the magistrate judge did not abuse her discretion because she considered the affidavits of both sides, fees in similar cases, and her own experience when she concluded a reasonable hourly rate was $300.

The magistrate judge decided the reasonable number of compensable hours was 82.8 hours, a fifty percent reduction from what Hepsen contended. The court noted, "excessive, redundant, or otherwise unnecessary hours should be excluded from the amount claimed." If a judge determines that the hours are unreasonably high, an across-the-board cut or an hour-by-hour analysis is permitted. In this instance, the magistrate judge performed an across-the-board cut. The court ruled that the magistrate judge did not abuse her discretion in making an across-the-board cut of compensable hours. The court found the number of hours claimed to be excessive and that at least half of the time entries were so vague that the court could not determine the service provided.

The court next considered the magistrate judge's decision to reduce the fee award by ten percent. "After the lodestar is determined by multiplication of a reasonable hourly rate times hours reasonably expended, the court must next consider the necessity of an adjustment for results obtained." Hepsen only achieved partial success, because, although he sought statutory, actual, and punitive damages, he ultimately only recovered a portion of the statutory damages sought. "If the result was partial or limited success, then the lodestar must be reduced to an amount

that is not excessive." Accordingly, the court determined the magistrate judge did not abuse her discretion in concluding that a ten percent reduction was appropriate in light of the results obtained.

DEBTOR COLLECTOR MAY BE LIABLE UNDER FDCPA FOR VENUE VIOLATION

Hess v. Cohen & Slamowitz LLP, 637 F.3d 117, (2nd Cir. 2011).

FACTS: Cohen & Slamowitz, LLP ("C & S") brought a debt collection action against Jonathan Hess in Syracuse City Court. Hess obtained dismissal of the action under the New York Uniform City Court Act ("UCCA"), because he did not live in Syracuse or in a town contiguous with it, as stipulated by the UCCA. Hess then sued C & S under the Fair Debt Collection Practices Act for violating its venue provision by suing him in a city court that lacked the power to hear the case.

The United States District Court for the Northern District of New York dismissed Hess's complaint under Fed. R. Civ. P. 12(b)(6), citing the "common law within the Second Circuit" interpreting the term "judicial district" in the FDCPA as "county." Hess appealed.

HOLDING: Vacated and Remanded.

REASONING: The sole issue on appeal for the court was whether C & S brought an action in the same "judicial district or similar legal entity" where Hess resided. The court first looked to the meaning of "judicial district" with regard to the plain language of the statute and concluded that Congress meant it to be some territorial subdivision of the courts, defined with respect to the state court system of New York. The court noted that defining "judicial district" as "county" was erroneous because C & S did not sue Hess in county court, but rather in the City of Syracuse. Because the New York state court system based territorial jurisdiction on a defendant's contact with the forum, the court ruled that a "judicial district" extended no farther than the boundaries of the city containing the court or contiguous cities. The court noted that the FDCPA's venue requirements restrict debt collectors from suing on debts in judicial districts remote from where the consumer lives. The court cited Section 213 of the UCCA where state law outlines the required nexus between the residence of the consumer and the location of the court, rendering invalid C&S's argument that lack of jurisdiction was different from a FDCPA venue violation. With regard to the lower court's "common law" interpretation, the court distinguished several cases that fell under various district courts within the Second Circuit, concluding none of these cases properly concluded that "judicial district" meant "county." The court took no position on whether C & S would be able to assert bona fide error as an affirmative defense.

Because the New York state court system based territorial jurisdiction on a defendant's contact with the forum, the court ruled that a "judicial district" extended no farther than the boundaries of the city containing the court or contiguous cities.

DEBT COLLECTOR DID NOT ESTABLISH "BONA FIDE ERROR" DEFENSE

Owen v. I.C. System, Inc., 629 F.3d 1263 (11th Cir. 2011).

FACTS: Kendra Owen filed an action claiming violations of the Fair Debt Collection Practices Act by I.C. System, Inc. ("ICS"). Owen obtained veterinary services from All About Animals Veterinary Services, P.C. ("AAA") and signed a promissory note to repay her bill in installments with an agreement that interest would be attached for delinquent payments. After Owen missed payments, AAA imposed the interest plus more fees that Owen had not agreed to and forwarded debt collection to ICS who notified Owen of her balance. Owen disputed the balance, claiming ICS had violated the FDCPA by seeking payment of unearned interest. ICS sought to use the "bona fide error" affirmative defense under 15 U.S.C. §1692k(c), claiming their lack of knowledge of AAA's improper fees barred them from liability as long as ICS procedures were reasonably adapted to avoid error. Owen claimed that the Supreme Court's decision in *Jerman v. Carlisle*, 130 S.Ct. 1605, (2010), precluded ICS from using such a defense, but the U.S. District Court for the Northern District of Georgia granted summary judgment for ICS based on the defense. Owen appealed.

HOLDING: Reversed and Remanded.

REASONING: The court ruled that while *Jerman* did not foreclose a debt collector's bona fide error defense, ICS was unable to use that defense here. The FDCPA typically subjects debt collectors to strict liability unless they can prove their action was (1) not intentional, (2) was a bona fide error, and (3) occurred despite the maintenance of procedures reasonably adapted to avoid such errors. These three elements constituted a bona fide error defense. In *Jerman,* the Court concluded that the procedures adapted to avoid errors that a given debt collector undertook only referred to clerical or factual mistakes, not mistakes or misinterpretations of law. Here, the unearned interest on the bill was a factual, not legal error, so ICS was not barred from using the defense.

However, in order to prove the ICS procedures were sufficient, the court relied on a two-step, fact-intensive inquiry: (1) did the debt collector actually employ procedures to avoid errors? and (2) were those procedures reasonably adapted to avoid the specific error in question? ICS claimed it had met this sufficiency through its suspension of collection efforts after receipt of Owen's contest of the bill and AAA documents to Owen, and through AAA's contractual obligation to ICS to provide accurate debt information. The court ruled that even though ICS did maintain procedures, it could not impose the responsibility of oversight to a creditor like AAA and thus failed to meet the last element of the bona fide error defense. ICS lacked any sort of internal controls and the mistakes were so facially apparent that the procedures could not be considered reasonably adapted, even though independent investigation is not required under the FDCPA. As a final note, the court reiterated that the third element of the defense is uniquely fact-bound, and should be judged on case-by-case basis.