

Class Action Defense Strategy Blog

Up-to-date information on class action litigation

SHEPPARD MULLIN

SHEPPARD MULLIN RICHTER & HAMPTON LLP

ATTORNEYS AT LAW

Class Action Defense Strategy Blog

Posted at 9:18 AM on April 21, 2010 by Sheppard Mullin

Seventh Circuit Affirms Dismissal Of Consolidated Class Actions Under The Fair Debt Collection Practices Act Based On Faulty Survey Evidence

By [Christopher Loveland](#)

In *DeKoven v. Plaza Associates* (No. 09-2016) and *Kubert v. Plaza Associates* (No. 09-2249), which were consolidated for decision, the United States Court of Appeals for the Seventh Circuit affirmed the dismissal of class actions brought under the Fair Debt Collection Practices Act regarding allegedly confusing dunning letters. In both cases, the District Court found that survey evidence offered by the plaintiffs' expert was flawed and entered summary judgment in favor of the defendant, Plaza Associates.

The plaintiffs were sent similar collection letters offering to settle their accounts from Plaza Associates, a well-known debt collection agency. The letters at issue in both cases stated that they were "valid for a period of thirty-five (35) days." Plaintiffs alleged that this statement implied that the letters were a final offer even though Plaza Associates was authorized to settle for a lesser amount by the creditors. The letter at issue in *Kubert* also included a paragraph demanding "satisfactory proof" if the recipient contended that the account was in error, which was allegedly misleading because it implied that the debtor must provide proof in order to dispute the claim.

15 U.S.C. § 1692e(10) prohibits a debt collector from "pretend[ing] that [a settlement offer] is final if it is not, in the hope that the debtor will think it is final." As the Seventh Circuit explained in *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 775-76 (7th Cir. 2007), the rule is difficult to implement because "the settlement process would disintegrate if the debt collector had to disclose the consequences of the consumer's rejecting his initial offer." For a court to determine that the statute has been violated, the plaintiff must present evidence showing that "a sufficiently large segment of the unsophisticated [debtors] are likely to be deceived." The most useful evidence of deception is a consumer survey.

Survey evidence also is indispensable for a plaintiff to demonstrate that debt collectors are

confusing debtors by “unacceptably increase[ing] the level of confusion.” Evidence that a debt collector should have added or deleted language from the dunning letter to make it clearer is necessary because, as noted by the court, “many unsophisticated consumers would be confused even if the letters they received contained nothing more than a statement of the debt and the statutory notice.”

The plaintiffs jointly retained an expert to conduct a consumer survey, which was used in both cases. One hundred sixty shoppers at a mall were interviewed for the survey. Eighty shoppers were shown the letter at issue in *Kubert*, which only materially differed from the letter in *DeKoven* in that it also included the “satisfactory proof” reference. The remaining eighty shoppers constituted the control group and were shown a letter without the allegedly improper language. Both groups were first orally asked questions about the letter and orally told that they had to choose between two answers. The respondents then were asked to fill out a card that contained the two orally presented answers as well as a third option: “don’t know/not sure.”

The “critical question” presented to the survey groups was what they “thought would happen if he or she didn’t accept the offer in the letter.” The Seventh Circuit found that, at first glance, the results of the survey “seem[ed] strongly to support the hypothesis that the letter to Kubert was misleading.” However, as found by the District Courts, the letter that was shown to the control group could be considered confusing. The control group letter lacked a deadline and did not include any language that the debt collector is not required to renew the offer. Additionally, sixty-six percent of the control group responded “don’t know/not sure” regarding whether or not they felt the offer would be renewed. If those responses are excluded from the survey, the control group only included twenty-seven people, which is too small a group to make a reliable extrapolation.

The question to the survey groups regarding the “satisfactory proof” language also created confusion. Fifty-six percent responded that they did not know whether or not the recipient of the letter could dispute the debt “without proof.” Because the control group letter did not include “the word ‘proof,’ it was natural for them to assume that the thing the word denotes was not required.” The Seventh Circuit also found that the question to the survey group was misleading because an answer in the affirmative “would imply that one can dispute a debt with unsatisfactory proof.”

Finally, the survey also was flawed because the “don’t know/not sure” response was omitted during oral questioning. The Seventh Circuit found that “the control letter was *so* confusing that most of the respondents in the control group may have grasped that option as a drowning man grasps at a straw.”

The court seemed troubled that many cases under the Fair Debt Collection Practices Act have encountered problems with survey evidence, and “invited” District Court judges to consider appointing their own experts to conduct surveys. Such an approach “is a possible alternative to the often unedifying spectacle of a battle of party-appointed experts.” The court was careful to note that appointing a neutral expert was entirely within a judge’s discretion.