

Firm's collection letter violated Fair Debt Act

1st Circuit adopts
'unsophisticated
consumer standard'

By Pat Murphy

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A North Attleborough law firm violated the Fair Debt Collection Practices Act when it sent a collection letter which included implied threats to sue that could have confused the debtor as to her statutory right to dispute the debt, the 1st U.S. Circuit Court of Appeals ruled in a 2-1 decision.

The court further recognized that collection letters from attorneys face heightened scrutiny under the FDCPA.

The defendant law firm argued that, because it had a legal right to commence a collection action against the debtor at any time, including during the 30-day period the FDCPA provides a consumer to dispute a debt, its implicit threats to sue could not be deemed a violation of the act.

But the court concluded that the collection letter violated §1692g(b) of the FDCPA, which requires that a debt collector's activities and communications "not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor."

Judge Bruce M. Selya said the majority "believe[d] that when Congress required a debt collector to give notice of this right and provided that conduct overshadowing the disclosure of such right shall not be undertaken, it prohibited conduct such as this — conduct that would dupe the unsophisticated consumer into believing that disputing a debt could not forestall a suit."

The 25-page decision is *Pollard v. Law Office of Mandy L. Spaulding*, Lawyers Weekly No. 01-240-14. The full text of the ruling can be found at masslawyersweekly.com.

Confusing collection letter?

The plaintiff debtor was represented by Sergei Lemberg of the consumer protection firm Lemberg Law in Stamford, Connecticut.

Lemberg was unavailable for comment, but an attorney in his office who handled the briefing in the case, Stephen F. Taylor, said one of the most significant aspects of the ruling is the 1st Circuit's adoption of the "unsophisticated consumer standard."

"The FDCPA is not meant to protect lawyers, it's supposed to protect regular people," Taylor said.

He added that the court sent a shot across the bow of debt collection attorneys who include threats to sue in their collection letters.

"If you are going to use these oblique, veiled or even express threats of suit, you are going to overshadow somebody's right [to dispute the debt]," Taylor said.

Scott Douglas Burke of Morrison Mahoney in Boston represented the defendant Law Office of Mandy L. Spaulding. Burke said he and his client are in the process of deciding whether to petition the court for a rehearing or rehearing en banc.

Burke noted that the majority seemed to acknowledge that the Spaulding firm's liability rested in large part on garbled language in its collection letter.

"I don't think that is the type of error the [FDCPA] was meant to penalize," Burke said. "The act is intended to go after those collectors who engage in harassment or unfair conduct. There's none of that in this case."

Burke also questioned the fact that the court was critical of his client's suggestion in its letter that it was prepared to sue immediately to collect the debt.



CHRISTOPHER SOMMA

"If the act gives you a right to file suit during that 30-day period [for disputing a debt], and you merely point that out to the recipient [of the letter], how is that violative of the act?" Burke asked. "The majority opinion goes too far in terms of restraining what the debt collector can write."

He also found fault with the court drawing a distinction between debt collectors who are lawyers and those who are not.

"That holding has only been applied to claims under §1692e that explicitly discuss collection efforts of attorneys," Burke said. "It is inappropriate to hold a lawyer's letter more likely to be violative under §1692g merely because it is written under a legal letter head. The statute doesn't provide for that distinction."

Christopher M. Lefebvre, a consumer protection attorney in Pawtucket, Rhode Island, said the suit was the result of a debt collector trying to be too creative in drafting its collection letter.

"The law firm seemed to suggest that it was going to start filing suit right away," Lefebvre said. "On the other hand, it told the consumer she had 30 days to dispute the debt. There's a conflict in those approaches."

Lefebvre said the decision is a good win for consumer protection lawyers in that the 1st Circuit has firmly established "some very clear guidelines on what letters are going to be acceptable and what letters cross the line."

But John J. O'Connor, a lawyer at Peabody & Arnold in Boston who has been doing FDCPA defense work for more than 20 years, called the ruling discouraging.

"This is tough decision," O'Connor said. "Essentially, the takeaway here for me is, if a law firm sends a collection letter to a debtor that

says it's going to pursue the matter unless it gets prompt payment, and the letter happens to have a typo in it, the firm has violated the statute. That's extraordinary."

O'Connor pointed out that there seemed to be no dispute in the case that the Spaulding firm's collection letter contained all the appropriate disclosures.

"But the decision still went against the law firm because some hypothetical unsophisticated consumer could possibly be misled by it," O'Connor said. "This decision is a wonderful boon to the plaintiffs' bar and very unfortunate for collection professionals."

Christopher J. Somma, a creditors' rights attorney at Goodwin Procter in Boston, said he took some comfort in the fact that the standard adopted by the 1st Circuit is actually less stringent than the "least sophisticated consumer" standard adopted by some other courts.

But Somma said he, too, is troubled by the court subjecting debt collecting attorneys to a heightened degree of scrutiny.

"The court is going to come down harder on attorneys than it will on lay debt collectors," Somma predicted.

FDCPA suit

In 2012, Debt Management, Inc., retained the defendant law firm to collect a \$612 debt allegedly owed by plaintiff Robbie Pollard. The law firm sent the plaintiff a collection letter typed on the firm's letterhead over the signature of attorney Mandy L. Spaulding.

The letter stated that the firm was "not inclined to use further resources attempting to collect this debt before filing suit." It went on to inform the plaintiff that the firm planned to collect the debt "through whatever legal means are available and without [the plaintiff's] cooperation" and that the firm was "obligated to [its] client to pursue the next logical course of action without delay."

Below the signature block and under the caption of "NOTICE OF IMPORTANT RIGHTS" were several paragraphs in smaller print ex-

CASE: *Pollard v. Law Office of Mandy L. Spaulding*, Lawyers Weekly No. 01-240-14

COURT: 1st U.S. Circuit Court of Appeals

ISSUE: Did a law firm violate the Fair Debt Collection Practices Act by sending a collection letter which included implied threats to sue that could have confused the debtor as to her statutory right to dispute the debt?

DECISION: Yes

plaining the plaintiff's rights under the FDCPA, including her rights to dispute and seek verification of the debt.

In connection with advising the plaintiff that she had the right to dispute the debt in writing within 30 days, the fine print included the grammatically garbled sentence, "We further inform you that despite the fact that you have a thirty (30) day period to dispute the debt may not preclude the filing of legal action against you prior to the expiration of the period."

According to Burke, the firm's lawyer, the inclusion of the word "despite" in the sentence was a drafting mistake.

After receiving the letter, plaintiff contacted the Spaulding firm to dispute and request verification of the debt. She subsequently filed suit in U.S. District Court, alleging that the firm violated the FDCPA by engaging in "overzealous collection tactics."

Judge Richard G. Stearns granted the plaintiff's motion for judgment on the pleadings, finding the firm's collection letter violated §1692g as a matter of law.

With the defendant law firm preserving its right to appeal, the parties agreed to entry of a judgment on the plaintiff's §1692g claim consisting of \$1,000 in damages and \$10,000 in attorneys' fees.

Overshadowed consumer rights

A threshold issue on appeal was from whose perspective a collection letter should be viewed for determining violations of the FDCPA, an open question in the 1st Circuit. Selya noted that a majority of the circuits applies a "least sophisticated" consumer standard.

However, the court decided to adopt the un-

sophisticated consumer standard followed by the 7th and 8th circuits.

"The standard protects 'all consumers, including the inexperienced, the untrained and the credulous,'" Selya wrote.

Selya proceeded to find that the collection letter sent by the Spaulding firm, when viewed through the eyes of the unsophisticated consumer, overshadowed or was inconsistent with

the validation notice in violation of §1692g(b).

"At bottom, the letter seems to threaten immediate litigation," Selya wrote. "We think that, implicit in this threat, is the idea that litigation can be avoided only if payment is made forthwith. That idea is reinforced by the fact that the letter appears on law firm letterhead and bears the signature of an attorney."

Critical to the court's finding that the Spaulding firm's collection letter violated the FDCPA was the grammatically incorrect sentence in the validation notice itself.

"With its hopelessly scrambled syntax, this sentence is easily read as suggesting that a lawsuit is going to proceed without delay whether the consumer disputes the debt or not," Selya said.

The court also found highly relevant the fact that the collection letter was sent by an attorney, following the 3rd Circuit's reasoning that attorney debt collectors "warrant closer scrutiny because their abusive collection practices are more egregious than those of lay collectors."

Senior Judge Bobby R. Baldock of the 10th Circuit, sitting by designation, dissented.

Baldock said there could be no violation of §1692g given that the law firm's letter did not explicitly demand immediate payment or payment sooner than 30 days and included the plaintiff's rights to dispute the debt and to request verification.

"The aspect of this letter most relied upon to hold a consumer would be confused about her right to dispute the debt is a sentence that reiterates a consumer has a right to dispute the debt," Baldock wrote. "I fail to discern the problem." MLW

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