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Are Litigating Attorneys Debt Collectors Under the Federal Fair Debt Collection Practices Act?

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by Tang Thanh Trai Le

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Congress enacted in 1977 the Federal Fair Debt Collection Practices Act (the "Debt Collection Act" or the "Act") to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses." 15 U.S.C. § 1692 (1988).

This case focuses on the scope of the definition of *debt collector* in the Act. The Debt Collection Act defines *debt collector* as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6) (1988). The act prohibits abusive and deceptive practices such as late night telephone calls to consumers, calls to consumers' employers, frequent calls, disclosure of debt to third parties, overstated threats of legal action, harassment, abuse, and threats of property seizure.

The Act, however, excludes certain persons falling under this definition from the requirements of the law. Originally, it excluded "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." As a result, creditors seeking to circumvent the requirements of the Act turned to attorneys. Despite the exclusion, in *FTC v. Shaffner,* 626 F.2d 32 (7th Cir. 1986), the Seventh Circuit held that an attorney who devoted his practice primarily to debt collection did not qualify for the exclusion solely because he possessed a license to practice law. The court ruled that attorneys remained liable under the Act when they functioned as debt collectors.

Congress amended the Debt Collection Act in 1986 to eliminate the exemption for attorneys. The amendment unquestionably brought attorneys within the scope of the Act when they devoted most of their practice to debt collection — for instance, when attorneys sent collection letters to debtors.

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GEORGE W. HEINTZ AND BOWMAN, HEINTZ, BOSCIA & MCPHEE v. DARLENE JENKINS
DOCKET NO. 94-367

ARGUMENT DATE:
FEBRUARY 21, 1995
FROM: THE SEVENTH CIRCUIT

Case at a Glance

In 1986 Congress amended the Fair Debt Collection Practices Act to include attorneys under the definition of *debt collector.* Now the Supreme Court is asked to determine if the law applies to attorneys suing debtors on behalf of clients, not just when they conduct debt-collection activities.

Debtors, however, began to bring suits alleging that attorneys also had to adhere to the requirements of the Act when they conducted litigation activities — for instance, when attorneys filed lawsuits against debtors on behalf of a client. In this case, the Supreme Court will decide if an attorney whose practice includes debt collection must adhere to the requirements of the Act when the debt collection occurs solely as part of a lawsuit.

ISSUE

Is an attorney litigating to collect a debt from a consumer on behalf of a client a *debt collector* within the meaning of the Federal Fair Debt Collection Practices Act?

FACTS

Darlene Jenkins obtained a loan to purchase an automobile from Gainer Bank of Gary, Indiana ("Gainer"), with the automobile serving as collateral. The loan agreement required Jenkins to buy insurance to "keep the collateral fully insured against loss or damage." If she failed to do so, Gainer could purchase the required insurance and add the cost to the amount of the loan.

When Jenkins defaulted on the loan payments and stopped buying insurance, Gainer purchased insurance and added the cost to the amount Jenkins owed. Gainer also hired George W. Heintz and the law firm of Bowman, Heintz, Boscia & McPhee ("Bowman") to file suit against Jenkins to recover the installment payments and insurance costs. After filing suit, Heintz wrote a letter to Jenkins' attorney seeking to settle the case. The letter detailed the insurance purchased by Gainer and expressed a desire "to reach some type of amicable practical resolution."

Jenkins responded by suing Heintz and Bowman for violating the Debt Collection Act. Jenkins alleged that the insurance purchased by Gainer and charged to her not only protected against damage and loss to the automobile but protected Gainer against the possibility of default by Jenkins. As a result, according to Jenkins, when Heintz and Bowman attempted to include the entire insurance cost in its suit and settlement efforts, they violated the Act. Specifically, Jenkins claimed that Heintz and Bowman violated a provision that prohibits adding an amount when attempting to collect a debt "unless such amount is expressly authorized by the agreement creating the debt as permitted by law." 15 U.S.C. § 1692f (1988). In this case, Jenkins alleged that the agreement only expressly authorized collection of the cost of insurance against loss or damage to the automobile; so, when Heintz and Bowman attempted to collect on a different insurance policy, they violated the Act. Jenkins' second claim asserted that the actions of Heintz and Bowman violated a provision of the Act barring "any false, deceptive or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e (1988).

The federal district court, in an unpublished opinion, dismissed Jenkins' suit, saying that the Debt Collection Act did not cover attorneys when they used litigation to collect debts. On Jenkins' appeal, the Seventh Circuit reversed, saying the Act as amended applied to attorneys engaged in debt-collection litigation. 25 F.3d 536 (7th Cir. 1994). The Supreme Court granted the petition for a writ of certiorari filed by Heintz and Bowman to review the scope of the Debt Collection Act as applied to attorneys. 115 S. Ct. 416 (1994).

CASE ANALYSIS

The federal circuit courts of appeal have disagreed over whether or not the Debt Collection Act covers attorneys engaged in debt-collection litigation. The Fourth Circuit and Ninth Circuit have agreed with the Seventh Circuit that the statute includes such attorneys. *See Fox v. Citicorp Credit Serv., Inc.*, 15 F.3d 1507 (9th Cir. 1994); *Scott v. James*, 964 F.2d 314 (4th Cir. 1992). The Sixth Circuit, on the other hand, has ruled that the Act does not apply to attorneys engaged solely in debt-collection litigation. *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993). This division is probably one reason the Supreme Court decided to hear the case.

Those who advocate including attorneys engaged in debt-collection litigation within the scope of the Act have emphasized the language of the statute itself. They have stressed that if the activities of attorneys relate to the collection of debt from a consumer, the attorneys will fall under the Act's definition of *debt collector* regardless of whether or not the attorneys acted pursuant to litigation.

These advocates place great emphasis on the 1986 amendment to the Act which removed the attorney exemption. Because the Act no longer specifically excludes attorneys from its scope, they argue that the Act no longer distinguishes in any way between attorneys and other debt collectors.

Courts ruling that the Debt Collection Act covers attorneys essentially end their analysis at this point, saying that if the plain language of the Act covers these actions, courts should not resort to any other sources, including legislative history, to attempt to determine its meaning. Jenkins argues, though, that even if the Court looks to the legislative history of the statute in order to ascertain whether or not it covers litigating attorneys, that history confirms that the Act, as amended, was intended to include

attorneys engaged in debt-collection litigation.

Jenkins points to a suggested modification to the 1986 amendment proposing that the Act continue to exempt attorneys "providing professional legal services." Leonard O. Abrams, Testimony on Behalf of the Commercial Law League of America, 90 COMM. L.J. 650, 651 (1985). This proposal, along with other proposals to limit the exposure of attorneys to the provisions of the Act, did not receive congressional approval. Jenkins asserts that this means that Congress specifically contemplated that attorneys engaged in debt-collection litigation were covered by the Act and must refrain from the practices it prohibits. Jenkins also argues that Congress intended to cover the debt-collection litigation activities of attorneys because self-regulation by bar associations had proven ineffective.

Opponents of extending the Debt Collection Act to attorneys conducting debt-collection litigation contend that the plain language of the statute does not conclusively encompass attorneys engaging in such litigation. They stress that the definition of *debt collector,* while referring to the "collection of any debts," does not indicate what activities relate to the collection of debts. Thus, in order to determine the meaning of the statute, its contextual background must receive examination.

The legislative history of the 1986 amendment, according to those who oppose extending the Act to litigating attorneys, shows a clear intent to exclude the activities of attorneys with regard to debt-collection litigation. In *Green,* 9 F.3d at 18, a case involving an attorney sued for filing a lawsuit misstating the amount of the debt by $100, the Sixth Circuit pointed to the stated intent of Congress when it enacted the statute in 1977 — to regulate debt-collection activities per se, not litigation activities. The court referred, as do Heintz and Bowman, to remarks entered into the Congressional Record by Representative Frank Annunzio (D-Ill.), who introduced the amendment striking the attorney exemption. Commenting three months after the bill's passage, Representative Annunzio stated that the amended Act applied "to attorneys when they are collecting debts, not when they are performing tasks of a legal nature." 132 Cong. Rec. H10031 (1986).

Opponents of applying the Act to attorneys engaged in debt-collection litigation also stress the interpretation given the 1986 amendment by the Federal Trade Commission ("FTC"), the agency that enforces the statute. After the 1986 amendment, the FTC issued a staff memorandum which stated, "Attorneys or law firms that engage in traditional debt collection activities . . . are covered by the Act, but those whose practice is limited to legal activities are not covered." 53 Fed. Reg. 50097, 50100 (1988). While the FTC interpretation does not bind courts, courts may look to it for guidance.

Heintz and Bowman have warned that interpreting the Debt Collection Act to cover attorneys engaged solely in litigation activities would lead to absurd results. Following the reasoning of the Sixth Circuit, they argue that if the law extended so far, the Act's provision barring further communication regarding the debt upon the consumer's request, 15 U.S.C. § 1692c(c) (1988), would mean that attorneys could not continue to prosecute lawsuits once a consumer requested that communications cease. They also argue that the provision subjecting debt collectors to liability for threatening "to take any action that cannot legally be taken," 15 U.S.C. § 1692e(5) (1988), would subject attorneys to liability whenever they took a position that did not succeed in court.

Finally, Heintz and Bowman stress that other law adequately regulates abusive actions by attorneys engaged in debt-collection litigation. In particular, they point to court rules forbidding attorneys from filing lawsuits not "well-grounded in fact" or "warranted by existing law, or a good faith argument for the extension, modification or reversal of existing law." *See, e.g.,* Fed. R. Civ. P. 11. Given these enforcement mechanisms, they maintain that there is no need to interpret the Act to regulate abusive practices by attorneys with regard to debt-collection litigation.

The Supreme Court will have to draw two conclusions in order to hold that the Act does not cover litigation activity like that conducted by Heintz and Bowman. First, it must decide that the amended Act still does not reach the *purely legal* activities of attorneys as opposed to their debt-collection activities. Second, it must rule that the activities engaged in by Heintz and Bowman — filing the lawsuit and writing the letter to Jenkins' attorney in an attempt to settle — constituted such *purely legal* activities and not the acts of a *debt collector* as defined by the Act.

SIGNIFICANCE

If the Supreme Court affirms the decision of the Seventh Circuit, thus finding for Jenkins, attorneys who litigate cases involving collection of debts may find themselves subject to liability for communications with the consumer or the consumer's attorney regarding the litigation. Furthermore, these attorneys would face personal liability for any violations of the Act in conducting debt-collection litigation. If, however, the Court reverses, thus finding for Heintz and Bowman, the collective sigh of relief from the legal community might well be audible.

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ARGUMENTS

For George W. Heintz and Bowman, Heintz, Boscia & McPhee (Counsel of Record: D. Kendall Griffith; Hinshaw & Culbertson; 222 North LaSalle Street, Suite 300, Chicago, IL 60601-1081; (312) 704-3000):

1. The plain language of the statutory definition of *debt collector* does not include attorneys engaged in the prosecution of consumer-debt litigation.
2. The legislative history, the interpretation of the Federal Trade Commission, and the structure of the Federal Fair Debt Collection Practices Act all support an interpretation that attorneys engaging in debt-collection litigation are not *debt collectors.*
3. State and federal courts already have procedures for regulating abusive activities by attorneys in litigating consumer debts.

For Darlene Jenkins (Counsel of Record: Joanne S. Faulkner; 123 Avon Street, New Haven, CT 06511; (203) 772-0395):

1. The plain language of the Federal Fair Debt Collection Practices Act, after unqualified repeal of the attorney exemption, is unambiguous and, accordingly, an attorney who regularly collects consumer debts is a *debt collector.*
2. The legislative history of the 1986 amendment confirms the plain language of the Act.
3. The repeal of the attorney exemption does not lead to absurd results.

AMICUS BRIEFS

In support of George W. Heintz and Bowman, Heintz, Boscia & McPhee

American Bar Association (Counsel of Record: George E. Bushnell, President, American Bar Association; 750 Lake Shore Drive, Chicago, IL 60611; (312) 988-5000);

Commercial Law League of America (Counsel of Record: Manuel H. Newburger; Barron & Newburger; 900 Congress Avenue, Suite 200, Austin, TX 78701; (512) 476-9103);

National Association of Retail Collection Attorneys (Counsel of Record: Ronald S. Canter; 7272 Wisconsin Avenue, 4th Floor, Bethesda, MD 20814-4838; (301) 951-8500).

In support of Darlene Jenkins

Sherry Ann Edwards, a consumer (Counsel of Record: Andrew Rosen; Stone, Sheefy, Rosen & Byrne; 1881 9th Street, No. 105, Boulder, CO 80302; (303) 442-0802);

Joint brief of National Consumer Law Center, American Association of Retired Persons, and the Legal Assistance Foundation of Chicago (Counsel of Record: Robert J. Hobbs; National Consumer Law Center; 18 Tremont Street, Boston, MA 02108; (617) 523-8010).