

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

No. 96- 15995

SHAROLYN CHARLES, Plaintiff - Appellant

v.

CHECK RITE, LTD., INC., LUNDGREN & ASSOCIATES, p.c.,  
and ALVIN R. LUNDGREN, Defendants - Appellees

On Appeal from the  
United States District Court for  
the District of Arizona

BRIEF FOR AMICUS CURIAE FEDERAL TRADE COMMISSION

STEPHEN CALKINS  
General Counsel

JAY C. SHAFFER  
Deputy General Counsel

ERNEST J. ISENSTADT  
Assistant General Counsel  
Federal Trade Commission  
6th & Pennsylvania Ave., N.W  
Washington, D.C. 20580  
(202) 326-2473

TABLE OF CONTENTS

B. In Enacting the FDCPA, Congress Understood and Intended that

<u>West v. Costen</u> , 558 F. Supp. 564 (W.D. Va. 1983) .....	12
<u>Zimmerman v. HBO Affiliate Group</u> , 834 F.2d 1163 (3d Cir. 1987) .....	12-14

STATUTES:

Ariz. Rev. Stat. Ann. § 47-3310 .....	5
Consumer Credit Protection Act, 15 U.S.C. §§ 1601 et seq. ....	13
Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-1693r .....	13
Fair Debt Collection Practices Act, 15 U.S.C. § 1692-1692n:	
15 U.S.C. § 1692(a) .....	17
15 U.S.C. § 1692(c) .....	3, 17
15 U.S.C. § 1692(e) .....	17
15 U.S.C. § 1692a(3) .....	5
15 U.S.C. § 1692a(5) .....	5
15 U.S.C. § 1692a(6) .....	4
15 U.S.C. §§ 1692b-i .....	4
15 U.S.C. § 1692k .....	4
15 U.S.C. § 1692k(e) .....	14
15 U.S.C. § 1692l(a) .....	1, 14
15 U.S.C. § 1692l(c) .....	14
15 U.S.C. § 1692l(d) .....	14
15 U.S.C. § 1692m.....	1
Federal Trade Commission Act:	
Section 5(a), 15 U.S.C. § 45(a) .....	1

LEGISLATIVE MATERIALS

H.R. 13720, 94th Cong., 2d Sess. (1976).....	7
H.R. 29, 95th Cong., 1st Sess. (1977).....	7
H.R. Rep. No. 131, 95th Cong., 1st Sess. (1977).....	6, 7
S.Rep. No. 382, 95th Cong., 1st Sess., <u>reprinted in</u> 1977 U.S.C.C.A.N.	
1695 .....	7-8, 10
<u>Hearings Before the Subcomm. on Consumer Affairs of the House</u>	
<u>Comm. on Banking, Finance and Urban Affairs on H.R. 29, 95th</u>	
<u>Cong., 1st Sess. (1977) .....</u>	8-9
<u>Hearings Before the Subcomm. on Consumer Affairs of the Senate</u>	

The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692n ("FDCPA" or "Act"), under which this case arises, is premised on the congressional belief that "every individual, whether or not he owes the debt, has a right to be treated in a reasonable and civil manner,"





a limitation of the FDCPA to credit transactions, and it appears from the court's opinion that it did not consider the House Report or other relevant legislative sources cited above in reaching its result.(11) As other courts have recognized, the critical distinction posed by the facts in Zimmerman was not the absence of an extension of credit by the cable companies, but the absence of any consensual "transaction" between the parties whatsoever. See Shorts v. Palmer, 155 F.R.D. 172, 175-76 (S.D. Ohio 1994) (collection of shoplifting debt not covered because "[p]laintiff has never had a contractual arrangement of any kind with any of the defendants. The defendants did not extend him credit or engage in any other transaction with him") (emphasis added).(12) Zimmerman's statement that the FDCPA is limited to credit transactions is, in any event, pure dictum as applied to the present case -- and unpersuasive dictum as well, for the reasons stated above.

In sum, no court of appeals has yet considered whether dishonored check collection is covered by the FDCPA. However, those district courts presented with FDCPA suits involving dishonored checks have, in predominant measure, either held or proceeded on the clear assumption that dishonored check collection is covered by the FDCPA.

#### **D. Consistent Administrative Practice Has Treated Collection of Dishonored Checks as Covered by the FDCPA.**

In performing its statutory responsibilities under the FDCPA, the Federal Trade Commission and its staff have taken the position from the Act's inception that it covers collection of dishonored checks.(13)

written because the consumer misinterprets the bank's policy regarding crediting deposits or honoring overdrafts. See Pearce v. Rapid Check Collections, Inc., 738 F. Supp. 334, 336 (D.S.D. 1990). In other cases involving dishonored checks, consumers may have valid defenses that the FDCPA is designed to let them assert. See McGilvray v. Hallmark Financial Group, Inc., 891 F. Supp. 265 (E.D. Va. 1995) (FDCPA plaintiff dunned for presentation of an insufficient check alleged that she had paid her account in cash). Some targets of dishonored check collection are themselves the victims of check fraud, such as the Vermont consumer whose story was told in congressional hearings (n. 5, supra) and the plaintiff in Byes v. Credit Bureau Enterprises, (n. 10, supra). In still other cases, checks are dishonored because consumers deliberately stop payment on them in the face of seller nonperformance. See Johnson v. Statewide Collections, Inc., 778 P. 2d 93 (Wyo. 1989) (plaintiff paid for rifle with a check; returned the rifle the following morning as defective and demanded return of the check; stopped payment on the check when the store refused to return it; and was subsequently harassed for the check balance and substantial additional charges). And some consumers are unlucky, careless, or irresponsible in the management of their personal finances and find themselves, like the plaintiff here, subjected to claims out of all proportion to the underlying debt.

The Commission holds no brief for individuals who deliberately pass worthless checks. But the remedy for such abuses, when they occur, lies in public enforcement of applicable criminal laws and private enforcement of parallel civil remedies, not in a special license for debt collectors to harass alike the guilty, the careless, the unfortunate, and those who do not owe a debt at all. Congress has chosen to establish in the FDCPA uniform national standards of conduct for third-party debt collectors, and the policy and purpose of the Act warrant treating the collection of dishonored checks no differently from the collection of other consumer obligations.

#### CONCLUSION

A3(teC)-3dy )T12-T \$0, Fw32673-0T 06)Tj EA 1MS4P <MCM05, DžúBDC 4r bcr 7A"503501.76 71088 11008 re f\* BT 0 scn /TT0 1



I hereby certify that on August 30, 1996, I served the "Brief for Amicus Curiae Federal Trade Commission" by causing two copies to be sent by first-class mail, postage prepaid, to counsel below:

Kevin J. Parker, Esq.  
SNELL & WILMER  
One Arizona Center  
400 E Van Buren  
Phoenix, Arizona 85004-0001

Mark Alan Tucker, Esq.  
LAW OFFICES OF J. MARK HELDENBRAND  
2720 E Thomas Rd.  
Bldg. A  
Phoenix, Arizona 85016

Alvin R. Lundgren, Esq.  
LUNDGREN & ASSOCIATES  
11290 Point East Drive, Ste. 210  
Rancho Cordova, California 95742-6243

Daniel A. Edelman, Esq.  
Beth I. Solomon, Esq.  
EDELMAN & COMBS  
135 S. LaSalle St.  
Suite 2040  
Chicago, Illinois 60603

Ernest J. Isenstadt

1. Defendant Lundgren himself appears to have recognized this fact at one stage of the proceedings. His first letter to the plaintiff recited, inter alia, that "[t]his is an attempt to settle an obligation which may be considered a debt under 15 U.S.C. 1692" (Complt., Exh. C).

2. After passage by the full House of Representatives, H.R. 5294 was referred to the Senate Banking Committee, which substituted the text of its bill for H.R. 5294. This substitute bill subsequently was passed by both houses. See S. Rep. No. 382, 95th Cong. 1st Sess. 1, reprinted in 1977 U.S.C.C.A.N. 1695, 1695-96. However, the definition of "debt" in both House and Senate versions was materially the same. The House bill defined "debt" to mean "any obligation of an individual to pay money arising out of a transaction in which the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes." H.R. Rep. No. 131 at 17. As comparison with the final version reveals, the Senate retained the basic structure of the definition, but modified the text to make clear that it included "alleged" obligations and collection on judicial judgments. In contrast, some versions of the FDCPA that were introduced earlier defined "debt" to mean an obligation arising out of a transaction "in which credit is offered or extended to an individual," see, e.g., H.R. 13720, 94th Cong., 2d Sess. (1976); H.R. 29, 95th Cong., 1st Sess. (1977), but, as noted, all reference to "credit" was omitted from the final House and Senate bills.

3. See Hearings Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Finance and Urban Affairs, on H.R. 29, 95th Cong., 1st Sess. at 257-61 (1977) (statement of John W. Johnson, Executive Vice-President, American Collectors Association, Inc.).

4. Id. at 184-215.



