TABLE OF AUTHORITIES

CASES:

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Heintz v. Jenkins, 115 S. Ct. 1489 (1995)
Holmes v. Telecredit Service Corp., 736 F. Supp. 1289 (D. Del. 1990)

Practices that contravene the FDCPA constitute "unfair or deceptive act[s] or practice[s] in violation" of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and the Commission may exercise all of its "functions and powers" under the FTC Act to enforce the FDCPA. 15 U.S.C. § 1692l(a). The Commission also reports annually to Congress regarding its administration of the FDCPA, including an assessment of the extent to which compliance with the FDCPA is being achieved, a summary of the Commission's enforcement actions, and any recommendations for change that the Commission believes appropriate. 15 U.S.C. § 1692m.

At issue in the present case is whether the FDCPA applies to third-

The FDCPA applies to third-party collection of obligations that arise out of consumer purchases of goods or services, or consumer loans. The FDCPA imposes various restraints upon the activities of third-party "debt collectors," see 15 U.S.C. §§ 1692b-i, 1692k, and defines "debt collector" to mean:

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). The FDCPA defines "debt" to mean:

any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

[redacted]

The Third Circuit's decision in Zimmerman v. HBO Affiliate Group, 834 F.2d 1163 (3d Cir. 1987), on which the district court below relied for its conclusion, did not involve check collection at all and is not on point. Zimmerman held that the FDCPA does not apply to third-party efforts to collect tort damages allegedly due cable companies as the result of a consumer's allegedly unauthorized interception of their microwave television signals. In reaching this unexceptionable result, the court suggested the concept of "credit" (which the court defined as the right to "defer payment") as a means of distinguishing the theft of microwave signals from the purchase of cable services and other consumer transactions. 834 F.2d at 1168-69. However, as explained in the preceding sections of this brief, neither the legislative history nor statutory text supports 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.(9) 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 Bass v.Stolper, slip op. at 8-9; 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)).(10) 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, the only court of appeals to consider whether dishonored check collection is covered by the FDCPA has ruled in favor of coverage, and 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 their statutory responsibilities under the FDCPA, the Federal Trade Commission and its staff have consistently and unvaryingly concluded from the Act's inception that it covers collection of dishonored checks.(11) In the Act’s early years, the Commission pursued suits and obtained judgments for civil penalties against firms that allegedly violated the FDCPA in collecting on dishonored checks. E.g., United States v. Collectron, Civ. No. JH-80-711 (D. Md. Mar. 27, 1980); United States v. Telecheck, Inc., Civ. No. JH-80-710 (D. Md. Mar. 27, 1980). The 1988 Official FTC Staff Commentary on the FDCPA, 53 Fed. Reg. 50097 (Dec. 13, 1988), also concludes that collection of dishonored checks is covered by the Act.(12) More recently, the Commission itself has affirmed this interpretation in a letter ruling denying a petition to quash compulsory process filed by the targets of a Commission investigation to determine whether violations of the FDCPA had occurred in the collection of dishonored checks. SeeFederal Trade Commission Letter Ruling Denying Petition to Quash Civil Investigative Demands, Lundgren & Associates, FTC File No. 952-3127, [1990-96 Transfer Binder] Consumer Credit Guide (CCH) ¶ 95,295 at 83,711-12 (Apr. 30, 1996).

The Commission’s consistent, longstanding, construction of the FDCPA to cover collection of dishonored checks arising from consumer transactions, supported by both statutory text and legislative history, is a further consideration that weighs in favor of plaintiff’s position. See Bass v. Stolper, slip op. at 11 n.8.

E. The Public Policy Reflected in the FDCPA Dictates Treatment of Dishonored Check Collection in the Same Fashion as Collection of Other Consumer Debts.

The public policy relevant to construing the FDCPA is that stated expressly by Congress in the statutory preamble, e.g., that "[t]here is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," 15 U.S.C. § 1692(a); that such practices "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy," id.; that "[m]eans other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts," 15 U.S.C. § 1692(c); and that "those debt collectors who refrain from using abusive debt collection practices [should not be] competitively disadvantaged," 15 U.S.C. § 1692(e).

Each of these stated statutory purposes applies no less forcefully to third-party check collection than to third-party collection of other types of consumer debt. The abusive practices that the FDCPA prohibits may be applied as readily to collection of dishonored checks as to other types of debt collection, and the consequences for the debtor from the exercise of disproportionate remedies may be just as great. Likewise, there are lawful means to collect dishonored checks, and there is no evident reason why those who refrain from the abusive tactics addressed by the FDCPA in collecting dishonored checks should be competitively disadvantaged.

Case law since passage of the FDCPA confirms that debts arising from dishonored checks, and the collection activities resulting therefrom, implicate the same range of concerns as debts that arise from default on installment obligations. For example, collection actions against some consumers may stem from different consumers' use or misuse of a joint account, the situation posed in Bass v. Stolper. Sometimes insufficient fund checks are 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. 4, supra) and the plaintiffs in Johnson v. CRA Security Systems, 1997 U.S. Dist.Lexis (N.D. Cal. 1997), and Johnson v. GC Services, Inc., 1997 U.S. Dist. Lexis 5926 (N.D. Cal. 1997), who were dunned for checks that had been stolen from them and forged. 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 subjected to claims out of all proportion to the underlying debt and to misleading threats of suit.(13)

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. The policy and purpose of the Act warrant treating the collection of dishonored checks no differently from the collection of other consumer obligations.

CONCLUSION

May, 1997

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 1997, 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:

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(1) In marked contrast to the definition of "debt" adopted by House and Senate, some proposed versions of the FDCPA that were introduced earlier had 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). Thus Congress was clearly aware of the means by which it could have limited "debt" to "credit" transactions, but eschewed that alternative. See Bass v. Stolper, slip op. at 10.

(2) 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.).

(3) Id. at 184-215.

Schrimpsher, the district court was apparently not apprised of any of these cases when it made its decision. See slip op. 2 n.1. Cases denying coverage include Sarver v. Capital Recovery Associates, Inc., 951 F. Supp. 550 (E. D.Pa. 1996); and by apparent implication, Cederstrand v. Landberg, 933 F. Supp. 804 (D. Minn. 1996); and Adams v. Law Offices of Stuckert & Yates, 926 F. Supp. 521 (E.D. Pa. 1996).

(8) See, e.g.,Stewart v. Slaughter, 165 F.R.D. 696 (M.D. Ga. 1996) (recipient of threat to sue for dishonored check satisfies typicality requirements for FDCPA class action); Edwards v. National Business Factors, Inc., 897 F. Supp. 455 (D. Nev. 1995); Bakumirovich v. Credit Bureau of Baton Rouge, Inc., 155 F.R.D. 146 (M.D. La. 1994); Pearce v. Rapid Check Collection, Inc., 738 F. Supp. 334 (D.S.D. 1990); Holmes v. Telecredit Service Corp., 736 F. Supp. 1289 (D. Del. 1990) (third-party check collection service is "debt collector" within meaning of FDCPA); Taylor v. Checkrite, Ltd., 627 F. Supp. 415 (S.D. Ohio 1986); West v. Costen, 558 F. Supp. 564, 571 (W.D. Va. 1983).

(9) The court in Zimmerman did rely on the fact that Congress enacted the FDCPA as an amendment to the Consumer Credit Protection Act, 15 U.S.C. §§ 1601 et seq. ("CCPA"), but that fact alone provides no reason to read into the FDCPA's broad definition of "debt" a limitation that is nowhere expressed and that was specifically rejected by the House Committee that fashioned the definition. See Mace v. Van Ru Credit Corp., 109 F.3d 338, 343 (7th Cir. 1997). Indeed, other portions of the CCPA also regulate non-credit transactions. See 15 U.S.C. §§ 1693-1693r ("Electronic Fund Transfer Act," enacted as Title IX of the CCPA); Bass v. Stolper, slip op. at 12-14.

(10) In denying FDCPA coverage for non-consumer debts, other Circuits, too, have focused on the absence of a "transaction" or a "consumer" relationship between the obligor and obligee. Bloom v. I.C. Systems, Inc., 972 F.2d 1067, 1068 (9th Cir. 1992) (FDCPA "applies to consumer debts and not business loans"); see also Mabe v. G.C. Servs. Ltd. Partnership, 32 F.3d 86, 88 (4th Cir. 1994) (child support obligations not FDCPA "debts" because not incurred to receive consumer goods or services).

(11) Although Congress expressly provided that neither the Commission nor any other agency could promulgate rules "with respect to the collection of debts by debt collectors as defined in this subchapter," 15 U.S.C. § 1692l(d), Congress did assign the Commission numerous responsibilities that require the Commission to interpret the FDCPA, including the responsibility to enforce the Act in both judicial and administrative proceedings, 15 U.S.C. §§ 1692l(a), (c), and the authority to issue advisory opinions (good faith action in reliance on which immunizes a debt collector from civil liability), 15 U.S.C. § 1692k(e).

(12) The Commentary states (53 Fed. Reg. at 50102):

- Unpaid taxes, fines, alimony, or tort claims, because they are not debts incurred from a "transaction (involving purchase of) property * * * or services * * * for personal, family or household purposes."
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