13-2742 (L)

13-2747 (CON) and 13-2748 (CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MONIQUE SYKES, et al., individually and on behalf of all other similarly situated,
Plaintiffs-Appellees,

v.

MEL S. HARRIS AND ASSOCIATES LLC, et al.,
Defendants-Appellants,
and
MEL HARRIS JOHN/JANE DOES 1-20, et al.,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE CONSUMER FINANCIAL PROTECTION BUREAU
AND FEDERAL TRADE COMMISSION
AS AMICI CURIAE SUPPORTING PLAINTIFFS-APPELLEES

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INTRODUCTION

Pursuant to Fed. R. Civ. P. 29(a), the Consumer Financial Protection Bureau respectfully submits this brief to address the scope of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq.[1] The Bureau is joined in this brief by the Federal Trade Commission.

The Bureau and Commission have significant regulatory authority with respect to the Act. Together with other federal agencies, the Bureau and Commission enforce the FDCPA. 15 U.S.C. § 1692l. In addition, the Bureau has authority to issue advisory opinions interpreting the Act. 15 U.S.C. § 1692k(e). Congress also granted the Bureau authority to "prescribe rules with respect to the collection of debts by debt collectors"—a power no agency previously had. 15 U.S.C. § 1692l(d). The Bureau and Commission therefore have a substantial interest in ensuring the proper interpretation of the Act.

Defendants ask this Court to adopt a sweeping exclusion from the FDCPA's coverage for "communications made either to third parties not affiliated with the debtors that the statute seeks to protect, or in circumstances otherwise having no chance of debtor deception." See Leucadia Br. at 35. But the plain text of the two provisions of the Act most directly at issue here, 15 U.S.C. §§ 1692e and 1692f, contains no such limitation. Section 1692e states that "[a] debt collector may not use

[1] The government expresses no view here regarding the class certification issues under Federal Rule of Civil Procedure 23.

any false, deceptive, or misleading representation or means in connection with the collection of any debt." Section 1692f provides, without limitation,

PERTINENT STATUTES

Pertinent statutes are reproduced in the addendum.

STATEMENT

I. STATUTORY BACKGROUND

Congress enacted the FDCPA in 1977 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." Pub. L. No. 95-109, § 802, 91 Stat. 874, 874 (1977) (codified at 15 U.S.C. § 1692); see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 577 (2010). Congress found that such abuses had "contribute[d] to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." Id. § 802(a). It also determined that "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers." Id. § 802(b). The FDCPA focuses on improper collection practices and does not distinguish between debts that are actually owed and those that are not. See, e.g., id. § 1692e; § 1692f; see also Keele v. Wexler

collection industry than any other. See Debt Collection (Regulation F), 78 Fed. Reg. 67848, 67851 (Nov. 12, 2013) (advanced notice of proposed rulemaking).[2] And since July 1, 2013, about thirty percent of all consumer complaints the Bureau has received have been about the debt collection industry.

The FDCPA is a key federal statute protecting these consumers. To effectuate its purposes, the Act prohibits a broad range of practices pertaining to the collection of consumer debts by debt collectors. *See generally* 15 U.S.C. §§ 1692-1692j. Two such prohibitions are most relevant here. First, the Act prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt

and a process serving agency and its employees. SA3-SA4. Plaintiffs allege that defendants engaged in an unlawful scheme to obtain default judgments against the plaintiffs in debt-collection actions in New York City civil court. SA4-SA6. After obtaining these default judgments, the defendants

judgments in tens of thousands of lawsuits every year, service of process in the majority of those lawsuits is allegedly done by only a handful of individual process servers." Ibid. Indeed, the district court found that "[r]ecords maintained by

Plaintiffs allege that the affidavits of merit were also false. SA5. Each of the affidavits of merit was drafted by a single affiant, and stated that the affiant "'maintain[ed] the daily records and accounts in the regular course of business, including records maintained by and obtained [from assignor]," and was "thereby fully and personally familiar with, and [had] personal knowledge of, the facts and proceedings relating to the within action." JA164–JA165; SA7–SA8. But according to plaintiffs, the affidavits were purposely drafted in this manner in order to give court personnel the impression that [the debt collectors] have met the statutory requirements for obtaining a default judgment, when in fact, [they have] not and cannot meet these requirements." JA156. Indeed, the district court found that the affiant "sign[ed]

alleged conduct was "false, deceptive or misleading" under 15 U.S.C. § 1692e, and "unfair or unconscionable" under § 1692f. JA118-JA120. The district court explained that "[p]laintiffs do not merely allege that the . . . defendants 'lack physical evidence of the debt,' but that they knowingly authorized [the filing of] false affidavits of merit misleading both the Civil Court and consumer-defendants—to secure default judgments." JA119-JA120.

3. This case is now on interlocutory appeal from the district court's class certification decision under Fed. R. App. P. 23(f).

ARGUMENT

THERE IS NO BLANKET IMMUNITY FROM FDCPA LIABILITY FOR CONDUCT DIRECTED TO THIRD PARTIES.

The consumer-plaintiffs here allege that the debt-collector defendants employed unlawful means to obtain default judgments against consumers in state court debt-collection actions, in violation of 15 U.S.C. §§ 1692e and 1692f. According to plaintiffs, defendants failed to serve consumers with process, but nevertheless filed affidavits falsely asserting that such service was made. And the defendants also allegedly filed affidavits of merit falsely asserting that the affiant was "fully and personally familiar" with the facts constituting the claim.

This matter is currently before this court on interlocutory appeal from the district court's class certification decision. See Fed. R. Civ. P. 23(f); JA427. Although the bulk of the parties' briefing is devoted to addressing whether the class certification

standards of Rule 23 have been met, the government expresses no interest in those matters. Rather, the government's interest in this matter relates to particular arguments defendants have made regarding the legal scope of the FDCPA, and our

'directly' to the consumer debtor," representations by debt collector lawyers in court "routinely come to the consumer's attention and may affect his or her defense of a collection claim)." Anticipating this point, the law firm defendants argue that the false affidavits were "not even seen by [the consumers] before entry of the default judgment." Harris Br. at 43. But this point only underscores the implausibility of defendants' claim that any misconduct was directed to the consumers. To the extent that the falsehoods here were not seen by anyone other than the court, it is because of another aspect of the misconduct—one that was unquestionably "directed at" consumers—the failure to properly serve those consumers with legal process. Indeed, taken as a whole, the alleged scheme is best understood as

This language is purposefully expansive. As this Court has explained, "[i]t is clear that Congress painted with a broad brush in the FDCPA to protect consumers from abusive and deceptive debt collection practices." Pipiles, 886 F.2d at 27; see also Jerman, 559 U.S. at 602 (highlighting the FDCPA's "broadly worded prohibitions on debt collector misconduct"). Thus, "courts are not at liberty to excuse -ulb-1(l)1(a)-2(t)3( )9

collecting debts. Neither provision contains any requirement that the relevant misconduct be directed at the consumer.

Second, defendants' contention that the Act excludes "communications made . . . to third parties not affiliated with the debtor" from the statute seeks to protect," Leucadia Br. at 35, is contradicted by some of the specific examples of unlawful conduct listed in Sections 1692e and 1692f. For example, 15 U.S.C. § 1692e(8) prohibits as a "false, deceptive, or misleading representation[]" or "means" the act of "[c]ommunicating . . . to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed." This provision thus protects consumers from false communications made to third parties, including (for example) credit reporting agencies. See Sykes v. Mel Harris, Holt, Eliades & Ravin, LLC, 717 F.3d 282, 285 (2d Cir. 2013) (noting that under § 1692e(8) "once a debt has been disputed, a debt collector cannot communicate the debtor consumer's credit information to others without disclosing the dispute" (emphasis added)). Similarly, 15 U.S.C. § 1692f(5) provides that it is "unfair or unconscionable" for a debtor to "caus[e] charges [such as collect calls] to be made to any person" for communications by concealment of the true purpose of the call." See Todd v. Collecto, 731 F.3d 734, 737 (7th Cir. 2013) (relying in part on § 1692f(5) to conclude that "the reach of § 1692f is readily apparent, and we conclude that anyone aggrieved by a debt collector's unfair or unconscionable collection practices can fall within the provision's zone of interest").

Third, other FDCPA provisions are expressly limited to communications received by a consumer. See, e.g., 15 U.S.C. § 1692c(a) (providing that "a debt collector may not communicate with a consumer in connection with the collection of any debt" in certain circumstances (emphasis added)). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Rusello v. United States, 464 U.S. 16, 23 (1983) (internal quotation marks and citation omitted).

In sum, even assuming that the alleged conduct here was not directed at consumers, see supra pp. 9-10, it unquestionably falls within the plain language of Sections 1692e and 1692f. 0.248 0 Td [(()-11(3)]TJ 4.393 0 Td 7.222 0 Td (01 Tw 8.692 0 T

or unconscionable means to collect . . . any debt." Id. § 1692f. Cf. S. Rep. No. 95-382 at 1, 4, 7 (

Thus, as this Court has explained in the context of the FDCPA, "[w]e are not at liberty to substitute a view different from that expressed by Congress in the legislative enactment." *Pipiles*, 886 F.2d at 27. Absent any textual basis for reading Sections 1692e and 1692f to exclude communications to third parties, defendants' contention that such an exclusion would be consonant with the Act's purposes is simply beside the point. *Cf. Heintz*, 514 U.S. at 295-96 (declining to "read the statute as containing an implied exemption for those debt-collecting activities of lawyers that consist of litigating")

Second, contrary to defendants' suggestion, reading Sections 1692e and 1692f as written to encompass communications to third parties protects the consumer, and far more effectively than the reading defendants propose.[5] For instance, the Supreme Court has made clear that conduct in debt-collection litigation is subject to the Act's prohibitions. *See Heintz*, 514 U.S. at 299. On defendants' view, however, debt-collectors may obtain a blanket immunity from those prohibitions simply by failing to serve process on the consumer and thus keeping the consumer ignorant of any misconduct, or by claiming that the misconduct was directed at the court rather than at the consumer.

purposes. Moreover, defendants' view "would give a competitive advantage to debt collectors who press the boundaries of lawful conduct," Jerman, 559 U.S. at 602, and would thus run contrary to Congress's goal of "insur[ing] that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e).

In addition, acceptance of defendants' theory would not simply hinder consumers' own efforts to obtain redress through private civil actions. The enforcement authority of the Bureau, the Commission, and other federal agencies under the FDCPA depends on the existence of a violation of the Act. See 15 U.S.C. § 1692(a)-(c). If communications with third parties were categorically outside the Act's purview, the FDCPA would not authorize governmental enforcement no matter how egregious the conduct.

b. Narrowing their focus to misconduct directed specifically to courts, defendants posit that "[s]tate courts and state bars are perfectly capable of policing the conduct of lawyers and the adequacy of court filings without the intervention of the FDCPA." Harris Br. at 42; see also Lasalle Br. at 37-38. But the FDCPA provides an independent federal cause of action for violations of its provisions, and that cause of action exists even where other rules or ethical standards also bar the same conduct. Thus, "courts are not at liberty to excuse violations [of the FDCPA] where the language of the statute clearly comprehends them." Pipiles, 267 F.2d at

c. Defendant also

based on allegations that, as part of its summary judgment motion, the defendant law firm had made false statements

recent bill or statement. Id. at 940. Despite acknowledging the fraudulent nature of the debt collector's actions, the majority held that the FDCPA "does not extend to communications that would confuse or mislead a court judge." Id. at 940, 944. Judge Tinder rejected that conclusion, concurring only in the result. See id. at 944-49 (Tinder, J., concurring).

Significantly, the majority and Judge Tinder agreed that the "Act's language is not specifically limited to statements directed at consumers." Id. at 941; see also id. at 948 (Tinder, J., concurring) ("[T]he use of the judicial process is unquestionably a means by which debts are collected, and I struggle to find in the language of the statute any reason why statements or representations made during the use of the judicial process should be categorically excluded from its ambit."). Nevertheless, the majority narrowed the reach of the statute's text based on its own assessment of "the Act's purposes." Id. at 942. In particular, the majority reasoned that "the Act and its protections do not extend to third parties" and that "nothing in the Act's text extends its7 0 Td ( )Tj -0.001 Tc -0.001 Tw 05ps ihy rewhc iat7-o3(icu)13(l)6133.002 Tw pat1it, th(c)9(o)-1(2)-1(s)-(su)5(t)122(r)(s.)-1(")6( )]TJ /TT1 1 Tf -0.006 Tc 0.006 Tw Id.

F.3d at 737-38. Specifically, the court explained that Congress clearly intended to "extend protection beyond consumers," and stressed that a reading of the Act that limited its protections to consumers would be "in tension with the text of several

issue—"that alleged misrepresentations to attorneys for putative debtors cannot constitute violations of the FDCPA," because "[w]here an attorney is interposed as an intermediary between a debt collector and a consumer," the attorney "will protect the consumer from a debt collector's fraudulent or harassing behavior." 127 F.3d at 1128. The Ninth Circuit employed equivalent reasoning in holding that communications to a consumer's attorney are not actionable under the FDCPA. Guerrero v. RJM Acquisitions LLC, 499 F.3d 926, 935 (9th Cir. 2007) ("[I]t appears that Congress viewed attorneys as intermediaries able to bear the brunt of overreaching debt collection practices from which debtors and their loved ones should be protected."). A number of appellate decisions predating Kropelnicki, however, have properly rejected this reading of the Act. See, e.g., Sayyed, 485 F.3d at 232-33; Evory, 505 F.3d at 774-75; Allen, 629 F.3d at 368. See also Guerrero, 499 F.3d at 942 (W. Fletcher, J., dissenting in part) (examining the statute's language and concluding that "it is impossible to conclude that all otherwise prohibited conduct is permitted merely because it is directed at a debtor's attor Tw 0

In short, this Court must apply the text of the FDCPA as Congress has written it, without limiting its plain scope based on defendants' incorrect assessment of the Act's purposes. This Court should accordingly reject defendants' attempt to read into the Act a blanket immunity for conduct that is "directed at" third parties.

CONCLUSION

For the foregoing reasons, this court should hold that the alleged conduct here is actionable under the Fair Debt Collection Practices Act.

Respectfully submitted,

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NOVEMBER 2013

CERTIFICATE OF COMPL IANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a

STATUTORY ADDENDUM

15 U.S.C. § 1692e. False or misleading representations.

A debt collector may not use any false, deceptive, or misleading representation

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

(Pub. L. 90-321, title VIII, §808, as added Pub. L. 95-109, Sept. 20, 1977, 91 Stat. 879.)