

11th Circuit falls in line with 8th and 9th: State law violations may support FDCPA claims

By Alan D. Leeth, R. Frank Springfield and Megan P. Stephens*

The 11th U.S. Circuit Court of Appeals recently ruled in *LeBlanc v. Unifund CCR Partners, et al.*, No. 08-16031 (11th Cir. 03/30/10), that a violation of a state statute could support a claim under the Fair Debt Collection Practices Act. The 11th Circuit also embraced its prior holding in *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985), and continued to apply the "least sophisticated consumer" standard in analyzing a 15 USC § 1692e(5) claim, and further extended the application of this standard to claims arising under Section 1692f.

Joseph LeBlanc brought several causes of action under the FDCPA and the Florida Consumer Collection Practices Act against Unifund CCR Partners and its two general partners, ZB Limited Partners and Credit Card Receivables Fund. The claims stemmed from a dunning letter LeBlanc received from Unifund. After purchasing LeBlanc's debt from a subsidiary of JP Morgan Chase, Unifund sent this letter to LeBlanc informing him that it had purchased his charged-off debt. Unifund advised in the letter that:

if we are unable to resolve this issue within 35 days we may refer this matter to an attorney in your area for legal consideration. If suit is filed and if judgment is rendered against you, we will collect payment utilizing all methods legally available to us, subject to your rights below.

Based upon Florida Consumer Collection Practices Statute § 559.553, which requires an out-of-state consumer collection agency to register with the state prior to engaging in collection activities, LeBlanc alleged that Unifund had failed to register under this statute and, thus, was not legally entitled to initiate suit to collect his debt. Consequently, LeBlanc brought suit against the defendants claiming Unifund's letter, among other things, threatened to take action that could not legally be taken in violation of Sections 1692e(5) and 1692f. After the lower court granted summary judgment for LeBlanc on these claims, the defendants appealed.

Issue of first impression

The crux of the 11th Circuit's decision was a novel issue for the Appeals Court: whether a violation of a state statute can support a federal cause of action under the FDCPA. As the Florida statute does not provide for a private cause of action, LeBlanc attempted to bring a claim under Section 1692e(5), alleging Unifund threatened to bring a collection suit against him while it was not registered with the state and could not legally engage in collection activities.

As a part of its analysis, the court noted that every federal District Court that had previously analyzed this issue held that a violation of the state registration statute could support a cause of action under the FDCPA. However, given that this was a matter of first impression for

the 11th Circuit, the court reviewed the objectives and purpose behind both the FDCPA and FCCPA. In light of the similar purposes of the statutes and the seriousness with which Florida punished violators of Section 559.553, the 11th Circuit reasoned that a violation of the FCCPA may support a cause of action under the FDCPA.

"We therefore hold that a violation of the FCCPA for failure to register may, in fact, support a federal cause of action under Section 1692e(5) of the FDCPA for threatening to take an action that it could not legally take," the 11th Circuit concluded.

It is important to note, however, that the 11th Circuit also provided that "all debt collector actions in violation of state law [do not] constitute *per se* violations of the FDCPA." Thus, violation of the state statute alone will not automatically constitute a violation of the FDCPA. "Rather, the conduct or communication at issue must also violate the relevant provision of the FDCPA," the 11th Circuit said.

As such, the 11th Circuit joined the 8th and 9th Circuits in holding that only those state-law violations which also involve "false, deceptive or misleading representation or means," will also constitute a violation of the FDCPA. (See *Wade v. Reg'l Credit Ass'n*, 87 F.3d 1098 (9th Cir. 1996) and *Carlson v. First Revenue Assurance*, 359 F.3d 1015 (8th Cir. 2004).)

FDCPA's 'least sophisticated consumer' standard reaffirmed, extended by court

In *LeBlanc*, the 11th Circuit also continued to apply the "least sophisticated consumer" standard first adopted in *Jeter* to evaluate whether Unifund's collection letter constituted a "threat to take action which could not legally be taken" and violated Section 1692e(5).

Reaffirming its reasoning behind *Jeter*, the court acknowledged that this standard was consistent with the purpose behind the FDCPA and provided more protection for the consumer. Although Unifund met the definition of "out-of-state consumer debt collector" and was required to register with the state prior to engaging in collection

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Servicing transfer notice not an FDCPA 'initial communication'

A transfer of servicing notice sent to a bankrupt borrower in default on his mortgage loan was not an "initial communication" triggering the Fair Debt Collection Practices Act's validation notice requirement. The U.S. District Court, Northern District of Indiana found that the transferee's notice, required under the Real Estate Settlement Procedures Act, was not a communication sent in connection with the collection of a debt. (*Thompson v. BAC Home Loans Servicing, L.P.*, No. 09-CV-311-TS (N.D. Ind. 03/26/10).)

"A reasonable person would not believe that the notice ... was a debt collection demand and thus a communication in connection with the collection of [the plaintiff's] debt," concluded District Judge Theresa L. Springman. "Accordingly, it was not a communication that triggered the requirement to send a validation notice."

Mortgage servicer BAC Home Loans Servicing LP acquired Thomas Thompson's home mortgage loan from a previous servicer. BAC sent Thompson notice of the servicing transfer, as required by RESPA. Meanwhile, Thompson's loan was in default and he had filed for Chapter 13 bankruptcy.

Thompson sued BAC Home Loans and its general partner BAC GP LLC for violating the FDCPA, alleging that he was not sent a validation notice required by 15 USC § 1692g within five days of the transfer notification, which Thompson termed an "initial communication" as defined by the provision. BAC moved to dismiss, arguing that it did not violate the FDCPA and, even if it did, Thompson's pendant bankruptcy precluded sending a validation notice.

The court agreed with BAC, finding that its six-page servicing transfer notice – including a payment coupon on its first page followed by five pages of informational attachments – was not a communication sent to Thomp-

son "in connection with the collection of any debt." While the court noted precedent stating that BAC's subjective purpose for sending the notice – to meet RESPA's notice requirement – did not control, neither did the language in the notice support Thompson's FDCPA claim.

No evidence of collection attempt

"The combination of materials sent to the plaintiff does not suggest that the defendants would not have sent the material if they had not been attempting to collect a debt," wrote Judge Springman. Nothing of the notice's content "resemble[d] a communication that demand[ed] payment of a delinquent debt" that would trigger the need for a validation notice.

However, the District Court observed that language required by the FDCPA to appear in any initial communication was included at the bottom of the first page: "this communication is from a debt collector attempting to collect a debt, and any information obtained will be used for that purpose."

That inclusion, however, "did not alter the nature of the communication or the information provided in the letter," concluded Judge Springman. "Although ensuring payment of the debt cannot be denied as [BAC]'s ultimate goal, the notice itself did not provide terms of payment or deadlines, threaten further collection proceedings, or demand payment in any form."

The District Court granted BAC's motion to dismiss.

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activity, the court held that a genuine issue of material fact existed as to whether Unifund's letter could be considered a "threat" to the least sophisticated consumer. For that reason, the court held that LeBlanc's Section 1692e(5) claim was best left to the jury. The court's analysis, however, did not end here.

Based upon Unifund's failure to comply with Section 559.553, LeBlanc also argued that Unifund used unfair means in collecting his debt in violation of Section 1692f of the FDCPA. Yet, the court noted that *Jeter* "did not adopt the 'least sophisticated consumer' standard for all purposes." In fact, the "least sophisticated consumer" standard had yet to be applied to Section 1692f by the court.

In evaluating LeBlanc's claim under Section 1692f, the court noted that the analysis of whether Unifund's acts were unfair or unconscionable looked more to the "means" employed by the debt collector and the debtor's reaction to said means" than the "individual debtor's circumstances." For that reason, the court determined that a Section 1692f

analysis was more analogous to the analysis under Section 1692e(5) and adopted the "least sophisticated consumer" standard for claims arising under Section 1692f.

'Threat' still to be determined

Similar to the Section 1692e(5) claim, the 11th Circuit's Section 1692f analysis also involved the determination of whether Unifund's letter constituted a threat. The court held that, just as was true of LeBlanc's claim under Section 1692e(5), a jury question existed as to whether Unifund's letter was an "unfair or unconscionable means to ... attempt to collect a debt" under Section 1692f.

From this decision, it is now clear that state law registration violations can now serve as the basis for FDCPA violations in the 11th Circuit if such violations prevent debt collectors from taking specific actions that the debt collector is threatening to take.

Additionally, the "least sophisticated consumer" standard in the 11th Circuit remains alive and well as it applies to claims under Section 1692e(5) and it has now been expanded to claims arising under Section 1692f. □