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Supreme Court Takes Pragmatic Approach To Whether Letters Violate FDCPA

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Consumer Financial Services Alert

Sheriff v. Gillie, No. 15-338 (2016)

On May 16, 2016 the Supreme Court unanimously reversed a decision of the Sixth Circuit that had held that collection attorneys hired as independent contractors to collect debts on behalf of the State of Ohio could be held liable under the FDCPA because, as required by the Ohio Attorney General (AG), they used official AG letterhead in contacting debtors. The Court decided it did not need to consider the first issue presented in the case, which was whether lawyers appointed as "special counsel" are actually state lawyers exempt from FDCPA liability. Instead the Court held, presuming the lawyers were not state officials, that their letters, including their use of the AG's letterhead, accurately described their relationship to the State and were thus not deceptive or misleading under the FDCPA.

The ruling is somewhat specific in its application to a particular type of collection lawyer, that is, one working for a government creditor. But the Court's pragmatic approach to the case may be of use in addressing more common FDCPA issues.

Facts. The Ohio AG hires private collection lawyers to collect debts owed to the State or its agencies, such as unpaid tuition to state universities or unpaid medical bills from state hospitals. Although they are considered independent contractors, the AG requires them to use its letterhead in communications with debtors. The lawyers who were sued in this case sent collection letters to debtors, using the AG letterhead but also identifying their own names and firms and listing themselves as "special" or "outside" counsel to the AG. Plaintiffs sued, alleging that by sending the letters private lawyers misrepresented themselves as state officials in violation of several provisions of 15 U.S.C. § 1692e. The District Court dismissed the case. The Sixth Circuit reversed, ruling that the lawyers were not state officials exempt from the FDCPA under 15 U.S.C. § 1692a(6) and that whether the letters would have misled, deceived or confused an unsophisticated consumer was a triable issue of fact. Judge Sutton dissented from both the panel opinion and denial of *en banc* rehearing and, in a real (and somewhat rare) pat on the back, Justice Ginsburg's opinion for the Supreme Court quoted liberally from his opinions.

Ruling. After concluding that it did not need to decide whether private lawyers hired by the Ohio AG were in fact state officials exempt from coverage under the FDCPA, the Supreme Court held that the letters those lawyers had sent to

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debtors on AG letterhead did not violate any of the cited provisions of § 1692e. Although the letters were sent on AG letterhead, the Court noted two other points about them: they correctly listed the lawyers' names and firms, and they identified the senders as "special" or "outside" counsel to the AG. These facts, combined with the fact that the AG actually required special counsel to use its letterhead, led the Court to hold that the letters accurately described the relationship between special counsel and the AG. Turning to specific subsections of § 1692e, the Court held that the letters did not *falsely* represent that they were "authorized, issued or approved" by the State of Ohio in violation of § 1692e(9) because they *were*, in fact, so authorized. And the Court added that by using the AG letterhead special counsel did not use an "untrue" name in violation of § 1692e(14) because the letters also correctly identified the actual firm and lawyer involved. (Because it resolved these issues this way based on undisputed facts, the Court also declined to consider whether they were properly considered under the Sixth Circuit's "least sophisticated consumer" standard, rather than from the view of the "average consumer who has defaulted on a debt," as Petitioners had argued.)

Finally the Court rejected as "unconvincing" the Sixth Circuit panel majority's view that use of the AG letterhead had led to confusion and could be intimidating to recipients. Taking a strong pragmatic view, the Court observed that the use of the AG letterhead had prompted debtors to resolve confusion the right way, by contacting the AG. And it rejected the contention that the letters might intimidate recipients into prioritizing their debts to the State due to the availability of remedies not afforded to private collectors, noting that, because such remedies *are* actually available to the State of Ohio, "[t]his impression is not false." And the Court observed that one letter had been signed by an employee of a firm rather than by the lawyer who had actually been appointed as special counsel, but wrote that off as "an immaterial, harmless mistake."

Conclusions. For a lawyer who collects debts for state or local governments this case represents a clear victory, and points out specific measures she can take to avoid FDCPA liability, including identifying herself and her firm's relationship to the government entity. More broadly, the Court took a very pragmatic line throughout, suggesting a realistic approach to whether a communication misleads or deceives under § 1692e. And it was willing to dismiss as a "harmless mistake" what would otherwise be just the sort of technicality that would inspire an FDCPA suit, namely the signing of a letter by the wrong person. Given that the Court was in such a practical (and unanimous) mood, it is unfortunate that it did not also use the occasion to comment on the meaning of the "least sophisticated consumer" standard, though attempting to do so might have threatened the Court's unanimity.

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