

Credit Union Attorney Law Letter

A Law Letter for Credit Unions, Financial Institutions, and Attorneys

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Debt Collectors Should Not Include this Language in Collection Letters

In *DeSantis v. Computer Credit, Inc.*, No. 00-9574 (2d Cir. Oct. 30, 2001), the Second Circuit held that including this language in a collection letter--“the [creditor] insists on payment or a valid reason for your failure to make a payment” and “[i]n the absence of a valid reason for your failure to make payment, pay the above debt or contact the [creditor] to settle this matter”--violates the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (the “Fair Debt Act”).

FACTS

John B. DeSantis incurred a debt of \$319.50 to Dr. Jeffrey A. Stahl. Dr. Stahl assigned the debt for collection to Computer Credit, Inc. Computer Credit sent DeSantis a collection letter stating:

“This notice will serve to inform you that your overdue balance with Dr. Jeffrey A. Stahl has been referred to Computer Credit, Inc., a debt collector. [T]he doctor insists on payment or a valid reason for your failure to make payment. The law prohibits us from collecting any amount greater than the obligation stated

above. Unless you notify us to the contrary, we will assume the amount due is correct. This communication is sent to you in an attempt to collect this debt. Any information obtained will be used for that purpose. *In the absence of a valid reason for your failure to make payment, pay the above debt or contact the doctor to settle this matter.* Payment can be sent directly to the doctor.” (Emphasis added.)

THE SUIT

Sometime after receiving this letter, DeSantis sued Computer Credit in a federal district court, alleging that the letter violated the Fair Debt Act.

The Fair Debt Act creates certain rights for consumers whose debts are turned over to professionals for collection. One is that, within five days of a collector’s first communication with a consumer, the collector must:

“send the consumer a written notice containing ... a statement that if the consumer notifies the debt collector in writing within [thirty days after receipt of the notice] that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such

verification or judgment will be mailed to the consumer by the debt collector.”

15 U.S.C. § 1692g(a)(4). The Act further provides:

“If the consumer notifies the debt collector in writing within the thirty day period ..., the debt collector shall cease collection ... until [it] obtains verification of the debt and a copy of such verification ... is mailed to the consumer by the debt collector.”

15 U.S.C. § 1692g(b).

A debt collector violates these provisions if it fails to convey this information or if the information it conveys is confusing or contradictory, so as to cloud the issue with uncertainty. If the least sophisticated consumer would not understand the information conveyed, the collector has violated the Fair Debt Act.

DeSantis argued that Computer Credit’s letter to him did not convey the information required by the above-quoted sections of the Fair Debt Act and, at the least, created enough uncertainty and confusion to constitute a violation of that act.

Computer Credit argued that the letter substantially complied with the Fair Debt Act and that, as a matter of law, even the least sophisticated consumer would not be confused by it.

The trial court agreed with Computer Credit and dismissed DeSantis’s complaint. DeSantis appealed.

LETTER POTENTIALLY CONFUSING

On appeal, the Second Circuit reversed and determined that a reasonable person could find the letter confusing, in that it implied that the consumer’s right to dispute the debt depended on having a valid reason not to pay. In fact, a consumer may dispute a debt for other reasons, such as when the consumer does not recognize the name of the creditor or he questions the amount of the debt. Also, regardless of the validity of the debtor’s reason for non-payment, if the collector receives written

notice of a dispute from the debtor, the collector must cease collection until it has verified the debt. The appeals court reversed for a trial on the confusing nature of the letter.

Employers Can Be Liable for Punitive Damages in Title VII Cases Even If Jury Finds No Actual Damages

In *Cush-Crawford v. Adchem Corp.*, case nos. 00-7617 & 00-7745 (2d Cir. Nov. 16, 2001), the Second Circuit has held that a plaintiff seeking to hold an employer liable under Title VII, 42 U.S.C. §§ 2000e, *et seq.*, for discriminatory or harassing conduct of its employees can recover punitive damages, regardless of whether the plaintiff suffered actual damages.

FACTS

Defendant Adchem owned and operated two adhesive tape manufacturing plants in New York. It employed 150 people.

In June 1993, Adchem supervisor Collin Mars hired Plaintiff Tonia Cush-Crawford to work as a lab technician at one of Adchem’s plants. According to Cush-Crawford, Mars immediately began sexually harassing her. To third parties, the relationship could easily have appeared more consensual.

According to Cush-Crawford, Mars called her at home during the week before she started work and asked her whether she was excited about starting her new job. During her first week, Mars complimented Cush-Crawford on her dresses and her looks. Later, Mars began asking Cush-Crawford to exercise at a gym with him after work. Cush-Crawford says she first said no but then relented because Mars had started complaining about her job performance and she believed his complaints were tied to her refusals to go to the gym.

A few weeks into her employment, Mars asked Cush-Crawford to go to Toronto with him to attend a

Caribbean festival, not work-related. Cush-Crawford said she initially refused but, when Mars later mentioned her “weekly evaluation,” she accepted his invitation.

About a week after their trip to Toronto, Mars asked Cush-Crawford to go to Boston with him to another festival, again not work-related. Again, Cush-Crawford said, she initially refused but eventually changed her mind because she worried that otherwise she would not survive her three-month probationary period at Adchem.

In August 1993, Mars took Cush-Crawford to dinner for her birthday and expressed his desire to have sex with her. Cush-Crawford refused. Mars and Cush-Crawford went to dinner one more time during Winter 1993-94. Cush-Crawford says that, after that, she refused Mars’s invitations and advances.

Cush-Crawford says she first told Adchem supervisors about Mars’s unwanted invitations and advances in September 1993. Still, there was no dispute Cush-Crawford never used the words “sexual harassment” to describe Mars’s conduct until November 1994. At that time, Adchem reassigned Cush-Crawford to its other plant and suspended Mars.

Months later, Cush-Crawford suffered an unrelated on-the-job injury and did not return to work.

TITLE VII CLAIM

In April 1995, Cush-Crawford filed a complaint with the Equal Employment Opportunity Commission (“EEOC”) alleging that Adchem had violated Title VII by allowing Mars to sexually harass her. Adchem responded that, until November 1994, when Cush-Crawford complained of “sexual harassment,” officials had believed the relationship was consensual.

The EEOC decided not to pursue a claim against Adchem on Cush-Crawford’s behalf and issued her a right to sue letter, which is a prerequisite to her filing suit on her own. Thereafter, Cush-Crawford filed a Title VII suit in a federal district court in New York.

The case proceeded to a trial. The jury returned a verdict in favor of Cush-Crawford. When specifying

damages, the jury found that Cush-Crawford had suffered zero actual damages, but awarded her \$100,000 in punitive damages.

Adchem moved to set aside the jury’s verdict and punitive damage award. Among other reasons, it argued, punitive damages should not be allowed when actual damages are non-existent. The court denied Adchem’s motion to set aside the award.

Adchem appealed. Cush-Crawford cross-appealed, arguing that the jury should have awarded her actual damages for pain and suffering.

NO ACTUAL DAMAGES NECESSARY

The Second Circuit had never previously addressed a plaintiff’s right to recover punitive damages when a jury finds no actual damages. The court began its analysis by citing the federal statute that authorizes punitive damages in Title VII cases: 42 U.S.C. § 1981a(b)(1). That statute expressly limits a plaintiff’s right to recover punitive damages to cases where the defendant has “engaged in discriminatory practices ... with malice or with reckless indifference to the federally-protected rights of” the plaintiff. The statute also contains a schedule that caps the aggregate damage award (that is the amount a jury can award for actual and punitive damages) according to the number of people employed by the defendant. In this case, Adchem employed enough people to be liable for up to \$100,000 in damages (actual and punitive).

Next, the court pointed to a split of relevant authority among circuit courts on the question of whether punitive damages can be awarded absent actual damages. According to the Second Circuit, the Seventh and Third Circuits would likely allow punitive damages without actual damages, while the First, Fourth, and Fifth Circuits would not.

The Second Circuit sided with the Seventh and Third Circuits, holding that “an award of actual or nominal damages is not a prerequisite for an award of punitive damages in Title VII cases.” The rationale for this

decision was that the aggregate damage cap in 42 U.S.C. § 1981a would prevent limitless awards of punitive damages in cases where actual damages were non-existent or insubstantial.

National Banks Can Act as Insurance Agents in Ohio Towns with Populations of 5,000 or Less

In *Association of Banks in Insurance v. Duryee*, No.99-3917 (6th Cir. Nov. 1, 2001), the Sixth Circuit has held that an Ohio statute does not prohibit national banks from acting as insurance agents.

CLASH BETWEEN FEDERAL & OHIO LAW

Federal statute 12 U.S.C. § 92, which is § 13 of the Federal Reserve Act, provides:

“[A]ny [national banking] association located and doing business in any place the population of which does not exceed five thousand inhabitants ... may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company”

Ohio has laws that would prevent banks from selling insurance despite the authorization in § 92. The Ohio Superintendent of Insurance is authorized to deny a license to sell insurance to--or to revoke the license to sell insurance of--anyone whose “**principal purpose**” is to

solicit, among others, any person for whom he acts as “agent, custodian, vendor, bailee, trustee, or payee.” See O.R.C. §§ 3905.02(B) & 3905.18(C). Because banks engaged in insurance sales generally solicit their own customers--and a bank is often the agent, custodian, vendor, bailee, trustee, or payee of its customers--banks usually fail Ohio’s principal purpose test.

DECLARATORY JUDGMENT ACTION

In 1998, several national banking associations desiring to sell insurance in small towns in Ohio filed suit in a federal district court seeking a declaration that the Ohio law did not apply to them. Both the district court and, on appeal, the Sixth Circuit agreed.

The Sixth Circuit used two federal preemption doctrines to determine whether federal law trumped Ohio law in the situation. The first was a preemption doctrine adopted by the U.S. Supreme Court in *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996). The court explained that it should be used to evaluate any state law enacted before September 3, 1998 (and portions of the Ohio principal purpose laws were enacted before then). Under *Barnett Bank*, federal law controls over state law if the state law would “prevent or significantly interfere with the national bank’s exercise of its powers.” Here, the court held, Ohio’s principal purpose test significantly interfered with the rights of national banks to sell insurance in small towns.

For state laws enacted after September 3, 1998 (and other portions of Ohio’s principal purpose test were), courts can use the *Barnett Bank* preemption test or a new non-discrimination test laid out in § 104(e) of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6701. Section 104(e) preempts state laws that fall in any one of four categories. Here, the court identified one preemption category into which the Ohio laws fell: laws that “have an impact on depository institutions ... that is substantially more adverse than its impact on other persons or entities providing the same products or services” For that

reasons too, the court concluded that federal law controlled.

Because federal law pre-empted Ohio law in this

situation, the Ohio Superintendent of Insurance was enjoined from denying national banks the right to sell insurance pursuant to 12 U.S.C. § 92.