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THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

NO. 68601-1

LARRY M. KASOFF,

Appellant,

v.

CCB CREDIT SERVICES INC., an Illinois corporation,

Respondent.

REPLY BRIEF OF APPELLANT LARRY M. KASOFF

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

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I. ARGUMENT

A. Respondent violated RCW 19.16.250(8)(c) and correspondingly RCW 19.16.450 applies to the claim

1. RCW 19.16.450

Respondent claims that Appellant does not have a right to recover under RCW 19.16.450 because Respondent had ceased collection of the account prior to receiving Appellant's letter to Respondent requesting the RCW 19.16.250(8)(c)(ii) information. However, Respondent's analysis is flawed in that it looks to the wrong action to determine whether RCW 19.16.250 has been violated "in the collection of a claim."

RCW 19.16.250(8), the subsection at issue here, regulates the sending, giving, or causing to be sent or given a letter, notice, or other written communication. The default, under the plain language of the statute, is that a licensee cannot send a letter unless they provide certain information in the letter and comply with other requirements stated in the UNLESS clause including the PROVIDED subclause. Therefore, it is the act of sending the letter or causing it to be sent which is the prohibited act and the one that needs to be done "in collection of a claim." The PROVIDED subclause in RCW 19.16.250(8)(c)(ii) is not a separate and independent prohibited action which must occur during the collection of

the claim.

The letter dated July 6, 2010 was clearly sent in collection of the claim. The evidence taken in the light most favorable to Appellant, who was the nonmoving party in Respondent's motion for summary judgment, is that the letter was sent or caused to be sent before the telephone call on July 6, 2010. However, even if the letter was sent or caused to be sent later that day, the letter is self-evidencing that it was done "in collection of the claim." The letter contains a clear demand for payment and does not make any reference to the alleged ceasing of the collection of the alleged debt. This demand for payment is not required in a 15 U.S.C. § 1692g(a) notice and is unnecessary if CCB had ceased collection of the alleged debt.

2. RCW 19.16.250(8)(c)

Regardless of whether Respondent knew whether the claim included interest, service charges, collection costs or late payment charges, Respondent, as an out-of-state collection licensee, had an obligation to indicate in clear and legible type the "amount owing on the original obligation at the time it was received by the licensee for collection or by assignment." RCW 19.16.250(8)(c). It did not do so.

B. Appellant can maintain a claim for declaratory judgment under the UDJA

Mr. Kasoff can maintain a claim for declaratory relief under the Uniform Declaratory Judgment Act (UDJA), RCW 7.24.010 *et seq.* RCW 19.16.450 is silent on the procedure to be used to effectuate the penalty it provides and allowing a declaratory judgment against a collection agency licensee to have it effectuated preserves the offender licensee's due process rights.

Respondent puts form over substance. At its core, this declaratory action seeks to determine if RCW 19.16.250(8)(c) was violated in collection of a claim (*i.e.* the *if* part of RCW 19.16.450). If that is declared, then the application of RCW 19.16.450 to the alleged claim is a rote application of RCW 19.16.450. The mere fact Mr. Kasoff has asked the Court to declare the ultimate legal conclusion should not deprive him of his ability to have his declaratory judgment that RCW 19.16.250(8)(c) was violated in collection of a claim.

Contrary to the assertions of CCB, there is an existing dispute between the parties, genuine and opposing interests, and direct and substantial interests at stake. CCB maintains it did not violate RCW 19.16.250(8)(c) in collection of a claim and Mr. Kasoff claims it did. While Mr. Kasoff has a genuine, direct interest in the outcome of this

declaration by getting a declaration that RCW 19.16.450 applies to the alleged debt, CCB also has a genuine and direct and substantial interest in proving that it did not violate one or more sections of RCW 19.16.250 so it does not have to report to the Department of Licensing any judgment that may arise out of any of the practices prohibited by RCW 19.16.250. *See*, WAC 308-29-050(1). Any such judgment can constitute unprofessional conduct and possible discipline by the Department of Licensing. *See*, RCW 18.235.110 and RCW 19.16.120. These interests, therefore, are truly opposing. Any judicial determination of whether CCB violated RCW 19.16.250(8)(c) would also be final and conclusive – even if the underlying debt remains disputed and the amounts of interest, late charges, attorney’s fees and other charges incidental to the principal remains indeterminable.

While it is true that pursuant to RCW 7.24.110 that all persons who have any interest which would be affected by the declaration should be made a party to the action and no declaration shall prejudice the right of person not party to the proceeding, under these circumstances, CCB and only CCB are the correct counter-party to Mr. Kasoff.

First, to the extent that Wells Fargo Bank, N.A. (“Wells Fargo”) was the holder of the account in July 2010, Wells Fargo lost its right under the facts of this case. Wells Fargo is a sophisticated party that knows or

should know the Washington Collection Agency Act (“WCAA”), including RCW 19.16.250 and 19.16.450. If Wells Fargo, as the putative original creditor, fails to provide the necessary information to CCB as are the undisputed facts, then it all but guarantees that CCB does not have it to provide an itemization in its initial letter to Washington debtors. In other words, CCB can only get that information, directly or indirectly, from Wells Fargo. Wells Fargo, therefore, cannot be surprised when a violation of RCW 19.16.250(8)(c) occurs because there is not an itemization on the initial letter or when an alleged debtor takes advantage of his or her right to request the RCW 19.16.250(8)(c)(ii) information and there is no procedure in place between CCB and Wells Fargo. It is hard to fathom under these circumstances what defense Wells Fargo could make under the undisputed facts that would change the outcome.

Assuming, which is not the case¹, the debt was controlled under Washington law, any defenses, including RCW 19.16.450, to the alleged debt from the breached contract would be binding on future assignees of the debt. *See*, RCW 4.08.080. Thus, even if Wells Fargo is no longer the holder, the defense would apply to the alleged underlying debt and, thus, there is no need to add unidentifiable subsequent holders of the alleged

¹ The alleged debt is actually controlled under South Dakota law , but neither party plead that it would be controlled by the foreign law.

debt if they exist.

Furthermore, CCB's method would require a court to mix determinations about the underlying alleged debt with this action determining whether or not CCB violated RCW 19.16.250(8)(c) in collection of a claim. Mr. Kasoff disputes this alleged debt for at least the reasons that (1) Wells Fargo Bank Nevada, N.A., rather than Wells Fargo Bank, N.A. may have owned the debt at the alleged time CCB tried to collect; and (2) there is no debt owed because the personal line was paid off. Mr. Kasoff does not need to prove that there is interest or other charges that are being collected. Such proof would be contrary to Mr. Kasoff's assertion that there is no underlying debt. Despite such an assertion, the RCW 19.16.450 penalty is not moot because Wells Fargo did send CCB to try and collect on its alleged claim. Thus, under CCB's assertions, he would also need to separately add Wells Fargo Bank Nevada, N.A. to the action and have a court determine which Wells Fargo entity actually owns the alleged debt and even if there is any such debt.

In addition, according to CCB, Mr. Kasoff would also need to add various other parties. He would need to add all identifiable other parties that have tried to collect on such alleged debt subsequently such as Focus Receivables Management as well as the Internal Revenue Service because should a declaration would likely lead to a cancellation of debt and a

1099-C being issued. All of these other parties, however, would be nominal and it is hard to fathom would be material to the outcome of the declaration.

Moreover, since RCW 19.16.450 has the rights lost when a violation of RCW 19.16.250 by a collection agency licensee occurs in collection of a claim, such a defense can come up in many different legal scenarios that provides no due process rights or even notice to the collection agency licensee alleged to violate RCW 19.16.250. For example, the issue of whether there is a violation and RCW 19.16.450 applies could come up in an FDCPA action against a subsequent debt collector predicated on a violation of 15 U.S.C. § 1692f(1) because RCW 19.16.450 applies. It could also come up as an affirmative defense in a collection action on the debt. *See, Streng v. Clarke*, 89 Wash.2d 23, 25, 569 P.2d 60, 61-62 (Wash. 1977). In these scenarios, the Department of Licensing is also deprived of being informed of a licensee where a court has determined a violation of RCW 19.16.250 has been found. Furthermore, these actions can occur years later after the alleged collection agency licensee has already destroyed its records allowing it to put on a defense. Allowing a declaratory judgment provides public notice to subsequent collectors that RCW 19.16.450 applies to the alleged underlying claim and allows for a cost-benefit analysis to be made before

a collection action is filed on the underlying debt.

RCW 19.16.460 is not a bar to this action. RCW 19.16.460 states, **“Notwithstanding any other actions which may be brought under the laws of this state,** the attorney general or the prosecuting attorney of any county within the state may bring an action in the name of the state against any person **to restrain and prevent any violation of this chapter.**” (emphasis added). The statute explicitly recognizes that there are other actions —such as one by private parties under the WCPA — that may be brought under Washington law that may allow for such relief. In addition, Appellant does not seek to restrain or prevent any violation of RCW 19.16.250 rather it is Appellant’s contention that such a violation has already occurred, and, correspondingly that RCW 19.16.450 applies to the alleged claim. As a result, the state is not a required party to this action and this action does not have to be prosecuted by the attorney general or the county prosecuting attorney.

Appellant’s claim for a declaratory judgment can be maintained because there is a justiciable controversy, standing, a real party in interest, and no missing indispensable parties.

C. The alleged failure to state a claim is not properly before the appellate court and should not be addressed

CCB did not file a notice of appeal seeking cross review pursuant to RAP 5.1(d) and Appellant has not sought review on the basis of whether Appellant has stated a claim for relief. Notably, Appellant's Notice of Appeal did not seek review of or attach the order denying Respondent's Motion to Dismiss. Accordingly, this issue is not properly before the Court.

D. Appellant has stated a claim upon which relief can be granted as to Respondent

Without waiving its objection that the issue is not properly before the Court, Appellant will nonetheless address why it has stated a claim for relief that can be granted as to the respondent.

RCW 19.16.440 and RCW 19.16.450 provide for two separate and independent penalties for violating RCW 19.16.250. In other words, a successful cause of action under RCW 19.86.090 based on the *per se* violation as stated in RCW 19.16.440 would not provide for the relief that is available under RCW 19.16.450. Conversely, the application of RCW 19.16.450 may be made as an affirmative defense in a collection action without a corresponding Washington Consumer Protection Act ("WCPA")

violation. *See, Strenge v. Clarke*, 89 Wash.2d 23, 25, 569 P.2d 60, 61-62 (Wash. 1977).

Mr. Kasoff has elected his remedy and has sought only the RCW 19.16.450 penalty. As such, he does not need to plead and prove actual damages or other elements of a WCPA cause of action.

The case of *Paris v. Steinberg & Steinberg et al*, 2011 U.S. Dist. LEXIS 126262 (W.D. Wash. 11/1/11), cited by the Respondent to show that there is no private right of action for a violation of the WCAA is not instructive. The violation of the Washington Collection Agency Act at issue in that case was not RCW 19.16.250 or RCW 19.16.450 but rather RCW 19.16.110, RCW 19.16.260, and RCW 19.16.430 involving an allegedly unlicensed collection agency. The court, thus, did not have any chance to reflect on whether or not there could be a private right action under the UDJA for RCW 19.16.450 predicated on a violation of one or more sections of RCW 19.16.250.

Moreover, the proposition that the WCPA is the exclusive affirmative cause of action for a violation of the WCAA is against the weight of most other legal authorities. Most courts have separately addressed the violation of the WCAA and the WCPA. *See, e.g., Hansen v. Ticket Track, Inc.*, 280 F.Supp.2d 1196, 1202 (W.D. Wash. 2003); *Walcker v. SN Commercial, LLC*, 286 Fed. Appx. 455, 457-458 (9th Cir.

2008) (unpublished) (addressing the WCAA claim under RCW 19.16.450 separately from a WCPA claim). One court has stated that, unlike the WCPA, the WCAA is a strict liability statute which cannot be the case if there is only a single cause of action under the WCPA for a WCAA violation. *Campion v. Credit Bureau Services, Inc.*, 206 F.R.D. 663, 675 (E.D.W.A. 2001).

In addition, WAC 308-29-050(1), a rule passed by the Department of Licensing, implies that there is more than one cause of action that could result from a violation of RCW 19.16.250. WAC 308-29-050(1) states, “Within thirty days after the entry of any judgment against the licensee or any owner, officer, director or managing employee of a nonindividual licensee, the licensee shall notify the director in writing ***of the judgment, if the judgment arises out of any of the practices prohibited in RCW 19.16.250*** or of any of the grounds set forth in RCW 19.16.120.” (emphasis added). If as Respondent claims there could only be a cause of action under the WCPA for a violation of RCW 19.16.250, then there would be no need for such an open-ended inclusion of any judgment that arises out of any practices prohibited in RCW 19.16.250. The Department of Licensing could have simply required licensees to report any WCPA judgments arising from any of practices prohibited in RCW 19.16.250.

Accordingly, since Mr. Kasoff is not pursuing a WCPA claim, he

does not have to plead and prove actual damages or otherwise prove elements of a WCPA cause of action. As stated, *supra*, Mr. Kasoff has stated a claim under the UDJA for a declaratory judgment that one or more acts or practices prohibited by RCW 19.16.250 were performed in collection of a claim. Accordingly, he has stated a claim upon which relief can be granted.

E. The Court should deny Respondent's attorney fees for this appeal

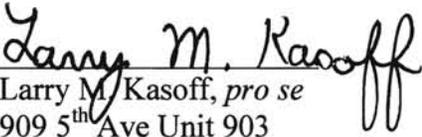
Even if the Court were not to rule for Appellant, it should deny CCB's request for its reasonable attorney fees for this appeal. CCB did not devote a section of its opening brief to the request for attorney fees as required by RAP 18.1(b). Instead, CCB makes the request in the last line of their conclusion. Furthermore, they fail to specify any authority as the basis for their request.

II. CONCLUSION

The Court should reverse the trial court's order granting summary judgment to CCB and remand for further proceedings to address any remaining issues in the case that were rendered moot by the granting of CCB's motion for summary judgment, namely whether the case is barred by the applicable statute of limitations.

DATED this 31st day of October, 2012.

Respectfully submitted,


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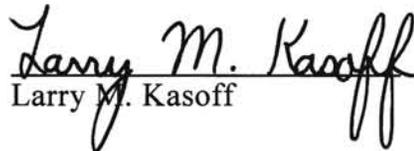
CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I served in the manner noted below, a true and correct copy of the foregoing document on the following:

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