

NO. 280608-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

DEBBIE DONOHUE, and all other similarly situated persons,

Plaintiffs/Appellants,

v.

GREGORY A. NIELSON and/or GREGORY A. NIELSON,
P.S.

Defendants/Respondents.

BRIEF OF APPELLANT RE:
VALIDATION NOTICE

MICHAEL J. BEYER, 9109
ATTORNEY FOR PLAINTIFF/APPELLANTS

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A. ASSIGNMENT OF ERROR

1. The Superior Court of Spokane County, State of Washington erred in granting summary judgment ruling that the Fair Debt Collection Practices Act does not require the appellee respondent to provide the appellant with a validation notice as required by 15 U.S.C. 1692 g.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Whether, contrary to the decision of the Superior Court, wherein the court ruled that the defendants/ respondents did not have to provide the appellant with a validation notice as required by 15 U.S.C. 1692 g Respondent was entitled to summary judgment as a matter of law.

C. STATEMENT OF THE CASE

A. NATURE OF THE CASE

GREGORY A. NIELSON and/or GREGORY A.

NIELSON, P.S., Bar #23702 is a Washington Attorney doing business in Spokane, Washington. [CP 3-4]. On or about February 7, 2008, Mr. Nielson sent to Ms. Donohue a demand letter attempting to collect a debt, representing that Ms. Donohue owed the sum of \$35.57 for interest on a principle of \$270.99. [CP 3]. On April 1, 2008, contending the interest rate exceeded the highest permissible rate for the State of Washington and was misrepresented, Ms. Donohue filed suit in Spokane County Superior Court, State of Washington seeking an award of damages for violations of the Fair Debt Collection Practices Act (FDCPA) 15 U.S.C. § 1692e, f and g [CP 1-6]. The summons and Complaint was amended on May 4, 2008 to allege a class action. [CP 21-32].

B. COURSE OF PROCEEDING AND DISPOSITION IN THE COURT BELOW.

On April 9, 2008, the plaintiff moved for summary judgment against the defendants/ respondents. [CP 7-20]. Both

parties moved for summary judgment representing that there were no genuine issues of material fact seeking judgment on the issue of liability. [CP 7-20, 173].

The Superior Court ruled that the interest rate did not exceed the highest permissible rate but that there was a wrongful misrepresentation and [CP 182-185]. The court further ruled that Mr. Nielson did not violate 15 U.S.C. § 1692g holding that the validation notice was not required. [CP 185] The Superior Court entered judgment for Mr. Nielson on other grounds on April 6, 2009. [CP 1251-256, 256-264]. In a companion case, *Debbie Donohue v. Quick Collect, Inc. an Oregon Corporation*, the Ninth Circuit of Appeals upheld the decision of the federal District Court granting summary judgment for the defendant/respondent on the issues concerning 15 U.S.C. § 1692e & f on January 13, 2010. Those issues having been resolved by the ninth circuit, there remains only one issue for this court, that of the failure of Mr. Nielson to provide a validation notice pursuant to 15 U.S.C.

§ 1692g. See, 592 F.3d 1027 (9th Cir. 2010).

D. STANDARD OF REVIEW

The issue of summary judgment is a question of law requiring a de novo review. *Westar Funding Inc. V. Sorrels*, 157 Wn. App.777, 239 P.3d 1109 (2010). Questions of law are reviewed de novo. *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 233 P.3d 861 (2010). Errors of law are reviewed de novo. *Sunnyside Valley Irrigation District v. Dickie*. 149 Wn.2d873, 880, 73 P.3d 369 (2003). This includes issues of construction or interpretation of a statute or court rule. See, *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006); *W. Telepage, Inc. V. City of Tacoma Department of Finances*, 140 Wn.2d 599, 607, 998 P.2d 884 (2004); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *In re Matter of Kistenmacher*, 134 Wn.App. 72, 79 n.5, 138 P. 3d 648 (2006); *In re Marriage of Wilson*, 117 Wn.App. 40, 45, 68 P. 3d. 1121 (2003) See also, *Kilian v. Atkinson*, 147 Wn.2d 16, 27, 50 P. 3d

638 (2002). When the meaning of an enactment or court rule is plain on its face, the reviewing court must give effect to that plain meaning. *See, McGinnis v. State*, 152 Wn. 2d 639, 645, 99 P. 3d 1240 (2004).

E. ARGUMENT

1. LIABILITY ANALYSIS

LAW RE LIABILITY

The FDCPA codified as 15 U.S.C. § 1692 is a comprehensive federal statute designed to protect the non-commercial consumer from over zealous collection practices and deception. This legislation added a new title to the Consumer Credit Protection Act entitled the Fair Debt Collection Practices Act. Its purpose is to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors.

This bill was strongly supported by consumer groups, labor unions, State and Federal law enforcement officials, and by both

national organizations which represent the debt collection profession, the American Collectors Association and Associated Credit Bureaus. Senate Report No. 95-382 Committee on Banking, Housing, and Urban Affairs, Page 1&2. 1977:

(a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

© Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) It is the purpose of this subchapter 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. 15 U.S.C. § 1692. Congressional Findings and Declaration of Purpose

[Section 802 of P.L.]

The Fair Debt Collection Practices Act prohibits “debt collector[s]” from making false or misleading representations and from engaging in various abusive and unfair practices and applies to attorneys prosecuting litigation in an attempt to collect a debt. *Heintz v. Jenkins*, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995). An intent to deceive the consumer is not a condition to establishing a violation of the act. See *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985.).

The FDCPA is a strict liability statute and is not predicated upon establishing intent regarding the violation. Intent or knowledge does however relate to the issue of damages and the bona fide error defense. *Bently v. Great Lakes Collection Bureau*, 6 F.3d 60 (2d Cir. 1993); See also, *Russell v. Equifax A. R.* 5. 74 F.3d 30, 35 (2d Cir. 1996); *Lindbergh v. Transworld Systems Inc.*, 846 F. Supp. 175 (D. Conn. 1994). (Consumer who failed to respond to validation notice did not show that collector had

knowledge that debt was barred by statute of limitation.).

The standard of review by which a court will judge the conduct of the collector to determine if the prohibitions have been violated, is the “least sophisticated consumer” or sometimes referred to as the “unsophisticated consumer”. *Jeter v. Credit Bureau, Inc.* 760 F.2d 1168 (1985) *Jeter* applied the standard to § 1692 d & 1692e(10) but not to § 1692e(5). The court indicated that the “least sophisticated consumer” standard was irrelevant to an alleged violation of 1692e(5). But see, *Swanson v. Southern Oregon Credit Service, Inc.*, 869 F.2d 1222 (9th Cir.1988) which took the opposite position regarding 1692e(5). See also, *Russell v. Eguifax A. R. 5.* 74 F.3d 30, 35 (2d Cir.1996). The least sophisticated standard has been applied to the following sections: 1692e, 1692f, and 1692g.

The Plaintiff/Appellant, Ms. Donohue, contends that Mr. Nielson violated 15 U.S.C. § 1692g of the Fair Debt Collection Practices Act which requires the sending of a validation notice.

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing-

- (1) the amount of the debt;
- (2) the name of the creditor to whom the debt is owed;
- (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- (4) a statement that if the consumer notifies the debt collector in writing within the thirty day period 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; and
- (5) a statement that, upon the consumer's written request within the thirty- day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

See also, Romea v. Heiberger & Associates, 163 F.3d 111,118 (2nd Cir., 1998). That case involved a 3day notice to pay for non payment of rent. The law firm who sent an initial communication did not provide the validation notice required by

§ 1692 g. The court in *Romea* held that the law firm had to comply with the FDCPA citing among other cases, *Heinz v. Jenkins* supra. Mr. Nielson has never to the date of this pleading ever sent Ms. Donohue a validation notice and such should have been sent within five days of the date of his initial communication, his February 7, 2008 demand letter.

1. THE DEFENDANTS/RESPONDENTS VIOLATED THE FDCPA BY FAILING TO PROVIDE A VALIDATION NOTICE

The issue in this appeal is whether the defendants/respondents must comply with § 1692g of the FDCPA, the validation notice requirement. Ms. Donohue received a letter from the defendants/respondents dated February 7, 2008. [CP 79 line 19 through 80 line 25, 125 line 13-15, 137, 158, 172] The letter, containing the identifying letterhead of Gregory A. Nielson P.S., did not contain a validation notice. [CP 79 line 19 through 80 line 25, 125 line 13-15, 137, 158, 172]. Except for the summons and complaint this was the first

communication from the defendants/respondents. [CP 79 line 19 through 80 line 25, 125 line 13-15, 137, 158, 172].

Should the defendants/respondents have provided a validation notice? The defense's contention is no, the attorney's client, Quick Collect Inc. provided such notice to Ms. Donohue prior to the commencement of litigation. The notice was provided by Quick Collect Inc in October of 2007. [CR 158]. Mr. Nielson first letter to Ms. Donohue was February 7, 2010. [CR 172] When dealing with the FDCPA and lawyers, the best place to start is with *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489 (1995). *Heintz* is the seminal case that subjects attorneys to the requirements of the FDCPA. The facts in *Heintz* are simple: Mr. Heintz represented a bank that was attempting to collect on a defaulted car loan. The Debtor, Jenkins sued Mr. Heintz and the firm for violations of §§ 1692 e and f. The attorney argued for a litigation exception to the FDCPA for attorneys. The court held that the FDCPA does apply to attorneys engaged in litigation to

collect debts as defined in the FDCPA and there was no intent on the part of Congress to exempt attorneys.

In *Griswold v. J&R Anderson Business Services, Inc* 1983 U.S. Dist. LEXIS 20365 (D. Or. Oct. 21, 1983) the court there stated, “There is nothing in the legislative history or the statutory language which indicates that an assignee debt collector should be exempt from any portion of section 1692g.” even though the previous debt collector provided such notice. Consistent with the rationale of *Heinz*, the court took the position that all the provisions of the act apply to all debt collectors regardless of their particular status as a subsequent debt collector. The effort here is like *Heinz*. The defense would like to carve out an exemption for attorneys under § 1692g when there is no express exemption for attorneys relative to the requirement of providing a validation notice. See *S. Rep. No. 382*.

The provision providing for the validation notice must apply to: “each debt Collector.” *Griswold* at page 2. There is

ample authority that supports this proposition including FTC opinion statement, the latest of which is *FTC Official Staff Commentary Section n 809(a) 7*, (1988). Further, support for this proposition is contained in the history and FTC analysis of the concept of first communication addressed when an attorney causes an debtor to be served a summons and complaint. The scenario that gave rise to the examination of first communication was the issue of whether or not an attorney had to provide a § 1692g Validation Notice when serving a summons and complaint. If the first contact with the consumer was service of the summons and complaint, it was required that the attorney provide the validation notice. The one and only FTC advisory opinion given in the long history of the FDCPA is *Mezines, FTC Advisory Opinion* (Mar. 31, 2000). Under the circumstances, where the first communication by the attorney was service of the summons and complaint, the FTC advised that the FDCPA did not preempt state laws prohibiting the inclusion of the validation notice in the

summons or complaint. The FTC took the view that the validation notice could either be sent before service or within five days of the service of the summons and complaint. If the FTC believes that the notice had to be sent regardless of state laws, it stands to reason that the notice is so important that it **must** be given by the attorney to the consumer. Although FTC staff letters and informal opinions can not be a basis of defense for violation of the FDCPA, pursuant to the express language of the FDCPA, 15 U.S.C. § 1692k(e), the ninth circuit in the case of *Pressley v. Capital Credit & Collection Services, Inc.*, 760 F.2d 922 (9th Cir. 1985) indicated that although not binding on the court, FTC advisory opinions are entitled to some weight. If the FTC believes that a validation notice is important enough to accompany a summons and complaint despite state law, surely, it should maintain its importance when the first communication is a letter, such as the February, 7, 2008 letter of the defendants to Ms. Donohue. The significance of the validation notice is not

lessened just because the client of Mr. Nielson, Quick Collect sent one with different information four months before the February 7, 2008 letter and the information had changed. Presently, for the court's edification, Congress disposed of the difficulty that the summons and complaint created concerning the 1692g validation notice by enacting a new provision that specifically excluded the summons and complaint from first communication consideration. See 1692g(b)(d)).

Another important consideration to examine is the policy of the FDCPA and Congress's intent concerning § 1692g. The FDCPA like the Truth In Lending Act 15 U.S.C. § 1601 et seq, is a remedial statute and as such should be construed liberally in favor of the consumer. *Johnson v. Riddle*, 305 F.3d 1107, 1117 (10th Cir. 2002); See , e.g. *Pfenning v. Household Credit Servs., Inc.* 286 F.3d 340, 344 (6th Cir. 2002) (TILA); *Rossmann v. Fleet Bank Nat'l Assoc.*, 280 F.3d 384, 390 (3d Cir. 2002)(TILA); *Ellis v. General Motors Acceptance Corp.*, 160F.3d 703,707 (11th ir.

1998)(TILA); *Plummer v. Gordon*, 193 F.Supp.2d 460,463 (D. Conn. 2002)(FDCPA); *Ross v. Commercial Fin. Servs.*, 31 F.Supp.2d 1077, 1079 (N.D. Ill. 1999)(FDCPA); *Harrison v. NBD, INC.*, 968 F.Supp. 837, 844 (E.D. N.Y. 1997)(FDCPA). The rights and obligations established by § 1692g were considered by the U.S. Senate to be a “significant feature” of the act. *S. Rep. No. 382 at 4*.

Because of the significance of § 1692g certain judicial principles have also emphasized the importance of this section. The placement of the notice must effectively convey notice to the least sophisticated consumer. *Swanson v. Southern Oregon Credit Service*, 869 F.2d 1222 (9th Cir. 1988). “Congress included the debt validation provisions in order to guarantee that consumers would receive adequate notice of their legal rights. *Miller v. Payco General American Credits, Inc.* 943 F.2d 482, 484 (4th Cir. 1991). Dunning letters can not contradict or overshadow the validation notice requirements. *Miller, Supra*.

In *Sutton v. Law Offices Of Alexander L. Lawrence* 1992 U.S. Dist. LEXIS 22761 (D. Del. June 17, 1992), the district court there faced the same situation as here. The attorney asserted that his letter was simply a follow up to the communication from his client the collection agency which had previously corresponded with the debtor containing the validation notice. The court in *Sutton* recognized that the correspondences were from two different parties and ultimately relied upon the FTC's Official Commentary addressed above, that attorneys must provide the requisite notice unless his correspondence deals directly with the litigation. Here Mr. Nielson's February 7, 2008 letter is inescapably a dunning letter and does not even address the litigation. Ms. Donohue was served on January 29, 2008. She attempted to pay the debt based upon prior demand from the agency. [CP 170].

The February 7, 2008 letter included new charges for filing, service and statutory attorney fees. The interest charged was

different from the agencies validation notice [CP 158].The amount owed, less interest, was now twice the amount originally demanded for the principle alone. This is a very significant difference from the demands of the agency. [Cp 158, 170] The court in *Griswold* stated at page 2 “*that the requirement that each debt collector comply with the statutory notification provisions relieves a court of the task of determining which debt collector sent the original notice, whether the debt has remained unchanged and whether the original notice was adequate.*” (emphasis added) Against this background of cases and congressional intent, the plaintiff proffers that the only position consistent with the language and spirit of the act is to require the defendants/respondent to provide the validation notice. The purpose of the act, is preserved and protected by requiring compliance. Not requiring compliance creates an exemption that is not contained in the specific provisions of the act and clearly inconsistent with the U.S. Supreme Court ruling in *Heinz* making

the act applicable to attorneys. There is no exception for litigation and this court should not construe any exception for communication that post dates the commencement of litigation. That should be left for Congress and the legislative process. To do otherwise, is to invite manipulation of the provisions of the FDCPA.

The defendants/respondents further rely upon *Senile v. Landau*, 390 F. Supp 2d 463 (D. Md. 2005). *Senile* held that the initial communication is the first communication provided by the agency and the validation notice must be in that communication. The statute as stated above should be read liberally in favor of the consumer. If congress intended an exception it would have added such. For example, the service of the summons and complaint although the first item received by Ms. Donohue from the defendants did not require a validation notice since such is specifically exempt from the statute. See FDCPA §§ 1692g(b)(d). Had the court known that pleadings were specifically exempted,

the court might have reached a different position. Also, not to require a subsequent debt collector to provide the notice allows the subsequent collector to circumvent the statute. Ms. Donohue doesn't assert that the summons or complaint had to have the § 1692g notice, but that the subsequent letter dated February 7, 29008 should have had the validation language. *Senile* had no subsequent letter and this should distinguish the *Senile* case.

Further, as here in this case, the interest figure is different. It is greater by \$2.98. There are other items contained in the letter such as attorney fees that are addressed in the notice sent by Quick Collect. If we apply part of the analysis of *Goray v. Unifund CCR Partners*, 2007 W.L.4260017 (D. Hawaii 2007), the debtor here, Ms. Donohue would not know because she was not advised that she should call the attorneys office to find out what the actual payoff figure would be based upon the time of her call. The fact that the interest figure changes daily, necessitates that the defendants/respondents should provide the § 1692 validation

notice. Without such, Ms. Donohue would not have known that she could have challenged the interest charge or at minimum, requested verification. Even more importantly, the previous notice provided by Quick Collect Inc. broke down the interest charges between pre and post assignment interest. This is extremely important since the interest rates are different. How is Ms. Donohue to know such? There is no way she can calculate how Mr. Nielson came up with the interest figure contained in the letter.

Still further, the validation provision in the statute is aimed at preventing collection efforts based upon mistaken information *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003); Section 1692g debt validation is a strict liability provision and an unintentional violation of the validation requirements is a violation of the Act. *Booth v. Collection Experts, Inc.* 969 F. Supp. 1161 (E.D. Wis. 1997).

Finally, the simplest explanation, that is totally consistent

with the statute and with *Heintz v. Jenkins* is the rationale used in the case of *Sutton v. Law Offices of Alexander L. Lawrence*, 1992 U.S. Dist. LEXIS 22761 (D. DEL. June 17, 1992). Mr. Sutton sued Attorney, Lawrence in Federal District Court alleging, among other things, that Lawrence failed to provide a validation notice with correspondence that Lawrence had sent to Sutton. Lawrence defended on the basis that the collection agency TCA Collections, Lawrence's client, had already provided such to Sutton. Applying the rationale of *Pressley v. Capital Credit and Collection Inc.*, 760 F.2d 922 (9th Cir. 1985), and dealing with the issue of inclusion of the § 1692e(11), disclosure requirement, the court in *Sutton* stated:

Similar to their argument under section 1692e(11), defendant argues that their "initial communication" with the plaintiff is only a follow up letter to their client's communication, permitting defendants to avoid the section 1692g requirements because they were previously provided in TCA's December 1989 letter. As indicated above, although defendants argue that the two letters are interrelated, it is obvious from the face of both letters that they are

from two separate parties.

Furthermore, the Federal Trade Commission's Staff Commentary on the Fair Debt Collection Practices Act, 53 F.R. 50,097 (Dec. 13, 1988) provides the following:

An attorney who regularly attempts to collect debts by means other than litigation, such as writing the consumer demand letters, dunning letters or calling the consumer on the phone about the obligation (except in response to a consumer's call to him after the suit has been commenced), must provide the required notice, even if a previous debt collector (or creditor) has given such notice. *Id.* at 50,108. In light of this finding, I cannot conclude other than that defendants are required to provide the necessary validation. Consequently, I find defendants' letter violated Section 1692g of the Act.

The court here in *Donohue*, should simply apply this rational and conclude that the defendants have violated section § 1692g because the attorney is a separate entity from the client, Quick Collect Inc. and must comply with all the requirements of the Act as required by *Heintz*.

F. REQUEST FOR ATTORNEY FEES

In the event that he challenged decision fo the superior court is reversed and overturned, the petitioner respectfully requests that, as the prevailing party, that she be awarded her attorney fees and costs including a reasonable attorney fee, in having to seek review in this matter, in so far that these fees and costs are duly authorized pursuant to 15 U.S.C. § 1692k. It is a long standing rule that a party is entitled to recover reasonable attorney fees when a statute, contract or recognized ground in equity allows for the same. *See, Panorama Village Condominium Owners Association Board of Directors v. Allstate Inc. CO.*, 144 Wn.2d 130, 143, 26 P.3d 910 (2001).

G. CONCLUSION

Based upon the foregoing points and authorities, petitioner Ms. Debbie Donohue respectfully request, in addition to the requested award of attorney fees and costs identified in Part F

above.

DATED this 12th day of November, 2010.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Michael J. Beyer", with a long horizontal flourish extending to the right.

MICHAEL J. BEYER, WSBA #9109
Attorney for Petitioner Ms. Donohue