

Thomas v. Law Firm of Simpson Cybak
2004 WI 29 30975 (7th Cir 2004)

PROCEDURAL FACTS - The case was on appeal from the District Court's dismissal that the law firm failed to advise Thomas of his rights as a debtor within five (5) days, in violation of the Fair Debt Collections Act ("FDCPA"). *15 U.S.C. Sec 1692*

ISSUE 1 - Whether GMAC's January 20, 2000, default letter to Thomas constitutes an "initial communication" for the purposes of the FDCPA?

ISSUE 2 - Whether Simpson service of a summons and complaint filed in state court was an "initial communication" within the meaning of the FDCPA, such that its service triggered an obligation to notify Thomas as of his validation rights within five days?

FACTS - In January 1998, Frank Thomas purchased a Chevrolet Blazer under installment contract assigned to GMAC.

Around January 2000, Thomas lost his job with GMAC. He received a default letter from GMAC informing him he was past due.

On March 27, 2000, GMCA, through its attorneys, Simpson & Cybak, sued Thomas in Illinois state court.

The complaint included a statement that "pursuant to the [FDCPA] you are advised that this law firm is a debt collector attempting to collect a debt."

Thomas filed suit against GMAC, claiming neither party sent him a debt validation notice advising him of his rights.

In dismissing Thomas' case for "failure to state a claim" the district court determined that the creditor's letter to the debtor constituted "initial communications" while the debt collection initiation of the law suit did not.

Thomas appealed.

HOLDING 1 - GMAC's letter to Thomas was a letter from the creditor and does not qualify as an "initial communication" under the Act. *Schlusser v. Fairbanks Capital Corp.*, 323 F 3d 534 536 (7th Cir. 2003)

HOLDING 2 - The court held that Simpson's service and complaint was an "initial communication", which triggered its obligation to notify Thomas of his validation rights. *Heintz v. Jenkins*, 514 U.S. 291, 11; S. Ct. 1489; 131 L.E. 2d 395 (1995)

REASONING - This court finds that the "FDCPA makes debt collectors, but not creditors responsible for notifying debtors of their validation rights." *15 U.S.C. 1692g(a)*. See also, note no. 1, regarding *Thomas v. Law Firm of Simpson & Cybak*, No. 00 D 8211, 2001 1516746, at 3 (N.D. Ill. Nov 28, 2001). *15 U.S.C. 1692(a)(4), (6)*.

The court stated that the "FDCPA affords different protection than state courts. FDCPA's broad definition of a "communication" encompasses the service of a summons and complaint. Plain language should be conclusive."

Simpson "contended that we should ignore the FDCPA's plain language."

“The Supreme Court considered and rejected similar arguments in *Heintz v. Jenkins*, 514 U.S. 291, 115; S. Ct. 1489; 131 L.E. 2d 395 (1995). The S. Ct. held that the FDCPA applied to lawyers who regularly attempted to collect through litigation.” This court recognizes there are complications, but indicated that “practical difficulties were not insurmountable and did not warrant an overriding of the Act’s plain language.” See *Heintz*. (“Commenting that we should not disregard plain language in order to impose on the statute what we may consider a more reasonable reading.”)

“The court document is a “communication” for the purposes of FDCPA. *Federal Trade Commission Staff Opinion letter, March 31, 2000, at 3*; available at: <http://www.ftc.gov/05/2000/04/fcdpaadvisoryopinion.htm>. 15 U.S.C. 19k(e) provides that no liability results from good faith reliance on such opinions; because of this, the court concluded that the service of summons and complaint by a debt collector constitutes an “initial communication” under FDCPA.”

Please see note no. 2: “We are aware that Congress has proposed a bill amending the FDCPA... but we must interpret the law as it existed at the time the dispute arose.” *HR 3066, 108th Cong* (2003).

Therefore, “Thomas stated a viable claim for violation of 15 U.S.C. 1692g.”

DICTA – “In the past, addressing FDCPA provisions, the court suggested explanatory language for debt collectors to use to overcome practical difficulties and avoid other complications.” See *Miller v. McCalla, Raymer, Padrick, Cobb, Nicholes and Clark, LLC*, 214 F. 3d 872, 875 (7th Cir. 2000); *Bartlett v. Heibl*, 128 F. 3d 497, 501-02 (7th Cir. 1997). The court thought it would be helpful to suggest explanatory language for debt collectors to use.”

DISPOSITION – The Court of Appeals disagreed with the District Court and REVERSED the dismissal under *Rule 12(b) (6)* of Thomas’ claim against Simpson, and REMANDED the case for further proceedings consistent with this opinion.

Terence T. Evans, Coffey, Manion, and Kanne DISSENT.