

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

NO. 14-1816

**DALE A. KAYMARK, individually and on behalf of other similarly situated
current and former homeowners in Pennsylvania,
Plaintiffs-Appellants,**

v.

**BANK OF AMERICA, N.A. and UDREN LAW OFFICES, P.C.,
Defendants-Appellees.**

**SUPPLEMENTAL BRIEF OF UDREN LAW OFFICES, P.C. PURSUANT
TO COURT'S DIRECTIVE AT ORAL ARGUMENT**

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Appellee Udren Law Offices, P.C. (“Udren”), by its undersigned counsel, respectfully submits this Supplemental Brief pursuant to the Directive of the Court at Oral Argument. Because the Court is familiar with the arguments of counsel and has limited the Brief to 3 pages, this argument shall be presented in “bullet point” format:

I. Documents filed with the court are not communications made to debtors, but rather are addressed to the court – distinction from *McLaughlin*, which involved a direct collection letter.

1. *O’Rourke v. Palisade Acquisition*, 635 F.3d 938, 942-44 (7th Cir. 2011), *cert. den.*, 132 S.Ct 1441 (2012). (Complaint with false exhibit not subject to FDCPA. Only communications directed to a consumer are subject to FDCPA. Rejects argument by concurring judge that since consumer is an indirect recipient of a pleading, document should be held to the “unsophisticated consumer” standard).

2. *Bandy v. Midland Funding, LLC*, 2013 U.S. Dist. LEXIS 7983 (S.D. Ala. 2013) (at *27 fn7) (“[t]he Fair Debt Collection Practices Act does not extend to communications that would confuse or mislead a state court judge.”).

3. *Okyere v. Palisade Collection*, 961 F.Supp. 2d 508, 520 (S.D.N.Y. 2013) (alleged misrepresentation to judge in court proceedings not FDCPA violation).

4. *Fratz v. Goldman & Warshaw, P.C.*, 2010 U.S. Dist. LEXIS 148744 (E.D.Pa. 2012) (at *12, fn6) (filings in arbitration proceeding not subject to FDCPA).

II. Request for Legal Fees in a Complaint Not Subject to FDCPA

1. *Mayhall v. Berman & Rabin, P.A.*, 2014 U.S. Dist. LEXIS 11397 (E.D. Mo. 2014) (at *15) (“A request to the court for an award of allegedly unreasonable attorney fees does not, without more, constitute a violation of the FDCPA.”)

2. *Hart v. Pacific Rehab of Md.*, 2013 U.S. Dist. LEXIS 130951 (D. Md. 2013) (at *71) (citing cases) (“The defendants have not violated the FDCPA by inserting an amount of attorneys fees in the collection complaint after plaintiff agreed to pay reasonable attorneys fees in the event of default. If plaintiff questions the reasonableness of the fees, it has various ways to challenge them.”)

3. *Sayyed v. Wolpoff & Abramson*, 733 F.Supp. 2d 635, 648 (D. Md. 2010), (“Numerous courts have held that a debt collector’s request for attorneys fees directed to the court in its pleadings is not an actionable representation under the FDCPA.”).

4. *Leone v. Credit Card Receivables Fund*, 2009 U.S. Dist. LEXIS 131479 (S.D. Fla. 2009) (at *15) (“The demand for fees in a complaint is no more binding on a plaintiff than any other factual allegation in a complaint.”)

5. *Bull v. Asset Acceptance LLC*, 444 F.Supp. 2d 946, 951 (N.D. Ind. 2006) (“The defendants have not violated the FDCPA by inserting an amount of attorneys fees in the collection complaint after Bull agreed to pay reasonable fees in the event of a default. . . Bull could have challenged the reasonableness of the attorneys fees in the state court proceeding.”).

6. *Argentieri v. Fischer Landscapes*, 15 F.Supp. 2d 55, 61-62 (D. Mass. 1998) (“A request for attorneys fees ultimately rests upon the discretion of the court and a determination of applicability at a later stage of the litigation. The whole purpose of regulating debt collection was to supervise a range of unsupervised contracts, such as demand letters and late night telephone calls. In contrast, a statement in a pleading is supervised by the court and monitored by counsel. The two situations are drastically different.”).

III. No distinction between Request for fees in the Prayer for Relief and the body of complaint - - Fn 6 of Appellant’s Brief.¹

Kaymark’s position on appeal is that there is a distinction between a request for a sum certain for fees found in the Prayer for Relief (not a violation) and the body of the complaint (a violation). The problem with this analysis is that in the case relied upon by Kaymark for this distinction (*Hall*), the request for fees was in the body of the complaint - - indeed, the allegation was virtually identical to that in this case. *See, Hall v. Leone, Halpin & Konopinski, LLP*, Complaint at Exhibit “A.” (underlying collection Complaint, ¶4) (Exhibit “A” hereto).² This Court will note that the request for liquidated fees is in the body of the complaint, as is the case here and that the prayer for relief seeks the total judgment, as is the case here. Thus, the very case relied upon by Kaymark to distinguish the long line of cases holding that a request for fees in a complaint does not violate the FDCPA supports Udren’s and not Kaymark’s position. Compare paragraph 4 and the prayer for relief in *Hall* with paragraph 6 and the prayer for relief filed by Udren. R. 47-48a. *See, Hall* at *18. (“The request for attorneys fees in the Wabash

¹ Footnote 6 of Appellant’s Brief states as follows: “A different question is presented when a sum certain for attorneys’ fees and costs is requested in the request for relief. *See, e.g., Hall v. Leone Halpin & Konopinski, LLP*, 2008 U.S. Dist. LEXIS 15843 (N.D. Ind. February 28, 2008) (Making a demand in a state court complaint for fees in an amount certain or otherwise asking for relief is not categorically barred - - just part of the normal judicial process). However, this [the Udren request] was not such a request for relief and this could not be mistaken for such a request given its placement in the body of the foreclosure complaint.”

² This pleadings is publicly available on the ECF system for the United States District Court for the Northern District of Indiana.

Circuit Court action doesn't violate 15 U.S.C. ¶1692e or §1692f, and the Leone Firm is entitled to summary judgment . . .”).

IV. The sole support for Kaymark's position arises out of “purchased debt” cases where debt collectors sought high percentage fees

As noted at pages 15 and 18-19 of Udren's Brief, the three cases cited by Kaymark for the proposition that a request for fees in a lawsuit may be the subject of an FDCPA violation arose out of “purchased debt” credit card cases in which the attorneys sought a percentage fee not authorized by the credit card agreement. However, in each case, much more was involved than a simple allegation in a pleading (all three went to judgment). This was discussed by the court in *Bandy v. Midland Funding, LLC*, 2013 U.S. Dist. LEXIS 7983 (S.D.Ala. 2013) (at *9-23) (reviewing “purchased debt cases” and articulating how the cases in which a claim was found to exist, the lawsuit was supported by false or deceptive representations, that the underlying debt was invalid and the defendant could not ever prove its claims, hoping to obtain either a default judgment or coerce a settlement and in general, was incapable of proving its case). Here, Kaymark admits liability under the mortgage and admits that Udren's client is entitled to “reasonable” fees. Indeed, he does not even contend that the \$1,650.00 is unreasonable. Rather, he attempts to create a new category of FDCPA claims where the plaintiff pleads the amount of attorneys fees sought to be collected in an eventual judgment. There are no cases which hold that such a fact pattern is sufficient to state a claim under the FDCPA. Indeed, this case was decided by the same judge who decided *Pierce v. Calvary SPVI, LLC*, 2013 U.S. Dist. LEXIS 178572 (W.D.Pa. 2013), relied upon by Kaymark. Clearly, Judge Bissoon clearly did not believe that *Calvary* was controlling under the facts of this case.

V. The decisions in *Heintz* and *Simon* are not controlling in this case³

Both *Heintz v. Jenkins*, 514 U.S. 291 (1995) and *Simon v. FIA Card Services, N.A.*, 732 F.3d 259 (3d Cir. 2013) stand for the general proposition that litigation activity is not, *per se*, exempted from the FDCPA. However, neither *Heintz* (a letter written by an attorney allegedly trying to collect an amount not authorized by the debt agreement) nor *Simon* (which arose from a letter written by bankruptcy counsel to bankruptcy debtor's counsel threatening to file a non-dischargeability complaint unless the plaintiffs agreed that the credit card debt was non-dischargeable or agreed to a settlement) involved a pleading to the court or decided whether a claim is stated based on a mere pleading, standing alone.

Indeed, while *Heintz* held that litigation activities of attorneys regularly engaged in debt collection activities may be the basis for FDCPA claims, the Supreme Court noted specifically in *Heintz* that the FDCPA had the “apparent objective of preserving creditors’ judicial remedies.” *Heintz, supra*, 514 U.S. at 296. The Eight Circuit, in ruling upon a theory similar to but stronger than the one in this case⁴ specifically rejected that *Heintz* required any such result:

The rule Ms. Hemmingsen urges - - that a debt collector’s fact allegations are false and misleading for the purposes of Section 1692e when rejected as not adequately supported in the collection suit - - would be contrary to the FDCPA’s “apparent objective of preserving creditors’ judicial remedies,” *Heintz* 514 U.S. at 296, an objective consistent with the principle “that the right of access to the courts is an aspect of the First Amendment right to petition the government for redress of grievances.” *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983).

Hemmingsen v. Messerli & Kramer, P.A., 674 F.3d 814, 819-20 (8th Cir. 2012).

³ Judge Krauss asked the undersigned to address this issue after Judge Fuentes requested a three page brief on the issues briefed above. Udren respectfully requests that the court indulge two additional pages to address Judge Krauss’ question.

⁴ In *Hemmingsen*, the state court had entered judgment in favor of the consumer before the FDCPA case was initiated. Here, there has been no such determination.

The court went on to note that “judges have ample power to award attorneys fees to a party injured by a lawyer’s fraudulent or vexatious litigation tactics . . . there is no need for follow-on Section 1692e litigation that increases the cost of resolving bona fide debtor creditor disputes.” *Id.*

Accordingly, while *Heintz* and *Simon* recognize a general rule that attorneys engaged in litigation are not immune from the FDCPA, neither case has held that an attorney is liable merely for allegations in a complaint disputed by a consumer nor do they address the relatively innocuous situation here, where an allegation seeking attorneys fees which the foreclosure defendant does not even contend are unreasonable is alleged to be an FDCPA violation because it sets forth a specific amount of such fees. The FDCPA is a remedial statute designed to remedy serious debt collection abuses. It is not a “gotcha” statute. Kaymark’s theory would allow every state court foreclosure action to serve as a predicate for a parallel FDCPA suit simply if the consumer disputes the creditor’s entitlement to any aspect of damages. That would, by definition, create an FDCPA cause of action in every defended foreclosure suit. That is not the purpose of the FDCPA.

Respectfully submitted,

WILENTZ GOLDMAN & SPITZER, P.A.

Dated: December 12, 2014

/s/ Jonathan J. Bart

Daniel S. Bernheim 3d, Esquire

Jonathan J. Bart, Esquire

Attorneys for Appellee

CERTIFICATE OF SERVICE

I caused a true and correct copy of the foregoing Supplemental Brief of Udren Law Offices, P.C. Pursuant to Court's Directive at Oral Argument to be served in accordance with the United States Court of Appeals for the Third Circuit's electronic filing system upon the following:

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WILENTZ GOLDMAN & SPITZER, P.A.

Dated: December 12, 2014

BY: /s/ Jonathan J. Bart
Jonathan J. Bart, Esquire

EXHIBIT “A”

**UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION**

FILED
MAY 31 2005
AL STEPHEN J. EDWARDS, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

RACHEL HALL,)
JOHN HALL,)
PLAINTIFFS,)
)

VS.)

LEONE HALPIN & KONOPINSKI, LLP,)
)
DEFENDANT.)

CASE NO. 3:06CV0343 RM

COMPLAINT AND DEMAND FOR JURY TRIAL

I. INTRODUCTION

1. This is an action for actual and statutory damages brought by Plaintiffs, Rachel Hall formerly Rachel Penrod ("Ms. Hall"), an individual consumer, and John Hall ("Mr. Hall") against Defendant, Leone Halpin & Konopinski, LLP, for violations of the Fair Debt Collection Practices Act, 15 U.S.C. §1692 et seq. (hereinafter "FDCPA"), which prohibits debt collectors from engaging in abusive, deceptive, and unfair practices.

II. JURISDICTION

2. Jurisdiction of this court arises under 15 U.S.C. §1692 and 28 U.S.C. §1337. Declaratory relief is available pursuant to 28 U.S.C. §§2201 and 2202. Venue is proper in this District in that the defendant has conducted business here and the conduct complained of occurred here.

III. PARTIES

- 3. Plaintiff, Ms. Hall, is a natural person residing in Wabash County, Indiana.
- 4. Plaintiff, Mr. Hall, is a natural person residing in Wabash County, Indiana.

SCANNED

5. Defendant is a law firm which attempts to collect debts in this state and whose principal place of business is in this state.

6. Defendant regularly attempts to collect debts alleged to be due another.

7. Defendant is engaged in collection of debts from consumers.

8. Defendant is a debt collector as defined by the FDCPA, 15 U.S.C. §1692a(6).

IV. FACTUAL ALLEGATIONS

9. Defendant has been retained by Communitywide Federal Credit Union concerning collection of a consumer account regarding an automobile loan incurred for personal, family, or household purposes, by Plaintiffs, Rachel Hall (formerly Rachel Penrod) and John Hall.

10. On May 31, 2005, Defendant filed a suit on behalf of Communitywide Federal Credit Union against Plaintiffs in the Wabash Circuit Court. (A true and accurate copy of the Summons and Complaint received by Ms. Hall and Mr. Hall is attached as Exhibit A.)

11. Plaintiffs allege Defendant violated 15. U.S.C. §1692g.

12. At all times relevant to this Complaint, there was in full force and effect

15U.S.C. § 1692g, which provides, in pertinent part:

(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.

13. Plaintiffs allege that Defendant failed to provide the required notice under 15 U.S.C. §1692g.

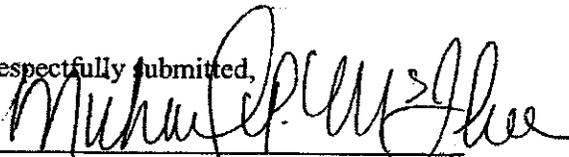
14. Plaintiffs allege that they did not receive the required notice prior to suit through any dunning letter nor as an attachment to Exhibit A of this Complaint.

15. Additionally, Plaintiffs allege that Defendant violated 15 U.S.C. 1692e(2)(A) and 15 U.S.C. 1692f(1) by requesting an attorney fee of \$1900 which they allege was not earned at the time of filing their state court complaint.

WHEREFORE, plaintiffs, Rachel Hall and John Hall, respectfully requests that judgment be entered against defendant, Leone Halpin & Konopinski, LLP, for the following:

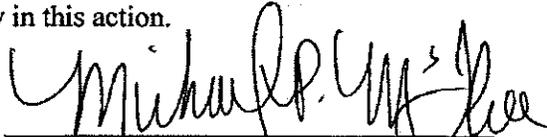
- A. Declaratory judgment that defendant's conduct violated the FDCPA;
- B. Actual Damages;
- C. Statutory damages pursuant to 15 U.S.C. §1692k;
- D. Costs and reasonable attorney fees pursuant to 15 U.S.C. §1692k; and
- E. For such other and further relief as the Court may deem just and proper.

Respectfully submitted,


Michael P. McIlree, Counsel for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff demands trial by jury in this action.



Michael P. McIlree, Counsel for Plaintiff

Michael P. McIlree
IN. Atty. 19847-45
Attorney for Plaintiffs
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Tel: (219) 548-1800
Fax: (219) 548-5905
mcilree1@aol.com

EXHIBIT A

Return

✓

JH

SUMMONS

STATE OF INDIANA)
) SS:
WABASH COUNTY)

WABASH CIRCUIT COURT
CAUSE NO. 85C01-0505-CC-225

Plaintiff - Names and Addresses
COMMUNITYWIDE FEDERAL CREDIT UNION
1555 Western Avenue
South Bend, IN 46619,

RECEIVED

FILED

MAY 31 2005

MAY 31 2005

WABASH CO. SHERIFF

Defendant - Names and Addresses
RACHEL L. PENROD
302 N. Walnut St.
North Manchester, IN 46962-1876.

Lon J. Draper
WABASH CIRCUIT COURT CLERK

TO THE ABOVE NAMED DEFENDANT OR DEFENDANTS:

You have been sued by the person(s) named "Plaintiff" in the court stated above.

The nature of the suit against you is stated in the complaint which is attached to this summons. It also states the demand which the plaintiff has made and wants from you.

You must answer the complaint in writing, by you or your attorney, within twenty (20) days commencing the day after you receive this summons, (you have twenty-three (23) days to answer if this summons was received by mail), or judgment will be entered against you for what the plaintiff has demanded.

If you have a claim for relief against the plaintiff arising from the same transaction or occurrence, you must assert it in your written answer.

CLERK'S ISSUANCE

Lon J. Draper
CLERK

DATE MAY 31 2005, 2005

BY *[Signature]*
DEPUTY

The following manner of service is hereby designated: Registered Mail Certified Mail
 By Sheriff as provided by law Other, as follows:

(If by mail, stamped addressed envelope with return receipt attached to be furnished by the attorney).

ATTORNEY FOR PLAINTIFF: Kristin R. Fox, Esq., Leone Halpin & Konopinski, LLP, 205 W. Jefferson Blvd., Suite 605, South Bend, IN 46601; (574) 234-3030

ACKNOWLEDGMENT OF SERVICE OF SUMMONS

A copy of the above summons and a copy of the complaint attached thereto was received by me at _____ this _____ day of _____, 2005

Signature of Defendant

STATE OF INDIANA)
)SS:
WABASH COUNTY)

IN THE WABASH CIRCUIT COURT
CAUSE NO. 85C01-0505-CC-285

COMMUNITYWIDE FEDERAL)
CREDIT UNION.)
1555 Western Avenue)
South Bend, IN 46619,)
)
Plaintiff,)

v.)

RACHEL L. PENTON,)
302 N. Walnut St.)
North Manchester, IN 46962-1876,)

JOHN D. HALL)
302 N. Walnut St.)
North Manchester, IN 46962-1876)
)
Defendants.)

FILED
MAY 31 2006
Lori J. Deaper
WABASH CIRCUIT COURT CLERK

COMPLAINT ON ACCOUNT

Plaintiff, for its cause of action against the defendants, states the following:

1. That it is a federally chartered credit union doing business in St. Joseph County, Indiana.

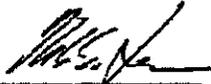
2. That on or about July 20, 2004, defendants, by execution of an Agreement, a copy of which is attached hereto, marked "EXHIBIT A" and made a part hereof, promised to repay plaintiff all sums received under such Agreement, together with interest at the rate of 17.9% per annum.

3. That the defendants have defaulted under the terms of such Agreement and are now liable to the plaintiff in the sum of \$7,376.50 principal, plus interest of \$1,883.97 through May 23, 2005, accruing at 17.9% per annum, plus attorney fees.

4. That the plaintiff is entitled to a reasonable attorney fee for pursuit of its remedies under the Agreement, and that a reasonable attorney fee is \$1,900.00.

WHEREFORE, plaintiff prays for judgment in its favor and against the defendants in the amount of \$11,160.47 plus the costs of this action and all other proper relief.

Respectfully submitted,



Charles S. Leone (8765-71)
Kristin R. Fox (20888-71)

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