ORIGINAL

BEFORE THE SUPREME COURT
STATE OF FLORIDA

CHESTER OSHEYACK

Appellant

vs

JOE GARCIA, etc., et al

Appellees

Monday, July 20, 2001

Case No. SC 96439
Lower Tribunal
Case No. 990869-TL

APPELLANT'S MOTION FOR REHEARING
ADDENDUM
AND
RESPONSE TO APPELLEE'S REPLY

By its ruling in Whitaker v Ameritech, the 7th Cir Ct has recognized the authority of the FDCPA in the telecommunications industry. By invoking the 7th Cir Ct decision in the above referenced case before this court, the FPSC has recognized the validity of the FDCPA in deciding questions relative to the telecom industry trade practices. In the past, the FPSC has eschewed the jurisdiction of the FTC in matters pertaining to utilities. This uncertainty can now be put to rest. Moreover, if s803(6)(f)(iii) applies to debt collection in the telecommunications industry, it follows that other sections of the "Act" should apply where appropriate. For example, it is my belief that S808 Unfair Practices is violated by the non-judicial act of interrupting a consumer's access to a market to collect a debt for one or more clients, despite the fact that the debt collector's account is pre-paid; s809 is violated in the processing of disputed debts; S810 is violated by not recognizing the payment of the debt collector's obligation when the consumer's phone service is interrupted. Of course, if the local phone service provider is not a "debt collector" he can do any of these abusive things, and others, with impunity.

Since the 7th Circuit Court opinion in Whitaker v Ameritech Corp appears to be at the core of this court's decision in this case, I will address what I consider to be certain flaws in that opinion. (ref page 5 of this court's order)

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It is stated that "It (Ameritech) acquires those debts according to contracts with the long distance and information providers, at the moment each telephone call is made." In fact, there is nothing in the FDCPA to indicate Congressional intent that creditors may make business decisions which determine whether or not a consumer can benefit from the protection of the statute. For example, the FTC has held (ref FTC opinion letters on Megalaw web site) that a creditor cannot avoid FDCPA coverage by having its client wait until the accounts have been transferred to the collector before labeling it in default. In fact, the FDCPA does not define "default". Accounts may be "overdue" aka "delinquent" without being in "default". It follows then, that the local and long distance telephone service providers should not be able, by executing a contract with each other, to determine when a debt is acquired or is in default. [ref Appellant's Reply Brief dtd Feb 16, 2000; pgs (4)(5)(6)] Moreover, what if the line is "busy"? or no one answers the call? How does the "contract" address those circumstances? A contract between two of three or more parties cannot change the simple reality that a call is not completed until and unless the call is accepted at its destination. Moreover, since time on-line is the deciding factor in the amount due and payable, that amount must be determined at the time the parties disconnect from each other. Now therefore, it is the local telcom on the call recipient's end of the line, which determines when the call is billable, not the telcom on the call initiator end of the line as indicated by the "contracts between Ameritech and its clients". Further, the local telcom at the call initiator's location, does not have the billing details until and unless such is sent to him by whoever aggregates the data. Today in Florida, the aggregator may be a 3rd party, and the local telcom (which may be a 4th party to the transaction) does nothing more than transfer the data to its own billing format for mailing to the consumer. This is particularly true in the case of resellers of long distance telephone service. The local telcom, performs the function of copying and mailing the bill to the consumer, receiving payment from the consumer, and sending collections on to the creditor. The local telcom does not provide any other direct service to the account holders. HBS Billing Service, for example, aggregates call data for VarTech Telecom and PT-1 Long Distance companies. HBS then sends the detailed billing data on to Verizon for inclusion in their bills. The data sent to the consumer appears under the billing

label of "other regulated charges". In addition a separate sheet containing details of the transactions is included with each bill under the logo of the long distance carrier which is the creditor. Questions or complaints about billing are referred to each company's private 800 number for response or resolution. Now therefore, what is a "debt collector"?

There are "definitions" in the FDCPA S803, which may be worthy of the attention of this court. The status of "what is a creditor", for example, is determined by the act of extending credit, which act creates a debt. It follows therefore, that an entity that does not extend credit is not a "creditor". Accordingly, an entity which is not a creditor, must be either a "debt collector" or an "agent" of the creditor having the power to act for the creditor and with commensurate liability for errors and/or omissions associated with the transactions. The fact is that the local service telcoms strive to avoid liability...(e.g. Verizon) which company places a notice on the back of their bill stating that "suspension (of telephone service) for past due bills", if implemented, is done so in accordance with "state regulatory requirements". This notice is constructed to serve as a disclaimer of responsibility. There is no mention of "contracts between the local telcoms and their patrons" (ref FS Ch 364.19), because, here in Florida, no such contract, which would define the rights and responsibilities of the parties, exists. A possible exception to this statement might be in the relationship between the telcoms and certain of their large "corporate patrons". Accordingly, if the local companies are not "creditors", "collection agents", or "debt collectors", (the latter pursuant to the interpretation of the FDCPA by the 7th Cir Ct.), what are they? and, by what controlling legal authority do they acquire the right to impose non-judicial punishment on the consumer, thereby circumventing the intent and/or substance of state, constitutional and federal law?

It is important that this court consider the intent of Congress in its decision. The Senate report on the original FDCPA bill when it was introduced in Congress, appears to clarify Congressional intent with respect to the issue of "exemption" from the FDCPA. (S. Rep No 382,95th Congress, 1st Sess., 7, reprinted in 1977, U.S. Code Congr. & Ad News 1695, 1698). This Senate report makes clear that it was the intent of Congress to exempt "mortgage service

companies" and "others" who service outstanding debts for third parties so long as the debts were not in default when taken for servicing. The term "others" has been interpreted to include any entity "whose business it is to service current accounts by accepting timely payments (sic installment payments) from the consumer in accordance with contractual commitments. (FTC staff opinions/Findlaw web site). The telecommunications industry trade practices were not a factor at the time the original bill was debated because the AT&T monopoly had not yet been dismembered. This telcom industry was neither considered for inclusion nor exclusion under the FDCPA by identification or distinguishing characteristics. Now, the 7th Circuit, in its order related to Whitaker v Ameritech Corp., quoted as a precedent for its decision, the case of Wadlington v Credit Acceptance Corp. 76 F.3d 103 (6th Cir 1996), in which it was held that an assignee of a retail installment contract, is not a "debt collector" under the definition in the FDCPA S803(6)(iii). The facts in this latter case are consistent with the interpretation of the FTC staff in its opinion letters on all legal information web sites on the internet. However, the decision of the 7th Circuit Court, misapprehends the opinions of the FTC staff with respect to the manner in which past due long distance phone bills are perceived, and it also stands alone among all the other circuits in such interpretation. (ref Cornell University Law School/LII web site commentary).

Then there is the public notice which Verizon (local and long distance telephone service provider formed by merger of Bell Atlantic and GTE) places on the back of its bills in Florida, to wit:

> **Service suspension for non-payment**
>
> Based on the state regulatory and notice requirements, once your bill is past due, some or all of your service may be suspended. Charges may apply to suspend and reconnect your service. A deposit to re-establish your service may also be required.

Thus it appears that it is not necessary for a debt to be in default in order for the local telcom to suspend phone service here in Florida. Moreover, the action to be taken is described as "suspension" of service, not "disconnection" of service, thereby implying that the act is temporary. Not-

withstanding this "temporary" characterization, it is a fact that this "suspension" may last for an indefinite period. Furthermore, the notice is not overly explicit in that it offers no information as to how, if at all, suspension may be averted, perhaps by paying for and retaining local service while negotiating independently with the long distance carrier(s) which are the creditors. But this is not an option under the rules. Moreover, the notice fails to make clear that there is a difference between billing for the service that Verizon provides, and billing for long distance service provided by others, some of whom may be competitors. This is especially important since Verizon is now authorized to provide both local and long distance service. It should be apparent now, that this "notice" would not pass scrutiny, under any reasonable interpretation of law, as a "contract between a company and its patrons". It is what it purports to be...a minimal accommodation to PSC rules. In all fairness, it should be said that this "notice" has been substantially changed since the initial filing of briefs in this case. The notice was previously expressed, when Verizon was GTE Florida, as either "suspension or disconnection", and the source of the mandate was not identified as the "state" or its regulatory apparatus. In fact Verizon, which is a global corporation today, is healthy and successful while serving consumers in New York State and Pennsylvania where no disconnection of local service is permitted to collect long distance bills...by action of the state regulatory authorities in those states.

SUMMARY

The Order in Whitaker v Ameritech is not consistent with the published opinions of the FTC staff in its perception of Congressional intent vis-a-vis S803(6)(iii) of the FDCPA; and, it certainly is not appropriate as a precedent for this case in the light of current market conditions and trade practices in the telcom industry in Florida. Technological advancement is changing the modus operandi in this industry at a rapid rate, and it behooves responsible government regulators to match or at least try to anticipate its pace. Insofar as the courts are concerned, these changes may cause interpretation of law to be a bit more complex than just reliance on what may be outdated precedents and obsolete data. Simply put, a case that involves

regulation of telecommunications industry practices and, which lies dormant for two-years, must be reheard. If for no other reason, a rehearing will permit the adversaries to update their facts and rethink their perception of laws, in order that the risk of unintended, unlawful and/or undesirable consequences can be avoided or at least, mitigated. We, the people of Florida must believe that, in the highest court in the state, the search for justice will trump reliance on process.

Now, I must respectfully dispute the PSC characterization of my "water & sewer service" reference as an "allegation". It is a fact to which I can attest since I was a participant with first hand knowledge of the circumstances. It was I who shined the light on the issue for the parties. However, in this case, the landlord voluntarily refunded Over $6,000 to 81 tenants; the Director of the County Water Department (which is the utility) acknowledged that his "one-a-year" monitoring was limited and his regulatory duties did not go beyond the master meter. The Florida Housing Finance Corporation is canvassing other states to find out how they are handling the problems that I outlined and they are meeting with the IRS to attempt to harmonize federal, state and county statutes which conflicts I called to their attention. Also, the state Consumer Affairs Department is monitoring events as a member of the Board of the Housing Finance Corporation; and, the County has added two people who have the sole and specific duty of monitoring elements of the Affordable Housing Program for the Elderly so that problems such as were encountered never happen again. These are facts. It is also a fact that the parties stepped up to the proverbial plate; accepted their responsibilities; and, are taking steps to remedy the problems that were brought to light.

In this regard, I would be remiss if I did not call this court's attention to the statement regarding the PSC's prior commitment to "revisit the rule and have its staff include a review of the rule in its current rulemaking projects." (ref Order page 4). This court has given the PSC two-years to honor its commitment. It has not done so. Moreover, as this court can see from the PSC response, there is still no acknowledgement as to where lies the greater good. That too, is a fact.

Respectfully submitted by:

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footnote: This appellant understands that the references to FTC staff opinions gathered from internet web sites may be challenged, however they are presented here in a good faith effort to assist the Court by offering expert opinions from professionals who deal with these issues on a daily basis in their field of endeavor which is enforcement. Their governmental mission is Consumer Protection, and the Federal Fair Debt Collection Practices Act is one of their "tools". It is significant that the views expressed were not prepared for this case. However, they were published for public consumption and meant to be considered guidelines for public use. As such, the knowledge and experience they represent should be given great weight by this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been forwarded by U. S. Mail on this 20th day of July 2001, to the following:

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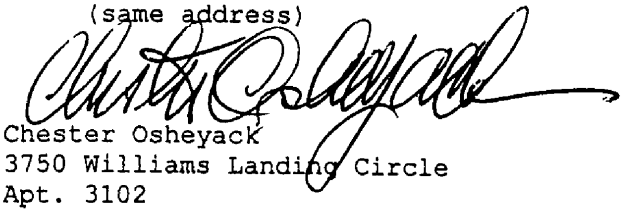

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