No. 19-12228

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Tiffany Wiley,

Plaintiff-Appellant,

v.

Notte & Kreyling, P.C., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

Hon. Steve C. Jones

Case No. 1:18-cv-2098

Brief of Amicus Curiae Consumer Financial Protection Bureau in Support of Plaintiff-Appellant and Reversal

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. Rule 26.1, counsel for *amicus curiae* Consumer Financial Protection Bureau certifies that the following additional persons and entities have an interest in the outcome of this appeal:

Bressler, Steven Y.

Coleman, John R.

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INTEREST OF AMICUS CURIAE

The Consumer Financial Protection Bureau is an agency of the United States charged with promulgating rules under the Fair Debt Collection Practices Act and enforcing compliance with the Act's requirements. *See* 15 U.S.C. § 1692*l*(b)(6), (d); 12 U.S.C. § 5512(b)(1), (4); *see also* 12 U.S.C. § 5481(12), (14) (including the FDCPA in the list of "Federal consumer financial laws" that the Bureau administers).

The FDCPA provides a means for consumers to challenge an alleged debt by properly "notif[ying] the debt collector" that the debt is disputed. 15 U.S.C. § 1692g(a)-(b). The Act sets out certain information about this dispute right that debt collectors generally must disclose to consumers. *Id.* § 1692g(a). This case presents the question of whether a debt collector violates these provisions, and engages in a deceptive collection practice, when it tells consumers that they must notify the creditor, rather than the debt collector, that the debt is disputed. The district court held that such conduct does not violate the FDCPA and, also holding that the claims were so frivolous as to have been brought vexatiously or in bad faith, awarded costs and fees against Plaintiff's counsel.

The requirement to accurately inform consumers about their right to dispute a debt is an important part of the FDCPA's consumer-protection

regime. Accordingly, the Bureau has a substantial interest in the Court's resolution of this case.

STATEMENT

A. The Fair Debt Collection Practices Act

Congress enacted the FDCPA in 1977 in light of "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors" and the serious harms these practices cause to individual consumers. Pub. L. No. 95-109, § 802(a), 91 Stat. 874, 874 (codified at 15 U.S.C. § 1692(a)). Congress intended the Act to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e); *see also id.* § 1692a(6) (defining "debt collector"). The FDCPA thus prohibits debt collectors from, among other things, using any false, deceptive, or misleading representation in connection with collecting a debt. *Id.* § 1692e.

In addition, the Act provides consumers a means to dispute and request certain information about an alleged debt. Under 15 U.S.C. § 1692g(a), a debt collector generally must provide consumers with certain information about the debt and about their right to dispute the debt, either in the initial communication with the consumer or shortly thereafter. This information is typically provided in a written notice that is commonly

referred to as a "validation notice." *E.g.*, *Caceres v. McCalla Raymer, LLC*, 755 F.3d 1299, 1301 (11th Cir. 2014).

Such a notice must include a statement that, if the consumer "notifies the debt collector" in writing within 30 days that she disputes the debt, the debt collector will obtain verification of the debt. 15 U.S.C. § 1692g(a)(4). The notice must also state 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." *Id.* § 1692g(a)(5). Finally, the notice must state that, "unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt … the debt will be assumed to be valid by the debt collector." *Id.* § 1692g(a)(3).

If the consumer properly "notifies the debt collector" that she disputes the debt or is requesting the name and address of the original creditor, the debt collector must "cease collection" until it has obtained and provided verification or the original-creditor information, as applicable. *Id.* § 1692g(b). "Any collection activities and communication" during the 30-day period "may not overshadow or be inconsistent with" the disclosure of these rights. *Id.*

Congress considered these provisions to be a "significant feature" of the statute and intended them to "eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid." S. Rep. No. 95-382, at 4 (1977). To ensure compliance with these and the FDCPA's other requirements, Congress included a private enforcement provision authorizing affected consumers to pursue remedies against "any debt collector who fails to comply with any provision" of the Act. 15 U.S.C. § 1692k(a); *see also* S. Rep. No. 95-382, at 5 (FDCPA was meant to be "primarily self-enforcing").

Congress also provided for administrative enforcement by a number of federal agencies. Until 2011, the Federal Trade Commission was the agency primarily responsible for enforcing the FDCPA. *See* 15 U.S.C. § 1692*l* (2010). In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. No. 111-203, 124 Stat. 1376. The Dodd-Frank Act granted the Bureau concurrent authority to enforce compliance with the FDCPA, 15 U.S.C. § 1692*l*(b)(6), and authorized the Bureau to "prescribe rules with respect to the collection of debts by debt collectors, as defined in the [FDCPA]," *id.* § 1692*l*(d).

Earlier this year, the Bureau issued a proposal to amend Regulation F, 12 C.F.R. pt. 1006, which implements the FDCPA, to

prescribe federal rules governing the activities of debt collectors. 84 Fed. Reg. 23,274 (May 21, 2019). The proposal includes, among other things, a model validation notice that debt collectors could use to comply with the FDCPA and the proposed rule's disclosure requirements. *Id.* at 23,409. The proposed model validation notice contains language directing consumers to contact the debt collector to dispute a debt, *id.*, but debt collectors would not be required to use the model notice, *id.* at 23,349. The proposed rule would also restate the statutory requirement that debt collectors must direct consumers to dispute a debt by notifying the debt collector. *Id.* at 23,404 (to be codified at 12 C.F.R. § 1006.34(c)(3)(i)). The comment period on the proposal is scheduled to close on September 18, 2019.

In issuing the proposed rule, the Bureau recognized that "[t]he requirement to provide validation information is an important component of the FDCPA and was intended to improve the debt collection process by helping consumers to recognize debts that they owe and raise concerns about debts that are unfamiliar." *Id.* at 23,333. The Bureau noted that this remains a significant area of concern for consumers, and that by far the most common type of debt-collection complaint that the Bureau receives is about attempts to collect a debt that the consumer reports is not owed. *Id.* at 23,340 & n.462 (citing CFPB, FAIR DEBT COLLECTION PRACTICES ACT:

ANNUAL REPORT, at 16 (2019), *available at* files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2019.pdf).

B. Factual and Procedural Background

Plaintiff Tiffany Wiley is a Georgia resident. Defendant Notte & Kreyling, P.C., is a debt collection law firm. In June 2017, Defendant sent Ms. Wiley a collection letter about a debt she allegedly owed to Georgia Power Company. Compl. ¶ 28. The letter contained a validation notice directing Ms. Wiley to raise any dispute about the debt with Georgia Power, the creditor, rather than with Defendant, the debt collector. Compl. ¶ 32; ECF No. 1-2 (collection letter). For example, the letter stated that, "[i]f you notify Georgia Power in writing within thirty (30) days of receiving this notice, Georgia Power will provide you with verification of the debt … ." ECF No. 1-2. And it stated categorically that "[a]ny letters or telephone calls must go directly to GEORGIA POWER COMPANY." *Id.*

Ms. Wiley filed this suit in May 2018. She alleged that Defendant's collection letter violated 15 U.S.C. § 1692g by failing to inform her that she must notify the debt collector to dispute the alleged debt and instead telling her to notify the creditor.[1] She further alleged that the letter violated the

[1] It is undisputed in this case that Defendant was acting as a debt collector when it sent the collection letter. *See, e.g.*, ECF No. 4-1, at 7-8 (Defendant's motion to dismiss acknowledging its status as a debt collector).

prohibition on false, deceptive, or misleading collection practices in 15 U.S.C. § 1692e by "misinform[ing] Plaintiff of how she must exercise her rights to dispute or validate the alleged debt." Compl. ¶ 33.

The district court granted Defendant's motion to dismiss on October 15, 2018, and entered judgment the next day. ECF No. 18. The district court found controlling this Court's decision in *Caceres v. McCalla Raymer, LLC*, 755 F.3d 1299 (11th Cir. 2014). *Caceres* dealt with a validation notice that properly told consumers to notify the debt collector if they disputed a debt, but departed from the statute in telling consumers that their failure to dispute would result in the debt being assumed valid by the creditor, rather than the debt collector. *Caceres* held that such notice was not deceptive because, although it did not use the exact language set out in 15 U.S.C. § 1692g(a)(3), it communicated substantively the same information. Relying on that decision, the district court concluded that the different language in the notice here was likewise not deceptive and also did not violate the FDCPA's requirements governing validation notices.

Defendant then moved for costs and attorney's fees under 28 U.S.C. § 1927, which authorizes such awards against litigants who "multipl[y] the proceedings in any case unreasonably and vexatiously." The motion noted that Plaintiff's counsel had previously sought to challenge the same

validation notice, on some of the same legal grounds, in a prior action brought by a different consumer. The district court in that case, as did the one here, dismissed the complaint after holding that the relevant claims were foreclosed by *Caceres*. *See Moore v. Notte & Kreyling, P.C.*, No. 1:17-cv-1148, 2017 WL 8217642 (N.D. Ga. Oct. 12, 2017), *report and recommendation adopted*, 2017 WL 8222324 (N.D. Ga. Oct. 31, 2017).

The district court in this case granted Defendant's motion for costs and fees on May 10, 2019, and entered judgment the same day. ECF No. 22. The court concluded that Plaintiff's counsel had "'knowingly and recklessly' pursued a frivolous claim against Defendant" that another district court judge had already held was barred under the law of this Circuit. *Id.* at 7. The district court ordered Plaintiff's counsel to pay all $12,362.50 in costs and fees that Defendant's counsel had requested. *Id.* at 11.

Plaintiff filed this appeal on June 7, 2019.

SUMMARY OF ARGUMENT

The FDCPA requires that debt collectors disclose the specific steps consumers must take to properly dispute a debt or request information about the original creditor. These disclosures—typically provided in a written "validation notice"—must include a statement directing consumers to dispute the debt by "notif[ying] the debt collector." 15 U.S.C.

§ 1692g(a)(4). Notifying the debt collector, and following the other steps required by the statute, triggers important protections for the consumer: The debt collector then must halt collection activities until it has verified the debt (or provided information about the original creditor, if requested by the consumer). *Id.* § 1692g(b).

Rather than telling consumers what they must do to properly dispute a debt, as required by the statute, the collection letter that Defendant sent to Ms. Wiley told her to do something else. It directed her to raise disputes not with Defendant (the debt collector) but with the creditor to whom the debt was allegedly owed. In fact, the letter went even further, warning that "[a]ny letters or telephone calls must go directly to GEORGIA POWER COMPANY," the creditor.

The letter violated the express requirement in 15 U.S.C. § 1692g(a) that validation notices must tell consumers to notify the *debt collector* to properly dispute a debt. And that violation matters. A consumer who followed Defendant's instructions and contacted the creditor could, as a result, be deprived of the protections she would be entitled to receive under 15 U.S.C. § 1692g(b) had she instead contacted the debt collector. In addition, the collection letter is deceptive in violation of 15 U.S.C. § 1692e because it is likely to mislead a consumer into thinking that her best or only

option for disputing the debt is to contact the creditor. In fact, the FDCPA provides a mechanism for raising such disputes through the debt collector, which is then obligated to cease collections until it has verified the debt.

This Court's decision in *Caceres v. McCalla Raymer, LLC*, 755 F.3d 1299 (11th Cir. 2014), on which the district court relied, is not to the contrary. *Caceres* concerned a notice that properly told consumers to contact the debt collector about disputes but also said that failure to dispute would result in the debt being assumed valid by the creditor, whereas the FDCPA requires a statement that the debt will be assumed valid by the debt collector. This Court concluded that the statement was not misleading because it raised "the same implication" as the statement set out in the statute. By contrast, the "same implication" does not arise from telling consumers to send disputes to the debt collector, as the statute requires, versus to the creditor. The former accurately informs consumers what they must do to ensure they receive the protections the statute affords; the latter is likely to lead them to do something else entirely.

The district court therefore erred in holding not only that Plaintiff had failed to state a claim, but that her claims were so meritless as to warrant sanctions against her attorney for having filed them.

ARGUMENT

DEFENDANT'S COLLECTION LETTER VIOLATED THE FDCPA'S DISCLOSURE REQUIREMENTS AND WAS DECEPTIVE

Defendant failed to comply with the disclosure provisions in the FDCPA requiring that validation notices include a statement telling consumers to "notif[y] the debt collector" if they dispute an alleged debt. Because that failure—along with Defendant's insistence that consumers must direct all communications to the *creditor* instead—was likely to mislead consumers about their dispute rights, Defendant also violated the FDCPA's prohibition on deceptive collection practices.

1. The FDCPA expressly requires that validation notices disclose five specific items of information. 15 U.S.C. § 1692g(a)(1)-(5). Among these, the notices must include "a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt … is disputed, the debt collector will obtain verification of the debt." *Id.* § 1692g(a)(4). Defendant's collection letter did not include such a statement. Instead, it told Ms. Wiley to notify the *creditor* if she disputed the debt, and insisted more broadly that "any" letters or calls "must go directly" to the creditor.

By directing Ms. Wiley to do something other than what the FDCPA requires in order to properly dispute a debt, Defendant's letter violated the clear statutory language of Section 1692g. And it did so in a way that could

deprive Ms. Wiley and other consumers of the very protections that validation notices are meant to disclose. The Court need go no further than the language of the statute to find that Defendant violated Section 1692g. *See generally Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (when interpreting a statute, the Court "will presume … that [the] legislature says … what it means and means … what it says").

That straightforward conclusion is confirmed by this Court's decision in *Bishop v. Ross Earle & Bonan, P.A.*, 817 F.3d 1268 (11th Cir. 2016). *Bishop* examined a validation notice that correctly told consumers to raise disputes with the debt collector but neglected to tell them that they must do so "in writing," as required by 15 U.S.C. § 1692g(a)(4)-(5). 817 F.3d at 1270.

This Court held that the plaintiff had stated a claim that the notice violated Section 1692g. It reached this conclusion even though the debt collector represented during the litigation that it would have waived the "in writing" requirement and accepted a dispute that a consumer raised orally. Although the debt collector was free to accept such disputes, the Court held that its willingness to do so did not vitiate its duty under the FDCPA to disclose the steps required by statute for properly disputing a debt. "The statute is clear," the Court explained. "The debt collector 'shall' notify the consumer of her right to dispute the debt in writing." *Id.* at 1274. The

statute is equally clear that Defendant here should have notified Ms. Wiley about her right to dispute the debt by contacting the debt collector.

2. Defendant's collection letter was also deceptive in violation of 15 U.S.C. § 1692e. "The absence of one or more of the statutory requirements for the validation notice is actionable as a violation of 15 U.S.C. § 1692e" under this Court's precedent "if the variance is one that would tend to mislead the least sophisticated consumer." *Caceres*, 755 F.3d at 1303.

The statements in the letter telling consumers to notify the creditor about any disputes—as well as the categorical command that "any" calls or letters "must go directly" to the creditor—are likely to mislead consumers about their statutory right to dispute a debt and about the steps required for doing so under the FDCPA. The letter creates the false impression that the proper—and indeed, only—way to dispute a debt is by notifying the creditor. In fact, the FDCPA provides a means for consumers to do so by notifying the *debt collector*. And when a consumer properly does so, the debt collector is obligated to cease collections until it has verified the debt.

This analysis is again confirmed by the Court's decision in *Bishop*. After holding that the plaintiff could challenge the validation notice for violating Section 1692g's disclosure obligations, *Bishop* separately held that the plaintiff had stated a claim that the notice was deceptive in violation of

Section 1692e. 817 F.3d at 1277. The plaintiff could proceed on that claim "because [the notice] misstates the law, omits a material term required by § 1692g(a), and misrepresents consumer rights under the FDCPA." *Id.* So too the collection letter in this case—which in fact went even further than the notice in *Bishop* by not just omitting information required by the statute, but affirmatively providing information contrary to what the statute requires.

3. The district court thus erred in concluding that Plaintiff failed to state a claim. The district court did not purport to base its decision on the text of the FDCPA, nor did it acknowledge this Court's holdings in *Bishop*. Instead, the district court relied almost entirely on *Caceres*. But *Caceres* is distinguishable and does not control this case. Moreover, the district court's approval of the type of arrangement here—in which the creditor, rather than the debt collector, purports to handle consumer disputes—would lessen the incentive to comply with the FDCPA because consumers generally cannot sue creditors for violating the statute.

Caceres dealt with a validation notice that said failure to dispute the debt would result in the debt being assumed valid by the creditor, whereas the FDCPA requires a statement that failure to dispute will lead to the debt being assumed valid by the debt collector. *See* 15 U.S.C. § 1692g(a)(3). (The

notice properly stated that disputes should be sent to the debt collector.) The Court held that the statement was not deceptive. Because the debt collector was an agent of the creditor, a statement that the debt collector would presume the validity of a debt would reasonably imply that the creditor could do so as well. 755 F.3d at 1304. Thus, the Court concluded, "the same implication arises whether or not the language of the notice is 'assumed valid by the debt collector,' as required by statute, or 'assumed valid by the creditor,' as stated in the letter." *Id.*

Although *Caceres*, like this case, involved a validation notice that replaced a statutorily required reference to the debt collector with one to the creditor, the statement in that case was quite different from the one here. *Caceres* concerned a representation about what would happen if a consumer properly disputed a debt: the creditor (rather than the debt collector) would presume the debt's validity. The Court held because "the same implication arises" either way the statement is phrased, the challenged statement was not likely to mislead consumers. *Id.*

The same is not true of the statements at issue here. They concern the specific steps a consumer must take to properly dispute a debt so as to ensure that the debt collector will cease collecting until it has verified the debt. *See* 15 U.S.C. § 1692g(b). The "same implication" does not arise from

a statement accurately informing consumers what steps they must take under the FDCPA to properly dispute a debt—i.e., notify the debt collector—versus statements that insist they do something else—i.e., notify the creditor (and *only* the creditor). The latter, as explained above, are likely to mislead consumers into taking steps to dispute a debt that are different from the steps the FDCPA prescribes. The result is a validation notice that undermines the very rights it was meant to disclose, by instructing consumers to take steps that are not guaranteed to trigger a debt collector's verification obligations under Section 1692g(b).

The district court's analysis would tend to undermine the FDCPA in a second, related way. If creditors and debt collectors could shift responsibility for handling consumer disputes from debt collectors, as the statute provides, to creditors, as the notice in this case purported to do, it would lessen the incentives to comply with the statute. This is because under the FDCPA, consumers generally can sue only debt collectors for violations of the Act. *See, e.g.*, *Henson*, 137 S. Ct. at 1720-21.

Thus, whatever other remedies a consumer might have against a creditor that mishandled a dispute, the consumer generally could not sue or seek statutory damages against the creditor under the FDCPA. The result would be to replace the Act's "calibrated scheme of statutory incentives to

encourage self-enforcement" against debt collectors that violate the statute, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 603 (2010), with a system in which creditors may (or may not) elect to follow the requirements governing disputed debts and may (but probably not) be held liable if they fail to do so. That is not the scheme Congress established in the FDCPA, which instead makes *debt collectors* responsible to consumers for handling and responding to disputes about alleged debts.[2]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

August 19, 2019

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[2] Because Plaintiff in fact stated claims that Defendant's collection letter violated 15 U.S.C. §§ 1692e and 1692g, Plaintiff's claims plainly were not so meritless as to warrant personal sanctions under 28 U.S.C. § 1927.

Certificate of Compliance

This brief complies with the length limits permitted by Federal Rule of Appellate Procedure 29(a)(5). The brief is 3,722 words, excluding the portions exempted by Rule 32(f). The brief's typeface and type style comply with Rule 32(a)(5) and (6).

August 19, 2019 /s/ *Kevin E. Friedl*

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Certificate Of Service

I hereby certify that on August 19, 2019, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

August 19, 2019 /s/ *Kevin E. Friedl*

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