

09-1247-cv

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**JANET ELLIS
Plaintiff-Appellee,**

v.

**SOLOMON AND SOLOMON, P.C., JULIE S. FARINA,
and DOUGLAS FISHER
Defendants-Appellants.**

**Appeal from United States District Court
District of Connecticut
The Honorable Janet Bond Arterton
No. 05-cv-1623**

**BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS
IN SUPPORT OF APPELLANTS AND URGING
REVERSAL OF THE DECISION BELOW**

Tomio B. Narita, Esq.
Simmonds & Narita LLP
44 Montgomery St., Suite 3010
San Francisco, California 94104
415 283 1000 (p) 415 352 2625 (f)

Donald S. Maurice, Jr., Esq.
Admission pending
Thomas R. Dominczyk, Esq.
Maurice & Needleman, P.C.
5 Walter Foran Blvd. Ste. 2007
Flemington, NJ 08822
908 237 4550 (p) 908 237 4551 (f)

Eric M. Berman, Esq.
Eric M. Berman, P.C.
500 West Main Street, Suite 212
Babylon, New York 11702
631 486-4900 (p) 631 486-4997 (f)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(a), the undersigned counsel for *amicus curiae* National Association of Retail Collection Attorneys (“NARCA”) states that NARCA is a 501(c)(6) organization that has no corporate parent and no publicly-held company owns ten percent or more of its stock.

DATED this 13th day of July, 2009.

By: **/s/ Thomas R. Dominczyk**
Thomas R. Dominczyk

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I. IDENTITY, INTEREST AND AUTHORITY OF AMICUS CURIAE

The National Association of Retail Collection Attorneys (“NARCA”), founded in 1993, represents the shared interests of attorneys and law firms whose primary practice is the collection of consumer debt. Its membership is composed of more than 700 law firms located in all fifty states of the United States. Among NARCA’s missions are to “further promote the image and function of the legal profession engaged in the collection of consumer debt, creditor rights, creditor representation in bankruptcy and related areas of the laws pertaining to consumer credit” and “[t]o elevate the standards and improve the practice and ethics of consumer collection law.” http://www.narca.org/Mission_History.htm.

NARCA’s member law firms and attorneys practice consumer debt collection, and their conduct is often subject to regulation by the Fair Debt Collection Practices Act, 15 U.S.C. 1692 et seq. (the “FDCPA” or the “Act”). Because of this, they are regular targets of FDCPA lawsuits.

Many of NARCA’s members engage in the collection of consumer debt primarily through use of the court system, and are subject to procedural rules of the various jurisdictions where they practice. The application of the FDCPA to attorney conduct in litigation is, necessarily, of substantial importance to NARCA members. More specifically, as is the case here, when NARCA members become targets of

FDCPA lawsuits which are based upon their filing and service of a summons and complaint, NARCA has a strong interest in ensuring that its members are not liable under the FDCPA for their compliance with local rules of procedure.

NARCA has a significant interest in this litigation because it is the only national trade association dedicated solely to the interests of consumer collection attorneys. Its members represent creditors in collection lawsuits filed in all fifty states. As a result, the issues raised in this appeal with regard to the relationship between the FDCPA and state laws governing the collection of debts are common to NARCA's members.

NARCA contends that Defendants-Appellants, Solomon and Solomon, P.C., Julie S. Farina, and Douglas Fisher (hereinafter the "Defendants") complied fully with state and federal laws governing the collection of debt and litigation activity. Defendants sent Plaintiff-Appellee, Janet Ellis (hereinafter "Plaintiff") a letter consistent with the notice requirements of section 1692g of the FDCPA, and subsequently served a summons and complaint upon Plaintiff consistent with the pleading and process requirements of Connecticut. Despite this, the district court held that the May 13, 2005 letter was overshadowed by the service of the summons and complaint on May 31, 2005. This holding was error. NARCA respectfully submits that the decision of the district court should be reversed.

NARCA files this brief with the consent of all parties pursuant to Federal Rule

of Appellate Procedure 29(a).

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The least sophisticated consumer is presumed to comprehend the notice mandated by §1692g of the Act. Likewise, the same consumer must be presumed able to read and understand a summons and collection complaint that is drafted in conformance with the laws of the state where the suit is filed. The FDCPA does not impose additional disclosure requirements for state court summonses and complaints served within the 30-day validation period, as the district court decided.

Even the hypothetical least sophisticated consumer is sophisticated enough to realize that the service of a collection complaint, more than two weeks after her receipt of the validation notice, does not impact her right to obtain validation of the debt or to dispute the debt. This is particularly true where, as here, the summons expressly advised the consumer that she had no obligation to respond to the complaint until more than a month after the thirty-day validation period had run. The FDCPA does not require a collection attorney to explain to the consumer the legal effect of a valid summons and collection complaint. In fact, the Rules of Professional Conduct expressly prohibits this. *See*, Model Rule of Professional Conduct 4.3 (“The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a

person are or have a reasonable possibility of being in conflict with the interests of the client.”)

In any event, it is undisputed that Defendants’ May 13, 2005 letter provided the Plaintiff with a proper notice under the Act; namely, that Plaintiff had thirty days from receipt of the letter to dispute the debt and obtain validation. It is undisputed that the summons and complaint served on May 31, 2005 provided the Plaintiff with all notices and disclosures required under Connecticut law to commence a lawsuit. It contained a “NOTICE TO EACH DEFENDANT” that a lawsuit was being initiated, that she could respond to the lawsuit by filing an “Appearance” on or before the second day after July 19, 2005, that if she failed to enter an “Appearance” within that time a default could be entered against her; and that she should “consult an attorney promptly” if she had any questions. Even the least sophisticated consumer would recognize the two deadlines were independent, not contradictory. All of her rights under state and federal law were conspicuously disclosed. There was no overshadowing.

III. ARGUMENT

The district court erred when it held that Defendants overshadowed the validation notice contained in the May 13, 2005 letter (the “Validation Notice”) by serving Plaintiff with a summons and complaint on May 31, 2005, “with no communication referencing or related to the 30-day dispute period that Defendants had outlined in the ‘VALIDATION NOTICE’ section of the May 13th Letter.” *Ellis v. Solomon & Solomon*, 599 F. Supp. 2d 298, 300 (D. Conn. 2009).

The least sophisticated consumer can read documents with care. The consumer will not be confused by a summons and complaint which does not demand immediate payment or require her to take any action until over a month after the thirty-day validation period had expired. She will understand that the summons and complaint does not foreclose her right to seek validation of the debt. Where a summons and complaint has been drafted in compliance with the pleading requirements of state law, federal courts should not second-guess those requirements by holding that the pleadings are confusing under the FDCPA. The decision should be reversed.

1. The Least Sophisticated Consumer Can Read Documents With Care

The Court will apply the “least sophisticated consumer” standard to determine whether a communication complies with the FDCPA. *See Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 90 (2d Cir. 2008). Although this standard is protective

of consumers, it is not without limits. Unreasonable or idiosyncratic interpretations of collection notices must be rejected. *See Id.* at 90; *see also Clomon v. Jackson*, 988 F.2d 1314, 1319 (2d Cir. 1993) (“[I]n crafting a norm that protects the naïve and the credulous the courts have carefully preserved the concept of reasonableness. . . .”).

Significantly, as this Court has explained, the “least sophisticated consumer” standard presumes that a debtor will read collection communications in their entirety and with some degree of care. *See Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 363 (2d Cir. 2005) ([E]ven the least sophisticated consumer can be presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care.) (citations and internal quotation marks omitted). Other circuits are in accord. *See, e.g., Wahl v. Midland Credit Management, Inc.*, 556 F.3d 643, 645 (7th Cir. 2009) (“The unsophisticated consumer isn't a dimwit. She may be uninformed, naive, and trusting, but she has rudimentary knowledge about the financial world and is capable of making basic logical deductions and inferences.”) (citations and internal quotations marks omitted); *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 592 (6th Cir. 2009) (“Stated differently, we will not countenance lawsuits based upon frivolous misinterpretations or nonsensical interpretations of being led astray”) (citations and internal quotations omitted); *Campuzano-Burgos v. Midland Credit Management, Inc.*, 550 F.3d 294, 299

(3d Cir. 2008) (“Although established to ease the lot of the naive, the standard does not go so far as to provide solace to the willfully blind or non-observant.”).

Collection notices do not violate the FDCPA unless they are materially misleading to the least sophisticated consumer. *See, e.g., Greco*, 412 F.3d at 365-66 (no violation of section 1692g where statement did not change letter’s “overall message” to the consumer); *Hahn v. Triumph*, 557 F.3d 755, 758 (7th Cir. 2009) (“A statement cannot mislead unless it is material, so a false but non-material statement is not actionable.”); *Miller*, 561 F.3d at 596-97 (same).

In this Circuit, “the FDCPA does not aid plaintiffs whose claims are based on ‘bizarre or idiosyncratic interpretations of collection notices.’” *Jacobson v. Healthcare Fin. Servs.*, 516 F.3d at 90, citing *Clomon* at 1320.

Here, the May 13, 2005 validation notice properly advised Plaintiff of her validation and dispute rights under the Act. The state law disclosures contained in the summons and complaint served on May 31, 2005 did not contradict the validation notice, nor would they confuse or mislead a consumer about her rights to dispute the debt, request validation of the debt or contest the lawsuit. The district court’s ruling is in error because it is a “bizarre or idiosyncratic” interpretation of the summons and complaint.

2. A Communication Will Not Overshadow The Validation Notice Unless It Would Confuse The Least Sophisticated Debtor About Her Section 1692g Rights.

Section 1692g of the FDCPA mandates that a collector must send a written notice to the consumer informing her of her right to dispute the debt or any portion thereof within thirty days of receiving the notice. *See* 15 U.S.C. § 1692g(a). Unless the consumer sends a written dispute, the collector is free to continue collection efforts during the thirty-day period. *Id.* at § 1692g(b).

A collector may not engage in collection activity during the thirty-day period that would contradict or overshadow the section 1692g notice. *Id.* at § 1692g(b). A communication will overshadow or contradict the notice “if it would make the least sophisticated consumer uncertain as to her rights.” *See Jacobson*, 516 F.3d at 90 (citation omitted).

For example, unlike the present case, a letter that demands payment of the debt in less than thirty days may overshadow the validation notice. *See, e.g., Savino v. Computer Credit, Inc.*, 164 F.3d 81, 85-86 (2d Cir. 1998) (demand for “immediate” payment on front of letter overshadowed validation notice on back of letter); *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34-35 (2d Cir. 1996) (demand for payment within ten days on front of letter overshadowed validation notice on back of letter); *Graziano v. Harrison*, 950 F.2d 107, 111 (3rd Cir. 1991) (“... the juxtaposition of two inconsistent

statements also rendered the statutory notice invalid under section 1692g.”)

Defendants did not demand payment within the thirty-day period. Rather, Defendants sent the notice required by section 1692g of the FDCPA on the front of their letter dated May 13, 2005. The letter advised Plaintiff of her right to dispute the debt, or any portion thereof, within thirty days of receipt. It informed Plaintiff that if she sent a written dispute of the debt, or any portion thereof, within the thirty-day period, Defendants would obtain verification of the debt and mail it to her. The May 13, 2005 letter complied with section 1692g of the Act.

On May 31, 2005, Plaintiff was served with a summons and complaint prepared by Defendants. The return date was July 19, 2005, well after the end of the thirty-day validation period described in the May 13, 2005 letter. Despite the fact that the May 13, 2005 letter contained the notice required by section 1692g, and the summons and complaint served on May 31, 2005 gave notice of her rights with respect to the lawsuit, the district court held that Defendants overshadowed the notice by serving the Plaintiff with the summons and complaint. The Court stated, in relevant part:

Faced with service of a summons and a civil complaint to be filed in court seeking repayment of a consumer debt, a consumer could reasonably be confused about whether her opportunity to contest the debt whose collection is sought in the complaint was now limited to defending the lawsuit against her.

Ellis v. Solomon & Solomon, 599 F. Supp. 2d 298, 304 (D. Conn. 2009).

But this rationale fails to grasp that the summons and complaint explicitly did not require the Plaintiff to do anything before the expiration of the thirty-day dispute period outlined by the May 13, 2005 validation notice. The summons notified Plaintiff that she could respond to the lawsuit by filing an “Appearance” on or before the second day after July 19, 2005; that if she failed to enter an “Appearance” within that time a default could be entered against her; and, that she should “consult an attorney promptly” if she had any questions.

Quite opposite to the district court’s findings, the May 13, 2005 letter and the May 31, 2005 service of the summons and complaint afforded the Plaintiff more opportunities to contest the debt and obtain validation – she could file her “Appearance,” she could dispute the debt and, if she had any questions, could “consult an attorney promptly” to have her concerns answered.

3. The Least Sophisticated Consumer Would Not Be Confused By A Summons And Collection Complaint Drafted In Conformance With State Law.

The complaint served upon Plaintiff consists of a caption and five paragraphs which identify the parties and the amount demanded by the creditor. Defendants utilized a standard form of summons, approved by the Judicial Branch of the State of Connecticut.¹ The form summons advised Plaintiff, *inter alia*, that a lawsuit was

¹ Copies of the current form of summons that has been approved for use in Connecticut courts by the Judicial Branch of the State of Connecticut, Form JD-CV-1,

being initiated, and that Plaintiff or her attorney would need to file a form called an “Appearance” on or before the second day after the Return Date listed in the summons. The “Return Date” was July 19, 2005, so no response was due until July 21, 2005. This was more than a month after the expiration of the thirty-day validation period established by the May 13, 2005 letter.

The Plaintiff never alleged, nor did the district court hold, that the summons or the complaint ran afoul of Connecticut state law.

Nothing in the summons or complaint demands immediate payment. Nor is there any language which suggests that the Plaintiff had lost her right to dispute the debt. Despite this, the district court concluded that the least sophisticated consumer would be confused by these pleadings, and would be unsure whether the right to dispute the debt had been eliminated. The Court stated:

The “Return Date” appearing on the summons is undefined and even though it post-dates the conclusion of the validation period, its significance would not be readily apparent to the least sophisticated consumer who only knows she is being sued. Even if a consumer determines that she was not obligated to respond in court until the “return date” which is after the validation period ends, that understanding does not dispel doubt or uncertainty about whether she still retains the right to dispute the debt as described in the validation notice, or whether the lawsuit signaled her loss of that opportunity or method of disputing or obtaining verification.

can be downloaded from the website of the Connecticut Court at the following web address: <http://www.jud2.ct.gov/webforms/forms/cv001.pdf>.

Ellis, 599 F. Supp. 2d at 304.

The district court erred when it relied on *Goldman v. Cohen*, 445 F.3d 152, 156 (2d Cir. 2006) in reaching this conclusion. *Goldman* considered, as a matter of first impression, whether a lawsuit against a consumer for unpaid rent could be deemed an “initial communication” under the Act. *Id.* at 153. The Court held that a lawsuit was an initial communication, which triggers the duty to make the validation disclosures required by 1692g at the time of or within five days of, service of the complaint. *Id.*, at 154-155.

Goldman is not an overshadowing case and its holding, which was legislatively overruled, does not apply here.² In *dicta*, the *Goldman* court expressed concern that if the §1692g validation notice was sent along with a summons and complaint, this may confuse the least sophisticated consumer into believing that the court’s deadlines were trumped by the Act’s validation period. *Id.* at 157. Here, by contrast, Defendants provided the required §1692g disclosures first, on May 13, 2005, and served the

2 As noted by the district court, “[T]he main holding of *Goldman*--that service of process constitutes an “initial communication” for purposes of the FDCPA, see 445 F.3d at 155 & 157--was overruled by statutory amendment, see § 1692g(d) (added by Pub. L. 109-351 § 802(a))” *Ellis v. Solomon & Solomon, P.C.*, 599 F. Supp. 2d 298, 303, n5 (D. Conn. 2009). Congress has since amended §1692g adding (d) which provides that a formal pleading is not an “initial communication.” Further, the Act had already provided that formal pleadings need not disclose that the communication was from a “debt collector” or that the communication was “an attempt to collect a debt” and that “all information obtained will be used for that purpose.” 15 U.S.C.

summons and complaint on May 31, 2005. *Goldman* does not help Plaintiff.

The least sophisticated consumer can understand two independent deadlines, one set by a state court, and another set by the FDCPA. For example, in *Federal Home Loan Mortgage Corp. v. Lamar*, 503 F.3d 504 (6th Cir. 2007), the debtor claimed that the validation notice (which was contained within the text of the collection complaint) was overshadowed by other language stating that the debtor had twenty days to respond to the complaint. *Id.* at 510. The debtor argued that the complaint should have included reconciling language which explained the two deadlines, but the Sixth Circuit rejected this argument:

We find that the least sophisticated consumer, after carefully reading the summons, notice, and complaint in their entirety, would not be led to believe that she did not have thirty days in which to dispute the validity of the debt. LS & R was not obligated to include further reconciling language to comply with the FDCPA.

Id. at 511.

More recently in *Daneshrad v. Cohen & Slamowitz, LLP*, the plaintiff asserted he was “mislead or confused” concerning his rights to dispute the debt and request validation of the debt because the defendants had sent communications and filed a collection law suit against him after sending the validation notice. *Daneshrad v.*

§1692e(11).

Cohen & Slamowitz, LLP, 2009 U.S. Dist. LEXIS 18173, *23-*24 (E.D.N.Y. Mar. 9, 2009). The district court found the argument “without merit” noting that the plaintiff had disputed the debt and requested validation following his receipt of the subsequent communications and the collection law suit. *Id.*

Consistent with *Goldman, Lamar and Daneshrad*, Defendants were not required to explain that the service of the suit did not alter Plaintiff’s validation or dispute rights under the Act. The complaint itself does not demand any response, and the summons makes clear that an “Appearance” is not required until July 21, 2005. Neither document makes any demand for payment within the thirty-day validation period specified in the May 13, 2005 letter. Nothing in the pleadings would make the least sophisticated consumer uncertain as to her rights to dispute the debt or request verification under the Act, or how she may contest the lawsuit. She was advised in the summons to seek an attorney’s advice if she had any questions. The decision of the district court should be reversed.

4. The Complaint Did Not Overshadow The Validation Notice Because It Supplied All The Information The Debtor Was Entitled To Receive Had She Exercised Her Validation Rights.

The district court held that Defendants overshadowed the validation notice by serving Plaintiff with the summons and complaint. But the complaint is a written statement confirming the identities of the parties and that the amount demanded by the

Defendants is what the creditor claimed was due. This is all of the information that must be supplied in order to verify a debt. Defendants could not have overshadowed Plaintiff's validation rights by providing her with the very information that she was entitled to obtain had she exercised those rights. The decision should be reversed.

A collector can satisfy its duty to verify the debt under section 1692g(b) of the FDCPA by providing the debtor written confirmation of the amount that the creditor claims is owed. *See Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1173-1174 (9th Cir. 2006); *Chaudhry v. Gallerizzo*, 174 F.3d 394, 406 (4th Cir. 1999) ("There is no concomitant obligation to forward copies of bills or other detailed evidence of the debt."). In *Clark*, the Ninth Circuit followed the Fourth Circuit's decision in *Chaudhry*, rejecting the consumer's argument that in order to verify a debt, a collector must provide copies of bills or other detailed evidence. The *Clark* court stated: "verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed." *See Clark*, 460 F.3d at 1173-74 (citations omitted).

Here, the Defendants did provide Plaintiff with written confirmation that the amount Defendants were demanding was what the creditor claimed was owed. This written confirmation is contained in the complaint, which was served along with the summons on May 31, 2005. That pleading confirms that the creditor, Citibank (South

Dakota) N.A., claimed that the sum of \$17,809.13 was due from Plaintiff. *Id.* Nothing more is required by section 1692g in order to verify the debt.

IV. CONCLUSION

When a debt collector serves a summons and complaint in compliance with state law, the least sophisticated consumer should be presumed to understand those pleadings. A federal court should not second-guess those pleadings or hold that they are confusing under federal law.

The least sophisticated consumer can read the summons and complaint served by Defendants. The pleadings did not demand payment within the validation period, nor did they include any language which would conflict with or confuse the debtor as to her validation rights.

A complaint that identifies the name of the creditor and confirms the amount that the creditor claims is due provides the debtor with all of the information that is required to verify a debt. The service of such a complaint cannot overshadow the consumer's validation rights.

Respectfully Submitted,

By: **/s/ Thomas R. Dominczyk**

Tomio B. Narita, Esq.

Eric M. Berman, Esq.

Donald S. Maurice, Jr., Esq.

Thomas R. Dominczyk, Esq.

Attorneys for *Amicus Curaie*

National Association of Retail Collection Attorneys

Dated: July 13, 2009

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

This brief contains 3,750 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in font size 14 and Times New Roman style.

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Dated at Flemington, in the District of New Jersey, this 13th day of July, 2009.

/s/ Thomas R. Dominczyk
Thomas R. Dominczyk