OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: GEORGE W. HEINTZ, ET AL., Petitioner v. DARLENE JENKINS

CASE NO: No. 94-367

PLACE: Washington, D.C.

DATE: Tuesday, February 21, 1995

PAGES: 1-44

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IN THE SUPREME COURT OF THE UNITED STATES

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GEORGE W. HEINTZ, ET AL., :

Petitioners :

v. : No. 94-367

DARLENE JENKINS :

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Washington, D.C.

Tuesday, February 21, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

GEORGE W. SPELLMIRE, ESQ., Chicago, Illinois; on behalf of the Petitioners.

DANIEL A. EDELMAN, ESQ., Chicago, Illinois; on behalf of the Respondent.

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PROCEEDINGS

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 94-367, George W. Heintz v. Darlene Jenkins.

Mr. Spellmire.

ORAL ARGUMENT OF GEORGE W. SPELLMIRE

ON BEHALF OF THE PETITIONERS

MR. SPELLMIRE: Mr. Chief Justice, and if it please the Court:

The Fair Debt Collection Practices Act should not be read to regulate the conduct of lawyers engaged in the prosecution of litigation even if that litigation is against the consumer for the collection of a debt, and as those terms are defined in the act.

The act, when read as a whole, demonstrates that it was not intended to regulate the behavior or conduct of attorneys when they are performing acts which are uniquely capable of performance by attorneys by reason of their licensure.

The act is ambiguous, and a -- by its definition of debt collector, and a literal application of the language of that statute, that act, would result in absurd outcomes, when reviewed with other statutes.

The congressional intent clearly establishes

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that Congress never intended the act to reach the conduct of lawyers performing the function of lawyers.

QUESTION: Well, Congress certainly did drop the exception that used to be in there for lawyers, didn't it?

MR. SPELLMIRE: Yes, it did, Your Honor. It did drop that exception.

QUESTION: And that certainly points in the direction of at least opening the question as to whether the definition of debt collector extends to lawyers who regularly collect or attempt to collect debts owed to another.

MR. SPELLMIRE: I think there is no question, Your Honor.

QUESTION: And the language literally can cover that kind of an attorney.

MR. SPELLMIRE: Your Honor, I do -- the petitioner does not agree that the language, when read in light of the entire statute, could be interpreted as the Court has suggested its interpretation.

When Congress removed the exception --

QUESTION: On looking at the definition of debt collector, and if you look at that in light of Congress' repeal of any exception for lawyers, it does seem to me that a lawyer could be a debt collector.

Now, it may raise other practical problems, but

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if you look at that definition, it would appear possible that a lawyer could be a debt collector.

MR. SPELLMIRE: Your Honor, the definition, taken in the context of the statute, is ambiguous. There's no question that an attorney can perform the activities of a debt collector, and when performing the activities of a debt collector would be governed by this act.

I think the phrase "debt collector" is clearly understandable when it is focused to collection agencies who through the mails or through the use of phone contact bring personal pressure and contact to bear upon an individual to pay a debt.

A lawyer, on the other hand, engaged in litigation, applies to a court, and asks a court to find a debt to be due, and asks a court to order the payment of that debt.

There is a difference between the two, and when read in the context of this statute, the definition of "debt collector" unless -- unless there is some explanation of what it means to collect a debt, remains ambiguous. Since it is ambiguous --

QUESTION: Isn't the ambiguity, though, answered by the terms that were repealed, because prior to the amendment the statute didn't merely have a general

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exception for lawyers, the exception read, any attorney at law collecting a debt as an attorney on behalf of.

That seems to refer to the peculiar functions that lawyers perform, and it would seem that the exception that used to be there is, in its terms, remarkably close, if not identical, to the exception that you want us to find as a way to resolve the ambiguity, and yet that was repealed. And doesn't the repeal of that language, which referred to lawyers acting as attorneys, cut against you and resolve the very ambiguity that you raise?

MR. SPELLMIRE: No, it does not. Let me explain.

When Congress initially enacted this legislation, it did have the exception, and lawyers, attorneys, in all of their functions when representing a client, were exempted from its coverage.

Following that enactment, lawyers then entered into the debt collection business in competition with lay debt collectors.

QUESTION: Well, that is to say they took on a lot of clients who had debts, and they specialized in debt collection.

MR. SPELLMIRE: They performed --

QUESTION: They were still representing clients, weren't they?

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MR. SPELLMIRE: They were -- yes, they were still representing clients, but the activities --

QUESTION: So they were doing just what the exception says would not bring them subject to the act.

MR. SPELLMIRE: They were representing clients, but in order to understand the meaning of the term "debt collector" within that statute, given its ambiguity, one has to examine the purposes for which the exceptions were removed, and the purpose and the congressional intention in removing the statute was to subject attorneys, when they engaged in the same activities as lay debt collectors, to the same rules.

QUESTION: Well, if that were the case, I don't know why it was necessary, because the exception read, "an attorney collecting a debt as an attorney." That is to say, I suppose, exercising those peculiar functions and powers that lawyers, as attorneys, may exercise, and if Congress meant nothing more than you say it meant, then it would seem to me that the attorneys, to the extent that they were doing something which was not peculiar to their profession, would have been covered by the statute anyway, so it wouldn't have been necessary to repeal the exception.

MR. SPELLMIRE: Your Honor,it is clear from the legislative history concerning this amendment.

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QUESTION: Well, how about -- and I don't want to cut you off from getting into that, but how about a -- just a comment on the text of the exception itself. The exception was limited to the exercise of functions as an attorney, i.e., functions which any debt collector in general would not have been able to exercise.

MR. SPELLMIRE: At the time the exception was enacted with the original enactment of the act, attorneys --

QUESTION: Okay, but isn't that what the text says?

MR. SPELLMIRE: That is what the text says.

QUESTION: Okay. Okay.

QUESTION: Well, does that have to mean only those functions that only an attorney can perform? Can you not be hired as an attorney for purposes of collecting the debt, and part of what you could do as an attorney is to call up the person that owes the debt and say, "You owe my client money. I'm the client's attorney."

MR. SPELLMIRE: You --

QUESTION: When are you going to pay the debt? Would that person be acting as an attorney, if he was hired as an attorney?

MR. SPELLMIRE: No.

QUESTION: I'm trying to help you here. No,

okay.

(Laughter.)

QUESTION: I would think he would be, and I would think that that's -- you know, that as an attorney does not necessarily mean doing only those things that lawyers can do. It could mean doing anything, but doing it in the capacity of having been hired as an attorney.

QUESTION: And isn't that what Congress responded to when it cut out the attorney exemption, attorneys calling up people in the middle of the night doing all the things that bad old debt collectors did?

MR. SPELLMIRE: That was the purpose, was to include attorneys when they were acting as a debt collector, when they were engaging in the kinds of activities that were forbidden by the act --

QUESTION: You don't want to say when they were acting as a debt collector. You want to say, when, as attorneys, they were doing the things that debt collectors do.

MR. SPELLMIRE: I will accept the Court's statement.

QUESTION: But if you say that, you've got to explain why the text read the way it did, and I haven't heard that explanation yet.

MR. SPELLMIRE: The text read the way it did

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when it was originally enacted because at that time attorneys had not invaded the debt collection business as they did in the years intervening.

QUESTION: That explains why they later perhaps wanted to broaden the coverage of the act, but it doesn't explain why they seemed, in the exception, to want to limit the exception by that phrase, which I assume has some meaning, "as an attorney." Why did they put that limitation in there, if you're going to accept Justice Scalia's argument?

MR. SPELLMIRE: Your Honor, at the time of the original enactment, inasmuch as Congress was exempting attorneys, Congress was not concerned with the types of activities attorneys were engaged in at that time. It became -- it was later that they became concerned with the types of activities that attorneys were engaged in, that is, attorneys performing debt collecting activities.

QUESTION: I assume they put that language in, or I assume you think they put that language in, to exclude the situation where a fellow who has a law degree is employed by a collection agency. He is not hired by anyone as an attorney. He happens to have a law degree.

If you exclude all attorneys from coverage of the act, as opposed to people acting as attorneys, the debt collection agencies would be staffed entirely by

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people with law degrees, who would not be acting as attorneys.

QUESTION: Yes, but the original exemption was the blanket exemption for attorneys. It was only when they were acting as attorneys.

MR. SPELLMIRE: Right, for a client.

QUESTION: Yes.

QUESTION: Yes --

QUESTION: Well, that --

QUESTION: -- and just an attorney-employee of a debt collection agency would not have been exempt under the original act.

MR. SPELLMIRE: Not by reason of its language.

QUESTION: And you want in -- if I understand it, your exception is an exception for lawyers who are acting in the exercise of their peculiar functions as attorneys, as distinct from the functions that any debt collector could perform.

MR. SPELLMIRE: That is correct. An attorney should not be regulated by this act when performing the functions peculiar to the --

QUESTION: I think you've just repealed the repealer.

MR. SPELLMIRE: No, Your Honor, we are not asking that. We are asking that the congressional intent

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be implemented by reason of the ambiguity contained in this statute, and it is clear that Congress did not intend to interfere with or regulate the practice of law by lawyers in their capacity as lawyers in this country.

What they did intend to do was, to the extent attorneys engaged in activities similar to those forbidden by this act, that they should be regulated by the act.

QUESTION: If I understand it, there are three situations:

1. People who have law degrees are not even hired as attorneys. They just happen to have law degrees. They are attorneys, but they're hired as debt collectors, work for a debt collection agency. There's no attorney-client relationship, whatever.

Situation 2, there is an attorney-client relationship, and the lawyer is doing the things that debt collectors do, not things that only lawyers can do.

And situation 3, there is an attorney-client relationship, and the lawyer is doing things which only lawyers can do. All right?

And as I understand your position, the original statute, which was repealed, covered situation 1, and the current statute, after the repealer, covers situation 2 but does not cover situation 3.

MR. SPELLMIRE: I believe that the -- I

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believe --

QUESTION: Did I go too fast?

MR. SPELLMIRE: No, Your Honor. The statute as --

QUESTION: Is that what you're saying?

MR. SPELLMIRE: The statute as originally enacted would have exempted situations 2 and 3. We are -- it is our position that in repealing the exemption, Congress meant to include example 2 but did not mean to include example 3.

QUESTION: Well, would you explain example 2, maybe, because I thought in example 2 there was a lawyer-client relationship, and yet the lawyer was not acting in any function, or performing any function peculiar to lawyers, so the relationship seems to be an empty one, because he's doing the same things, and only those things, that he was doing under example 1, isn't that correct?

And if that is correct, then what we're left with is the preservation of a lawyer exception, i.e., example 3, which seems to be the same exception that was in the old exception that was repealed.

MR. SPELLMIRE: No. When the act -- when the exemption was repealed, it is true that example number 2 then fell within the act. Harassing phone calls, threats, contacting employers.

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QUESTION: How about just writing a letter, which many perfectly legitimate collection lawyers do? Before you file a lawsuit, maybe we can get this by letter. Is that covered in so-called 2?

MR. SPELLMIRE: Since that letter could be written by a person who does not possess a law license, that could be covered, and that lawyer, in that act, would fall within the purview of the Fair Debt Collection Practices Act, according to our interpretation of that act.

QUESTION: So it's only when you file a lawsuit, under your view, on behalf of a client, that a lawyer is exempt?

MR. SPELLMIRE: The -- yes, and when you perform other functions that are incidental and necessary --

QUESTION: What would those be?

MR. SPELLMIRE: -- to the prosecution of that lawsuit.

QUESTION: What would those be, like taking a deposition, request for admissions, that sort of thing?

MR. SPELLMIRE: Correspondence with opposing counsel that is aimed at bringing the case towards a conclusion.

QUESTION: Why should correspondence with opposing counsel be not covered, but a letter to the

potential defendant covered?

MR. SPELLMIRE: The reason is that in representing a client in a case, only a lawyer can perform the functions of dealing with other counsel that can move the case forward to resolution. A lawyer has to have a license to represent a third party in a courtroom, and that lawyer then, in the conduct of the litigation, even in the writing of letters to counsel, or in dealing with witnesses, has to have that license to do that.

QUESTION: Well, the --

QUESTION: Do you draw a complaint line, then, so that a letter written the day before the complaint is filed would be covered, on your analysis, but a letter written the day after would not be? Because anybody could write a letter, doesn't have to be licensed to be a lawyer, the day before.

MR. SPELLMIRE: Unless it is a function that is peculiar to the practice of law by reason of the license --

QUESTION: Well, do you draw the complaint line?

MR. SPELLMIRE: Yes.

QUESTION: Well, section 1692c(b) allows communication with the attorney for the debtor -- I mean, expressly allows it -- so it seems to me the statute contemplates that yes, lawyers, when acting as debt

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collectors, can communicate with the debtor's attorney.

MR. SPELLMIRE: They certainly can, Your Honor.

QUESTION: I mean, by express provision in the statute, so --

MR. SPELLMIRE: They can.

QUESTION: I don't think that's part of the chamber of horrors. There's an exception for that.

MR. SPELLMIRE: No, I do not -- it is not our position that a debt collector cannot correspond with counsel for a debtor, not at all, but that correspondence has to --

QUESTION: That's not your argument.

MR. SPELLMIRE: No, it is not, Your Honor, part of our argument.

QUESTION: Okay.

QUESTION: But some States require that a demand letter be sent before executing on a promissory note, and this is required in the pleadings. Would the sending of a demand letter be part of the practice of law, in your view, if the attorney sent the demand letter? Would that be protected?

MR. SPELLMIRE: Your Honor, I am not familiar with those statutes, and I --

QUESTION: Well, let's assume that under State practice, a demand letter must precede the filing of the

lawsuit. Would a demand letter signed by an attorney be part of the practice of law, in your view?

MR. SPELLMIRE: If the law required an attorney to --

QUESTION: No, the law doesn't -- the law just requires a demand letter.

MR. SPELLMIRE: Then if that demand letter were to violate the statutory prohibitions of the act, then it would be within the act.

QUESTION: It would be helpful to me if you could go back to Justice O'Connor's question and list what would be in this chamber of horrors. I mean, I did feel that the brief had quite a few, what you called anomalies, but then when I went through the statute, it didn't seem they were quite so anomalous, and that's why I wonder which -- what bad things will happen if it does cover attorneys?

For example, the attorney would be liable if it turned out that the debt wasn't real, but there is a good faith exception, I gather, so that the attorney would be liable only when he didn't act in good faith.

MR. SPELLMIRE: Your Honor, the good faith exception that you have just mentioned has been very narrowly construed by the lower courts. Consequently, it is basically, as they interpret it in any event, a defense

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that allows for clerical errors provided the business enterprise has sufficient safeguards within its procedures to prevent such clerical errors.

It is not a defense in the sense that you just -- in the sense that it was just described --

QUESTION: Well, that's what I wanted to know.

MR. SPELLMIRE: -- as interpreted by those courts.

QUESTION: All right. Maybe that's not right as applied to a lawyer.

MR. SPELLMIRE: That might be.

QUESTION: What it says is, a debt collector may not be held liable if the violation was not intentional, and resulted from a bona fide error, so if in fact the client comes and says, A, B, and C is true, the lawyer thinks that's probably right, puts him on the stand, the jury disbelieves him, the lawyer would not be liable, as long as the lawyer was in good faith. Is that right? I mean, doesn't that solve most of the problem?

MR. SPELLMIRE: As good faith has been described, that would solve that problem.

QUESTION: Then what other problems are in the chamber?

MR. SPELLMIRE: Under 1962c(c) of the act, a debtor can express the desire to no longer be contacted,

and that can bring about a cessation of any contacts with that debt collector by anybody -- excuse me, debtor by anybody.

QUESTION: But it says you can communicate to -- where the creditor intends to invoke a specified remedy. Might that not imply that the lawyer can then go ahead and invoke the specified remedy?

MR. SPELLMIRE: That would permit that, Your Honor.

QUESTION: What?

MR. SPELLMIRE: That would be permitted.

QUESTION: Oh, then that would get rid of that horror. What's the next one?

MR. SPELLMIRE: The verification and disclosure provisions would be applicable to pleadings, to complaints, and to virtually all documents that constituted communications that would be sent.

QUESTION: And what harm does that cause?

MR. SPELLMIRE: Your Honor, may I return to your prior question for a second? While the answer that I gave to that question was accurate, in the context, however, of, for example, a deposition, should the debtor take the position that the debt is disputed, that would have to terminate all activities at that time with respect to that deposition.

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This would allow for the very serious disruption, if it were utilized, of this act to frustrate the normal rules of procedure.

QUESTION: Well, but there's an exception with the express permission of a court of competent jurisdiction.

MR. SPELLMIRE: That would still require, Your Honor, an attorney to apply to a court if it occurred at a deposition.

QUESTION: For a deposition order, yes. I mean, that's not unusual, either.

MR. SPELLMIRE: It is very unusual, Your Honor, in the normal litigation context, for a deponent party to determine that that party no longer wishes to be communicated with.

QUESTION: Don't you think an ordinary notice of deposition, pursuant to the rules, would imply the permission of the court?

MR. SPELLMIRE: I'm not sure that that would imply, necessarily, the permission of the court, because very often, such notices may be sent unilaterally.

QUESTION: I realize you don't need a court approval to notice someone's deposition, but the rules provide for the notice, and it seems to me one could argue that is enough to show that the court -- court approval

under this statute.

MR. SPELLMIRE: The rules do provide a framework in which the parties may conduct discovery. This statute, however, also has rules pertaining to communications. I'm not aware of a case that has answered any question concerning its application in the context of litigation. I am aware that the Federal Trade Commission, in its view of this statute, considers the application of this statute, for example, in the context of litigation, to be impractical and unworkable.

QUESTION: Mr. Spellmire, what do we make of the express exceptions that Congress did put in, at least one? They took out a litigation-connected activity, process-serving, and they said that that doesn't apply, that the act will not apply to the -- to process-serving, so -- but they didn't say, it doesn't apply to other things connected with litigation.

MR. SPELLMIRE: Your Honor, I believe a fair interpretation of that particular exception indicates the intention of Congress that the act not apply to matters that occur in the litigation context.

Now --

QUESTION: But it says only one function. There are many things that go on in a litigation after process is served. Doesn't it imply that since they made an

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exception for that, they didn't mean to make an exception for anything else?

MR. SPELLMIRE: Pursuant to their intention, and their congressional purpose in this law, they didn't need any further exemption, because attorneys from their view, Congress' view, were not within the ambit of this act when they were engaged in litigation and -- engaged in litigation, so it is consistent, really, with the congressional purpose and intent that this law -- that this act not discuss legal activities following the initiation of a suit.

The only -- the only reference in the act to a legal action is section 1962i, which describes the venues in which suit may be brought. That section was enacted at a time when attorneys remained exempt. It was enacted originally with the act itself in 1977, and should not be read to indicate that Congress intended to regulate the litigation of cases.

Rather, that was intended to prevent a collection tactic which Congress considered to be abusive, and that tactic was the filing of litigation in locations that were inconvenient to the debtor. It should not be interpreted as indicating a congressional intent to regulate lawyers as they practice law in the courts of the United States.

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Your Honor, I would like to reserve my remaining time for rebuttal.

QUESTION: Very well, Mr. Spellmire.

Mr. Edelman, we'll hear from you.

ORAL ARGUMENT OF DANIEL A. EDELMAN

ON BEHALF OF THE RESPONDENT

MR. EDELMAN: Mr. Chief Justice, and may it please the Court:

The issue before the Court is whether otherwise illegal conduct by one who regularly collects consumer debts is outside the scope of the Fair Debt Collection Practices Act because that person is acting as a lawyer.

The statute was originally passed in 1977. At that time, in a number of States, including such large States as California, a collection agency, a lay collection agency, could take an assignment of a debt and bring suit on it, often without the services of any attorney, to enforce it. As a result, the original version of the FDCPA which contained the lawyer exemption also contained several provisions which deal expressly with litigation conduct.

The most important is the venue restriction, 1692i. It applies to anyone who fits the definition of debt collector, and prohibits the filing of lawsuits in certain inconvenient forums, even though they are

permitted by State law, rules on jurisdiction and venue.

There is in addition an exemption in 1692a(6)(D) for attempting to serve legal process on any other person in connection with the judicial enforcement of any debt. The phrase "judicial enforcement of any debt" would have no meaning unless it were within the basic scope of debt collection activity.

1692c(b) contains another pertinent exemption.

QUESTION: What was that --

MR. EDELMAN: 1692a(6)(D), Your Honor.

QUESTION: Would you say that again?

MR. EDELMAN: 1692a(6)(D) is the exemption for persons attempting to serve legal process.

QUESTION: 1692a(6)(D)?

MR. EDELMAN: Yes, Your Honor. The next exemption that's pertinent is 1692c, subdivision (b), and that provides --

QUESTION: Can I ask, are these different provisions in your paper somewhere?

MR. EDELMAN: Yes, Your Honor.

QUESTION: Where were you reading from? It's hard to follow the argument with all these subsections.

MR. EDELMAN: They are cited in the appendix to the certiorari petition, in the joint appendix.

QUESTION: Also, petition for certiorari

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appendix 24, 25, 26, 27.

MR. EDELMAN: Yes, Your Honor.

The second pertinent exemption is in 1692c(b), and that is an exemption for third party communications reasonably necessary to effectuate a post judgment judicial remedy.

QUESTION: And that's one that is not included in the appendix to the cert petition is it?

MR. EDELMAN: I believe that some others were in the joint appendix. I apologize if anything pertinent was omitted.

In any event, we again have a statutory provision which expressly recognizes that the obtention of a judicial remedy is part of debt collection. It, for example, would permit the service of a citation of garnishment on the consumer's bank, and to have an express exemption covering certain litigation --

QUESTION: Yes, as long as you're there, 1692c(b), which prohibits communications with third parties, it says that without the prior consent of the consumer --

QUESTION: Where are you reading from, Justice Kennedy?

QUESTION: I have the statute here -- except with the prior consent of the consumer or the express

permission of the court, you may not communicate with the debtor. That seems to me -- it seems to me answers the question put by the Chief Justice in which he said, perhaps depositions could be assumed to be with the permission of the court, since they're in the rules. This requires the express permission of the court to communicate with the client.

MR. EDELMAN: Your Honor, if any deponent refuses to appear for a deposition, or refuses to answer questions --

QUESTION: No, no, but you can't even notice the deposition, under the statute, without the express permission of the court.

MR. EDELMAN: I would believe, Your Honor, that express permission could be construed to encompass a rule or order of general applicability authorizing with specificity a particular activity, such as noticing a deposition.

QUESTION: Well, I think the point is somewhat in doubt.

MR. EDELMAN: I'm sorry, Your Honor?

QUESTION: I think the point is somewhat in doubt.

MR. EDELMAN: In any event, if there -- if there is a question as to a matter, nothing prevents the

collection lawyer from applying by motion to the court for permission to take the deposition.

QUESTION: But then you would have to acknowledge that this would require a change in normal litigation practice for a collection lawyer, that most lawyers wouldn't have to do this.

MR. EDELMAN: Actually, I don't believe that's correct. In most States depositions are not permitted unless the amount in controversy is over a certain amount.

QUESTION: Well, but suppose it is over a certain amount.

MR. EDELMAN: In that case, it might, if it is construed as Justice Kennedy suggested, require the permission of a court upon application in a motion. However, in most small collection matters, that would be required anyway. In Illinois, for example, depositions are not permitted by notice if the debt is less -- is up to $2,500, so that a motion would be required in any event.

QUESTION: But if you've got $2,600 at issue, you would have to -- unlike most lawyers, you'd have to go to court -- if you read the statute literally, you'd have to go to court and get permission to take a deposition.

MR. EDELMAN: That might be required, Your Honor.

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QUESTION: That isn't what it says. It says, in 1692c(b), that deals with communications to third parties, not a communication to the consumer debtor himself, and the consumer debtor can be noticed under the provisions of the statute. This only deals with communications to third parties, and it says that the consumer, the debtor, or the consumer debtor's attorney, are not -- you're not prevented from communicating with them.

MR. EDELMAN: That is correct, Your Honor. The restriction --

QUESTION: So I think you're misreading it.

QUESTION: That appears to be correct.

MR. EDELMAN: The restriction would apply only to third party witness --

QUESTION: And even then, express permission may simply -- is not necessarily the same as specific permission, individualized permission.

MR. EDELMAN: That is correct.

QUESTION: As long as it's express, you could say.

Tell me, how does a lawyer know when he's covered by these things? I mean, I guess every lawyer who brings a case for collection of a debt, even if he does things that debt collectors do, is not necessarily covered by the act, isn't that right? He has to do it on a

regular basis.

MR. EDELMAN: That is correct, Your Honor. There might be some room for debate at the lower end of the spectrum. However, the --

QUESTION: If I'm not a litigator, and generally just give business advice, do a little litigation sometimes. However, it's trusts and other stuff, family matters. Occasionally I get a debt collection case. I might not be covered at all.

MR. EDELMAN: That is correct, Your Honor, but while there might be some debate as to very marginal situations, that's not the reality Congress was dealing with when it repealed the attorney exemption. Basically, there are law firms and attorneys that specialize in the collection of consumer debts. One of those attorneys would not have any question in his mind as to whether he's covered, and if there is a question in his mind, he can of course always comply in any event.

QUESTION: In any event, he's not in any tougher position than the nonlawyer.

MR. EDELMAN: That is correct, Your Honor.

QUESTION: What about -- wasn't it the ABA that took the position in this case that if we read the statute the way you're suggesting, then we're driving clients to the most incompetent, most inexperienced lawyers, because

they won't be debt collectors because they're not regularly engaged in the collection of debts?

MR. EDELMAN: They would be, Your Honor, if the lawyer then begins to regularly enforce consumer debts.

QUESTION: So it's like a dog is allowed one free bite? Is that --

MR. EDELMAN: In many respects, the statute does embody that principle. For example, the good faith reasonable conduct defense, if a creditor furnishes false information to the collection lawyer, the collection lawyer, despite reviewing the matter, does not detect that it's false, until the first time that the falsity is detected, he would appear to have a defense.

Of course, once he -- once it is brought to his attention that the creditor is not providing accurate information, then he would have further obligations.

All of this was addressed in the -- at the time that the attorney exemption was repealed. The reason that the attorney exemption was repealed was that between 1978, when the organized bar secured the original attorney exemption, and 1986, the Federal Trade Commission received some 1,400 complaints about law firms engaged in collection activities, and the number of law firms that were engaged in collection activities increased dramatically. Some of them were actually advertising that

they were not subject to the restrictions that lay debt collection agencies had. For example --

QUESTION: On billboards.

(Laughter.)

MR. EDELMAN: That's correct. I believe, Your Honor, that the statutory history, that there was an attorney exemption, and that it was removed, and that Congress expressly declined to adopt a substitute exemption for attorneys acting in court as attorneys as sufficient to resolve the problem.

QUESTION: Mr. Edelman, what if I'm a lawyer who represents a bank, and the bank, say, has a number of floor plan arrangements with automobile dealers, and so in March I sue one dealer for half-a-million dollars for defaulting on a floor plan arrangement. In April I sue another dealer on behalf of the bank for three-quarters of a million dollars for defaulting on a floor plan arrangement, and in May I sue still another dealer for a million dollars, am I a debt collector?

MR. EDELMAN: No, Your Honor, because the statute only applies to the collection of consumer debt. Debt is defined as limited to consumer debt. Those were business transactions, and if those --

QUESTION: And a consumer debt is something incurred by someone who plans to make use of the thing

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themselves?

MR. EDELMAN: It basically -- Your Honor, it basically tracks the definitions found in the other titles of the Consumer Credit Protection Act. It's normally not difficult to determine whether something is a consumer debt. For example, if a truth in lending statement was issued in connection with the underlying indebtedness, it's a fair inference that it's a consumer debt. Debts incurred to corporations would never be considered to be consumer debts.

QUESTION: Well, what if the corporation buys a lot of products to consume them in its manufacturing process?

MR. EDELMAN: That is not considered to be a consumer debt.

QUESTION: That's not a "consumer debt"?

MR. EDELMAN: Only debts owed by natural -- or allegedly owed by natural persons would be covered, Your Honor.

QUESTION: Well, what if Howard Hughes, doing business in his own name, buys a million dollars' worth of stuff, they use them to make airplanes?

MR. EDELMAN: That would not be covered, Your Honor. The term "debt" is defined in 1692a(5) as an obligation or alleged obligation of a consumer to pay

money arising out of a transaction in which the money, property, insurance, or services, three dots, are primarily for personal, family, or household purposes, so if we're talking about raw materials for manufacturing, that's not for household purposes.

Again, there might be some gray areas which can be easily dealt with by complying with the statute, but if the debt consists of raw materials for manufacturing sold to a corporation, or sold to somebody using a business title or name, that is quite clearly not a consumer debt, Your Honor.

QUESTION: How does this work, though? I take it that home mortgages would be covered.

MR. EDELMAN: That is correct, they are covered.

QUESTION: So they can be a lot of money, and suppose that the person collects home mortgages, i.e., he brings lawsuits. That's part of his practice. I take it he would be covered, that person?

MR. EDELMAN: Yes, Your Honor, and in fact --

QUESTION: All right. Then what happens when they want to bring a suit, and there's a lot of money involved, maybe a million dollars. That's up there. And the lawyer would like to depose a witness, indeed, also would like to talk to the -- would like to depose the consumer, the borrower. The borrower writes back and

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says, "I will not pay. I don't think I owe it."

Now, how does it work? As I read this, it's a little tough for the lawyer to go and talk to the borrower. In fact, it says you should not.

MR. EDELMAN: Not really, Your Honor.

QUESTION: Why not?

MR. EDELMAN: 1692c(c), which is the ceasing communication provision --

QUESTION: Right.

MR. EDELMAN: -- contains an express exemption for telling the consumer that we're going to invoke specified remedies.

QUESTION: That's right. Now we say, I'm going to sue you.

MR. EDELMAN: And you sue.

QUESTION: Now what the lawyer wants to do is, he wants to go and talk at the deposition to the borrower.

MR. EDELMAN: There is nothing which would prevent that.

QUESTION: What about the words that "...shall cease further communication with the consumer."? What about those words, "...shall cease further communication..." unless, of course, it falls within 1, 2, or 3? And I didn't see -- at least reading it literally, it was rather tough to see where that came in.

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MR. EDELMAN: I would construe the remedy, Your Honor, as including --

QUESTION: That's what we're -- so that's what we would have to do. You'd have to say the words, to invoke a specified remedy include, to invoke a specified remedy, and then going on to implement that specified remedy, and therefore we would have to read into this silence everything to do with a lawsuit where you talk to the consumer.

MR. EDELMAN: The legislative history indicates precisely that. The purpose of this c(c) exemption was to bring -- was to permit the consumer to bring the matter to a head by in effect demanding that the debt collector sue them, so --

QUESTION: But there is no specific thing that talks about the communications that go on during a lawsuit, I take it?

MR. EDELMAN: That is correct, but --

QUESTION: So we'd have to imply that.

MR. EDELMAN: I don't think it's too much of an implication to say that notification that one is going to invoke a specified remedy would include, for example, notifying the consumer's deposition. There is the question as to third party depositions, which are very unusual in debt collection cases, even mortgage

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foreclosures, Your Honor.

Going back to the 1986 repeal of the attorney exemption, Congress expressly stated in the legislative history that its intent was to place attorneys and lay collection agencies, which again at that time had, in a number of States, the right to take assignments of debts and sue, on the same footing, and the principle complaint that -- among the 1,400 received by the Federal Trade Commission, concerned attorney contact. Namely, attorneys filing suit in improper or prohibited venues. They could be, in fact, permitted by State law, but they were not consistent with 1692i.

Congress responded to this concern by totally deleting the attorney exemption and refusing to enact statutes which were proposed by the Commercial Law League and the ABA, and Representative Hiler, to the effect that there would remain an attorney exemption.

As a result, we have a statute which once contained an express exclusion for the matter at issue here, was amended to remove the express exclusion, and where Congress declined to enact precisely that position which petitioners contend, namely that litigation conduct is not covered.

With respect to the other absurd results, in some 17 years, the statute has been construed in a

reasonable and rational manner by the lower Federal courts. It has never, for example, been held that if a lawyer files a collection action and loses, that that violates the prohibition against -- that one cannot take action if it is not lawful to take it.

It has never been construed to permit the debtor to direct the attorney not to file suit against him. On the contrary, the purpose of 1692c is to require the -- is to allow the consumer to force the debt collector to sue.

Some question is raised in the briefs as to whether the 1692g notice has to be attached to a pleading, if that's the first that the debtor hears from the debt collector. The answer is, it is probably not a communication, but in any event it is a common and, in effect, general practice among collection attorneys to attach a sheet of paper to the end of the first pleading containing the FDCPA warnings.

So that the parade of horribles that was suggested by petitioners and appears to have been suggested by the Sixth Circuit in the one decision supporting their position, Green, is simply not there if the act is construed carefully and in a reasonable manner.

The only other support which petitioners point to are two things. The first is a very ambiguous statement that Representative Annunzio had inserted in the

Congressional Record 3 months after the statute was passed, and when nothing pertaining to the FDCPA was before the Congress. It's not legislative history, even if one can extract from certain --

QUESTION: He should have inserted 3 months earlier.

MR. EDELMAN: Well, I think the Court has consistently made a difference, a distinction, between legislative history which predates the enactment of a statute, and something which -- this wasn't even spoken to Congress on the floor of the House. It was inserted pursuant to privilege in the Congressional Record one night 3 months afterwards. It's not permissible legislative history.

QUESTION: Do you suppose he could have been prosecuted under a 1001?

(Laughter.)

MR. EDELMAN: I won't comment on that. I don't know enough about 1001, Your Honor.

The other is the commentary by the FTC staff. It's not the FTC itself. The FTC staff supported the position of the ABA and the Commercial Law League and Representative Hiler that there should be an attorney exemption in 1986. Even after Congress rejected that position, the FTC staff came out with this commentary

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which said, we're not going to enforce the act against attorneys engaged in litigation.

The FTC -- not even the Commission itself has rule-making authority under the Fair Debt Collection Practices Act. It's a fairly unique situation. There's very broad rule-making authority given to the enforcing agencies under the other eight or nine titles of the Consumer Credit Protection Act, but in this one case, the enforcing authority is completely denied any rule-making authority whatever.

And notwithstanding this, we have a commentary which is read by petitioners to say -- to create an exemption. There is no authority to create such an exemption. An administrative agency, much less its staff, cannot create statutory exemptions without some basis in the congressional enactment that purports to authorize it.

The staff commentary, incidentally, does not actually support petitioner's position in this case, insofar as it applies to the letter. The staff says that if an attorney does not engage regularly in consumer debt collection activity, he's not subject to the act insofar as litigation conduct is concerned, but it is now conceded by petitioners that they do engage regularly in consumer debt collection activity, such as sending consumers dunning letters.

So basically, we have a statute which I think is plain on its face, when you consider the sequence of basic definition of debt collection, which even in Black's Law Dictionary covers suing someone for a debt, the original attorney exemption, and the removal of that attorney exemption while all along litigation conduct by collection agencies is regulated, and intentionally regulated, by the statute.

If you look at the legislative history, you find, again, an intent on the part of Congress to subject lawyers to regulation that did not heretofore exist.

QUESTION: What is your answer specifically to the argument that this will chill full adversarial zeal, the best representation of the client, because the attorney will be intimidated by the prospect of liability, so will hold back arguments that might be tenable, but that ultimately fail?

MR. EDELMAN: Your Honor, insofar as the issue before the Court is concerned, namely, adding charges to debts which are not expressly authorized, Congress intentionally, and with application to both lawyers and other debt collectors, imposed a strict standard. A consumer cannot be subjected to any charge that someone might be able to dream up a nonfrivolous argument in support of.

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Congress was careful about this, because it realized that the vast majority of collection lawsuits go by way of default judgment. There is no one there to argue against the lawyer, and accordingly, it made the standard one of whether the debt is expressly authorized, or whether the charge is expressly authorized by the instrument creating the debt, or permitted by law.

It's not an unfair standard, because first, if no one is going to argue against the imposition of the charge, it shouldn't be routinely imposed where it will greatly -- as in this case, greatly increase the amount of the debt, and the consumer is not represented and says nothing.

In addition, normally, most collection lawyers are enforcing printed form contracts. It's very easy for the creditor to solve the problem by simply providing for the charge, and then if it's not prohibited by law, it falls within 1692f(1).

So Congress did tighten the standard, and it would not be appropriate for an attorney to argue that a consumer is liable for insurance or some other charge that a nonfrivolous argument could be made with respect to, but which is not expressly authorized in the instrument creating the debt.

That problem, or that restraint, has nothing to

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do with the attorney's status as attorney. The collection agency can't demand such a charge before the matter is in litigation, or during litigation, and the same restraint is imposed upon the attorney.

So the answer to Your Honor's inquiry, Your Honor, is that the act imposes certain restrictions, it imposes them equally upon lawyers and nonlawyers who are collecting consumer debts, and in the 17 years that the act has been applied to collection agencies, these restrictions have not been found to impose an undue burden upon the collection of debts for consumers or the extension of consumer credit.

Congress had a -- was faced with a problem in balancing the interests of collection agencies and then collection lawyers on the one hand and the public on the other, it drew that balance very carefully, and I think the judgment of Congress as expressed in the act should be respected. That judgment does not permit of an attorney litigation exemption.

What the petitioner's argument, I think, really boils down to is an appeal to the reluctance of attorneys to impose liability on other attorneys. The problem with that position is that Congress did exactly that after an 8-year trial period of an exemption, and specific provisions of the act address explicitly litigation

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conduct. There is simply no textual basis for a continued attorney exemption, whether limited to litigation or otherwise.

Unless the Court has questions, that concludes my remarks.

QUESTION: Thank you, Mr. Edelman.

Mr. Spellmire, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF GEORGE W. SPELLMIRE

ON BEHALF OF THE PETITIONERS

MR. SPELLMIRE: Within the act, there are no provisions which deal with the regulation of lawyers in litigation. The focus that is appropriate is, what was the intention of Congress when they enacted this law, and whether the definition of "debt collector" has a fair meaning when read in the context of the entire statute.

It is clear, or should be clear, that it is ambiguous. Since it is ambiguous, the intention of Congress should be examined, and the intention of Congress is clear, as well as the interpretation of the FTC, although not binding.

Finally, Mr Annunzio, Representative Annunzio, prior to the enactment, stated that the amendment would not affect the practice of law by the Nation's attorneys. When he filed his supplemental report, he was amplifying on that point that had been previously made.

QUESTION: When you say, his supplemental report, was this something other than just his own individual doing?

MR. SPELLMIRE: Your Honor, he was the sole sponsor of the act. When he wrote his explanation, which was included in the record, it explains the sponsor's intention.

QUESTION: You mean, he was the sponsor of the amendment which took the attorney exemption out?

MR. SPELLMIRE: That is correct.

QUESTION: Yes. Incidentally, it's an unusual case in another way. I see Judge Manion and Judge Fairchild agreed with one another.

MR. SPELLMIRE: Thank you.

QUESTION: Thank you, Mr. Spellmire. The case is submitted.

(Whereupon, at 11:57 a.m., the case in the above-entitled matter was submitted.)

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GEORGE W. HEINTZ, ET AL., Petitioners v. DARLENE JENKINS

CASE NO.: 94-367

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BY Ann Marie Federico

(REPORTER)