IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TAMARA M. SMITH	:	CIVIL ACTION
	:	
v.	:	
	:	
LAURENCE A. HECKER	:	NO. 04-5820

O'NEILL, J. APRIL 18, 2005

MEMORANDUM

Plaintiff Tamara Smith filed a complaint on December 15, 2004 against defendant Laurence Hecker, individually and doing business as the Law Offices of Laurence A. Hecker (collectively "Hecker"), alleging that in his attempt to collect on plaintiff's consumer debt defendant failed to provide a required validation notice and sent a false and misleading communication in violation of Sections 1692g and 1692e of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq. Jurisdiction is based on 15 U.S.C. § 1692k and 28 U.S.C. § 1337. Before me now is defendant's motion to dismiss, plaintiff's response, and defendant's reply thereto.

BACKGROUND

Smith defaulted on $1970.30 of consumer debt held by Providian National Bank. The collection of this debt was assigned to Hecker. In an attempt to collect on this debt, Hecker sent Smith a one page letter which notified her that he was attempting to collect a debt she allegedly owed to Providian. The letter identified Alliance East III as the new creditor to whom Smith owed the debt and the new account number, identified Providian as the original creditor with the

original account number, and provided the amount of the debt. The body of the letter stated that Hecker represented Alliance for purposes of collecting Smith's debt. The letter further stated that the letter "is a demand for full payment because you have had ample time to pay your creditor. Sometimes we can arrange installment payments but you must contact this office for arrangements." The whole letter is printed in the same font and size; however, the letter provided, in all capital letters:

NOTICE OF IMPORTANT RIGHTS

> UNLESS YOU, THE CONSUMER, WITHIN THIRTY DAYS AFTER RECEIPT OF THIS NOTICE, DISPUTE THE VALIDITY OF THE DEBT, OR ANY PORTION THEREOF, THE DEBT WILL BE ASSESSED VALID. IF YOU THE CONSUMER NOTIFY US IN WRITING WITHIN THE THIRTY DAY PERIOD THAT THE DEBT, OR ANY PORTION THEREOF, IS DISPUTED, WE WILL OBTAIN VERIFICATION OF THE DEBT OR A COPY OF A JUDGEMENT [sic] AGAINST YOU, THE CONSUMER, AND A COPY OF SUCH VERIFICATION OR JUDGEMENT [sic] WILL BE MAILED TO YOU BY OUR OFFICE. UPON YOUR WRITTEN REQUEST WITHIN THE THIRTY-DAY PERIOD, WE WILL PROVIDE YOU WITH THE NAME AND ADDRESS OF THE ORIGINAL CREDITOR, IF DIFFERENT FROM THE CURRENT CREDITOR. IF YOU NOTIFY OUR OFFICE IN WRITING TO CEASE CONTACT BY TELEPHONE AT YOUR PLACE OF EMPLOYMENT, NO FURTHER SUCH CONTACT WILL BE MADE.

The letter also provided, in bold type-face:

> **This is an attempt to collect a debt. Any information obtained will be used for that purpose. As required by law, you are hereby notified that a negative credit report reflecting on your credit record may be submitted to a credit reporting agency if you fail to fulfill the terms of your credit obligations.**

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss all or part of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6) (2004). In ruling on a 12(b)(6) motion, I must accept as true all well-pleaded allegations of fact, and any reasonable inferences that may be drawn therefrom, in plaintiffs' complaint and must determine

whether "under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir.1996) (citations omitted). Nevertheless, in evaluating plaintiffs' pleadings I will not credit any "bald assertions." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429 (3d Cir. 1997). Nor will I accept as true legal conclusions or unwarranted factual inferences. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "The complaint will be deemed to have alleged sufficient facts if it adequately put the defendant on notice of the essential elements of the plaintiff's cause of action." Nami, 82 F.3d at 65. A Rule 12(b)(6) motion is proper only if the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46.

DISCUSSION

"The FDCPA provides a remedy for consumers who have been subjected to abusive, deceptive or unfair debt collection practices by debt collectors." Piper v. Portnoff Law Assocs., Ltd., 396 F.3d 227, 232 (3d Cir. 2005). Congress enacted the FDCPA "to eliminate abusive debt collection practices which contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy . . . [and] to guarantee that consumers would receive adequate notice of their rights under the law." Wilson v. Quadramed Corp., 225 F.3d 350, 354 (3d Cir. 2000) citing S. Rep. No. 382, 95th Cong., 1st Sess. 4, 8 reprinted in 1977 U.S.C.C.A.N. 1695, 1699, 1702. However, the FDCPA "was not intended to penalize honest debt collectors." Higgins v. Capitol Credit Servs., Inc., 762 F. Supp. 1128, 1134-35 (D. Del. 1991) citing S. Rep. No. 382, 95th Cong., 1st Sess. 1-2, reprinted in 1977 U.S.C.C.A.N. 1695, 1696 ("[FDCPA's] purpose is to protect consumers . . . without imposing unnecessary restrictions on ethical debt collectors."); 15 U.S.C. § 1692(e) (2004) ("It is the

purpose of [the FDCPA] to eliminate abusive debt collection practices by debt collectors [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged . . . ").

One threshold requirement for application of the FDCPA is that the defendant's alleged conduct took place in an attempt to collect a debt. Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 400 (3d Cir. 2000). The FDCPA defines "debt" to mean "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5) (2004). "[A] debt is created whenever a consumer is obligated to pay money as a result of a transaction whose subject is primarily for personal, family or household purposes. No 'offer or extension of credit' is required." Pollice, 225 F.3d at 401. The parties do not dispute that Hecker was attempting to collect a debt from Smith.

A second threshold requirement for application of the FDCPA is that the defendant be a "debt collector," because generally only "debt collectors" and not "creditors" are subject to the FDCPA. Pollice, 225 F.3d at 403. The FDCPA defines "debt collector" to mean, in relevant part, "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). "Attorneys who regularly engage in debt collection or debt collection litigation are covered by the FDCPA, and their litigation activities must comply with the requirements of that Act." Piper, 396 F.3d at 232 citing Heintz v. Jenkins, 514 U.S. 291

(1995). The parties do not dispute that Hecker is a debt collector as defined by the FDCPA.

I. 15 U.S.C. § 1692g -- Debt Validation Notice

Under Section 1692g, a debt collector is required to include the following information in a debt collection letter:

> (1) the amount of the debt;
> (2) the name of the creditor to whom the debt is owed;
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

15 U.S.C. § 1692g(a). Paragraphs (3), (4), and (5) constitute the "debt validation notice," i.e. the statements that inform the consumer how to obtain verification of the debt and that the consumer has thirty days in which to do so. Wilson, 225 F.3d at 354. Beyond merely including the debt validation notice in the debt collection letter, the validation notice must be conveyed effectively to the debtor. Id. The effectiveness of the validation notice is measured from the perspective of the "least sophisticated debtor." Id.

Under the least sophisticated debtor standard, a validation notice is not effective if it is overshadowed or contradicted by accompanying messages from the debt collector or is deceptive to the least sophisticated debtor. See generally id. (citing cases). A validation notice is overshadowed or contradicted by accompanying messages if it would make the least sophisticated consumer uncertain as to her rights. Id. A collection letter "is deceptive when it can be reasonably read to have two or more meanings, one of which is inaccurate." Id. "The

least sophisticated debtor standard is lower than simply examining whether particular language would deceive or mislead a reasonable debtor." Id. Although the least sophisticated debtor standard protects the naive, it also "prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care." Id.

Smith asserts in her complaint that Hecker's letter violates Section 1692g of the FDCPA because Hecker's use of the phrase "will be assessed valid" instead of the statutory phrase "will be assumed to be valid" and omission of the statutory phrase "by the debt collector" renders the letter an ineffective validation notice. These assertions will be addressed in turn.

A. "will be assessed valid"

Smith first argues in her response that the use of the phrase "will be assessed valid" instead of the statutory phrase "will be assumed to be valid" renders the letter an ineffective validation notice because it would confuse or deceive the least sophisticated debtor into believing that the debt will be determined to be valid by some entity of authority, rather than informing the least sophisticated debtor that the debt will be assumed to be valid for collection purposes unless disputed.

I agree. Hecker's collection letter can reasonably be interpreted to have two or more meanings, including the inaccurate one asserted by Smith. See id. Section 1692g requires a debt collector to provide the debtor with "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt *will be assumed to be valid* by the debt collector." 15 U.S.C. § 1692g(a)(3) (emphasis added). Neither the FDCPA nor its relevant case law define the term "assume." However, Black's Law

Dictionary defines "assume" to mean, in relevant part, "To pretend. . . . or to put on deceitfully, take appearance of, affect, or outwardly seem." Black's Law Dictionary (6th ed. 1990). Webster's Third New International Dictionary defines "assume" to mean, in relevant part, "4: To take in appearance only : pretend to have or be: FEIGN 5: to take for granted : accept arbitrarily or tentatively : SUPPOSE 6: to take as an assumption or premise in logic." Webster's Third New Int'l Dictionary (1986). Webster's further defines "assumed" to mean, in relevant part, "2a: MAKE-BELIEVE, PRETENDED, FEIGNED b: FICTITIOUS, FALSE 3: taken for granted : supposed." Thus, Section 1692g requires a debt collector to provide the debtor with a statement that unless the debt is disputed the debt collector will proceed under the temporary fiction that the debt is correct as stated in the validation notice.

In contrast, Hecker's validation notice stated that "unless you, the consumer, within thirty days after receipt of this notice, dispute the validity of the debt, or any portion thereof, the debt will be assessed valid." Black's Law Dictionary defines "assess" to mean, in relevant part, "[t]o ascertain; fix the value of." Black's Law Dictionary (6th ed. 1990). Black's Law Dictionary further defines "assessed" to mean "equivalent to 'imposed'. To value or appraise." Id. Webster's Third New International Dictionary defines "assess" to mean:

> 1: to determine the rate or amount of (as a tax, charge, or fine) 2a: to determine the amount of an impose (as a tax, charge, or fine) according to an established rate or apportionment b: to subject to a tax, charge, or levy so determined 3: to make an official valuation or estimate of (property) esp. for the purposes of taxation 4: to analyze critically and judge definitively the nature, significance, status, or merit of : determine the importance, size, or value of

Webster's Third New Int'l Dictionary (1986). In light of these definitions, there are numerous reasonable interpretations of Hecker's validation notice. The least sophisticated debtor may believe that unless she disputes the validity of the debt asserted by the debt collector, her debt

will be: (1) determined to be valid by a court, credit reporting agency, or other entity of authority; (2) imposed upon her using a valid procedure; or (3) officially valued at a specified amount. A reasonable debtor would be unlikely to interpret this sentence to mean that her debt will be assumed to be valid for collection purposes. The remainder of the letter does nothing to disabuse the least sophisticated debtor of any false interpretation. Hecker's statements in the final paragraph of the letter that the letter "is an attempt to collect a debt" and that "[a]ny information obtained will be used for that purpose" does not ameliorate the confusion created by the use of the word "assessed" or clarify that the debt merely will be assumed to be valid to debt collection purposes. Rather, the final sentence of the debt collection letter reinforces the inaccurate interpretation that the debt will be determined to be valid by a credit reporting agency: "you are hereby notified that a negative credit report reflecting on your credit record may be submitted to a credit reporting agency if you fail to fulfill the terms of your credit obligations."

Hecker argues that he is not obligated to provide a validation notice letter that quotes the exact language of the statute. See Emanuel v. Am. Credit Exch., 870 F.2d 805, 808 (2d Cir. 1989) ("[T]here simply is no requirement that the letter quote verbatim the language of the statute."). While debt collectors are not required to quote directly from the language of the statute in their debt validation notices,[1] they are required to provide the least sophisticated debtor

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[1]Hecker also argues that:

> [Smith] has failed to provide a causal nexus between the use of the word "assess" and the deprivation of any rights or protections defined under the statutory validation framework of 1692g. [Smith] has failed to identify how the word "assess" would deceive a least sophisticated consumer - simply concluding it's deceptive does not make it so.

Similarly, Hecker argues that Smith failed to "plead that she was confused or that a least sophisticated consumer would have been confused by the use of the term 'assessed'." Smith

with a nondeceptive statement that unless the consumer disputes the validity of the debt within the statutory period, the debt will be assumed to be valid for collection purposes. Hecker's use of the word "assessed" in his collection letter is deceptive and does not convey an effective validation notice.

B. "by the debt collector"

Smith also argues that Hecker's omission of the phrase "by the debt collector" or its equivalent renders the letter an ineffective validation notice because it would confuse the least sophisticated debtor as to who or what entity will "assess" the debt. Smith further argues that "Hecker did not even attempt to alleviate this confusion or misleading omission by replacing the phrase 'by the debt collector' with a reference to 'we' or 'us' so that the least sophisticated consumer would at least have some clue as to who would consider the debt 'assessed valid.'" Thus, Smith argues that the least sophisticated debtor may be confused or misled into believing that the debt will be deemed to be valid by a court, credit agency, or other entity rather than merely by the debt collector.

Hecker argues that Smith improperly focuses on one sentence and ignores the remainder of the debt collection letter. When reviewing a debt validation notice, I must review the document as a whole in order to evaluate whether the notice would inform sufficiently a least sophisticated debtor of his debt validation rights. See Wilson, 225 F.3d at 354 (reviewing the entirety of the collection letter). See also Bartlett v. Heibl, 128 F.3d 497, 500 (7th Cir.1997); Edmonds v. Nat'l Check Bureau, Inc., No. 01-1289, 2003 U.S. Dist. LEXIS 17476, *12 (S.D.

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rebuts these arguments in her response by arguing that the least sophisticated debtor may be misled into believing that the debt will be determined to be valid by a court, credit reporting agency, or some other entity of authority.

Ind. July 31, 2003) ("In determining whether a collection letter comports with the requirements of the FDCPA, courts should not read selected passages out of context, but should consider the letter in its entirety."); Farley v. Diversified Collection Servs., Inc., No. 98-2108, 1999 WL 965496, *3 (N.D. Ill. September 30, 1999) ("The test for whether the collection letter violates § 1692g is whether the letter, *taken as a whole*, would confuse the unsophisticated consumer about his or her rights.") (emphasis added); Keen v. Omnibus Int'l, Inc., No. 98-3947, 1998 WL 485682, (N.D. Ill. August 12, 1998) ("[B]ecause overshadowing and contradiction are merely two mechanisms that create confusion, the true test remains whether the letter, taken as a whole, would confuse an unsophisticated consumer about his or her rights."). Thus, Hecker argues that a reading of the letter in its entirety shows that the only interpretation of the notice is that "the debt will be deemed to be valid for collection purposes by the debt collector."

Initially, I observe that Hecker's letter does not meet the requirements of Section 1692g(a)(3). Section 1692g(3) requires a debt collector to provide the debtor with "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid *by the debt collector*." 15 U.S.C. § 1692g(a)(3) (emphasis added). Hecker's validation notice does not inform Smith that her debt will be assumed, or in this case "assessed," to be valid by the debt collector. In fact, the notice does not inform Smith that her debt will be assumed, or "assessed," to be valid by any individual or entity.

There is no language in the entire letter that identifies the person or entity that will assume, or "assess," the debt to be valid. Hecker's use of the words "us," "we," and "our" in other parts of the debt validation notice does not connect with the verb "assessed." As a result,

the least sophisticated debtor may be led to believe that unless she disputes the validity of the debt asserted by the debt collector, her debt will be determined to be valid by a court, credit reporting agency, or other entity of authority. As discussed above, the final sentence of the debt collection letter reinforces the inaccurate interpretation that the debt will be determined to be valid by a credit reporting agency. When read in the context of the entire letter, the phrase "will be assessed valid" and the subsequent omission of any reference to the entity that will be "assessing" the debt is likely to confuse or mislead the least sophisticated debtor into believing that her debt would be determined to be valid by an entity of authority. Hecker's debt collection letter does not comply with Section 1692g, is deceptive, and, therefore, does not convey an effective validation notice.

II. 15 U.S.C. § 1692e -- False, Deceptive, or Misleading Representations

Smith asserts in her complaint and response that Hecker's letter violates Section 1692e of the FDCPA for substantially the same reasons as asserted under Section 1692g. However, because Hecker does not assert grounds for the dismissal of Smith's Section 1692e claim, I will not address Smith's Section 1692e claims here. Hecker's motion to dismiss will be denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TAMARA M. SMITH	:	CIVIL ACTION
	:	
v.	:	
	:	
LAURENCE A. HECKER	:	NO. 04-5820

ORDER

AND NOW, this 18th day of April 2005, upon consideration of defendant's motion to dismiss, plaintiff's response, and defendant's reply thereto, and for the reasons set forth in the accompanying memorandum, it is ORDERED that defendant's motion to dismiss is DENIED.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.