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Are You Threatening Me? Northern District Says No in Debt Collection Case

By Ryan M. Holz and Douglas R. Sargent*

The authors of this article explain a recent U.S. District Court for the Northern District of Illinois grant of summary judgment in favor of a debt collector in Bandas v. United Recovery Service *and its ramifications.*

The recent trends in the U.S. District Court for the Northern District of Illinois and the U.S. Court of Appeals for the Seventh Circuit have not been favorable to debt collectors, with plaintiffs winning a number of Fair Debt Collection Practices Act ("FDCPA") cases on curious grounds. Recently, however, the Northern District granted summary judgment in favor of a debt collector in *Bandas v. United Recovery Service*.[1] The decision confirms that all is not lost in the Northern District and that a debt collector's fate in a given case is often at the mercy of the judicial draw.

FACTUAL AND PROCEDURAL BACKGROUND

Frank Bandas brought an individual suit against United Recovery Service ("URS") under the FDCPA. He alleged that he incurred a $94 debt to Advocate Medical Center, defaulted on that debt, and was referred to URS for collection. URS sent him a letter that said:

> Dear FRANK,
>
> Please receive and accept this letter in the spirit in which it is intended. We do not seek to create a climate of argument and threat but merely to state our position in as factual a manner as possible.
>
> Our client claims a debt is due and owing from you; they have attempted to resolve this between them and you with no success. Our office has been brought into the picture and we have done everything we can think of to convince you to pay this claim; our file indicates that you have the means to pay but that you will not pay.
>
> We wish to make this appeal to you as one reasonable party to

---

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[1] No. 17 C 01323, 2018 U.S. Dist. LEXIS 153105 (N.D. Ill. Sept. 7, 2018).

another. Send us your full payment today or contact this office at once to make suitable payment arrangements so that no further procedures need to be taken in this matter.

This is our third attempt to have you voluntarily resolve this claim. We seek your cooperation now! . . .

Bandas alleged that this letter led him to believe that URS was going to sue him, despite the fact that neither URS nor Advocate had such plans or ever actually pursued legal relief. Bandas thus claimed that the letter violated the FDCPA because it was a threat to take action that was not intended to be taken[2] and was a false and deceptive means to collect a debt.[3] Both he and URS moved for summary judgment.

LEGAL ANALYSIS

URS admitted it had no intention to sue Bandas. As such, the legal question was whether an unsophisticated consumer would believe from the letter that URS intended to sue. Under the unsophisticated consumer standard, the plaintiff must establish that the letter is confusing to a significant fraction of the population.

That can be accomplished in two ways. First, the plaintiff can establish the statement is plainly deceptive and need not produce any extrinsic evidence. Alternatively, the plaintiff can establish the statement is deceptive by producing extrinsic evidence, such as consumer surveys, that establish that consumers find the statement deceptive. The plaintiff must also establish that the statement is materially false, meaning it has the ability to influence a consumer's decision.

Bandas eschewed any extrinsic evidence and that proved fatal to his claim. Judge Virginia Kendall held that Bandas "offers no support for his conclusion that an unsophisticated consumer would automatically assume litigation is the *only* 'further procedure' available to URS."

Moreover, for a letter to impermissibly threaten legal action, it must do more than indicate that a lawsuit is a possibility, it must indicate that the decision to pursue legal action is "imminent or already made." URS's letter did not mention litigation, let alone threaten imminent litigation. URS's use of "today," "at once" and "now" did not alter the analysis; "[d]ebt collectors are permitted to use an urgent tone in attempting to collect the debt as quickly as possible."

Bandas also relied on the Seventh Circuit's decision in *Pantoja v. Portfolio*

[2] 15 U.S.C. § 1692e(5).

[3] 15 U.S.C. § 1692e(10).

Recovery Associates, LLC, to argue that URS's letter was designed to deceive. Judge Kendall rejected that as well. *Pantoja* held it was deceptive to both (1) fail to warn a debtor that partial payment may restart the statute of limitations on a time-barred debt and (2) tell the debtor that the debt collector would not sue when it could not sue due to the expired statute of limitations. The Seventh Circuit's ruling was premised on evidence that the debt collector has deliberately taken vague language from a consent decree to obscure its intentions. There was no similar evidence here that URS had crafted its letter to deceive.

Finally, Judge Kendall rejected Bandas's argument that the letter had only two possible interpretations—either to (1) falsely threaten more phone calls or letters, or (2) falsely threaten litigation—both of which violate the FDCPA. Judge Kendall seized on that argument, noting that the dual interpretations actually undermined Bandas's argument that the letter plainly and clearly threatened litigation. The letter was not misleading on its face, and having eschewed extrinsic evidence, Bandas could not prevail on his claim.

RAMIFICATIONS

In a vacuum, *Bandas* would not be a significant decision. Judge Kendall reviewed a letter that did not mention litigation, and determined that letter did not threaten litigation, let alone imminent litigation. But in the Northern District, that type of reasoning has been in short supply lately. Instead, judges have appeared to go out of their way to interpret debt collector communications in the most deceptive light possible, imposing liability for seemingly benign communications.

What this means is that debt collectors should be especially cognizant of their judicial draw in the Northern District. Until the Seventh Circuit weighs in on certain issues, some judges are going to look more suspiciously at debt collection communications than others. Litigators and in-house counsel need to understand their audience and craft their litigation and settlement strategies accordingly.