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Case Comments D. Consumer Protection Ferris V. Haymore

legislative scheme, which is to ensure equal opportunity in employment and a discrimination-free workplace, and which is not to punish recalcitrant employers.[131] Finally, the Fourth Circuit's holding is congruous with the United States Supreme Court's current use of the "plain meaning" statutory construction rule.[132]

D. Consumer Protection

Ferris v. Haymore

967 F.2d 946 (4th Cir. 1992)

The Motor Vehicle Information and Cost Savings Act[133] (Odometer Act) provides a private federal cause of action for victims of odometer fraud. Odometer fraud is the act of tampering with a vehicle's odometer to reduce its milage reading and thereby increase the vehicle's ostensible value. The Odometer Act provides a remedy of treble damages, court costs, and attorneys fees for successful plaintiffs. The Act imposes this liability on all transferrers with intent to defraud in the vehicle's chain of title. Whether each defendant is individually liable under the Odometer Act for the full damage award, or whether the liability is joint and several among the defendants, has been the subject of opposing interpretations of the Odometer Act.[134] The Fourth Circuit addressed this issue and issues relating to North Carolina's state odometer law in *Ferris v. Haymore*.[135]

In *Ferris*, the plaintiff purchased a car from a Richmond, Virginia auto dealer in November 1983 after the dealer assured him that the odometer reading was accurate. After experiencing costly mechanical problems with the car, Ferris contacted the Virginia Division of Motor Vehicles (VDMV) in December 1983. The VDMV responded in a letter dated January 21, 1985 that Ferris might be a victim of odometer fraud. Ferris later discovered that the car's odometer had been fraudulently turned back approximately 40,000 miles. Ferris sued the Richmond dealer in the United States District Court for the Eastern District of Virginia, and settled with the dealer for $6,000.

Ferris then brought suit in the United States District Court for the Middle District of North Carolina against five defendants linked to the

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131. *Sherman*, 891 F.2d at 1536-42 (Tjoflat, C.J., specially concurring) (arguing that Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988) was wrongly decided and interpreting Title VII to protect former employees is contrary to legislative purpose).

132. *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (holding that plain meaning rule should be conclusive except in rare cases where literal application of statute produces result demonstrably inconsistent with intent of drafters) (citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

133. 15 U.S.C. § 1981 (1988).

134. *See infra* notes 130-32 and accompanying text (discussing opposing interpretations of Odometer Act).

135. 967 F.2d 946 (4th Cir. 1992).

car's chain of title: Carl Simmons, Lucille Inman, Bill Inman, Dean Haymore, and Western Surety Company (Western). Carl Simmons, Lucille Inman, and Dean Haymore were owners of two dealerships in the car's chain of title. Western provided surety bonds to both dealerships. Ferris voluntarily dropped his claim against Bill Inman before trial. Before trial Ferris also settled with Simmons for $5,000, bringing Ferris' total settlements to $11,000 before the trial against the remaining four defendants.

The district court determined that, due to the inflated price Ferris had paid for the car and the repairs he had been forced to make as a result of the car's unknown high milage, Ferris had suffered actual damages of $3,712.84. Based on this finding, the court awarded Ferris treble damages of $11,138.52 under federal law, and $11,138.52 under North Carolina state law against Haymore and Lucille Inman. The district court then reduced the resulting total of $22,277.04 by $11,000, the amount Ferris had collected in prior settlements. After adding $3,090.40 in prejudgment interest, the court awarded Ferris a final judgment of $14,317.44 against Haymore and Lucille Inman. The district court later ordered Haymore and Inman to pay Ferris $17,207.25 in court costs and attorneys fees. The district court also held that Western, as surety to Haymore and Lucille Inman, was liable to Ferris for the actual damages of $3,712.84, plus postjudgment interest, but Western was not liable for treble damages or costs, and attorneys fees.

Ferris appealed, arguing that Western also was liable to him for treble damages, costs and attorneys fees, and that the reduction of his judgment against Haymore and Lucille Inman in the amount of his pretrial settlements was improper. Western cross-appealed the district court's refusal to grant summary judgment in its favor and the court's failure to reduce the judgment against it by the amount of Ferris' pretrial settlements.

The United States Court of Appeals for the Fourth Circuit first addressed Western's cross-appeal for summary judgment. Ferris' claim against Western as surety for Haymore and Inman arose under the North Carolina motor vehicle dealer suretyship statute, but did not arise under the federal Odometer Act. Therefore, Ferris' claims against Western, as well as Western's cross appeal, were purely issues of North Carolina law. The Fourth Circuit briefly considered and rejected the first three of Western's four arguments for summary judgment.

Western's fourth argument for summary judgment against Ferris was that Ferris filed his action after the statute of limitations had run. Western argued that Ferris' claim arose under its suretyship contract with the dealer, and that the limitations period began to run when the dealer's fraud breached that contract. Western relied on North Carolina's adherence to the common-law rule that the limitations period in a contract action begins to run upon breach, not upon discovery of the breach. Because Ferris brought his action more than three years after the breach of the contract between Western and the dealer, Western argued that Ferris did not bring his claim within the applicable three year statute of limitations.

To resolve the statute of limitations issue, the Fourth Circuit relied on the North Carolina Court of Appeals' reasoning in *Bernard v. Ohio Casualty Insurance Co.*[136] In *Bernard* the court ruled that, under the statutes governing motor vehicle surety bonds in North Carolina, the plaintiff's cause of action against the surety accrues at the same time the plaintiff's cause of action accrues against the surety's principal.[137] Holding that the ruling in *Bernard* was directly applicable to the case at bar, the Fourth Circuit concluded that Ferris' action against Western accrued simultaneously with his action against Haymore and Inman. Because Ferris' action against Haymore and Inman was an action sounding in fraud, that cause of action did not accrue until Ferris discovered the fraud when he received the VDMV's letter in January 1985. Accordingly, Ferris' cause of action against Western did not accrue until January 1985. On this basis, the Fourth Circuit concluded that Ferris' action against Western was not time-barred, and affirmed the district court's denial of Western's motion for summary judgment.

The Fourth Circuit next addressed Ferris' claim that Western was liable to him for treble damages in addition to the actual damage amount the district court awarded. To resolve this issue, the Fourth Circuit looked to the North Carolina Supreme Court decision in *Tomlinson v. Camel City Motors, Inc.*[138] In *Tomlinson*, the North Carolina Supreme Court held that when an automobile dealer had violated North Carolina's unfair trade statute, the dealer's surety was not liable to the plaintiff for treble damages under the statute.[139]

As a possible exception to the rule that a dealer's surety is not liable to the plaintiff for treble damages under the statute, the *Tomlinson* court stated in dicta that trebling against the surety may be appropriate in cases where the plaintiff had incurred losses beyond "actual damages."[140] The Fourth Circuit interpreted this proviso to mean that a plaintiff may, in circumstances where the plaintiff incurred losses not normally included in the legal calculation of "actual damages," collect damages to a maximum of the amount of treble damages. The Fourth Circuit ruled that none of Ferris' claims for recovery belonged in the *Tomlinson* court's category of incurred costs beyond actual damages. The Fourth Circuit accordingly upheld the district court's ruling that Ferris was not entitled to recover any portion of a treble damage award against Western.

Ferris also appealed the district court's denial of his claim for court costs and attorney's fees from Western. The Fourth Circuit noted that no North Carolina statute expressly allows for plaintiffs in Ferris' position to recover costs and attorney's fees from sureties, and that *Tomlinson* did

136. 339 S.E.2d 20 (1986).
137. Bernard v. Ohio Casualty Ins. Co., 339 S.E.2d 20, 22 (N.C. Ct. App. 1986).
138. 408 S.E.2d 853 (N.C. 1991).
139. Tomlinson v. Camel City Motors, Inc., 408 S.E.2d 853, 856 (N.C. 1991).
140. *Id.*

not address this question. In the absence of any legislative intent or guidance from North Carolina courts, the Fourth Circuit concluded that it had no authority to impose liability for costs and attorneys fees on Western.

Because Ferris' arguments for recovery of treble damages, costs, and attorneys fees against Western failed, the Fourth Circuit ruled that under North Carolina law Western was liable to Ferris only for the actual damage amount of $3,712.84.

The Fourth Circuit then addressed Ferris' appeal of the district court's reduction of his claim against Haymore and Inman by the $11,000 he had received in pretrial settlements. Unlike his claim against Western, which arose only under state law, Ferris' judgment against Haymore and Inman was in satisfaction of both state and federal law claims. Because the state and federal statutes differ with respect to their treatment of the liability of separate defendants, the question of whether the reduction was proper is more complicated than it would be under a single statute. The Fourth Circuit reasoned that the first step in determining whether the reduction of Ferris' claim against Haymore and Inman was proper was to determine what proportion of the pretrial settlements Ferris received in settlement of state law claims, and what proportion he received in settlement of federal law claims.

The $6,000 settlement from the Richmond auto dealer was clearly in settlement of Ferris' federal claim against the dealer, as the settlement agreement stated this. The $5,000 settlement from Simmons was in settlement of both state and federal claims. Although the district court did not describe the details of the agreement, the Fourth Circuit assumed that the $5,000 represented $2,500 in settlement of the state claim and $2,500 in settlement of the federal claim. Therefore, of the $11,000 in pretrial settlements, Ferris received a total of $8,500 in settlement of his federal law claim, and $2,500 in settlement of his state law claim.

The Fourth Circuit reasoned that the question of whether Ferris' judgment against Haymore and Inman under the federal Odometer Act should have been reduced by the amount he received in pretrial settlements depended directly on whether defendants are liable separately or jointly under the Odometer Act. Both the plain language of the Odometer Act and its punitive purpose indicate, the Fourth Circuit reasoned, that Congress intended the liability to be separate and individual among the defendants. The Fourth Circuit noted further that a majority of federal courts have reached this conclusion in interpreting the Odometer Act, and that the Sixth Circuit's contrary position was not persuasive. The Fourth Circuit concluded that, because the Odometer Act imposes separate liability on each defendant, the district court's reduction of Ferris' claim against Haymore and Inman was not proper as to the $8,500 representing Ferris' pretrial settlements of his federal claims.

In contrast to the separate liability imposed by the federal statute, the state of North Carolina adheres to the common-law rule of "one recovery" for each injury, even where the legislature has imposed punitive liability.

Ferris' pretrial settlements were therefore part of his one recovery. On this basis the Fourth Circuit affirmed the district court's reduction of Ferris' judgment against Haymore and Inman by the $2,500 Ferris received from Simmons in settlement of his state law claim.

Finally, the Fourth Circuit addressed Western's claim that it was entitled to a reduction of the $3,712.84 actual damage award the district court imposed on it by the $11,000 Ferris received in pretrial settlements. In declining to allow this reduction, the Fourth Circuit explained that Haymore and Inman were liable to Ferris in tort, whereas Western was liable to Ferris under its suretyship contract. Although North Carolina law allows reduction of a tort defendant's judgment in the amount of pretrial settlements received by a codefendant in tort, it does not entitle a defendant in contract to reduction based on a codefendant's settlement in tort. Western was therefore not entitled to a reduction of the judgment against it under either federal law or North Carolina law.

In summary, the Fourth Circuit affirmed the district court's findings on all issues appealed and cross-appealed, with the exception of the reduction of Ferris' claim against Haymore and Inman by the $8,500 Ferris had previously received in settlement of his federal claims. On this issue the Fourth Circuit ruled that the district court erred in its interpretation of the federal Odometer Act, and that the reduction was improper.

The dissent concurred with all parts of the majority opinion except the finding that the reduction of Ferris' claim under federal law was improper. Relying on the Sixth Circuit's interpretation of the Odometer Act in *Rice v. Gustavel*,[141] the dissent reasoned that the language of the Odometer Act plausibly could be read to allow only one treble damage award for victims of odometer fraud. The dissent reasoned further that its interpretation would be more sensible, as the majority's reading allows plaintiffs to recover awards many times in excess of their already trebled damages.

On the question of whether the Odometer Act imposes separate punitive liability on each defendant, the *Ferris* decision brings the Fourth Circuit into line with the Fifth Circuit,[142] making the Sixth Circuit ruling in *Rice* the minority position.[143]

Scott v. Jones

964 F.2d 314 (4th Cir. 1992)

In 1977 Congress passed the Fair Debt Collection Practices Act (FDCPA).[144] In pertinent part, the FDCPA establishes venue restrictions

141. 891 F.2d 594 (6th Cir. 1989).

142. Ally v. Chrysler Credit Corp., 767 F.2d 138, 142 (5th Cir. 1985) (holding that defendants under Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1981 (1988), are separately and individually liable to plaintiff).

143. Rice v. Gustavel, 891 F.2d 594 (6th Cir. 1989) (holding that defendants are not separately and individually liable to plaintiff under Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1981 (1988)).

144. 15 U.S.C. §§ 1692-1692o (1988).

for legal actions filed by "debt collectors" to recover consumer debt.[145] Suits must be filed in the judicial district in which the consumer signed the contract sued upon or where the consumer resides.[146] A "debt collector" is defined by the FDCPA as:

> [A]ny 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.[147]

In 1986 this definition was amended to eliminate an exemption from the definition of "debt collector" which excluded attorneys collecting debt on behalf of, and in the name of, a client.[148] Given this relatively recent change in an attorney's status under the FDCPA, the United States Court of Appeals for the Fourth Circuit in *Scott v. Jones*[149] was presented, for the first time, with the issue of whether an attorney employed by a third party to institute legal proceedings to collect outstanding debts was a "debt collector" within the meaning of the FDCPA.[150]

The defendants in *Scott*, Sherwood A. Jones and his law firm, Jones & Jones, were retained by Central Fidelity Bank (CFB) to represent CFB's bank card division in lawsuits based upon delinquent credit card accounts. In February 1990, Jones filed suit against the plaintiff, Matilda Scott, in General District Court for the City of Richmond seeking to recover past due debts owed on a bank card Scott had obtained from CFB. Scott, however, resided in Lynchburg, Virginia. Consequently, venue in Richmond was improper under the FDCPA. Jones agreed to transfer the case to Lynchburg General District Court, but CFB subsequently dropped the lawsuit and forgave Scott's outstanding debt.

Scott then filed a class action lawsuit against Jones seeking the imposition of civil liability on Jones for his violation of the venue provisions of the FDCPA. The FDCPA authorizes such liability.[151] Upon cross-motions for partial summary judgment on the issue of whether Jones was a "debt collector," the United States District Court for the Western District of Virginia granted Scott's motion and ruled that Jones was a

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145. 15 U.S.C. § 1692i (1988).

146. 15 U.S.C. § 1692i(a) (1988).

147. 15 U.S.C. § 1692a(6) (1988).

148. 15 U.S.C.A. § 1692a(6)(F) (West 1982), *as amended by* 15 U.S.C. § 1692a(6) (1988). *See generally* Michael K. Sweig, *Guidelines for Consumer Debt Collection by Attorneys Under the 1986 Amendments to the Fair Debt Collection Practices Act*, 21 NEW ENG. L. REV. 697 (1985-1986) (noting repeal of attorney exemption); Jeffrey D. Friebert, *Fair Debt Collections Practices Act*, WIS. LAW., June 1990, at 15 (noting repeal of attorney exemption and informing attorneys of potential liability under FDCPA).

149. 964 F.2d 314 (4th Cir. 1992).

150. Scott v. Jones, 964 F.2d 314, 315 (4th Cir. 1992).

151. 15 U.S.C. § 1692k (1988).

"debt collector" under the FDCPA. Jones was granted an interlocutory appeal by the Fourth Circuit.[152]

On appeal, the Fourth Circuit affirmed the district court's ruling. It found that Jones satisfied both alternatives of the definition of "debt collector" under the FDCPA. Initially, Jones's and his law firm's "principal purpose" was the collection of debts. The court noted that at least seventy to eighty percent of his legal fees were generated in relation to his debt collection activities.

Furthermore, the appellate court also agreed that Jones regularly attempted to collect debt indirectly. The volume of Jones's debt collection work established its regularity. Jones filed approximately four thousand warrants per year between 1983 and 1987. Filing these warrants constituted an "indirect" means of collecting debt. In reaching this conclusion, the *Scott* court relied on two points. First, the court felt the conclusion it reached was justified by what it termed a "common sense construction" of the statutory definition. Second, the *Scott* court observed that in the FDCPA, Congress chose to regulate venue as well as more traditional debt collection activities involving direct contact of debtors.[153] Thus, Congress must have intended the FDCPA to include attorneys within the definition of a debt collector. The Fourth Circuit dismissed as an artificial distinction Jones's argument that he was engaged in the practice of law and not debt collection.[154] Regardless of the name applied to what Jones did, the principal purpose of his activities was debt collection.[155]

Jones unsuccessfully argued two additional points. First, Jones argued that the legislative intent of the 1986 amendment was to make attorneys liable under the FDCPA only to the extent that other nonlawyer debt collectors were liable. Thus, Jones's legal work would still be excluded. The *Scott* court summarily dispensed with this argument, citing *United States v. Ron Pair Enterprises, Inc.*,[156] which stated that where a statute's language is clear, the court's only function is to enforce the statute's plain language.[157] Although the court conceded that there is no absolute rule against looking to sources such as legislative intent, the court concluded that the statutory language was clear, and that the sources that Jones advanced were not sufficiently probative of congressional intent to override that express language.

Jones next argued that the court was bound by the definition which the Federal Trade Commission (FTC) adopted concerning the language

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152. *See* 28 U.S.C. § 1292(b) (1988) (allowing interlocutory appeals of district court orders not otherwise appealable).

153. *See Scott*, 964 F.2d at 316 n.1 (defining traditional debt collection activities). Traditional debt collection activities include such actions as dunning letters and similar types of direct contact with debtors. *Id.*

154. *Id.* at 316.

155. *Id.*

156. 489 U.S. 235 (1989).

157. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989).

"collection of debt" as used by the FDCPA.[158] The FTC definition excludes an attorney "whose practice is limited to legal activities (for example, the filing and prosecution of lawsuits to reduce debts to judgment)."[159] Jones even secured a letter from an FTC staff attorney which indicated that Jones was not a debt collector within the meaning of the FDCPA. Even with these facts, however, the Fourth Circuit still refused to accept the FTC definition. Citing *Chevron, Inc. v. Natural Resources Defense Council, Inc.*,[160] the court reasoned that if a statute is silent or ambiguous as to a specific issue, then a court should defer to the reasonable administrative interpretation of the statute.[161] Because the court had already decided that the statutory language was clear, it would not accept the FTC's interpretation which ran counter to the plain meaning of the statutory language.

Only one other court of appeals decision has addressed attorneys as debt collectors. In *Crossley v. Lieberman*,[162] the attorney sent a letter to the debtor demanding payment of the debt directly to the attorney.[163] The court found that the attorney was a debt collector because the attorney had testified in a separate case that his practice was principally centered on debt collection.[164] The *Crossley* court also noted that the attorney filed a significant number of cases for mortgage foreclosure and other collections related activity,[165] that the attorney represented three other creditors,[166] and that the attorney's relationship with the particular creditor in question had been ongoing for ten years.[167]

Jones distinguished *Crossley* by arguing that the attorney there had directly contacted the debtor. The Fourth Circuit responded by admitting a potential grounds for distinction because, in its view, the *Crossley* court was not clear in its opinion whether it was the attorney's direct contact of the debtor, or the attorney's legal activities alone, that formed the basis for its decision.[168] Regardless of this ambiguity, however, the Fourth Circuit found that there was nothing in *Crossley* to contradict its position that an attorney can be considered a "debt collector" on the basis of his legal activities alone.[169]

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158. Scott v. Jones, 964 F.2d 314, 317 (4th Cir. 1992).

159. Federal Trade Commission, Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,102.

160. 467 U.S. 837 (1984).

161. Chevron, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

162. 868 F.2d 566 (3d Cir. 1989).

163. Crossley v. Lieberman, 868 F.2d 566, 567 (3d Cir. 1989).

164. *Id.* at 570.

165. *Id.* at 570 n.2.

166. *Id.* at 570.

167. *Id.*; *see* Cacace v. Lucas, 775 F. Supp. 502, 504 (D. Conn. 1990) (listing and applying factors set out in *Crossley*).

168. Scott v. Jones, 964 F.2d 314, 317 n.3 (4th Cir. 1992).

169. *Id.* at 317-18 n.3.

As previously noted, the United States Court of Appeals for the Third Circuit is the only other court of appeals to consider the issue of attorneys as debt collectors. While both the Third and the Fourth Circuits found the attorney to be a debt collector, the factual basis relied upon by the two courts is not clearly the same.[170] The attorney in *Crossley* did not cite to the court the same legislative intent arguments as did the attorneys in *Scott*. Nor did the *Scott* court directly address Jones's distinction argument. Instead, it simply observed that nothing in *Crossley* prevented its ruling. Thus, the potential for a future split among circuits still exists.

The significance of the Fourth Circuit's decision becomes even less clear when compared to the approach taken by the United States District Court for the Southern District of New York. That court has accepted the legislative intent argument that was rejected by the Fourth Circuit.[171] Other district courts have used a similar analysis.[172] *Scott*, in comparison to these cases, represents the broadest application of the "debt collector" definition. Under *Scott*, the attorney can be considered a "debt collector" exclusively on the basis of the attorney's legal activities.[173]

The *Scott* decision has probably not ended litigation on this issue, but simply shifted its focus. The issue courts and attorneys are now likely to face is how significant a collection practice the attorney must possess in order to be a debt collector. The salient facts in *Scott* are that Jones filed four thousand suits each year and that those suits generated seventy to eighty percent of his legal fees. The next logical issue is to determine the proportion of legal fees required to make debt collection an attorney's "principal purpose."[174] Furthermore, the number of legal actions that will suffice to indicate regularity under the FDCPA's definition is disputable.[175] The last potential target for litigation could be whether regularity will be measured according to volume or percentage.[176] The *Scott* court did not address any of these issues because in Jones's situation both the volume and the percentage of business were high. The next case to consider

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170. *Id.* (discussing confusion over basis for *Crossley* decision).

171. *See* Fireman's Ins. Co. v. Keating, 753 F. Supp. 1137, 1142-43 (S.D.N.Y. 1990) (holding that law firm not debt collector under FDCPA); National Union Fire Ins. Co. v. Hartel, 741 F. Supp. 1139, 1140-41 (S.D.N.Y. 1990) (same).

172. *See* Green v. Hocking, 792 F. Supp. 1064, 1065-66 (E.D. Mich. 1992) (applying congressional intent over literal reading of FDCPA definition); Mertes v. Devitt, 734 F. Supp. 872, 874 (W.D. Wis. 1990) (finding support in legislative history for conclusion that attorney not debt collector). The *Green* case was decided nine days after *Scott*. Indeed, the *Green* opinion accepts the distinction as to *Crossley* that Jones advanced. *Green*, 792 F. Supp. at 1065. The *Green* court also suggested that the FDCPA may violate the principle of separation of powers if it were to be applied to attorneys. *Id.* at 1066 n.4.

173. *Scott*, 964 F.2d at 317.

174. *See Mertes*, 734 F. Supp. at 874 (holding one percent of income from debt collection activities not "regular" within meaning of FDCPA).

175. *See id.* (holding two collection matters over two years not "regular" within meaning of FDCPA).

176. *See* Stojanovski v. Strobl & Manoogian, P.C., 783 F. Supp. 319, 322 (E.D. Mich. 1992) (holding volume proper measure).