

248 F.3d 767, 45 UCC Rep.Serv.2d 811
(Cite as: 248 F.3d 767)



United States Court of Appeals,
Eighth Circuit.
Troy L. FREYERMUTH Appellant,
v.
CREDIT BUREAU SERVICES, INC, d/b/a Check-
mate of Fremont Appellees.

No. 00–2661.
Submitted: Feb. 15, 2001.
Filed: April 27, 2001.

Debtor brought action against check authorization service, alleging that, in seeking to collect payment for dishonored checks, it engaged in abusive practices in violation of the Fair Debt Collection Practices Act (FDCPA). The United States District Court for the District of Nebraska, [William G. Cambridge, J.](#), granted summary judgment in favor of service, and debtor appealed. The Court of Appeals, [Davis](#), District Judge, sitting by designation, held that: (1) addressing an issue of apparent first impression in the circuit, in the absence of a threat of litigation or actual litigation, a debt collector does not violate the FDCPA when it attempts to collect on a potentially time-barred debt that is otherwise valid; (2) to the extent debtor's complaint rested on alleged violation of the FDCPA committed when service sent its initial notices, the action was time-barred; and (3) even if service's subsequent notices formed the basis of debtor's complaint, service did not violate Nebraska law when it imposed service fees, nor did it violate the FDCPA when it attempted to collect them.

Affirmed.

West Headnotes

[1] Federal Courts 170B **3604(4)**

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(K) Scope and Extent of Review

170BXVII(K)2 Standard of Review

170Bk3576 Procedural Matters

170Bk3604 Judgment

170Bk3604(4) k. Summary judgment. **Most Cited Cases**
(Formerly 170Bk776)

Court of Appeals reviews a grant of summary judgment de novo.

[2] Limitation of Actions 241 **58(1)**

241 Limitation of Actions

241II Computation of Period of Limitation

241II(A) Accrual of Right of Action or Defense

241k58 Liabilities Created by Statute

241k58(1) k. In general. **Most Cited Cases**

In cases regarding abusive debt collection letters, date of the violation of the Fair Debt Collection Practices Act (FDCPA), for limitations purposes, occurs on the date the letter that allegedly does not comply with the FDCPA's requirements is sent to debtor. Consumer Credit Protection Act, § 813(d), as amended, [15 U.S.C.A. § 1692k\(d\)](#).

[3] Limitation of Actions 241 **58(1)**

241 Limitation of Actions

241II Computation of Period of Limitation

241II(A) Accrual of Right of Action or Defense

241k58 Liabilities Created by Statute

241k58(1) k. In general. **Most Cited Cases**

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To the extent that debtor's complaint rested on an alleged violation of the Fair Debt Collection Practices Act (FDCPA) committed when check authorization service sent its initial notices to debtor, action, filed more than one year after the last of the initial notices was mailed, was time-barred. Consumer Credit Protection Act, § 813(d), as amended, [15 U.S.C.A. § 1692k\(d\)](#).

[4] Antitrust and Trade Regulation 29T **213**

[29T](#) Antitrust and Trade Regulation

[29TIII](#) Statutory Unfair Trade Practices and Consumer Protection

[29TIII\(C\)](#) Particular Subjects and Regulations

[29Tk210](#) Debt Collection

[29Tk213](#) k. Practices prohibited or required in general. [Most Cited Cases](#)

(Formerly 92Hk10 Consumer Protection)

Under the Fair Debt Collection Practices Act (FDCPA), a debt collector may not impose a service charge unless (1) the agreement creating the debt expressly authorizes the charge, or (2) the charge is permitted by law. Consumer Credit Protection Act, § 808(1), as amended, [15 U.S.C.A. § 1692f\(1\)](#).

[5] Sales 343 **384(1)**

[343](#) Sales

[343VII](#) Remedies of Seller

[343VII\(F\)](#) Actions for Damages

[343k384](#) Damages

[343k384\(1\)](#) k. In general. [Most Cited Cases](#)

Nebraska law authorizes reimbursement to the seller for incidental damages, including any commercially reasonable charges, incurred as a result of the buyer's breach. [Neb.Rev.St.U.C.C. § 2-710](#).

[6] Sales 343 **384(1)**

[343](#) Sales

[343VII](#) Remedies of Seller

[343VII\(F\)](#) Actions for Damages

[343k384](#) Damages

[343k384\(1\)](#) k. In general. [Most Cited Cases](#)

Under Nebraska law, a person “in the position of a seller” can recover incidental damages incurred as a result of the buyer's breach. [Neb.Rev.St.U.C.C. §§ 2-707\(1\), 2-710](#).

[7] Antitrust and Trade Regulation 29T **213**

[29T](#) Antitrust and Trade Regulation

[29TIII](#) Statutory Unfair Trade Practices and Consumer Protection

[29TIII\(C\)](#) Particular Subjects and Regulations

[29Tk210](#) Debt Collection

[29Tk213](#) k. Practices prohibited or required in general. [Most Cited Cases](#)

(Formerly 92Hk10 Consumer Protection)

Bills and Notes 56 **26**

[56](#) Bills and Notes

[56I](#) Requisites and Validity

[56I\(A\)](#) Form and Contents of Bills of Exchange, Drafts, Checks, and Orders

[56k24](#) Refusal of Drawee to Accept or Pay

[56k26](#) k. Liability of drawer. [Most Cited Cases](#)

Check authorization service that engaged in debt collection did not violate Nebraska law when it imposed service fees, nor did it violate the Fair Debt Collection Practices Act (FDCPA) when it attempted to collect them, where, in referring checks to service for collection, merchants retained ownership of the debt, but service “became responsible for” the debt and so stood in the position of the merchants for

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purposes of collecting incidental damages, in the form of a commercially reasonable charge. Consumer Credit Protection Act, § 808(1), as amended, [15 U.S.C.A. § 1692f\(1\)](#); [Neb.Rev.St.U.C.C. §§ 2-707\(1\), 2-710](#).

[8] Antitrust and Trade Regulation 29T 213

[29T](#) Antitrust and Trade Regulation

[29TIII](#) Statutory Unfair Trade Practices and Consumer Protection

[29TIII\(C\)](#) Particular Subjects and Regulations

[29Tk210](#) Debt Collection

[29Tk213](#) k. Practices prohibited or required in general. [Most Cited Cases](#)

(Formerly 92Hk3 Consumer Protection)

Congress enacted the Fair Debt Collection Practices Act (FDCPA) in order to stop the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Consumer Credit Protection Act, § 802(a), as amended, [15 U.S.C.A. § 1692\(a\)](#).

[9] Antitrust and Trade Regulation 29T 213

[29T](#) Antitrust and Trade Regulation

[29TIII](#) Statutory Unfair Trade Practices and Consumer Protection

[29TIII\(C\)](#) Particular Subjects and Regulations

[29Tk210](#) Debt Collection

[29Tk213](#) k. Practices prohibited or required in general. [Most Cited Cases](#)

(Formerly 92Hk10 Consumer Protection)

Impermissible practices under the Fair Debt Collection Practices Act (FDCPA) include harassing, oppressive, or abusive conduct; false, deceptive, or misleading representations; and unfair or unconscionable collection methods. Consumer Credit Protection Act, §§ 806-808, as amended, [15 U.S.C.A. §§ 1692d-f](#).

[10] Antitrust and Trade Regulation 29T 214

[29T](#) Antitrust and Trade Regulation

[29TIII](#) Statutory Unfair Trade Practices and Consumer Protection

[29TIII\(C\)](#) Particular Subjects and Regulations

[29Tk210](#) Debt Collection

[29Tk214](#) k. Communications, representations, and notices; debtor's response. [Most Cited Cases](#)

(Formerly 92Hk10 Consumer Protection)

Court evaluating debt collection letters, for purposes of the Fair Debt Collection Practices Act (FDCPA), must view them through the eyes of the unsophisticated consumer. Consumer Credit Protection Act, § 802 et seq., as amended, [15 U.S.C.A. § 1692 et seq.](#)

[11] Limitation of Actions 241 166

[241](#) Limitation of Actions

[241IV](#) Operation and Effect of Bar by Limitation

[241k166](#) k. Nature and extent of bar. [Most Cited Cases](#)

Statute of limitations does not eliminate a debt; it merely limits the judicial remedies available.

[12] Antitrust and Trade Regulation 29T 213

[29T](#) Antitrust and Trade Regulation

[29TIII](#) Statutory Unfair Trade Practices and Consumer Protection

[29TIII\(C\)](#) Particular Subjects and Regulations

[29Tk210](#) Debt Collection

[29Tk213](#) k. Practices prohibited or required in general. [Most Cited Cases](#)

(Formerly 92Hk10 Consumer Protection)

In the absence of a threat of litigation or actual

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litigation, no violation of the Fair Debt Collection Practices Act (FDCPA) has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid. Consumer Credit Protection Act, § 802 et seq., as amended, 15 U.S.C.A. § 1692 et seq.

*769 Sam Houston, argued, Feller & Houston, Tekamah, NE, for appellant.

James J. Frost, argued, Douglas Eugene Quinn, Amy E. Wallace, McGrath & North, Omaha, NE, for appellee.

Before RICHARD SHEPPARD ARNOLD, and HANSEN, Circuit Judges, and DAVIS,^{FN1} District Judge.

FN1. The Honorable Michael J. Davis, United States District Judge for the District of Minnesota, sitting by designation.

DAVIS, District Judge.

Troy L. Freyermuth (Freyermuth) appeals the district court's entry of summary judgment in favor of Credit Bureau Services, Inc., d/b/a/ Checkmate of Fremont (Checkmate). Freyermuth commenced this action pursuant to the Fair Debt Collection Practices Act (FDCPA), for abusive practices in seeking to collect payment for dishonored checks. 15 U.S.C. §§ 1692 et seq. The District Court^{FN2} granted summary judgment for defendant. We affirm.

FN2. The Honorable William G. Cambridge, United States District Judge for the District of Nebraska.

I.

Between May 11, 1990, and April 8, 1998, Freyermuth wrote fourteen checks which were returned for insufficient funds (NSF) to various merchants in Fremont, West Point, and Wisner, Nebraska. The

merchants referred the NSF checks to Checkmate, a check authorization service, for collection. Six of the checks were referred to Checkmate in 1990; two checks were then referred in 1994, five in 1995, and one in 1998. Checkmate sent individual notices (“Initial Notices”) to Freyermuth within two business days after receiving each of the referred checks. Each Initial Notice was sent to Freyermuth at his last known address. The Initial Notices indicated that Freyermuth had an amount due on Checkmate's permanent bad check data file, and listed the outstanding balance and applicable service charges. Freyermuth paid the principal balance on seven of the fourteen checks; he did not pay service charges on any of the fourteen checks. On May 6, 1998, Checkmate sent Freyermuth two follow-up notices (“Subsequent Notices”) regarding the NSF checks identified in the fourteen Initial Notices.

The language of the Subsequent Notices reads: “Our records show the amount due indicated below remains in our CHECKMATE PERMANENT BAD CHECK DATA FILE. TO PROTECT YOUR CHECK-WRITING PRIVILEGES, REMIT THE BALANCE DUE IMMEDIATELY (CASH OR MONEY ORDER ONLY)... To be sure of proper credit and to stop further procedure [sic], make your payment in full.”^{FN3}

FN3. The language of the two notices differs slightly. One notice addresses the checks for which the principal balance and the service charges are outstanding. The other notice addresses those checks on which only the service charge is outstanding.

On May 20, 1998, Freyermuth, through his counsel, wrote Checkmate requesting the names and addresses of the original creditors and the amount in controversy concerning each check. On June 2, 1998, Checkmate replied in writing with a list of 11 creditors, and a principal amount for each creditor. Freyermuth filed this lawsuit against Checkmate on May 5,

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1999, for abusive debt collection practices in violation of the FDCPA. He alleged that Checkmate unlawfully attempted to collect a service charge in violation of 15 U.S.C. § 1692f(1).

*770 Checkmate brought a motion for summary judgment. In his response to Checkmate's motion, Freyermuth raised the new claim that Checkmate had further violated the FDCPA by attempting to collect on debts that were probably time-barred, and moved for partial summary judgment in his favor. The district court granted summary judgment to Checkmate, holding that the entire claim was barred by the FDCPA's one year statute of limitation. Furthermore, the court held, Nebraska law did not prohibit the collection of a service fee for a bad check, and thus no violation of the FDCPA had occurred.

II.

[1] This court reviews a grant of summary judgment *de novo*. Thus, summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *See Hill v. St. Louis Univ.*, 123 F.3d 1114, 1118–19 (8th Cir.1997); *Duffy v. Wolle*, 123 F.3d 1026, 1033 (8th Cir.1997).

The Fair Debt Collection Practices Act (FDCPA) makes it unlawful for debt collectors to use “any false, deceptive, or misleading representation or means in connection with the collection of any debt.” 15 U.S.C. § 1692e. The Act prohibits a debt collector from collecting any service charge “unless such amount is expressly authorized by the agreement creating the debt or permitted by law.” 15 U.S.C. § 1692f(1). In addition, it is a violation of the Act to threaten to take “any action that cannot legally be taken.” 15 U.S.C. § 1692e(5).

[2][3] The FDCPA states that any action to enforce any liability created by the Act must be brought

“...within one year from the day on which the violation occurs.” 15 U.S.C. § 1692k(d). This Court has previously held that in cases regarding abusive debt collection letters, the date of the violation of the FDCPA occurs on the date the letter that allegedly does not comply with the FDCPA's requirements is sent to the debtor. *See Mattson v. U.S. West Communications, Inc.*, 967 F.2d 259, 261 (8th Cir.1992). This action was filed on May 5, 1999, more than one year after the last of the Initial Notices was mailed, on or about April 10, 1998. To the extent the complaint rests on an alleged violation of the Act committed when Checkmate sent the Initial Notices, this action is time-barred.

Freyermuth argues that his Complaint concerns alleged violations of the Act by the Subsequent Notices, not the Initial Notices. Even if we were to find that the Subsequent Notices form the basis of the Complaint and therefore it is not time barred, the claim would nonetheless fail on the merits. Checkmate did not violate the FDCPA when it attempted to collect service fees, nor when it attempted to collect on a debt that was potentially time-barred.

[4][5][6] Under the FDCPA, a debt collector may not impose a service charge unless (i) the agreement creating the debt expressly authorizes the charge, or (ii) the charge is permitted by law. *See* 15 U.S.C.A. § 1692f(1). Neither party has argued that the charge was expressly authorized, and so we must look to applicable state law. Nebraska law authorizes reimbursement to the seller for incidental damages incurred as a result of the buyer's breach. Such incidental damages may include any commercially reasonable charges. *Neb.Rev.Stat. U.C.C. § 2–710* (1963). A person “in the position of a seller” can also recover incidental damages. In Nebraska, a “person in the position of a seller” is one who “who has ... become responsible for the price of goods *771 on behalf of his principal....” *Neb.Rev.Stat. U.C.C. § 2–707(1)*(1963).

[7] In this case, various merchants referred the checks to Checkmate for collection. The merchants

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retained ownership of the debt, but enlisted the services of Checkmate to collect on the amount due. In this way, Checkmate “became responsible for” the debts, and thus stands in the position of the merchants for purposes of collecting incidental damages, in the form of a commercially reasonable charge. See *Tuttle v. Equifax Check*, 190 F.3d 9, 14–15 (2d Cir.1999). Checkmate therefore did not violate Nebraska law when it imposed the service fees, and did not violate the FDCPA when it attempted to collect them.

[8][9][10] The question of whether a debt collector violates the FDCPA when it attempts to collect on a potentially time-barred debt is one of first impression in this Circuit. Congress enacted the Fair Debt Collection Practices Act in order to stop “the use of abusive, deceptive and unfair debt collection practices by many debt collectors.” 15 U.S.C.A. § 1692(a). Impermissible practices include harassing, oppressive or abusive conduct; false, deceptive or misleading representations; and unfair or unconscionable collection methods. 15 U.S.C.A. § 1692d-f. A court evaluating debt collection letters must view them “through the eyes of the unsophisticated consumer.” *Duffy v. Landberg*, 215 F.3d 871, 873 (8th Cir.2000).

The case law on this issue focuses on the debt collector's actions, and whether an unsophisticated consumer would be harassed, misled or deceived by them. In *Kimber v. Fed. Fin. Corp.*, 668 F.Supp. 1480 (M.D.Ala.1987), the court held that the debt collector's filing of a lawsuit on an apparently time-barred debt, without having first determined after a reasonable inquiry that the limitations period had been tolled, was a violation of the FDCPA. Subsequent cases have similarly turned on the threat, or actual filing, of litigation. See *Beattie v. D.M. Collections, Inc.*, 754 F.Supp. 383, 393 (D.Del.1991)(threat of lawsuit which debt collector knows or should know is time-barred is violation of FDCPA); *Aronson v. Commercial Fin. Serv.*, 1997 WL 1038818, *3 (W.D.Pa.1997)(no FDCPA violation where no lawsuit threatened, and language of letters tracked language of

statute); *Shorty v. Capital One Bank*, 90 F.Supp.2d 1330, 1332 (D.N.M.2000)(no FDCPA violation where no lawsuit or further collection action threatened); *Johnson v. Capital One*, 2000 WL 1279661, *1 (W.D.Tex.)(no violation of the FDCPA where creditor only expressed intent to pursue lawful collection attempts).

[11][12] Only one court has found a violation of the Act in the absence of an express threat of litigation when a creditor attempts to collect on a time-barred debt. See *Stepney v. Outsourcing Solutions, Inc.*, 1997 WL 722972, *4 (N.D.Ill.)(FDCPA claim stated where collection notice promised “no further collection action” if the time-barred debt was paid). Here, no legal action was taken or even threatened. As several cases have noted, a statute of limitations does not eliminate the debt; it merely limits the judicial remedies available. We decline to extend the reasoning of *Kimber*, and hold that, in the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid.

III.

For the aforementioned reasons, we affirm the district court's grant of summary judgment for Checkmate.

C.A.8 (Neb.),2001.

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