No. 19-1184

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nichole L. Richards,
Plaintiff-Appellant,

v.

PAR, Inc., et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana
No. 1:17-cv-00409-TWP-MPB
The Honorable Judge Tanya Walton Pratt

APPELLANT'S REPLY BRIEF

Robert E. Duff
Indiana Consumer Law Group/
The Law Office of Robert E. Duff
P.O. Box 7251
Fishers, IN 46037
(800) 817-0461

Adina H. Rosenbaum
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff-Appellant

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INTRODUCTION

In her opening brief, Nichole Richards explained that, in repossessing her car, appellees Par, Inc. and Lawrence Towing, LCC (collectively, Lawrence Towing) violated 15 U.S.C. § 1692f(6)(A), a provision of the Fair Debt Collection Practices Act (FDCPA) that forbids debt collectors from taking nonjudicial action to repossess collateral without a "present right to possession" of the collateral. In particular, Ms. Richards explained that, under an Indiana statute governing a secured party's right to take possession of collateral after a default, a secured party proceeding without judicial process loses the right to take possession of collateral if there is a breach of the peace. *See* Ind. Code § 26-1-9.1-609(b)(2). Therefore, once there was a breach of the peace, Lawrence Towing lacked the "present right to possession" of Ms. Richards's car. And accordingly, Lawrence Towing violated section 1692f(6)(A) when it took "nonjudicial action to effect dispossession" of the vehicle.

In response, Lawrence Towing contends that, as long as a debt collector repossesses collateral pursuant to a valid security interest, its actions comply with section 1692f(6)(A). Section 1692f(6)(A), however,

does not just require a valid security interest. It requires a "present right to possess[]" the collateral, and a debt collector does not have the "present right" to possess collateral if a state law forbids it from taking possession of the collateral.

Lawrence Towing also argues that the FDCPA is not "an enforcement mechanism for state law." Appellees' Br. 12. Ms. Richards's FDCPA claim, however, does not seek to enforce state law. It seeks to enforce one of the FDCPA's "own rules," *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 474 (7th Cir. 2007)—the provision forbidding debt collectors from using nonjudicial action to repossess collateral when they lack the present right to possess it.

As Ms. Richards noted in her opening brief, courts in this Circuit and around the country have long recognized that state laws governing the right to repossess collateral inform whether a debt collector has the "present right to possession" of the collateral under section 1692f(6)(A). Apart from the decision below, Ms. Richards is not aware of any cases holding to the contrary, and Lawrence Towing has cited no such cases in its brief. The district court erred in refusing to consider the state law governing a "[s]ecured party's right to take possession after default,"

Ind. Code § 26-1-9.1-609, in determining whether Lawrence Towing had the "present right to possession" of Ms. Richards's vehicle. This Court should reverse the grant of summary judgment in Lawrence Towing's favor and the dismissal of Ms. Richards's state-law claims.

ARGUMENT

I. The FDCPA Forbids Self-Help Repossession Absent a "Present Right to Possession" of the Collateral.

Section 1692f(6)(A) forbids debt collectors from taking nonjudicial action to repossess property if "there is no present right to possession of the property claimed as collateral through an enforceable security interest." 15 U.S.C. § 1692f(6)(A). Debt collectors thus violate 1692f(6)(A) if they engage in self-help repossession without the "present right to possess[]" the collateral—that is, if they lack the right to take possession of the collateral at the moment they repossess it.

Here, state law did not allow Lawrence Towing to take possession of Ms. Richards's car after the peace was breached. Accordingly, Lawrence Towing lacked the "present right to possession" at the time it repossessed the car, and its repossession violated section 1692f(6)(A).

In arguing to the contrary, Lawrence Towing accuses Ms. Richards of focusing too closely on the statutory language requiring the

debt collector to have a "present right to possession" of the collateral. According to Lawrence Towing, that language must be read in context, and "the plain meaning of [section 1692f(6)(A)], when read as a whole, is to only prohibit repossessions in the absence of an enforceable security interest." Appellees' Br. 9. Section 1692f(6)(A), "read as a whole," however, does not simply prohibit using nonjudicial means to effect dispossession of property if the debt collector lacks a valid security interest. It prohibits using nonjudicial means to effect dispossession of property if "*there is no present right to possession of the property* claimed as collateral through an enforceable security interest." 15 U.S.C. § 1692f(6)(A) (emphasis added). Thus, to comply with section 1692f(6)(A), a debt collector must have *both* a present right to possession and a valid security interest. *See Amodio v. Ocwen Loan Servicing, LLC*, No. 3:18-CV-00811, 2019 WL 2162944, at *4 (M.D. Tenn. May 17, 2019) ("[A debt collector] must have, not merely a security interest, but a presently operative right of possession in order for its nonjudicial [repossession] to avoid violating § 1692f(6)."); *see also Nadalin v. Auto. Recovery Bureau, Inc.*, 169 F.3d 1084, 1085 (7th Cir. 1999) (explaining that a debt collector violates section 1692f(6)(A) if it

repossesses a vehicle without "having any right to take possession" of it). The maxim that language should be read in context does not permit part of the statute to be ignored.

Lawrence Towing claims that Congress's intent in enacting section 1692f(6)(A) was only to "safeguard consumers by preventing debt collectors from recovering property without a valid security interest." Appellees' Br. 10. The statutory language goes further, however, also protecting consumers against self-help repossession by debt collectors who lack a "present right to possession" of the property. And there is nothing "absurd or unreasonable," Appellees' Br. 9 (citation omitted), about Congress wanting to protect consumers against the actions of debt collectors who, without a court order, attempt to take property without the right to do so.[1]

Lawrence Towing asserts that, as long as the property is being repossessed "pursuant to a valid security interest," the repossessor has

[1] As part of its argument about congressional intent, Lawrence Towing states that enforcers of security interests fall outside the FDCPA's ambit for all purposes except section 1692f(6). Appellees' Br. 9–10. This case arises under section 1692f(6), however, and, for purposes of that section, the term debt collector "includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." 15 U.S.C. § 1692a(6).

the requisite present right of possession. Appellees' Br. 11. But a valid security interest does not just need to *exist* for a debt collector to have a "present right to possession." The security interest must give the debt collector the right to possess the property at the moment it "effect[s] dispossession" of it. And although Lawrence Towing objects to the consideration of state law, state law affects whether the debt collector has that right. If, despite the existence of the security interest, the debt collector does not have the right to possess the property under state law, then the security interest has not successfully given the debt collector the "right to possess[]" the property.

Here, the security interest did *not* give Lawrence Towing the right to take possession of Ms. Richards's car after the peace was breached. Despite the existence of the security interest, once the peace was breached, Lawrence Towing was not allowed to take possession of the vehicle. *See* Ind. Code § 26-1-9.1-609(b)(2).[2] Accordingly, Lawrence Towing lacked the present right to possession of the vehicle, and its repossession violated section 1692f(6)(A).

[2] Further underscoring that the security interest did not provide Lawrence Towing with the right to possession after the peace was breached, the loan agreement in this case specifically provided that the secured party would not breach the peace. R. 37-3, at 3.

II. Taking State Law into Account in Determining Whether a Debt Collector Has a Present Right to Possess Collateral Does Not Turn the FDCPA into an Enforcement Mechanism for State Law.

Lawrence Towing devotes a large portion of its brief to arguing that "the FDCPA is not an enforcement mechanism for state law." Appellees' Br. 12–18. Because Ms. Richards is not seeking to enforce state law, but to enforce section 1692f(6)(A)'s prohibition on taking collateral without a "present right to possession of the property," Lawrence Towing's arguments on this point are inapposite.

Lawrence Towing relies primarily on *Beler*, 480 F.3d 470, and *Bentrud v. Bowman, Heintz, Boscia & Vician, P.C.*, 794 F.3d 871 (7th Cir. 2015), to support its arguments about enforcing state law. In *Beler*, the Court rejected the argument that it is automatically "'unfair' or 'unconscionable,'" in violation of section 1692f, for a debt collector to "violate any other rule of positive law." 480 F.3d at 473. In *Bentrud*, the Court similarly held that it was not automatically unfair or unconscionable, in violation of section 1692f, for a debt collector to breach a contractual provision. 794 F.2d at 875. Here, Ms. Richards's FDCPA claim is not based on the argument that Lawrence Towing's conduct was unfair or unconscionable under section 1692f because it

violated state law or a contractual provision. Rather, Ms. Richards is arguing that Lawrence Towing's conduct was unfair or unconscionable because Lawrence Towing took "nonjudicial action to effect dispossession" of property without "a present right to possession of the property," 15 U.S.C. § 1692f(6), and Congress has already determined that taking such action is an "unfair or unconscionable means" of collecting a debt in violation of the FDCPA, *id.* § 1692f.

Stated differently, Ms. Richards is not seeking to enforce Indiana Code § 26-1-9.1-609(b)(2); she is seeking to enforce one of section 1692f's "own rules." *Beler*, 480 F.3d at 474. Lawrence Towing contends that the "fallacy in this argument is that nothing in section 1692f regulates breach of the peace repossessions." Appellees' Br. 16. But section 1692f does regulate taking nonjudicial action to dispossess property, and specifically prohibits such dispossession by debt collectors who lack the "present right to possession of the property." 15 U.S.C. § 1692f(6)(A). Ms. Richards is trying to enforce that express FDCPA prohibition.

That state law provides the *reason* that Lawrence Towing lacked a present right to possess the vehicle does not turn Ms. Richards's FDCPA claim into a claim seeking to enforce state law. As Ms. Richards

explained in her opening brief, it is not unusual for FDCPA violations to depend on the answers to predicate state-law questions. For example, "a debt collector violates the Act by suing to collect a consumer debt after the statute of limitations has run and bars the suit." *Pantoja v. Portfolio Recovery Assocs., LLC*, 852 F.3d 679, 683 (7th Cir. 2017). Whether a debt collector violates the FDCPA in filing a state debt collection action thus depends on whether a state's statute of limitations has expired. *See*, *e.g.*, *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013). That a FDCPA claim depends on whether the state-law statute of limitations has expired, however, does not turn the FDCPA claim into an improper attempt to enforce that state law. Likewise, that a section 1692f(6)(A) claim depends on whether the debt collector has the right under state law to take possession of the collateral does not turn that FDCPA claim into an improper attempt to enforce state law.

Evory v. RJM Acquisitions Funding LLC, 505 F.3d 769 (7th Cir. 2007), further demonstrates the principle. In *Evory*, a debt collector threatened to impose a penalty that was unlawful under Indiana law. In discussing whether the debt collector violated the FDCPA, the Court explained that, "[a]lthough a violation of state law is not in itself a

violation of the federal Act," *id.* at 778 (citing *Beler*, 480 F.3d at 473–74), "a threat to impose a penalty that the threatener knows is improper because unlawful is a good candidate for a violation of sections 1692d and e," which prohibit harassment or abuse and false or misleading misrepresentations, *id.* Again, that Indiana law provided the reason the penalty was unlawful did not turn the claim that the debt collector violated sections 1692d and 1692e by threatening to impose the penalty into one seeking to enforce Indiana law.

Lawrence Towing attempts to distinguish *Evory* by noting that the "prohibition against threatening to charge a penalty that the collector knows is unlawful is expressly prohibited by the [*sic*] § 1692d and § 1692e of the FDCPA." Appellees' Br. 15. The same, however, is true here: The prohibition against taking nonjudicial action to take possession of collateral when the debt collector lacks a present right to possess the property is "expressly prohibited" by section 1692f(6)(A).

Lawrence Towing also suggests that *Evory* is distinguishable because it did not involve section 1692f. *Evory* did not indicate, however, that the reason state law could be taken into account was because sections 1692d and 1692e were at issue, rather than section

1692f. And Lawrence Towing provides no reason why it would be proper to take state law into account in determining whether the express prohibitions in one section of the FDCPA were violated, but not in determining whether the express prohibitions in another section were violated.

Moreover, this Court has also taken state law into account in determining whether section 1692f was violated. In *Seeger v. AFNI, Inc.*, 548 F.3d 1107, 1111 (7th Cir. 2008), for example, this Court examined whether a collection fee was "permitted by Wisconsin law" in determining whether the debt collector seeking to collect the fee violated section 1692f(1), which prohibits the "collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1). Determining that the fee was not permitted by Wisconsin law, the Court affirmed summary judgment in favor of a plaintiff class on both the section 1692f(1) claim and a Wisconsin state-law claim. 548 F.3d at 1115; *see also*, *e.g.*, *Shula v. Lawent*, 359 F.3d 489, 491, 493 (7th Cir. 2004) (considering state law in determining that a consumer was not

obligated to pay court costs absent an order awarding such costs and concluding that the debt collector violated section 1692f(1) in attempting to recover such costs).

Lawrence Towing argues that Ms. Richards's "right to recovery is limited to the state law she is seeking to enforce." Appellees' Br. 16. Ms. Richards's FDCPA claim, however, is seeking to enforce section 1692f(6)(A), rather than state law, and she is entitled to the remedies available under the FDCPA. *See* 15 U.S.C. § 1692k. Lawrence Towing also claims that holding it liable under section 1692f(6)(A) would "allow a litigant to transform any alleged violation of state consumer protection laws into a cause of action under § 1692f." Appellees' Br. 20. That is not the case. Not all state consumer protection laws deprive debt collectors of the present right to possess collateral. Finally, Lawrence Towing repeatedly accuses Ms. Richards of trying to "broaden" the scope of the FDCPA. *See*, *e.g.*, Appellees' Br. 15. To the contrary, Ms. Richards is simply trying to hold Lawrence Towing accountable for behavior the FDCPA expressly prohibits—taking nonjudicial action to repossess collateral without a "present right to possession of the property." 15 U.S.C. § 1692f(6)(A).

Courts for decades have looked to state law to determine whether a debt collector has a "present right to possession" under the FDCPA. *See* Appellant's Br. at 18–19 & n.4 (citing cases). As a district court in this Circuit recently explained, "[c]ourts presented with the issue of determining whether a repossession agency has violated § 1692f(6) look to the applicable state self-help repossession statute which identifies the circumstances under which an enforcer of a security interest does not have a present right to the collateral at issue." *Oney v. Assured Recovery LLC*, No. 19-C-680, 2019 WL 3346754, at *3 (E.D. Wis. July 25, 2019) (quoting *Gable v. Universal Acceptance Corp. (WI)*, 338 F. Supp. 3d 943, 949 (E.D. Wis. 2018)). Aside from the decision below, Lawrence Towing does not cite any cases holding otherwise.

In enacting section 1692f(6)(A), Congress protected consumers from debt collectors who engage in self-help repossession when they lack the present right to possession of the collateral. At the moment it repossessed Ms. Richards's car, Lawrence Towing lacked the right to take possession of the vehicle. Its repossession thus violated section 1692f(6)(A), and the district court's grant of summary judgment and dismissal of the state-law claims should be reversed.

CONCLUSION

The Court should reverse the district court's grant of summary judgment to defendants on the FDCPA claim and dismissal of the state-law claims and should remand for further proceedings.

Respectfully submitted,

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Robert E. Duff
Indiana Consumer Law Group/
The Law Office of Robert E. Duff
P.O. Box 7251
Fishers, IN 46037
(800) 817-0461

Counsel for Plaintiff-Appellant

August 14, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c). As calculated by my word processing software (Microsoft Word for Office 365), the brief contains 2,716 words.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I hereby certify that on this date, August 14, 2019, I am electronically filing this brief through the ECF system, which will send a notice of electronic filing to counsel for all parties in this case.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum