No. 06-12088-F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

HARRY L. DANOW,

Plaintiff-Appellant,

v.

DAVID E. BORACK and
THE LAW OFFICE OF DAVID E. BORACK, P.A.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR APPELLANT HARRY L. DANOW

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May 17, 2006

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26-1, appellant provides the following list of persons who may have an interest in the outcome of this appeal:

Harry L. Danow

The Law Office of David E. Borack, P.A.

David E. Borack, Esq.

Steven M. Canter, Esq.

The Honorable Jose E. Martinez, District Judge

The Honorable Ted E. Bandstra, U.S. Magistrate Judge

As far as appellant is aware, there are no additional persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular appeal.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-appellant Harry L. Danow does not believe that oral argument would aid this Court's disposition of this appeal. The appeal presents a straightforward case of impermissible *sua sponte* dismissal that should be summarily reversed under this Court's controlling precedent. *See Jefferson Fourteenth Assocs. v. Wometco de Puerto Rico*, 695 F.2d 524 (11th Cir. 1983). If the Court is inclined to reach the merits of the claims that were dismissed *sua sponte*, that issue too is straightforward and is controlled by this Court's prior precedent. *See Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985).

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291. A final order and judgment was issued on January 24, 2006, and an order denying plaintiff-appellant's motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) was issued on March 3, 2006. The notice of appeal was filed on March 30, 2006. The appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A) and 4(a)(4)(A)(iv).

STATEMENT OF THE ISSUES PRESENTED

1. Did the district court err in dismissing *sua sponte* Mr. Danow's claims under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692c and 1692d? *See Jefferson Fourteenth Assocs. v. Wometco de Puerto Rico*, 695 F.2d 524 (11th Cir. 1983).

2. Did Mr. Danow's allegations concerning the defendants' telephone calls state a claim upon which relief could be granted under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692c and 1692d? *See Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985).

STATEMENT OF THE CASE

Appellant Harry Danow filed this action on September 26, 2006, alleging various violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, *et seq*., on the part of the defendant debt collectors, David E. Borack and the

Law Offices of David E. Borack. (RE 1). In addition to several other unrelated FDCPA claims concerning the nature of the defendants' dunning letter, the complaint alleged violations of two provisions of the statute relevant to this appeal—15 U.S.C. §§ 1692d and 1692c. Specifically, the complaint alleged that, on October 14, 2004, Mr. Danow sent a letter to the defendant debt collectors asking them to cease all telephone calls to him. The letter said, in relevant part: "I am requesting that this debt be charged off, and that you only contact me by mail as I am often a nervous wreck when the phone rings or if I have to talk to a creditor." (RE 1, Exhibit C). The complaint alleged that the defendants, despite this letter, contacted Mr. Danow by telephone on numerous occasions following their receipt of the October 14 letter. (RE 1 at 5). The complaint alleged that these telephone calls violated 15 U.S.C. §§ 1692c(a)(1), 1692c(c), and § 1692d. (RE 1 at 6).

The defendants filed a motion to dismiss and for more definite statement on October 21, 2005. (RE 7). The defendants' motion sought to dismiss the lion's share of the claims in the lawsuit, but specifically did *not* seek dismissal of the two claims relating to the telephone calls—the claims under 15 U.S.C. §§ 1692d and 1692c. Instead, with respect of the claims under section 1692c, the motion asked only for a more definite statement, arguing that defendants "are unable to file a responsible pleading as the allegations regarding the time that the alleged

telephone calls occurred are ambiguous." (RE 7 at 9). The motion made no mention of Mr. Danow's claim under section 1692d.

Mr. Danow filed an opposition to the motion on December 5, 2005. (RE 22). His opposition brief tracked the sequence of the arguments in the defendants' motion, responding to each argument point-by-point. Because the defendants' motion did not attack the merits of his claims relating to the telephone calls under sections 1692c and 1692d or otherwise seek dismissal of those claims, Mr. Danow's brief did not provide an argument concerning the merits of the claims. Instead, he responded only to the defendants' request for a more definite statement, explaining that the telephone calls had occurred *after* the letter dated October 14, 2004, requesting that the defendants cease telephone communications.

The parties consented to have the case heard by a magistrate judge and, on January 27, 2006, the magistrate judge granted the defendants' motion to dismiss. The magistrate judge's order granted the defendants' motion on all counts on which they sought dismissal. In addition, however, the very last page of the magistrate judge's order included the following footnote, which dismissed Mr. Danow's section 1692c claim *sua sponte* and without explanation:

> The Court further finds plaintiff's allegations with respect to alleged telephone calls insufficient to state a cause of action under 15 U.S.C. § 1692c. Accordingly, plaintiff's allegations with respect to this claim are dismiss thereby rendering it unnecessary to address defendant's motion for a more definite statement.

(RE 32 at 12 n.4). Although the order did not address Mr. Danow's claim under section 1692d, the court issued an administrative order closing the case on the same day that the dismissal order was filed.

Following these orders, Mr. Danow filed a Rule 59(e) motion on February 3, 2006, asking the court to alter or amend the judgment because his claim under 15 U.S.C. § 1692d had not been dismissed by the order granting the motion to dismiss, but had been foreclosed by virtue of the order closing the case. (RE 33).

The magistrate judge responded to this motion not by amending the judgment to permit Mr. Danow's undismissed claim to go forward, but by amending its dismissal order to dismiss the section 1692d claim *sua sponte*. (ER-4). Once again, the magistrate judge did not provide an explanation for the sua sponte dismissal. Instead, the court simply ordered that plaintiff's motion was denied "except to the extent that footnote 4 of this Court's January 24, 2006 Order is hereby amended to further include tho [sic] finding that plaintiff's allegations with respect alleged telephone calls are insufficient to state a cause of action for harassment under 15 U.S.C. § 1692d." (RE 36).

The district court thus dismissed Mr. Danow's two telephone-call claims on its own motion, without providing Mr. Danow any notice or an opportunity to be heard on the merits of the two claims. This appeal followed.

STANDARD OF REVIEW

With respect to a dismissal for failure to state a claim, the standard of review "is the same for the appellate court as it was for the trial court." *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1187 (11th Cir. 2004) (internal quotations omitted). This Court reviews the dismissal *de novo*, "accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003).

SUMMARY OF ARGUMENT

This appeal presents a clear case of impermissible *sua sponte* dismissal. In the course of deciding a motion that sought the dismissal of other unrelated claims, the district court dismissed Mr. Danow's claims under 15 U.S.C. U.S.C. §§ 1692c and 1692d, even though the motion expressly did not seek dismissal of those claims and the parties neither briefed nor argued the merits of the claims.

This Court's decision in *Jefferson Fourteenth Assocs. v. Wometco de Puerto Rico, Inc.*, 695 F.2d 524, 526 (11th Cir. 1983), specifically prohibited *sua sponte* dismissal under circumstances that are indistinguishable from those present here—namely, that (1) the defendant had not yet filed an answer and thus, the plaintiff still had a right under Fed. R. Civ. P. 15(a) to amend the complaint; (2) the dismissed claims were brought in good faith and were not vexatious or patently frivolous; and (3) the district court had provided the plaintiff with neither notice of

its intent to dismiss the relevant claims nor an opportunity to respond. Accordingly, under controlling Circuit precedent, the decision below should be reversed and remanded for further proceedings. *See also Davken, Inc. v. City of Daytona Beach Shores*, 159 Fed.Appx. 970 (11th Cir. 2005).

The error is compounded by the fact that the district court provided not even a minimal explanation for its decision to dismiss Mr. Danow's claims and because the merits of the claims are in fact quite compelling. Accordingly, if this Court is inclined to review the merits of the district court's decision for the first time on appeal, the Court should reverse the dismissal because Mr. Danow's claim—that the defendant debt collectors continued to telephone him on numerous occasions after he specifically requested in writing that he cease doing so—falls within the core of the conduct prohibited by three separate subsections of the FDCPA; it is exactly the type of conduct the statute was designed to prevent.

ARGUMENT

I. THE DISTRICT COURT'S *SUA SPONTE* DISMISSAL OF MR. DANOW'S CLAIMS UNDER 15 U.S.C. §§ 1692c and 1692d WAS ERRONEOUS.

In *Jefferson Fourteenth Assocs. v. Wometco de Puerto Rico, Inc.*, 695 F.2d 524, 526 (11th Cir. 1983), this Court held that district courts may "exercise their inherent power to dismiss a suit that lacks merit only when the party who brought the case has been given notice and an opportunity to respond." This rule, the Court

explained, is rooted in an elementary principle of procedural due process. *Id.* at 524 ("We reverse for the reason that the district judge dismissed the case *sua sponte*, depriving Wometco of its right to procedural due process."); *id.* at 527 ("[E]ven if its claim ultimately has no merit, a party who brings a claim in good faith has a due process right to litigate that claim."). Indeed, the Supreme Court has consistently held that "[a]n elementary and fundamental requirement of due process in *any proceeding* which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added).

Wometco specifically prohibited *sua sponte* dismissal under circumstances that are indistinguishable from those present here—namely, that (1) the defendant had not yet filed an answer and thus, the plaintiff still had a right under Fed. R. Civ. P. 15(a) to amend the complaint; (2) the dismissed claims were brought in good faith and were not vexatious or patently frivolous; and (3) the district court had provided the plaintiff with neither notice of its intent to dismiss the relevant claims nor an opportunity to respond. *Wometco*, 695 F.2d at 524-26 (describing procedural background). The district court's *sua sponte* dismissal of the claims at issue in this appeal was therefore in direct contravention of this Court's precedent.

Wometco also made clear that a defendant's mere suggestion concerning the merits of a claim—such as the defendants' motion for a more definite statement here—is insufficient, without an express request for dismissal, to constitute notice to the plaintiff that the court may be contemplating dismissal. 695 F.2d at 527. In *Wometco*, the defendant had at least suggested that the court dismiss the plaintiff's claims *sua sponte*. But the plaintiff there, Wometco, "did not address the merits of its case, pointing out instead that it would be unfair to dismiss the case when the motion before the court" was a motion to lift a stay, not a motion expressly seeking dismissal of the claims. *Id.* at 527. Nevertheless, the Court explained that "Wometco was correct in refusing to argue the merits" because it had a due process right to litigate the issue before the court could appropriately dismiss the claim. *Id.*

To be sure, *Wometco* recognized that a district court may dismiss truly vexatious or frivolous suits *sua sponte*, and the Supreme Court has recognized that "a [d]istrict [c]ourt may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 (1962). But this case does not present such special circumstances. Indeed, even in the special context of *in forma pauperis* prisoner litigation, where Congress has implemented special measures to permit quick dismissal of frivolous suits, this Court recently held that a plaintiff's

right to due process was not violated by a magistrate's report recommending dismissal without first giving him the opportunity to be heard because the plaintiff was given the opportunity to object to the report before the district court entered its final order. *Vandenberg v. Donaldson*, 259 F.3d 1321, 1324-25 (11th Cir. 2001). In this case, Mr. Danow was not permitted even the opportunity to object on the merits afforded to prisoner litigants.

A persuasive recent illustration of the application of *Wometco* in this Circuit, and an indication of its continued vitality as controlling precedent, is *Davken, Inc. v. City of Daytona Beach Shores*, 159 Fed.Appx. 970 (11th Cir. 2005). On appeal, the plaintiff complained that the district court had dismissed its claim under the Contracts Clause of the Constitution without proper notice or an opportunity to respond and that this failure required reversal. This Court agreed, explaining that *Wometco* had "specifically prohibited" such a practice and that all of the circumstances present there—the lack of an answer, the lack of any suggestion of vexatiousness or frivolousness, and the lack of any notice of the court's intention to dismiss the relevant claims or an opportunity to respond—were all present in *Davken* as well. *Id.* at 972. "Accordingly," the Court held, "pursuant to our controlling case precedent, we reverse and remand the district court's *sua sponte* dismissal of the Contracts Clause claim." *Id.* The Court instructed the district

court, on remand, to "provide notice of its intent to dismiss the claim for lack of merit and an opportunity for Davken to respond." *Id.*

For two reasons, the error on this score is even *more* apparent here than in *Wometco* and *Davken*. *First*, the magistrate judge provided no analysis or explanation whatsoever concerning the dismissal of the claims under sections 1692c and 1692d of the FDCPA, leaving this Court to guess at its reasons: Was the dismissal based solely on a desire for docket-clearing expediency or was it based on some actual defect in the claim that the judge spotted but failed to note? As the Third Circuit has put it, "[j]udicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic." *Bright v. Westmoreland County*, 380 F.3d 729, 732 (3d Cir. 2004). Here, the magistrate judge provided no "tangible proof" of having "actively wrestled" with Mr. Danow's claims at all. This Court, too, has explained the importance of reasoning in support of a legal conclusion. "Ordinarily the appellate court is given the tools to determine if the trial court acted correctly." *Hulsey v. Pride Restaurants, LLC*, 367 F.3d 1238 (11th Cir. 2004) (*Clay v. Equifax, Inc.*, 762 F.2d 952, 957 (11th Cir.1985)). But an

"unexplained . . . order not only denies to the appellate court the tools of review but conceals what the court did and why and leaves the appeals court, like the proverbial blind hog, scrambling through the record in search of an acorn. This is antithetical to proper performance of the review function." *Id.*

Second, as explained below, the error below is particularly apparent because it is abundantly clear that the allegations at issue—uncontested allegations that a debt collector made numerous phone calls to a consumer following a written letter expressly requesting that the debt collector cease making such phone calls because they had a tendency to make the consumer a "nervous wreck"—give rise to liability under the FDCPA, a statute designed to prevent just such conduct.

II. Mr. Danow Stated Claims Under 15 U.S.C. §§ 1692c and 1692d Upon Which Relief Could Be Granted.

In the FDCPA, Congress responded to "abundant evidence of the use of abusive, deceptive and unfair debt collection practices by many debt collectors," 15 U.S.C. § 1692(a), by enacting a comprehensive, detailed remedial scheme that imposes civil liability on debt collectors who engage in a range of prohibited conduct, without regard to their knowledge or intent. *See Russell v. Equifax A.R.S.*, 74 F.3d 30 (2d Cir. 1996) ("Because the Act imposes strict liability, a consumer need not show intentional conduct by the debt collector to be entitled to damages."). Congress relied on extensive evidence showing that "[a]busive debt

collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy," 15 U.S.C. § 1692(a), and that "the suffering and anguish" that "unscrupulous debt collectors . . . regularly inflict is substantial." S. Rep. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 (1977) (describing Congressional findings).

Despite the district court's unexplained conclusion to the contrary, there can be little doubt that Mr. Danow's complaint made allegations concerning defendants' telephone calls to him that were sufficient to withstand dismissal for failure to state a claim. Mr. Danow's claimed the defendants had violated two sections of the FDCPA—sections 1692c and 1692d—by making telephone calls to him after he had specifically asked them to stop and had explained that such calls made him a "nervous wreck."

Section 1692c of the FDCPA contains two subsections relating to communications between debt collectors and consumers that are relevant here. First, section 1692c(a)(1) provides:

> **Communication with the consumer generally**—Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer.

15 U.S.C. § 1692c(a). Among other things, this section prohibits a debt collector from calling a consumer when the debt collectors knows that it will be inconvenient for the consumer. The section has been applied broadly to personal visits and other means of communicating, including telephone calls. *See, e.g., Austin v. Great Lakes Collection Bureau, Inc.*, 834 F. Supp. 557 (D. Conn. 1993) (continued telephone calls to consumer, after collector had been asked to cease such calls because they inconvenienced the consumer, violated 15 U.S.C. § 1692c(a)(1)).

Section 1692c was considered "an extremely important protection" by Congress. S. Rep. No. 382, 95th Cong., 1st Sess. 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696; *see also* 122 Cong. Rec. H7,308 (daily ed. July 19, 1976) (remarks of Rep. Annunzio, chief sponsor of the FDCPA, concerning H.R. 13720). Among the other important rights, it provides is the right of the consumer to require the debt collector to stop communicating with the consumer about the debt:

> **Ceasing communication**—If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communications with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt . . .

15 U.S.C. § 1692c(c). This subsection, too, clearly supports a cause of action based on Mr. Danow's allegations. *See*, *e.g.*, *Herbert v. Monterey Financial*

Services, Inc., 863 F. Supp. 76 (D. Conn. 1994) (phone call, after debt collector received letter from consumer's attorney stating that consumer refused to pay the debt, violated the FDCPA).

Finally, Mr. Danow's claims concerning the telephone calls were also based on section 1692d of the FDCPA, which provides, in relevant part, that a "[a] debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d. "Without limiting the general application of the foregoing, the following conduct is a violation of this section–Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number." *Id.* § 1692d(5).

The seminal case concerning the standard under which this provision should be interpreted is this Court's decision in *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985). Discussing section 1692d, *Jeter* explained that "[w]hether a consumer is more or less likely to be harassed, oppressed, or abused by certain debt collection practices does not relate solely to the consumer's relative sophistication; rather such susceptibility might be affected by other circumstances of the consumer or by the relationship between the consumer and the debt collection agency." *Id.* at 1179. Accordingly, the court held that "claims under § 1692d should be viewed from the perspective of a consumer whose circumstances

makes him relatively more susceptible to harassment, oppression, or abuse." *Id.* In this case, the defendants were on actual notice that Mr. Danow was himself particularly prone to harassment by telephone, that such calls caused him distress, and that he did not want them to call him. Nevertheless, the defendants persisted in making numerous calls following their receipt of his letter. Under the standard announced in *Jeter*, Mr. Danow's allegations are more than enough to withstand a motion to dismiss. Moreover, *Jeter* explained that "[o]rdinarily, whether conduct harasses, oppresses, or abuses will be a question for the jury." *Id.* at 1179. Here, however, Mr. Danow's claims were dismissed before he even had an opportunity to brief or argue the question of whether they state a claim upon which relief could be granted—let alone try them to a jury.

CONCLUSION

Because the district court improperly dismissed plaintiff's claims under 15 U.S.C. §§ 1692c and 1692d *sua sponte* and without explanation, this Court should reverse the dismissal of those claims and remand for further proceedings. Alternatively, if the Court is inclined to reach the merits, it should do so and reverse the district court's decision as a matter of law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 3,611 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

May 17, 2006 Donald Yarbrough

CERTIFICATE OF SERVICE

I hereby certify that on this date I am causing two copies of the foregoing brief to be served by first-class mail, postage pre-paid, on the following counsel:

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May 17, 2006