

15-527
Garfield v. Ocwen Loan Servicing, LLC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2015

Argued: October 20, 2015

Decided: January 4, 2016

Docket No. 15-527

1 DONNA GARFIELD,
2 Plaintiff-Appellant,
3

4 v.

5
6 OCWEN LOAN SERVICING, LLC,
7 Defendant-Appellee.
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10 Before: NEWMAN, WINTER, and CABRANES, Circuit Judges.

11
12 Appeal from the January 26, 2015, judgment of the
13 United States District Court for the Western District of New
14 York (Elizabeth A. Wolford, District Judge), dismissing
15 claims brought under the Fair Debt Collection Practices Act
16 for seeking to collect a debt discharged in bankruptcy, and
17 requiring the plaintiff to seek relief in the bankruptcy
18 court.

19 Judgment reversed and case remanded with instructions
20 to reinstate the FDCPA claims.
21

1 Kenneth R. Hiller, Law Offices of
2 Kenneth Hiller, PLLC, Amherst,
3 NY, for Appellant.
4

5 Gary Neal Smith, Houser & Alison,
6 APC, Newark, NJ, for Appellee.
7

8 (Daniel L. Geysler, Stris & Maher
9 LLP, Los Angeles, CA, for
10 *amicus curiae* National
11 Association of Consumer
12 Bankruptcy Attorneys, in
13 support of Appellant.)
14

15
16 JON O. NEWMAN, Circuit Judge.

17 The principal issue on this appeal is whether a
18 debtor who has received a claim on a debt that has been
19 discharged in a bankruptcy proceeding can sue the claimant
20 in a district court under the Fair Debt Collection Practices
21 Act ("FDCPA") or must seek relief in the bankruptcy court.
22 The issue arises on an appeal by Plaintiff-Appellant Donna
23 Garfield from the January 26, 2015, judgment of the United
24 States District Court for the Western District of New York
25 (Elizabeth A. Wolford, District Judge), in favor of
26 Defendant-Appellee Ocwen Loan Servicing, LLC ("Ocwen"). The
27 judgment dismissed Garfield's complaint alleging various
28 causes of action under the FDCPA.

29 We conclude that Garfield may pursue her FDCPA claims
30 in a district court and therefore reverse and remand.

Background

The complaint alleges the following facts, which are assumed to be true on this appeal from dismissal for failure to state a claim on which relief can be granted. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Garfield obtained a mortgage from Ocwen's predecessor-in-interest, Litton Loan Servicing L.P. and became personally obligated on a mortgage loan. Garfield failed to make payments on the mortgage loan and filed for Chapter 13 Bankruptcy in the United States Bankruptcy Court for the Western District of New York. During the bankruptcy proceedings, Ocwen acquired Garfield's mortgage loan.

Under her bankruptcy plan, Garfield paid the arrears on her mortgage loan through monthly payments made during the bankruptcy proceeding. Critical to the pending appeal, in August 2013 she obtained a discharge of her entire personal obligation for the mortgage loan.¹ However, Garfield agreed

¹ Garfield's claim that her personal obligation on the mortgage debt was discharged is inferable from her complaint, but not precisely stated. The complaint alleges that Garfield's "bankruptcy was discharged," ¶ 14, and that Ocwen reported to Equifax that she "still owed the amount which was included in her Chapter 13 bankruptcy," ¶ 19. Her brief in this Court explicitly alleges that her debt "had been discharged in her prior bankruptcy case," Br. for Appellant 1, and that "the Bankruptcy Court entered an order discharging Plaintiff's indebtedness on all of the debts

1 to pay \$938 per month to prevent foreclosure of the
2 mortgaged property.²

3 Garfield concedes that she made only one monthly
4 payment after her bankruptcy discharge and that by March
5 2014 the arrears on her monthly obligation totaled
6 \$6,672.34. In February 2014 Ocwen contacted Garfield and
7 demanded that she pay \$21,825.15 or face foreclosure on her
8 home. Ocwen sent a delinquency notice in April 2014 for
9 \$22,684.36. These amounts reflected both Garfield's conceded
10 arrears for post-bankruptcy monthly payments and the
11 mortgage loan arrears that had been discharged. Ocwen also
12 reported to Equifax that Garfield owed the discharged
13 amount.

14 In July 2014, Garfield filed her FDCPA complaint
15 against Ocwen in the United States District Court for the
16 Western District of New York. She alleged that Ocwen's
17 attempt to collect the arrears on her mortgage loan, which

listed on her bankruptcy petition, including her debt to
Ocwen," *id.* 3-4 (citing Complaint ¶ 14).

² Ocwen contends that it is only the "servicer" of
Garfield's mortgage, "not the owner of the security
instrument," and "is not a secured creditor enforcing a
valid security interest." Br. for Appellee 27 n.8. Ocwen
does not dispute that Garfield's failure to make required
payments risks foreclosure.

1 had been discharged,³ violated several provisions of the
2 FDCPA: 15 U.S.C. § 1692e, 15 U.S.C. § 1692e(2), 15 U.S.C. §
3 1692e(5), 15 U.S.C. § 1692e(8), 15 U.S.C. § 1692e(10), 15
4 U.S.C. § 1692e(11), 15 U.S.C. § 1692f, 15 U.S.C. § 1692f(1),
5 and 15 U.S.C. § 1692g(a)(3).

6 Garfield also alleged that Ocwen violated the FDCPA in
7 the manner it attempted to collect the post-bankruptcy
8 monthly mortgage payments that she concedes she owes.
9 Specifically, she alleges (1) that Ocwen violated subsection
10 1692e(11), which requires a so-called "mini-Miranda
11 warning," during conversations with a debtor, and (2) that
12 Ocwen failed to send within five days of its initial
13 communications a 30-day notice of a debtor's right to
14 dispute a debt, as required by subsection 1692g(a)(3).

15 The District Court dismissed Garfield's complaint. The
16 Court held that the Bankruptcy Code provides the exclusive
17 remedy for Garfield's claim that Ocwen attempted to collect

³ The Bankruptcy Code's discharge provision, 11 U.S.C. § 524, provides in relevant part that a discharge in bankruptcy "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act[] to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharged of such debt is waived." *Id.* § 524(a)(2).

1 an allegedly discharged debt.⁴ The Court also stated that,
2 even if the Code does not broadly preclude all FDCPA claims
3 for conduct that violates the discharge injunction,
4 Garfield's particular FDCPA claims conflict with the Code's
5 remedies and were therefore precluded.

6 Discussion

7 I. Implied Repeal of All FDCPA Provisions Invoked for Claims 8 After Discharge

9 The District Court held that the Bankruptcy Code
10 precludes all claims under the FDCPA for conduct that
11 violates a discharge injunction. Acknowledging Garfield's
12 argument that the Supreme Court "should only rarely infer
13 statutory repeal," the District Court ruled that "many of
14 Plaintiff's allegations directly conflict with the
15 Bankruptcy Code's discharge injunction provisions."

16 When it is claimed that a later enacted statute creates
17 an irreconcilable conflict with an earlier statute, the
18 question is whether the later statute, by implication, has
19 repealed all or, more typically, part of the earlier
20 statute. *See National Ass'n of Home Builders v. Defenders of*

⁴ Specifically, it held that the appropriate means to redress conduct that violates the discharge injunction is a motion for contempt filed in the bankruptcy court under 11 U.S.C. § 105(a).

1 *Wildlife*, 551 U.S. 644, 662-63 (2007). Repeal by implication
2 is disfavored. "In the absence of some affirmative showing
3 of an intention to repeal, the only permissible
4 justification for a repeal by implication is when the
5 earlier and later statutes are irreconcilable." *Morton v.*
6 *Mancari*, 417 U.S. 535, 550 (1974).

7 Where, as in this case, the later statute is the
8 Bankruptcy Code,⁵ a distinction must be made between claims
9 brought under the earlier statute *during* the pendency of a
10 bankruptcy proceeding and those brought *after* a discharge.
11 Four circuits have considered FDCPA claims brought during
12 the pendency of a bankruptcy proceeding.

13 Our Court has ruled that the FDCPA does not authorize
14 suit during the pendency of bankruptcy proceedings. See
15 *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir.
16 2010). This ruling appears to construe FDCPA provisions to
17 be inapplicable when invoked for claims made during
18 bankruptcy, rather than determine that such provisions have

⁵ The subsections of the FDCPA under which Garfield makes claims, with one exception discussed below, see note 11, *infra*, were enacted on September 20, 1977, and came into effect on March 20, 1978. See Pub. L. No. 95-109, §§ 807, 808, 809, 91 Stat. 874, 877, 879 (1977). The current version of the discharge injunction, 11 U.S.C. § 524(a), was enacted on November 6, 1978. See Pub. L. No. 95-958, 92 Stat. 2549, 2592 (1978).

1 been impliedly repealed by the provision of the Bankruptcy
2 Code authorizing a discharge injunction. *See id.* at 94. Our
3 Court's opinion does not include the word "repeal."

4 In *Simmons*, the debtors, while engaged in a bankruptcy
5 proceeding, objected to the amount of a creditor's proof of
6 claim, which the bankruptcy court reduced. The debtors then
7 brought a putative class action, contending that the
8 creditor's filing of an inflated proof of claim violated the
9 FDCPA. *See id.* The creditor moved to dismiss, arguing that
10 the Bankruptcy Code exclusively provides whatever remedies
11 exist for filing an inflated proof of claim. *See id.*

12 Affirming dismissal of the complaint, we said, "The
13 FDCPA is designed to protect defenseless debtors" and
14 "[t]here is no need to protect debtors who are already *under*
15 *the protection of the bankruptcy court.*" *Id.* at 96 (emphasis
16 added). Noting that some courts had broadly rejected all
17 FDCPA claims (even claims filed after discharge) predicated
18 on acts alleged to have violated the Bankruptcy Code, we
19 observed that "[t]his broader rule has not been universally
20 accepted, and we are not compelled to consider it in this
21 case." *Id.* at 96-97 n.2 (citation omitted).⁶

⁶ In a non-precedential decision, *Yaghibi v. Robinson*, 145 F. App'x 697 (2d Cir. 2005), we affirmed the dismissal

1 The Ninth Circuit has ruled that the Bankruptcy Code
2 precludes FDCPA claims brought during the pendency of
3 bankruptcy proceedings. *See Walls v. Wells Fargo Bank, N.A.*,
4 276 F.3d 502, 511 (9th Cir. 2002). This Court, like the
5 District Court in the pending appeal, appears to have said
6 "precludes" FDCPA claims to reflect that the FDCPA
7 provisions invoked for such claims have been repealed by
8 implication with respect to conduct that violates the
9 discharge injunction.

10 Two circuits have ruled to the contrary. In *Randolph v.*
11 *IMBS, Inc.*, 368 F.3d 726, 728 (7th Cir. 2004), the debtors
12 brought FDCPA claims against creditors for seeking to
13 collect debts in violation of the automatic stay. The
14 creditors asserted that the Bankruptcy Code's remedies for
15 violations of the automatic stay, *see* 11 U.S.C. § 362(h)
16 (now § 362(k)), precluded relief under the FDCPA.

of claims, alleging violations of a discharge injunction, brought in a district court under the Bankruptcy Code's contempt provision, 11 U.S.C. § 105(a), the Code's discharge provision, *id.* § 524, the FDCPA, and state law provisions. After affirming dismissal of claims brought under the Bankruptcy Code's provisions, we also affirmed the dismissal of "plaintiff's parallel federal and state unfair debt collection practice claims," adding, "We need not here decide whether debtors in bankruptcy can ever maintain such claims based on violations of the Bankruptcy Code," noting the circuit split discussed above. *See id.* at 698.

1 The Seventh Circuit acknowledged that there were some
 2 "operational differences between the statutes," but stated
 3 that these differences constituted "overlap" between the
 4 statutes rather than "irreconcilable conflict," *id.* at 730,
 5 and that "[o]verlapping statutes do not repeal one another
 6 by implication," *Id.* at 731. "The Bankruptcy Code of 1986
 7 does not work an implied repeal of the FDCPA, any more than
 8 the latter Act implicitly repeals itself." *Id.* at 732.

9 Judge Easterbrook helpfully assembled a chart comparing
 10 the statutes' differing treatment of conduct that violates
 11 both the automatic stay and the FDCPA:

	<u>Bankruptcy</u>	<u>FDCPA</u>	
12			
13	Who	Anyone	Debt collector only
14			
15	Scienter	Willfulness	Strict liability (§
16			1692e(2)(A)
17			
18	Defense	None	Bona fide error plus due
19			care (§ 1692k(c)), or
20			reliance on FTC opinion
21			(§ 1692k(e))
22			
23	Statutory Damages	None	\$ 1,000 maximum
24			(§ 1692k(a)(2)(A))
25			
26	Compensatory Damages	Yes	Yes (§ 1692k(a)(1))
27			
28	Punitive Damages	Yes	No
29			
30	Cap on Class Recovery	No	Yes (§ 1692k(a)(2)(B)(ii))

1	Maximum recovery	No	Yes, \$500,000 or 1% of net
2			worth, whichever is less
3			(§ 1692k(a)(2)(B)(ii))
4			
5	Attorneys' fees to debtor	No	Yes (§ 1692k(a)(3))
6			
7	Attorneys' fees to creditor	No	Yes (§ 1692k(a)(3))
8			
9	Statute of limitations	None (laches defense only)	One year (§ 1692k(d))

10
11 *Id.*

12 The Seventh Circuit concluded, "It is easy to enforce
13 both statutes, and any debt collector can comply with both
14 simultaneously." *Id.*

15 The Third Circuit has also ruled against implied repeal
16 of FDCPA provisions invoked for claims brought during the
17 pendency of bankruptcy proceedings, see *Simon v. FIA Card*
18 *Services, N.A.*, 732 F.3d 259, 274 (3d Cir. 2013), concluding
19 that the Bankruptcy Code effected "no broad preclusion" of
20 FDCPA claims, *id.* at 278.

21 The pending appeal concerns FDCPA claims brought *after*
22 discharge, the context we explicitly distinguished in
23 *Simmons*. Now facing the issue of implied repeal of FDCPA
24 provisions invoked for claims in the post-discharge context,
25 we conclude that the Bankruptcy Code does not broadly repeal
26 the FDCPA for purposes of FDCPA claims based on conduct that
27 would constitute alleged violations of the discharge

1 injunction. No irreconcilable conflict exists between the
2 post-discharge remedies of the Bankruptcy Code and the
3 FDCPA. There is no reason to assume that Congress did not
4 expect these two statutory schemes to coexist in the post-
5 discharge context. The Seventh Circuit's analysis of FDCPA
6 and Bankruptcy Code provisions, although leading that Court
7 to a result that differs from our *Simmons* decision in the
8 pre-discharge context, argues against preclusion of FDCPA
9 claims after discharge. At that point the former debtor no
10 longer has the "protection of the bankruptcy court,"
11 *Simmons*, 622 F.3d at 96, which we deemed decisive on the
12 preclusion issue prior to discharge. Indeed, the Bankruptcy
13 Code provision concerning the discharge injunction, see 11
14 U.S.C. § 524(a)(2), does not explicitly create a cause of
15 action for its violation, whereas the automatic stay
16 provision provides such a remedy, see *id.* § 362(k).⁷

⁷ In noting this distinction, we do not decide whether the discharge injunction provision should be construed implicitly to create a cause of action for its violation, in addition to a contempt remedy. See 11 U.S.C. § 105(a); *Bessette v. Avco Financial Services, Inc.*, 230 F.3d 439, 445 (1st Cir. 2000) (discharge injunction enforceable by contempt proceeding).

1 II. Implied Repeal of Specific FDCPA Provisions Invoked for
2 Claims After Discharge

3 Even though the Bankruptcy Code does not impliedly
4 repeal all FDCPA provisions to remedy conduct that violates
5 the discharge injunction, it might impliedly repeal some
6 specific provisions invoked to remedy such conduct. Ocwen
7 focuses first on Garfield's claim that Ocwen's failure to
8 provide a so-called "mini-Miranda" warning in its initial
9 communication violated subsection 1692e(11) of the FDCPA.⁸
10 This claim, Ocwen contends, irreconcilably conflicts with
11 the Bankruptcy Code's post-discharge remedies.

12 In *Simon*, the Third Circuit held that the FDCPA could
13 not require the creditor to include a mini-Miranda warning
14 with its examination notice and subpoenas because a
15 communication that included such a warning, sent prior to a

⁸ Subsection 1692e(11) prohibits

"[t]he failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action."

1 discharge, would constitute a collection attempt forbidden
2 by the automatic stay. See 732 F.3d at 279-80. Sending the
3 notice and subpoenas prior to discharge did not violate the
4 Bankruptcy Code. See *id.* The Third Circuit ruled that
5 subsection 1692e(11) conflicted with the Bankruptcy Code
6 because including the warning would violate the Code and
7 omitting it would violate the FDCPA. See *id.* at 280.

8 This holding in *Simon*, however, whether or not we would
9 agree with it, has no application to Garfield's subsection
10 1692e(11) claim. Ocwen's communication, even without a mini-
11 *Miranda* warning, was an attempt to collect a discharged debt
12 in violation of the Bankruptcy Code. The absence of a mini-
13 *Miranda* warning also violated the FDCPA. There is no
14 conflict.

15 Two of Garfield's FDCPA claims allege that Ocwen
16 violated subsections 1692e(11) and 1692g(a)(3) in the manner
17 that Ocwen sought to collect Garfield's delinquent post-
18 bankruptcy monthly payments, which she agreed to make to
19 avoid foreclosure. Subsection 1692g(a)(3) requires notice of
20 an opportunity to dispute a debt.⁹ Both of these subsections

⁹ Subsection 1692g(a)(3) provides:

"Within five days after the initial communication with a consumer in connection with the collection

1 regulate Ocwen's collection of debt that Garfield concedes
2 she owes.

3 Garfield alleges that Ocwen sent her a bill on March
4 17, 2014, for her monthly payment as well as her arrears for
5 post-discharge monthly payments missed from July 2013 to
6 February 2014. She claims that Ocwen violated the mini-
7 *Miranda* warning requirement of subsection 1692e(11) "during
8 conversations with [her]," and that it violated subsection
9 1692g(a)(3) by failing to send a 30-day right-to-dispute
10 notice within five days of the initial communication. These
11 alleged violations do not conflict with any provisions of
12 the Bankruptcy Code.¹⁰

of any debt, a debt collector shall . . . send the
consumer a written notice containing . . . a
statement that unless the consumer, within thirty
days after receipt of the notice, disputes the
validity of the debt, or any portion thereof, the
debt will be assumed to be valid by the debt
collector"

¹⁰ Had there been a conflict, the analysis with respect
to subsection 1692e(11) would differ from that applicable to
the FDCPA as a whole because this subsection was
substantially reworded in a 1996 amendment, see Pub. L. 104-
208 § 2305, 100 Stat. 3009 (Sept. 30, 1996), and therefore
is a later statute compared to the injunction provision of
the Bankruptcy Code. In the absence of a conflict, the
sequence of these provisions need not be considered on the
issue of implied repeal.

1 Ocwen challenges several of Garfield's other FDCPA
2 claims on a somewhat perverse ground. These are Garfield's
3 claims under subsections 1692e, 1692e(2), 1692e(5),
4 1692e(8), 1692e(10), 1692f, and 1692f(1), all of which
5 regulate collection of a debt. Subsection 1692e, for
6 example, prohibits use of "any false, deceptive, or
7 misleading representation or means in connection with the
8 collection of any debt." Ocwen contends that these
9 provisions conflict with the Bankruptcy Code because, by
10 regulating how to collect a debt, they imply that it can
11 collect the discharged debt, an action that the discharge
12 injunction prohibits. But, as Garfield responds, Ocwen can
13 avoid violating both the cited provisions and the Bankruptcy
14 Code simply by not attempting to collect the discharged
15 debt. And once Ocwen tries to collect the discharged debt,
16 it risks violation of both the cited provisions and the
17 Bankruptcy Code. Either way, there is no conflict.

18 In sum, none of Garfield's individual FDCPA claims
19 conflicts with the discharge injunction under the Bankruptcy
20 Code.

21 III. Piecemeal Litigation

22 The District Court ruled that, even if some of
23 Garfield's claims do not pose a conflict with the discharge

1 injunction, the Court should dismiss them and require
2 Garfield to bring them in the Bankruptcy Court. The District
3 Court relied on the "clear federal policy . . . [of]
4 avoidance of piecemeal adjudication," Joint App'x at 39
5 (alteration in original), citing *Colorado River Water*
6 *Conservation District v. United States*, 424 U.S. 800, 819
7 (1976). That decision created a limited abstention doctrine
8 in the context of ongoing, parallel state proceedings, which
9 do not exist here. *See id.* at 817-18.

10 We do not rule out the unlikely possibility that in
11 adjudicating a debtor's FDCPA claims, a district court might
12 consider it useful to stay its proceedings to permit the
13 plaintiff to seek clarification from a bankruptcy court as
14 to the proper interpretation of some aspect of that court's
15 rulings, including the discharge injunction. But the remote
16 possibility of a need for such clarification provides no
17 basis for routing all FDCPA claims exclusively into the
18 bankruptcy court.

19 Conclusion

20 The judgment of the District Court is reversed, and the
21 case is remanded with instruction to reinstate Garfield's

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Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

Catherine O'Hagan Wolfe

