Journal of Taxation and Regulation of Financial Institutions

Who Can Sue Under the FDCPA? Sixth Circuit Expands Standing

In a recent decision, the Sixth Circuit expanded the notion of statutory standing under the Fair Debt Collection Practices Act by holding that the term "person" may include artificial entities. The case is significant in that it potentially opens the door to a new class of plaintiffs under a federal statutory scheme which was intended to protect individual consumers.

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The federal Fair Debt Collection Practices Act[1] (FDCPA or the "Act") was enacted in 1977 with the stated purpose of protecting consumers from debt collection abuses. Until recently, courts uniformly have considered only natural persons as having standing to bring claims under the Act. In a split decision, however, the Sixth Circuit recently diverged from that stance, holding that artificial entities may also qualify as "persons" with standing to bring claims under the FDCPA. The decision, *Anarion Investments LLC v. Carrington Mortgage Services, LLC*,[2] runs counter to the FDCPA's stated purpose and exposes debt collectors to expanded liability from a new and unanticipated class of plaintiffs—artificial entities.

FDCPA BASICS

The FDCPA was adopted in 1977 "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."[3]

By its express terms, the Act limits its application to the collection of consumer debts. Under the FDCPA, a debt is defined as being an obligation or alleged obligation of a consumer arising out of a transaction in which the money, property, insurance, or services that are the subject of the transaction are *primarily for personal, family, or household purposes*.[4] A "consumer" is defined as being a *natural person* obligated or allegedly obligated to pay a debt.[5] The Act's "*purpose is to protect consumers* from a host of unfair, harassing, and deceptive debt collection practices,"[6] including harassing or abusing any person in connection with the collection of a debt.[7]

The FDCPA is primarily self-enforcing and provides persons injured by violations of the Act with a right to recover statutory and actual damages, as well as attorneys' fees.[8] Until *Anarion*, the FDCPA had only offered protection to natural persons. The Sixth Circuit's opinion in *Anarion*, however, expands the standing provision of the FDCPA to include artificial entities.

THE *ANARION* CASE

Underlying Facts. In 2008, Kirk Leipzig purchased a residence in Brentwood, Tennessee, and secured the purchase with a Deed of Trust.[9] The amended

[1] 15 U.S.C. § 1601 et. seq. Unless otherwise stated, all references in this article to "Sections" in the text are to sections of the United States Code comprising the FDCPA.

[2] 33 F. Supp. 3d 927, rev'd 794 F. 3d 568 (6th Cir. 2015).

[3] 15 U.S.C. § 1692(e).

[4] 15 U.S.C. § 1692a(5).

[5] 15 U.S.C. § 1692a(3).

[6] S. Rep. 95-382, at 1 (1977) (emphasis added).

[7] See, e.g., 15 U.S.C. § 1692d.

[8] 15 U.S.C. §1692k(a).

[9] *Anarion*, 33 F. Supp. 3d at 929.

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complaint alleges that the house was purchased for personal, family, or household use and, therefore, the transaction was a consumer debt for purposes of the FDCPA. Mr. Leipzig then conveyed title in the property to the Leipzig Living Trust (the "Trust").[10] As a result, Mr. Leipzig remained the obligor on the deed of trust while the Trust held legal title to the property.

In 2010, the Trust leased the property to Scott Johannessen and provided him with an option to purchase.[11] According to the district court docket, Mr. Johannessen and his family took up residency in the property and continued to live there through at least 2014. In 2011, Mr. Johannessen exercised the option to purchase the property but took no further action to obtain title.[12] He then assigned his interests under the lease and the option to purchase to Anarion Investments LLC, a Delaware limited liability company in which he owned a controlling interest.[13]

Sometime in the interim, Mr. Leipzig and/or the Trust quit making the mortgage payments and the defendants instituted a foreclosure action.[14] According to the amended complaint, Mr. Johannessen and Anarion discovered that foreclosure proceedings had been commenced by happenstance and brought suit to enjoin the foreclosure.[15] At the time the suit was brought, Mr. Leipzig was the obligor on the mortgage, the Trust held legal title to the property, and Anarion contended it held equitable title to the property.

In its amended complaint, Anarion alleged several causes of action against the foreclosing entities, including violations of the FDCPA. Specifically with respect to its FDCPA claims, Anarion alleged that (1) the foreclosing defendants made certain misrepresentations in the foreclosure notices and (2) the foreclosure notices did not provide sufficient notice to interested parties, including Anarion as the assignee of the lessee. Anarion alleged that these misrepresentations gave rise to FDCPA claims, including claims under Section 1692d.[16] The foreclosing entities moved to dismiss all claims, including the FDCPA claims, asserting that the FDCPA does not provide a private right of action to corporate entities.[17]

The District Court Decision. The district court agreed with the defendants and dismissed Anarion's suit, holding that Anarion did not have statutory standing under the FDCPA because it was an artificial entity. In doing so, the district court focused on three provisions of the FDCPA, Sections 1692a, 1692d, and 1692k:

- The district court began its analysis by looking at the definitions of a "consumer" and "debt" under Section 1692a. The court noted that a "consumer" is "any *natural* person obligated or allegedly obligated to pay any debt" and that a "debt" is "any obligation or alleged obligation of a consumer" incurred for personal, family, or household purposes."[18]
- The court then looked at Section 1692d, which prohibits a debt collector from engaging in "any conduct the natural consequence of which is to harass, oppress, or abuse *any person* in connection with the collection of a debt."[19]
- Section 1692k, which provides the private right of action, in turn states that "[e]xcept as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to *any person* is liable to such person. . . ."[20]

The district court then turned its attention to the meaning of the term "any person" for purposes of Sections 1692d and 1692k. Because the term was left undefined by the Act, the court referred to the federal Dictionary Act which provides that, in determining the meaning of any Act of Congress, unless the context indicates otherwise, the word "person" includes corporations, companies, associations, and other artificial entities.[21] The district court determined that in construing the provisions of the Act in context, and particularly Sections 1692d and 1692k, the Dictionary Act definition of "person" did not apply to alleged violations of Section 1692d and similarly did not apply to Section 1692k.[22] In doing so, the court concluded that "[i]f the courts were to replace the term 'any person' with 'a corporation' or an LLC, certain provisions of the FDCPA would make little or no sense, because the FDCPA's violation terms generally seem to assume that a 'person' is a 'natural person.'"[23] The court therefore granted the motion

[10] Id.

[11] Id.

[12] Id.

[13] *Anarion*, 794 F.3d at 569.

[14] *Anarion*, 33 F. Supp. 3d at 929.

[15] Johannessen not only resided in the property and was the controlling member of Anarion, he also was an attorney and counsel of record for Anarion throughout the proceedings.

[16] Section 1692d prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.

[17] *Anarion*, 33 F. Supp. 3d at 931.

[18] Id. at 932 (emphasis added).

[19] 15 U.S.C. § 1692d (emphasis added).

[20] 15 U.S.C. § 1692k (emphasis added).

[21] 1 U.S.C. § 1.

[22] *Anarion*, 33 F. Supp. 3d at 934.

[23] Id. at 933.

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to dismiss and held that Anarion lacked statutory standing to sue under Section1692k.

The Sixth Circuit Decision. Anarion then appealed to the Sixth Circuit, where the court focused on the meaning of a single word: "person." Specifically, the issue as articulated by the Sixth Circuit was whether Anarion was a "person" under Section 1692k and therefore had standing to assert an FDCPA claim.[24] The appellate court in reversing the district court again looked to the federal Dictionary Act and this time found that there was plenty of relevant context to come to the opposite conclusion—that the default definition of "person" found in the Dictionary Act should apply and that "the term 'person' as used in the FDCPA includes both artificial entities and natural persons alike."[25]

In doing so, the court noted that under certain FDCPA provisions, the term "person" encompasses artificial entities, as well as natural persons. For example, the terms "creditor" and "debt collector" routinely include artificial entities and are defined in terms of "any person."[26] The court discounted the defendants' (now the appellees) notion that other provisions of the Act, which made specific reference to harming the "physical person, reputation or property of any person" or the "arrest or imprisonment of any person," referred unambiguously to natural persons. The court dismissed this argument by stating that "corporations do have "reputation[s] and property which means that 'any person' could include artificial entities, as well as natural persons."[27] The court also gave no deference to the express definition of consumer contained within the Act, which is couched specifically in terms of any *natural* person.

While concluding that Anarion was a "person" for purposes of standing to bring a claim under the Act, the appellate court seemed to take solace in the fact that its opinion was limited solely to the narrow issue of who was a person for purposes of Section 1692k and that Anarion would have additional hurdles to clear in order to recover. "Left unanswered, among other questions, is the question whether any of defendants' representations were made 'with respect to' Anarion, as required for relief under §1692k(a) of the Act."[28] Despite all of the limitations on the opinion's application, the court's decision is, as described by the dissent, "cavalier" in response to a very real concern and "potentially opens the door to a new class of plaintiffs under the FDCPA."[29]

CRITICAL CONCERNS FOR THE CONSUMER FINANCIAL SERVICES INDUSTRY

Anarion is problematic in many respects. First, while the appellate court's decision highlights the fact that the statute is inconsistent in its use of the term "person," the majority ignores the fact that construing "person" to allow artificial entities standing to assert claims under the FDCPA is contextually inconsistent with the relevant provisions of the Act and attempts to place a square peg into a round hole. Second, the *Anarion* court's expansion of standing is inconsistent with the FDCPA's stated purpose and its intended beneficiary—the individual consumer. Finally, the court's holding provides a foothold to expand the protections offered by the FDCPA to a new class of plaintiffs.

The Sixth Circuit gave no deference to the express definition of consumer contained within the Act, which is couched specifically in terms of any *natural* person.

Inconsistent Language Muddies Intended Meaning. The *Anarion* decision highlights the problem presented when a word is used inconsistently within a statutory scheme. After expressly setting forth its purpose as being to protect consumers and defining a "consumer" narrowly to include only natural persons, the FDCPA's drafters inexplicably reverted to the use of the generic term "person" in a number of sections without definition or refinement. The FDCPA's inconsistent use of language thus creates a small opening for Anarion's argument that it has standing to bring a claim under the FDCPA.

Because the term "person" is not defined within the FDCPA, the Sixth Circuit defaulted to the definition set forth in the Dictionary Act which, as noted earlier, provides that, in determining the meaning of any Act of Congress, the term "person" includes artificial entities "*unless the context indicates otherwise*."[30] The Supreme Court has articulated the circumstances for when context indicates otherwise, instructing that the relevant context courts should look to is "the text of

[24] *Anarion*, 794 F.3d at 569.

[25] Id. at 570.

[26] See, e.g., 15 U.S.C. §§ 1692a(4) and (6).

[27] *Anarion*, 794 F. 3d at 570.

[28] Id.

[29] Id. at 574.

[30] 1 U.S.C. § 1 (emphasis added).

the Act of Congress, surrounding the word at issue, or the texts of other related congressional Acts."[31] Explaining further, the Supreme Court stated:

> If "context" thus has a narrow compass, the "indication" contemplated by 1 U.S.C. § 1 has a broader one. The Dictionary Act's very reference to contextual "indication" be-speaks something more than an express contrary definition, and courts would hardly need direction where Congress had thought to include an express, specialized definition for the purpose of a particular Act; ordinary rules of statutory construction would prefer the specific definition over the Dictionary Act's general one. *Where a court needs help is in the awkward case where Congress provides no particular definition, but the definition in 1 U.S.C. § 1 seems not to fit. There it is that the qualification "unless the context indicates otherwise" has a real job to do, in excusing the court from forcing a square peg into a round hole.* . . . The point at which the indication of particular meaning becomes insistent enough to excuse the poor fit is of course a matter of judgment, but one can say that "indicates" certainly imposes less of a burden than, say, "requires" or "necessitates." One can also say that this exception from the general rule would be superfluous if the context "indicated otherwise" only when use of the general definition would be incongruous enough to invoke the common mandate of statutory construction to avoid absurd results.[32]

By reverting to the Dictionary Act's default definition of "person," the majority in *Anarion* ignores the context of the relevant FDCPA provisions, as well as the Act's expressly stated congressional intent, and forces the court into the absurd result that a statutory scheme intended solely for consumer protection may now provide protection to commercial entities.

Context Matters: Outward-Facing vs. Inward-Facing Conduct. The term "person" appears 47 times within the FDCPA and is used in a number of contexts. Several of these references clearly include artificial entities; however, several do not. Where the references are outward facing from the person harmed, they clearly include artificial entities. However, where the references are turned inward toward the person harmed, they clearly refer to natural persons.

For instance, certain definitional sections within the FDCPA reference "persons," particularly the definitions of "creditor" and "debt collector." Section 1692a(4) defines a creditor "as *any person* who offers or extends credit creating a debt or to whom a debt is owed." Likewise, Section 1692a(6) defines a debt collector as "*any 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. . . ." The definitional sections then make specific references which affirm that they include artificial entities. Specifically, Section 1692a(6) excepts from the definition of a debt collector officers or employees of a creditor and persons related by common ownership or affiliated by corporate control.[33] Both of these sections clearly contemplate, therefore, that for purposes of being a creditor or debt collector, "person" includes artificial entities.

Similarly, in other places, the Act refers to "person[s] other than the consumer" and again the FDCPA makes it clear that these sections clearly contemplate that a "person" may include artificial entities.[34] For instance, Sections 1692b and 1692c limit the information which can be conveyed to a "person other than the consumer," including consumer reporting agencies. These provisions are clearly there for the protection and benefit of the consumer. In each of these instances, the prohibited conduct referred to is *outward facing* communications from the debt collector to third parties *about* the consumer. Taking the context of these provisions into consideration, there is a clear indication that these provisions similarly intend the term "person" to include artificial entities.[35]

In other FDCPA sections, however, it is equally clear that the use of "person" only refers to natural persons. Each of these sections identifies specific prohibited actions by debt collectors which would give rise to a violation of the Act and are thus, inward facing to the persons protected by the Act.[36] Reading these provisions with the express congressional intent set forth within the FDCPA can lead to only one conclusion—that contextually, the use of the word "person" in each of these sections refers to a consumer or some other natural person and if violated, these natural persons may have the right to bring claims under the Act.

[31] Rowland v. Cal. Men's Colony, 506 U.S. 194, 199, 113 S. Ct. 716, 121 L.Ed.2d 656 (1993).

[32] Id. (emphasis added).

[33] See, e.g., 15 U.S.C. § 1692a(6)(A) (excepting from the definition of "debt collector" "any officer or employee of a creditor") and 15 U.S.C. § 1692a(6)(B) (excepting from the definition of a debt collector any person acting as a debt collector on behalf of another person to whom it is related by common ownership or affiliated by corporate control).

[34] See, e.g., 15 U.S.C. §§ 1692b and 1692c.

[35] See, e.g., 15 U.S.C. § 1692c(b) ("a debt collector may not communicate in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector").

[36] See, e.g., 15 U.S.C. §§ 1692d and 1692e.

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For instance, Section 1692d prohibits a debt collector from engaging in conduct the natural consequence of which is to harass, oppress, or abuse *any person* in connection with the collection of a debt[37] and makes specific reference to the *physical person*, reputation, or property of any person.[38] Similarly, Section 1692e prohibits a debt collector from making any false, deceptive, or misleading representation in connection with the collection of any debt.[39] As examples of conduct that would violate this section, it includes "[t]he representation or implication that nonpayment of any debt will result in the arrest or imprisonment of *any person*"[40] and "[t]he false representation or implication that *the consumer* committed any crime or other conduct in order to disgrace the consumer."[41] Each of these provisions reflect *personal* harm that cannot be suffered by an artificial entity. Therefore, the context strongly suggests that in these instances, "person" is limited to natural persons.

Section 1692k, the enforcement provision of the Act, provides that any debt collector who fails to comply with any provision of the FDCPA with respect to any *person* is liable to such person. The court's choice to apply the default definition contained in the Dictionary Act does not give proper consideration to the fact that the context of the sections surrounding Section 1692k indicate otherwise.

Section 1692k refers to "persons" four times. In each instance, the use of person refers to the injured party. "Anyone in another posture, i.e., the creditor or debt collector, is referred to by some other term."[42] A contextual reading of Section 1692k, therefore, must take into account other references to the "persons" injured by a debt collector's violation of the FDCPA. As set forth above, the only references to a "person" injured by the Act aside from the consumer are found in Sections 1692d and 1692e. Contextually, those references make sense only when the term "person" is limited to natural persons, particularly taking into account the FDCPA's express congressional intent—i.e., consumer protection. The more context-appropriate interpretation of "persons" for purposes of Section 1692k therefore requires a similar limitation to natural persons.

***Anarion* Decision Is Contrary to FDCPA'S Purpose.** The Sixth Circuit's determination that an artificial entity has standing to bring a claim under the FDCPA runs counter to the express purpose and congressional intent of the FDCPA—to protect *consumers* from abusive debt collection practices arising from the collection of *consumer* debts. From the outset, the FDCPA clearly articulates that the driving force behind the adoption of the Act was to remediate existing laws which were inadequate for protecting consumers from unfair and deceptive debt collection practices.[43] The expressly stated purpose of the FDCPA is "to eliminate abusive debt collection practices by debt collectors . . . and to promote consistent State action to protect *consumers* against debt collection abuses."[44] The Senate Report associated with the FDCPA's enactment re-enforces its intended scope, stating that "[i]ts purpose is to *protect consumers* from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collections."[45] This statement makes it clear, then, that the intended beneficiary of the Act is consumers.

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Adding further support to the FDCPA's intended purpose and beneficiary, the Act expressly defines a consumer in terms of a natural person and a debt in terms of something only a natural person can incur (for personal, family, or household purposes).[46] Taking the definitional provisions into account, it is impossible for an artificial entity, such as Anarion, to qualify as a consumer or to enter into a transaction which may be covered by the Act.[47]

[37] 15 U.S.C. § 1692d.

[38] 15 U.S.C. § 1692d(1).

[39] 15 U.S.C. § 1692e.

[40] 15 U.S.C. § 1692e(4).

[41] 15 U.S.C. § 1692e(7).

[42] *Anarion*, 794 F. Supp. at 573.

[43] 15 U.S.C. § 1692(b); see also S. Rep. No. 382, 95th Congr. 1st Session (1977) ("the primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the state level").

[44] 15 U.S.C. § 1692(e).

[45] S. Rep. No. 382, supra note 43.

[46] See 15 U.S.C. § 1692a(3) and (5).

[47] In fact, Anarion was not a consumer and it did not enter into a transaction which would be covered by the Act. The underlying debt the defendants were attempting to collect upon was the mortgage incurred by Eric Leipzig. Anarion was simply the assignee of a lease and option to purchase of the underlying real property. Therefore, the only way Anarion could have standing to bring claims under the FDCPA is if it qualified as a "person" and the definition of "person" under 15 U.S.C. § 1692k includes "persons" other than a consumer.

Moreover, the harms the FDCPA was enacted to prevent are all personal harms and not those that can be sustained by an artificial entity. "There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of *personal* bankruptcies, to marital instability, to the loss of jobs, and to invasions of *individual* privacy."[48]

Finally, the Sixth Circuit's suggestion that artificial entities, such as Anarion, have standing to bring claims, does not take into account the scope of the Act, which is to prohibit unfair and deceptive debt collection practices regarding consumer debts. The Act has no application to the collection of commercial accounts.[49] Therefore, to allow artificial entities, such as Anarion, standing to bring claims under the FDCPA—even under some limited basis or isolated circumstances—is simply inconsistent with the FDCPA.

Debt collectors who attempt to contact consumers at their place of employment may now be doing so at their own peril.

Door Is Opened to a New Class of Plaintiffs. As pointed out in Judge Donald's scathing dissent, while Anarion ultimately may not be able to get over the hurdles presented by other FDCPA provisions, some other legal entity in the future may be able to do so. Thus, the real concern presented by *Anarion* is that it potentially creates a new class of claims under the FDCPA.

While a number of the prohibitions of the FDCPA are limited to actions and communications directed to the consumer, one provision is more broadly stated. Section 1692d provides that 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."[50] Section 1692d, without limiting its general application, then sets forth specific conduct which violates the section including: "[c]ausing 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."[51] Courts have routinely allowed natural persons other than the consumer to bring claims under this provision, recognizing that this particular provision has a broader reach.[52] Typical of these cases, the plaintiff receives a number of calls and automated messages from the collection agency seeking to speak with a third party who no longer is associated with that telephone number or address. The called party then sues the debt collector seeking to recover damages for violations of Section 1692d(5), alleging that the calls were excessive and made with intent to annoy, abuse, or harass their recipient.[53]

Under *Anarion*, artificial entities may now have standing to bring similar claims. Applying the holding in *Anarion*, debt collectors who attempt to contact consumers at their place of employment may now be doing so at their own peril. Under the *Anarion* standard for standing, artificial entities now have a narrow foothold to make claims against debt collectors who repeatedly call their businesses attempting to collect a debt from a consumer/employee/former employee under Section 1692d. Conceivably, under the *Anarion* standard, a business entity that receives repeated calls from a debt collector seeking to speak to one of its employees or former employees or some other third party may now have standing to bring such a claim, alleging that the calls were excessive and intended to harass or annoy the business.

CONCLUSION

Anarion runs counter to the FDCPA's express purpose. The Sixth Circuit clearly missed the mark in not distinguishing between outward and inward facing references to "persons" and by failing to give deference to the Act's expressly stated purpose and history. Moreover, the opinion is likely to be an outlier because the FDCPA only applies to consumer debts and artificial entities, such as Anarion, will not qualify as consumers. Despite its limited application, the primary concern presented by the *Anarion* court's expansive view of standing is that it potentially opens the door to a new class of claims under Section 1692d. Those involved in the financial services industry should carefully monitor further case law developments in this area. ■

[48] 15 U.S.C. § 1692 (emphasis added).

[49] S. Rep. No. 382, supra note 43, at 3.

[50] 15 U.S.C. § 1692d (emphasis added).

[51] 15 U.S.C. § 1692d(5) (emphasis added).

[52] See, e.g., Montgomery v. Huntington Bank, 346 F.3d 693 (6th Cir. 2003); Wright v. Finance Serv. of Norwalk, Inc., 22 F.3d 647 (6th Cir. 1994); Kerwin v. Remittance Assistance Corp., 559 F. Supp. 2d 1117, 2008 U.S. Dist. LEXIS 43584, 70 Fed. R. Serv. 3d (Callaghan) 1174 (D. Nev. 2008); Jeter v. Alliance One Receivables Mgmt., 2010 U.S. Dist. LEXIS 50178, 2010 WL 2025213 (D. Kan. May 20, 2010).

[53] Id.

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