

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CYNTHIA JENKINS, SANDRA LOGUE
and ADA HOWARD,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

GENERAL COLLECTION CO.,
MARK D. STELK, and
RICHARD E. GEE,

Defendants.

Case No. 8:06cv00743

**SECOND AMENDED COMPLAINT
AND DEMAND FOR JURY TRIAL
(Class Action)**

I. INTRODUCTION

This is a consumer credit class action brought pursuant to the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* (hereinafter “FDCPA” or “Act”) and the Nebraska Consumer Protection Act (“NCPA”) Neb. Rev. Stat. § 59-1601 *et seq.* Plaintiffs, individually and on behalf of all persons similarly situated, seek actual damages, injunctive relief, a declaratory judgment, statutory damages and other relief against Defendant debt collectors arising from their routine practices of filing or proceeding on lawsuits on time barred debts. Plaintiffs, individually and on behalf of all persons similarly situated, also seek actual damages, injunctive relief, a declaratory judgment, statutory damages and other relief against Defendant debt collectors arising from their routine practices of attempting to collect any amounts on said lawsuits, including interest, attorney fees, and costs on claims allegedly for materials or services furnished arising from alleged credit card debts as this cause of action is inapplicable to such claims and defendants have no legal right to claim prejudgment interest and attorney fees.

II. JURISDICTION

1. Subject matter jurisdiction of this Court arises under 15 U.S.C. § 1692k(d), actionable through 28 U.S.C. § 1331 and 1337. Jurisdiction over the supplemental state law claims arise under 28 U.S.C. § 1367.

2. *In personam* jurisdiction exists and venue is proper as Defendants have their principal places of business in this state and regularly do business in this district. Plaintiffs are residents of this district and the alleged violations occurred here.

III. PARTIES

3. Plaintiff Cynthia Jenkins (“Ms. Jenkins”), is an adult individual residing in Omaha, Douglas County, Nebraska. At all times material hereto, Plaintiff Jenkins and each member of the class she seeks to represent, are “consumers” as that term is contemplated in §1692a of the Act.

4. Plaintiff Ada Howard (“Ms. Howard”), is an adult individual residing in Omaha, Douglas County, Nebraska. At all times material hereto, Plaintiff Howard and each member of the class they seek to represent, are “consumers” as that term is contemplated in §1692a of the Act.

5. Plaintiff Sandra Logue (“Mrs. Logue”) is an adult individual residing in Omaha, Douglas County, Nebraska. At all times material hereto, Plaintiff Logue and each member of the class they seek to represent, are “consumers” as that term is contemplated in §1692a of the Act.

6. Defendant, General Collection Co. (“GCC”) is a Nebraska corporation engaged in the business of collecting debts due or alleged to be due to others across the state of Nebraska, with its principal office for the regular transaction of business in Grand Island, Nebraska. As such, GCC is a “debt collector” as that term is contemplated in §1692a(6) of the Act.

7. Defendant, Mark D. Stelk, is the President of Defendant General Collection Co. and is actively engaged in the business of collecting debts due or alleged to be due to others across the state of Nebraska, with his principal office in Grand Island, Nebraska. As such, Stelk is a “debt collector” as that term is contemplated in §1692a(6) of the Act. Stelk also actively participates by personally signing the purchase documents for Defendant GCC’s purchase of the accounts, which are the subject of its lawsuits.

8. Defendant, Richard E. Gee, is the outside counsel for Defendant General Collection Co. and is actively engaged in the business of collecting debts due or alleged to be due to others across the state of Nebraska, and has his principal office for the regular transaction of business in Grand Island, Nebraska. As such Gee is a “debt collector” as that term is contemplated in §1692a(6) of the Act. Gee has personal involvement in the acts challenged by this lawsuit.

IV. FACTUAL ALLEGATIONS

Cynthia Jenkins

9. On or about November 1, 2004, Defendant General Collection Co., through its attorney Defendant Gee, filed a lawsuit against Ms. Jenkins in the County Court of Douglas County by filing a Petition under Docket Number CI04-20215, entitled, *General Collection Co. v. Cynthia Jenkins*, (hereinafter “Jenkins Collection Suit”).

10. In the Jenkins Collection Suit, GCC sought to collect on “materials and or services furnished” in the “original” amount of \$5,795.54. The alleged debt was incurred primarily for personal, family or household purposes.

11. The alleged debt was for a First USA credit card debt, incurring fees and interest.

12. The last activity for “materials or services furnished” on the account was more than for four years prior to the Defendants’ filing of the collection lawsuit against Jenkins.

13. The *Jenkins* Collection Suit also sought pre-judgment interest, plus “court costs, sheriff fees, certified mail expenses, attorney fees, and interest on said judgment as provided by law.”

14. On or about January 18, 2005, Ms. Jenkins filed a *pro se* Answer in the Jenkins Collection Lawsuit. Said Answer reads in part, “I ask that the suit be dismissed as the four-year statute of limitations [for this type of account]...has passed.... The statute of limitations for a lawsuit expired several months ago and prior to the time in which the petition was filed.” Ms. Jenkins attached verification to her Answer that the statute of limitations passed.

15. On or about February 11, 2005, Defendant Stelk signed and filed his standard “Affidavit for Judgment” in the Jenkins collection case averring under oath in part that:
...“he is the President of the Plaintiff Company herein and that the following facts are true as he verily believes:

Original Balance due as stated in the Petition	\$ 6635.02
Amounts paid since Petition filed	\$ 0.00
Present balance due on the date Judgment requested	\$ 6635.02

The party against whom judgment is being sought is not a minor or incompetent person or in the military service, that such amount shown by the statement is justly due and owing, and that no part thereof has been paid except as set forth in the statement.”....

S/Mark D. Selk

[notary provision]

16. Despite being put on actual notice of the expiration of the statute of limitations, none of the Defendants did anything to investigate further and continued to pursue the collection lawsuit against Ms. Jenkins.

17. During the course of the collection lawsuit, the county court docket sheet reflects that GCC was given several opportunities, including on 8/25/05, and 9/08/05 to produce evidence that the account was within the statute of limitation, but failed to do so.

18. On or about September 8, 2005, GCC failed to appear or present any evidence so the county court dismissed the Jenkins Collection Lawsuit on Ms. Jenkins' motion, based on the expiration of the relevant statute of limitations. Defendants [county court Plaintiffs] subsequently appealed the decision to the district court. The district court remanded the case back to the county court for an evidentiary hearing to give Defendants yet another chance to prove that the account was within the statute of limitations.

19. A Motion for Summary Judgment was filed on behalf of Ms. Jenkins in the *Jenkins* Collection Suit, specifically indicating that it was based on the expiration of the statute of limitations.

20. Despite being again on actual notice of the statute of limitations, Defendants chose to continue to pursue the lawsuit and refused to dismiss it voluntarily.

21. On or about September 28, 2006, the county court conducted a hearing on Ms. Jenkins' Summary Judgment Motion, which gave GCC yet another opportunity to prove the

account was not outside the statute of limitations. Defendants failed to provide any evidence and the court granted Jenkins' Motion for Summary Judgment and dismissed the collection lawsuit. The county court made a specific finding in its Order Granting Summary Judgment, dated October 4, 2006, that the statute of limitations had expired. No appeal was taken from that Order and the appeal period has passed.

22. Defendants' standard collection complaint filed in the *Jenkins* matter alleges that the consumer "is indebted to [creditor] in the original amount of \$5,795.54 for materials and or services furnished. Said amount is fair and reasonable."

23. In fact, the principal amount described by defendant as the "original amount" includes hidden charges for late fees, overlimit fees and interest.

24. The Jenkins collection complaint also states "attached is a statement of the account of said debt showing the original amount, payments made and balance now due of \$5,795.54."

Sandra Logue

25. On or about April 3, 2006, defendants filed a lawsuit against Sandra Logue in the County Court of Douglas County, Nebraska, by filing a Complaint at Docket Number CI 06-6453 (Hereinafter "Logue Collection Suit").

26. The Logue Collection Suit sought to collect on "materials and or services furnished" in the "original" amount of \$1,418.99.

27. The alleged debt was incurred primarily for personal, family, or household purposes.

28. The alleged debt was for a BANKFIRST credit card debt, incurring fees and interest.

29. The last activity for the “materials or services furnished” on the account was more than four (4) years prior to the defendants’ filing the Logue Collection Suit.

30. The Logue Collection Suit also sought pre-judgment interest, as well as “court costs, sheriff fees, certified mail expenses, attorney fees, and interest on said judgment as provided by law.”

31. On September 20, 2006, Defendants applied for entry of default judgment in an amount which included interest and attorneys fees. Defendant’s actions on September 20, 2006 to secure a default judgment against Ms. Logue occurred within one year prior to the filing of Plaintiff’s original Complaint herein, filed on December 5, 2006.

32. On or about September 25, 2006, a default judgment was entered on the Logue Collection Suit in favor of the Defendants and against Sandra Logue for \$1,640.70, together with interest as allowed by law, court costs in the amount of \$78.00, and attorney fees of \$169.00.

33. The Complaint in the Logue Collection Suit also contains a statement alleging that, “[a]ttached is a statement of account of said debt showing the original amount, payments made, and a balance now due of \$1,418.99.”

34. Sandra Logue has made monthly payments directly to defendant General Collection Co. since the time of the county court action.

Ada Howard

35. On or about October 31, 2005, Defendants filed a lawsuit against Ada Howard in the County Court of Douglas County, Nebraska by filing a Complaint at Docket Number CI 05-20860 (Hereinafter “Howard Collection Suit”).

36. The Howard Collection Suit sought to collect on “materials and or services furnished” in the “original” amount of \$3,045.30 on a Providian account.

37. The Howard Collection Suit sought to collect on “materials and or services furnished” in the “original” amount of \$608.15 on a First Consumer card.

38. The alleged debts were incurred primarily for personal, family, or household purposes.

39. The alleged debts were for PROVIDIAN and FIRST CONSUMER CARD credit card debt, incurring fees and interest.

40. The last activity for the “materials or services furnished” on both accounts was more than four (4) years prior to the Defendants’ filing the Howard Collection Suit.

41. The Howard Collection Suit also sought pre-judgment interest, as well as “court costs, sheriff fees, certified mail expenses, attorney fees, and interest on said judgment as provided by law.”

42. On or about December 21, 2005, Defendants applied for a default judgment against Ada Howard. On May 29, 2006, Defendants filed a motion for an Order Nunc Pro Tunc to increase and amend the amount of the judgment from the original judgment for \$2,010.00. Defendants’ activities to secure a judgment and Order Nunc Pro Tunc against Ada Howard occurred within one year prior to the filing of the Plaintiff’s original Complaint in this matter, filed on December 5, 2006.

43. On or about June 22, 2006, an amended default judgment was entered on the Howard Collection Suit in favor of the defendants and against Ada Howard for \$5,274.71, together with interest as allowed by law, and court costs in the amount of \$46.88.

44. The Complaint in the Howard Collection Suit also contains the following respective statements that, “[a]ttached is a statement of account of said debt showing the original amount, payments made, and a balance now due of \$3,045.30.” (Cause of Action No. 1), and “[a]ttached is a statement of account of said debt showing the original amount, payments made and a balance now due of \$608.15.” (Cause of Action No. 2).

45. Ada Howard has made payments directly to defendant General Collection Co. since the time of the county court collection case.

Facts as to all three plaintiffs and the putative class

46. Pursuant to Nebraska law, lawsuits such as the *collection* suits against the named Plaintiffs, may only be brought and prosecuted within four years of the date of the obligation to pay on the debt. The GCC collection lawsuits against Ms. Jenkins, Ms. Logue, and Ms. Howard and the class they seek to represent were outside of the statute of limitations, and GCC failed and refused to properly investigate the issue, continued to pursue the lawsuits on time barred debts and moneys for principal sums, attorney fees, interest and costs were collected from the consumer debtors nonetheless.

47. The practice of filing or proceeding with collection lawsuits on time-barred debts when Defendants either knew or should have known of the expiration of the statute of limitations, and its collection of any amounts (including principal and Suit Charges) as a result of such lawsuits, violates §§1692e, 1692e(2)(A), 1692e(5), 1692e(10) and 1692f (1) of the Act.

48. Defendants' standard collection complaint in each of the Plaintiffs' collection cases also affirmatively states that General Collection Co. "is entitled to attorney fees and costs."

49. Defendants' standard collection complaint in each of the Plaintiffs' collection cases affirmatively states that General Collection Co. "is entitled to pre-judgment interest."

IV. DEFENDANTS' ROUTINE PRACTICES

50. It is Defendants' routine practice to seek and collect sums in addition to principal, such as late fees, pre-judgment interest and attorney fees, even though GCC's standard collection complaints do not plead the mandatory language or meet the necessary requirements for being awarded either attorney fees or pre-judgment interest.

51. Defendants' routine practice of pleading that the consumer is indebted in the original amount for materials and services when in fact that is not the nature of the debt, violates the FDCPA by misrepresenting the nature and character of the debt.

52. Defendants' routine practice of collecting unauthorized charges violates the FDCPA by seeking and collecting amounts, including interest, fees and costs which are not permitted by law, in violation of 15 U.S.C. § 1692f and 1692f(1).

53. Defendant Gee routinely files and prosecutes said collection lawsuits against consumers resident in the state of Nebraska.

54. Defendant Mark D. Stelk routinely participates in the collection lawsuits by providing and signing affidavits that the alleged debts are due and owing. Stelk's affidavits are incorrect and misleading as to the character and amount of the debt owed, if any. Stelk also routinely participates by personally signing the purchase paperwork for the accounts defendant GCC purchases which are the subject of this lawsuit.

55. Defendants systematically mischaracterize the consumer debts in their standard collection complaints as being for “materials and or services furnished” in order to avail themselves of the benefits of Neb. Rev. Stat. § 25-1801 and § 45-104 et seq., which include attorney fees, interest and costs in proper instances.

V. CLASS ALLEGATIONS

56. Plaintiffs bring this action on their own behalf and on behalf of two classes with two subclasses of consumers designated pursuant to Fed.R.Civ.P. 23(a), 23(b)(2) and (b)(3).

A. STATUTE OF LIMITATIONS CLASS

57. Class “A” is comprised of all persons who satisfy the following criteria:

Subclass A

- (a) All Nebraska residents;
- (b) Against whom:
 - 1. GCC filed a collection lawsuit for materials and/or services furnished,
or
 - 2. A GCC collection lawsuit for materials and/or services furnished was pending or proceeding;
- (c) In an attempt to collect a debt incurred primarily for personal, family or household purposes, where;
- (d) The alleged indebtedness arose more than four years before the filing of Defendants’ collection action;
- (e) During the one year prior to filing of the Complaint in this action through the date of class certification.

Subclass B

- (a) All Nebraska residents;
- (b) Against whom:
 - 1. GCC filed a collection lawsuit for materials and/or services furnished
or
 - 2. A GCC collection lawsuit for materials and/or services furnished was pending or proceeding,
- (c) In an attempt to collect a debt incurred primarily for personal, family or household purposes, where;
- (d) The alleged indebtedness arose more than four year before the filing of Defendants' collection action;
- (e) During the four years prior to filing of the Complaint in this action through the date of class certification.

B. MATERIALS OR GOODS FURNISHED CLASS

58. Class "B" is comprised of all persons who satisfy the following criteria:

Subclass A

- (a) All Nebraska residents;
- (b) Against whom:
 - 1. GCC filed a collection lawsuit,
or
 - 2. A GCC collection lawsuit was pending or proceeding;

- (c) For an “original amount” for “materials and or services furnished” in an attempt to collect a debt incurred primarily for personal, family or household purposes, where;
- (d) The obligation was a credit card debt which included interest, late fees and other charges, and/or;
- (e) Any funds were sought for other than original principal. Such amounts include but are not limited to attorney fees, late fees, finance charges, or pre-judgment interest;
- (f) Within one year prior to the filing of the Complaint through the date of class certification.

Subclass B

- (a) All Nebraska residents;
- (b) Against whom:
 - 1. GCC filed a collection lawsuit,
 - or
 - 2. A GCC collection lawsuit was pending or proceeding;
- (c) For an “original amount” for “materials and or services furnished” in an attempt to collect a debt incurred primarily for personal, family or household purposes, where;
- (d) The obligation was a credit card debt which included interest, late fees and other charges, and/or;

- (e) Any funds were sought for other than original principal. Such amounts include but are not limited to attorney fees, late fees, finance charges, or pre-judgment interest;
- (f) Within four years prior to the filing of the Complaint through the date of class certification.

59. The class is believed to be so numerous that joinder of all members is impractical. This Second Amended Complaint concerns routine and ongoing practices, including suing on time-barred accounts, pursuing those lawsuits, and the collection of any sums on said lawsuits. There are questions of law or fact common to the class. These include whether the filing and proceeding on collection lawsuits on accounts that are barred by the applicable statute of limitations and the collection of any amounts thereon, mischaracterizing the debts and collecting any amounts other than original principal violates (a) Nebraska law and (b) the Fair Debt Collection Practices Act.

60. The claims of the Plaintiffs are typical of those of the class. All of Plaintiffs' claims are based on the same factual and legal theories. These include whether the challenged practices violate (a) Nebraska law governing assessment of extra charges and (b) the prohibitions against unfair or unconscionable means to collect a debt in violation of the FDCPA.

61. Plaintiffs will fairly and adequately protect the interests of the class. Plaintiffs have no interests antagonistic to those of the class. Plaintiffs' counsel are competent and experienced in consumer credit cases and class actions.

62. Defendants have acted on grounds generally applicable to the class thereby making final relief and declaratory relief appropriate with respect to the class as a whole.

63. The questions of law and fact common to the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy. The class members are consumers, who may be unable to locate, or afford to hire lawyers. Most are probably unaware that their rights, and the FDCPA, have been violated. The amounts of actual damages per consumer, while not insignificant to a consumer debtor, are generally small, and thus a consumer class action is a particularly well-suited vehicle for to address the violations and for recovery of these amounts.

64. The Class may be certified under Rule 23(b)(3), as such represents a superior method for the fair and efficient adjudication of this controversy in that:

- (a) Congress specifically contemplated FDCPA class actions as a principal means of enforcing the statute. 15 U.S.C. §1692k.
- (b) Most of the class members are not aware of their rights and have no knowledge that their rights are being violated by the time-barred lawsuits and/or the collection of any amounts thereon.
- (c) The interest of class members in individually controlling the prosecution of separate claims against the defendant is small because the maximum statutory damages in an individual action under the FDCPA is \$1,000 and the actual damages are generally small per consumer.
- (d) Management of this class action is not likely to present significant difficulties.

65. This action may also be certified pursuant to Rule 23(b)(2) because Defendants acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole.

66. Plaintiffs request certification of a hybrid class action combining Rule 23(b)(2) for injunctive and declaratory relief with Rule 23(b)(3) for monetary damages.

VI. CAUSES OF ACTION

COUNT I - FAIR DEBT COLLECTION PRACTICES ACT

67. The Defendants, by filing or proceeding with collection lawsuits on time-barred debts and/or seeking to collect any amounts for materials or services furnished arising from a credit card debt, have violated 15 U.S.C. §§1692e, 1692e(2)(A), 1692e(5), 1692e(10) and 1692f(1) of the Act.

WHEREFORE, Plaintiffs request that this Court certify this matter to proceed as a class action and enter judgment for Plaintiffs and the class members, as follows:

- (a) Awarding actual damages;
- (b) Awarding statutory damages to the Plaintiffs and also to the class as provided by 15 U.S.C. §1692k(a)(2);
- (c) Awarding Plaintiffs and the class their costs and reasonable attorney's fees;
- (d) Entry of a Declaratory Judgment that Defendants' practice of suing for and collecting on time-barred lawsuits and/or lawsuits for goods or services furnished arising from alleged credit card debt to be unlawful under the Act;

and

- (e) Granting such other and further relief as may be deemed just and proper.

COUNT II - CONSUMER PROTECTION ACT

68. Plaintiffs incorporate by reference the allegations contained above as if the same were here set forth at length.

69. Defendants each qualify as a “Person” engaged in “Trade or Commerce” as those terms are contemplated in the Consumer Protection Act, Neb. Rev. Stat. § 59-1601.

70. The filing and pursuing of collection lawsuits on time-barred debts and misrepresenting the nature and character of the debts constitute unfair or deceptive acts or practices, in violation of Neb. Rev. Stat. §59-1602. The collection of any amounts as a result of said acts also constitute unfair or deceptive act or practice, in violation of Neb. Rev. Stat. §59-1602.

71. These violations cause financial injury to the Plaintiffs and the Class and bringing this claim is in the public interest.

WHEREFORE, Plaintiffs request that this Court certify the class and enter judgment for Plaintiffs and the class members:

- (a) For actual damages;
- (b) Attorney fees and costs;
- (c) Statutory damages;
- (d) Injunctive relief;
- (e) Such other and further relief as the Court shall allow, pursuant to Neb. Rev. Stat. § 59-1609.

August 8, 2007

Cynthia Jenkins, Sandra Logue, and Ada Howard,
On Behalf of Themselves and All
Others Similarly Situated,
Plaintiffs,

By: s/Pamela A. Car
Pamela A. Car, #18770
William L. Reinbrecht, #20138
Car & Reinbrecht, P.C., L.L.O.
8720 Frederick St. # 105
Omaha, NE 68124
(402) 391-8484 phone
(402) 391-1103 fax
carlaw@uswest.net –e-mail
and

O. Randolph Bragg
HORWITZ, HORWITZ & ASSOC.
25 East Washington St., Suite 900
Chicago, IL 60602
(312) 372-8822
(312) 372-1673 (FAX)

Charles M. Delbaum
National Consumer Law Center
77 Summer Street, 10th Floor
Boston, MA 02110-1006
1 (617) 542-8010
1 (617) 542-8028 - Fax
Attorneys for the Plaintiff and the
Putative Class

JURY DEMAND

Plaintiffs demand a trial by jury as to all issues so triable.

By: s/Pamela A. Car
Pamela A. Car, #18770
William L. Reinbrecht, #20138
Car & Reinbrecht, P.C., L.L.O.
8720 Frederick St. # 105
Omaha, NE 68124
(402) 391-8484 phone
(402) 391-1103 fax
carlaw@uswest.net –e-mail

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2007, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the following:

Michael A. Klutho
Bassford Remele
33 S. 6th Street, Suite 3800
Minneapolis, MN 55402-3707

John A. Svoboda
GROSS & WELCH, P.C.,L.L.O.
1500 Omaha Tower
2120 S. 72nd Street
Omaha, NE 68124

Richard E. Gee
Attorney at Law
916 West 1st Street
Grand Island, NE 68801

and I certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

None

By: s/Pamela A. Car

Pamela A. Car, #18770
William L. Reinbrecht, #20138
Car & Reinbrecht, P.C., L.L.O.
8720 Frederick St. # 105
Omaha, NE 68124
(402) 391-8484 phone
(402) 391-1103 fax
carlaw@uswest.net –e-mail
Attorneys for Plaintiffs and the
Putative Class