EXHIBIT 2

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Citation: **1999 U.S. Dist. LEXIS 9324**

*1999 U.S. Dist. LEXIS 9324, **

DOSKOCIL, INC., et al., Plaintiffs, v. FIREMAN'S FUND INSURANCE COMPANY, et al., Defendants.

NO. C 98-0776 TEH

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1999 U.S. Dist. LEXIS 9324

June 15, 1999, Decided
June 17, 1999, Filed; June 21, 1999, Entered in Civil Docket

DISPOSITION: [*1] Travelers' counter-motion for summary judgment GRANTED, Doskocil's motion for partial summary judgment DENIED and case dismissed.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff Texas corporation filed a motion for partial summary judgment in action against defendant insurer that alleged that defendant had a duty to defend design patent infringement lawsuit that was filed against a California corporation prior to its merger with plaintiff. Defendant filed a counter-motion for summary judgment on the basis that it had no duty to defend and no duty to indemnify.

OVERVIEW: Before a California corporation's merger with plaintiff Texas corporation, the California corporation was sued for design patent infringement and related claims. The individual who filed the lawsuit alleged that the California corporation manufactured and sold "knock-offs" of his unique brand of pet food and water bowls. After California corporation merged with plaintiff, plaintiff tendered the lawsuit to its insurer. Before plaintiff received a response, it settled with the individual by purchasing his design patent. Plaintiff's insurer denied coverage. Plaintiff filed suit against defendant insurer, who was California corporation's insurer. Plaintiff asserted that the lawsuit fell within coverage for advertising injury. Initially, the court determined that Texas law applied. The court next found that the alleged tortious activity was not covered under the policy because it began before the policy's effective date. The court also found that no duty to defend was triggered because the design patent infringement complaint did not state a cause of action based on advertising activity. Finally, the alleged infringing product was advertised prior to the policy's effective date.

OUTCOME: Plaintiff Texas corporation's motion for partial summary judgment was denied. Defendant insurer's motion for summary judgment was granted. Defendant had no duty to defend or to indemnify plaintiff in trademark infringement action that had been filed against plaintiff's corporate predecessor prior to its merger with plaintiff.

CORE TERMS: advertising, summary judgment, policy period, advertising injury, coverage, counter-motion, duty to defend, insurer, governmental interest, insurance contract, insurance policy, continuing tort, Local Rules, insurance coverage, extrinsic evidence, nonmoving party, forum state, infringement, defeat, corners, motion to strike, partial, reply, trademark infringement, patent infringement, causes of action, return a verdict, substantive law, reasonable jury, genuine issue

LexisNexis(R) Headnotes ◆ Hide Headnotes

Civil Procedure > Summary Judgment > Evidence

Civil Procedure > Summary Judgment > Opposition > General Overview

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

HN1 On a motion for summary judgment the court must decide whether there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The evidence is to be viewed in the light most favorable to the nonmoving party. While the initial burden of showing that there is no genuine issue of fact rests on the moving party, in order to defeat a motion for summary judgment, the non-moving party must demonstrate that the evidence is such that a reasonable jury could return a verdict in his or her favor. The requirement that an issue be genuine relates to the quantum of evidence the plaintiff must produce to defeat the defendant's motion for summary judgment. There must be sufficient evidence that a reasonable jury could return a verdict for the nonmoving party. More Like This Headnote

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Scintilla Rule

Civil Procedure > Summary Judgment > Evidence

Civil Procedure > Summary Judgment > Standards > General Overview

HN2 If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. The district court must not weigh the evidence or determine the truth of contested matters, but rather must determine whether any material factual dispute remains for trial. Although the court must draw inferences in the light most favorable to the nonmoving party, the court has no obligation to draw unreasonable inferences. More Like This Headnote

Civil Procedure > Federal & State Interrelationships > Erie Doctrine

HN3 A federal court sitting in diversity must apply state substantive law. Generally, the federal court applies the substantive law of the forum state. More Like This Headnote

Civil Procedure > Federal & State Interrelationships > Choice of Law > Governmental Interests

HN4 California law is presumed to apply in cases before the United States District Court for the Northern District of California, and California choice of law standards control on conflict of law issues. According to the California Supreme Court, California employs a governmental interest analysis to conflicts of law. Under the governmental interest test, the pertinent substantive laws of each state are first compared to determine whether they differ. If the laws differ, the court must determine whether there is a real conflict by assessing whether each state has an interest in having its law applied to the case. If a real conflict exists, the court must decide which state's interest would be more impaired if its policy were subordinated. More Like This Headnote

Civil Procedure > Federal & State Interrelationships > Choice of Law > General Overview

Insurance Law > General Liability Insurance > Obligations > Defense

HN5 Texas and California law differ significantly in the evidence which may be examined to determine whether there is a duty to defend. Whereas Texas follows the so-called eight corners rule, looking only to the complaint and the insurance policy to determine whether there is a potential for coverage, in California facts known to the insurer and extrinsic to the third party complaint can generate a duty to defend, even though the face of the complaint does not reflect a potential for liability under the policy. Texas also applies a rule in cases involving continuing torts which apparently does not exist in California. More Like This Headnote

Civil Procedure > Federal & State Interrelationships > Choice of Law > General Overview

Insurance Law > Claims & Contracts > Policy Interpretation > Reasonable Expectations > General Overview

Insurance Law > General Liability Insurance > Coverage > General Overview

HN6 To the degree that the scope of comprehensive general liability insurance coverage impacts the incentives of corporate actors, the state in which a corporation primarily acts has the greater interest in applying its laws on insurance coverage. More Like This Headnote

Insurance Law > Business Insurance > Intellectual Property Coverage

Torts > Negligence > Duty > Animal Owners > General Overview

Trademark Law > Conveyances > Licenses

HN7 According to Texas law, a continuing tort is not covered if the tortious activity begins before the policy period. Although trade dress infringement is a continuing tort which involves wrongful conduct that is repeated until desisted, and each day creates a separate cause of action, a claim of trade dress infringement does not occur during the policy period for purposes of insurance coverage where the infringement begins before the policy commences. More Like This Headnote

Trademark Law > Federal Unfair Competition Law > False Designation of Origin > General Overview

Trademark Law > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > Infringement Actions > General Overview

HN8 That trademark infringement is a continuing tort does not change the effect of the prior publication analysis. More Like This Headnote

Civil Procedure > Summary Judgment > Opposition > General Overview

Governments > Courts > General Overview

HN9 The clear provision in the Local Rules of the Northern District of California states that a reply or opposition to a counter-motion shall not exceed 15 pages of text. U.S. Dist. Ct., N.D. Cal., R. 7-3(d). More Like This Headnote

COUNSEL: For DOSKOCIL INC., Plaintiff: M. Danton Richardson, Stanley H. Shure, Gauntlett & Associates, Irvine, CA.

For FIREMAN'S FUND INSURANCE CO, defendant: Ralph A. Lombardi, Bruce P. Loper, Robert D. Eassa, Diane R. Stanton, Hardin Cook Loper Engel & Bergez, Oakland, CA.

For TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, defendant: William C. Morison-Knox, Thomas Holden, Morison-Knox Holden Melendez & Stokes LLP, Walnut Creek, CA.

JUDGES: THELTON E. HENDERSON, UNITED STATES DISTRICT COURT.

OPINION BY: THELTON E. HENDERSON

OPINION: ORDER RE: SUMMARY JUDGMENT

I. INTRODUCTION

On September 16, 1997, Michael E. Finnegan filed a lawsuit in federal court in Arizona against Dogloo, Inc., stating causes of action for design patent infringement, breach of contract, trade secret violations, and unfair competition under 15 U.S.C. § 1125 (a)(1)(A). Finnegan alleged that Dogloo manufactured and sold "knock-offs" of his unique brand of pet food and water bowls. *Finnegan v. Dogloo*, C 97-1920 PCT EHC (D. Ariz.) (the "Finnegan Action"). The complaint requested preliminary **[*2]** and permanent injunctive relief against Dogloo in addition to money damages and an order of seizure for Dogloo's inventory of knock-off products.

On September 19, 1997, Dogloo, a California corporation, merged with the plaintiff here, Doskocil, Inc., a Texas corporation which also manufactures pet products. Two months later, plaintiff tendered the Finnegan Action to its comprehensive general liability insurer, Travelers Indemnity Company of Connecticut ("Travelers"). Before receiving a formal response from Travelers, Doskocil settled with Mr. Finnegan on December 17, 1997, by agreeing to purchase Finnegan's design patent. Travelers subsequently denied coverage on December 23, 1997, and refused to defend the Finnegan Action. Plaintiff brought the instant suit pursuant to the Court's diversity jurisdiction against Travelers and Fireman's Fund Insurance Company, Dogloo's insurer, asserting that the Finnegan Action falls within the policies' coverage for advertising injury.

Presently before the Court is plaintiff's motion for partial summary judgment seeking to establish that defendant Travelers owed a duty of defense in the Finnegan Action. Travelers has filed a counter-motion for summary **[*3]** judgment, contending for a variety of reasons that there is no duty to defend and no duty to indemnify. For the following reasons, plaintiff's motion is denied, Travelers' counter-motion is granted, and the case will be dismissed.

II. LEGAL STANDARD

HN1 On a motion for summary judgment the Court must decide whether there is a "genuine issue as to any material fact" and whether the movant is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). The evidence is to be viewed in the light most favorable to the nonmoving party. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). While the initial burden of showing that there is no genuine issue of fact rests on the moving party, in order to defeat a motion for summary judgment, "the non-moving party must demonstrate that the evidence is such that a reasonable jury could return a verdict in his or her favor." *Id.* The Ninth Circuit has emphasized that "the requirement that an issue be 'genuine' relates to the quantum of evidence the plaintiff must produce to defeat the defendant's motion for summary judgment. There must be sufficient evidence 'that a reasonable jury could return a verdict for the nonmoving party. **[*4]** . . . HN2 If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.'" *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 916 (9th Cir. 1997) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)), *cert. denied*, 118 S. Ct. 369, 139

L. Ed. 2d 287 (1997). The district court must not "weigh the evidence or determine the truth of contested matters," but rather must determine whether any material factual dispute remains for trial. *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9th Cir.), *amended by* 125 F.3d 1281 (9th Cir. 1997). Although the Court must draw inferences in the light most favorable to the nonmoving party, the Court has no obligation to draw unreasonable inferences. *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987).

III. DISCUSSION

Because the material facts are essentially uncontested, the Court moves directly to its legal analysis, stating only such facts as are necessary to resolve the instant motions. Although the parties raise a host of legal issues for the Court to consider, most are poorly briefed **[*5]** and tangential. Accordingly, the Court restricts its examination to four central questions: 1) whether Texas or California law controls, 2) whether an offense occurred within the Travelers policy period, 3) whether advertising activity is alleged in the complaint, and 4) whether the prior publication exclusion applies.

A. Conflict of Laws

The threshold issue is whether California or Texas law applies in this case. HN3 A federal court sitting in diversity must apply state substantive law. *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Generally, the federal court applies the substantive law of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 1021-22, 85 L. Ed. 1477 (1941). HN4 California law is presumed to apply in cases before this court and California choice of law standards control on conflict of law issues. *See id.* According to the California Supreme Court, California employs a "governmental interest analysis" to conflicts of law. *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 148 Cal. Rptr. 867, 869-71, 583 P.2d 721 (1978). Under the governmental interest test, the pertinent substantive **[*6]** laws of each state are first compared to determine whether they differ. If the laws differ, the court must determine whether there is a "real conflict" by assessing whether each state has an interest in having its law applied to the case. If a real conflict exists, the court must decide which state's interest would be more impaired if its policy were subordinated. *See Rosenthal v. Fonda*, 862 F.2d 1398, 1400 (9th Cir. 1988).

As the forum state here, California "has an interest in having its law applied . . . . and [will] apply its own law unless the application of the foreign law will significantly advance the interests of the forum state." *Id.* at 1401 (internal quotations omitted). Texas also has an interest in having its law applied to this case. Plaintiff's headquarters and principle place of business are located in Arlington, Texas, the insurance contract was entered into and delivered to plaintiff in Texas, plaintiff's products are manufactured in Texas, and amendatory endorsements to the insurance contract refer only to Texas.

HN5 Texas and California law differ significantly in the evidence which may be examined to determine whether there is a duty to defend. Whereas Texas **[*7]** follows the so-called "eight corners rule," looking only to the complaint and the insurance policy to determine whether there is a potential for coverage, *National Union Fire Ins., Co. of Pittsburgh v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (1997) ("If a petition does not allege facts within the scope of coverage, an insurer is not legally required to defend a suit against its insured . . . . An insurer's duty to defend is determined by the allegations in the pleadings and the language of the insurance policy"), in California facts "known to the insurer and extrinsic to the third party complaint can generate a duty to defend, even though the face of the complaint does not reflect a potential for liability under the policy." *Montrose Chemical Corp. v. Superior Ct.*, 6 Cal. 4th 287, 24 Cal. Rptr. 2d 467, 472, 861 P.2d 1153 (1993). Texas also applies a rule in cases involving continuing torts which apparently does not exist

in California. *See* Two Pesos, Inc. v. Gulf Ins., Co., 901 S.W.2d 495, 500-01 (1995) (no coverage where initial act of continuing tort predates policy period even though tortious conduct continues into policy period). Texas and California **[*8]** law do not appear to differ in their treatment of the prior publication exclusion.

Under the third prong of the governmental interest analysis, the Court holds that Texas' interests would be most impaired if its law is not applied. In light of Doskocil's Texas presence and the facts surrounding the insurance contract, it is clear that the parties anticipated Texas law would apply. *See* Roesgen v. American Home Products Corp., 719 F.2d 319, 321 (9th Cir. 1983) (court should "decline to apply California law when the facts indicate that the parties' only reasonable expectations were that the law of a foreign state would apply"). HN6 To the degree that the scope of comprehensive general liability insurance coverage impacts the incentives of corporate actors, the state in which a corporation primarily acts has the greater interest in applying its laws on insurance coverage. n1

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Under California Civil Code § 1646, the place of performance, or, alternatively, the place of acceptance, determines applicable law in a contract case. Although the insurance broker through which Doskocil obtained the Travelers policy is in New York, it appears that Doskocil "made" and "accepted" the contract in Texas. Thus Texas law applies under § 1646 and the governmental interest test. *See* Arno v. Club Med Inc., 22 F.3d 1464, 1468 n.6 (9th Cir. 1994).

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[*9]

B. Offense During the Policy Period

Doskocil's policy with Travelers covers the period from June 30, 1997 to June 30, 1998. This was the first policy Doskocil obtained from Travelers. The complaint in the Finnegan Action, however, states that "in the Spring of 1997, Dogloo began selling cheap plastic two-vessel watering devices" using information obtained during licensing discussions between Dogloo and Mr. Finnegan. Compl. P 16. HN7 According to Texas law, a continuing tort is not covered if the tortious activity began before the policy period. In *Two Pesos*, the court held that although trade dress infringement is a continuing tort which "involves wrongful conduct that is repeated until desisted, and each day creates a separate cause of action," a claim of trade dress infringement does not occur during the policy period for purposes of insurance coverage where the infringement began before the policy commenced. 901 S.W.2d at 500-01. Therefore, even assuming that Dogloo became a covered entity under Doskocil's policy with Travelers and that the alleged offenses qualify as advertising injuries, there was no offense during the policy period here since Dogloo began making **[*10]** and selling its allegedly infringing products before June 30, 1997.

C. Allegation of Advertising Injury

According to the Travelers insurance policy, "advertising injury" must be "caused by an offense committed in the course of advertising your goods, products or services." Under Texas law, Doskocil has the burden of establishing that the Finnegan complaint alleges some form advertising activity on the part of Dogloo (again assuming that Dogloo is a covered entity on the Travelers policy). Absent evidence in the complaint demonstrating a connection between advertising activity and Mr. Finnegan's claims, there is no coverage. *See* Sentry Ins. v. R.J. Weber Co., Inc., 2 F.3d 554, 557 (5th Cir. 1993) (applying Texas law and holding that

complaint for copyright infringement which alleges that insured copied, published, distributed and sold copies of two books without permission, but "states nothing about advertising," does not create coverage under advertising injury clause of insurance contract). Here, although the complaint states causes of action for design patent infringement and false designation of origin, there is no mention whatsoever of advertising activity on **[*11]** the part of Dogloo. Doskocil presents ample extrinsic evidence of advertising activity, but under the eight corners rule this evidence is irrelevant to assessing the duty to defend.

D. Prior Publication

The Travelers insurance policy has an exclusion which precludes coverage for advertising injuries "arising out of oral or written publication of material whose first publication took place before the beginning of the policy period." Travelers correctly points out that, by Doskocil's admission, the allegedly infringing "Le Bistro" product line of pet feeders was "published" in advertisements by Dogloo beginning in April 1997, well before the policy period. Bergman Decl. P 4-6. This advertising activity was continued by Doskocil during the policy period, *see id.*, and clearly "caused the type of injury alleged in" the Finnegan Action insofar as Finnegan stated a cause of action for false designation of origin under 15 U.S.C. § 1125 (a)(1). *See Dogloo, Inc. v. Northern Ins. Co. of New York*, 907 F. Supp. 1383, 1391 (C.D. Cal. 1995) (under California law, must show that prior publication "caused the type of injury alleged in the [complaint]"). n2 HN8 That trademark **[*12]** infringement is a continuing tort does not change the effect of the prior publication analysis. *See Applied Bolting Technology Prod., Inc. v. U.S.F. & G.*, 942 F. Supp. 1029, 1036 (E.D. Pa. 1996) ("Under the exclusion's plain terms, the 'first publication' date is a landmark: if the injurious advertisement was 'first published' before the policy coverage began, then coverage for the 'advertising injury' is excluded. . . . It is irrelevant that later publications, made after the policy period became effective, also caused 'advertising injury' or increased the damages.") (Internal citations omitted), *aff'd*, 118 F.3d 1574 (3d Cir. 1997). Doskocil provides no argument or precedent for the claim that the result should be different merely because a corporate predecessor, Dogloo, was responsible for the publications that antedated the policy. n3

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 Although extrinsic evidence of advertising activity comes in here to establish the prior publication exclusion under California law, this evidence does not alter the Court's earlier analysis of coverage under the eight corners rule. Indeed, there is some authority that Texas law allows extrinsic evidence to establish that an exclusion defeats coverage. *See State Farm Fire & Casualty Co. v. Wade*, 827 S.W.2d 448, 453 (1992). **[*13]**

n3 The Court also declines Doskocil's invitation to hold that the prior publication exclusion applies only to advertising injury arising from libel, slander, and invasion of privacy. *See, e.g., Applied Bolting*, 942 F. Supp. at 1037 (rejecting similar argument on grounds that "the first publication exclusion must be read to apply to the entire definition of 'advertising injury,' which includes the offenses of 'misappropriation of advertising ideas or style of doing business' and 'infringement of copyright, title, or slogan'"). Plaintiff's counsel, it seems, is incapable of taking a consistent view of the advertising injury clause. He vigorously argues throughout Doskocil's briefs that advertising injury must be construed *liberally* to cover design patent and trademark infringement but unflinchingly claims here that the prior publication exclusion should be read to cover only a *narrow* category of advertising injuries. The Court is equally off-put by counsel's invitation to rely on unpublished Texas case law which apparently may not be cited as authority according to Texas Rule of Appellate Procedure 47.7. *See, e.g., Bristol-Myers Squibb Co. v. Highlands Ins. Co.*, 1997 Tex. App.

LEXIS 5725, No 09-96-238 CV, 1997 WL 674765 (Tx. Ct. App. Oct. 30, 1997) (cited by plaintiff's counsel in Plf's Opp. to Counter-Mo. at 9, n.25).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*14]**

IV. CONCLUSION

Accordingly, and good cause appearing, the Court HEREBY GRANTS Travelers' counter-motion for summary judgment and DENIES Doskocil's motion for partial summary judgment. Travelers has no duty to defend or indemnify the Finnegan Action. The clerk of the court shall enter an order dismissing this case forthwith.

There is one final matter. In response to Traveler's opposition and counter-motion, Plaintiff's counsel filed two separate briefs totaling 35 pages despite *HN9* the clear provision in the Local Rules of the Northern District stating that a reply and/or opposition to counter-motion "shall not exceed 15 pages of text." Local Rule 7-3(d). Plaintiff's counsel then had the temerity to file a motion to strike when Travelers responded by filing a reply memorandum in support of its counter-motion for summary judgment. Stunningly, plaintiff's counsel accused Travelers of "'thumbing its nose' at this Court's procedures." Plf's Mo. to Strike Travelers' Reply Mem. at 1. Although Travelers should have sought relief from the Court when faced with a breach of the Local Rules by plaintiff's counsel, it could not have anticipated the breach when preparing the counter-motion **[*15]** and would have been prejudiced without an opportunity to address arguments raised in plaintiff's additional papers.

The Court does not take lightly to violations of the Local Rules and holds plaintiff's counsel responsible for the instant spate of excessive briefing. The Court is particularly troubled by plaintiff's unblinking attempt to paint Travelers as the offending party in the motion to strike. Accordingly, and good cause appearing, Travelers shall submit proof of the attorney fees and costs incurred in preparing its reply memorandum as well as its opposition to the motion to strike and plaintiff's counsel is HEREBY ORDERED to personally reimburse such expenses as may be approved by the Court as a sanction for disregarding the Local Rules. Under no circumstances shall plaintiff be billed for this sanction.

IT IS SO ORDERED.

DATED 6/15/99

THELTON E. HENDERSON,

UNITED STATES DISTRICT COURT

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Travelers' counter-motion for summary judgment is **[*16]** GRANTED and Doskocil's motion for partial summary judgment is DENIED.

June 17, 1999
Date

Service: **Get by LEXSEE®**

Citation: **1999 U.S. Dist. LEXIS 9324**
View: Full
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EXHIBIT 3

Service: **Get by LEXSEE®**
Citation: **1991 U.S. Dist. LEXIS 16260**

*1991 U.S. Dist. LEXIS 16260, **

HARTFORD INSURANCE COMPANY OF THE MIDWEST, an Indiana corporation, Petitioner v. WISK COMPUTER SERVICES, INC., a California corporation, Respondent. WISK COMPUTER SERVICES, INC., a California corporation, Plaintiff, v. HARTFORD INSURANCE COMPANY OF THE MIDWEST, an Indiana corporation, Defendant

Nos. C- 91-3436 SBA, C-91-2030 SBA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1991 U.S. Dist. LEXIS 16260

November 7, 1991, Decided
November 7, 1991, Filed

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff insured filed an action alleging that defendant insurer breached its insurance contract by failing to pay or deny its claim and that it acted in bad faith. In a separate action the insurer sought an order compelling an appraisal pursuant to the Federal Arbitration Act, 9 U.S.C.S. § 1 et seq., and moved for a stay of the insured's claim until the appraisal was complete. The insurer also sought discovery pending the appraisal.

OVERVIEW: The insured's policy with the insurer included coverage for losses pertaining to lost business income and continuing expenses. The insured suffered damage from flooding due to frozen pipes. The court held that in determining whether to grant the petition compelling appraisal, the court first had to determine whether there was an agreement to arbitrate, and if so, the court had to determine the scope of that agreement and whether the dispute at issue fell within the scope of the agreement. The court could then assess the propriety of staying any or all of the proceedings. The court granted the petition for appraisal, finding that the disputed clause was a narrow agreement to submit a dispute as to valuation of a claim to an appraisal. The court found that an agreement to submit to an appraisal was an agreement to arbitrate. The court stayed discovery only in connection with the insured's claim for breach of contract, but not the bad faith claim. The court denied the insurer's request for discovery regarding the appraisal, holding that discovery on the subject matter of a dispute to be arbitrated should be denied.

OUTCOME: The court ordered the appraisal. The court granted the petition for a stay only as to the breach of contract claim, but not the bad faith claim. The court denied the insurer's request to engage in limited discovery pending the appraisal.

CORE TERMS: appraisal, arbitration, interstate commerce, discovery, appraiser, agreement to arbitrate, insurance business, memorandum, choice of law, Federal Arbitration Act, insurance contract, interstate, referable, arbitrate, characterization, motion to stay, nonpayment, umpire, reply, principal place of business, arbitration agreement, favoring arbitration, federal policy, home office, nonarbitrable, policyholders, out-of-state, arbitrable, arbitrator's, conclusory

LexisNexis(R) Headnotes ◆ Hide Headnotes

Civil Procedure > Alternative Dispute Resolution > Arbitrations > General Overview

Civil Procedure > Alternative Dispute Resolution > Mandatory ADR

Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

HN1 9 U.S.C.S. § 4 provides: A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action for an order directing that such arbitration proceed in the manner provided for in such agreement. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. More Like This Headnote

Civil Procedure > Alternative Dispute Resolution > Arbitrations > General Overview

Contracts Law > Defenses > Ambiguity & Mistake > General Overview

Contracts Law > Formation > Ambiguity & Mistake > General Overview

HN2 Generally, arbitration agreements are to be construed liberally, pursuant to the body of federal substantive law which establishes and regulates the court's duty to honor such agreements. The court is encouraged to give a "healthy regard" to the federal policy favoring arbitration, and to resolve any doubts or ambiguities as to the scope of an agreement in favor of arbitration. A petition to arbitrate a grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. More Like This Headnote

Civil Procedure > Federal & State Interrelationships > Choice of Law > Governmental Interests

HN3 When a contract contains no choice of law provision, California determines choice of law by using a "governmental interests" analysis, pursuant to which the court evaluates the relative interests of the parties and the states in the dispute. In determining choice of law, furthermore, the Ninth Circuit places the burden of proof upon the party seeking to invoke the foreign law to demonstrate the foreign rule will further the interests of the foreign state. More Like This Headnote

Civil Procedure > Alternative Dispute Resolution > Arbitrations > General Overview

Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Insurance Law > Claims & Contracts > Arbitration

HN4 The strong federal policy favoring arbitration commands a court not to construe the interstate characterization of an arbitration agreement narrowly. More Like This Headnote

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview

Civil Procedure > Alternative Dispute Resolution > Mandatory ADR

International Trade Law > Dispute Resolution > Arbitration

HN5 9 U.S.C.S. § 3 provides: If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. More Like This Headnote

Civil Procedure > Alternative Dispute Resolution > Validity of ADR Methods

Civil Procedure > Judgments > Entry of Judgments > Stays of Proceedings > General Overview

HN6 A stay of proceedings is appropriate only in those suits which are brought upon any issue referable to arbitration under an agreement. In determining the scope of the agreement, a court must assess whether the underlying factual allegations in the complaint "touch matters" covered by the agreement to arbitrate, regardless of the legal labels attached to the allegations in the complaint. More Like This Headnote

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Arbitrability

Civil Procedure > Alternative Dispute Resolution > Mandatory ADR

Civil Procedure > Judgments > Entry of Judgments > Stays of Proceedings > General Overview

HN7 In those instances in which the agreement to arbitrate does not extend to all disputes arising out of the contract, the court, in the exercise of discretion to control its own docket, may stay the balance of the proceedings. More Like This Headnote

JUDGES: [*1]

Saundra Brown Armstrong, United States District Judge.

OPINION BY: ARMSTRONG

OPINION: *ORDER*

I. Background

A. Motions before the Court

Defendant/petitioner the Hartford Insurance Company of the Midwest (the "Hartford") came before the Court on November 5, 1991, in connection with two motions: the Hartford's petition for order compelling appraisal, and the Hartford's motion for stay of CV-91-2030 pending the appraisal. In the latter motion, the Hartford also requested limited discovery pending the appraisal. This Order is issued upon consideration of the briefs submitted by the parties, the supporting declarations, and the oral testimony elicited during the hearing on November 5, 1991.

The Hartford's motions involve two separately filed actions. In the earlier of the two actions, filed with the Court on July 2, 1991, plaintiff/respondent Wisk Computer Services, Inc.

("Wisk") filed a complaint alleging (1) that defendant/petitioner insurer the Hartford breached its insurance contract by failing to pay or deny plaintiff's claims and (2) that defendant acted in bad faith in denying plaintiff's insurance claims.

In its answer to plaintiff's complaint, the Hartford stated, as an affirmative defense, **[*2]** that plaintiff failed to submit to an appraisal of the amount of the loss, as required by the insurance contract, and as demanded by the Hartford on July 22, 1991. n1

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 While the exhibit attached to the Hartford's motion to stay discovery consists of the demand for the appraisal dated June 22, 1991, the Court learned, during oral argument, that the appraisal was actually never demanded until July 22, 1991, approximately 20 days after plaintiff had already filed a complaint alleging nonpayment of claims.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Subsequently, on October 10, 1991, defendant filed, as separate action, a petition with this Court seeking an order from the Court which would compel plaintiff to submit to an appraisal, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et. seq. Concurrent with the filing of the petition, defendant filed a motion in the earlier action seeking to stay the earlier proceeding pending the appraisal.

B. Factual Background

Wisk took out an insurance policy with the Hartford on September 24, 1990. The policy included **[*3]** coverage for losses pertaining to lost business income and continuing expenses. On December 23, 1990, Wisk suffered damage from flooding due to sub-freezing temperatures which resulted in bursting sprinklers. Wisk alleges that the parties came to an agreement as to the amount of the loss on April 11, 1991, but that as of July 2, 1991, the Hartford had failed to pay or deny any claims, and failed to provide any advances.

On July 2, 1991, Wisk filed its complaint alleging breach of contract, for Hartford's failure to pay claims, and bad faith. Wisk's bad faith allegation stems from defendant's alleged inadequate investigation of claims, delay in processing claim, oppressive demands, withholding of payment, and an alleged forcing of plaintiff to seek legal redress in order to coerce settlement.

On October 10, 1991, the Hartford filed a petition seeking an order compelling appraisal, pursuant to the provision of the insurance policy relating to "Loss Conditions". Specifically, the first clause of the Loss Conditions provision contains a clause, which provides:

1. Appraisal

If we and you disagree on the amount of Net Income and operating expense or the amount of loss, either may make written **[*4]** demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser.

The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of Net Income and operating expense or amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

a. Pay its chosen appraiser; and

b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

II. Petitioner's Petition to Compel Appraisal

Petitioner the Hartford contends that the above clause constitutes an agreement to submit disputes regarding valuation of loss of business income to an appraisal. The Hartford contends, furthermore, that the agreement is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et. seq., and that this Court should compel the appraisal, as an arbitration, and stay all proceedings pending the appraisal. Wisk disputes the characterization of the appraisal clause as an **[*5]** arbitration agreement governed by the Act.

A. The Federal Arbitration Act

The Federal Arbitration Act (the "Act") was enacted to give credence to parties' private agreements to subject disputes to arbitration, thereby placing arbitration agreements on the same footing as other contracts. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1984). HN1 Section 4 of Title 9 of the ted States Code provides:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action . . . for an order directing that such arbitration proceed in the manner provided for in such agreement . . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . .

In determining whether to grant the petition compelling appraisal, this court must first determine whether **[*6]** there was an agreement to arbitrate. Mitsubishi Motors v. Soler Chrysler Plymouth, 473 U.S. 614, 626 (1985) Second, if an agreement to arbitrate exists, this Court must determine the scope of that agreement, and whether the dispute at issue falls within the scope of the agreement. Genesco Inc. v T. Kakiuchi & Co., Ltd., 815 F.2d 840, 844 (2d Cir. 1987); Mesquite Lake Associates v. Lurgi Corp., 754 F. Supp. 161, 162 (N.D. Ca. 1991). Finally, upon making a determination as to the scope of agreement, this Court will assess the propriety of staying any or all of the proceedings. 9 U.S.C. § 3.

B. Agreement to Arbitrate

1. Federal Law construing agreements to arbitrate

HN2 Generally, arbitration agreements are to be construed liberally, pursuant to the body of federal substantive law which establishes and regulates the court's duty to honor such agreements. Mitsubishi Motors, 473 U.S. at 625. The Court is encouraged to give a "healthy regard" to the federal policy favoring arbitration, and to resolve any doubts or ambiguities as to the scope of an agreement in favor of arbitration. Moses H. Cone Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1982). **[*7]** A petition to arbitrate a grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. United steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

However, not every clause in a contract constitutes an agreement to arbitrate. The Ninth Circuit has been cautious in construing arbitration clauses which do not contain the broad

language recommended by the American Arbitration Association. See, Alascom Inc. v. ITT North Elec. Co., 727 F.2d 1419, 1422 (9th Cir. 1984); Mesquite Lake Associates, 754 F.Supp. at 163.

This Court finds that the disputed clause is an agreement, with a narrow scope, to submit a dispute as to valuation of a claim to an appraisal. Arbitrability of the clause turns on whether an appraisal may be considered an arbitration, and whether agreement relates to interstate commerce, as required by the Act.

2. Appraisal, arbitration, and choice of law

Plaintiff concedes that the Ninth Circuit considers an appraisal to be an arbitration. Wasyl, Inc. v. First Boston Corp., 813 F.2d 1579, 1582 (9th Cir. 1987). **[*8]** Without citing any authority as to choice of law, plaintiff merely asserts in a conclusory fashion that this Court should be guided by the "relevant" laws of Connecticut and Indiana, defendant's place of incorporation and principal place of business.

However, HN3 when a contract contains no choice of law provision, California determines choice of law by using a "governmental interests" analysis, pursuant to which the court evaluates the relative interests of the parties and the states in the dispute. Hurtado v. Superior Court, 11 Cal.3d 574, 581 (1974). In determining choice of law, furthermore, the Ninth Circuit places the burden of proof upon the party seeking to invoke the foreign law to demonstrate the foreign rule will further the interests of the foreign state. McGhee v. Arabian America Oil Co., 871 F.2d 1412, 1422 (9th Cir. 1989). Plaintiff's conclusory assertions as to the relevance of Connecticut and Indiana law fail to meet the requisite burden. Hence, California law applies to this Court's definition of arbitration. Accordingly, this Court finds that an agreement to submit to an appraisal is an agreement to arbitrate.

3. Interstate **[*9]** Commerce

Petitioner the Hartford is an Indiana Corporation with its principal place of business in Connecticut. Wisk contends that, notwithstanding the parties' diversity of citizenship, the agreement does not involve interstate commerce, since the contract was negotiated and executed in California, the Hartford was at all times represented by local agents, and since premiums were paid by Wisk to the Hartford in California.

The Ninth Circuit has not spoken directly on the issue of interstate commerce in the context of an insurance agreement's arbitrability. HN4 The strong federal policy favoring arbitration, however, commands a court not to construe the interstate characterization of an arbitration agreement narrowly. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401,402 n.7 (1967); Snyder v. Smith, 736 F.2d 409, 417 (7th Cir. 1984) cert. den. 469 U.S. 1037 (1984). Moreover, a number of courts determine that the insurance business, per se, is business in interstate commerce. See, Bernstein v. Centaur Ins. Co., 606 F.Supp. 98, 101 (S.D. N.Y. 1984); Ainsworth v. Allstate Insurance Co., 634 F.Supp. 52, 55 (W.D. Mo. 1985); **[*10]** Mutual Reinsurance Bureau v. Mutual Insurance Co., 750 F. Supp. 455 (D.Kan. 1990) (insurance across state lines is interstate business). In alleging that the Ainsworth court refused to permit diversity to satisfy the interstate commerce requirement, plaintiff places undue reliance upon one portion of the Ainsworth holding. Plaintiff neglects that portion of the Ainsworth decision that acknowledges that, although the insurance contract at issue covered out-of-state insureds and was partially negotiated out of the forum, the mere fact that the agreements involve insurance may be enough to establish the interstate connection. Ainsworth, 634 F.Supp. at 55.

In finding that the insurance business is interstate commerce, the Bernstein court relied upon the Supreme Court's holding in U.S. v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). The Supreme Court in South-Eastern premised its decision upon the exigencies of

the "modern insurance business" which functions as a result of "interrelationship, interdependence, and integration of activities in all the states in which they operate . . ." Id. at 539, 541. **[*11]** The Supreme Court noted that a large share of the insurance business is concentrated in a few companies located in the East, and that notwithstanding the geographical centrality of the companies, the premiums from policyholders "flow into these companies for investment," and checks and drafts "flow back to the many states where the policyholders reside." Id. at 541. The Court explained that the industry conducted commerce as "a continuous and indivisible stream of intercourse among the states" and that the decisions which are made at a home office affect not just the residents of the home office state, but people beyond its boundaries. Id. at 541-541. The Ninth Circuit has followed the decision of South-Eastern, albeit in the context of the McCarran-Ferguson Act, in determining that insurance business is interstate commerce. See, Feinstein v. Nettleship Co. of Los Angeles, 714 F.2d 928, 931 (9th Cir. 1983); In Re Insurance Antitrust Litigation, 723 F.Supp. 464, 472 (N.D.Ca. 1989).

Wisk asks this Court to determine the interstate commerce characterization of the agreement by using a "totality of the **[*12]** circumstances" standard which Wisk alleges has been adopted by the Ainsworth court as well as the District of Kansas. The district court in Mutual Reinsurance Bureau, 750 F.2d at 473, looked to a number of factors, including: diversity of citizenship, the existence of a reinsurance contract, defendant's acknowledgement of some interstate activity, drafting and execution in different states, the fact that plaintiff's representatives personally crossed state lines, use of interstate telephone and mail, and the fact that certain payments crossed state lines and arbitration hearings were conducted in a different state.

Given the broad construction of interstate commerce, and in light of the Ainsworth and Bernstein decisions which permit a court to determine that the insurance business is business in interstate commerce, this Court need not engage in a balancing process in order to determine that the business of insurance is interstate commerce. This Court's decision to characterize the contract as one involving interstate commerce is nonetheless supported by the additional facts alleged by the Hartford in its reply memorandum, which depicts the insurance **[*13]** contract at issue as one covering out-of-state perils, and one for which certain telephone calls, mailings, and payments were made across state lines.

C. Conclusion

This court HEREBY ORDERS PLAINTIFF TO SUBMIT TO AN APPRAISAL, IN ACCORDANCE WITH THE TERMS OF THE AGREEMENT, PENDING THIS COURT'S DETERMINATION OF THE EVIDENCE THAT AN APPRAISER MAY CONSIDER. PARTIES SHALL SUBMIT SUPPLEMENTAL MEMORANDA TO THE COURT, IN ACCORDANCE WITH A TIMETABLE AGREED UPON BY PARTIES AND SUBMITTED TO THE COURT, IN CONNECTION WITH THE FOLLOWING:

1. Respondent Wisk shall submit a memorandum in support of its contention that certain evidence not be considered by the appraiser. Respondent's memorandum shall address the issue of why this Court, as opposed to an appraiser, should make this determination at this time.

2. Petitioner shall submit a reply memorandum in support of its contention that certain evidence should not be excluded from the appraisal. Petitioner's memorandum shall address the issue of whether this Court, as opposed to an appraiser, should make this determination at this time.

3. Both parties shall devote a separate portion of their memoranda to a brief discussion of the propriety **[*14]** of this Court's awarding of costs to petitioner in connection with its petition.

4. Parties shall file with this Court a briefing schedule by no later than November 15, 1991. Upon this Court's receipt of petitioner's reply memorandum, this matter shall be deemed submitted on the papers.

III. Hartford's motion to stay proceedings and for limited discovery

A. Stay of proceedings

The Hartford's motion to stay the proceedings in C-91-2030 is premised upon HN5 9 U.S.C. § 3, which provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

HN6 A stay of proceedings is appropriate only in those suits which are brought "upon any issue referable to arbitration under **[*15]** an agreement." In determining the scope of the agreement, a court must assess whether the underlying factual allegations in the complaint "touch matters" covered by the agreement to arbitrate, regardless of the legal labels attached to the allegations in the complaint. Mitsubishi, 473 U.S. at 624 n.13; Genesco Inc., 815 F.2d at 846.

The only issue referable to arbitration in this matter is the dispute as to the amount of the claim. While plaintiff contends that the allegations in the complaint do not arise out of the disputed amount of the claim, but rather, arise from the alleged nonpayment of the claim, this Court finds that nonpayment and the amount of payment are inextricably intertwined.

HN7 In those instances in which the agreement to arbitrate does not extend to all disputes arising out of the contract, the Court, in the exercise of discretion to control its own docket, may stay the balance of the proceedings. Genesco, 815 F.2d at 856. The Second Circuit finds broad stays particularly appropriate where arbitrable claims predominate the underlying lawsuit, and nonarbitrable claims are of questionable merit. Id. In this **[*16]** action, the arbitrable elements of the dispute are narrow, and exclusively concerned with the amount of the claim, and not with the defendant's alleged bad faith in processing of plaintiff's claim. Moreover, given the fact that the demand to submit to an appraisal was not made until after the underlying complaint had been filed, this Court cannot find that the nonarbitrable claims of bad faith should suffer from any further delay.

Accordingly, this Court HEREBY STAYS DISCOVERY ONLY IN CONNECTION WITH PLAINTIFF'S FIRST CLAIM FOR RELIEF, (BREACH OF CONTRACT FOR FAILURE TO PAY OR DENY CLAIM), IN THE COMPLAINT FILED IN CV-91-2030.

B. Limited Discovery

Defendant's request for limited discovery pending the appraisal directly controverts the great weight of authority, which is clearly to the effect that discovery on the subject matter of a dispute to be arbitrated will be denied. Mississippi Power Co. v. Peabody Coal Co., 9 F.R.D. 558, 565 (S.D. Ms. 1976). To allow discovery to proceed by virtue of the district court's order would leave "the parties standing with one foot in the district court and the other in the arbitrator's office." Id. at 564. **[*17]** Simultaneous discovery proceedings or disputes would defeat the purpose of giving effect to the parties' intent to arbitrate. Moreover, the Act, as

well as California law, endow arbitrators with the power to compel witnesses and documents. 9 U.S.C. § 7; California Code of Civil Procedure § 1280 et. seq.

Accordingly, DEFENDANT'S REQUEST TO ENGAGE IN LIMITED DISCOVERY PENDING THE APPRAISAL IS HEREBY DENIED.

IT IS SO ORDERED.

EXHIBIT 4

Service: **Get by LEXSEE®**
Citation: **1994 U.S. Dist. LEXIS 12884**

*1994 U.S. Dist. LEXIS 12884, **

JOEL M. HOFFMAN, Plaintiff, v. PARTNERS IN COLLECTIONS, INC., Defendant.

No. 93 C 4182

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1994 U.S. Dist. LEXIS 12884

September 12, 1994, Decided
September 13, 1994, Docketed

CORE TERMS: disputed, summary judgment, genuine issue, material fact, collection, collector, amend, entitled to summary judgment

JUDGES: **[*1]** LINDBERG

OPINION BY: GEORGE LINDBERG

OPINION: MEMORANDUM OPINION AND ORDER

Plaintiff, Joel M. Hoffman, brings this action against defendant, Partners in Collections, Inc. (PICI), alleging that defendant has violated the Federal Fair Debt Collection Practices Act, 15 USC § 1692 et seq. (FDCPA), in the course of its business as a debt collector. Count III of the complaint alleges that after plaintiff disputed his alleged debt with defendant, defendant reported plaintiff's debt to two credit reporting agencies, TRW and Equifax, without advising the agencies that the debt was disputed in violation of 15 USC § 1692e(8) of the FDCPA. Plaintiff has moved for summary judgment on Count III.

On November 22, 1992, defendant sent a letter to plaintiff demanding payment of a debt. Plaintiff's affidavit indicates that on November 23 or 24, 1992, he called defendant and disputed the validity of the debt which should have been paid by insurance. Defendant admits that on November 25, 1992, it received a telephone call from plaintiff "during which plaintiff questioned the insurance payment of this account." Plaintiff's affidavit also states **[*2]** that shortly after making the phone call, he sent a confirming letter (dated November 25, 1992) to defendant disputing the claim. The defendant denies ever receiving this letter.

Plaintiff alleges that defendant violated 15 USC § 1692e(8) by sending a report to TRW and Equifax on his debt at the end of November 1992 without disclosing that he had disputed his debt on November 23, 24, or 25, 1992. In response to Plaintiff's First Set of Requests for Admission, defendant admitted that it transmitted reports to TRW and Equifax and that the report that it sent to TRW and Equifax did not indicate that plaintiff had disputed the debt. In its response to the motion for summary judgment, defendant attempts to withdraw or amend these admissions. However, since defendant has not submitted a motion to withdraw or amend its admissions, the matter admitted is conclusively established. FRCP 36(b).

Summary judgment should be rendered:

> If the pleadings, depositions, answers to interrogatories, and admissions on file,

> together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment **[*3]** as a matter of law.

FRCP 56(c).

Section 1692e(8) of the FDCPA provides:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> . . .
>
> (8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

15 USC § 1692e(8).

Section 1692e(8) does not require that a debt be disputed in writing. 15 USC § 1692e(8). Plaintiff's call to the defendant, whether on November 23, 24, or 25, 1992, was sufficient to place the debt in dispute under Section 1692e(8). Thus, the essential remaining question in the case is, was November 23, 24, or 25, 1992 when plaintiff orally disputed his debt with defendant, prior to the time defendant sent a report on plaintiff's debt to TRW and Equifax at the end of November.

To be entitled to summary judgment against defendant, plaintiff would have to **[*4]** establish that there is no genuine issue as to the fact that he called defendant and disputed his debt before defendant sent any reports to credit agencies regarding plaintiff's alleged debt. However, plaintiff has failed to prove whether defendant sent reports on his alleged debt to TRW and Equifax before or after plaintiff disputed the debt on November 23, 24, or 25, 1992. Plaintiff has only proven that defendant sent the reports "at the end of November," which may or may not have been after he disputed the debt. Thus, a genuine question of material fact exists with respect to Count III of the complaint.

Therefore, plaintiff is not entitled to summary judgment.

ORDERED: The motion for summary judgment of plaintiff, Joel M. Hoffman, is denied.

ENTER:

GEORGE LINDBERG

District Judge

DATED: SEP 12 1994

Service: **Get by LEXSEE®**

Citation: **1994 U.S. Dist. LEXIS 12884**
View: Full
Date/Time: Friday, March 2, 2007 - 2:49 PM EST