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U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)
LANA MARIE BARR,)
fdba TV Facts, NE, Inc.,)
Debtor,)
CHECK CENTRAL OF OREGON,)
INC.,)
Plaintiff,)
v.)
LANA MARIE BARR,)
fdba TV Facts, NE, Inc.,)
Defendant.)

Bankruptcy Case No. 382-03318
Adversary Proceeding No. 83-0208
FINDINGS OF FACT AND CONCLUSIONS OF LAW
GRANTING NONDISCHARGEABLE JUDGMENT TO PLAINTIFF FOR \$55.10 AFTER ALLOWING SETOFF

Plaintiff, Check Central of Oregon, Inc. ("Check Central" filed this complaint seeking to except from discharge under 11 U.S.C. §523(a)(2)(A) the debtor's liability on four "NSF" checks totalling \$155.81. Plaintiff also requested attorney's fees, apparently relying on O.R.S. 20.090. The debtor counter-claimed, alleging violations of the Fair Debt Collection Practices Act ("FDCPA" or "the Act"), 15 U.S.C. §§1692-1692o (1982), based
FINDINGS OF FACT AND CONCLUSIONS OF LAW

1 upon the content of collection notices used by plaintiff. The
2 Court herein makes its written Findings of Fact and Conclusions
3 of Law.

4 I find that the debt described in the complaint is a
5 liability for obtaining property by "false pretenses, a false
6 representation, or actual fraud . . ." within the meaning of
7 11 U.S.C. §523(a)(2)(A). Plaintiff carried its burden of proof
8 by clear and convincing evidence. Specifically, I find that the
9 debtor acted with intent to deceive when she authored and
10 negotiated the checks at issue to various merchants in return for
11 merchandise and that she was aware that funds were not available
12 to cover the checks.

13 I disbelieve the debtor's testimony and argument that
14 correction by the bank of a \$4,000.00 error in her favor was
15 either the ultimate cause of the returned checks or establishes
16 the debtor's innocence in writing checks in reliance upon the
17 bank's mistake. The exhibits show that on July 12, 1982, about
18 ten days prior to the date the first dishonored check was written,
19 a bank entry was made to correct the \$4,000.00 bank error. The
20 debtor then equivocated as to whether she received notice of this
21 entry around July 12 or sometime shortly after August 9, 1982,
22 when she received her monthly statement. Defendant did not satis-
23 factorily explain away the unfavorable inference arising from bank
24 statements covering the two-month period during which these checks
25 were written which show \$138.00 in NSF/overdraft charges, or
26 twenty-three separate charges.

1 Check Central bases its claim to attorney's fees on
 2 O.R.S. 20.090, which contains a specific grant of attorney's fees
 3 in dishonored check cases. The debtor argues that this statute
 4 is inapplicable in bankruptcy and that only a prevailing debtor in
 5 a dischargeability action is entitled to attorney's fees, see
 6 11 U.S.C. §523(d).

7 Dischargeability is solely a question of federal law.
 8 In re Fulwiler, 624 F.2d 908, 910 (9th Cir. 1980). However, the
 9 question of dischargeability differs from the question of liability
 10 and damages, which are matters of state law. See, e.g., In re
 11 Lucas, 21 B.R. 794, 799 (Bankr. W.D. Mich. 1982); In re Cooney,
 12 8 B.R. 96, 100 (Bankr. W.D. Ky. 1980) ("[A]ny determination that
 13 we make will relate to the character of the debt, and not to the
 14 amount of the liability." (emphasis in original)). Under Oregon
 15 law, attorney's fees are a special rule of damages or penalty
 16 where liability is incurred for writing a check on insufficient
 17 funds. This special state-created measure of damages or penalty
 18 should be unaffected once the debt is determined to be nondis-
 19 chargeable in bankruptcy. Accordingly, Check Central is entitled
 20 to attorney's fees.

21 The debtor alleges that the form of notice sent to her
 22 by Check Central violates the validation requirements of 15 U.S.C.
 23 §1692g(a)(4) and the general proscription against false or mis-
 24 leading representations contained in 15 U.S.C. §1692e. Because
 25 two of the notices were sent after bankruptcy, the cause of action
 26 belongs to her. Three violations are charged: first, that the

1 use of the word "judgment" is improper because none existed; and
 2 secondly, that the notice incorrectly states that the consumer may
 3 obtain verification of the debt by written "notice" instead of
 4 written "dispute", as is assertedly required by the statute.
 5 Thirdly, the debtor urges that the notice violates 15 U.S.C. §1692e(11)
 6 because it does not "disclose clearly . . . that [Check Central]
 7 is attempting to collect a debt and that any information obtained
 8 will be used for that purpose." 15 U.S.C. §1692e(11).

9 Applicable decisions dispose of two of Check Central's
 10 defenses. First, collection activities related to dishonored
 11 checks used by a consumer are subject to the FDCPA. In re
 12 Scrimsher, 17 B.R. 999, 1010 (Bankr. N.D. N.Y. 1982). Secondly,
 13 the "bona fide error" defense found in 15 U.S.C. §1692k(c) applies
 14 only to clerical errors. The defense will not cure mistakes of
 15 law or actions taken on advice of counsel. Baker v. G. C. Services
 16 Corp., 677 F.2d 775, 779 (9th Cir. 1982). There was no clerical
 17 error in this case.

18 Check Central's notice to the debtor violated 15 U.S.C.
 19 §1692e(11) because it did not affirmatively inform the debtor that
 20 any information obtained by the collector would be used for pur-
 21 poses of collecting the debt. Judge Frye's decision in Case v.
 22 Credit Bureau, Inc. of Georgia, Civ. No. 82-1107FR (D. Or. Nov. 1,
 23 1982 and Jan. 10, 1983) is directly on point. While Judge Frye
 24 made it quite clear that she was deciding only a motion to dismiss
 25 and not the merits, Beaulieu v. American National Education Corp.,
 26 CV 79-L-271 (D. Neb. Jan. 22, 1981), cited with approval in Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1 Frye's later opinion, granted summary judgment to the consumer.
2 Check Central introduced no evidence at trial that would warrant a
3 different result here.

4 Check Central's notice states that the consumer must
5 "notify this office in writing in 30 days . . ." in order to obtain
6 verification of the debt. This statement is not false or misleading
7 and in no way detracts from the consumer's ability to protect his
8 or her rights. I find that this statement does not violate the
9 Act.

10 The inclusion of the word "judgment" in the validation
11 notice does not violate the FDCPA. The language of the notice
12 mirrors almost exactly the language contained in 15 U.S.C.
13 §1692g(a)(4). I agree with the decision in Blackwell v. Professional
14 Business Services of Georgia, Inc., 526 F. Supp. 535, 539 (N.D.
15 Ga. 1981), which appears to be the lone judicial decision
16 addressing this issue. The informal FTC staff letters cited by
17 the debtor may be relevant but they are not binding. Case v. Credit
18 Bureau of Georgia, Inc., Civ. No. 82-1107FR, memo. op. at 3 (D. Or.
19 Nov. 1, 1982).

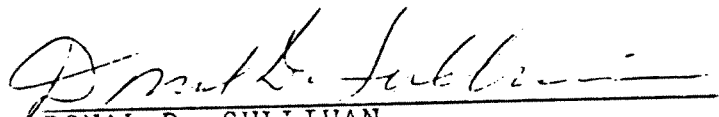
20 Check Central is entitled to judgment for \$155.81 on the
21 merits of its complaint and for attorney's fees in the amount of
22 \$400.00. This judgment should be declared nondischargeable in
23 bankruptcy pursuant to 11 U.S.C. §523(a)(2). Punitive damages
24 should not be allowed.

25 Considering the factors enumerated in 15 U.S.C. §1692k(b)
26 statutory damages should be awarded to the defendant on the

1 counterclaim in the sum of \$100.00 in order to encourage future
2 compliance with the statute. Reasonable attorney's fees should
3 also be awarded in the amount of \$400.00 to the debtor. Although
4 the character of the awards is not identical, there is sufficient
5 similarity and equities to make setoff appropriate.

6 For the foregoing reasons, and after allowing setoff
7 between the parties, the plaintiff is entitled to a judgment, non-
8 dischargeable in bankruptcy in the amount of \$55.10.

9 DATED this 19th day of January, 1984.

10 
11 DONAL D. SULLIVAN
12 Bankruptcy Judge
13
14

15 ADOPTED this 19 day of
16 January, 1984.

17 
18 U. S. District Court Judge
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22 cc: Brian W. O'Brien
23 Frank J. Dixon
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