2023 WL 8185669
Only the Westlaw citation is currently available.
United States District Court, D. New Jersey.

Clifford J. CHURCH and Randa A. Husain, on behalf of themselves and those similarly situated, Plaintiffs,
v.
COLLECTION BUREAU OF the HUDSON VALLEY, INC.; and John Does 1 to 10, Defendant.

Civil Action No. 20-3172(MEF)(LDW)
|
Signed November 27, 2023

Synopsis

Background: Debtors brought putative class action against debt collector for violation of Fair Debt Collection Practices Act (FDCPA). Debt collector moved to dismiss.

Holdings: The District Court, Michael E. Farbiarz, J., held that:

debtors did not allege that deceptive letter sent from debt collector harmed or injured them in any way, to establish concrete injury for Article III standing;

district court would treat as facial debt collector's motion to dismiss for lack of standing; and

tort of unreasonable debt collection, under Texas law, was not "traditional," for purposes of establishing that tort provided basis for lawsuit to show that intangible harm created concrete injury to establish Article III standing.

Motion granted.

Procedural Posture(s): Motion to Dismiss for Lack of Standing.

Attorneys and Law Firms

Jason Robert D'Agnenica, Kim Law Firm LLC, Hackensack, NJ, Philip D. Stern, Kim Law Firm LLC, Hackensack, NJ, Ronald Ira Levine, Wyckoff, NJ, Yongmoon Kim, Kim Law Firm LLC, Hackensack, NJ, for Plaintiff.

Mitchell L. Williamson, Barron & Newburger, P.C., Somerset, NJ, for Defendant.

OPINION

Michael E. Farbiarz, United States District Judge

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* * *

A debt collector said it might report two people to credit agencies if they did not take certain steps.

The people sued under a federal statute.

The debt collector now moves to dismiss, arguing that because the people were not injured the Court does not have jurisdiction.

The motion will be granted.

* * *

I. Background

A. Procedural History

In March of 2020, two people (the "Plaintiffs" [1]) sued a debt collector (the "Defendant" [2]) on behalf of a putative class.

1 The Plaintiffs are Clifford J. Church and Randa A. Husain.

2 The Defendant is Collection Bureau of the Hudson Valley, Inc. The caption also lists 10 "John Doe" defendants. They have not been identified by the Plaintiffs or served. They are not considered by the Court here.

In November of 2022, the Court certified the class.

In May of 2023, the Defendant moved to dismiss. The motion was fully briefed as of late June, and it is now before the Court. [3]

3 This case was re-assigned to the undersigned on May 25, 2023.

B. Allegations

The allegations as relevant for now are as follows.

The Plaintiffs each received a debt collection letter from the Defendant. See Complaint ¶¶ 20-21.

According to the letter, the Defendant might "take additional collection efforts" if there was no response to the letter within seven days. Complaint ¶¶ 23, 28; Exs. A, B. These "efforts," according to the letter, could include sending "a negative credit report[.]" Complaint ¶¶ 23, 28.

The Plaintiffs' core allegation: the letters were deceptive, because the Defendant had a policy of credit reporting at 60 days, not seven. See Complaint ¶ 26. Therefore, the Plaintiffs argue, sending the letter violated the Fair Debt Collection Practices Act. [4] See id. ¶¶ 1-2, 27, 41-49.

4 The Act: "A debt collector may not use any false, deceptive, or misleading representation ... in connection with the collection of any debt.... [T]he following conduct is a violation of this section: .... The threat to take any action that ... is not intended to be taken." 15 U.S.C. § 1692e(5).

C. The Motion

As noted, the Defendant has moved to dismiss. It contends the Plaintiffs suffered no "concrete" injury and therefore do not have standing to bring this case. See Motion to Dismiss at 6-17.

***2** The core legal issue raised by the motion is discussed below, in Part II.A, Part II.B, and Part II.C. In Part II.D, the Court sets out its approach to the issue.

II. The Legal Issue

A. Standing: In General

Federal courts exercise the "judicial Power of the United States[.]" U.S. Constitution, Article III. That power "extends only to 'Cases' and 'Controversies[.]' " Spokeo, Inc. v. Robins, 578 U.S. 330, 337, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016) (quoting Article III). In turn, "a case or controversy can exist only if a plaintiff has standing to sue[.]" United States v. Texas, 599 U.S. 670, 675, 143 S.Ct. 1964, 216 L.Ed.2d 624 (2023).

There are a few elements of standing. See Spokeo, 578 U.S. at 338, 136 S.Ct. 1540. One is the Plaintiff suffered a "concrete injury." Id. at 339, 136 S.Ct. 1540.

In some contexts, showing a "concrete injury" is straightforward.

Take, for example, a person who gets a deceptive debt collection letter, like the Plaintiffs allegedly received here. The letter might cause the recipient to make a payment she otherwise would not have. That could amount to a concrete injury. [5] Or the letter might hurt the recipient's reputation if shared with others, or it might deeply upset the recipient. These, too, could potentially count as concrete injuries. [6]

5 See, e.g., Huber v. Simon's Agency, Inc., 84 F.4th 132, 149 (3d Cir. 2023) (extra payment by plaintiff: concrete injury).

6 See, e.g., Ewing v. MED-1 Sols., LLC, 24 F.4th 1146, 1153 (7th Cir. 2022) (reputational harm: concrete injury); Magruder v. Cap. One, Nat'l Ass'n, 540 F. Supp. 3d 1, 9-10 (D.D.C. 2021) (emotional distress: concrete injury).

B. Standing: This Case

This case, though, is different than the ones discussed just above.

Here, the Plaintiffs allege they received a deceptive letter. But there are no allegations they made a payment based on it, or incurred out-of-pocket costs. There is nothing to say they were embarrassed or distressed by the letter, or that anyone publicized the letter, perhaps hurting the Plaintiffs' reputation or credit score.

Rather, the Plaintiffs allege they received the letter, passed it on to a lawyer, and --- nothing else. In short: the Plaintiffs do not contend the letter harmed or injured them in any way.

C. The Defendant's Motion, and the Plaintiffs' Response

Against this backdrop, the Defendant has moved to dismiss for lack of standing. [7]

7 The motion is under Rule 12(b)(1), which permits motions to dismiss for "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). Because "standing is a jurisdictional matter," a "motion to dismiss for want of standing is ... properly brought pursuant to Rule 12(b)(1)." Ballentine v. United States, 486 F.3d 806, 810 (3d Cir. 2007). In assessing a Rule 12(b)(1) motion, a court "has to first determine" whether the motion is "facial" or "factual." Const. Party of Pennsylvania v. Aichele, 757 F.3d 347, 358 (3d Cir. 2014). A facial motion is decided on the allegations in the complaint. A factual motion is decided on the evidence put forward by the parties. See id. Here, the parties have offered evidence. See Motion to Dismiss, Exs. D-E; Opposition to Motion to Dismiss, Decls. of Randa A. Husain and Mohamad K. Mohamad. But neither the evidence nor the allegations in the complaint suggest harm. This case is therefore the same whether the motion to dismiss is thought of as facial or factual. The Court, though, must make a choice, and will treat the motion as facial, to allow the Plaintiffs the chance to later build a fuller record here, should they wish to.

***3** At first glance, the motion looks like one to grant. This Court has held, more than 20 times, that there is no standing in no-injury scenarios analogous to the one at issue here. [8]

8 See Valentine v. Mullooly, Jeffrey, Rooney & Flynn LLP, 2023 WL 4867398 (D.N.J. July 31, 2023); Rodriguez v. Awar Holdings, Inc., 2023 WL 4362729 (D.N.J. July 6, 2023); Jones v. JHPDE Fin. I, LLC, 2023 WL 4287616 (D.N.J. June 30, 2023); Winter v. Resurgent Cap. Servs.

L.P., 2023 WL 3431215 (D.N.J. May 12, 2023); Lespes v. Monarch Recovery Mgmt., Inc., 2023 WL 4060183 (D.N.J. Apr. 14, 2023), report and recommendation adopted, 2023 WL 4060255 (D.N.J. May 3, 2023); Chapman v. AA Action Collection Co., 2023 WL 2020037 (D.N.J. Feb. 15, 2023); Nuamah-Williams v. Frontline Asset Strategies, LLC, 2023 WL 1470057, at *2 (D.N.J. Feb. 2, 2023); Levins v. Healthcare Revenue Recovery Grp., LLC, 2023 WL 416077 (D.N.J. Jan. 26, 2023); Jackson v. I.e. Sys., Inc., 2023 WL 157517 (D.N.J. Jan. 11, 2023); Valentine v. Unifund CCR, LLC, 2023 WL 22423 (D.N.J. Jan. 3, 2023); Rodriguez-Ocasio v. I.C. Sys., Inc., 2022 WL 16838591 (D.N.J. Nov. 8, 2022); Rabinowitz v. Alltran Fin. LP, 2022 WL 16362460 (D.N.J. Oct. 25, 2022); Duncan v. Sacor Fin., Inc., 2022 WL 16722236 (D.N.J. Oct. 19, 2022), report and recommendation adopted, 2022 WL 16716085 (D.N.J. Nov. 4, 2022); Lahu v. I.C. Sys., Inc., 2022 WL 6743177 (D.N.J. Oct. 11, 2022); Daye v. GC Servs. Ltd. P'ship, 2022 WL 4449381 (D.N.J. Sept. 23, 2022); Sandoval v. Midland Funding, LLC, 2022 WL 3998294 (D.N.J. Sept. 1, 2022); Foley v. Medicredit, Inc., 2022 WL 3020129 (D.N.J. July 29, 2022); Schultz v. Midland Credit Mgmt., Inc., 617 F. Supp. 3d 249 (D.N.J. 2022); Madlinger v. Enhanced Recovery Co., LLC, 2022 WL 2442430 (D.N.J. July 5, 2022); Vaughan v. Fein, Such, Kahn & Shepard, P.C., 2022 WL 2289560 (D.N.J. June 24, 2022); Rohl v. Pro. Fin. Co., Inc., 2022 WL 1748244 (D.N.J. May 31, 2022); Oh v. Collecto, Inc., 2021 WL 3732881 (D.N.J. Aug. 23, 2021).

But the Plaintiffs look to sidestep these cases by pressing a novel argument. See Opposition to Motion to Dismiss at 15.

To understand the argument, step back for a moment.

In TransUnion LLC v. Ramirez, 594 U.S. ——, 141 S. Ct. 2190, 2204, 210 L.Ed.2d 568 (2021), the Supreme Court explained how standing's "concrete injury" requirement can be satisfied where, as here, there are no allegations of any tangible harms to the plaintiff.

> Various intangible harms can ... be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion. And those traditional harms may also include harms specified by the Constitution itself.
>
> In determining whether a harm is sufficiently concrete to qualify as an injury in fact, the Court [has] ... said that Congress's views may be instructive. Courts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation. In that way, Congress may elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law. But even though Congress may elevate harms that exist in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.

***4** Id. at 2204-05 (internal quotation marks, citations, and parentheticals removed); see also Huber, 84 F.4th at 148-49.

In short: when a "tradition[al]" injury in the law is "elevated" by a statute, certain violations of the statute, even if they only cause intangible harms, can create a "concrete injury" of the sort that can be a basis for standing.

For example, the tort of intrusion upon seclusion has long been burrowed deep in American law. See William L. Prosser, Privacy, 48 Cal. L. Rev. 383, 389-90 (1960) (hereafter "Prosser, Privacy"). The harms associated with the tort were boosted up by Congress, when it passed the Telephone Consumer Protection Act. And when the Act is violated in ways that bear enough of a relationship to intrusion upon seclusion, a plaintiff can be concretely injured and therefore have standing. See Susinno v. Work Out World Inc., 862 F.3d 346, 351-52 (3d Cir. 2017).

Come back now to this case, and the Plaintiffs' argument.

The Plaintiffs argue: (1) there was a "tradition[al]" anchor tort called unreasonable debt collection, see Opposition to Motion to Dismiss at 17, (2) it was "elevated" by Congress by the Fair Debt Collection Practices Act, see id. at 23-24, and (3) simple receipt of an allegedly deceptive letter, without more, violates the Act in a way that is closely-enough related to the traditional tort --- such that the Plaintiffs have a "concrete injury" here, and can therefore establish standing. See id. at 29-30. [9]

[9] The Plaintiffs' argument is focused exclusively on establishing the existence of the anchor tort of unreasonable debt collection (number (1) in the text) and then teasing out its implications for the standing analysis (numbers (2) and (3) in the text). (To see this, refer to Appendix A, which collects references to the Plaintiffs' brief.) The Plaintiffs do not make any other argument. Establishing the existence of a traditional cause of action is the Plaintiff's sole focus. Not, for example, establishing the existence of traditional harms that various causes of action might address under different legal headings, and that Congress then "elevated" with the Fair Debt Collection Practices Act. The Court addresses the argument the Plaintiffs make, not others, Cf. Perez v. McCreary, Veselka, Bragg & Allen, P.C., 45 F.4th 816, 825 (5th Cir. 2022).

D. The Court's Approach

To evaluate the Plaintiffs' three-part argument, the Court begins at step one, by assessing whether there is a traditional tort of unreasonable debt collection.

First, the Court defines the tort and establishes based on the Plaintiffs' evidence how old and how widespread it is. See Part III.

The Court then asks: given its longevity and prevalence, does the tort count as traditional? The Court's answer: no. See Part IV.

The implication of all this: the Plaintiffs have not established standing. See Part V.

III. Unreasonable Debt Collection

As noted above, the traditional tort put forward by the Plaintiffs is unreasonable debt collection.

To start assessing whether it is traditional, the Court outlines its elements, see Part III.A, and concludes that on the Plaintiff's evidence the tort is about 70 years old and exists in one jurisdiction. See Parts III.B and III.C.

A. Elements

***5** That tort has four elements. [10]

[10] A caution at the start. Some of the tort's elements "are not clearly defined and the conduct deemed to constitute an unreasonable collection effort varies from case to case." EMC Mortg. Corp. v. Jones, 252 S.W.3d 857, 868 (Tex. App. 2008) (compiling varying cases); see also Souto v. Bank of Am., N.A., 2012 WL 3638024, at *6 (S.D. Tex. Aug. 22, 2012); B.F. Jackson, Inc. v. CoStar Realty Info., Inc., 2009 WL 1812922, at *5 (S.D. Tex. May 20, 2009). This is in part because the tort was first articulated in Texas, see Boe W. Martin, A Creditor's Liability for Unreasonable Collection Efforts: The Evolution of a Tort in Texas, 9 S. Tex. L.J. 127, 132 (1966) (hereafter "Martin, A Creditor's Liability"), and "[t]he Supreme Court of Texas has not directly addressed the elements to be proven in an action for unfair collection practices." Hidden Forest Homeowners Ass'n v. Hern, 2011 WL 6089881, at *4 (Tex. App. Dec. 7, 2011).

First, the defendant "made unreasonable collection efforts against [the plaintiff]." Moore v. Savage, 359 S.W.2d 95, 96 (Tex. Civ. App. 1962), writ refused NRE, 362 S.W.2d 298 (Tex. 1962). " '[U]nreasonable collection efforts' ... means such efforts as a person of ordinary care and prudence would not have used under the same or similar circumstances." Montgomery Ward & Co. v. Brewer, 416 S.W.2d 837, 838 (Tex. Civ. App. 1967), writ refused NRE (Nov. 15, 1967); see also id. (cleaned up) (defining unreasonable collection efforts as "a course of harassment on the part of a creditor which is willful, wanton and malicious and is intended to inflict mental anguish and resulting bodily harm").

Second, the defendant undertook unreasonable collection efforts with "reckless disregard of the health and welfare of plaintiff." Martin, A Creditor's Liability, at 128-29 (citing Moore, 359 S.W.2d 95).

Third, the unreasonable collection efforts "were a proximate cause of ... physical illness and mental and emotional pain." Moore, 359 S.W.2d 95; see also Kruse v. Bank of New York Mellon, 2012 WL 13094122, at *8 (N.D. Tex. June 22, 2012); cf. McDonald v. Bennett, 674 F.2d 1080, 1089 (5th Cir. 1982), on reh'g, 679 F.2d 415 (5th Cir. 1982). [11]

[11] The Plaintiffs argue that unreasonable debt collection is an intentional tort, and the law

therefore "provides a remedy in the form of nominal damages ... without proof of any other harm[.]" Opposition to Motion to Dismiss at 23. But the Plaintiffs have not put forward unreasonable debt collection cases that say this. The two Texas cases cited by the Plaintiffs involved allegations of actual harm. See Pullins v. Credit Exch. of Dallas, Inc., 538 S.W.2d 681, 682 (Tex. Civ. App. 1976), writ refused NRE (Dec. 31, 1976); Marshall, 347 S.W.2d at 623. So, too, other Texas cases. See e.g., Moore, 359 S.W.2d at 96; cf. McDonald, 674 F.2d at 1088; see also Martin, A Creditor's Liability, at 131 (actual damages are "essential to the existence of this tort"). Indeed, the Texas Supreme Court case that established the tort, see Martin, A Creditor's Liability, at 131-32, held liability exists when the relevant conduct "has the intended effect of causing great mental anguish to the debtor, resulting in physical injury[.]" Duty v. Gen. Fin. Co., 154 Tex. 16, 20, 273 S.W.2d 64 (1954). And the Texas Supreme Court itemized alleged "injuries" caused by the defendants in that case, including: physical injury; psychological/emotional impacts; and being "discharged from ... work[.]" Id. at 19, 273 S.W.2d 64. All of this suggests the possibility that even if unreasonable debt collection efforts is a traditional tort, that may not in the end help the Plaintiffs' standing argument. This is because the tort seems to require actual harm. But harm is precisely what the Plaintiffs have not plead.

***6** Fourth, the defendant intended such harm. See Moore, 359 S.W.2d at 96 (requiring intent to cause harm); Montgomery Ward & Co. v. Brewer, 416 S.W.2d 837, 838 (Tex. Civ. App. 1967), writ refused NRE (Nov. 15, 1967) (basing decision in part on lack of intent to cause harm). [12]

12 As noted, the elements are not drawn with perfect sharpness. For example, some Texas courts seem to suggest intent to harm is required. See Moore, 359 S.W.2d at 96; Montgomery Ward & Co., 416 S.W.2d at 838. Others do not. See Employee Fin. Co. v. Lathram, 363 S.W.2d 899, 901 (Tex. Civ. App. 1962), rev'd on other grounds, 369 S.W.2d 927 (Tex. 1963) (seeming to require only negligence, as determined in light of the ordinary care standard).

B. The Plaintiffs' Evidence

As noted in Part II.C, the Plaintiffs' argument rests on the premise that unreasonable debt collection is a traditional tort.

To show that it is, the Plaintiffs put forward ten cases, said to represent "examples of actionable claims arising from this tort." Opposition to Motion to Dismiss at 18.

This section analyzes the ten cases.

1. The Two Unreasonable Debt Collection Cases

Two of the ten cases, each from Texas, involve the tort of unreasonable debt collection. These are Pullins v. Credit Exch. of Dallas, Inc., 538 S.W.2d 681 (Tex. Civ. App. 1976), writ refused NRE (Dec. 31, 1976) and Marshall v. United Fin. & Thrift Corp., 347 S.W.2d 623 (Tex. Civ. App. 1961). These cases trace back to a 1954 Texas Supreme Court case, Duty v. Gen. Fin. Co., 154 Tex. 16, 273 S.W.2d 64. That 1954 case first established the tort. See Martin, A Creditor's Liability, at 131.

2. The Other Eight Cases

The Plaintiffs' remaining eight cases do not mention unreasonable debt collection. They do not cite the Texas cases, or any cases that invoke unreasonable debt collection.

In short: the Plaintiffs' remaining eight cases do not appear to have a connection to the tort of unreasonable debt collection.

A closer look, as set out just below, emphasizes the point.

a. Libel

Three of the Plaintiffs' eight cases are libel cases. See Opposition to Motion to Dismiss at 18-21 (citing Thompson v. Adelberg & Berman, Inc., 181 Ky. 487, 205 S.W. 558 (1918), Muetze v. Tuteur, 77 Wis. 236, 46 N.W. 123 (1890), Woodling v. Knickerbocker, 31 Minn. 268, 17 N.W. 387 (1883)).

The elements of libel, from around the period of the cited cases: (1) "an unprivileged publication" (2) "of false and defamatory matter of another which" (3)(a) "is actionable

irrespective of special harm, or (b) if not so actionable, is the legal cause of special harm to the other." Restatement (First) of Torts § 558 (1938).

But there is no overlap between these elements and the four elements of the tort of unreasonable debt collection, as set out above in Part III.A. Libel and unreasonable debt collection are not yoked together. Instead, they have no meaningful connection.

b. Publicity Given to Private Life

One of the eight cases cited by the Plaintiffs is a Kentucky case that invoked a right of privacy. See Opposition to Motion to Dismiss at 20-21 (citing Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927)).

The common law right to privacy encompasses multiple torts. [13] The Kentucky case concerned one of these, the "publicity given to private life" tort. The elements of that tort: "1) giving publicity; 2) to private facts; 3) of a kind highly offensive to a reasonable person; and 4) which are not of legitimate concern to the public." Bowley v. City of Uniontown Police Dep't, 404 F.3d 783, 788 n.7 (3d Cir. 2005) (cleaned up) (applying Pennsylvania law); cf. Restatement (Second) of Torts § 652D (1977) (outlining similar elements).

13 The Restatement (Second) outlines four: intrusion upon seclusion, appropriation of name or likeness, publicity given to private life, or publicity placing persons in false lights. See Restatement (Second) of Torts § 652 (1977); see also Boring v. Google Inc., 362 F. App'x 273, 278 (3d Cir. 2010) (recognizing similar torts under Pennsylvania law); Conserve v. City of Orange Twp., 2021 WL 3486906, at *6 (D.N.J. Aug. 9, 2021) (recognizing similar torts under New Jersey law).

***7** But none of these elements are also among the elements of unreasonable debt collection. The torts are not linked.

c. Intentional Infliction of Emotional Distress

Three of the eight cases cited by the Plaintiffs concern intentional infliction of emotional distress. See Opposition to Motion to Dismiss at 18, 21-22 (citing Clark v. Associated Retail Credit Men of Washington, D.C., 105 F.2d 62 (D.C. Cir. 1939); La Salle Extension Univ. v. Fogarty, 126 Neb. 457, 253 N.W. 424 (1934); Barnett v. Collection Serv. Co., 214 Iowa 1303, 242 N.W. 25 (1932)).

The generally-recognized elements of intentional infliction of emotional distress: "(1) defendants acted intentionally or recklessly, both in doing the act and producing the emotional distress; (2) defendants' conduct was outrageous and extreme, so as to go beyond all bounds of decency and be utterly intolerable in a civilized community; (3) defendants' actions were the proximate cause of the plaintiff's emotional distress; and (4) the distress suffered was so severe that no reasonable person could be expected to endure it." Kounelis v. Sherrer, 529 F. Supp. 2d 503, 532 (D.N.J. 2008) (applying New Jersey law); cf. Restatement (Second) of Torts § 46 (1965) (outlining similar elements).

These elements do not meaningfully overlap with the elements of unreasonable debt collection. Unreasonable debt collection, for example, requires a connection to debt collection efforts. See Moore, 359 S.W.2d at 96. Intentional infliction of emotional distress does not. Intentional infliction of emotional distress requires both extreme conduct by the defendant [14] and an impact on the plaintiff "so severe that no reasonable person could be expected to endure it." Kounelis, 529 F. Supp. 2d at 532. The unreasonable debt collection tort is actionable based on much less egregious conduct from the defendant, and a much less hard landing on the plaintiff.

14 New Jersey law refers to this as "extreme and outrageous" conduct. Buckley v. Trenton Saving Fund Soc., 111 N.J. 355, 366, 544 A.2d 857 (1988). The online version of the Restatement (Second) calls it "severe or outrageous conduct," and defines it as "conduct [which] has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement (Second) of Torts § 46 cmt. D (2023).

d. Physical Injury

The last case put forward by the Plaintiffs is based on the tort of physical injury caused by a wrongful act. See Opposition to Motion to Dismiss at 20 (citing Engle v. Simmons, 148 Ala. 92, 94, 41 So. 1023 (1906)). That tort is not crisply defined, but it appears related to intentional infliction of emotional

distress, with an added element of physical harm. See Engle, 148 Ala. at 94, 41 So. 1023. But as noted above, unreasonable debt collection is far afield from intentional infliction of emotional distress. Adding a physical injury requirement does not change the picture.

C. Conclusion: The Tort is 70 Years Old, and Established in One Jurisdiction

As set out above, there is a tort called unreasonable debt collection, see Part III.A, and to show it is traditional, the Plaintiffs come forward with ten cases.

***8** But eight of these cases concern torts that have no meaningful connection to unreasonable debt collection. See Part III.B. Those eight cases are therefore irrelevant here, and must be put to the side.

That leaves behind a tort reflected in two cases, one from Texas in 1961 and one from Texas in 1976. These two cases, as noted, trace back to a 1954 Texas Supreme Court case. [15]

15 The Court does not look beyond the Plaintiffs' ten cases. This is for two reasons. First, "[c]ourts are ... entitled to decide a case based on the historical record compiled by the parties[.]" New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 142 S. Ct. 2111, 2130 n.6, 213 L.Ed.2d 387 (2022); see also Safari v. Whole Foods Mkt. Servs., Inc., 2023 WL 5506014, at *8 (C.D. Cal. July 24, 2023) (applying this principle to a history-focused Article III standing inquiry); see generally, e.g., Greenlaw v. United States, 554 U.S. 237, 244, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008) ("[o]ur adversary system is designed around the premise that the parties ... are responsible for advancing the ... arguments entitling them to relief") (cleaned up). Second, the Court's role here is not to "say what the law [of unreasonable debt collection] is." Marbury v. Madison, 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed. 60 (1803). (Where its role is saying what the law is, the Court is not quite so tightly tethered to what a party may have said about the law's content.) Rather, the Court here must assess whether the Plaintiffs have carried their standing burden, see Spokeo, 578 U.S. at 338, 136 S.Ct. 1540, by means of the ten cases they have offered to establish that the tort of unreasonable debt collection is traditional. These ten cases work as the Plaintiffs' evidence of how traditional the tort is. That evidence, like virtually all other evidence, is to be assessed as presented by the parties. See, e.g., Greenlaw, 554 U.S. at 243, 128 S.Ct. 2559 ("In our adversary system, ... we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."). The evidence is not to be yeasted up by further research on the part of the Court. And that is true whether that research would be factual (as would be the case with most evidence) or legal (as it would be here).

IV. Is Unreasonable Debt Collection "Traditionally Recognized"?

Does a tort that has existed in one state (Texas) for about 70 years (since 1954) count as "traditionally recognized as providing a basis for lawsuits in American courts?" TransUnion, 141 S. Ct. at 2204.

That is the question teed-up by the Plaintiffs' argument [16] and cases. [17] This Part answers it.

16 See footnote 9 above.

17 See footnote 15 above.

A. Longevity

One common sense aspect of something being "traditional" is that it is at least somewhat old. [18] "[H]ow old must a common-law tort be in order to qualify as having been traditionally ... regarded as providing a basis for a lawsuit in English or American courts"? Sierra v. City of Hallandale Beach, Fla., 996 F.3d 1110, 1121 (11th Cir. 2021) (Newsom, J., concurring) (cleaned up).

18 See, e.g., Tradition, sense I.1.c, Oxford English Dictionary (2023) ("Any practice or custom which is generally accepted and has been established for some time within a society, social group, etc.") (emphasis added).

***9** On the sources put forward by the Plaintiffs, unreasonable debt collection is around 70 years old. Is that old enough? [19]

19 Neither the Supreme Court nor the Third Circuit has articulated a test that sorts torts that are old enough to count as traditional from torts that are not. Cf. Sierra, 996 F.3d at 1121 (Newsom, J., concurring) (the question of how "old ... a common-law tort [must] be in order to qualify ... remain[s] largely unsettled").

To answer this question, the Court focuses on the relevant decisions, see Part IV.A.1 below, but tentatively concludes these are not clarifying enough here. See Part IV.A.2 below.

1. The Cases

Since the Supreme Court's Spokeo decision, the Third Circuit has suggested to varying degrees that certain torts may potentially qualify as traditional for the Article III standing purposes at issue here.

Take these briefly, one at a time.

The first tort: unreasonable publicity given to another's private life.[20] The foundational common law cases recognizing the tort are from the early 1900s. See, e.g., Hinish v. Meier & Frank Co., 166 Or. 482, 506, 113 P.2d 438 (1941) (compiling cases); Melvin v. Reid, 112 Cal. App. 285, 297, 297 P. 91 (1931); Brents, 221 Ky. at 771-73, 299 S.W. 967; Feeney v. Young, 191 A.D. 501, 181 N.Y.S. 481 (1920); Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); see generally Jonathan B. Mintz, The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain, 55 Md. L. Rev. 425, 432 n.17 (1996).[21]

20 See, e.g., Kamal v. J. Crew Grp., Inc., 918 F.3d 102, 114 (3d Cir. 2019).

21 As part of considering the "traditional" aspect of this tort, the Third Circuit has cited Section 652 of the Restatement (Second). See Kamal, 918 F.3d at 114; Long v. Se. Pa. Transp. Auth., 903 F.3d 312, 324 (3d Cir. 2018). Section 652 cites cases that date back as far as the 19th century. See Restatement (Second) of Torts § 652A-E (1977).

The second tort: breach of confidence. The Third Circuit has discussed this as a potential traditional tort. See Kamal, 918 F.3d at 114. The tort runs back to the 19th century. See Neil M. Richards & Daniel J. Solove, Privacy's Other Path: Recovering the Law of Confidentiality, 96 Geo. L.J. 123, 143 (2007).[22]

22 In this context, the Third Circuit cited, see Kamal, 918 F.3d at 114, a law review article, see Alan B. Vickery, Breach of Confidence: An Emerging Tort, 82 Colum. L. Rev. 1426 (1982). The article traces the tort back to 19th century England and also cites examples of breach of confidence from the first half of the 20th century. See Vickery, Breach of Confidence, 82 Colum. L. Rev. 1426, 1449-50, n.115-126, 1452, 1454 n.146.

The third tort: intrusion upon seclusion. The Third Circuit has held that this is a traditional tort,[23] and the tort traces back to the late 19th and early 20th centuries. See Prosser, Privacy, at 389-90.[24]

23 See Susinno, 862 F.3d at 351-52.

24 As part of delineating the traditional contours of the tort, the Third Circuit cited, see Susinno, 862 F.3d at 351-52, the Restatement (Second). The Restatement (Second), in relevant part, relies on cases that run back to the late 19th century. See Restatement (Second) of Torts § 652B (1977).

***10** The fourth: fraudulent misrepresentation.[25] This tort predates the Founding and was widely recognized (sometimes by another name: deceit) in the United States in the 19th century.[26]

25 See Huber, 84 F.4th at 148.

26 As part of considering whether this tort is traditional, the Third Circuit cited Section 525 of the Restatement (Second). See Huber, 84 F.4th at 154. The Restatement (Second), in relevant part, looks to cases starting from the late 19th century. See Restatement (Second) of Torts § 525 (1977).

The fifth: abuse of process. The Third Circuit has seemed to suggest this is a traditional tort, see Grasso v. Katz, 2023 WL 4615299, at *2 (3d Cir. July 19, 2023), and it dates back to the 19th century. See Jeffrey J. Utermohle, Look What They've Done to My Tort, Ma: The Unfortunate Demise of "Abuse of Process" in Maryland, 32 U. Balt. L. Rev. 1, 6-7 (2002).[27]

27 As part of its analysis, the Third Circuit cited the Handbook of the Law of Torts. See Grasso, 2023 WL 4615299, at *2. The Handbook, in turn, cites cases as old as the 19th century. See 1 William L. Prosser, Handbook of the Law of Torts 892 (1941).

Sixth and finally: unjust enrichment. The Third Circuit has suggested this is traditionally recognized, see Glen v. Trip Advisor, LLC, 2022 WL 3538221, at *2 (3d Cir. Aug. 18, 2022), and proceeding on an unjust enrichment theory was well-established in American courts in the 18th and 19th centuries. See Chapter One, The Intellectual History of Unjust Enrichment, 133 Harv. L. Rev. 2077, 2083-4 (2020).

2. What Can be Taken from the Cases

As set out in the preceding section, the Third Circuit has suggested, to varying degrees, that a number of torts may count as traditional for the Article III standing analysis at issue in this case.

But each of these torts is at least 125 years old, and some are much older than that.

In some contexts, this might well be clarifying. For example, if 125 is old enough, then a tort recognized 250 years ago would plainly seem to be old enough.

But on the Plaintiffs' evidence, unreasonable debt collection is around 70 years old. See Part III.C above. That makes the Third Circuit's decisions hard to lean on here for guidance. That a 125-year-old tort is old enough to be traditional does not, on its own, indicate whether a 70-year-old tort is old enough to count as traditional. And the Third Circuit has not indicated that 125 (or any other "age") sets a minimum threshold of longevity that must be crossed before a tort can be chalked up as traditional. [28]

28 The Supreme Court's cases do not shed more light. They, too, concern torts substantially older than 70. The Court has suggested defamation is traditional. See TransUnion, 141 S. Ct. at 2208-09; Spokeo, 578 U.S. at 341-42, 136 S.Ct. 1540. But defamation is hundreds of years old. See Van Vechten Veeder, The History and Theory of the Law of Defamation, 3 Colum. L. Rev. 546 (1903). The Supreme Court has also suggested intrusion upon seclusion is traditional. See TransUnion, 141 S. Ct. at 2204. But, as noted, that tort dates to the late 19th and early 20th centuries. See Prosser, Privacy, at 389-90. Finally, the Supreme Court has suggested that public disclosure of private facts (also called: unreasonable publicity given to another's private life) is a traditional tort. See TransUnion, 141 S. Ct. at 2204. But that dates to the early 20th century. See Mintz, The Remains of Privacy's Disclosure Tort, 55 Md. L. Rev. 425. In Short: all of these torts are substantially older than 70. Other federal cases are also not clarifying here. Some examples: Farrell v. Blinken, 4 F.4th 124, 133-34 (D.C. Cir. 2021) (discussing a cause of action related to the right to expatriate, and tracing it back to the early 19th century) and Perry v. Newsom, 18 F. 4th 622, 639-640 (9th Cir. 2021) (discussing a cause of action related to breach of contract in the absence of tangible harm, and tracing it back to before the Founding in England and to the early 19th century in the United States).

***11** In short: the tort at issue here is about 70 years old, and the cases decided to this point do not provide a direct and definitive sense of whether a 70-year-old tort counts as traditional. [29]

29 It might be suggested that a tort can be traditional only if it runs back to the Founding. Cf. Buchholz v. Meyer Njus Tanick, PA, 946 F.3d 855, 871 (6th Cir. 2020) (Murphy, J., concurring in part and dissenting in part). But the Supreme Court and Third Circuit have identified torts as traditional that were first articulated after the Founding. Compare, e.g., TransUnion, 141 S. Ct. at 2204 (identifying intrusion upon seclusion as one such tort) and Susinno, 862 F.3d at 351-52 (same) with Prosser, Privacy, at 389-90 (tracing the tort back to the late 19th century).

In the absence of surer guideposts, [30] the Court does not continue the longevity analysis, but rather pauses it.

30 At first glance, another doctrine might be clarifying here. To analyze the separation of powers, the Supreme Court has long looked to the "gloss" of historical practice. See, e.g., N.L.R.B. v. Noel Canning, 573 U.S. 513, 523, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014); McCulloch v. Maryland, 17 U.S. 316, 402, 4 Wheat. 316, 4 L.Ed. 579

(1819); see generally Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 412 (2012) (collecting numerous cases). The "law of Art[icle] III standing is built on a single basic idea --- the idea of separation of powers." TransUnion, 141 S. Ct. at 2203 (cleaned up). This suggests gloss jurisprudence might have a role to play in the standing analysis here --- because, per the Supreme Court, standing is in essence a separation of powers question. If gloss jurisprudence is relevant here, note the Supreme Court has indicated historical practice of much less than 70 years can be relied on for "gloss." See Dames & Moore v. Regan, 453 U.S. 654, 679, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981) (29 years); The Pocket Veto Case, 279 U.S. 655, 689, 49 S.Ct. 463, 73 L.Ed. 894 (1929) (20 years). If 29 years and 20 years are old enough, is a 70-year-old tort old enough? Probably not. One of the Supreme Court's core reasons for turning to historical gloss is acquiescence, see Noel Canning, 573 U.S. at 546-47, 134 S.Ct. 2550, when one of the federal elected branches pursues a course of action that impacts the power of the other, and the latter branch lets it happen. The gloss cases that look to less than 70 years of historical practice are acquiescence cases. See Dames & Moore, 453 U.S. at 684, 101 S.Ct. 2972; The Pocket Veto Case, 279 U.S. at 688-690, 49 S.Ct. 463. And acquiescence may well be why, in those cases, the Supreme Court was willing to reason from a relatively shorter time period. But here, acquiescence is not part of the equation. Neither Congress nor the President has a role when a state court creates a new tort, as Texas did here in 1954. Therefore, it cannot be argued that the federal elected branches somehow acquiesced in the tort. (This said, acquiescence might possibly be relevant when it comes to a federal statute that gives plaintiffs a basis for seeking remedies that would otherwise be for the federal Executive Branch to pursue. Such a statute might be thought of as displacing the Executive's Article II power. See, e.g., TransUnion, 141 S. Ct. at 2207; see also Sierra, 996 F.3d at 1133 (Newsom, J., concurring). Therefore, acquiescence by the federal Executive Branch in such a statute, even perhaps over a relatively tight time period, see Dames & Moore, 453 U.S. at 679, 101 S.Ct. 2972, The Pocket Veto Case, 279 U.S. at 689, 49 S.Ct. 463, could potentially have a role in the standing analysis.)

***12** Whether or not it is old enough, the tort at issue here exists, on the Plaintiffs' evidence, in just one jurisdiction. If a one-jurisdiction tort is not prevalent enough to count as traditional, then there is no need for further consideration of whether a 70-year-old tort is old enough.

B. Prevalence

Can a tort recognized in one state, see Part III.B above, count as traditional? [31] The Court's answer: no.

31 To be called traditional, a practice must reach a certain level of prevalence. This is part of what the term means. See, e.g., Tradition, sense I.1.c, Oxford English Dictionary (2023) ("Any practice or custom which is generally accepted and has been established for some time within a society, social group, etc.") (emphasis added).

This conclusion is based on a Supreme Court decision, see Part III.B.1 below, on the way in which the courts have decided cases in this area, see Part III.B.2 below, and on some more general considerations suggested by the Supreme Court, see Part III.B.3 below. All of this together establishes that for a tort to count as traditional it must be somewhat broadly accepted, not just in a single jurisdiction.

1. Sprint Communications

Start with the Supreme Court's decision in Sprint Communications, Inc. v. APCC Services, Inc., 554 U.S. 269, 128 S.Ct. 2531, 171 L.Ed.2d 424 (2008). The question there: does a plaintiff have Article III standing if they have been assigned a legal claim for the purpose of collecting money for the assignor? See Sprint, 554 U.S. at 271, 128 S.Ct. 2531.

Answering this question, the Supreme Court sought to determine if there is a "tradition specifically of suits by assignees for collection[.]" Sprint, 554 U.S. at 285, 128 S.Ct. 2531. Whether such assignees could sue emerged as a live issue in the 19th century, see id., and the Court looked to that period.

Before taking up the Court's opinion, consider the four-Justice dissent. Among other things, the dissent criticized

the majority's analysis of the "historical tradition of assignments," id. at 305, 128 S.Ct. 2531 (Roberts, C.J., dissenting), because the cited tradition was too "equivocal." Id. at 306, 128 S.Ct. 2531.

> The majority concedes that "some States during this period of time refused to recognize assignee-for-collection suits," but that refusal was substantially more widespread than the majority acknowledges....
>
> The majority's survey of 19th-century judicial practice ... ignores a substantial contrary tradition during this period. That tradition makes clear that state courts did not regularly "entertai[n] suits virtually identical to the litigation before us." In reality, all that the majority's cases show is that the question ... was hotly contested --- a live issue that spawned much litigation and diverse published decisions.

Id. at 309-10, 128 S.Ct. 2531 (cleaned up).

For the dissent, the "unsettled and conflicting state of affairs" it found in the cases, id. at 311, 128 S.Ct. 2531, was not enough to show that collection lawsuits by assignees were the sorts of suits that were "traditionally amenable to the judicial process[.]" Id. at 311, 128 S.Ct. 2531 (cleaned up).

Now put aside the dissent, and consider the Court's opinion.

"[D]uring the 19th century," the Court stated, "most state courts entertained suits virtually identical to the litigation before us: suits by individuals who were assignees for collection only[.]" Id. at 280, 128 S.Ct. 2531. In support of this, the Court analyzed numerous 19th century cases, see id. at 280-81, 128 S.Ct. 2531, and compiled an appendix that listed cases from a large range of jurisdictions. See id. at 292-98, 128 S.Ct. 2531. The Court:

> ***13** Of course, the dissent rightly notes, some States during this period of time refused to recognize assignee-for-collection suits, or otherwise equivocated on the matter. But so many States allowed these suits that by 1876, the distinguished procedure and equity scholar John Norton Pomeroy declared it "settled by a great preponderance of authority, although there is some conflict" that an assignee is "entitled to sue in his own name" whenever the assignment vests "legal title" in the assignee, and notwithstanding "any contemporaneous, collateral agreement by virtue of which he is to receive a part only of the proceeds ... or even is to thus account [to the assignor] for the whole proceeds." [J. Pomeroy,]Remedies and Remedial Rights § 132, p. 159 [1876] (internal quotation marks omitted; emphasis added). Other contemporary scholars reached the same basic conclusion. See, e.g., P. Bliss, A Treatise Upon the Law of Pleading § 51, p. 69 (2d ed. 1887) (stating that "[m]ost of the courts have held that where negotiable paper has been indorsed, or other choses in action have been assigned, it does not concern the defendant for what purpose the transfer has been made" and giving examples of States permitting assignees to bring suit even where they lacked a beneficial interest in the assigned claims (emphasis added)). See also Clark & Hutchins[, The Real Party in Interest, 34 Yale L.J. 259, 264 (1925)] ("[M]any, probably most, American jurisdictions" have held that "an assignee who has no beneficial interest, like an assignee for collection only, may prosecute an action in his own name" (emphasis added)). Even Michael Ferguson's California Law Review Comment --- which the dissent cites as support for its argument about "the divergent practice" among the courts, recognizes that "[a] majority of courts has held that an assignee for collection only is a real party in interest" entitled to bring suit. See Comment, The Real Party in Interest Rule Revitalized: Recognizing Defendant's Interest in the Determination of Proper Parties Plaintiff, 55 Cal. L. Rev. 1452, 1475 (1967) (emphasis added); see also id., at 1476, n. 118 (noting that even "[t]he few courts that have waivered on the question have always ended up in the camp of the majority" (emphasis added)).

Id. at 281-82, 128 S.Ct. 2531 (internal citations omitted).

The back and forth between the dissent and the Court sketched out above is clarifying.

For the dissent, the requisite tradition could not be established because there were 19th century cases on both sides of the question of whether a collection suit by an assignee could go forward. See id. at 309-12, 128 S.Ct. 2531.

The Supreme Court's response was not to suggest that so long as "some" 19th century cases supported a suit by assignees, see id., that was enough.

Rather, the Court worked to show that the "majority" of 19th century cases held that assignee suits could go forward --- and this established that assignee lawsuits were sufficiently traditional for Article III standing purposes. As quoted before:

> Of course, the dissent rightly notes, some States during this period of time refused to recognize assignee-for-collection suits, ... But so many States allowed these suits that [the

practice was deemed] "settled by a great preponderance of authority[.]"

Id. at 281, 128 S.Ct. 2531 (cleaned up).

In short: the Court's response to the dissent was not that "some" cases are adequate to help establish standing; rather, the Court's response was that there were not in fact "some" assignee cases, but a "great preponderance" of them. In turn, this suggests that for the Sprint Communications Court, authority from just "some" jurisdictions was not enough to establish a type of lawsuit as traditional for standing purposes.

This suggestion is buttressed from two different sides. Consider these in the following sections.

2. Method

Note first that as part of assessing whether a tort is traditional for Article III purposes, the Supreme Court and the Third Circuit have consistently relied on particular types of sources.

In TransUnion, see 141 S. Ct. at 2208, and Spokeo, see 578 U.S. at 341-42, 136 S.Ct. 1540, for example, the Supreme Court looked to the Restatement (First) of Torts (1938). Restatements generally aim to "articulate[ ] the reasoned, mainstream, modern consensus" of our law. Scampone v. Highland Park Care Ctr., LLC, 618 Pa. 363, 403, 57 A.3d 582 (2012); cf. Wallach v. Eaton Corp., 837 F.3d 356, 367 (3d Cir. 2016); David Gruning, Pure Economic Loss in American Tort Law: An Unstable Consensus, 54 Am. J. Comp. L. 187, 190 (2006).

Similarly, the Third Circuit has frequently cited in this area the Restatement (Second) of Torts (1977). See Huber, 84 F.4th at 154; In re Nickelodeon Consumer Priv. Litig., 827 F.3d 262, 293 (3d Cir. 2016). The Restatement sections cited by the Third Circuit collect cases from many jurisdictions --- from more than 20 state and territories, see Restatement (Second) of Torts § 525 (1977) (cited in Huber); from more than 35, see id. § 549 (cited in Huber); and from more than 20, see id. § 652B (cited in In re Nickelodeon Consumer Priv. Litig.).

***14** The Third Circuit has also cited Section § 652A of the online version of the Restatement (Second) of Torts. See In re Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 638 (3d Cir. 2017). The current, updated version of § 652A cites cases from more than 35 states and territories. See Restatement (Second) of Torts § 652A (2023) (online version).

A final example: the Third Circuit has looked to the Handbook of the Law of Torts on the tort of abuse of process. See Grasso, 2023 WL 4615299, at *2. The Handbook cites cases from more than thirty states and territories. See 1 William L. Prosser, Handbook of the Law of Torts 892-96.

Bottom line: assessing what is traditional in this context, the Supreme Court and the Third Circuit have looked to sources that largely aim to describe the consensus view of American law as it exists across many jurisdictions. This broad-gauge approach is consistent with a focus on the state of the law in general --- and not just the law as it might exist here and there, in a small set of jurisdictions.

3. "American Courts"

Step back now and consider why, per the Supreme Court, there is a focus on what is traditional in this area.

Standing doctrine is rooted in Article III's invocation of "Cases" and "Controversies." And the Supreme Court has indicated that the meaning of those terms can be understood, to an extent, by looking to the sorts of cases and controversies that "American courts" [32] have, in fact, historically handled.

> [H]istory is particularly relevant to the constitutional standing inquiry since, as we have said elsewhere, Article III's restriction of the judicial power to "Cases" and "Controversies" is properly understood to mean "cases and controversies of the sort traditionally ... resolved by, the judicial process."

Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 774, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (quoting Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)).

> Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm

> that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.

Spokeo, 578 U.S. at 340-41, 136 S.Ct. 1540.

32 For use of this phrase by the Supreme Court in this context, see TransUnion, 141 S. Ct. at 2204, 2206, 2208, 2209, 2210 n.6, 2213, and see Spokeo, 578 U.S. at 341, 136 S.Ct. 1540.

In short: the Supreme Court has (1) focused on what has "traditionally been regarded as ... a basis for a lawsuit" in "American courts," as (2) a way to shed light on what the Constitution means by "Cases" and "Controversies." [33]

33 The Supreme Court's approach may be related to "liquidation," a doctrine recently discussed by the Supreme Court, see Noel Canning, 573 U.S. at 525, 134 S.Ct. 2550, and associated most prominently with James Madison in Federalist Number 37 and Chief Justice Marshall. See generally William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1 (2019).

Take each of these two parts separately.

As to the first: to determine whether a tort ("a basis for a lawsuit") has been "traditionally" established within "American courts," it does not make sense to look to a tort that is established in only a few courts. An "American court[ ]" that alone or virtually alone recognizes a particular tort is not proceeding in a way that is "generally accepted" [34] by the broader body of "American courts." Quite the opposite.

34 Tradition, sense I.1.c, Oxford English Dictionary (2023) ("Any practice or custom which is generally accepted and has been established for some time within a society, social group, etc.") (emphasis added).

***15** As to the second point: the Supreme Court has indicated it assesses what is traditional in this area to help clarify what is included within Article Ill's "Cases" and "Controversies." But why, then, look to torts that are largely off on their own, recognized only in a smattering of jurisdictions here and there? Such torts are by definition obscure. They say something about the types of cases and controversies that have occasionally been "resolved by[ ] the [American] judicial process." Steel Co., 523 U.S. at 102, 118 S.Ct. 1003. But they have little to say about the heartland of what "American courts" have widely (and publicly [35]) been understood to do --- and therefore they do not shed meaningful light on what Article III should be taken to mean when it invokes "Cases" and "Controversies."

35 Cf. Baude, Constitutional Liquidation, 71 Stan. L. Rev. at 18-21.

4. Conclusion: Unreasonable Debt Collection is Not Prevalent Enough

In sum: a tort embraced in only a very small number of jurisdictions does not count as traditional. [36]

36 Cf. Ward v. Nat'l Patient Acct. Servs. Sols., Inc., 9 F.4th 357, 362 (6th Cir. 2021) (conducting a Transunion Article III analysis and describing the relevant tort as "recognized in most states"); Patel v. Facebook, Inc., 932 F.3d 1264, 1272 (9th Cir. 2019) (describing the relevant tort as recognized "in the great majority of the American jurisdictions that have considered the question") (cleaned up); Perry v. Cable News Network, Inc., 854 F.3d 1336, 1341 (11th Cir. 2017) (same).

This is suggested by the back-and-forth between the Court and the dissent in Sprint Communications, see Part IV.B.1; by the way the Supreme Court and the Third Circuit have proceeded in this area, see Part IV.B.2; and by the reason the Supreme Court has said it looks to the traditional practices of "American courts," see Part IV.B.3.

Where does all this leave the Plaintiffs?

They have shown only that the tort of unreasonable debt collection was established by the Texas Supreme Court in 1954. See Part II. But to make their chosen argument [37] work, the Plaintiffs needed to demonstrate the tort is a traditional cause of action in American courts. This required the Plaintiffs to establish, at a minimum, that a meaningful number of courts have recognized the tort. They have, instead, come forward with only one. This is not enough.

37 See footnote 9.

V. Conclusion

On the Plaintiffs' standing argument, the question is whether the tort of unreasonable debt collection is traditional. See Part II. Per the Plaintiffs' evidence, the tort is 70 years old and exists in one jurisdiction. See Part III. Regardless of whether 70 is old enough to count, see Part IV.A, a tort that exists in only one jurisdiction is not prevalent enough to be traditional. See Part IV.B. Accordingly, the Plaintiffs have not carried their burden to establish standing.

The Defendant's motion to dismiss for lack of subject matter jurisdiction will be granted as to the Plaintiffs, by a separate order to issue today.

Appendix A

As to the point in footnote 9, collected here are some references to the Plaintiffs' Opposition to Motion to Dismiss: at 6 ("the common law intentional tort of unreasonable debt collection is closely related to the FDCPA and allows for nominal damages for the invasion of the right to be free from unreasonable debt collection. Therefore, Plaintiff's intangible harm is concrete."); id. at 13 ("The common law analogue here is the tort referred [sic] either as unreasonable debt collection or unreasonable collection methods."); id. ("As an intentional tort, a plaintiff is entitled to nominal damages .... Thus, both the tort and the FDCPA provide a remedy for the invasion of the legally protected interest without proof of a tangible harm."); id. at 15 ("[U]unreasonable debt collection is the common law analogue for Plaintiffs' FDCPA claims and ... is an intentional tort for which a plaintiff may recover nominal damages without any proof of additional harm."); id. ("despite the obvious connection between the intentional tort of unreasonable debt collection and the FDCPA, we have found no decision in which that tort was either raised or addressed as the common law analogue supporting the concreteness of an intangible harm from a debt collector's violation of the Act"); id. ("The intentional tort of unreasonable debt collection, with its allowance for nominal damages in the absence of proof of a tangible harm, establishes that the invasion of a consumer's legally protected interest under the FDCPA is itself a concrete harm."); id. ("The Common Law Analogue: The Intentional Tort of Unreasonable Debt Collection"); id. at 17 ("the Plaintiffs identify the intentional tort known as unreasonable debt collection or unreasonable collection methods."); id. at 18 (introducing supporting cases with "[h]ere are some examples of actionable claims arising from this tort"); id. at 23 (describing the tort); id. at 25 ("Just as the intentional tort of unreasonable debt collection applies to a variety of circumstances ..., the FDCPA applies to the same variety."); id. at 30 ("The right to be free from coercive collection methods is embodied in the common law intentional tort of unreasonable debt collection and in the FDCPA. Both the tort and the FDCPA provide a remedy for the invasion of that right in the form of nominal damages in the absence of actual damages. Therefore, the invasion of the Plaintiffs' rights protected under the FDCPA is concrete after due consideration of Congress's judgment and the common law analogue.").

All Citations

--- F.Supp.3d ----, 2023 WL 8185669