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A PRACTITIONER'S PERSPECTIVE ON EMERGING LEGAL TRENDS

Collect with Caution: Avoiding the Traps of the Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act ("FDCPA" or the "Act"), codified at 15 U.S.C. § 1692, was enacted in order to regulate abusive debt collection practices. However, its constructive intent has resulted in unintended consequences that create exposures for attorneys who may not be conversant with its ramifications. This article focuses on the issues surrounding the Act that are most likely to affect attorneys.

Background of the FDCPA and Lawyers

The FDCPA represents an amorphous collection of prohibitions and requirements that focus on debt collection activities that are likely to mislead or confuse unsophisticated consumers. Attorneys whose practices focus on core debt collection activities, such as sending dunning letters, predominantly fall within the scope of its provisions. Nevertheless, the Act has expanded to encompass substantially broader activity, including representations made in court filings.

While the intent of the original drafters may have been otherwise, the broader application of its provisions has resulted in increased risk for the unwary. As originally enacted, the Act expressly exempted attorneys. However, the exemption was later repealed.[1] While one congressional sponsor of that repeal predicted the change in law should only create liability for extra-judicial conduct such as dunning letters or collection calls—as opposed to core litigation activities like court filings or appearances—the U.S. Supreme Court expressly rejected this limitation in 1995's *Heintz v. Jenkins*,[2] and federal courts have consistently expanded the Act's application to attorneys since. In one recent example that is particularly sobering, the Eleventh Circuit Court of Appeals relied on *Heintz* in *Miljkovic v. Shafritz & Dinkin, P.A.*, 791 F.3d 1291 (11th Cir. 2015), to hold that a defendant could theoretically be liable under the FDCPA for misrepresentations made in a *reply* filed in a garnishment proceeding. This express expansion of the Act's coverage to court filings created a whole new realm of potential liability.

Are You Subject to the Scope of the Act?

The Act only applies to "debt collectors" of *consumer* debts—commercial debts are excluded from its coverage. "Debt collector" is defined as any business whose "principal purpose" is the collection of debts, or any person or entity who "regularly collects or attempts to collect debts."[3] Courts apply common sense constructions to "principal purpose" and "regularly" to hold that law firms which conduct debt collection sporadically rather than regularly, or whose practices are primarily devoted to other matters are not subject to the Act.

For example, *Mertes v. Devitt*, 734 F. Supp. 872 (WD Wis. 1990), held that because debt collection comprised less than one percent of a lawyer's practice, he was excluded from the statutory definition of "debt collector." The Texas Appellate Court in *Catherman v. First State Bank of Smithville*, 796 SW2d 299 (Tex. Ct. App. 1990), relied upon the fact that a firm had conducted consumer collections for only two banks, had five such cases out of a total of 750-1,000 active files, and had handled ten to fiteen consumer debt collection cases in the preceding five years in reaching the same conclusion.

However, a significant zone of uncertainty remains for firms that conduct limited but regular collection activities, and leads to a word of warning regarding the so-called "mini-Miranda" debt collection notice set forth in §1692e(11), which requires collectors to identify that communications are directed to debt collection.[4] While the language is mandated for consumer debt collection efforts, its indiscriminate use in email footers of non-debt collectors may potentially create an issue of fact, precluding summary judgment based on an otherwise viable argument that one is not a debt collector.

1 *See Heintz v. Jenkins*, 514 U.S. 291, 294-295 (1995).
2 *Id.*

3 §1692a(6)
4 §1692e(11) states: "The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action."

Danger Zones for Attorneys Under the Act

The FDCPA prohibits two broad categories of distinct misconduct: namely, conduct that is abusive and deceptive/misleading. It does not meaningfully define "abusive," "deceptive" or "misleading,"[5] but does contain a laundry list of prohibited activities that are collectively quite broad. Many of those activities, such as late night debt collection telephone calls, are not likely to involve attorneys. Rather, some of the most common grounds asserted for attorney liability fall under §1692e, "False or misleading representations," specifically the §1692e(2) prohibition of misrepresenting "the character, amount, or legal status of any debt,"[6] and the §1692e(5) prohibition on "threat[s] to take any action that cannot legally be taken or that is not intended to be taken."[7]

Alleged violations of these sections frequently arise from demand letters to debtors. One common example involves demands for consolidated sums that do not clearly delineate between past and future principal, interest, and attorneys' fees or collection charges.[8]

Courts that have evaluated the issue have frequently found such communications misleading based upon the FDCPA "least sophisticated consumer" standard, which requires that communications be judged from the perspective of a relatively simple layperson rather than a sophisticated attorney. Plaintiffs have invoked this clause in a creative manner. For example, the authors defended a suit based upon a plaintiff's claim that the least sophisticated consumer standard supported her alleged belief that a writ of execution (to levy upon property) was actually a death warrant authorizing Florida Sheriffs to summarily execute her upon sight over an unpaid $10,000 student loan.[9]

The §1692(e)(5) prohibition pertaining to so-called threats to take action the collector either cannot take legally, or does not intend to take, also is frequently applied to demand letters. The same execution case noted above was remanded by the Eleventh Circuit based upon its observation that the collector's failure to actually seize any assets more than a year after the execution was issued gave rise to an inference that he never intended to levy any assets in the first place. Moreover, the writ was issued merely to intimidate the plaintiff. In other circumstances, courts have relied upon collectors' testimony that they rarely or never actually file suit against debtors in order to support summary judgment blocking inferences that a demand letter threatening suit violated §1692(e)(5).[10]

While most circuits seem to agree that the least sophisticated consumer standard does not apply to §1692(e)(5) since it turns on the collector's subjective intent or black letter law rather than the debtor's perception, its prohibition of threats to take illegal action results in significant complications. While the statutory scheme is federal, the question of whether a particular action is or is not legal is frequently a matter of state law. Thus, the same action may violate the FDCPA if taken in one state, but not if the activity is undertaken in a different state. One common example of this dichotomy is seen in the context of violations based upon attempts to charge a debtor for attorneys' fees incurred in pursuing the debt. Notably, the permissibility of this practice varies from state to state. Seeking such fees, therefore, *does not* constitute a violation in a state that permits the practice, but conversely *is* a violation in jurisdictions that impose a prohibition on this activity.[11]

Questions about the legality of a given course of action are also affected by the language of promissory notes or other borrowing contracts. In *Prescott v. Seterus, Inc.*, 635 Fed. Appx. 640, 645 (11th Cir. 2015), the Eleventh Circuit held that a collection agency violated the FDCPA by including estimated future legal fees as part of a payoff package. Although the communication clearly indicated that the fees had yet to be earned and thus did not violate the prohibition on misrepresentations, the Court ruled that the parties' contract permitted the debtor to be charged solely for previously incurred fees. The request for future fees, therefore, violated the Act by creating the impression that the creditor was allowed to recover additional costs for which there was no contractual predicate. These variables require an attorney evaluating FDCPA authority to identify any unique state or contractual components of a decision to determine the scope of its applicability to other jurisdictions and circumstances.

5 Definitions at §1692a.
6 §1692e(2).
7 §1692e(2). While §1692c(c) prohibits communications with debtors represented by counsel, it is largely superfluous for attorneys who are independently barred from such contact by relevant ethical rules.
8 See *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872, 875 (7th Cir.2000) (holding that debt collector must "state the total amount due—interest and other charges as well as the principal"; and creating a "safe harbor" formula in which the accrual of interest is specifically addressed); See *Marucci v. Cawley & Bergmann, LLP*, 66 F. Supp. 3d 559, 565 (D.N.J. 2014) for a thorough stringcite of related issues. *See also Jones v. Midland Funding, LLC*, 3:08-CV-802 RNC, 2012 WL 1204716, at *1 (D. Conn. Apr. 11, 2012) ("This case presents a recurring issue . . . on which courts are divided: whether a debt collector's "validation notice" to a consumer fails to correctly state "the amount of the debt" as required by the Act unless it discloses that the debt is accruing interest.").
9 This action causing her to run over and unfortunately kill her parents' cat, leading to a somewhat surreal footnote stating, "Newman's argument that Ormond was the proximate cause of the death of her family cat is relevant only to the issue of damages, [which is not ripe for appeal]." *Newman v. Ormond*, 396 Fed. Appx. 636, 641 (11th Cir. 2010).
10 *See Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1177 (11th Cir. 1985).
11 *See Shapiro v. Riddle & Associates*, P.C., 351 F.3d 63 (2nd Cir., 2003) (holding that debt collector does not violate FDCPA by seeking to collect attorneys' fees if fees are permitted under state law) *but see Barany-Snyder v. Weiner*, 539 F.3d 327 (6th Cir. 2004) (holding that debt collector does violate FDCPA by seeking to collect attorneys' fees if fees are not permitted under state law).

The Act not only prohibits, but also requires certain activities. However, it is worth noting that the authors have seen far fewer FDCPA lawsuits against attorneys for failure to take some required action than lawsuits arising from allegedly confusing demand letters. One example is the "mini-Miranda" warning at §1692e(11) which requires a collector to identify certain collection communications as coming from a debt collector and a warning that any information the collector gathers will be used in the collection of that debt.

Another provision, §1692g, entitled "validation of debts," sets forth certain information a debt collector is required to disclose either in its initial communication or within five days thereafter. This information includes the amount of the debt, the creditor to whom it is owed, as well as basic instructions for notifying the creditor in the event the debt is disputed. While the authors have not been involved in any litigation against attorneys for violation of the §1692g validation notice requirement, this provision is litigated frequently against non-lawyers. If you handle any significant volume of debt collection and are not conversant with the FDCPA, a review of the §1692g requirements is recommended.

Interestingly, a significant number of circuit courts are divided on the question of whether communications with a debtor's attorney, as opposed to direct communications with the debtor, are exempt from the scope of the Act.

Are Communications with Debtors' Attorneys Subject to the Act?

Interestingly, a significant number of circuit courts are divided on the question of whether communications with a debtor's attorney, as opposed to direct communications with the debtor, are exempt from the scope of the Act. The courts that exclude these communications from the scope of the Act utilize the rationale that a debtor with counsel will be protected by a sophisticated attorney, rather than through the FDCPA. The jurisdictions that have reached the opposite conclusion strictly construe the statutory text, which does not contain an express provision exempting or modifying the scope of the Act for attorney-to-attorney communications, except as noted below. To complicate matters further, at least one circuit court applies a "reasonably competent attorney" standard to communications with attorneys, rather than the "least sophisticated consumer" standard described above."[12]

The question of whether communications with attorneys fall within the scope of the Act overlaps with the related but separate question of whether the Act applies to court filings on the latter issue; the trend appears to be affirmative. As noted earlier, the *Heintz* and *Miljkovic* cases authorize FDCPA claims based upon representations made in *court filings.* The *Miljkovic* court, relying on *Heintz*, explained:

> If Congress had intended to exempt all litigating activities or any one litigating activity from the Act's other provisions, "it presumably would have done so expressly," as it did in §1692e(11). . . . Instead, Congress has effectively instructed that *all* litigating activities of debt-collecting attorneys are subject to the FDCPA, except to the limited extent formal pleadings are exempt under §1692e(11).[13]

Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1299 (11th Cir. 2015).

12 **2nd Circuit:** Undecided but leaning toward not actionable–*Kropelnicki v. Siegel*, 290 F.3d 118, 127 (2d Cir. 2002).
3rd Circuit: Actionable–*Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 (3d Cir. 2011).
4th Circuit: Actionable (and includes court filings)–*Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007).
7th Circuit: Actionable with modified "reasonably competent attorney" standard–*Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769 (7th Cir. 2007).
8th Circuit: addressed but undecided–*Richmond v. Higgins*, 435 F.3d 825, 828 (8th Cir. 2006).
9th Circuit: Not actionable. *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 936 (9th Cir. 2007).
11th Circuit: Actionable and includes court filings–*Miljkovic v. Shafritz & Dinkin, P.A.*, 791 F.3d 1291 (11th Cir. 2015) Representations made by an attorney in court filings during the course of debt-collection litigation were actionable under the FDCPA, absent a statutory exception, even if "directed to" the debtor's attorney.

13 Section 1692e(11) does not require "formal pleadings" to contain the mini-Miranda debt collection warning required of other less formal "communications."

Bona Fide Error Defense

The FDCPA also recognizes a "bona fide error" defense. This defense does not extend to misinterpretations of the law,[14] however, and its application is primarily restricted to factual mistakes and mathematical miscalculations.[15]

FDCPA Damages

Recoverable damages in most FDCPA cases tend to be *de minimis*. While the Act permits statutory damages of up to $1,000, a plaintiff is essentially limited to one $1,000 recovery against each defendant regardless of how many violations were committed by the defendant.[16] The Act also permits a plaintiff to recover "actual damages" which have been described as arising from personal humiliation, embarrassment, mental anguish, emotional distress, and "out-of-pocket expenses."[17] Some courts have also ruled that actual damages include payments collected from debtors as a result of FDCPA violations.[18] However, the majority of courts appear to distinguish between valid and invalid debts, by limiting actual damages (in this context) to debts or fees the debtor never legally owed.[19] In other words, if FDCPA violations result in a consumer paying debts he did not owe, then those payments are recoverable as actual damages in an FDCPA case. If the consumer *did* owe the money, then his payments should not be characterized as actual damages.

Finally, the statutory cap reflects a maximum potential award. Courts are permitted to, and often will, award less than the damage limitation. Thus, courts exercise significant discretion in this area. For example, in *Elmore v. Ne. Florida Credit Bureau, Inc.*, 3:10-CV-573-J-37JBT, 2011 WL 4480419 (M.D. Fla. 2011) the court awarded only $200 although the plaintiff requested (and was theoretically entitled to) $2,000.

14 *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010).

15 *Id.* (A *bona fide* error defense does not apply to violation of FDCPA "resulting from a debt collector's incorrect interpretation of legal requirements of the Act.").

16 Some courts have incorrectly observed that the FDCPA limits the total recovery of additional damages to $1,000 per plaintiff. Nevertheless, the text of the Act does not support that limitation, as observed in *Overcash v. United Abstract Group, Inc.*, 549 F. Supp. 2d 193, 196-97 (N.D.N.Y. 2008), the $1,000 limit "is cast not in terms of the plaintiff's recovery, but in terms of the *defendant's liability. Thus, in the case of multiple defendants, each may be liable* for additional damages of up to $1,000." *Id.* (emphasis added)."

17 *Davis v. Creditors Interchange Receivable Mgmt., LLC*, 585 F. Supp. 2d 968, 971 (N.D. Ohio 2008) (observing that The FTC Commentary to the FDCPA states that these "actual damages" emanating from FDCPA violations include "damages for personal humiliation, embarrassment, mental anguish, or emotional distress" as well as "out-of-pocket expenses.").

18 *Hamid v. Stock & Grimes*, LLP, 876 F. Supp. 2d 500, 503 (E.D. Pa. 2012) (characterizing payments to debtor as actual damages and observing "It is clear from its underlying purpose that debtors may recover for violations of the FDCPA even if they have defaulted on a debt. It follows that debtors may recover the amount paid to settle a debt, if the debt collector violated the FDCPA in making the collection, as occurred here.").

19 *See Moritz v. Daniel N. Gordon, P.C.*, 895 F. Supp. 2d 1097, 1117 (W.D. Wash. 2012) (distinguishing Hamid, supra and observing that the majority position appears to be that "[P]laintiffs are not injured in the amount collected when the plaintiff owed the debt even where the debt collector violated state law in doing so.").

FDCPA Class Actions and Damages

FDCPA claims are well suited to class actions[20]. A plaintiff's attorney who learns of a single violative dunning letter will frequently investigate whether the same type of letter was sent to other similarly situated debtors (e.g., the residents of the same condominium, or customers of a particular business) and attempt to certify these parties as a class. In this example, if class certification is granted —whether through settlement or through adversarial motion practice—it is because the FDCPA plaintiffs share a common claim and, by extension, a common injury. If, however, the putative class is comprised of individuals with unique or differing damages or extreme variations in the collection activity—a relatively rare occurrence given the structure of the Act—class certification would be inappropriate due to the lack of commonality and typicality.

Class action damages are calculated differently than individual damages under the Act. While the named plaintiff is entitled to recover his typical statutory damages, the remainder of the class must divide either $500,000 or one percent of the net worth of the defendant, whichever is smaller.[21] As is the case with individual statutory damages, the Court is not obligated to award the full amount.

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20 *See Morris v. Risk Mgmt. Alternatives, Inc.*, 203 F.R.D. 336, 345 (N.D. Ill. 2001) ("[A] class action is well-suited to the FDCPA context. *Crawford v. Equifax Payment Servs., Inc.* 201 F.3d 877, 880 (7th Cir.2000) (noting in FDCPA case that "[b]ecause these are small-stakes cases, a class suit is the best, and perhaps the only, way to proceed").

21 1692k(a)(2)(B).

Conclusion/FDCPA Danger Zones

Attorneys who frequently engage in debt collection obviously are most concerned about the ramifications of the Act. For those attorneys, this brief article represents only general information of what they should know to engage in debt collection activities without creating unintended exposures to themselves and their clients. Nevertheless, certain conduct seems to carry the most risk of triggering FDCPA lawsuits. Consequently, anyone who assumes a role as a debt collector should be able to avoid and significantly reduce their exposure to FDCPA claims by recognizing the following signals:

- Dunning letters that do not clearly differentiate between principal, interest, and attorneys' fees, and that fail to identify whether interest continues to accrue at the time of the letter[22]
- Payoff calculations that include calculations for prospective but unearned fees or interest, regardless of how clearly they are described[23]
- Idle threats to sue[24]
- Deceptive descriptions of available remedies against debtors[25]
- Debt collection court filings
- Communications directly to a represented debtor[26]
- Continuing to correspond with consumer following a cease contact notification[27]
- Directing collection communications to anyone but the debtor, his/her attorney, or collection agencies[28]
- Court filings which misrepresent the quantity or legal status of a debt[29]
- Checking promissory notes and local law to determine whether arguable "threats" in a demand letter can actually be made in that jurisdiction legally

22 *See discussion supra.*
23 *Prescott v. Seterus, Inc.*, 635 Fed. Appx. 640, 645 (11th Cir. 2015).
24 *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1177 (11th Cir. 1985).
25 *Lox v. CDA, Ltd.*, 689 F.3d 818 (7th Cir. 2012) (Statement to debtor in debt collector's dunning letter, that "court could allow ... attorney fees," when underlying service agreement did not provide for award of attorney fees in event of nonpayment, was misleading on its face, constituting per se violation of §1692e.
26 §1692(c)(A)(2).
27 §1692c(c).
28 §1692(b).
29 *Miljkovic v. Shafritz & Dinkin*, P.A., 791 F.3d 1291 (11th Cir. 2015).

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