Consumers vs. Debt Collectors

By Dana Karni*

Consumer Rights Under the Fair Debt Collection Practices Act

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Introduction

In recent months, there has been no shortage of reporting that the nation's financial institutions have taken a hit. With all the talk about bailouts, recession and unemployment, at the end of the day it comes as no surprise that consumers have been hit hard, too. On average, American families are straddled with over $8,000 in debt stemming from credit cards alone.[1] According to the Federal Reserve, the total amount of consumer debt in the United States reached $2.56 trillion at the end of 2008.[2] Last summer, the National Association of Attorneys General released its report of top ten consumer complaints, listing abusive debt collection as the number one complaint nationwide for 2008.[3]

The Federal Trade Commission, one of several agencies to track consumer complaints, cites that it "receive more complaints about the debt collection industry than any other specific industry."[4] With over 78,000 complaints, debt collection complaints represented 18.9% of all complaints received by the FTC in 2008.[5] While the attorneys general and the federal trade commission have taken legal action against abusive debt collectors, the vast majority of cases are brought by individuals suing under the Fair Debt Collection Practices Act.[6]

Obvious debt collection violations stem from abusive communications, whether through collection calls or dunning letters. With few exceptions, collectors are prohibited from communicating with a third party regarding a consumer's debt[7] or continuing collection efforts on a disputed debt.[8] Bill collectors are strictly prohibited from using profanity,[9] calling consumers in the middle of the night,[10] or threatening wage garnishment.[11]

Congressional Findings

In promulgating the FDCPA, Congress found "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors."[12] Congress also found that abusive "collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs and to invasions of individual privacy."[13] The number of consumer bankruptcies topping one million filings in the first nine months of 2009, is synchronous with the growing percentage of abusive debt collection claims.[14]

FDCPA Threshold Requirement: What qualifies as a "debt?"

One stated purpose of the FDCPA is the elimination of abusive debt collection. The statute largely limits potential claims in its definitions of "debt" and "debt collector." The Act only applies to consumer debt, specifically debt obligations arising out of transactions for personal, household or family purposes.[15] The Act's definition of "debt" and supporting case law clearly exclude commercial debt. Not uncommon is the debt arising out of a defaulted credit or charge card used for both personal and business purchases. The determination of whether such a mixed-purpose obligation is consumer or commercial in nature may result in a jury question.[16] A number of obligations seemingly obviously stemming from personal, family or household purposes have been excluded from the definition of "debt." At least one federal district court in Texas held that child support payments are not "debts" covered by the Act.[17] Similarly, criminal fines are excluded and not subject to the FDCPA.[18]

"Debt Collector" defined

Even if an obligation falls under the rubric of "debt," with few exceptions, the Act only protects consumers against violations by third-party debt collectors.[19]

The term "debt collector" means any person who uses any instrumentality of interstate commerce of the mails in any business the principal purpose of which is the collection if any debts, or who regularly collects or attempt to collect, directly or indirectly, debt owed ro due or asserted to be owed or due another.[20]

At least two types of collectors have been scrutinized in case law to determine their status as "debt collectors." With a growing number of debt being sold from one buyer to the next, a common argument is that a debt buyer assumes the status of creditor, thereby excluding itself from coverage under the FDCPA. A number of courts have ruled that it is immaterial whether the defendant-collector owns the account they are attempting to collect. Rather, courts must look at "whether a debt was in default when acquired to determine the status of 'creditor' vs. 'debt collector.'" [21]

To the extent that attorneys collecting debt were attempting to avoid liability under the FDCPA, the Act was amended in 1986 to include attorneys.[22] Presently, an attorney who regularly collects consumer debts is subject to the Act. In 1995, the United States Supreme Court reinforced and expanded coverage of attorneys as "debt collectors" under the FDCPA. In *Heintz v. Jenkins*, the Court ruled that Act applies to lawyers engaged in debt collection litigation.[23] "In ordinary English, a lawyer who regularly tried to obtain payment of consumer debts through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts."[24]

Ramifications for attorney debt collectors: The Fifth Circuit issues words of caution

Frequently, debt collectors - and debt buyers in particular, will retain a collection firm to communicate with consumers. While attorneys are subject to all of the FDCPA's provisions, certain sections of the Act will more readily apply to an attorney than any other debt collector.

Developing case law further limits actions by lawyers collecting consumer debt. An attorney may not misrepresent or exaggerate his involvement in the collection of a debt.[25] Applicable to

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any debt collector, the FDCPA prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."[26] Specifically dealing with attorney involvement, the FDCPA prohibits "[t]he false representation or implication that any individual is an attorney or that any communication is from an attorney."[27] Consistent with other courts, the Fifth Circuit ruled that collection letters purportedly signed by an attorney who was not actually involved in a case violate the FDCPA.[28] Indeed, many collection firms now add a disclaimer suggesting that no attorney has personally reviewed a particular letter or file, in an effort to shield themselves from liability under the Act.

The Fifth Circuit recently reversed and remanded a 12(b)(6) ruling in a case involving a collection letter sent out by a law firm.[29] In *Gonzalez v. Kay*, the Kay Law Firm sent out an unsigned letter on the firm's letterhead in its attempt to collect a consumer debt. Gonzalez asserted that operative disclosures that the letter was from a "debt collector" and that "[n]o attorney with [the] firm has personally reviewed the particular circumstances of [the] account," were not conspicuous, and that as a result, the letter was deceptive. In fact, the disclosures were printed on the back of the letter, in the "legalese," as referred to by the court. The court found that the disclaimers on the back "completely contradicted the message on the front" that the Kay Law Firm had been retained to collect the debt. The Fifth Circuit went so far as to "caution lawyers who send debt collection letters to state clearly, prominently and conspicuously that although the letter is from a lawyer, the lawyer is acting solely as a debt collector and not in any legal capacity when sending the letter."[30]

Bona Fide Error Defense

The FDCPA contains an affirmative defense provision which states that a debt collector will not be held liable for violations that are "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."[31] Where the bona fide error cited by a defendant debt collector is the result of some clerical error, courts have sustained the defense.[32]

Another aspect of the bona fide error defense, asserting mistakes of law has been emerging in FDCPA cases. The issue of whether a debt collector can defend itself by citing ignorance of the law was recently decided by the United States Supreme Court in *Jerman v. Carlisle*.[33] In *Jerman*, the debt collector law firm's validation notice to a consumer improperly required the consumer to dispute the debt in writing. The Sixth Circuit affirmed the district court, granting the defendant's motion for summary judgment and finding that the bona fide error defense shielded the collector from liability. The Supreme Court reversed and rejected the argument that bona fide errors cover would encompass "'all types of errors,' including mistakes of law."[34]

Conclusion

With collection abuse on the rise, FDCPA litigation is increasing nationwide. Attorneys involved in consumer debt collection matters, whether handling collection itself, or pursuing consumer rights against rogue collectors, are sure to see continued developments through case law. Changes in Washington are also likely to impact consumer rights' legislation, including the Fair Debt Collection Practices Act.

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1. *See* http://www.creditcards.com/credit-card-news/credit-card-industry-facts-personal-debt-statistics-1276.php *citing* Nielson Report, April 2009.
2. Federal Reserve's G.19 report, February 2009.
3.http://www.naag.org/top-10-list-of-consumer-complaints-for-2008-aug.-31-2009.php
4. Annual Report 2009: Fair Debt Collection Practices Act, at page 4.
5. *Id.* Because the FTC considers FDCPA complaints as those dealing with third-party collection agencies only, the report also cites over 104,000 collection complaints when combining both third-party bill collectors and in-house collections for 2008.
6. *See e.g., In the Matter of State of Texas and NCO Financial Systems, Inc.*, Cause No. 08-14928 in the 193rd Judicial District Court, Dallas County, Texas (alleging *inter alia* that NCO made harassing calls to Texas consumers, failed to verify debts were owed, and threatened to report debts over 7 years old to credit reporting agencies); *United States v. LTD Financial Services*, Cause No. 4:07-cv-3741in the United States District Court for the Southern District of Texas (alleging the Texas defendant threatened wage garnishment and criminal actions against consumers, resulting in a civil penalty judgment of $1,375 million).
7. 15 U.S.C. § 1692c.
8. 15 U.S.C. § 1692g(b).
9. 15 U.S.C. § 1692d(2).
10. 15 U.S.C. § 1692c(a)(2).
11. 15 U.S.C. § 1692e(4). The FDCPA does not specifically prohibit threat of wage garnishment, rather Section 1692e(4) prohibits "[t]he representation or implication that nonpayment of any debt will result in ... garnishment, attachment or sale of any property or wages of any person unless such action is lawful..." *Id.*
12. FDCPA, 15 U.S.C. § 1692(a).
13. *Id.*

14. Consumer Bankruptcy Filings Surge Past One Million During First Nine Months of 2009, October 2, 2009, American Bankruptcy Institute. *See*__http://www.abiworld.org/AM/Template.cfm?Section=Home&CONTENTID=58852&TEMPLATE=/CM/ContentDisplay.cfm
15. 15 U.S.C. § 1692a(5).
16. *Moss v. Cavalry Inv., LLC*, 2004 WL 2106523 (N.D. Tex. 2004).
17. *Campbell v. Baldwin*, 90 F. Supp. 2d 754 (E.D. Tex. 2000).
18. *U.S. v. Phillips*, 2004 WL 2368237 (5th Cir. 2004) (unpublished).
19. 15 U.S.C. § 1692a(6). Remedies are available against original creditors under the Texas Debt Collection Act, codified in the Finance Code. Tex. Fin. Code § 392.001 *et. seq.*
20. *Id*.
21. *Federal Trade Comm'n. V. Check Investors, Inc.*, 502 F.3d 159, 168-169 (3rd Cir. 2007). See also *McKinney v. Cadleway Props., Inc.*, 548 F.3d 496 (7th Cir. 2008) (holding that a debt buyer is a "debt collector" as defined since the account was in default when the debt buyer purchased it.)
22. Pub. L. No. 99-361, 100 Stat. 768 (effective July 9, 1986).
23. 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995).
24. *Id*.
25. 15 U.S.C. § 1692e(3) and (10).
26. 15 U.S.C. § 1692e(10).
27. 15 U.S.C. § 1692e(3).
28. *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1237 (5th Cir. 1997).
29. *Gonzalez v. Kay* 2009 WL 2357015 (5th Cir. Aug. 3, 2009).
30. *Id*.
31. 15 U.S.C. § 1692k(c).
32. See *Wilhelm v. Credico, Inc.,* 426 F. Supp. 2d 1030 (D.N.D. 2006) (bona fide error defense sustained where debt collector showed it mistakenly entered principal and interest); *Goodman v. Southern Credit Recovery, Inc.*, 1999 WL 14004 (E.D. La. Jan. 8, 1999) (sending a collection letter using an envelope with the wrong mailing address was a bona fide error).
33. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 559 U.S. ____ (2010) (decided April 21, 2010).
34. *Id.* Slip. op. at 9.