Professional Liability Defense
QUARTERLY

Dabbling in Debt Collection: Is Your Law Firm Unwittingly Acting as a "Debt Collector" Under the Fair Debt Collection Practices Act?

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Federal courts have noted the "cottage industry" of litigation—often nothing more than a "glorified game of gotcha"—that has sprung up around the Fair Debt Collection Practices Act ("FDCPA") in jurisdictions across the country. *Barclift v. Keystone Credit Servs., LLC*, 585 F.Supp.3d 748, 755-56 (E.D. Pa. 2022) (internal quotations omitted and citing *In re FDCPA Mailing Vendor Cases*, 551 F.Supp.3d 57, 61 (E.D.N.Y. 2021)). Indeed, consumer attorneys filed more than 4,500 FDCPA lawsuits last year. https://webrecon.com/webrecon-stats-dec-22-year-in-review/. As well, the Consumer Financial Protection Bureau fielded more than 60,000 consumer complaints about first- and third-party debt collectors in 2022. *Id*.

Though these numbers surprisingly represent a recent *downward* trend, economic pundits have been warning us to brace ourselves for the impact of an incoming financial downturn for some time now. *Id*. No soothsayer is needed to conclude that, if those predictions become reality, consumers facing the economic pressures attendant to recession will be more apt to commence suit under statutes like the FDCPA as a means to ward off the collection efforts of their creditors.

Add to this brewing storm a slew of recent decisions that, pursuant to Article III of the United States Constitution, would-be FDCPA litigants must allege—and later *prove*—a "concrete" injury-in-fact in order to seek redress in federal court. *See, e.g., Casillas v. Madison Avenue Associates, Inc.*, 926 F.3d 329 (7th Cir. 2019); *Larkin v. Fin. Sys. of Green Bay, Inc.*, 982 F.3d 1060 (7th Cir. 2020); *Spuhler v. State Collection Serv., Inc.*, 983 F.3d 282 (7th Cir. 2020). In other words, an averment that "your collection letter stressed me out" no longer is enough "harm" to open the federal courthouse doors to a putative FDCPA plaintiff.

The potency of these variables becomes apparent when they are considered together. First, we are already dealing with thousands of FDCPA claims filed each year. Second, economic forecasts indicate that conditions will be ripe for an *increased* number of FDCPA filings in the coming months (perhaps even years). Third, following the wave of "no standing" decisions in FDCPA cases, the plaintiffs' bar is on the lookout for claims involving actual consumer "harm" in order to avoid being booted out of federal court.

What collection efforts might give rise to "concrete injury," you ask? How about claimed "injuries" arising from legal proceedings or post-judgment collection efforts. You know, the kinds of things lawyers routinely do in attempting to make their clients whole in court in breach-of-contract and other "collection adjacent" litigation.

Regardless of the economic climate and the existence (or not) of some cognizable "injury" to the consumer, the fact is that the mere involvement of an attorney in the collection process automatically puts most consumers on the defensive. As one court noted, a "consumer, getting a letter from an 'attorney,' knows the price of poker has just gone up. And that clearly is the reason why the dunning campaign escalates from the collection agency, which might not strike fear in the heart of the consumer, to the attorney, who is better positioned to get the debtor's knees knocking." *Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996).

And that's precisely why this issue matters for PLDF members (and their attorney clients as well). An "upped ante" from the consumer's perspective means the lawyer's own risk of exposure is also "upped." Put bluntly, this dynamic makes an attorney attempting to collect a consumer debt a target for legal action under the FDCPA. Most insidiously, that exposure—i.e., up to $1,000 in statutory damages, plus actual damages, *plus* reasonable attorneys' fees and costs to a prevailing plaintiff's counsel (almost always the highest figure in this equation) —can manifest without the attorney even realizing they're engaged in consumer debt collection. 15 U.S.C. § 1692k(a).

So, counsel, is your firm engaged in consumer debt collection? Let's find out (and what you can do to mitigate risk if you are).

It's the "Principal" of the Thing (or Even Just "Regular" Collection of Consumer Debts)

Happily, the FDCPA only applies to "debt collectors" collecting consumer "debts" that are in default at the time of placement or retention. A consumer "debt" is "any obligation … to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes …." 15 U.S.C. § 1692a(5). Broad, yes, but sufficiently detailed to allow a reasonable determination whether a particular financial obligation falls within the statutory scheme.

The debt collector requirement is trickier. It includes (1) anyone in "any business the <u>principal purpose</u> of which is the collection of any debts … owed or due or asserted to be owed or due another," <u>or</u> (2) anyone "who <u>regularly</u> collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6) (emphasis added).

It's a fairly easy call to say that a collection agency specializing in the collection of, say, defaulted retail credit card accounts has both a "principal purpose" of, and is "regularly" engaged in, collecting consumer debt.

But consider a three-person law firm where one partner focuses exclusively on professional liability defense, a second has a robust trusts-and-estates practice, and a third represents a number of small-to-medium-sized businesses with all of their litigation needs, including the occasional lawsuit to collect defaulted accounts receivable arising from "personal, family, or household" financial obligations. Perhaps the firm's "principal purpose" is not consumer debt collection, but is the third partner's "from-time-to-time" handling of consumer collection lawsuits "regular" enough to make them and their firm a "debt collector" subject to the FDCPA?

Courts have grappled with this issue, and it usually requires a developed fact record to determine, but here are some factors courts have used to guide the analysis:

(1) the absolute number of debt collection communications issued, and/or collection-related litigation matters pursued, over the relevant period(s),
(2) the frequency of such communications and/or litigation activity, including whether any patterns of such activity are discernable,
(3) whether the entity has personnel specifically assigned to work on debt collection activity,
(4) whether the entity has systems or contractors in place to facilitate such activity, and whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the lawyer or firm to assist in the collection of outstanding consumer debt obligations.

Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 62–63 (2d Cir. 2004) (citation marks omitted and re-formatted).

An additional factor is the role debt collection work plays in the firm's practice as a whole. *Id*. at 63. But be careful—the stats potentially cut either way: "debt collection constituting 1% of the overall work or revenues of a very large entity may, for instance, suggest regularity, whereas such work constituting 1% of an individual lawyer's practice might not." *Id*.

In short, this is a fact-dependent inquiry that your firm should undertake at the front end (rather than waiting to sort it out while defending a FDCPA claim) based on the unique circumstances of the firm's overall structure and practice areas.

Collecting Consumer Debt Versus Enforcing a Security Interest

The Supreme Court recently confirmed that "security interest enforcers" are not subject to the FDCPA's full coverage. In *Obduskey v. McCarthy & Holthus LLP*, the Supreme Court held that, with the exception of § 1692f(6) (which prohibits a debt collector from taking or threatening to take an action on the collateral without a present right of possession), the FDCPA's strictures simply do not apply to those merely enforcing the creditor's security interest in property, like the non-judicial foreclosure of a home mortgage. *Obduskey v. McCarthy & Holthus LLP*, 203 L. Ed. 2d 390, 139 S. Ct. 1029, 1036–37 (2019). Though the FDCPA does not define "security interest," the concept generally encompasses a "property interest created by agreement or by operation of law to secure performance of an obligation." SECURITY INTEREST, Black's Law Dictionary (11th ed. 2019).

And therein lies the key distinction: enforcing the creditor's right to property securing the consumer's obligation to pay (e.g., repossessing a car), rather than taking measures to involuntarily force payment (e.g., bank or wage garnishment on a judgment). Understanding whether your firm is engaged in consumer debt collection (subject to the complete FDCPA) versus enforcement of a creditor client's security interest in property held by the consumer (subject to § 1692f(6) only), is critical to charting a compliant course for your firm under the Act.

Additional Risk Mitigation Considerations

The first consideration is the most important (and now review material for you since you've made it this far in the article): is your firm a debt collector? At a high level, the three questions to be answered are (1) do we do any collection work for our clients; (2) if so, is it "consumer debt" (personal, family, or household purposes) in default; <u>and</u> (3) do we do enough of it such that we "regularly" attempt to collect (or it is somehow the firm's "principal purpose")?

As discussed above, the first two questions are *mostly* straightforward. The third, however, can be more complicated. Nonetheless, it is critical that your firm figure out the answer because hanging your defense hat on "not-regular-enough-to-be-a-collector," and proving it on summary judgment or at trial, is likely to cost far more money and employee resources than establishing compliance protocols that avoid the suit in the first instances. (Ounce of prevention, pound of cure … you're lawyers—you know the drill!)

If the Act *does* apply to your firm, no more dabbling. It's time to commit 100% to compliance. The first step is to put someone in charge of managing your firm's processes. That should be a competent attorney within your firm (potentially assisted by outside counsel or other external resources) who acts as the "point person" in making decisions about the "do's and don'ts" of your collection practice and training firm employees accordingly.

If you've guessed that the "appoint-a-point-person" talk was a lead-in to a discussion about compliance policies and procedures, you're absolutely correct. But first, it's time to dig not only into the text of the FDCPA (and the decades of case law it has produced), but also the Consumer Financial Protection Bureau's debt collection rule, Regulation F, which implements the Act. 12 C.F.R. § 1006 *et seq*.; *see also* https://www.consumerfinance.gov/rules-policy/final-rules/debt-collection-practices-regulation-f/ (last accessed February 1, 2023).

The regulation is complex and lengthy and imposes significant additional requirements on debt collectors that did not exist 18 months ago. So, start your FDCPA compliance and risk management journey with the Bureau's "Debt Collection Rule Small Entity Compliance Guide," which takes the 600-plus pages of the actual regulation and condenses it into an "easily digestible" 116-page summary. https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_small-entity-compliance-guide.pdf (last accessed Feb. 1, 2023). Seriously, it's an excellent "crash course" resource and the place to start.

Now, about those policies and procedures. Generally speaking, the debt collector's intent is irrelevant to the determination of whether the FDCPA has been violated. But Congress included an important defensive "safety valve" in the Act: the *bona fide* error defense. 15 U.S.C. § 1692k(c). To wit, "[a] debt collector may not be held liable … if the debt collector shows by a preponderance of the evidence that the violation was **not intentional** and resulted from a **bona fide error** notwithstanding the maintenance of **procedures reasonably adapted to avoid any such error**." *Id*. (emphasis added)

Simply put, if the debt collector has reasonable policies and procedures in place—i.e., written down, actually trained, and actually followed—to avoid the issue giving rise to the FDCPA claim, that's potentially a complete defense. To be sure, implementing policies and procedures governing your firm's adherence to the FDCPA's many nuanced requirements serves this legal purpose. But putting the firm's expectations and protocols in writing and training them also serves a practical purpose: avoiding the lawsuit in the first place.

In sum, the FDCPA waters are choppy and deep, but they are navigable. The first step is recognizing that your practice is subject to the Act. From there, reading up on recent regulatory changes and activating intentional and mindful compliance protocols is the entire game.

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