

## 2<sup>nd</sup> Circuit Orders Discovery On Debt Collection Practices

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Lawyers who commit all or a substantial part of their law practice to debt collection for clients with a stream of customer claims should be careful to study and comply with the provisions of the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.A 1690 et. seq. The provisions of the Act were central to the recent decision of the U.S. Court of Appeals for the *Second Circuit in Miller v. Wolpoff & Abramson*, #02-717 (February 25, 2003).

*The facts of Miller.* Miller was a customer of Lord & Taylor. He refused to pay a charge of \$1,618.14. The claim was referred to the law firm of Wolpoff & Abramson (W&A). The file transmitted to W&A showed Miller 's name, his address & social security number, his home and work phone numbers, his Lord & Taylor account number, those entries in his account record which related to the debt in question, and a record of Lord & Taylor 's collection efforts.

Based upon a review of the file as transmitted to it, a partner at W&A "activated a print command on [W&A's] computer system and [W&A's] initial collection letter was printed and mailed..." This first letter contained a notice of collection on the front and a so-called validation notice on the back.

The initial letter was followed by two other W&A letters, both of which were ignored by Miller. The matter was then referred by W&A to National Attorney Network, Inc. (NAN), a non-attorney collection network that describes itself as "a single source for accessing collection and subrogation attorneys nationwide from a centralized case administration center." NAN referred the matter to the firm of Upton, Cohen & Slamowitz (U, C&S). After writing a single collection letter to Miller, U, C&S sued Miller in Queens County Court. In addition to the outstanding debt, U, C&S asked for \$323.63 in attorney's fees, which it claimed as owing under Miller's credit card agreement.

Miller then brought a putative class action against W&A, NAN and U,C&S. He alleged that the defendants, individually and as joint-venturers and co-conspirators, had violated the FDCPA by (1) sending collection letters on attorney letter-head without meaningful review by an attorney of the circumstances surrounding the debts; (2) attempting to collect attorneys fees which had not been agreed upon and sharing these fees with NAN as a referral fee in violation of professional ethics rules; (3) mailing a letter that would confuse consumers as to their rights. Before any discovery could be conducted in Miller's action, the three defendants moved for summary judgment or to dismiss. Plaintiff Miller argued that the defendants had resisted his efforts at discovery and asked for an expedited discovery schedule. After both sides had exchanged affidavits and engaged in oral argument, the lower court granted defendants' motion for summary judgment and Miller appealed. The appellate court considered all the issues de novo.

## **When Is A Collection Letter "From An Attorney"?**

One of the deceptive collection practices enjoined by the FDCPA is "the false representation or implication that an individual is an attorney or that any communication is from an attorney." Although there is no dispute in this case that W&A and U, C&S are law firms or that the letters were sent by them in the literal sense, some degree of involvement by the lawyers is required before it may be said that the letters were "from" them in the sense required by the statute. Plaintiff argues that the letters were form letters generated by a computerized collection system without any meaningful attorney involvement and that he should have been allowed to conduct discovery to counter the affidavits submitted by the defendants.

Although the affidavits submitted by partners in W&A and U, C&S state that they do not conduct collection activity until a partner reviews the file and exercises his independent professional judgment that collection is appropriate, the court cannot conclude on the record that the information in plaintiff's file was adequate to support the defendants' judgments. Discovery in this case might have supported plaintiff's claim that W&A takes in over 55,000 new collection accounts every month and could be mailing 110,000 letters every month.

When a party facing an adversary's motion for summary judgment reasonably advises the court that he needs discovery to be able to present facts needed to defend the motion, the court should defer decision of the motion until the party has had an opportunity to take discovery and rebut the motion. (citing *Commercial Cleaning Servs., LLC v. Colin Serv. Sys. Inc.*, 271 F.3d 345 (2d Cir. 2001)).

The Court cannot, as the plaintiff requests, declare a minimum standard requiring lawyers to review a copy of the contract, a credit report, and a full payment history or a statement of account to satisfy the term "meaningful lawyer involvement," because there will be circumstances in which this is not necessary. But we do find on this "undeveloped record" that merely being told that a debt is overdue is not enough. Plaintiff is entitled to discovery.

## **The Attempt by U, C&S to collect attorney's fees.**

The FDCPA makes it illegal to collect an amount not "expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692(1). Plaintiff argues that U,C&S violated the statute by asking for \$323.63 in attorney's fees. He also argues that Ohio law forbids the collection of counsel fees in any consumer contract of adhesion and that the agreement by U,C&S to share the fee with NAN, a nonlawyer, violates New York's Code of Professional Responsibility.

Plaintiff does not dispute that the credit card agreement with Lord & Taylor provides for payment of attorneys fees. As to his argument that Ohio law forbids collection of attorneys fees under adhesion contracts, plaintiff failed to raise that argument either in his complaint or in response to the motion to dismiss and has therefore waived it.

The FDCPA does not by its terms prevent an attorney from asserting and collecting attorney's fees which are permitted in the credit terms or contract simply because he may later dispose of the fee in some prohibited manner. The contract between the creditor and the debtor is the instrument which controls the payment of fees, not the intent of the lawyer as to the disposition of the fees.

## **The W&A Collection Letter**

Plaintiff argues that the first collection letter mailed by W&A was deceptive in that it would confuse the least sophisticated customer as to his rights under the FDCPA. Specifically, he alleges the letter did not clearly offer an option to request validation of the debt on the face of the letter, that the validation notice falsely suggests the it lists all of the debtor's rights under the FDCPA, and that the listing of forty-four cities as "NAN affiliates" on the letterhead is misleading because it could suggest to a consumer that W&A was admitted to practice in all these jurisdictions.

We find that plaintiff has effectively waived the last of these arguments concerning NAN because he was given numerous opportunities to raise them but failed to do so. As to the body of the letter, we find that it complies with the requirements of the FDCPA. The measure of compliance is whether the "least sophisticated consumer" would be deceived by the letter. The notice on the back of the letter contains a validation notice which complies with the Act. The front of the letter does not contradict or overshadow this notice (see, *Russell v. Equifax A.R.S.*, 74 F.3d 30 (2d Cir. 1996)). At the bottom, the letter states in large-print capital letters, "BEFORE RESPONDING TO THIS LETTER SEE REVERSE SIDE FOR IMPORTANT NOTICE." The least sophisticated consumer should have turned to the back to read the validation notice and would have discovered that he was required to request validation in writing and that an invitation to call the law firm was only that - an invitation to call.

The W&A validation notice contains everything the FDCPA requires. It does not have to say that is not an exclusive list of the debtor's rights under the Act, nor does the fact that it does not list all the debtor's rights under the Act make it misleading.