

Avoid Penalties Under Fair Debt Collection Procedures Act

BY STEWART E. WURTZEL

The scenario is common. A client asks her attorney to recover monies which a debtor owes to the client but has failed to pay despite the client's repeated demands. The attorney offers the opinion that the debtor has no defense and that a firmly worded attorney's demand letter with a threat of litigation will scare the debtor into paying. The attorney sends out his standard demand letter advising that he has been retained by the creditor to collect the delinquent debt, that immediate payment of the debt is due and that failure to make the payment will result in the commencement of litigation, as well as the filing of negative credit reports against the debtor and a slew of other terrible consequences to the debtor, including the imposition of additional costs and expenses. The client is pleased with the letter's tenacity. But the lawyer may find himself liable to the debtor for damages, including attorney's fees, for violation of the debtor's rights under the Fair Debt Collection Procedures Act (the "FDCPA" or the "Act").

The Act, codified at 15 U.S.C.A. 1690 et seq., sets forth numerous prohibitions and requirements that a debt collector must observe when seeking to collect a debt that is covered by the Act. The Act defines a debt collector as "any person who uses any instrumentality of interstate commerce or the mails in a business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C.A. 1692a (6). The act applies only to debts arising out of transactions in which the money, property, insurance or services that are the subject of the transaction are primarily for personal, family or household purposes. 15 U.S.C.A. 1692a (5). It does not apply to commercial transactions, nor does it generally apply to a creditor who seeks to collect its own debt.

Collection Attorney Is Debt Collector

An attorney whose practice includes any tangible amount of debt collection work is considered a debt collector under the Act and is subject to its restrictions. As enacted in 1977, the Act originally contained an exemption for lawyers who collected debts on behalf of clients. However, that exemption was repealed in 1986 and the U.S. Supreme Court has held that lawyers engaged in debt collection litigation are subject to the Act. *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 148 (1995). Recently, the Second Circuit upheld the claim that a lawyer violated the FDCPA although he served a proper rent demand which complied in all respects with New York State's Real Property Actions and Proceedings Law. *Romea v. Heiberger & Associates*, 163 F.3d 111 (2d Cir. 1998).

Several Housing Court judges have ruled that three-day demands which do not comply with the FDCPA do not qualify as proper demands in summary proceedings and have dismissed non-payment petitions as a result. See, e.g., *Eina Realty v. Calixte*, New York Law Journal, August 19, 1998 (Kings Cty.); *Soho Tribeca Space Corp. v. Mills*, New York Law Journal, May 13, 1998 (NY Cty.). However, in *Wilson Han Association v. Arthur*, NYU July 6, 1999 (App. Term 2d Dept.), the court ruled that Congress did not intend

to include non-payment proceedings within the FDCPA. The court said, "Even if the notice violated the FDCPA, it would still be a sufficient predicate for a non-payment proceeding."

In addition to setting forth numerous instances of prohibited conduct, the FDCPA mandates that certain disclosures be made to debtors by debt collectors. The initial notice issued by a debt collector must disclose that the communication is an attempt to collect a debt and that any information obtained will be used for that purpose. Subsequent communications, *including all oral communications*, must disclose that the communication is from a debt collector. Further — unless the initial communication makes such disclosure — within 5 days after the initial communication, the debt collector must supply the debtor, in writing, with the amount of the debt; the name of the creditor to whom the debt is owed; a statement that the debt collector will assume the debt to be valid unless the consumer within 30 days after receipt of the notice disputes the validity of the debt or any portion thereof in writing; and a statement that if the consumer notifies the debt collector within the 30 day period that the debt or any portion is disputed, the debt collector will obtain verification of the debt and a copy of the consumer does notify the debt collector in writing within the 30 day period that the debt or any portion thereof is disputed, the debt collector must cease collection of the debt until verification of the debt is mailed to the consumer by the debt collector. Failure of the consumer to contest the validity of the debt is not construed as an admission of liability for the debt. 15 U.S.C.A. 1692g(c).

Validation Language Not Enough

But compliance with the validation language required by the Act does not necessarily satisfy the Act's disclosure requirements. Notification to the consumer of his rights under the FDCPA must not be contradicted or overshadowed by any part of the demand. The validation language must be clearly disclosed; it cannot be concealed and cannot be any less prominently displayed than the demand for payment. Typically, a demand for immediate payment or for payment within ten days of receipt of a letter, without fully explaining and harmonizing the debtor's right to dispute the validity of the debt within 30 days, is found to be a violation of the FDCPA, subjecting the debt collector to liability under the Act. In a recent decision by the Eastern District of New York, a debt collector was found to have violated the FDCPA by asserting in his collection notice that the outstanding obligation required the debtor's "IMMEDIATE ATTENTION". *DeSantis v. Roz-ber*, New York Law Journal, June 11, 1999, Page 42, Col. 5 (E.D.N.Y.)

The standard which measures whether a notice is contradictory or overshadowing is: by an objective standard, will the "least sophisticated consumer" be uncertain as to her rights. Courts have routinely held that the "Act is aimed at protecting consumers in general from abusive debt collection practices and the test is how the least sophisticated consumer — one not having the astuteness of a 'Philadelphia lawyer' or even the sophistication of the average, everyday, common consumer — understands the notice he or she receives." *Russell v. Equifax A.R.S.* 74 F.3d 30 (2d Cir. 1996). Clearly, the standard is broad and all encompassing.

Strict Liability Standard

The Courts have also made it very clear that violations of the Act are governed by a strict liability standard. The standard will be applied unless the Court determines that violation of the Act resulted from a bona fide error notwithstanding the use of procedures reasonably adapted to avoid error. *Russell v. Equifax*, supra. A consumer need not show intentional conduct by the debt collector to be entitled to

damages (Russell, id.), nor does she need to show actual injury, *Passeggio v. Cosmetique, Inc.*, 1999 U.S. Dist. LEXIS 7607 (E.D.N.Y.) nor that the consumer even read the letter, *Harrison v. Great Springwaters of America, Inc.*, 1997 U.S. Dist. LEXIS 23267 (E.D.N.Y.). A simple showing that the demand did not comply with the act is sufficient to establish a violation of the act and entitle the consumer to damages.

Violations of the Act are not limited to failure to comply with the validation notice requirements. The Act proscribes many forms of conduct, sometimes in extremely broad terms. Section 1692 (e) of the Act provides that a debt collector may not use any false, deceptive or misleading representation or means in connection with the collection of any debt. This provision is broadly interpreted.

Without limiting the general prohibition against false and misleading representations, the Act specifies 15 examples of conduct which violate the Act, including, (1) the threat to take any action that cannot legally be taken or that is not intended to be taken; (2) communicating or threatening to communicate to any person, credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed; and (3) the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

Mass-Produced Letters May Not Comply

For example, in the leading case of *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993), a lawyer who issued a series of computer-generated form letters upon receipt of arrears information from his client, was found liable for misleading a consumer into believing that the lawyer had reviewed each file personally and had determined, based upon a review of the files, to commence collection proceedings against the debtor. The court found the communication was misleading because it gave the impression that it was from a "lawyer" who was involved in the day to day collection process when it was clear that he was not. The Court wrote, "there will be few, if any, cases in which a mass-produced collection letter bearing the facsimile of an attorney's signature will comply with the restrictions imposed by §1992e." Id at 1321.

Penalties for violation of the Act can be substantial and bear no relation to the debt sought to be recovered. Under 15 U.S.C.A. 1692k, a debt collector who fails to comply with the Act is liable to the debtor for (a) actual damages sustained by the debtor; (b) additional damages to be awarded in the court's discretion up to \$1,000; and (c) attorneys fees and costs incurred in the successful prosecution of a fair debt collection claim. Factors considered by the court in determining whether additional damages are to be awarded include the frequency and persistence of non-compliance by the debt collector, the nature of such non-compliance, and the extent to which non-compliance was intentional. Class action certification is common when the court is faced with mass-mailed demand letters which on their face do not comply with the Act. Many reported cases involve demand letters which sought recovery of such minimal amounts as \$80, \$9.42 and \$24.91. See *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991), *Clomon v. Jackson*, supra, and *Passeggio v. Cosmetique, Inc.*, supra.

Courts Offer Guidance

Several courts have tried to give lawyers guidance as to how demand letters may be prepared to avoid violating the Act. These judges have taken great pains to point out that collection activity need not cease during the 30 day validation period. However, the activity must explain to the least sophisticated consumer that his right to seek validation of the debt for 30 days is not affected by a demand for immediate payment. Some examples may be found in *Savino v. Computer Credit, Inc.*, 164 F.3d 81 (2d Cir.

1998), *Bartlett v. Heibl*, 128 F.3d 497 (7th Cir. 1997) (where the Court appended a proposed safe harbor demand letter), and *Beeman v. Lacy, Katzen Ryan & Mittleman*, 892 F. Supp. 405 (N.D.N.Y. 1995).

Clearly, the lawyer's attempt to comply with her ethical obligation to represent her client zealously, must give way and defer to restrictions imposed by the FDCPA on the means and measures that a lawyer may take in order to collect an outstanding debt.

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