

When Is A Law Firm A Debt Collector?

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When is a law firm deemed a "debt collector" under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.S. 1692 et seq.? This question was answered by the Court of Appeals for the Second Circuit in *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti*, No. 019085, NYLJ, July 12, 2004.

Plaintiff Goldstein was a tenant in a Manhattan apartment leased from a client of the Hutton law firm. After a series of disputes, Hutton served Goldstein with a three day notice under the New York State Real Property Actions and Proceedings Law, demanding either payment of all outstanding rents or possession of the apartment within the notice period, and threatening summary disposition proceedings upon Goldstein's noncompliance.

Goldstein alleged that in sending the three day notice Hutton had violated the FDCPA. Specifically, Goldstein alleged that Hutton had (1) failed to include the thirty day notice required by 15 U.S.C. 1692g stating the amount of the debt and offering the debtor an opportunity to dispute the debt (validation notice); (2) failed to disclose that Hutton was attempting to collect a debt and that any information obtained would be used for that purpose, in violation of 15 U.S.C. 1692e(11); and (3) mailed a notice which contained threats to take actions that could not legally be taken or were not intended to be taken, in violation of 15 U.S.C. 1692e(5).

Hutton moved for summary judgment, arguing that its conduct did not violate the FDCPA and that it was not a "debt collector" as that term was defined in the statute.

The district court granted the motion and Goldstein appealed. The appellate court reversed. It held there was sufficient evidence to support a finding that Hutton was a debt collector and remanded for further proceedings.

History and Purpose of FDCPA

Congress passed the FDCPA "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. 1692(e). § 1692a(6) states:

The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any 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.

In granting Hutton's motion for summary judgment, the district court relied on the fact that Hutton had

derived only \$5,000 in revenue from the issuance of three day notices in behalf of landlords, less than 5% of its total revenue; that Hutton did not advertise itself as being in the business of debt collection; and that it did not represent traditional debt collection agencies.

Debt Collector Defined Two Prongs

Writing for the appellate court, Judge Swain, sitting by designation, pointed out that these factors addressed only the first prong of the term "debt collector" whether debt collection was a principal business and not the second prong whether the entity engages regularly in debt collection. The Judge said, "...we believe that the decision below should have focused on the regularity of Hutton's debt collection activity rather than principally on the proportion [of] of its business devoted to debt collection."

The Court rejected plaintiff Goldstein's argument that the issuance of more than five debt notices by a collection agency or law firm should be conclusive evidence of debt collector status. Goldstein relied for her argument on a decision of the Third Circuit ((*Crossley v. Lieberman*, 868 F.2d 566 (1989)), which quoted a law journal article stating, "any attorney who engages in collection activities more than a handful of times per year must comply with the FDCPA."

The Court held:

...the question of whether a lawyer or law firm "regularly" engages in debt collection activity within the meaning of section 1692a(6) of the FDCPA must be assessed on a case by case basis in light of factors bearing on the issue of regularity.

The Court cited five factors which are "most important...in the assessment of facts closely related to ordinary concepts of regularity."

- (1) the absolute number of debt collection communications issued, and/or collection related litigation matters pursued, over the relevant period;
- (2) the frequency of such communications and/or litigation activity, including whether any patterns are discernible;
- (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
- (5) whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the firm to assist in the collection of outstanding consumer debt obligations.

Traditional debt collection businesses are not the only clients that require regular ongoing relationships with lawyers to assist in the collection of consumer debt. "...case law and common sense suggest that lenders and other creditors, landlords or other lessors, and service providers are among the types of businesses that may regularly engage legal assistance in consumer debt collection."

The record indicated that Hutton had issued 145 three day notices within a twelve month period and that several notices were issued in each month. This large number of notices, taken together with the regular monthly pattern of notices, could easily support the conclusion that the firm's debt collection practices were regular. Also, most of the notices were issued on behalf of one entity and its affiliates, all bearing the name "Stahl." This ongoing relationship with an entity for which it repeatedly sent collection notices further indicates regularity of collection work by the firm.

The record also contained evidence that Hutton had a system in place for preparing and issuing notices:

...it relayed tenant arrears information to an outside computer service which generated the notices, assigned a paralegal to review them for consistency with the information provided by the landlord's managing agent, and sent the notices to a process server for delivery to the tenant. The firm's name was shown on the notice and on the mailing envelope "to provide a contact person for the recipients of the notice if the recipients had questions or wished to pay their rent.

The Court concluded that a rational fact-finder could conclude that Hutton was a debt collector under the FDCPA. It vacated the decision granting summary judgment to Hutton and remanded the case for further proceedings.

Section 1692k of the FDCPA provides that any debt collector who fails to comply with any provision of the statute will be civilly liable to the person whose rights are violated. Damages are the sum of:

- (1) actual damages sustained, plus:
- (2) in the case of an action by an individual, damages awarded by the court, not to exceed \$1,000; or
- (3) in the case of a class action, (i) damages for each named plaintiff in an amount not to exceed \$1,000 and (ii) "such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector."