

I. FEDERAL FAIR DEBT COLLECTION PRACTICES ACT (FDCPA) (15 U.S.C.A. § 1692a.)

A. Collection of Cases.

Many lawyers are of the opinion that the FDCPA does not apply to them. In 1986 the FDCPA was amended to include attorneys under the definition of “debt collectors”. Prior to then, there was an express exemption for lawyers.

1. Cases – Attorneys are debt collectors.

a. *Heintz v. Jenkins*, 115 S.Ct. 1489 (1995); 514 U.S. 291 (1995); 131 L.Ed.2d 395. The FDCPA applies to lawyers regularly engaged in consumer debt collection on behalf of creditor clients, even when that activity consists of litigation. However, the court never explained how the FDCPA applies to litigation.

b. *Sandlin v. Shapiro & Fishman*, 919 F.Supp. 1564 (M.D. Fla.1996) (Fort Meyers Division).

The Defendants filed a Motion to Dismiss a FDCPA case claiming they were not acting as “debt collectors” and were therefore not subject to the FDCPA. The court found that the Defendants Shapiro & Fishman, a law firm, were debt collectors under the FDCPA. (The attorneys filed a mortgage foreclosure case and sent the debtor a payoff figure and a reinstatement letter).

2. Cases – Landlord Tenant.

a. Landlord Tenant Statutory 3-day Notice.

Romea v. Heierger & Associates, 163 F.3d 111 (2nd Cir. 1998). Appeal from the U. S. District Court for the Southern District of New York. Three day rent demand notice required by New York law as condition precedent to summary eviction proceeding was a communication to collect a debt within meaning of FDCPA.

Courts outside of New York have declined to follow this case, but it is out there.

b. *Reynolds v. Gables Residential Services, Inc.*, 428 F.Supp.2d 1260 (M.D. Fla. 2006)(Tampa Division).

Gables was a property management company. The Court held that the exclusionary language in §1692 (a)(6)(F) excludes a person collecting a debt due another to the extent the activity is incidental to a bona fide fiduciary obligation or bona fide escrow arrangement; concerns a debt which was originated by such person; concerns a debt which was not in default at the time it was obtained by such person; or concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor. Therefore the property management company was not a “debt collector” under FDCPA.

The court found that Gables had a fiduciary relationship and obligation to the owners to manage the apartment property and collect the monthly rent. The monies due to the property manager were payable to it not as a “debt collector”, but as manager of the property. Therefore, it was not a “debt collector” under FDCPA.

3. **Cases – Court papers are not “communications”.**

a. *Vega v. McKay*, 351 F.3d 1334, (11th Cir., 2003).

The term “communication” as used in the act does not include a “legal action or pleading”. Plaintiff’s attorney served the defendants with a civil summons, complaint, notice of pretrial conference and a FDCPA notice. Defendants claimed that the summons overshadowed and contradicted the FDCPA notice rendering it invalid and a violation of the FDCPA act. The court held that the term “communication” as used in the act does not include a “legal action or pleading”. Therefore, there was no violation of the act. This case effectively overruled a portion of the holding in the case *Martinez v. Stern*.

b. *Martinez v. Stern*, 266 B.R. 523 (S.D. Fla., 2001); 311 F.3d 1272 (11th Cir. 2002). Plaintiff’s attorney served the defendant with a foreclosure summons, complaint *lis pendens*, FDCPA Notice, note, mortgage and attachments totaling 16 pages. The FDCPA Notice was the 8th page of the package. The court held that the debt collector must ensure that the notice of the right to dispute the debt is actually conveyed to the consumer and that the notice is effectively conveyed. The effectiveness of the notice is based on an objective standard of the manner in which a “*least sophisticated consumer*” would interpret the notice. The standard presumes a level of sophistication that is “low, close to the bottom of the sophistication meter.” (citations). Therefore, the notice is ineffective if the content of the notice is overshadowed or contradicted by accompanying messages from the debt collector.

c. *McKnight v. Benitez*, 176 Fed. Supp. 2d 1301 (M.D. Fla. 2001)(Tampa Division).

Formal legal action is not considered a “communication” under FDCPA triggering the requirement for the FDCPA notice. Since the FDCPA notice is not required to be sent with formal legal papers, the fact that it is ineffective is of no consequence. (By sending the notice when the debt collector is not required to does not then create a right if the notice is otherwise defective or ineffective).

McKnight, a consumer, purchased a 1999 Chevrolet Suburban and financed it through Ford Motor Credit Company (FMC). The vehicle was seized by the Sheriff of Collier County for allegedly being used in a drug transaction. FMC sought to protect its security interest by obtaining possession of the vehicle. Benitez, FMC’s attorney, obtained a pre-judgment Writ of Possession and took possession of the vehicle. McKnight negotiated a settlement of the action with FMC (in cash?) and the vehicle was re-delivered to McKnight. McKnight then brought an action for violation of FDCPA against Benitez.

McKnight claimed that the FDCPA notice attached to the Complaint was ineffective because it was overshadowed and contradicted by the language in the Summons. The issue was

whether the Complaint served upon a debtor is an “initial communication” within the meaning of the FDCPA.

The court looked to the Federal Trade Commission Commentary wherein it was stated that formal legal action was not a “communication” in connection with the collection of a debt under the FDCPA. Therefore, the court held that since all of the documents served on the Defendant are either pleadings or Orders, the FDCPA notice attached to the Complaint was not required and issue of whether or not the notice was effective was of no consequence.

d. *Acosta v. Campbell*, 2006 WL3804729 (M.D. Fla. December 22, 2006)(Orlando Division).

The court held that Eleventh Circuit case law is clear that filing suit is not “an initial communication” under FDCPA (which triggers the requirement to give the FDCPA notice.) The court also held that an attorney debt collector may take legal action even in the face of notice that the consumer has disputed the debt; however, the attorney is restricted from other collection efforts, such as letters or calls to the consumer. Continuing legal proceedings, as opposed to other collection efforts, does not violate FDCPA. ***However, the court also held that if the foreclosure action also sought a personal judgment against the Plaintiff, then the attorney’s actions would be subject to the full provisions of FDCPA.***

The basis of the Plaintiff’s FDUPA case against the attorneys was for filing and serving a foreclosure complaint even though the Plaintiff had sent a notice disputing the debt. Plaintiff’s theory was that filing and service of the foreclosure suit where “debt collection” activities after the law firm had been notified that the debt was disputed.

It is noteworthy that the opinion states that nearly every court that has addressed the question has held that foreclosing a mortgage is not debt collection activity for the purposes of FDCPA and that enforcement of a security interest is not debt collection.

e. *Shimek III v. Weissman, Nowack, Curry & Wilco, P.C.*, 374 F.3d 1011 (11th Cir. 2004).

The court held that the FDCPA does not preclude a debt collector from contemporaneously filing a lien with the state clerk of the court at the same time it sends a letter of demand to the consumer, so long as the initial filing of that lien is permitted by state law, even if the consumer did not first have the opportunity to dispute or verify the debt; and (2) FDCPA does not create a duty on the debt collector to prevent the clerk of the court from recording the lien after verification has been requested.

This case is out of Georgia. The Plaintiff Shimek (an attorney) was a homeowner and member of a homeowner’s association that hired the Defendants to collect past due homeowners’ fees and assessments. The Plaintiff alleged that the law firm violated the FDCPA by filing a lien for past due assessments without first sending the FDCPA notice and then not trying to stop the lien process when the consumer disputed the debt.

4. Cases – for good measure.

Ferguson v. Credit Management Control, Inc., 140 F.Supp.2d 1293 (M. D. Fla. 2001), and *Kaplan v. Assetcare, Inc.*, 88 F.Supp.2d 1355 (S.D. Fla. 2000). FDCPA is a strict liability statute, therefore, no element of knowledge or intent is required, except for certain portions of the statute which specifically require intent or knowledge. “Congress took care to require an element of knowledge or intent in certain portions of the FDCPA where it deemed such a requirement necessary.” See discussion in Kaplan at 1362.

B. Selected Statutory Provisions

1. Notice Provision: 15 U.S.C.A. § 1692g.

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing--

- a. the amount of the debt;
- b. the name of the creditor to whom the debt is owed;
- c. a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- d. a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
- e. a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor

2. Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.”

3. Key Definitions:

This list is not complete, but was selected by the author/speaker for seminar content. The reader is referred to the United States Code for a complete list of definitions.

a. The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

b. The term "debt" means any obligation or alleged obligation of a consumer 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, whether or not such obligation has been reduced to judgment.

c. 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. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of [section 1692f\(6\)](#) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include--

(i) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(ii) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(iii) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(iv) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(v) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(vi) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

d. The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

4. **Civil Liability: 15 U.S.C.A. § 1692k.**

a. Activities.

--communication 1692c. Place of employment, third parties, party known to be represented by attorney;

--harassment 1692d; see the statute.

--false or misleading representations 1692e; see the statute.

--unfair practices 1692f. Acceptance of a check postdated more than five days. See the statute for a list of other unfair practices.

b. **Jurisdiction.** Any appropriate United States District Court without regard to the amount in controversy, or any other court of competent jurisdiction.

c. **Statute of Limitations.** Within one year from the date on which the violation occurs.

d. **Damages.** Any actual damage sustained by such person as a result of such failure and, in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1,000.00. In the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. In a class action, no more than \$1,000.00 per named plaintiff and such other amount as the court may allow other class members not to exceed the lesser of \$500,000.00 or one per centum of the net worth of the debt collector.

e. **Intent.** [15 U.S.C.A § 1692k(c)] A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of 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.

C. **Conclusions:**

1. The FDCPA is not an affirmative defense to an action for eviction, but would be the basis for a civil action against the attorneys and debt collector, most likely in federal court.

2. Attorneys may be "debt collectors" under the FDCPA. In an FDCPA case, this may be a question of fact to be resolved by the court based upon the law firm's business mix.

3. A property management company or the property owner themselves would appear to not be “debt collectors” under FDCPA and would therefore not be required to give the required FDCPA notice.

4. Court papers, such as the Summons and Complaint are not “initial communications” under FDCPA which would trigger the requirement to give the FDCPA notice.

5. Since the FDCPA only applies to natural persons and consumer transactions, (those obligations arising out of personal, family, or household purposes), the FDCPA would arguably apply to a residential eviction.

6. The Acosta case appears to hold that sending an FDCPA notice along with a Three Day Notice would not toll the time for filing suit for possession or prohibit the attorney from filing suit and serving court papers prior to the expiration of the thirty (30) day FDCPA notice, even in the face of the tenant’s dispute of the debt. One caveat is that the tenant could claim that the Three (3) day Notice was defective because the notices were conflicting and confusing. Typically these cases involve multiple and conflicting Three (3) day notices.

End of Outline.