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Initial communications, attorneys and the FDCPA — Was it something I didn't say?

By Lawrence Young and James Potts*

The **Fair Debt Collection Practices Act** was enacted to protect consumers from abusive, deceptive and unfair debt collection practices. **Congress** found that "abusive collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasion of individual privacy." The FDCPA provides guidelines and requirements that must be followed by all "debt collectors" as defined by the act.

Under the FDCPA, a "debt collector is one who regularly collects or attempts to collect debt on behalf of another." Although attorneys were initially exempt from the act, the exemption was scrapped in a 1986 amendment. Thus, attorneys and law firms who are involved in debt collection activity must be intimately familiar with the FDCPA. Whether or not an attorney fits the definition of "debt collector" is a court determination made on a case-by-case basis. Moreover, debt collection activity encompasses more than just making phone calls or sending letters soliciting payment.

Debt collection necessarily requires communication between the debt collector and the consumer. The FDCPA defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." A debt collector's "communication" is the focal point of the FDCPA. Although representations in all communications are subject to FDCPA scrutiny, it is the "initial communication" that carries obligations that can result in strict liability. However, what constitutes "initial communication" has been a matter of discord amongst the courts.

Obligations attached to 'initial communication'

Initial communication triggers obligations under Section 1692e(11) and Section 1692g of the FDCPA. Section 1692e(11), the "mini-Miranda" provision, requires an initial communication to disclose that the debt collector is "attempting to collect a debt and that any information obtained will be used for that purpose." Section 1692g requires that the debt collector, within five (5) days of the initial communication give the consumer written notice of, among other things, his or her validation rights. Thus, it is necessary for the debt collector to be aware of what action constitutes "initial communication."

For a conventional debt collector, such as a collection agency, the answer is rather straightforward. Their first contact with the consumer via phone call or correspondence would likely constitute "initial communication." However, for attorneys who collect through court proceedings, the answer is less clear. Recently, there has been a split between the **7th** and the **11th U.S. Circuit Courts of Appeals** as to whether a debt collector's initiation of a lawsuit in state court constitutes an "initial communication" within the meaning of the FDCPA.

In *Vega, et al. v. McKay*, 351 F.3d 1334 (11th Cir. 2003), the 11th Circuit held that service of a summons and complaint did not qualify as "initial communication" under the FDCPA, and thus did not trigger the FDCPA notice requirements. The *Vega* court, quoting *McKnight v. Benitez*, 176 F.Supp. 1301 (M.D. Fla. 2001), found that "the term 'communication' as used in the Act does not include a 'legal action' or pleadings or orders connected therewith." However, in *Thomas v. Law Firm of Simpson & Cybak, et al.*, 392 F.3d 914 (7th Cir. 2004), the 7th Circuit held that a summons and complaint does constitute "initial communication" for FDCPA purposes. Therefore, within five (5) days of the summons and complaint, the attorney must send a validation notice to the debtor in order to comply with Section 1692g.

The *Thomas* court reasoned that such a holding will "ensure that debtors will be informed about their validation rights and that debt collectors, knowing that they are obliged to advise debtors of these rights, will investigate claims before initiating litigation to collect debts." Furthermore, the court said that excluding service of pleadings from the definition of "communication" would allow debt collectors to avoid the validation notice requirement completely by initiating litigation. Permitting such a loophole would negate the intention of the statute. The court went on to note that Congress specifically excepted pleadings from the definition of "communication" for purposes of the "mini-Miranda" warning in Section 1692e(11), but did not do so for validation notices under Section 1692g.

Defendants in the case argued that such a ruling will interfere with litigation and make collection lawsuits more cumbersome for attorneys. Their concern is well founded. Section 1692g(b) requires a debt collector to cease collection efforts, if within 30 days of receiving a validation notice, the consumer requests verification of the debt. Therefore, the consumer could effectively abate a lawsuit by requesting verification. However, the court suggests that the summons and complaint need not be the attorney's first communication with the debtor. The court submits that a concerned attorney should make his or her initial communication 30 days before initiating

(See **COMMUNICATIONS** on page 4)

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Credit contract may be 'unwritten' if creditor can't produce copy

A consumer can bring a **Fair Debt Collection Practices Act** complaint when a credit card contract is not "complete" and therefore "unwritten" for the purposes of Illinois' law at 735 ILCS 5/13/06, and the creditor cannot produce a copy of the contract. (*Rawson v. Credigy Receivables, Inc.*, No. 05 C 6032 (N.D. Ill. 02/16/06).)

Credigy Receivables sent **Jerold Rawson** a letter demanding payment of a credit card debt and threatening to sue if he failed to make a payment. Rawson beat Credigy to the punch and sued, alleging that Credigy violated state law by threatening to sue him over a contract outside the state's five-year statute of limitations.

Under Illinois law a 10-year statute of limitations applies to written contracts. All other contracts are subject to a five-year limitation period. A contract is "written" for purposes of the 10-year period if "all the essential terms of the contract are in writing and are ascertainable from the instrument itself." Rawson argued the contract was not "complete" because it was subject to amendment or modification.

Credigy moved to dismiss, arguing the 10-year limitations period applied, but it failed to provide a copy of the contract. The parties stipulated that the debt was at least five years old. Credigy cited *Harris Trust & Savings Bank v. McCray*, 21 Ill.App.3d 605 (Ill. App. Ct. 1974) as "on point" for establishing that the 10-year limitations period applied to credit card contracts.

Rawson disagreed with the application of *Harris* on the grounds that the case did not address the question of whether the contract was in writing. The District Court held that "*Harris* is not precedent for whether the particular agreement before the *Harris* court was governed by the five- or ten-year statute of limitations."

The court ruled that it was required to accept Rawson's allegations as true. Because Credigy failed to submit a copy of the contract, the court denied its motion. ❑

Alexander Burke and **Daniel A. Edelman** of **Edelman, Combs, Latturner & Goodwin LLC** in Chicago represented Rawson. **David L. Hartsell** and **Tammy L. Adkins** of **McGuire Woods LLP** in Chicago represented Credigy.

COMMUNICATIONS (continued from page 3)

litigation. Advance notice would prevent a verification request from interfering with litigation, and assure compliance in states that prohibit sending other documents with a summons and complaint, the court reasoned.

Another concern addressed by the court was the likelihood that a validation notice served with the summons will confuse the plaintiff as to when she must answer the complaint. Section 1692g notice informs the debtor that she has 30 days to dispute her debt. However, in federal court the plaintiff must answer a complaint within 20 days of its filing to avoid default judgment. Thus, the court was concerned that the debtor might mistakenly believe that she has 30 days to take any action in the lawsuit. The court places the onus on the attorney debt collector, who chooses to send the Section 1692g validation notice with the summons and complaint or shortly thereafter, to prevent such miscommunication by including clarifying language with the validation notice.

Finally, the court recognized that its decision departed from that of the 11th Circuit in *Vega*. The court criticized the 11th Circuit for relying on "nonbinding **Federal Trade Commission** staff commentary," to which the *Thomas* court chose not to give significant weight.

Thomas resulted in a split decision. A dissent noted that a bill pending in Congress would amend the FDCPA to specifically exclude formal pleadings from the definition of "communication" under Section 1692g. Although the pending amendment may indicate that Congress considers the current FDCPA definition of "communication" to include the filing of a legal action, the dissent found it more likely that "the purpose of the proposed amendment is to make explicit what is clearly implicit." Justice Evans, who authored the dissent, said "I think the proposed amendment is more easily viewed as an effort to curtail erroneous interpretations, like the one the majority makes here."

Be prepared

If the amendment is adopted, *Thomas* becomes largely irrelevant. Attorneys outside of the 11th Circuit, in the meantime, would be well advised to consider the filing of a lawsuit in connection with the collection of a debt, to be "communication" for FDCPA purposes, and be prepared to send validation notices within five days of filing.

Other court rulings have addressed whether other legal actions constitute "communication." In *Kong-Quee v. Lien Filers, Etc. LLC, et al.*, No. 1:04-CV-3417-RLV (N.D. Ga. 06/16/05), the District Court found a statutorily required notice of lien was not an "initial communication" under the FDCPA based on the 11th Circuit's ruling in *Vega*. Another court, with the same set of facts as *Kong-Quee*, might rely on *Thomas* as opposed to *Vega*. The 7th Circuit's ruling in *Thomas* should cause an attorney to hesitate before relying on such lower court precedent.

Until the *Vega-Thomas* split in the Circuits is resolved, attorneys collecting consumer debts outside the 11th Circuit should treat a summons and complaint as "initial communications" under the FDCPA. With this status goes all the obligations of the "mini-Miranda" warning and the FDCPA validation notice, along with language specified by *Thomas* to keep consumers from being confused by the different time requirements. ❑

For more on debt collection communications, see **The Most Commonly Litigated Consumer Lending Practices: Guidance, Tips and Expert Analysis**, *available at www.shoplrp.com or by calling 1-800-341-7874.*

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