Litigation Activity as Basis for Debt Practices Collection Claim

By Jeffrey P. Lewis

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The federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* (FDCPA), prohibits "debt collectors from engaging in various abusive and unfair practices" in the pursuit of consumer debt collection. Its purpose is to eliminate "abusive debt collection practices; to ensure that debt collectors who abstain from such practices are not competitively disadvantaged; and to promote consistent state action to protect consumers." A debt collector is defined by the statute as one who "regularly collects … debts owed or due or asserted to be owed or due another." An earlier version of the act expressly excluded its application to lawyers. But by judicial interpretation of its current version, "debt collector" includes "lawyers who regularly collect debts through litigation." Therefore, litigation practices can constitute a violation of the FDCPA. Moreover, notwithstanding that lawyers may enjoy judicial immunity for certain litigation practices under state law, lawyers can be subject to liability under the FDCPA for the same conduct because the act pre-empts state law whenever it conflicts with the act. Recent cases illustrate these points.

The opinion in *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, ___ F.3d ___, 2011 WL 746892 (9th Cir. March 4, 2011), considers several issues, only one of which I take up here. Plaintiff in *McCollough* asserts a FDCPA violation because the defendant lawyers had served him with requests for false admissions in a lawsuit brought to collect debt generated in a credit card account after the applicable statute of limitations had expired. The lawyer representing the creditor served the debtor — defendant in that action and the plaintiff here — a set of requests for the debtor to admit untrue facts: "that he had never disputed the debt, that he had no defense, that every statement in (the creditor's) complaint was true, and that he had actually made a payment on or about June 30, 2004." The significance of the payment date request is that admission of that would make the filing of the collection action timely under the applicable statute of limitations.

The defendant lawyers argued that the application of FDCPA with respect to litigation practice should be limited to the filing of a complaint "and the service of settlement letters during the course of litigation." Moreover, they argued "that failure to exclude discovery procedures from FDCPA coverage would hinder attorneys' ability to litigate cases." They contended that court rules of civil procedure should provide the remedies for improper discovery tactics and that they cannot be liable under the FDCPA if they have complied with the applicable state rules.

The district court rejected this argument, finding that service of a set of requests for false admission by counsel representing the creditor constitutes a violation of FDCPA as a matter of law. The defendant lawyers did not fare any better on appeal. The 9th Circuit panel, which included retired Justice Sandra Day O'Connor, sitting by designation, found no such distinction in the case law. Instead, the opinion considers the broad definition of "debt collector" under the act and the fact that the express exemption for lawyers contained in an earlier version of the act had been removed by Congress when the act was amended. In the appellate court's view, defendant lawyers did not help their case when, at the bottom of the first page of the request, they stated the following disclosure, which is required if the act applies: "This is an attempt to collect a debt."

In *O'Rourke v. Palisades Acquisition XVI, LLC,* ___ F.3d ___, 2011 WL 905815 (C.A.7 (Ill.) March 17, 2011), a 7th Circuit panel in Illinois considered the issue of whether an allegedly deceptive exhibit attached to the complaint in a collection action, which was allegedly intended to deceive not the consumer but the trial judge, can implicate the FDCPA. In affirming summary judgment granted to the defendant lawyer, two members of the panel found that it did not. The third member concurred on the basis that the judgment could be affirmed without reaching this legal issue and then opining in dicta "that the language of the Act may be expansive enough to prohibit misleading submissions to a court, that is, to a court which can impose liability on the debtor."

Many collection cases are hard to prove because of the age of the debt and because of spotty loan documentation. Under Illinois practice, the trial judge has the discretion to require additional proof of a claim, notwithstanding that the defendant has defaulted. The debtor in *O'Rourke* contended that the collection attorney had attached an exhibit to the complaint that gives the mistaken appearance that it is an account statement sent to the debtor six months before and to which he did not object. Debtor contends that this was done to support an account-stated theory, which would suggest a slam-dunk case, to deceive the trial judge not to exercise his or her discretion and require additional proof from the creditor in the event of a default.

In a reading of the act by the majority in *O'Rourke,* "in light of the Act's purpose and numerous provisions, the prohibitions are clearly limited to communications direct to the consumer and do not apply to state judges." In their view, "(a)s a general matter, the Act and its protections do not extend to third parties," although they note the existence of case law that does extend "the Act's prohibitions to some statements made to a consumer's attorney … and to others who can be said to stand in the consumer's shoes." The concurring opinion, however, notes a 9th Circuit case, *Guerrero v. RJM Acquisitions, LLC,* 499 F.3d 926 (9th Cir. 2007), which holds that a complaint served on a consumer in a debt-collection matter is subject to certain provisions of the act.

What is ironic is that in both *McCollough* and *O'Rourke,* the debtor's legal position in the underlying matter was not compromised in any way because of the alleged abusive conduct. In *McCollough,* the debtor had retained counsel who had timely responded to the admission request with denials. In *O'Rourke*, counsel for the creditor ultimately moved for dismissal with prejudice of the underlying matter because it was not cost effective to proceed to trial. The lack of prejudice does not matter, however, because liability does not rest upon whether the abusive conduct was successful in influencing the consumer. Instead, this is a strict liability claim (although subject to exceptions); it is intended as remedial to stop such practices in general.

What lessons do *McCollough* and *O'Rourke* teach with respect to the application of the FDCPA to litigation practices in consumer debt collection actions? There is potential exposure under the act with respect to any litigation actions in that area of practice.