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Collecting Debt in Wyoming: The Fair Debt Collection Practices Act as a Trap for the Unwary

Robert A. Monteith*

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You've just received the answer on that collection action you filed a couple of weeks ago. As you expected from talking to the defendant, the answer merely denies liability and pleads poverty. As you didn't expect, the answer also contains a third-party claim for \$1,000.00 in statutory damages, actual damages and attorney fees against *you* and a counterclaim seeking the same damages from your client.

You handled the matter as you have for years. When the claim for money due the doctor came in, you called the debtor to see if you could work it out. Then you sent your standard demand letter; you know, the one you've used so long its origins are uncertain. The debtor wrote back and claimed he'd never heard of your client and wouldn't pay. A week or two later you called again with a final warning, to no avail.

So, you filed suit requesting, in addition to the debt, the collection costs and attorney fees agreed to in the patient agreement. You had the defendant served, personally, at his job in Casper (he lives in Glenrock but, since you are in Casper, the doctor is closer to Casper and the wage garnishment will have to be served in Casper, anyway, it seemed to be the most central spot). What went wrong?

INTRODUCTION

As this article will show, just about everything which could go wrong, did.¹ Throughout the process, long accepted actions exposed the attorney, and the client, to personal liability for violations of the Fair Debt Collection Practices Act (FDCPA).² Such oversight is espe-

1. The initial contact was acceptable but must be followed, within five days, by a "validation notice" required by 15 U.S.C. § 1692g(a). The initial call, demand letter and follow-up call did not contain the warnings required by 15 U.S.C. § 1692e(11). Continuing collection efforts, after the debtor's letter, violated the validation requirements of 15 U.S.C. § 1692g(b).

The complaint, in enforcing contracted-for collection costs, attempted to enforce an obligation not due (pursuant to the U.C.C.C.) in violation of 15 U.S.C. § 1692f(1) and 15 U.S.C. § 692e(2)(A). Although venue was proper in Casper, pursuant to WYO. STAT. § 1-5-108 (1977), it was improper pursuant to 15 U.S.C. § 1692i(a)(2). Finally, the collection summons and complaint were a communication triggering the requirements of 15 U.S.C. § 1692e(11). Thus, by following the standard and time honored collection practices, the hapless practitioner has managed to commit at least seven federal violations.

Finally, the third-party complaint properly named the attorney as the individual liable for the damages. Pursuant to 15 U.S.C. § 1692k(a) it is the "debt collector" who is liable for violations of the Act. In addition, the client may also be liable vicariously so the counterclaim is proper. See *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1516 (9th Cir. 1994). In seeking both statutory and actual damages, the counterclaim and third-party complaint apply 15 U.S.C. § 1692k(a)(2)(A). Attorney fees may be recovered pursuant to 15 U.S.C. § 1692k(a)(3).

2. 15 U.S.C. § 1692-1692o (1994).

cially dangerous because awareness of the pitfalls facing "debt collectors" is growing.³

To assist Wyoming practitioners on both sides of the issue, this article addresses the major requirements placed upon collection of delinquent consumer debt.⁴ The purpose of this article is not to address the entire field in detail.⁵ It will, however, address specific issues of Wyoming state law which are troublesome in complying with the FDCPA.⁶

The FDCPA was originally enacted in 1977.⁷ It was intended and designed to address a perceived set of abuses by the debt collection industry.⁸ To accomplish this the Act controls the major stages in the collection process. However, it was also crafted to avoid overly broad application. To understand this balance, the Act is best viewed in stages.

The Act

Specific definition of terms and the limitation of protection by the use of these terms is used throughout the FDCPA to control the scope of the Act. First, the Act carefully defines "debt collector".⁹ Then, the Act limits

3. Although only one reported decision has addressed application of the federal Fair Debt Collection Practices Act in Wyoming (*Johnson v. Statewide Collections, Inc.*, 778 P.2d 93 (Wyo. 1989)) it is unreasonable to assume that the trend of litigation in other parts of the country will soon reach the state. The area has become so popular, in fact, that some attorneys have devoted their practices to prosecuting FDCPA violations. See, e.g., Mark Hansen, *When Rubin Sues, Defendants Settle: Unscrupulous Debt Collectors Pay the Bills for New Mexico Consumer Lawyer*, A.B.A. J., Jan., 1993, at 28.

4. Although many attorneys collect both consumer and commercial debt, the scope of this article is limited to issues presented in consumer collections because consumer debt collection has the most serious pitfalls. Generally though, compliance with the Act in a commercial setting will also avoid liability.

5. Several full length texts address issues presented by the FDCPA. For full length treatments of the subject, see AMERICAN COLLECTORS ASSOCIATION, INC., FAIR DEBT COLLECTION PRACTICES ACT (1993) and 2 NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION (1991 & Supp. 1995). The American Collectors Association (ACA) is a national trade association made up of collection industry professionals while the National Consumer Law Center (NCLC) is an activist organization addressing consumer rights. The ACA may be reached by writing P. O. Box 39106, Minneapolis, MN, 55439, or by phone at (612) 926-6547. The NCLC is located at 18 Tremont Street, Boston, MA, 02108, (617) 523-8010. Also, several good law review articles address the topic including: Elwin Griffith, *Fair Debt Collection Practices Act: Some Problems in Interpretation*, 27 WILLAMETTE L. REV. 237 (1991) and Laurie A. Lucas & Alvin C. Harrell, *1993 Update on the Federal Fair Debt Collection Practices Act*, 48 BUS. LAW. 1159 (1993).

6. Two bills are currently before Congress to modify the FDCPA, H.R. 1711 introduced by Representative Bachus and S. 1379 introduced by Senator Simpson. Although an analysis of these bills is outside the scope of this article, neither bill would add compliance requirements to the material discussed here.

7. Pub. L. No. 95-109, 91 Stat. 874 (1977).

8. 15 U.S.C. § 1692.

9. 15 U.S.C. § 1692a(6) defines a "debt collector" as:

the application of most of its provisions to "debt collectors" and excludes the activities of most first-party creditors.¹⁰ Also, the Act's application is limited to debts owed by individuals and founded upon consumer transactions.¹¹ Thus, the Act's protections are limited to dealings between "professional" debt collectors and "unsophisticated" consumers.

Although the Act does not attempt to control all aspects of the relationship between collectors and consumers, it has a pervasive effect. It controls communication between the parties,¹² deceptive practices,¹³ oppressive practices,¹⁴ and provides consumers with opportunities to have their position heard.¹⁵ Further, it permits the states to establish other, more restrictive, regulatory schemes.¹⁶

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 (G) 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

The provision goes on to include the activities of persons who enforce security agreements. It concludes with a list of exceptions including officers and employees of the original creditor, U.S. government collectors, process servers, some credit counselors and some specific debtor/creditor relationships. 15 U.S.C. § 1692a(6)(A)-(F).

10. 15 U.S.C. § 1692j is the only protective provision of the Act which is not limited to "debt collectors." It prohibits the use of forms which would give the impression a third-party collector is involved. The provision is applied in *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864, 871 (D.N.D. 1981) and *Anthes v. Transworld Sys., Inc.*, 765 F. Supp. 162, 167 (D. Del. 1991). The first-party creditor, a creditor collecting its own debt in its own name, also loses the protection of its status if it chooses to give the appearance that the debt has been sent to a third-party collector. 15 U.S.C. § 1692a(6).

11. 15 U.S.C. § 1692a(3), (5). Although discussed subsequently, this result is achieved from an interplay between the definitions of "debt" and "consumer." Subsection (3) defines consumer as "any natural person obligated or allegedly obligated to pay any debt." Then, subsection (5) provides that "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." *Id.*

12. 15 U.S.C. § 1692c addresses the time, place, and with whom communication may occur. Communication with third parties is also controlled by the requirements of 15 U.S.C. § 1692b.

13. 15 U.S.C. § 1692e specifically prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." The section goes on to provide a *non-exclusive* list of prohibited deceptive practices. *Id.*

14. Again, as with prohibited deception, the Act prohibits "unfair or unconscionable" means to collect a debt, 15 U.S.C. § 1692f, and means which "harass, oppress or abuse," 15 U.S.C. § 1692d. Each section provides a *non-exclusive* list of such practices.

15. The Act provides very specific requirements for notices to the consumer at or shortly after the first communication. 15 U.S.C. § 1692g. These requirements are designed to provide the consumer information to permit identification of the debt and a means to request additional information. *Id.* In addition, the Act's venue provision, 15 U.S.C. § 1692i, insures that legal proceedings are undertaken in a forum convenient for the consumer.

16. 15 U.S.C. § 1692n establishes the preemptive effect of the Act and provides that, unless state laws are directly inconsistent with *and* less restrictive than the Act, they are not pre-

Finally, the Act attempts to discourage abuse through a tri-partite scheme for enforcement.¹⁷ The most meaningful enforcement provision is significant civil liability for violations.¹⁸ The Act also provides class action liability to encourage enforcement by entire groups of consumers.¹⁹ Finally, the Act empowers the Federal Trade Commission (FTC) to enforce the Act, in the same manner as it controls any other deceptive or unfair practice.²⁰

THE ATTORNEY AS COLLECTOR

Until 1986, an attorney acting on behalf of a client was specifically exempt from the FDCPA.²¹ The exception created a paradox. The Act was intended to protect consumers from oppressive debt collection practices.²² Yet, it excluded an entire class of potent and powerful individuals regularly collecting from consumers.²³ In response to the contradiction, Congress has eliminated the exception for attorneys.²⁴

Elimination of the attorney exception, while not automatically extending FDCPA coverage to attorneys, subjected them to the same definition applied to others.²⁵ Now, as with collectors, the test turns upon the nature of the attorney's activities and the nature of the debt and debtor. If the attorney is a "debt collector," is not excluded, and the debtor is a "consumer," the attorney must comply with the Act.²⁶

empted. In addition the states are invited to establish their own, more restrictive, statutory schemes at 15 U.S.C. § 1692o.

17. 15 U.S.C. §§ 1692k-1692l.

18. 15 U.S.C. § 1692k provides that the aggrieved consumer may collect actual and statutory damages. The award of attorney fees is also authorized for successful consumers. In a practical sense, these attorney's fees are often the most significant cost of a violation. For example, in *Pipiles v. Credit Bureau, Inc.*, 886 F.2d 22, 28 (2d Cir. 1989), attorneys' fees were awarded although the consumer was awarded neither actual nor statutory damages.

19. 15 U.S.C. § 1692k(a)(2)(B). In addition to actual damages and attorney fees, each named plaintiff may receive up to \$1000 statutory damages. The class, as a whole, may also receive a substantial award. *Id.* Because many debt collectors, and collection attorneys, practice in a highly repetitive, standardized manner, the possibility of a large class action award is meaningful.

20. 15 U.S.C. § 1692l.

21. 15 U.S.C. § 1692a(6)(F) (Supp. II 1979).

22. 15 U.S.C. § 1692(e).

23. For a discussion of this inconsistency see *Crossley v. Lieberman*, 868 F.2d 566, 569 (3d Cir. 1989).

24. Pub. L. No. 99-361, 100 Stat. 768 (1986) (amending 15 U.S.C. § 1692(a)(6)).

25. See *e.g.*, *Mertes v. Devitt*, 734 F. Supp. 872, 873 (W.D. Wis. 1990) where an attorney was not "regularly" collecting debts and, thus, was not subject to the provisions of the Act.

26. Many cases apply the Act to attorneys. See, *e.g.*, *Crossley*, 868 F.2d at 569, *Scott v. Jones*, 964 F.2d 314, 316 (4th Cir. 1992), *Shapiro and Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo. 1992), *Littles v. Lieberman*, 90 B.R. 700, 707 (E.D. Pa. 1988), *Tolentino v. Friedman*, 46 F.3d 645, 649 (7th Cir. 1995), *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1513 (9th Cir. 1994).

Thus, determining if the FDCPA applies to actions of an attorney turns, really, on three key points. Does the attorney regularly engage in collection activities? Did the debt arise from a transaction? Finally, was the debtor's purpose in engaging in the transaction related to personal, family or household needs?

Who's Included

In defining "debt collector," the FDCPA establishes two alternate means of inclusion.²⁷ In general, the Act includes those businesses or individuals whose "principal purpose" is the collection of debt.²⁸ In addition, it includes those who "regularly" collect "debts" due another.²⁹

An attorney, pursuing a collection on behalf of a client, is attempting to collect money due another.³⁰ Thus, the Act's application turns upon the determination of what constitutes "regularly" collecting.³¹ When collections constitute a large portion of an attorney's business, the Act applies.³² On the other hand, when such cases are an *exceedingly* small portion of the practice, courts usually determine the Act does not apply.³³

Problems arise in the middle ground. When collections are neither a large nor insignificant portion of a practice, the courts seek to determine if such collections are *extraordinary*.³⁴ The approach emphasizes that "regular" does not mean substantial. Rather, the test is if the collection practice is outside the ordinary routine of the attorney or firm.³⁵

Even if collection is a principal or regular part of a practice, exceptions to coverage exist.³⁶ The major exception excludes employees and officers of the original creditor collecting the creditor's debts in the creditors name (assuming the original creditor is not otherwise a "debt collec-

27. 15 U.S.C. § 1692a(6).

28. *Id.*

29. *Id.*

30. The employee exception, 15 U.S.C. § 1692a(6)(A), would apply to "in house" counsel collecting in their employer's name.

31. *See, e.g., Mertes*, 734 F. Supp. at 873, *Stojanovski v. Strobl & Manoogian, P.C.*, 783 F. Supp. 319, 322 (E.D. Mich. 1992).

32. In *Scott*, 964 F.2d at 316, the court found an attorney was "regularly" engaged in collection where, during a four year period, he filed over 4,000 collection cases a year and collections accounted for 80% of his practice.

33. *See, e.g., Catherman v. First State Bank*, 796 S.W.2d 299, 303 (Tex. Ct. App. 1990); *Mertes*, 734 F. Supp. at 873.

34. *See, e.g., Stojanovski*, 783 F. Supp. at 322. In this case, collections amounted to less than 4% of the firm's business and, yet, the firm was determined to be "regularly" engaged in collections. *Id.*

35. *Id.*

36. 15 U.S.C. § 1692a(6)(A)-(F).

tor").³⁷ However, the protection is lost if the attorney fails to clearly disclose the true nature of the relationship.³⁸

Case law, for a time, created an exception to the Act's coverage for an attorney whose collection activity consisted exclusively of litigation.³⁹ The exception was rejected by other courts.⁴⁰ The dispute was resolved when the United States Supreme Court found that, if the other necessary criteria are met, an attorney whose activities are confined *solely* to litigation is a "debt collector" within the meaning of the Act.⁴¹

Who's Protected

The next issue in determining the applicability of the FDCPA turns on the nature of the debt *and* of the debtor. To trigger the Act's protection, the debtor must be a "consumer."⁴² The definition of "consumer," on its face, requires only that a consumer be a natural person.⁴³ However, use of the term "debt" incorporates the additional requirements of that definition.⁴⁴ Specifically, a "debt" requires a transaction *and* that the transaction be for personal, family or household purposes.

In defining transaction, courts require some sort of an exchange.⁴⁵ Despite this, issuing a bad check and making a consumer loan constitute transactions to which the Act applies.⁴⁶ With checks and loans, it appears that the purpose for which the loan is made or the check is given is determinative. If made or given in exchange for personal, family or household

37. 15 U.S.C. § 1692a(6)(A).

38. *See, e.g.,* Dorsey v. Morgan, 760 F. Supp. 509, 513 (D. Md. 1991).

39. Green v. Hocking, 9 F.3d 18, 21 (6th Cir. 1993); Azar v. Hayter, 874 F. Supp. 1314, 1320 (N.D. Fla. 1995) (following *Green*).

40. Fox v. Citicorp Credit Servs., Inc., 15 F.3d 1507, 1512 (9th Cir. 1994); Jenkins v. Heintz, 25 F.3d 536, 538 (6th Cir. 1994).

41. Heintz v. Jenkins, 115 S. Ct. 1489, 1490 (1995).

42. Only 15 U.S.C. § 1692j prohibits conduct toward the public in general. The remainder of the Act's prohibitions, 15 U.S.C. §§ 1692b-1692i, limit their protection to "consumers."

43. "The term 'consumer' means any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. § 1692a(3).

44. 15 U.S.C. § 1692a(5).

45. In Staub v. Harris, 626 F.2d 275, 278 (3d Cir. 1980) the court determined that tax collection does not trigger protection because taxes do not involve a transaction. A similar result is reached in the case of overdue child support, Mabe v. GC Servs., 32 F.3d 86, 87 (4th Cir. 1994); in the case of a mistaken overpayment, Arnold v. Truemper, 833 F. Supp. 678, 685 (N.D. Ill. 1993); and in the case of damages from theft or fraudulent conduct, Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1167 (3d Cir. 1987); Shorts v. Palmer, 155 F.R.D. 172, 174 (E.D. Ohio 1994).

46. For application to checks, *see* Wegmans Food Mkts., Inc. v. Scrimpsheer, 17 B.R. 999, 1009 (N.D.N.Y. 1982). For loans, *see* Bloom v. I.C. Sys., Inc., 753 F. Supp. 314, 317 (D. Or. 1990), where the court, while recognizing that a loan could be a transaction, excluded the transaction because the loan was not for personal, family or household purposes.

purposes the Act applies.⁴⁷ Finally, although not a great number of cases address the precise meaning of "personal, family or household," the decisions liberally construe it.⁴⁸

Given the strict penalties for non-compliance and the relative ease of complying, an attorney undertaking nearly any type of debt enforcement action should err on the side of caution and comply with the Act.⁴⁹

COMMUNICATION WITH THE CONSUMER

The collection process is intricately tied to communication between collector and debtor. From the initial contact through enforcement of a judgment, it is communication which dominates the process. Thus, not surprisingly, many of the prescriptive requirements of the FDCPA control the content and manner of this communication.

Validation Notice

The first, and often overlooked, mandate of the Act is a requirement that the consumer be given an opportunity to dispute a debt's validity, at the outset of collection.⁵⁰ The provision, by requiring disclosure of specific information about the debt and the consumer's validation rights, is intended to limit the effect of mistaken identity and confirm the existence and amount of a debt.⁵¹

The statute, on its face, requires collectors to give notice of its protection to the consumer. Within five business days of the first communication, the collector must advise the consumer of the amount of the debt, the creditor to whom the debt is owed, a statement of the consumer's right to dispute the debt and to request further investigation by the debt collector, and a notice that the consumer will receive the results of such investigation.⁵²

47. See *supra* note 46.

48. See, e.g., *Dorsey v. Morgan*, 760 F. Supp. 509, 512 (D. Md. 1991); *Herbert v. Monterey Fin. Servs.*, 863 F. Supp. 76, 79 (D. Conn. 1994).

49. Actions not traditionally thought of as "collection" cases can bring an attorney within the coverage of the Act. In *Shapiro and Meinhold v. Zartman*, 823 P.2d 120, 123 (Colo. 1992), an attorney was subject to the Act's requirements although his practice was limited to mortgage foreclosures. Even the distinction between consumer and commercial collection is not sacrosanct. In *Sluys v. Hand*, 831 F. Supp. 321, 323 (S.D.N.Y. 1993), the court reasoned that the business debts of a sole proprietor would entitle the individual to the protection of the Act.

50. 15 U.S.C. § 1692g.

51. E.g., *Swanson v. Southern Or. Credit Servs., Inc.*, 869 F.2d 1222, 1225 (9th Cir. 1988).

52. 15 U.S.C. § 1692g(a)(1)-(5).

In view of the apparent simplicity of the required disclosures, courts are intolerant of any departure from the prescribed information.⁵³ To avoid inadvertent error, the required notice should track, as closely as possible, the specific notices required by the section.⁵⁴ Case law imposes one other major requirement upon the notice. It must be clearly printed, readily apparent and not "overshadowed" by other parts of the dunning letter.⁵⁵ The standard applied, when determining if such a notice is sufficiently clear and prominent, is the objective effect it would have on the use of "least sophisticated consumer."⁵⁶ In reviewing notices, courts find the diminutive typefaces, type sizes and unusual locations indicative of overshadowing.⁵⁷ Further, false senses of urgency expressed in other portions of the dunning letter can overshadow the notice.⁵⁸

Overshadowing is particularly troublesome for attorneys in two settings. First, filing a complaint is usually prefaced by a demand for

53. See, e.g., *Baker v. GC Servs. Corp.*, 677 F.2d 775, 778 (9th Cir. 1982).

54. To insure compliance with the section's requirements, and those of 15 U.S.C. § 1692e(11), all of the author's first notices contain the name of the creditor and total amount of the debt due and are printed on letterhead containing the following postscript:

This communication is for the purpose of collecting a debt and any information received will be used for that purpose. Unless you notify this office within 30 days after receiving this notice that you dispute the validity of the debt or any portion thereof, this office will assume the debt is valid. IF you notify this office in writing within 30 days from receiving this notice, that the debt or any portion thereof is disputed, this office will obtain verification of the debt or obtain a copy of the judgment against you and mail you a copy of such judgment or verification. IF you request this office in writing within 30 days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.

55. The principal case describing and applying these requirements is *Swanson*, where the Court noted:

The statute is not satisfied merely by inclusion of the required debt validation notice; the notice Congress required must be conveyed effectively to the debtor. It must be large enough to be easily read and sufficiently prominent to be noticed—even by the least sophisticated debtor. Furthermore, to be effective, the notice must not be overshadowed or contradicted by other messages or notices appearing in the initial communication from the collection agency.

869 F.2d at 1225 (citation omitted).

56. Although stated nowhere in the Act, the "least sophisticated consumer" standard is adopted from Federal Trade Commission law which, when defining the individual to be protected from unfair and fraudulent practices, views statements in light of their effect upon the unsophisticated. *FTC v. Standard Educ. Soc.*, 302 U.S. 112, 114 (1937). Although the court, in *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1172 (11th Cir. 1985), applied the standard to activities prohibited in the Act, based upon their likelihood to harass, oppress, deceive or abuse a consumer, subsequent cases have applied the standard to the review of all actions and communications with the consumer. In this regard, see *Swanson*, 869 F.2d at 1225, and *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991).

Other courts have used different terminology to the same effect. See *Gammon v. GC Servs. Ltd. Partnership*, 27 F.3d 1254, 1257 (7th Cir. 1994) (less sophisticated consumer).

57. See, e.g., *Rabideau v. Management Adjustment Bureau*, 805 F. Supp. 1086, 1093 (W.D.N.Y. 1992).

58. See *Miller v. Payco-General Am. Credits, Inc.*, 943 F.2d 482, 484 (4th Cir. 1991).

immediate payment. Whether by phone or letter, this demand triggers the requirements of the section. If such a demand is for "immediate" payment, or payment before the validation period expires, courts construe the urgency created by the demand to overshadow the notice.⁵⁹ Thus, initial demands must not impose time limits or other conditions contradicting the validation opportunity afforded by the section.

Second, as noted in *Heintz*,⁶⁰ court pleadings, including the initial summons and complaint, are communications covered by the Act. Thus, were there no previous communication with the consumer, the summons and complaint would have to carry the validation notice. However, this procedure ignores the fact that the summons requires an answer within 20 days.⁶¹ This requirement would contradict and, thus, overshadow the 30 days afforded the consumer by the notice in which to dispute the debt. To avoid this dilemma, a demand letter, with validation notice, must *always* precede filing suit or the answer period must be extended to 30 days.

The Act does not require that all collection activity stop during the validation period, absent written notice of a dispute.⁶² However, caution dictates that filing suit be delayed until the period expires. Such caution is necessary to avoid filing shortly after receipt of notice of a dispute and to avoid overshadowing the validation notice. However, if time is *truly* of the essence, it is possible to argue that filing suit at a time when the *answer date* falls outside the *validation period* does not violate the Act.⁶³

What verification must be supplied before collection may proceed? The Act is notably silent on the point, unless the debt is founded upon an existing judgment. In that case, a copy of the judgment itself is sufficient under the statutory language.⁶⁴

Determining the exact nature of validation information required in the case of debts, prior to judgment, is difficult. In one case, a computer printout informing the consumer of the amount of the debt, the date the services were provided, the name of the creditor and the date upon which the debt was incurred provided adequate verification.⁶⁵

59. See, e.g., *Johnson v. Eaton*, 873 F. Supp. 1019, 1023 (M.D. La. 1995). For a similar result in a collection agency setting, see *Graziano*, 950 F.2d at 111.

60. *Heintz v. Jenkins*, 115 S. Ct. 1489, 1491 (1995).

61. Wyo. R. Civ. P. 12.

62. 15 U.S.C. § 1692g(b). See, e.g., *Johnson v. Statewide Collections, Inc.*, 778 P.2d 93, 99 (Wyo. 1989).

63. Filing of suit, after receipt of a verification request but before mailing of verification, is a violation of the Act. See *Taylor v. Fink*, 1994 WL 669605, at *5 (N.D. Ill. Nov. 25, 1994).

64. 15 U.S.C. § 1692g(b).

65. *Graziano v. Harrison*, 950 F.2d 107, 113 (3d Cir. 1991).

Despite this relatively low burden, it is advantageous and prudent to provide the best available information confirming the existence and amount of a debt, when validation is requested. Such a procedure not only complies with the Act, but reduces unnecessary objections to payment.

The 'Mini-Miranda'

The Act requires that debt collectors affirmatively communicate the purpose of their communication, *whenever* they communicate with the consumer.⁶⁶ Thus, every communication with a debtor should contain the following injunction, “[t]his communication is an attempt to collect a debt and any information obtained will be used for that purpose.”⁶⁷

The language of the section unambiguously requires the disclosure in all communication.⁶⁸ There is no exception for in-person or telephone communication or for subsequent communications.⁶⁹ It applies to attorneys engaged in settling a judgment.⁷⁰ It applies to attorneys in settlement negotiations.⁷¹

Although not addressed in case law, the notice provisions of the section are, arguably, applicable to the summons, complaint and other pleadings in a collection action. Having found the Act applicable to attorneys in litigation, *Heintz* provides no clear guidance to the extent of its application.⁷² Therefore, the *only* safe course is to print the required warning on *all* pleadings filed in any consumer collection action.

66. This requirement comes from 15 U.S.C. § 1692e(11) which provides, in pertinent part, “the failure to disclose clearly in all communications . . . , that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose” constitutes a prohibited action.

67. See *Emanuel v. American Credit Exch.*, 870 F.2d 805, 808 (2d Cir. 1989) for a discussion of the required wording.

68. Cases applying and explaining this provision includes *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 26 (2d Cir. 1989) and *Emanuel*, 870 F.2d at 808.

69. Although one circuit has required the warning in only the first communication, *Pressley v. Capitol Credit & Collection Serv., Inc.*, 760 F.2d 922, 925 (9th Cir. 1985), other circuits have applied the plain meaning of the provision and required the warnings in all communications. See, e.g., *Pipiles*, 886 F.2d at 26, *Dutton v. Wolopoff & Abramson*, 5 F.3d 649, 653 (3rd Cir. 1993), *Frey v. Gangwish*, 970 F.2d 1516, 1519 (6th Cir. 1992), and *Carroll v. Wolopoff & Abramson*, 961 F.2d 459, 460 (4th Cir.), *cert. denied*, 113 S. Ct. 298 (1992).

70. See, e.g., *Dutton*, 5 F.3d at 651.

71. *Tolentino v. Friedman*, 46 F.3d 645, 649 (7th Cir. 1995).

72. In discussing some of the questions of communication in the litigation process, the Court chose to leave the issues unresolved. *Heintz v. Jenkins*, 115 S. Ct. 1489, 1492 (1995).

Limits on Communication

The Act controls who a collector may communicate with, when communication must terminate, when it may take place and where it may occur.⁷³ Generally, the provision limits communication to times and places acceptable to the consumer. In addition, it limits communication to the consumer, or to specified close relatives.⁷⁴

Prohibited third-party communication (i.e., without the express permission of the consumer) is not often litigated, but is strictly construed.⁷⁵ However, the Act permits limited third-party contact with court permission or as *reasonably* necessary to enforce a judgment.⁷⁶ It also permits communication with the original creditor involved in the transaction and with credit reporting agencies.⁷⁷ A final exception exists to permit a collector to obtain "location information," under specific limitations.⁷⁸

Beyond prohibiting most third-party contact, the Act defines the times when the "debt collector" may not communicate with the *consumer*. First, if the consumer notifies the debt collector, *in writing*, that either he refuses to pay the debt or wishes communication to cease, the collector must cease communication.⁷⁹ This protection, too, is strictly construed.⁸⁰ However, the Act does permit further communication for three *specific* reasons: notification that the matter is being dropped, notification that the collector intends to invoke specific remedies "ordinarily" invoked and notification that the collector intends to invoke a specific remedy.⁸¹

73. 15 U.S.C. § 1692c.

74. 15 U.S.C. § 1692c(d) expands the definition of consumer to include "the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator."

75. *See, e.g., West v. Costen*, 558 F. Supp. 564, 576 (W.D. Va. 1983) (consumer's relatives); *Austin v. Great Lakes Collection Bureau, Inc.*, 834 F. Supp. 557, 559 (D. Conn. 1993) (consumer's secretary).

76. 15 U.S.C. § 1692c(b).

77. *Id.*

78. 15 U.S.C. § 1692a(7) limits such "location information" to the consumer's address, telephone number and place of employment. 15 U.S.C. § 1692b(1)-(6) specifies the specific conditions which govern such third-party communications. In general, these provisions permit only so much disclosure as is necessary to obtain the information and prohibit discussion of the existence of a debt.

79. 15 U.S.C. § 1692c(c).

80. *See, e.g., Herbert v. Monterey Fin. Servs.*, 863 F. Supp. 76, 79 (D. Conn. 1994); *Carrigan v. Central Adjustment Bureau*, 502 F. Supp. 468, 470 (D. Ga. 1980).

81. 15 U.S.C. § 1692c(c)(1)-(3). It is useful to note that there is no decision applying the cease communication provisions in the litigation process. *Heintz v. Jenkins*, 115 S. Ct. 1489, 1491 (1995), discussed but did not resolve the issue. Although the institution of suit, subsequent to a demand for termination of communication, would probably be notice of the invocation of "specific remedies", what of other steps in the litigation process? For example, would the tak-

The Act also prohibits direct communication with a consumer represented by an attorney unless the consumer's attorney fails to respond in a reasonable time.⁸² For the bar, this requirement adds little to the requirements of the ethical canons.⁸³ However, such knowledge would also prohibit contact with third parties in pursuit of location information.⁸⁴

Application of this prohibition is problematic when specific notices to the consumer are required before statutory remedies are permitted.⁸⁵ If the consumer is represented, can the notices be sent to the attorney? The statutes do not, on their face, authorize it.⁸⁶ As a compromise, the author sends such notices to the consumer, in care of the attorney and at the attorney's address.

In addition to limiting contacts, the Act has two specific provisions regarding when and where such communication may take place. First, it prohibits communication at unusual times and places.⁸⁷ Second, if known that such communications are not permitted, it bars communication at the consumer's place of employment.⁸⁸

ing of a deposition in aid of execution, pursuant to WYO. STAT. § 1-17-402 (Supp. 1995), be a communication in violation of the Act? Although no cases address the issue, the safest course is to provide the notice in any, and all, communication.

82. 15 U.S.C. § 1692c(a)(2). Cases addressing the issue require that the collector is aware the consumer is represented regarding the *specific* debt. *See, e.g.,* Graziano v. Harrison, 950 F.2d 107, 113 (3rd Cir. 1991). However, such an approach is inherently hazardous and the author strongly recommends against it.

83. WYO. R. PROF. CONDUCT 4.2.

84. 15 U.S.C. § 1692b(6).

85. For example, WYO. STAT. § 1-1-115 (1977) requires two specific notices to the issuer of a bad check, before statutory penalties are imposed. This issue was directly addressed in Johnson v. Statewide Collections, Inc., 778 P.2d 93, 102 (Wyo. 1989). The Court found that a statutory notice, sent to the consumer after the collector received notice of representation, violated the Act. The Court offered, as an alternative procedure, that the required notice should be sent directly to the attorney but this does not comply with the language of the check act. *Id.*

86. *See supra* note 85.

87. 15 U.S.C. § 1692c (a)(1). For cases applying this provision, and coming to inconsistent results, *see* Juras v. Aman Collection Serv., Inc., 829 F.2d 739, 741 (9th Cir. 1987); United States v. Central Adjustment Bureau, Inc., 667 F. Supp. 370, 375 (N.D. Tex. 1986).

88. 15 U.S.C. § 1692c(a)(3). For an application of this provision *see* Austin v. Great Lakes Collection Bureau, Inc., 834 F. Supp. 557, 559 (D. Conn. 1993). This provision, too, presents a dilemma. In cases where the consumer's residence address is unknown and the attorney is aware the consumer's employer does not permit communication, is it a violation of the Act to have the consumer served at work? Again, no reported cases address the issue. However, caution would dictate seeking an ex parte order permitting such service before proceeding.

HARASSMENT AND UNFAIRNESS PROHIBITED

Sometimes, consumers are not at their best when dealing with collectors and attorneys. Sometimes, collectors and attorneys are not at their best when dealing with consumers. The Act, however, deals only with the conduct of collectors and attorneys.

To this end, the Act prohibits, "any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with collection of a debt."⁸⁹ In addition, it prohibits the use of "unfair and unconscionable" methods in the collection process.⁹⁰ To illustrate prohibited conduct, the Act provides *non-exclusive* lists of actions which violate the sections.⁹¹ In applying both provisions, conduct or communication is reviewed from the viewpoint of the "least sophisticated consumer."⁹²

Abuse, Harassment and Oppression

In reviewing allegations of abuse, oppression, and harassment, courts look to the apparent, natural, and intended effect of the activity.⁹³ However, the action must cross some ill-defined line. Threats to file suit (if true), threats to seek attorney fees and costs, and repeated communication by mail, are among actions which do not violate the section.⁹⁴

As noted, the Act provides specific examples of actions which do violate the section. Obscenity, threats of violence or criminal conduct, public humiliation, and repeated phone contact are specifically prohibited.⁹⁵ These activities, as examples of prohibited conduct, provide guidance regarding the prohibition. However, the best test lies in the mind of the collector or attorney. If the action is intended to harass, abuse or oppress, it probably would and is prohibited.

89. 15 U.S.C. § 1692d.

90. 15 U.S.C. § 1692f.

91. 15 U.S.C. §§ 1692d(1)-(6), 1692f(1)-(8).

92. *See, e.g.*, *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1175 (11th Cir. 1985).

93. Cases illustrating this analysis include *Rutyna v. Collection Accounts Terminal, Inc.*, 478 F. Supp. 980, 981 (N.D. Ill. 1979) and *Cirkot v. Diversified Sys., Inc.*, 839 F. Supp. 941, 947 (D. Conn. 1993).

94. *See, e.g.*, *Taylor v. Fink*, 1994 WL 669605, at *5 (N.D. Ill. Nov. 25, 1994) (threats of suit), *Dorsey v. Morgan*, 760 F. Supp. 509, 515 (D. Md. 1991) (attorney fees and costs), and *Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456, 1465 (D. Colo. 1991) (mail communication).

95. 15 U.S.C. § 1692d(1)-(6). *See, e.g.*, *United States v. Central Adjustment Bureau, Inc.*, 667 F. Supp. 370 (N.D. Tex. 1986) (obscenity), *Cirkot*, 839 F. Supp. at 947, (threats of violence), *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864, 873 (D.N.D. 1991) (phone contact) and *Kuhn v. Account Control Technology, Inc.*, 865 F. Supp. 1443, 1462 (D. Nev. 1994) (phone contact).

When contemplating an action in the gray area, remember, would you want to defend it to a judge? How about a jury?

Unfairness

The Act is silent as to the precise meaning of what constitutes prohibited "unfair or unconscionable" conduct. The concept of unfairness, however, is broadly defined by courts to encompass practices that offend public policy, are immoral or oppressive, or cause substantial injury.⁹⁶ Similarly, unconscionable is probably defined as conduct which is shocking to the conscience.⁹⁷

As with abuse and harassment, case law provides some guidance in defining what is prohibited. Threatening to withhold a student's transcripts is not unfair, *if* permitted by law.⁹⁸ On the other hand, attempts to collect without a required license and garnishing the wages of a debtor current in an agreed upon repayment schedule violate the provision.⁹⁹

It would seem, as with abusive practices, that case law and the statutory examples combine to urge caution.¹⁰⁰ Good intentions are not enough.¹⁰¹ Caution and the attorney's sense of justice must provide guidance. If it seems unfair, it probably is. If it seems questionable, prudence would dictate caution.

Statute of Limitation Issues

Several of the Act's specific examples of unfair practices can be especially troublesome for collection attorneys. The section specifically prohibits collection of any amount not due.¹⁰² Although, at first blush, this seems obvious, it has at least two important implications for the collection attorney.

The first trap is triggered by an attempt to collect a time-barred account. Wyoming's eight-year statute of limitations on open accounts and the ten-year statute on written agreements will, most often, control in col-

96. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972), defines the term in a consumer protection context which predates the Act.

97. *Domus Realty Corp. v. 3440 Realty Co., Inc.* 40 N.Y.S.2d 69, 73 (1942).

98. *See Juras v. Aman Collection Serv., Inc.*, 829 F.2d 739, 742 (9th Cir. 1987).

99. *See, e.g., Kuhn*, 865 F. Supp. at 1451 (license requirement); *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1516 (9th Cir. 1994) (payments current).

100. For the statutory examples, *see* 15 U.S.C. § 1692f(1)-(8).

101. For a discussion of the immateriality of intent in reviewing a FDCPA violation, *see Baker v. GC Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982).

102. 15 U.S.C. § 1692f(1).

lections.¹⁰³ However, collection of checks is, arguably, governed by a separate three-year statute of limitation.¹⁰⁴ Also, several other types of debt obligations have specific limitations shorter than the general ten-year statute.¹⁰⁵ Application of a foreign statute of limitation adds additional complexity.¹⁰⁶

Arguably, rather than making a debt no longer due, the statute of limitation merely bars its judicial enforcement.¹⁰⁷ However, courts addressing the issue are not so discriminating. They find an attempt to collect a time-barred account is an attempt to collect an amount not due, in violation of the Act.¹⁰⁸ Further, the attempt to collect time-barred accounts, without disclosing the time-bar, misrepresents the nature of the debt in violation of another portion of the Act.¹⁰⁹

Issues Regarding Other Charges

Attorney fees, collection costs, interest and court costs provide a real threat to the attorney because, though often sought, their award is restricted. In prohibiting attempts to collect "any amount" not due, the Act provides no safe harbor or room for error.¹¹⁰ Thus, an attorney's tendency to request the fullest possible measure of relief can *seriously* backfire.

103. WYO. STAT. § 1-3-105(a)(i) (Supp. 1995) controls on written agreements while WYO. STAT. § 1-3-105 (a)(ii) (Supp. 1995) controls on open accounts.

104. WYO. STAT. § 34.1-3-118(c) (Supp. 1995). It could be argued that the eight year statute governing open accounts, WYO. STAT. § 1-3-105(a)(ii) (Supp. 1995), would govern collection on the original obligation upon which the check was given. However, such argument would not extend to the check costs and fees authorized by WYO. STAT. § 1-1-115 (Supp. 1995). It is unclear if the eight year period for imposition of statutory liability, other than for penalties, provided for in WYO. STAT. § 1-3-105(a)(ii)(B) (Supp. 1995) would control on the check issue. Certainly it is arguably applicable but conservative practice would dictate caution.

105. WYO. STAT. § 34.1-3-118(a)-(g) (Supp. 1995).

106. *See, e.g.*, COLO. REV. STAT. ANN. § 13-80-103.5 (West 1989 & Supp. 1995), which provides only six years for collection of a liquidated claim, like an open account. Although suit may be brought in Wyoming because of the consumer's place of residence, the law of the situs of the transaction would control the choice of statute of limitations. *See generally*, 15 AM. JUR. 2D *Limitation of Actions* § 61 (1976).

107. For example, WYO. STAT. § 1-3-102 (1977) provides: "Civil actions can only be commenced within the periods prescribed in this chapter . . ." Further, WYO. R. CIV. P. 8(c) specifically identifies the statute of limitations as an affirmative defense which must be specifically plead and, thus, identifies it as an avoidance.

108. *See, e.g.*, *Kimber v. Federal Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987).

109. 15 U.S.C. § 1692e(2)(A). However, in *Lindbergh v. Transworld Sys., Inc.*, 846 F. Supp. 175, 178 (D. Conn. 1994), the court failed to impose liability when the collector neither knew nor should have known the claim was time-barred. This lack of knowledge, however, is a tough argument for a collection attorney to make.

110. 15 U.S.C. § 1692f(1). Unlike WYO. R. CIV. P. 11, the Act provides no exception for arguments in the alternative or for extension of existing law. Either the money is due or it is not.

The Act requires all amounts collected to be authorized by "the agreement creating the debt or permitted by law."¹¹¹ Although the language of the provision requires that the inappropriate charge be collected from the consumer, courts apply the provision to *attempts* to collect inappropriate charges.¹¹² Again, other provisions of the Act make the distinction of little import.¹¹³

It is clear that attorney's fees are not recoverable absent specific statutory authorization or express agreement between the parties.¹¹⁴ Further, court costs are generally permitted and awarded in all but the smallest collections.¹¹⁵

Although not permitted on unliquidated claims, most collections involve liquidated claims upon which interest is allowed.¹¹⁶ Yet, the correct rate is problematic without an agreement. The conservative position is to use 7 percent which is the rate permitted on money, which arguably includes open account debt, absent a different agreement.¹¹⁷

The FDCPA cases addressing interest, court costs, and attorneys fees are rather literal and strict in finding violations.¹¹⁸ In addition, excessive check fees receive an equally harsh treatment.¹¹⁹ Finally, attempts to impose these charges, except interest, before judgment creates a violation.¹²⁰

The Collection Cost Problem

Only in the case of checks does Wyoming law specifically authorize the collection of collection fees, absent an agreement.¹²¹ However, the Act authorizes the recovery of other charges agreed to between the parties.¹²² Therefore, a written agreement authorizing collection fees should pass muster.

111. 15 U.S.C. § 1692f(1).

112. *See, e.g., Johnson v. Statewide Collections, Inc.*, 778 P.2d 93, 101 (Wyo. 1989).

113. 15 U.S.C. § 1692e(2)(A).

114. *See UNC Teton Exploration Drilling, Inc. v. Peyton*, 774 P.2d 584 (Wyo. 1989); *Coulter v. City of Rawlins*, 662 P.2d 888 (Wyo. 1983) (discussing Wyoming law on attorneys' fees).

115. WYO. STAT. § 1-14-124 (Supp. 1995). *But see* WYO. STAT. § 1-14-125 (Supp. 1995) which disallows costs when the recovery is less than \$100. When the general statute would prohibit costs, specific statutes authorizing them, like WYO. STAT. § 1-1-115(b) (Supp. 1995), should control the award.

116. *See, e.g., Rissler & McMurry Co. v. Atlantic Richfield Co.*, 559 P.2d 25, 31 (Wyo. 1977).

117. WYO. STAT. § 40-14-106(e) (1977).

118. *See, e.g., Martínez v. Albuquerque Collection Service*, 867 F. Supp. 1485, 1509 (D.N.M. 1994) (attorney fees and interest); *Dutton v. Wolhar*, 809 F. Supp. 1130, 1140 (D. Del. 1992) (court costs).

119. *See, e.g., Johnson*, 778 P.2d at 101; *West v. Costen*, 558 F. Supp. 564, 581 (W.D. Va. 1983).

120. *See, e.g., Smith v. Mikell*, No. 81 C 4736 (N.D. Ill. Feb. 17, 1983); 17 CLEARINGHOUSE REV. 585 (1993).

121. WYO. STAT. § 1-1-115 (Supp. 1995).

122. 15 U.S.C. § 1692f(i).

Right? *Wrong*.

Wyoming Statutes regarding credit sales and other credit transactions enumerate and control what charges are permissible upon default.¹²³ In dealing with consumer credit sales, the Wyoming Uniform Consumer Credit Code (U.C.C.C.) limits the types of charges collectable upon default to those *expressly* authorized by the U.C.C.C.¹²⁴ A similar result is reached in “consumer related sales” by enumerating and limiting the types of enforceable charges.¹²⁵

The U.C.C.C. permits contracting for and charging reasonable attorneys fees upon default.¹²⁶ Similarly, the cost of realizing on a security interest is permissible.¹²⁷ However, the U.C.C.C. does not authorize collection fees or costs. The default charge provisions, thus, make the charges unenforceable, regardless of the parties agreement.¹²⁸ This is the result the drafters of the U.C.C.C. intended.¹²⁹

PROHIBITED MISREPRESENTATION

The last significant prohibition of the Act, like those dealing with unfairness and abuse, is relatively straightforward in prohibiting the use of “any false, deceptive, or misleading representation or means” to collect a debt.¹³⁰ As with the other provisions, the Act provides an illustrative and non-exclusive list of prohibited conduct.¹³¹ As with the other provisions, it incorporates the “least sophisticated consumer” standard.¹³²

The section appears to require only honesty in word and deed.¹³³ It would seem to impose no greater burden upon the bar than that imposed by the ethical canons.¹³⁴ Yet, when combined with the “least sophisticated consumer” standard, it can prohibit communications which are arguably accurate, although misleading without a deeper understanding.¹³⁵

123. WYO. STAT. §§ 40-14-101 to -702 (Supp. 1995), the Wyoming Uniform Consumer Credit Code (U.C.C.C.).

124. WYO. STAT. § 40-14-248 (Supp. 1995).

125. WYO. STAT. § 40-14-259 (Supp. 1995).

126. WYO. STAT. §§ 40-14-247, 40-14-259(a)(i) (Supp. 1995).

127. WYO. STAT. §§ 40-14-248, 40-14-259(a)(i) (Supp. 1995).

128. WYO. STAT. §§ 40-14-248, 40-14-259 (Supp. 1995).

129. See the commentary to the U.C.C.C. (1968 Act) § 2.414; 7 U.L.A. 703 (1985).

130. 15 U.S.C. § 1692e.

131. 15 U.S.C. § 1692e(1)-(16).

132. See, e.g., *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993).

133. See *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864, 872 (D.N.D. 1981) and *Harvey v. United Adjusters*, 509 F. Supp. 1218, 1221 (D. Or. 1981) for cases finding factual accuracy sufficient.

134. See, e.g., WYO. R. PROF. CONDUCT 3.3, 4.1, and 4.3.

135. See *Dutton v. Wolhar*, 809 F. Supp. 1130, 1140 (D. Del. 1992), in which the statement

In its list of examples of prohibited misrepresentation, the section identifies four areas which could easily trap an attorney. Falsely representing an attorney's involvement in a collection, unclearly communicating regarding execution powers, incorrectly representing the debt and threatening prohibited or unintended actions are all specifically prohibited.¹³⁶

Attorney Involvement

While a non-attorney representing himself as a member of the bar clearly violates the Act, most problems which arise are not so clear.¹³⁷ How much involvement in a matter is necessary to justify the statement of attorney involvement? May an attorney merely draft a form letter with a facsimile signature? Must an attorney have some distinct level of knowledge of the matter?

Letters purportedly from an attorney with no knowledge of the matter, who offered no legal advice on the matter and who merely approved a general series of letters bearing a facsimile of his signature violated the section.¹³⁸ Similarly, merely signing the letter does not avoid liability, if the attorney has no knowledge of the matter.¹³⁹ In requiring a meaningful level of knowledge of the matter, one court found a mere perfunctory check for conflicts insufficient.¹⁴⁰

In general, the cases require professional familiarity with the matter before an attorney may imply involvement. The extent of the involvement required is unclear. What is clear is that to merely provide a signature or rubber stamp is insufficient.

Execution Issues

The threat, express or implied, that failure to pay a debt will lead to criminal prosecution or imprisonment is specifically prohibited.¹⁴¹ The provision is most often applied when a debt collector threatens criminal check prosecution without the intent or ability to institute such a prosecution.¹⁴² An interesting and unresolved question arises when the contact is a precursor to criminal prosecution.¹⁴³

"once judgment is obtained" misrepresented the "fact" that judgment would be obtained.

136. 15 U.S.C. § 1692e(2)-(5).

137. 15 U.S.C. § 1692e(3).

138. *Colomon v. Jackson*, 988 F.2d 1314, 1320 (2d Cir. 1993).

139. *Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456, 1461 (D. Colo. 1991).

140. *Martinez v. Albuquerque Collection Service*, 867 F. Supp. 1495, 1500 (D.N.M. 1994).

141. 15 U.S.C. § 1692e(4).

142. *See, e.g., West v. Costen*, 558 F. Supp. 564, 577 (W.D. Va. 1983).

143. Consider, for example, a demand pursuant to WYO. STAT. §§ 6-3-703 (a)(ii), (iii) (1977).

A more common problem arises in the case of false, or unclear, threats regarding seizure of property or wages. A threat to seize assets or property, before judgment, violates the provision.¹⁴⁴ Merely advising the debtor of provisions of law regarding garnishment or execution, if it is clearly conveyed that such remedies are only available after judgment, is acceptable.¹⁴⁵

In discussing property and wage seizure, great care to accurately describe the process is required.¹⁴⁶ If a seizure is threatened, limit the description of what can be taken with a statement like "not otherwise exempt by law."

Misrepresentation Regarding the Debt

The debt collector may not misrepresent "the character, amount or legal status" of the debt.¹⁴⁷ This section, and the provisions regarding unfair practices, make determining permissible court costs, attorney fees, interest, collection costs and the applicable statute of limitation especially critical.

To communicate with a debtor regarding a time-barred account, without advising the consumer of the time bar, mischaracterizes the legal status of the debt and is a violation.¹⁴⁸ To improperly request fees, costs or interest mischaracterizes the amount of the debt and is a violation.¹⁴⁹ Thus, an attorney must take care to correctly determine the amount and validity of a consumer debt.

Threats of Legal Action

The threat of an action not legally available, or which the collector does not plan to take, is specifically prohibited.¹⁵⁰ This provision can create problems because, if an attorney routinely sends a demand letter threatening suit, the attorney must *intend* to follow through.¹⁵¹ Also, the attorney must have the *ability* to follow through.

144. See, e.g., *Cacace v. Lucas*, 775 F. Supp. 502, 506 (D. Conn. 1990). However, the truthful expression of the intent to seek a pre-judgment attachment, pursuant to WYO. STAT. §§ 1-15-103 and -104 (Supp. 1995), would not violate the Act, if clearly communicated.

145. See, e.g., *Higgins v. Capitol Credit Servs., Inc.*, 762 F. Supp. 1128, 1136 (D. Del. 1991).

146. See *Oglesby v. Rotche*, 1993 WL 460841, at *8 (N.D.Ill. Nov. 5, 1993), where the court found a violation because the collector failed to mention possible exemptions when describing the wages, property and financial assets to be seized.

147. 15 U.S.C. § 1692e(2).

148. See, e.g., *Kimber v. Federal Fin. Control Corp.*, 1480, 1488 (M.D. Ala. 1987).

149. See, e.g., *Johnson v. Eaton*, 873 F. Supp. 1019, 1025 (M.D. La. 1995); *Martinez v. Albuquerque Collection Serv.*, 867 F. Supp. 1495, 1509 (D.N.M. 1994).

150. 15 U.S.C. § 1692e(5).

151. See, e.g., *United States v. Central Adjustment Bureau, Inc.*, 667 F. Supp. 370, 378 (N.D. Tex. 1986).

Intent, at the time a threat of suit is made, is reviewed in light of the attendant circumstances. If the threat is made before the creditor authorizes suit, the intent to file is contradicted.¹⁵² A litigation history contradicting the probability of suit has supported finding a violation.¹⁵³ The size of the debt, also, is significant if it is small enough to negate any practical intent to file suit.¹⁵⁴

False threats of suit are often found in two settings. First, a communication, while not specifically threatening legal action, implies such action is imminent.¹⁵⁵ The second problem comes from the perceived need to create a sense of urgency in the consumer. This urgency is expressed in arbitrary and untrue deadlines for payment before legal action. Such false statements of urgency give rise to liability.¹⁵⁶

When an attorney undertakes a collection against an out-of-state consumer, the attorney may not have the ability to follow through with the threat of suit. The problem results from the statute's venue provision and the profession's licensing requirements.

The Act limits the venue for consumer collection actions.¹⁵⁷ If suit is on an open account, the consumer may *only* be sued in the judicial district where the consumer resides.¹⁵⁸ If the debt is founded on a *written* agreement, the action is also proper where the consumer *signed* the contract.¹⁵⁹ Although it was argued that "judicial district" could mean the United States judicial district, the accepted view is that suit is proper only in the correct local or state district.¹⁶⁰

If a consumer resides in, or signed a contract in, the state where the attorney is licensed, venue is not a problem. However, unless the attorney can file suit in the correct venue, he or she may not threaten a suit that he or she could not file.¹⁶¹

152. *See, e.g.*, Bentley v. Great Lakes Collection Bureau, 6 F.3d 60, 62 (2d Cir. 1993), Kuhn v. Account Control Technology, Inc., 865 F. Supp. 1443, 1450 (D. Nev. 1994).

153. Baker v. GC Servs. Corp., 677 F.2d 775, 778 (9th Cir. 1982).

154. *See, e.g.*, United States v. Central Adjustment Bureau, Inc., 667 F. Supp. 370, 378 (N.D. Tex. 1986).

155. *See, e.g.*, Herbert v. Monterey Fin. Servs., 863 F. Supp. 76, 80 (D. Conn. 1994).

156. *See, e.g.*, Bentley, 6 F.3d at 79; Oglesby v. Rotche, 1993 WL 460841, at *7 (N.D. Ill. Nov. 5, 1993).

157. 15 U.S.C. § 1692i(a).

158. 15 U.S.C. § 1692i(a)(2)(B).

159. 15 U.S.C. § 1692i(a)(2)(A).

160. *See, e.g.*, Dutton v. Wolhar, 809 F. Supp. 1130, 1138 (D. Del. 1992).

161. *See* Gaetano v. Payco, Inc., 774 F. Supp. 1404, 1414 (D. Conn. 1990) and Kuhn v. Account Control Technology, Inc., 865 F. Supp. 1443, 1451 (D. Nev. 1994), for discussion of a similar problem faced by collection agencies collecting out of state.

DAMAGES AND DEFENSES

Even a seemingly insignificant violation of the Act automatically subjects the attorney, *and* any employee of the attorney responsible for the violation, to specific classes of damages.¹⁶² There is authority which would impute this liability to the client.¹⁶³ Beyond this, a single minor violation in a standard form or practice, repeated time and again, gives rise to class action liability.¹⁶⁴ And, in every case, a successful consumer is entitled to an attorney fee award.¹⁶⁵

In any action on a violation, the case may be brought as an independent state action, a counterclaim, a third-party claim or as an independent action in federal district court.¹⁶⁶ In addition, trial to a jury is available.¹⁶⁷ A cause under the Act is not limited to the consumer debtor, any person injured by a violation is entitled to recovery.¹⁶⁸

The Act permits the recovery of actual damages which, though usually minor, have serious potential. The loss of a job could be the direct result of improper third-party contact, for example.¹⁶⁹ In applying the provision, courts give it a broad reading and allow compensation for emotional distress, attorneys fees and travel expenses incurred to rectify harm caused by the violation, and even loss of consortium.¹⁷⁰

Statutory damages of up to \$1,000.00 provide a second deterrent to violation. The damages are independent of any award of actual damages.¹⁷¹ However, as the award may range up to \$1,000.00, the severity of

162. 15 U.S.C. § 1692k(a). *See* *Teng v. Metropolitan Retail Recovery, Inc.*, 851 F. Supp. 61, 67 (E.D.N.Y. 1994) (holding employees liable for their violations).

163. *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1516 (9th Cir. 1994).

164. 15 U.S.C. § 1692k(a)(2)(B). Thus, the simple failure to include the Mini-Miranda on the standard summons and complaint or a failure to provide the validation notice on the standard demand letter creates class liability extending to *all* of the consumer collections done by an attorney, at least in the preceding year.

165. 15 U.S.C. § 1692k(a)(3).

166. 15 U.S.C. § 1692k(d).

167. *See, e.g., Sibley v. Fulton Dekalb Collection Serv.*, 677 F.2d 830, 834 (11th Cir. 1982).

168. *See, e.g., Whatley v. Universal Collection Bureau, Inc.*, 525 F. Supp. 1204, 1205 (N.D. Ga. 1981).

169. As where a debt collector improperly contacts a consumer's employer and the employer terminates the consumer as a result.

170. *See e.g., Smith v. Law Office of Mitchell N. Kay*, 124 B.R. 182, 185 (D. Del. 1991) (emotional distress), *Carrigan v. Central Adjustment Bureau*, 502 F. Supp. 468, 470 (D. Ga. 1980) (emotional distress), *Venes v. Professional Serv. Bureau, Inc.*, 353 N.W.2d 671, 675 (Minn. Ct. App. 1984) (fees and expenses) and *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864, 875 (D.N.D. 1981) (consortium loss).

171. *See, e.g., Baker v. GC Servs. Corp.*, 677 F.2d 775, 780 (9th Cir. 1982); *Harvey v. United Adjusters*, 509 F. Supp. 1218, 1222 (D. Or. 1981).

the violation is often used to determine the actual amount.¹⁷² One court indicates that violations by attorneys are more severe than those by lay collectors.¹⁷³ Only one recovery of statutory damages per civil action is permitted, regardless of the number of violations found.¹⁷⁴

Although not actually a measure of damages, the section's authorization of attorneys fees is often the most significant financial aspect of an FDCPA action. While statutory damages are capped at \$1,000.00 per action and actual damages are often slight, application of the "lodestar" fee computation method can lead to fee awards many times the amount of the recovered damages.¹⁷⁵ In reviewing attorney fee requests in a different setting, the United States Supreme Court has indicated a willingness to weigh the relative success of the consumer's case in determining an appropriate award.¹⁷⁶ At least one court has reached a similar result in reviewing fees under the FDCPA.¹⁷⁷ However, most courts give effect to the "private attorney general" aspect of the Act and are reluctant to engage in result oriented review.¹⁷⁸ Finally, although the section permits an award of fees to the debt collector for bad faith suits, courts are grudging in application of the provision.¹⁷⁹

Defenses to Liability

Of course, the best defense to liability is not to violate the Act. However, even conscientious counsel dedicated to avoiding violation will occasionally err. In addition, the possibility of large attorney fee awards for successful consumer plaintiffs encourages actions which might otherwise be deemed trivial. Thus, the collection attorney must always beware.

Actions to enforce FDCPA liability have a relatively short, one year, period in which they may be brought.¹⁸⁰ The period begins running from the time of the violation, not from when the consumer

172. See, e.g., *Carrigan*, 502 F. Supp. at 471; *Rutyna v. Collection Accounts Terminal, Inc.*, 478 F. Supp. 980, 982 (N.D. Ill. 1979).

173. *Crossley v. Lieberman*, 868 F.2d 566, 572 (3d Cir. 1989).

174. See, e.g., *Harper v. Better Business Servs., Inc.*, 961 F.2d 1561, 1563 (11th Cir. 1992); *Teng v. Metropolitan Retail Recovery, Inc.*, 851 F. Supp. 61, 69 (E.D.N.Y. 1994).

175. See *Altergott v. Modern Collection Techniques, Inc.*, 864 F. Supp. 778, 780 (N.D. Ill. 1994) for a rather complete analysis of the fee problem.

176. *Farrar v. Hobby*, 506 U.S. 103, 115 (1992).

177. *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 629 (4th Cir. 1995).

178. See, e.g., *Tolentino v. Friedman*, 46 F.3d 645, 652 (7th Cir. 1995).

179. 15 U.S.C. § 1692k(a)(3). See, e.g., *Latimer v. Transworld Systems, Inc.*, 842 F. Supp. 274, 275 (E.D. Mich. 1993).

180. 15 U.S.C. § 1692k(d).

learns of the violation.¹⁸¹ At least one court has found that tolling concepts are not applicable to the limitation.¹⁸²

Another portion of the Act provides a bona fide error defense.¹⁸³ Only unintentional violations are defensible.¹⁸⁴ Thus, intentional actions, taken upon incorrect legal advice, are not protected.¹⁸⁵ In fact, reliance upon such incorrect advice is considered to be evidence the violation was intentional, making the defense unavailable.¹⁸⁶

Damned if you do, and damned if you don't?

For application of the good faith error defense, the violation must be a good faith error *and* have occurred despite procedures reasonably adapted to avoid such an error. Thus, when a subordinate merely makes a mistake, the defense is unavailable.¹⁸⁷ A missed communication is also insufficient.¹⁸⁸ It is not enough that the error is merely unintentional.¹⁸⁹ In determining the sort of errors to which the defense applies, at least one court has likened it to the Truth-in-Lending Act's error exception which excuses *only* unintentional clerical errors.¹⁹⁰ However such an error is defined, there must exist procedures to catch and prevent it. It is the burden of the defendant to show such procedures.¹⁹¹ Although the burdens facing such a defense are high, it can prevail.¹⁹²

There exists one final, and seldom used, safe harbor defense. The Act provides that a debt collector may rely upon an official advisory opinion of the FTC.¹⁹³ However, the provision is rarely used and official FTC opinions are nearly impossible to get.

181. See, e.g., *Mattson v. U.S. West Communications*, 967 F.2d 259, 261 (8th Cir. 1992).

182. *Chisolm v. Charlie Falk Auto Wholesalers, Inc.*, 851 F. Supp. 739, 749 (E.D. Va. 1994).

183. 15 U.S.C. § 1692k(c).

184. *Id.*

185. See, e.g., *Martinez v. Albuquerque Collection Serv.*, 867 F. Supp. 1495, 1502 (D.N.M. 1994).

186. See *Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984), for this result in a very similar truth in lending setting.

187. See, e.g., *Sluys v. Hand*, 831 F. Supp. 321, 326 (S.D.N.Y. 1993).

188. See, e.g., *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1514 (9th Cir. 1994).

189. See, e.g., *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864, 874 (D.N.D. 1981).

190. *Baker v. GC Servs.*, 677 F.2d 775, 779 (9th Cir. 1982).

191. See, e.g., *Johnson v. Eaton*, 873 F. Supp. 1019, 1028 (M.D. La. 1995).

192. See, e.g., *Juras v. Aman Collection Serv., Inc.*, 829 F.2d 739, 741 (9th Cir. 1987).

193. 15 U.S.C. § 1692k(e).

CONCLUSION

As originally intended, the FDCPA sought to balance the disparate power of professional debt collectors and uninformed consumers. It was an attempt to control perceived abuses of power and to insure some measure of fairness and civility.

To achieve these ends, the Act is applied to professional collectors, including attorneys, when dealing with consumers. It controls communication with consumers and protects consumers from embarrassing disclosures. It prohibits unfair and deceptive practices and provides examples of such prohibited conduct. It prohibits both express and implied misrepresentation. Finally, it has several provisions designed to insure the consumer a meaningful opportunity to dispute a debt.

To encourage compliance, the Act provides stiff penalties for violation and imposes these penalties without regard to fault. It does, however, offer limited protection to the collector who makes an inadvertent error, despite having established procedures to promote compliance.