



**CURRENT ISSUES SURROUNDING**  
**FAIR DEBT COLLECTION PRACTICES ACT**

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**Preliminary Statements**

A significant area with regard to the malpractice exposure for attorneys has grown out of the passage of the Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq* ("FDCPA"), which took effect on March 20, 1978. It was poised to fulfill a Congressional intent:

To eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. §1692(e). See, also, Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997), Wright v. Finance Service of Norwalk, Inc., 22 F.3d 647 (6th Cir. 1994).

This paper looks at various aspects of the FDCPA in an effort to address both the particular focus it may have on attorney malpractice, but also to look at the general issues which the Act creates. To the extent an attorney is seeking to collect the debt of another, application of the requirements of the Act certainly must be considered. To the extent that the Act itself seems rather fluid as a result of its interpretation by a variety of circuits looking at a variety of different specific provisions as they might be relevant to a variety of debt circumstances, the safest approach may simply be to assume that the Act will apply in virtually any instance and make every effort to conform one's conduct to the Act.

In general terms, the FDCPA applies when a debt collector, as defined by §1692(a)(6) is attempting to collect a debt, as defined by §1692(a)(5) from a consumer as delivered by §1692(a)(3). As set out in §1692(a)(6), a 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 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 purposes of section 1692(f)(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 interest.

There are exemptions set out in the statute which do not generally apply to an attorney collecting the debt of a client.

In defending attorney malpractice cases which involve allegations of violations of the FDCPA, it is essential to determine whether in any particular situation the definitions of the statute are met in order to know whether the acts of the attorney are subject to the requirements of the Act. The question of whether this definition applies to attorneys was addressed by the United States Supreme Court in Heintz v. Jenkins (1995) 514 U.S. 291, 131 L. Ed. 395, 115 S. Ct. 1489:

..the Act, applies to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation.

As to what constitutes regular collection activity, the Court in Schroyer v. Frankel, 197 F.3d 1170, set forth a good analysis of this issue:

...the legislative history hardly makes clear that attorneys who collect debts occasionally and small firms that collect debts incidentally to their general practices are "debt collectors" under the FDCPA. The House Report accompanying the 1986 amendment to

the FDCPA explained that Congress revoked the attorney exemption because its assumption that attorneys were only incidentally involved in debt collection no longer rang true, stating: "[i]n recent years, a large number of law firms have gone into specialized debt collection, and many of these firms use persons full time to collect debts. Repeal of the exemption will require these firms to comply with the same standards of conduct as lay debt collection firms." H.R Rep. No. 99-405, *reprinted in* 1986 U.S.C.C.A.N. 1752, 1759. Elsewhere, the House Report expresses its concern about the entry of attorneys into the "debt collection industry" and "the proliferation of attorney debt collection firms." *Id.* at 1754, 1756. Moreover, the House Report repeatedly identifies attorneys "in the business of" collecting debts as the targets of its legislation. These *see id.* at 1753, 1754.

Drawing from this legislative history, we believe reveals that for a court to find that an attorney or law firm "regularly" collects debts for purposes of the FDCPA, a plaintiff must show that the attorney or law firm collects debts as a matter of course for its clients or for some clients, or collects debts as a substantial, but not principal, part of his or its general law practice. Such an interpretation accentuates the apparent purpose of Congress in creating attorney liability under the FDCPA "[w]hile attorneys who are considered competitors of traditional debt collection companies should be covered under the Act, a firm whose debt collection activity does not approximate that of a traditional collection agency should not be sueable under the Act. *White*, 23 F. Supp 2d at 276. In identifying such attorneys, other courts have relied upon a variety of factors, including the volume of the attorney's collection activities, the frequent use of a particular debt collection document or letter, and whether there exists a steady relationship between the attorney and the collection agency or creditor he represented. *See, e.g. Cacace v. Lucas*, 775 F. Supp. 502, 504 (D. Conn. 1990). Courts have considered what portion of the overall case load debt collection cases constitute and what percentage of revenue is derived from debt collection activities. *See e.g., Von Schmidt v. Kratter*, 9 F. Supp. 2d 100, 102 (D. Conn. 1997); *Nance*, 881 F. Supp. at 224. Summit maintained that even where debt collection takes up a minor portion of a law practice, "debt collector" liability may lie where the defendant has an "ongoing relationship" with a client whose activities

substantially involve debt collection. *See, Stojanovski, 783 F. Supp. at 322*

Schroyer v. Frankel, 197 F.3d 1170, 1175-1176 (6th Cir. 1999).

Counsel defending or pursuing a malpractice action related to debt collection activities faces a significant factual question as to the application of the Act. There may well be a circumstance where an attorney writes only one letter to collect a debt in his entire career and yet he could be subject to the Act if the client is regularly in the business of collecting debt. On the other hand, he could write only one letter for a particular client who ordinarily isn't involved in collecting debt but has a particular problem with regard to a particular account and yet the letter used by the lawyer is subject to the Act because the lawyer himself regularly is engaged in debt collection activities or uses a letter which is a form letter. There is no bright-line test and certainly in each instance a development of all the facts surrounding both the lawyer's activity and the client's activity is necessary.

Next it is important to determine whether the letter is intending to retrieve funds which constitutes a debt obligation. The FDCPA defines debt as:

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.

15 U.S.C. §1692a(5). Examples of obligations found by the courts to constitute a "debt" within the meaning of the FDCPA are: an assessment fee owed to a condominium association, Ladick v. Van Gemert, 146 F. 3d 1205 (10th Cir. 1998), Newman v. Boehm, Pearlstein & Bright, Ltd., 119 F.3d 477 (7th Cir. 1997); NSF or dishonored check, Duffy v. Landberg, 133 F. 3d 1120 (8th Cir. 1998), Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F. 3d 1322 (7th Cir. 1997); unpaid administrative and other fees charged under a rental agreement by an automobile and truck rental company, Brown v. Budget Rent-A-Car Systems, Inc., 119 F. 3d 922 (11th Cir. 1997).

Finally, it's important to determine whether the recipient of the letter is a consumer. Generally efforts by an attorney to collect debt from a business entity as opposed to an individual consumer would not be covered by the Act. For FDCPA purposes, a "consumer" means any natural person obligated or allegedly obligated to pay any debt. 15 U.S.C. §1692a(3). It should be noted, however, that while at first blush it appears the FDCPA applies to situations where a "debt collector" is seeking to collect a "debt" from a "consumer", various sections of the statute expand the statute's coverage to protect all persons from various debt collection activity. For example, 15 U.S.C. §1692d provides:

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse **any person**...

(author's emphasis added). See also: 15 U.S.C. §1692e, false or misleading represen