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Be a Confident Collection Lawyer

By Michael H. Sartip

In 1986, the Boston Celtics were playing the Seattle Supersonics in a televised NBA game. With 13 seconds left in the game, the game was tied and the Celtics called a time-out with the ball. During the time out, Larry Bird walks into the huddle and tells Coach K.C. Jones and his teammates to give him the ball and get out of his way. After the time out, Larry Bird walks over to Seattle's Xavier McDaniel, who is guarding him, and tells him he's taking the last shot, exactly where he'll receive the ball and the spot he'll shoot from, then says he'll bury the shot and leave no time on the clock. McDaniel tells Bird he'll be waiting. Bird gets the ball in the exact spot, makes the move and buries the shot with McDaniel's hand in his face and leaving no time on the clock. In a later interview, Larry Bird indicated he was very confident he would make the shot. He played to his strengths and avoided his limitations.

From time to time, I get calls on collection matters, and it is apparent that lawyers lack confidence, because they are confused about what is allowed and what is not allowed under the law. In the collections practice, lack of knowledge is a formula for failure. The law governing consumer debt collections, the Fair Debt Collection Practices Act (FDCPA), creates a minefield of liability. For those who collect debts, there is an inherent risk of substantial civil liability if you do not fully understand the FDCPA. Even the slightest mistakes are a basis for consumer lawsuits. While damages are limited to $1,000 per violation of the FDCPA, the real damages come in the form of attorneys' fees, which are recoverable. Second, FDCPA claims are exemptions in many attorney malpractice policies. Finally, if a debt collector sends multiple letters with the same mistaken language, class action lawsuits are permitted with money for damages up to $500,000, or one percent of the collector's net worth, whichever amount is lower. The good news for lawyers is that there is a one-year statute of limitations. The one-year statute of limitations begins to run when a collection letter is mailed or an improper legal action is filed.

The purpose of this article is to give some pointers and highlight

some pitfalls to avoid rather than give a comprehensive overview of the FDCPA. This article does not focus on post judgment collections and does not address collection issues under the S.C. Consumer Protection Code. You can avoid considerable risk by reading the full text of the FDCPA set forth at the Federal Trade Commission's website at www.ftc.gov/os/statutes/fdcpa/fdcpact.shtm and following a few simple rules.

Do you fall within the definition of a debt collector?

15 U.S.C. § 1692a(6) provides that the term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another" (2006). In *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 378 (4th Cir. 2006), the Fourth Circuit court held that lawyers are debt collectors even when acting as trustees foreclosing on a property pursuant to a deed of trust. In *Silva v. Mid Atlantic Management Corp.*, 277 F. Supp. 2d 460 (E.D.Pa. 2003), the court held that the Defendant law firm regularly engaged in debt collection practices, and thus it qualified as a "debt collector" pursuant to FDCPA, even though debt collection activity made less than one percent of the volume of the law firm's cases and revenue. The court held that the Defendant law firm was a debt collector because it consistently accepted at least 10 debt collection matters each year for several consecutive years.

Is this a commercial debt or a consumer debt?

The FDCPA covers consumer debts, not commercial debts. "Consumer debt" is defined 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) (2006). Consumer debts are personal, family and household debts such as credit cards, personal loans and medical bills. They also include real estate foreclosures, homeowner's association debts and promissory notes to individuals. The key question to ask is whether the debt is a consumer debt or a business debt at the time of the transaction.

Recommendations for consumer debt collectors

1. Do provide disclosures. Pursuant to 15 U.S.C. § 1692g (2006), the first communication should be in writing and include the following language: (1) the amount of the debt; (2) the name of the creditor to whom the debt is owed and the following: (3) "Unless you notify this law firm within 30 days after receiving this notice that you dispute the validity of this debt, or any portion thereof, this law firm will assume this debt is valid. If you notify this law firm in writing within 30 days from receiving this notice that you dispute the validity of this debt, or any portion thereof, this law firm will obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification. If you request of this law firm in writing within 30 days after receiving this notice this law firm will provide you with the name and address of the original creditor, if different from the current creditor. This communication is from a debt collector. This is an attempt to collect a debt, and any information obtained will be used for that purpose. 15 U.S.C. § 1692g requires a collection attorney to provide this notice within five days after the initial communication with a consumer in connection with the collection of any debt."

As a safeguard, you should include the disclosure in the initial communication instead of providing it five days after the initial written communication.

2. Do wait more than 30 days. After you send the letter, you must wait at least 30 days from the date that the debtor received the notice. Unless you serve the letter return receipt requested, it is wise to wait at least 35 days before taking additional action. In *Miller v. Payco-General American Credits, Inc.*, 943 F.2d 482, 484 (4th Cir. 1991), the court held that the Defendant violated the FDCPA where the debt collector's letter indicated a demand for immediate full payment of the debt in direct contradiction to the 30-day notice period. The court has labeled this violation "overshadowing." Therefore, overshadowing occurs when you give the Debtor 30 days to respond in the initial notice letter, but other sections of the letter conflict or demand for performance by the debtor within less than the 30-day notice period.

3. Do provide verification or validation of the debt. If the debtor contacts you and requests verification of the debt, you must stop collecting on the debt until you provide verification of the debt. Written verification of the debt can be as simple as providing an itemized bill to the consumer showing the consumer the debt and why the amount is owed. The Fourth Circuit has held that "verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed; the debt collector is not required to keep detailed files of the alleged debt." *Chaudhry v. Gallerizzo*, 174 F.3d 394 (4th Cir. 1999).

4. Do not threaten suit. In the initial demand letter, do not threaten suit unless you have been given specific written authorization from your client to file suit, are able to file suit in the proper jurisdiction and intend to file suit. The FDCPA prohibits "the threat to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. § 1692e(5) (2006).

5. After the initial disclosure, do recite the Mini Miranda. After you send the initial communication (generally in the form of a collection letter), the Fourth Circuit has held that you and your staff must communicate the following to each consumer debtor in all subsequent verbal and written communications: "This communication is from a debt collector." It is also recommended that you communicate that this is an attempt to collect a debt and any information obtained will be used for that purpose. This is known as the "Mini Miranda." The Fourth Circuit held the Mini Miranda applies to all communications, including any follow-up correspondence. *Carroll v. Wolpoff & Abramson*, 961 F.2d 459, 461 (4th Cir. 1992) (finding section 1692e(11) "makes no distinction between initial and subsequent communications"). The "Mini-Miranda" Warning, 15 U.S.C. § 1692e(11) (2006), does not apply to a formal pleading made in connection with a legal action and applies solely to communications with consumers, not their attorneys.

6. Do not communicate with debtors in closed border states. Some states have burdensome licensing requirements, debt collection laws and consumer laws and require an out-of-state attorney to be licensed as a lawyer or as a debt collector. If you send a letter across your state border into their "closed border" and you are not licensed as a lawyer or debt collector, you may be violating their state laws. Even though the debt has been incurred in South Carolina, you have to be licensed in the outside state to contact the debtor or send a collection letter into that state or face the prospect of civil fines and subject yourself to FDCPA liability. If it is an action for real property in South Carolina, or the Debtor signed a contract in South Carolina, you may file suit in South Carolina and serve the Defendants in those states. Service of process is exempt from the rule. This only applies to contacting the Debtor by telephone or in writing prior to litigation. Please pay particular attention to the burdensome regulations in the following "closed border" states: Connecticut, Delaware, Hawaii, Massachusetts, New Jersey, Texas, West Virginia, Wisconsin and Wyoming.

7. Do not communicate with third parties. A debt collector may communicate with the consumer unless the debt collector knows that the Debtor has an attorney. The only exception is that a debt collector may communicate with third parties for the purpose of acquiring location information about the consumer. A debt collector may also communicate with third parties if they have the prior written consent of the consumer or the express permission of a court of competent jurisdiction. *See* 15 U.S.C. § 1692c (2006).

8. Do not leave voice mail. The federal case *Foti v. NCO Fin. Sys., Inc.*, 424 F. Supp. 2d 643 (S.D.N.Y. 2006), and the subsequent cases that have concurred with *Foti* conclude a voice mail is a "communication" under the FDCPA and as a result, such communications must provide meaningful disclosure of the caller's identity and include the Mini-Miranda disclosure in the messages. The danger with voice mail is that people other than the intended party may hear a message that contains personal and private information. Therefore, a voice mail message by a debt collector may violate 15 U.S.C. §§ 1692c-e and §1692g because it fails to provide the proper disclosures.

9. File suit in the proper jurisdiction. Unless you have a contract signed by the Debtor or an action to enforce an interest in real property, you must file suit in the county where the Debtor resides. [15 U.S.C. § 1692i(a): Any debt collector who brings any legal action on a debt against any consumer shall—(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or (2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or simi-

lar legal entity (A) in which such consumer signed the contract sued upon; or (B) in which such consumer resides at the commencement of the action. (b) Nothing in this title shall be construed to authorize the bringing of legal actions by debt collectors (2006).]

10. Filing suit. Pursuant to 15 U.S.C. § 1692g(d), communications in the form of formal pleadings in a civil action shall not be treated as communications (2006). Therefore, the initial disclosures and notice provisions are not required with the summons and complaint, and pleadings.

11. Bona fide error defense. Prior to April of 2010, many consumer lawyers could take some relief in knowing that there exists a bona fide error defense. 15 U.S.C. § 1692k(c) (2006) provides that a debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. However, in *Jerman v. Carlisle,* 130 S. Ct. 1605 (2010), the U.S. Supreme Court held that the "bona fide error" defense does not apply to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. To many consumer lawyers, this ruling seriously weakens this defense to consumer lawsuits. This is one more reason for you to familiarize yourself with the FDCPA, as the FDCPA can be very intimidating if you are not familiar with it.

After reading this article, you may not be as confident as Larry Bird, but I hope it provides you an incentive to familiarize yourself with the FDCPA, as well as some guidance in representing creditors against consumers in South Carolina.

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