Professional Liability Defense
QUARTERLY

Is Your Law Firm a Debt Collector Under the Fair Debt Collection Practices Act?

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Socrates once declared, "The unexamined life is not worth living." The universality of this ancient dictum is self-evident. Indeed, this sage advice also applies to your law practice, as the unexamined practice of law could land you in hot water in the form of liability under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*. ("FDCPA" or "the Act"). Diligent practitioners need to know about this fee-shifting statute, its strictures and contours, and assess any collection work they may do within the totality of their overall practice.

A recent decision by the United States Court of Appeals for the Fifth Circuit in *Reyes v. Steeg Law, L.L.C.*, No. 17-30849, 2019 U.S. App. LEXIS 1605 (5th Cir. 2019), put the spotlight on a Louisiana law firm engaged by one of its condominium clients to obtain payment from one its delinquent residents. A simple engagement turned into a class action filed by the resident against the law firm itself and wound its way to the Fifth Circuit. While the opinion issued by the court turned in the law firm's favor, it illustrates the perils facing lawyers and law firms representing clients for simple "breach of contract" actions.

The FDCPA, enacted in 1978, is the main federal statute that governs debt collection activities by third parties. Congress first enacted the FDCPA to prevent harassment or abuse by collectors, including false and misleading representations, and unfair or unconscionable practices. Since then, however, enterprising plaintiffs' attorneys have succeeded in bringing innovative claims under the Act, thereby triggering potential liability for seemingly harmless conduct. For example, FDCPA plaintiffs have alleged violations under the Act over ostensibly benign language related to interest in collection letters, debt validation language that closely tracts the Act itself, and even for gratuitous settlement offers. The ultimate success of the more inventive claims depends largely on the particular facts of the case. Practitioners can determine whether they are subject to the FDCPA, and best achieve compliance with the Act, only through a holistic understanding of it.

The Act creates a private civil cause of action, and provides for statutory damages, actual damages, plus attorneys' fees and costs for a prevailing party. Claims under the FDCPA invoke federal jurisdiction, so defendants in state court can remove the actions to federal court unless a party raises the FDCPA claim as a counterclaim in a collection lawsuit. Strict liability characterizes the FDCPA; thus, plaintiff do not need to prove knowledge or intent elements for successful claims. Successful plaintiffs in individual actions are entitled to up to $1,000 per action, plus any proven actual damages and reasonable attorneys' fees and costs. A successful class action will result in damages of the lesser of either $500,000 or up to one percent of the collector's net worth. Generally, the Act regulates the manner, time, and content of communications between collectors and consumers, and outlaws harassment, false or misleading representations, and unfair practices.

Additionally, Section 1692g of the FDCPA also contains debt validation requirements and dispute procedures that collectors must strictly follow should a consumer launch a valid dispute. While this may appear simple, things can get especially tricky because varying federal circuit courts of appeal have interpreted these requirements differently, mandating different obligations and establishing a patchwork of compliance standards. For example, the United States

Court of Appeals for the Third Circuit has ruled that a consumer must submit a dispute *in writing* in order for the dispute to be effective, which would trigger the collector's dispute obligations under the Act. *See Graziano v. Harrison*, 950 F.2d 107, 112 (3d Cir. 1991). However, the Second, Fourth, and Ninth Circuits have rejected the "in writing" dispute requirement. *See Hooks v. Forman, Holt, Eliades & Ravin, LLC*, 717 F.3d 282, 286 (2d Cir. 2013); *Clark v. Absolute Collection Serv., Inc.*, 741 F.3d 487, 490 (4th Cir. 2014); *Camacho v. Bridgeport Fin. Inc.*, 430 F.3d 1078, 1081 (9th Cir. 2005). Upon possessing basic knowledge and familiarity with the FDCPA, practitioners need to assess whether they are subject to the Act itself.

A "debt collector" under the FDCPA is "*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." *See* 15 U.S.C. § 1692a(6). (Emphasis added). From the FDCPA's enactment in 1978 to 1986, attorneys were explicitly exempt from the Act. However, Congress later removed the attorney exemption upon finding that many attorneys were involved in the business of recovering consumer debt. *See Heintz v. Jenkins*, 514 U.S. 291, 294-95 (1995). The Fifth Circuit has held that "[a]ttorneys qualify as debt collectors for purposes of the FDCPA when they *regularly engage* in consumer debt collection, including but not limited to litigation on behalf of a creditor client." *See Reyes v. Steeg Law, L.L.C.*, No. 17-30849, 2019 U.S. App. LEXIS 1605, at *5 (5th Cir. 2019); *see also Mahmoud v. De Moss Owners Ass'n, Inc.*, 865 F.3d 322, 330 (5th Cir. 2017). Unfortunately, no magic formula exists to determine instantly whether an attorney *regularly* engages in debt collection for purposes of the Act. Courts answering this question apply a multitude of factors and assess the question on a case-by-case basis.

In *Reyes v. Steeg Law, L.L.C.*, Steeg Law represented various condominium association clients, and sent the plaintiff lien letters regarding unpaid condominium assessments. *Id*. at *2. The plaintiff responded by filing a class action lawsuit alleging FDCPA claims against Steeg Law and one of its associate attorneys. *Reyes*, No. 17-30849, 2019 U.S. App. LEXIS 1605, at *1-2. The plaintiff alleged that the letters sent to her and the class constituted facial violations of the FDCPA, because they demanded payment within seven days instead of thirty, in violation of Section 1692g of the FDCPA. *Id*. The plaintiff further alleged the letters demanded amounts not expressly authorized by contract or law, in violation of Section 1692f. *Id*. at *3. Lastly, the plaintiff alleged that Steeg Law violated Section 1692c(a)(2) of the Act, because they directly communicated with her even after learning that she had an attorney for the matter. *Id*. After early discovery, the district court certified the class as "individuals who received lien letters from Steeg Law in the year preceding the filing of the complaint." *Id*. As the case progressed with additional discovery and motion practice, Steeg Law successfully argued that it was not a debt collector for FDCPA purposes, because it was not *regularly* engaged in collection activity. *Id*. at *4. The district court granted summary judgment in its favor. *Id*.

The plaintiff appealed, and on review, the Fifth Circuit affirmed the district court's grant of summary judgment. The Fifth Circuit reiterated that it "has not developed a bright-line rule to determine when a law firm is a debt collector for the purposes of the FDCPA." *Id*. at *5. Instead, the court reiterated that it resolves this question on a fact-intensive, case-by-case basis, using a multitude of factors. *Id*. These factors include (1) the number of lawsuits filed and collection letters mailed; (2) the percentage of time debt collection activities consume; (3) the share of total lawsuits filed that were dedicated to debt collection; (4) the number of creditor clients and the length of the firm's relationship with them; (5) the frequency and nature of the non-collection work in which the firm engages; (6) and the number of firm attorneys and other employees dedicated to debt collection activities. *Id*. at *5-6; *see also Kirkpatrick v. Dover & Fox, P.C.*, No. 4:13-cv-00123, 2013 U.S. Dist. LEXIS 150988, at *13-14 (S.D. Tex. Oct. 21, 2013). Using these factors and Fifth Circuit precedent, the plaintiff argued that Steeg Law *regularly* engages in debt collection for purposes of the FDCPA. *Id*. at *6.

The plaintiff reasoned that the Fifth Circuit previously found an attorney to be liable under the Act where he attempted to collect debts from 639 different individuals in a six-month period, even though the attorney's debt collection for that particular client only constituted 0.5% of his overall practice during that same period. *Id*.; *see also Garrett v. Derbes*, 110 F.3d 317, 318 (5th Cir. 1997).

The Fifth Circuit disagreed, explaining that labeling Derbes' practice as "regular" was a reflection on the nature of his practice. *Id*. The court then contrasted Steeg Law's practice with Derbes', noting that Steeg Law only sent thirty-six letters, relating to thirty-four liens, in the year before the plaintiff filed her complaint. *Id*. Although these letters constituted more than 0.5% of Steeg Law's total practice during the relevant period, the Fifth Circuit observed that this work did not represent a large part of its overall work. *Id*. at *7. The court further noted that in the three years preceding the filing of the plaintiff's complaint, all of the firm's work for its condominium association clients constituted less than 1.5% of its overall practice. *Id*. Further, less than 3.5% of that 1.5% was specifically dedicated toward collection activity. *Id*. Thus, the Fifth Circuit held, "[n]either this court's precedent nor common sense compel a determination that these circumstances constitute regularly engaging in debt collection activity[,]" and affirmed Steeg Law's earlier grant of summary judgment. *Id*.

While other jurisdictions use similar factors to determine whether an attorney regularly engages in collection activity for purposes of the Act, the factors do differ. For example, courts within the Second Circuit employ the following factors: (1) the absolute number of debt collection communications issued, and/or collection-related litigation matters pursued over the relevant time period; (2) the frequency of such communications and/or litigation activity, including whether any patterns of such activity are discernable; (3) whether the entity has personnel specifically assigned to work on debt collection activity; (4) whether the entity has systems or contractors in place to facilitate such activity; and (5) whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the lawyer or firm to assist in the collection of outstanding consumer debt obligations. *See Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertollotti*, 374 F.3d 56, 62-63 (2d Cir. 2004); *see also Cashman v. Ricigliano*, No. 3:02-cv-1423, 2004 U.S. Dist. LEXIS 17027, at *17-18 (D. Conn. Aug. 25, 2004). Using these factors, a federal district court in Connecticut held that a law firm was subject to the FDCPA as regularly engaging in debt collection, where the firm sent ninety-seven collection letters in a five-month period, initiated fifty-three collection law-suits, and maintained certain personnel who were devoted, at least in part, to the firm's debt collection activity. *See Cashman*, No. 3:02-cv-1423, 2004 U.S. Dist. LEXIS 17027, at *18-19. The court in *Cashman* also reasoned that the firm established facilities designed expressly to facilitate debt collection, and that the firm undertook the collection activity in connection with an existing relationship with a collection agency. *Id*. at *19-21. Other jurisdictions choose not to apply enumerated factors for this question at all. In the Sixth Circuit, for a court to conclude that an attorney *regularly* engages in debt collection activities, "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." *See Schroyer v. Frankel*, 197 F.3d 1170, 1176 (6th Cir. 1999).

A key takeaway from these holdings is whether a lawyer is subject to the FDCPA requires a comprehensive look at the lawyer's own practice, as well as the work done by his or her law firm. Whether an attorney is regularly engaged in debt collection will turn on a highly fact-intensive, case-by-case assessment of the lawyer *and* the law firm's overall work portfolio. With this in mind, it is not impossible to imagine a scenario where a particular attorney in a law firm, who may not engage in much collection work individually, being unknowingly subjected to the FDCPA based on more consistent or regular collection work done by others in her law firm. The court may therefore impute the volume of your firm's collection work to you as an individual lawyer for FDCPA purposes, even if you do not engage in much collection work individually. Thus, thoughtful practitioners should not make the mistake of blindly assuming that they themselves cannot be subject to the Act because they personally do not regularly engage in collection activity. Prudent attorneys should have the FDCPA in mind regardless of their own individual volume of collection work.

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