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ARTICLES

WHAT ATTORNEYS SHOULD KNOW ABOUT THE FAIR DEBT COLLECTION PRACTICES ACT, OR, THE 2 DO'S AND THE 200 DON'TS OF DEBT COLLECTION

Scott J. Burnham*

I. INTRODUCTION

In the spring of 1992, George W. Heintz, a partner in a small Merrillville, Indiana law firm, received a routine file from a client, NDB Bank.¹ The bank had financed Darlene Jenkins' purchase of a car for her personal use and Jenkins had defaulted on the loan.² The bank had repossessed the car and conducted a sale, but the sale netted less than the balance due on the loan.³ The bank wanted the law firm to recover from Jenkins approximately \$3,000 she owed on the loan, \$4,173 for insurance the bank purchased when Jenkins failed to insure the car, and other amounts.⁴ Using the information in the file, Heintz prepared a summons and complaint. He then forwarded the legal documents to the bank, asking the bank to verify that the figures were correct.⁵ After the bank returned a written verification, Heintz filed suit.⁶ Jenkins responded with an answer and a counterclaim that alleged that the contract between herself and the Bank did not authorize the Bank to "force place" insurance and

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1. *See Jenkins v. Heintz*, No. 93C1332, 1996 WL 535167, at *1 (N.D. Ill. Sept. 18, 1996).

2. *See id.*

3. *See Jenkins v. Heintz*, 124 F.3d 824, 826 (7th Cir. 1997).

4. *See id.* at 827.

5. *See id.*

6. *See id.*

pass the cost on to her.⁷

In July, 1992, Heintz sent Jenkins' attorney a settlement offer.⁸ Jenkins then sued Heintz and his law firm for violating the federal Fair Debt Collection Practices Act ("FDCPA"), which in pertinent part prohibits debt collectors from attempting to collect unauthorized amounts.⁹ Heintz's defense was simple. He claimed, in effect, "I'm not a [shudder] debt collector trying to collect a debt. I'm an attorney involved in litigation." The case went all the way to the United States Supreme Court, which gave Heintz the surprise of his life.¹⁰ In April, 1995, the Court held unanimously that the FDCPA applies to attorneys such as Heintz, who never regarded themselves as debt collectors.¹¹

This article explores the ramifications of that decision for practicing attorneys. Part II briefly discusses common law claims against debt collectors. Part III examines the holding in *Heintz v. Jenkins* and some possible consequences for attorneys as debt collectors under the FDCPA. Part IV points out the do's and don'ts of the FDCPA that have particular application to attorneys. Part V looks at the liability to which attorneys are exposed under the FDCPA and the defenses available to them. The article concludes by summarizing steps attorneys might take to comply with the Act.

II. COMMON LAW CLAIMS

Debt collection is big business. There are more than 5,000 debt collection agencies in the United States. In 1995, creditors turned 383 million accounts aggregating \$117 billion over to them.¹² Debt collectors seem to operate under three premises:

1. Keep your transaction costs low. It is better to collect a debt by making a telephone call than by initiating a lawsuit.
2. Scare the wits out of the debtor. The more debtors believe

7. See *id.*

8. See *id.*

9. See *id.*; Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o (1994). This article refers to the statute as the FDCPA or the Act and textual section references are to the Act rather the Code.

10. The decisions of the courts on trial, appeal, and remand are: *Jenkins v. Heintz*, No. 93C1332, 1993 WL 284115 (N.D. Ill. July 27, 1993), *Jenkins v. Heintz*, 25 F.3d 536 (7th Cir. 1994), *Heintz v. Jenkins*, 514 U.S. 291 (1995), *Jenkins v. Heintz*, No. 93C1332, 1996 WL 535167 (N.D. Ill. Sept. 18, 1996), *Jenkins v. Heintz*, 124 F.3d 824 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1304 (1998).

11. See *Heintz v. Jenkins*, 514 U.S. 291 (1995).

12. These figures were obtained from the American Collectors Association web site, <<http://www.collector.com>>.

that terrible things will happen to them if they don't pay their debts, the more effective the collection efforts will be.

3. Most debtors don't pay their debts because they can't, not because they are unwilling. Get in fast, for debts become more difficult to collect as time passes. Because you can't squeeze blood from a turnip, focus on collectible debts.

The conclusion follows from these premises that when debt collectors are left to their own devices, the harm they do to debtors may well exceed the benefit to creditors. The economics of debt collection encourages debt collectors to use quick and dirty means of collection, even though many of those efforts will prove fruitless. In an industry with a lot of hunters and little game, overly aggressive collectors will have a competitive edge. Even debt collectors using fair and reasonable methods will cause some inconvenience, embarrassment, or annoyance to the debtor. The issue is when these methods become actionable.

When the Fair Debt Collection Practices Act became effective on March 20, 1978, debtors had a federal statutory claim against debt collectors. Prior to that date, debtors seeking recourse against debt collectors had to find a basis for a tort claim in the common law. Common law tort claims against debt collectors have included invasion of privacy, intentional infliction of emotional distress, libel and slander, false imprisonment, malicious prosecution and abuse of process, and assault and battery.¹³ Plaintiffs found these claims difficult to prove and, because of the American Rule that each side pays its own attorneys' fees, even victorious plaintiffs rarely came out ahead. Because of these obstacles, successful common law actions were rare. For example, in *Public Finance Corp. v. Davis*,¹⁴ the debt collector called and visited Davis' home repeatedly, called Davis at the hospital when she was visiting her sick daughter, induced Davis to write a check for the debt by promising not to cash it until later and then phoned a friend of Davis and informed her

13. See ROBERT J. HOBBS, FAIR DEBT COLLECTION ch. 12, at 339-59 (3d ed. 1996). This manual, published by the National Consumer Law Center, is the best guide for attorneys handling FDCPA cases. The manual also contains a disk with checklists and pleadings. Occasionally the Center's pro-consumer views color its interpretation of the statute; the prudent attorney can look at this as the worst that can happen to her as a debt collector. The Center operates a web site at <<http://www.consumerlaw.org>>. The Federal Trade Commission also has a website at <<http://www.ftc.gov>> that contains information about collection, but it is not particularly sophisticated.

14. 360 N.E.2d 765 (Ill. 1976).

that Davis was writing bad checks.¹⁵ During one visit to the house, the debt collector asked if he could use the phone to call a colleague and, once inside, used the telephone to give the colleague an inventory of Davis' household goods, presumably for later repossession.¹⁶ Applying the *Restatement (Second) of Torts* standard for intentional infliction of emotional distress, the court found that these acts were not "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency."¹⁷

Many of the common law privacy cases involved creditors who made frequent telephone calls to the debtor or who disclosed information to the debtor's employer.¹⁸ Others involved creditors who placed signs regarding the debt in places where the public could read them.¹⁹ For example, in *Voneye v. Turner*,²⁰ the debt collector called and wrote Voneye's employer to disclose the status of the debt. Although the court pointed out that public disclosure of a private fact may constitute invasion of the right to privacy, it found that communications from a debt collector to an employer are acceptable disclosures; people who do not pay their debts are protected only from undue or oppressive publicity.

Even after enactment of the FDCPA, the common law still lives. In a widely publicized 1995 case, a Texas jury awarded \$2 million in compensatory damages and \$9 million in punitive damages to a couple because of actions by a debt collector. The debtors were subject to repeated telephone calls, including 26 phone calls in one two-hour period and eight or nine phone calls a night. The calls included profanity and at least one death threat. The debt collector made calls to the debtor's employer, including a bomb threat to the place of employment. An important aspect of the case is that the credit company that retained the services of the debt collector was held liable for the actions of its agent. Needless to say, businesses should choose their debt collectors carefully.²¹

15. See *Public Finance Corp.*, 360 N.E.2d at 768.

16. See *id.*

17. *Id.* at 767-69 (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

18. See HOBBS, *supra* note 13, §§ 12.3, 12.4.

19. See, e.g., *Brents v. Morgan*, 299 S.W. 967 (Ky. 1927) (store listed debtors on a 5' x 8' sign in the window); *Mason v. Williams Discount Ctr., Inc.*, 639 S.W.2d 836 (Mo. Ct. App. 1982) (store listed names under the heading "NO CHECKS" at checkout counter in full view of customers).

20. 240 S.W.2d 588 (Ky. 1951).

21. See *Jury Nails Firm Over Bill Threat*, CHI. TRIB., Aug. 25, 1995, § News, at 3.

As in the Texas case, the actions of debt collectors may involve criminal acts. Criminal prosecutions arise because, as one court stated, “[t]he law does not countenance forceful and unlawful collection even of just debts.”²² Following enactment of the FDCPA, however, criminal prosecutions are rare, perhaps because the civil penalties sufficiently discourage improper behavior or perhaps because prosecutors spend their scarce resources fighting more serious crimes. Criminal prosecutions for debt collection may still be seen in instances of loansharking or the collection of gambling debts.²³ Occasionally a thug who shakes down someone who owes money to his boss is charged with felony murder. His defense is that he was not engaged in robbery because what he took from the victim did not belong to the victim but to his boss. “I may have violated the FDCPA,” the perpetrator argues, “but I didn’t commit robbery.” The argument is not successful.²⁴

III. THE FDCPA

When a substantial imbalance exists between parties and the common law provides inadequate redress, government frequently intervenes to regulate the transaction. The government regulation strengthens the hand of the weaker party, providing in effect the rules that party would have demanded if it had the bargaining power. Debt collectors and consumer debtors are a case in point. A few states enacted debt collection statutes to address the issue; Montana did not. In 1977, Congress enacted the Fair Debt Collection Practices Act as part of the Federal Consumer Credit Protection Act.²⁵ By permitting private claims—and in fact encouraging them by providing for mandatory attorney’s fees—the government can stay out of the regulation business, leaving it to the parties to enforce the rules.

The FDCPA states its purpose in a straightforward manner:

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure 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 collec-

22. *State v. Richards*, 167 P. 47, 48 (Wash. 1917).

23. *See HOBBS, supra* note 13, § 13.5.

24. *See, e.g., Sheckles v. Indiana*, 501 N.E.2d 1053 (Ind. 1986) (holding defendant creditor’s use of force to collect a secured loan did not negate criminal intent).

25. The FDCPA is codified at 15 U.S.C. §§ 1692-1692o (1994).

tion abuses.²⁶

While these goals are praiseworthy, the issue is how much regulation is necessary to serve these purposes, especially in a political and economic climate in which regulation is appropriately suspect. This article explores whether application of the statute to attorneys furthers these regulatory goals or indicates that enforcement of the statute has taken on a life of its own independent of its purposes. We will first look at the structure of the Act.

The FDCPA is laudably written in plain language.²⁷ It is written in a clear and coherent manner using words with common and everyday meanings and is appropriately divided and captioned by its various sections.²⁸ As with all statutes, however, the key to cracking its meaning lies in the definitions. The Act defines the term "debt collector" to include a person "who regularly collects or attempts to collect, directly or indirectly, debts owed [to] . . . another."²⁹ It does not regulate debt collection, but *debt collectors*. Because it applies to debt collectors, the Act does not apply to a business collecting its own debts unless that business uses a different name when engaging in debt collection.³⁰ Therefore, the Act does not apply to a law firm or hospital collecting its own receivables. But if St. Mary's Hospital collects its bills under the name of The Hospital Services Company, then the Act does apply. It applies to a debt collector retained by the state or federal government to collect debts, but it does not apply to debts collected by government agencies.³¹

When originally enacted in 1977, the FDCPA contained an express exemption for lawyers. The definition of "debt collector" provided that the term did not include "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a

26. FDCPA § 802(e), 15 U.S.C. § 1692 (1994).

27. *Cf.* Montana Plain Language in Contracts Act, MONT. CODE ANN. §§ 30-14-1101 to -1113 (1997).

28. *See* FDCPA §§ 802-818, 15 U.S.C. §§ 1692-1692o (1994). Section 802 contains the findings and purpose of the Act. Section 803 contains definitions. Sections 804 through 812 contain the do's and don'ts for debt collectors. Section 813 contains the remedies. Section 814 provides for administrative enforcement by the Federal Trade Commission (FTC). The rest is housekeeping.

29. FDCPA § 803(6), 15 U.S.C. § 1692a(6) (1994).

30. *See* FDCPA § 803(6)(A), 15 U.S.C. § 1692a(6)(A) (1994).

31. *See* FDCPA § 803(6)(C), 15 U.S.C. § 1692a(6)(C) (1994). Federal collection efforts are regulated by the Federal Claims Collection Act and the Debt Collection Act, as well as umbrella federal regulations and the collecting agency's regulations. *See* 31 U.S.C. §§ 3711-3720E (1994); 4 C.F.R. pts. 101-105 (1998).

client.³² Not surprisingly, attorneys were quick to take advantage of this loophole. Attorneys began increasingly to specialize in the collection of consumer debts and to own or operate debt collection agencies. The FTC estimates that half of all debt collectors were attorneys, who sometimes tried to attract customers by boasting that they had an advantage over other debt collectors because they did not have to comply with the FDCPA.³³ When investigating this problem, the FTC probe specifically stated:

Please note that the inquiry pertains solely to possible abuses by attorneys who are engaged *primarily* in the collection of consumer debts (rather than attorneys who may be engaged in a conventional law practice entailing the intermittent provision of collection services on behalf of clients.)³⁴

Responding to the FTC findings of abuses by attorneys, Congress repealed this exemption in its entirety in 1986.³⁵

The issue then arose whether, in spite of the FTC's limited intention, the FDCPA applied to attorneys who were not in the collection business but who nevertheless intermittently engaged in collection services. The issue came to a head in *Heintz v. Jenkins*.³⁶ To buttress his argument that the Act did not apply to lawyers whose debt collection activities consisted of litigation and related settlement efforts, Heintz cited the Act's legislative history and the FTC Staff Commentary.³⁷ The Court disparaged those sources in light of the plain language of the Act.³⁸ It held that because Congress repealed the attorney exemption without creating a narrower, litigation-related, exemption, "one would think that Congress intended that lawyers be subject to the Act whenever they meet the general 'debt collector' definition."³⁹

The Act divides its definition of "debt collector" into two parts.⁴⁰ The first part—"any person . . . in any business the

32. 15 U.S.C. § 1692a(6)(F) (Supp. I 1977).

33. See HOBBS, *supra* note 13, § 4.2.6.2.

34. Letter from Federal Trade Commission to Montana Legal Services Association (Nov. 1, 1985) (on file with author) (emphasis in original).

35. See Pub. L. No. 99-361, 100 Stat. 768 (effective July 9, 1986).

36. 514 U.S. 291 (1995).

37. See *Heintz*, 514 U.S. at 295-98.

38. See *id.* at 297-98. This jurisprudence may exemplify the Court's recent eschewal of legislative history. See ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997).

39. *Heintz*, 514 U.S. at 295.

40. Section 803(6) provides in pertinent part that "[t]he term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails

principal purpose of which is the collection of any debts"—is not applicable to most practicing attorneys such as Heintz. The second part of the definition more likely applies to a person whose primary business is the practice of law—"any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." To prevent the Act's application, attorneys will seize on the word *regularly*, claiming that while they may occasionally collect debts, they do not regularly do so. One trial court enumerated factors to be considered in making this determination:

In order to determine whether an attorney is a person who "regularly" collects debt, the court will take into account the following factors: the volume of the attorney's collection activities; the frequency of the use of the collection letter in question; and whether or not there is found to be an ongoing relationship between the attorney and the collection agency he represented.⁴¹

Because the purpose of the legislation is to protect consumers, courts may interpret the term broadly, netting attorneys who collect debts in more than isolated instances, as a minor but regular part of their practice, or more than a few times a year. If one attorney in a law firm regularly collects debts for one client, then that law firm may be held to be a debt collector with regard to all debts collected. On the other hand, in a recent unreported decision,⁴² Montana Federal District Court Judge Hatfield held that the law firm of Church, Harris, Johnson & Williams did not regularly collect debts under the following facts:

Defendant [attorney in the firm] maintains she handled only one other matter involving consumer debt collection in the two years preceding the events at issue herein. Moreover, the defendant law firm avers that any debt collection matters are a relatively minuscule percentage of the work performed by the firm during the relevant period. Specifically, of the eighteen members of the defendant law firm, only ten percent of one attorney's practice involves collection and repossession, primarily non-judicial foreclosures of trust indentures on residential

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." FDCPA § 803(6), 15 U.S.C. § 1692a(6) (1994).

41. *Cacace v. Lucas*, 775 F. Supp. 502, 504 (D. Conn. 1990) (citing *Crossley v. Lieberman*, 868 F.2d 566, 570 (3d Cir. 1989)).

42. *See Seckel v. Church, Harris, Johnson & Williams*, 23 Mont. Fed. Rep. 178 (1998).

real property.⁴³

The prudent attorney may find it wise to comply with the Act in the course of her occasional collection efforts rather than claim later that those efforts were not "regular."

What is a debt under the Act? The FDCPA limits "debt" to consumer debt, that is, obligations of a natural person "arising out of . . . transaction[s]" that "are primarily for personal, family, or household purposes."⁴⁴ Because its purpose is consumer protection, the Act does not apply to the collection of commercial debt. It also has limited application to the enforcement of a security interest against a consumer.⁴⁵

Many consumers have brought claims under the Act against debt collectors who were trying to recover on bad checks written by the consumer.⁴⁶ The debt collectors have raised the defense that bad checks are not the kind of debt contemplated by the FDCPA. For example, in a recent Ninth Circuit case,⁴⁷ the defendant claimed that the FDCPA applied only to debts arising out of an offer or extension of credit.⁴⁸ The court rejected the argument, holding that the statutory definition of *debt*⁴⁹ was clear: the Act applies to any obligation to pay money.

The definition of *debt* also includes an *alleged obligation* to pay money.⁵⁰ Does this mean that an attorney who writes a demand letter for a client must comply with the Act? For example, after an insurance company has paid its insured Jones for damages allegedly caused by Smith in an automobile accident, the insurance company has a subrogation claim against Smith. Its

43. *Id.* at 181.

44. FDCPA § 803(5), 15 U.S.C. § 1692a(5) (1994).

45. Section 803(6) applies the Act to the enforcement of security interests for the purposes of § 808(6), which makes the following conduct a violation of the Act:

Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

- (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
- (B) there is no present intention to take possession of the property; or
- (C) the property is exempt by law from such dispossession or disablement.

FDCPA § 808(6), 15 U.S.C. § 1692f(b) (1994).

46. *See infra* note 83 and accompanying text.

47. *See Charles v. Lundgren & Assoc.*, 119 F.3d 739 (9th Cir. 1997) (citing with approval *Bass v. Stolper*, 111 F.3d 1322 (7th Cir. 1997)).

48. *See id.* at 741.

49. *See* FDCPA § 803(5), 15 U.S.C. § 1692a(5) (1994).

50. *See* FDCPA § 803(5), 15 U.S.C. § 1692a(5) (1994).

attorney may write a letter to Smith demanding payment to its client. Whether the attorney is involved in debt collection depends on whether Smith's alleged obligation arose 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," in the words of the statutory definition of *debt*.⁵¹ Is an automobile accident such a transaction? The Federal Trade Commission says it is not.⁵² On the other hand, a broad reading of the Act indicates that its purposes are to encourage persons collecting debts to disclose the nature of their communications and to deter them from engaging in certain behaviors. These purposes would be served in such a situation. Even though the claim is a long shot, the prudent attorney might find complying with the Act more cost effective than litigating its non-application.

IV. COMPLYING WITH THE FDCPA

The Act is best thought of as a collection of "do's" and "don'ts"—things the debt collector must do affirmatively and things the debt collector must not do. The Act contains only two affirmative requirements, the "Miranda Warning" and the validation notice. The prohibitions are numerous. The Act also contains procedural restrictions with which attorneys involved in debt collection litigation must be aware. We will now examine these aspects of the Act.

A. Do #1: The Miranda Warning

The Act affirmatively requires that the debt collector disclose to the debtor two things: 1) that the debt collector is attempting to collect a debt, and 2) that any information obtained

51. FDCPA § 803(5), 15 U.S.C. § 1692a(5) (1994).

52. Federal Trade Commission Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,102 (1988), states in pertinent part:

2. *Exclusions.* The term does not include: Unpaid taxes, fines, alimony, or tort claims, because they are not debts incurred from a "transaction (involving purchase of) property . . . or services . . . for personal, family or household purposes."

The Commentary carries little weight. In *Heintz*, the Court stated that the Commentary is not binding on the public and is not entitled to deference when it conflicts with the plain language of the statute. See *Heintz v. Jenkins*, 514 U.S. 291, 298 (1995).

will be used for that purpose.⁵³ This disclosure is informally called the Miranda Warning, for like the notice to arrested persons of their rights, it tells consumers who they are talking to and what the effect of their conversation might be. Until recently, circuit courts were split as to whether the disclosures applied only to the initial communication or to all communications. The Ninth Circuit was virtually alone in holding that the debt collector must include the notice in the initial communication but not in every communication thereafter.⁵⁴ The Ninth Circuit's views were adopted in a revision of the Act effective for communications after December 30, 1996:

The failure to disclose *in the initial written communication* with the consumer and, in addition, if the initial communication with the consumer is oral, *in that initial oral communication*, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose *in subsequent communications that the communication is from a debt collector*, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.⁵⁵

After the initial communication, subsequent communications need only make clear that the communication is from a debt collector. Frequently collection agencies exhaust all means of debt collection short of litigation before turning the file over to an attorney to bring suit. The amendment clarifies that, even though attorneys are debt collectors subject to the Act, an attorney need not include the Miranda Warning in the complaint if the complaint is the attorney's initial communication.

B. Do #2: Validation Notice

The Act also requires that the debt collector send the consumer certain information regarding the debt in writing either with the initial communication or within five days after the initial communication.⁵⁶ But if the debt collector sends the text

53. See FDCPA § 807(11), 15 U.S.C. § 1692e(11) (1994).

54. See *Pressly v. Capitol Credit & Collection Serv., Inc.*, 760 F.2d 922 (9th Cir. 1985).

55. FDCPA § 807(11), 15 U.S.C.A. § 1692e(11) (West 1997 & Supp. 1998) (emphasis added).

56. See FDCPA § 809(a), 15 U.S.C. § 1692g(a) (1994). The disclosures include:

1. the amount of the debt;
2. the name of the creditor to whom the debt is owed;

as found in the statute, the debt collector may violate the Act! One court has held that the debt collector must communicate the notice in a way that is effective for an unsophisticated consumer, and the statute is not easily comprehensible.⁵⁷ The following plain language version of the notice will probably suffice:

Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within 30 days from receiving this notice, this office 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 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.⁵⁸

The debt collector should not mislead the consumer into thinking that the consumer has fewer rights than are stated in the validation notice, an abuse known as "overshadowing." For example, in *Swanson v. Southern Oregon Credit Service, Inc.*,⁵⁹ the debt collector put the required notice in small type and over it in bold faced type several times larger put this notice:

**IF THIS ACCOUNT IS PAID WITHIN THE NEXT 10 DAYS
IT WILL NOT BE RECORDED IN OUR MASTER FILE AS AN
UNPAID COLLECTION ITEM.
A GOOD CREDIT RATING—IS YOUR MOST VALUABLE
ASSET.**

The court held that the debt collector violated the Act when it

3. a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

4. a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

5. a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

57. See *Furth v. United Adjusters, Inc.*, Clearinghouse No. 35,925 (D. Or. 1983), cited in HOBBS, *supra* note 13, §5.7.2.2 n.869.

58. Stephen L. Albrecht, *Minimize Risk by Maximizing Compliance*, COLLECTOR, Aug. 1997, at 19.

59. 869 F.2d 1222 (9th Cir. 1988).

gave the consumer a 10-day notice that conflicted with and overshadowed the 30-day notice.⁶⁰

From the statutory language requiring the debt collector to cease collection efforts if the consumer responds, it can be implied that the debt collector is not required to cease communications during the 30-day period if the consumer does not respond.⁶¹ But if the consumer disputes the debt or requests the name and address of the original creditor in writing during the 30 days, the debt collector must cease all collection activities when it receives the communication and cannot resume them until it sends verification or the address to the consumer.⁶² *Heintz v. Jenkins* implies that litigation activities must also cease during this time.⁶³ If the consumer requests verification, the debt collector complies by sending the debtor the information it received from the creditor; neither the debt collector nor the creditor must verify the accuracy of the debt. For example, the Third Circuit held that computer printouts containing the amount of the debt, the date of services provided, and the date on which the debt was incurred, were sufficient verification.⁶⁴

Unlike the Miranda Warning, the notice of validation rights must be sent even if the attorney's initial communication is the complaint. As noted in *Swanson*, an attorney may violate the Act by giving the consumer a deadline that overshadows the 30-day notice.⁶⁵ Giving the 30-day notice in or with a complaint, but simultaneously serving a summons that requires an answer in 20 days, may constitute such a violation. This issue is addressed in an amendment to the Montana Justice and City Court Rules of Civil Procedure. Effective October 1, 1997, the Rules allow a defendant 20 days "unless otherwise provided by law" in which to answer.⁶⁶ The Act's 30-day provision is an example of where a longer period is otherwise provided by law.

60. See *Swanson*, 869 F.2d at 1226.

61. See FDCPA § 809(b), 15 U.S.C. § 1692g(b) (1994).

62. See FDCPA § 809(b), 15 U.S.C. § 1692g(b) (1994).

63. The *Heintz* Court allowed some leeway where a statute not originally applicable to attorneys created "anomalous results" when applied to attorneys. *Heintz v. Jenkins*, 514 U.S. 291, 295-96 (1995). The requirement that collection activities cease seems equally applicable to litigation activities.

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

65. See *Swanson*, 869 F.2d at 1226.

66. MONT. J. & CITY CT. R. CIV. P. 5(A) (1997). See also Cynthia Ford, *Civil Practice in Montana's "People's Courts": The Proposed Montana Justice and City Court Rules of Civil Procedure*, 58 MONT. L. REV. 197, 231 (1997).

C. *The 200 Don'ts*

The statute mainly enumerates actions that violate the Act. These enumerations frequently consist of general admonitions, followed by particulars. Thus an act can be a violation even if it is not specifically enumerated. The general admonitions relate to (1) forbidden communications, (2) harassment or abuse, (3) false, deceptive, or misleading representations, and (4) unfair or unconscionable practices. We will look more closely at those admonitions that may particularly affect attorneys.

1. *Forbidden Communications*

Section 804 is the “skip tracer” provision, regarding the debt collector’s communications in an attempt to locate the debtor. Section 805(b), prohibits communication with persons other than the consumer; however, for purposes of this section only, the term *consumer* includes the consumer’s spouse, parent (if the consumer is a minor), guardian, executor, or administrator.⁶⁷ Under sections 804(6) and 805(a)(2), once the debt collector knows the debtor is represented by an attorney, the debt collector must thereafter communicate with the attorney. Attorneys should already know this rule from the Model Rules of Professional Conduct.⁶⁸

Section 805(c) permits the debtor to notify the debt collector in writing to cease all communications and the debt collector must honor the request. If the debt collector is not an attorney, this tactic may prompt the debt collector to turn the file over for litigation. If the debt collector is an attorney who attempted to collect the debt through litigation, must the attorney cease litigation efforts when she receives the section 805(c) notice? Such a result would be perverse. So argued Heintz, raising this and other “anomalies” in his attempt to persuade the Supreme Court that the Act is ill-suited to attorneys. The argument failed, although the Court acknowledged that the Act might need some tweaking to fit the attorney’s situation:

We need not authoritatively interpret the Act’s conduct-regulating provisions now, however. Rather, we rest our conclusions upon the fact that it is easier to read [section 805(c)] as containing some such additional, implicit, exception than to believe

67. See FDCPA § 805(d), 15 U.S.C. § 1692c(d) (1994).

68. See MONT. RULES OF PROFESSIONAL CONDUCT Rule 4.2.

that Congress intended, silently and implicitly, to create a far broader exception, for all litigating attorneys, from the Act itself.⁶⁹

Attorneys therefore need not literally comply with the Act, but may invoke "implicit" exceptions necessitated by the circumstances of litigation.

2. *Harassment or Abuse*

Section 806 prohibits conduct that harasses, oppresses, or abuses the consumer, and contains a non-exclusive list of acts that violate the section. Because most of these "don'ts" reflect common sense and professionalism, attorneys are unlikely to violate them. For example, they know better than to threaten violence or use obscene language. It may be a violation of this section to threaten to report a bad check to the County Attorney; the attorney is of course free to report it, but to threaten to report it may constitute harassment. Another violation is the publication of "deadbeat" lists.⁷⁰ Attorneys should be careful not to circulate lists of consumer debtors other than to credit reporting agencies.

3. *False, Deceptive, or Misleading Representations*

Section 807 prohibits false, deceptive, or misleading representations, and contains a non-exclusive list of acts that violate the section. For example, it is a violation of section 807(3) to falsely represent or imply "that any individual is an attorney or that any communication is from an attorney" and of section 807(5) to threaten "to take any action that cannot legally be taken."⁷¹ Attorneys may unintentionally violate this section by sending a collection letter to a state in which they are not admitted to practice; for purposes of the statute, they are probably not an attorney in that state.⁷² Occasionally attorneys have allowed their names to be used by their debt collector clients, thereby

69. *Heintz v. Jenkins*, 514 U.S. 291, 296-97 (1995).

70. *See* FDCPA § 806(3), 15 U.S.C. § 1692d(3) (1994). The author has seen these lists, or the bounced checks themselves, posted in public view at the cash registers of many businesses. This action does not violate the statute, as it is committed by the creditor and not the debt collector, but it no doubt violates the common law (*see supra* note 19) and perhaps the Montana Unfair Trade Practice and Consumer Protection Act, MONT. CODE ANN. § 30-14-133 (1997).

71. FDCPA § 807(3), (5), 15 U.S.C. § 1692e(3), (5) (1994).

72. *See Rosa v. Gaynor*, 784 F. Supp. 1 (D. Conn. 1989).

misrepresenting the source of the collection letter. In one case, where a lawyer allowed his name to be used by a collection agency to collect \$9.42 for a magazine subscription, the plaintiff recovered \$1,000 statutory damages against the attorney.⁷³ Attorneys who fail to review a file before making a demand or who misuse their letterhead may also face bar discipline.⁷⁴

Attorneys also frequently violate section 807(5) by threatening "to take any action that cannot legally be taken or that is not intended to be taken."⁷⁵ For example, a threat to sue the debtor if payment is not made within a certain period of time can be a violation if the deadline is specious or if the attorney has no intention of suing.⁷⁶ If the attorney does in fact frequently begin litigation when payment is not made, then of course the threat can be made.

Attorneys also violate the Act by making misleading representations as to the effect of litigation. Attorneys should not enumerate post-judgment remedies without enumerating the debtor's right to be heard in court and the existence of post-judgment exemptions and due process protections. Attorneys who bring lawsuits must watch out for violations of section 807(15), which makes it a violation to falsely represent or imply that documents do not require action by the consumer. For example, service of a summons may induce the debtor to call and offer to make payment if the suit is dropped. The attorney tells the debtor he does not need to respond to the suit. When full payment is not made, the attorney then takes a default judgment. Although it may be proper to take a default when no answer is received, the attorney may have violated the Act by implying that the debtor was not required to take action in response to the complaint.

Because the FDCPA prohibits "deceptive" practices in § 807, an issue often arises as to what standard should be used to determine if collection messages are deceptive or misleading. In *Gammon v. GC Services*,⁷⁷ the debt collector mailed to Gammon a form collection letter containing the following language:

Your account with American Express has been referred to us for immediate attention.

73. See *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993).

74. See MONT. RULES OF PROFESSIONAL CONDUCT Rules 7.1, 7.5.

75. FDCPA § 807(5), 15 U.S.C. § 1692e(5) (1994).

76. See HOBBS, *supra* note 13, § 5.5.1.7.

77. 27 F.3d 1254 (7th Cir. 1994).

You should know that we are an experienced collection agency. *We provided the systems used by a major branch of the federal government and various state governments to collect delinquent taxes.*

We have collected millions of accounts from people in similar circumstances. Now we intend to collect your debt. We know what we are doing, and we are very efficient. We have handled every kind of account—and dealt with every kind of excuse.

You must surely know the problems you will face later if you do not pay. Send us your payment in full in the enclosed envelope, which is directed to the post office box we maintain for American Express accounts.⁷⁸

The issue was whether the debt collector violated section 807(1), which provides that it is a violation to falsely represent or imply “that the debt collector is vouched for . . . or affiliated with the United States or any State.” The debt collector maintained that a reasonable consumer would know that the debt collector was not affiliated with the United States, but the trial court used the “least sophisticated consumer” standard.⁷⁹ The appellate court was somewhat troubled by that standard, for “[l]iterally, the least sophisticated consumer is not merely ‘below average,’ he is the very last rung on the sophistication ladder. Stated another way, he is the single most unsophisticated consumer who exists.”⁸⁰ The court rejected this literal interpretation and blended in a reasonableness standard:

In maintaining the principles behind the enactment of the FDCPA, we believe a simpler and less confusing formulation of a standard designed to protect those consumers of below-average sophistication or intelligence should be adopted. Thus, we will use the term, “unsophisticated,” instead of the phrase, “least sophisticated,” to describe the hypothetical consumer whose reasonable perceptions will be used to determine if collection messages are deceptive or misleading. We reiterate that an unsophisticated consumer standard protects the consumer who is uninformed, naive, or trusting, yet it admits an objective element of reasonableness. The reasonableness element in turn shields complying debt collectors from liability for unrealistic or peculiar interpretations of collection letters.⁸¹

78. *Gammon*, 27 F.3d at 1255-56.

79. *Id.* at 1257.

80. *Id.*

81. *Id.* The Ninth Circuit has also adopted the least sophisticated consumer standard with an objective twist. In *Swanson v. Southern Oregon Credit Serv., Inc.*, 869 F.2d 1222 (9th Cir. 1989), the court stated:

In an amusing concurring opinion, Judge Easterbrook questioned whether the “least sophisticated consumer” was an appropriate standard. He noted that, according to the tabloids, the least sophisticated consumers actually believe that twelve Senators are from other planets, and observed:

[U]sing the “least sophisticated consumer” as the benchmark would create big problems when determining whether the plaintiff belongs to the class he purports to represent. Imagine the deposition:

Q: Mr. Gammon, I see that you received a C in high school English and read detective stories. How then can you be included among the *least* sophisticated recipients of debt collection notices?

A: Counsel, even my best friends will tell you that I am a simpering fool.

Litigation to determine just how gullible the class representative is would not be enlightening.⁸²

4. *Unfair or Unconscionable Practices*

Section 808 prohibits unfair or unconscionable means of collection, and contains a non-exclusive list of acts that violate the section. One of the most significant is subsection (1), the violation alleged in *Jenkins v. Heintz*:

The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.⁸³

This section has been problematic when debt collectors try to collect bad checks. In that situation, debt collectors frequently seek to recover amounts beyond the face amount of the check. For example, in *Charles v. Lundgren & Associates, P.C.*,⁸⁴ plain-

Therefore, we evaluate the threatened conduct in the second notice under the least sophisticated debtor standard. Although this standard is objective, the standard is lower than simply examining whether particular language would deceive or mislead a reasonable debtor.

Id. at 1227.

82. *Gammon*, 27 F.3d at 1259 (Easterbrook, J., concurring).

83. FDCPA § 808(1), 15 U.S.C. § 1692f(1) (1994).

84. 119 F.3d 739 (9th Cir. 1997). See *supra* text accompanying note 46 (discuss-

tiff wrote a check for \$17.93 to pay for a restaurant meal. When the check bounced, the restaurant sent it to Check Rite for collection. Check Rite demanded \$42.93, then referred the matter to defendant attorneys. The attorneys claimed plaintiff owed \$317.93 and offered to settle for \$127.93. The court properly held that the plaintiff stated a claim under the Act.⁸⁵ Unless an exception applies, the Act prohibits recovery of any amount greater than the amount of the debt, \$17.93. While the result is correct under the Act, this rule provides little incentive for consumers to honor their obligations, thus putting pressure on the states to offer other relief to creditors.

Two exceptions to this rule allow a debt collector to recover additional amounts: recovery is permissible if the amount is expressly authorized by the agreement creating the debt or permitted by law. Prior to 1995, no statute in Montana authorized service charges. Often businesses posted signs stating that an additional charge would be added to a bad check. The issue under the Act was whether these charges were “expressly authorized by the agreement creating the debt.”⁸⁶ This issue is now largely mooted by section 27-1-717 of the Montana Code, which permits the payee to add “a service charge in a reasonable amount, not greater than \$30,” thus satisfying the alternative requirement that the “amount is . . . permitted by law.”⁸⁷ The

ing whether a bad check constitutes a debt).

85. See *Charles*, 119 F.3d at 742.

86. FDCPA § 808(1), 15 U.S.C. § 1692f(1) (1994). The author’s opinion is that such a sign does not expressly authorize the additional charge. See Scott J. Burnham, *Collection of a Dishonored Check in Montana*, MONTANA LAWYER, Feb. 1986, at 6.

87. MONT. CODE ANN. § 27-1-717 (1997) provides in full:

27-1-717. Issuing a bad check or stopping payment—civil liability

(1) A person who issues a check, draft, or order for the payment of money is liable for a service charge, as provided in subsection (2), or for damages in a civil action, as provided in subsection (3), to the payee to whom the check, draft, or order is issued, or the payee’s assignee, if the check, draft, or order is:

- (a) dishonored for lack of funds or credit or because the issuer has no account with the drawee; or
- (b) issued in partial or complete fulfillment of a valid and legally binding obligation and the issuer stops payment with the intent to fraudulently defeat a possessory lien or otherwise defraud the payee of the check.

(2) The person who issues the check, draft, or order is liable to the payee or the payee’s assignee for a service charge in a reasonable amount, not greater than \$30. The payee or the payee’s assignee may waive the service charge. Demand for the service charge must be made in writing by the payee or the payee’s assignee and mailed to the address shown on the

issue remains whether a service charge of \$30 may be recovered in every event or whether the payee must prove that the charge is reasonable.

To recover the service charge, the debt collector must satisfy the notice requirement of the statute:

Demand for the service charge must be made in writing by the payee or the payee's assignee and mailed to the address shown on the check, draft, or order or to the issuer's last-known address. The demand must state that the issuer is required to pay the value of the check, draft, or order and service charge and must state the service charge provided for in this section.⁸⁸

The statute further provides that, in addition to the service charge, the creditor may recover substantial damages in a civil action brought on a bad check. A creditor or debt collector claiming charges arising under section 27-1-717 must be especially wary to avoid violating the FDCPA. Although not clearly drafted, the statute seems to permit the payee or the payee's assignee

check, draft, or order or to the issuer's last-known address. The demand must state that the issuer is required to pay the value of the check, draft, or order and service charge and must state the service charge provided for in this section.

(3) The amount of damages awarded pursuant to subsection (1) must be an amount equal to the service charge plus the greater of \$100 or three times the amount for which the check, draft, or order was issued. However, damages may not exceed the value of the check, draft, or order by more than \$500.

(4) The remedy provided by subsection (3) is available only if:

(a) the payee or the payee's assignee has made the written demand required in subsection (2) not less than 10 days before commencing the action; and

(b) the issuer has failed to tender an amount of money equal to the amount demanded under subsection (2) prior to the commencement of the action.

(5) The remedy provided by this section:

(a) may be pursued notwithstanding the provisions of 27-1-312;
(b) may be pursued whether or not a criminal penalty is sought under 45-6-316 or any other statute providing a criminal penalty; and

(c) does not affect the obligation of the issuer provided for in 30-3-423 to pay the amount of the draft. However, in case of any inconsistency with the provisions of Title 30, chapter 3, the provisions of this section apply.

(6) Upon introduction by the payee or the payee's assignee of evidence sufficient to establish the fact of mailing as required under subsection (2), the failure to receive the written demand is not a defense to the action allowed under subsection (3).

88. MONT. CODE ANN. § 27-1-717(2) (1997).

(often the debt collector) to recover substantial damages, but not before the conditions precedent stated in subsection (4) have occurred. First, the payee or assignee must make written demand for the \$30 service charge. Second, the debtor must not have paid the amount demanded. Third, not less than 10 days after making the written demand, the payee or assignee must file a lawsuit.

A debt collector who demands an amount beyond the service charge before a lawsuit is commenced would seem to violate the FDCPA, for that amount is not due until a lawsuit is filed. On the other hand, the debt collector would probably not violate the Act if he or she warned the debtor that the debtor might ultimately have to pay the charges. One caveat is that a debt collector violates the Act by threatening legal action if in fact legal action is rarely undertaken.⁸⁹ If the debt collector makes the threat in an attempt to induce payment, it is important to state correctly the possible charges. After a lawsuit has been filed, the debt collector can demand the following amounts:

- check less than \$33.33: \$100 + \$30
- check \$33.34 to \$235: 3 x amount of the check + \$30
- check greater than \$235: amount of the check + \$500

For example, assume that you are retained, like the attorneys in *Charles v. Lundgren & Associates, P.C.*, to recover on a bad check in the amount of \$17.93. You write a letter to the debtor that states, "Montana Code Annotated § 27-1-717 provides that you may be responsible for up to \$500 in damages for issuing a bad check." Although your statement is accurate as far as it goes, you have violated the Fair Debt Collection Practices Act by not telling the whole story. When the amount of the check in issue is \$17.93, the statement is misleading, for in that case you could recover only \$130 under the statute and not \$500.

D. Jurisdiction and Venue

According to section 813(d), FDCPA claims "may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction." Instead of bringing FDCPA claims affirmatively, debtors usually raise them as counterclaims to the creditor's suit

89. Section 807(5) prohibits "[t]he threat to take any action that cannot legally be taken or that is not intended to be taken." FDCPA § 807(5), 15 U.S.C. § 1692e(5) (1994).

on the debt. Because of the relatively small amounts involved, these suits are often brought in courts of limited jurisdiction, such as Justice Court. Some Justices of the Peace believe they cannot entertain a claim based on federal law. Of course, they are wrong, but you try to convince them.⁹⁰ The debtor may in fact gain an advantage if the Justice Court declines jurisdiction, for the creditor's transaction costs will be substantially higher in District Court.

Section 811(a) provides that legal action must be brought only in the district where the consumer signed the contract or where the consumer resides at the commencement of the action. These venue requirements are narrower than the venue requirements for Justice Court jurisdiction.⁹¹ In perhaps a typical case, James Crawford, a resident of Clay County, South Dakota, sought medical services at the Yankton Medical Clinic in adjacent Yankton County.⁹² When he did not pay all charges, the hospital assigned the account to defendant for collection. Defendant filed a small claims action in Yankton county against Crawford's wife, Glenda, who was then living in Minnehaha County. The court held that the defendant violated the FDCPA by bringing suit in the First Judicial District, where the hospital was located, rather than in the Second Judicial District, where the debtor resided. Although Glenda proved no actual damages, the court awarded her \$500 statutory damages plus \$4,000 in attorney's fees.

The venue restrictions probably apply to post-judgment execution, even though they are overly restrictive in that context. For example, the Act may not permit an attorney to garnish a consumer's earnings or attach her bank account when the earnings or account are located in a judicial district other than the ones where the consumer resides or signed the contract. Technically, if the consumer moves after legal proceedings have begun, the judgment could not be enforced in the district where the

90. A Justice of the Peace reluctant to hear a federal statutory claim has the right instincts, however, for these courts have historically considered common law claims in which fairness and reasonableness were more central to the decision-making process than the arcana of statutory interpretation. On the other hand, the FDCPA lacks the technicalities of many statutes and often requires the judge to determine what is fair.

91. See MONT. J. & CITY CT. R. CIV. P. 3 (1997). For example, Rule 3(A)(2)(b) provides that an action based on a contract may be brought in the county in which the contract was to be performed.

92. See Crawford v. Credit Collection Services, 898 F. Supp. 699, 701 (D.S.D. 1995).

consumer currently resides, because it would not be the district “in which such consumer resides at the commencement of the action.”

V. CIVIL LIABILITY

The Act provides for actual damages and “additional” damages up to \$1,000. The actual damages may include emotional distress, damage to relationships and reputation, loss of income, and telephone charges. They are rarely substantial. The additional damages serve the deterrent purposes of punitive damages and the court may award them even if the debtor can prove no actual damages.⁹³

Like many consumer protection statutes, the FDCPA provides the incentive of attorney’s fees to encourage private attorneys to take what otherwise would be unrewarding cases and thereby to do the public good.⁹⁴ The court must award the fees and may award them only to the consumer, not to the debt collector. An exception arises if the court finds the consumer brought the action in bad faith—a finding courts seem reluctant to make.⁹⁵ The statute thereby rarely deters debtors from bringing claims. In the event of a settlement that is silent on attorney’s fees, the Ninth Circuit has held that the attorney did not waive a claim for fees.⁹⁶

The liability portion of the statute provides for certain defenses to FDCPA claims. One provides for a defense if the act was done in conformity with an advisory opinion of the Federal Trade Commission.⁹⁷ This never happens, because there are no advisory opinions.⁹⁸ The more helpful defense is the bona fide error defense:

A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intention-

93. See, e.g., *Baker v. G.C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982).

94. See Robert F. Koets, Annotation, *Award of Attorneys’ Fees under § 813(A)(3) of Fair Debt Collection Practices Act*, 132 A.L.R. FED. 477 (1996).

95. See, e.g., *Swanson v. Southern Or. Credit Serv. Inc.*, 869 F.2d 1222 (9th Cir. 1988); *Juras v. Aman Collection Serv., Inc.*, 829 F.2d 739 (9th Cir. 1987), cert. denied, 488 U.S. 875 (1988).

96. See *Holland v. Roeser*, 37 F.3d 501, 503 (9th Cir. 1994).

97. See FDCPA § 813(e), 15 U.S.C. § 1692k(e) (1994).

98. The term “advisory opinion” is a term of art in FTC practice and procedure. None has been issued under the FDCPA. The FTC staff issues informal letters, but these are not binding. See HOBBS, *supra* note 13, § 7.6.

al and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.⁹⁹

The bona fide error defense arose in a curious postscript to the story of attorney Heintz that we began with. Having determined that the Act applied to Heintz, the Supreme Court remanded the case for determination of the substantive issues. Back in district court, Heintz moved for summary judgment, claiming that even if he had violated the Act, the violation was the product of a bona fide error.¹⁰⁰ Because the alleged violation involved an unauthorized charge, Heintz and his law firm had to prove, in the words of the district court, "by a preponderance of the evidence that their attempt to collect the excess FPCI fee was unintentional and that they maintained procedures that were reasonably adapted to prevent the collection of unauthorized FPCI charges."¹⁰¹ The court found that the law firm's action was unintentional when it had no knowledge that the charge was unauthorized by the loan contract and that its procedures were reasonable when the obligations were verified by the client. The court held that the debt collector was permitted under the statute to rely on its client's representation that a charge was valid and did not have to make an independent investigation.¹⁰²

The district court opinion was recently affirmed by a divided panel of the Court of Appeals.¹⁰³ For purposes of the summary judgment motion, the court assumed that the insurance placed by the bank was not authorized by the contract.¹⁰⁴ Therefore, absent the bona fide error defense, the law firm's attempt to collect the charge violated the Act. The plaintiff claimed that as a matter of fact, the attorneys knew the charge was impermissible.¹⁰⁵ The defendants claimed ignorance—the law firm only knew what the bank told it.¹⁰⁶ The court found that because the plaintiff could only prove that the defendants should have known it, not that they actually knew it, there was no triable

99. FDCPA § 813(c), 15 U.S.C. § 1692k(c) (1994).

100. See *Jenkins v. Heintz*, No. 93C1332, 1996 WL 535167, at *1 (N.D. Ill. Sept. 18, 1996).

101. *Id.* at *3.

102. See *Jenkins v. Heintz*, 124 F.3d 824 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1304 (1998).

103. See *id.*

104. See *id.* at 828-29.

105. See *id.* at 829-30.

106. See *id.*

issue of fact.¹⁰⁷

Plaintiff then argued that even if the lawyers didn't know, by failing to find out they committed an error of legal judgment, not the kind of clerical error excused by the statute.¹⁰⁸ The court reasoned that an attorney's liability for making a legal judgment presupposes a duty to make a determination, here to determine whether the debt was one that could be collected legally.¹⁰⁹ The court imposed no such higher duty on an attorney debt collector, finding that any debt collector is free to write a demand letter based on the information it receives from a client, accurate or not.¹¹⁰

Finally, plaintiff argued that the bona fide error defense was not available to Heintz's firm, but only to debt collectors who maintain "procedures reasonably adapted to avoid any such error," in the words of section 813(c) of the FDCPA.¹¹¹ The court summarized the law firm's procedures and found them acceptable.¹¹² The enumeration is a good checklist for attorneys who may have to avail themselves of the defense:

The defendants have offered un rebutted evidence of the procedures they followed when preparing to file suit to collect a debt to avoid errors and omissions that could result in an FDCPA violation. These include the publication of an in-house fair debt compliance manual, updated regularly and supplied to each firm employee; training seminars for firm employees collecting consumer debts; and an eight-step, highly detailed pre-litigation review process to ensure accuracy and to review the work of firm employees to avoid violating the Act. After suit is filed, the firm assigns an attorney to review all issues relating to a particular deficiency, and stops all collection efforts on a disputed balance before judgment to verify all disputed items with the client.¹¹³

Again the court reasoned that adoption of these procedures is sufficient; no independent investigation is required.¹¹⁴ In conclusion, the court reiterated that when the Supreme Court held that attorneys were debt collectors under the statute, it recog-

107. See *id.* at 831-32.

108. See *id.* at 823.

109. See *id.*

110. See *id.* at 833.

111. *Id.* at 834 (citing FDCPA § 813(c), 15 U.S.C. § 1692k(c) (1994)).

112. See *id.*

113. *Id.* at 834.

114. See *id.* at 834-35.

nized that attorneys were bound by the same standards as other debt collectors and no more.¹¹⁵

In a strong dissent, Judge Ripple expressed concern that the majority's application of the bona fide error defense would permit attorneys to undo what the Supreme Court had done when it brought them under the requirements of the Act.¹¹⁶ Ripple agreed with the plaintiff that while the defendants' procedures might pick up clerical errors, nothing in the system was designed to detect unauthorized amounts erroneously claimed by the creditor.¹¹⁷ More significantly, he argued that lawyers *are* different from other debt collectors because only lawyers can bring a lawsuit: "He is a debt collector who, because of the special tools at his disposal, can violate the Act in especially potent ways."¹¹⁸ Ripple's approach would still give lawyers the benefit of the bona fide error defense for attempting to collect unauthorized amounts, but only if their procedures are designed to detect this kind of error.

It remains to be seen whether courts in other circuits will follow the majority or the minority view. Again, attorneys wishing to act prudently might take Judge Ripple's suggestion. In establishing procedures, the firm might ask the client to break the amount claimed into its component parts and to state the source of each part. The firm could then determine whether each part was authorized by the contract or other authority.

VII. CONCLUSION

The purpose of this article is to alert attorneys to the applicability of the Fair Debt Collection Practices Act to their practices. This cuts two ways. Some plaintiff-oriented attorneys may see in the Act an opportunity to serve consumers by identifying claims that may be brought against their fellow attorneys. Defense-minded attorneys will see the need to take steps to reduce exposure to such claims. The result may be for some time an unfortunate game in which tremendous resources are brought to bear and disproportionate losses are suffered because attorneys catch each other in "technical" violations of the Act.

115. See *id.* at 835.

116. See *id.* at 835 (Ripple, J., dissenting).

117. See *id.* at 836.

118. *Id.* at 838. Earlier, Judge Ripple cited Judge Terence Evans' pithy remark, "An unsophisticated consumer, getting a letter from an 'attorney,' knows the price of poker has just gone up." *Id.* at 837 (citing *Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996)).

A similar game was played out some years ago after the adoption of the Truth in Lending Act (TILA).¹¹⁹ This situation was ameliorated by a number of reforms. For one, the Federal Reserve promulgated safe-harbor forms, use of which was a defense to a claim under TILA.¹²⁰ Debt collectors, however, are unlikely to accept legislative safe harbors. One of our premises is that the greater the pressure brought to bear on debtors, the more successful the results. Therefore, debt collectors will probably prove unwilling to trade their freedom to craft payment-inducing techniques for the sanctity of a safe harbor. More likely, the proliferation of trade associations and debt collection software will satisfy the market for acceptable form language without the need for legislation.¹²¹

Another reform to the Truth in Lending Act was the limitation that statutory damages, as opposed to actual damages, would be imposed only for certain enumerated violations, which were chosen because they were substantial rather than technical violations.¹²² This approach would probably not work with the FDCPA, for the prohibitions are phrased in general terms with the enumerations being by way of example only. The same result would be accomplished if courts paid closer attention to section 813(b)(1) of the FDCPA:

(B) In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors—

in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional;¹²³

As the statute is structured, subsection (a) provides for actual damages, statutory damages, and attorney's fees.¹²⁴ Therefore, the language in (b) authorizes the court to limit a defendant's exposure to liability even where the defendant has clearly violat-

119. See, e.g., William E. Boyd, *The Truth-In-Lending Simplification and Reform Act—A Much-Needed Revision Whose Time Has Finally Come—Part I*, 23 ARIZ. L. REV. 1 (1981).

120. See 15 U.S.C. § 1640(f) (1994). The forms are found in 12 C.F.R. § 226, App. H (1997). Because of the difficulty of compliance, the statute makes use of the forms a defense even if the forms violate the law.

121. See any issue of *Collector* magazine for examples of both.

122. See 15 U.S.C. § 1640 (flush language following subsection (a)) (1994).

123. 15 U.S.C. § 1692k(b)(1) (1994).

124. See 15 U.S.C. § 1692k(a) (1994).

ed the Act. The attorney who was unaware of the Act's application and who did not abuse the debtor might well escape with an appropriate slap on the wrist.

In a recent issue of *Collector*, the publication of the American Collectors Association, Stephen L. Albrecht, the Association's director of Government Relations, railed against the exposure of debt collectors, "who are feeling as if they have a target sign painted across their backs that says 'Sue me.'" Albrecht wasn't just a whiner, however. He had a plan for how collectors can "strike back" against their oppressors—they can comply with the Act!¹²⁵ He is, of course, quite right. Because reform of the Act is unlikely, attorneys must find low-cost means of compliance.

The implications for attorneys are clear. First, attorneys must realize that they may well be debt collectors. In cases of doubt, the cost of compliance may be less than the cost of non-compliance. Second, compliance is not that difficult. The two do's are straightforward and easily assimilated into procedures. The two hundred don'ts are more problematic, as they include many don'ts that are not intuitive even to the attorney determined not to take any actions that are unfair or deceptive. But because collection generally involves repetitive steps, the proper procedures and language can be incorporated into those steps. Joining a trade association or purchasing collection software might be a cost effective way to learn appropriate procedures and language. Third, preventive steps can not only prevent violations but can provide a defense if a violation occurs. Alert attorneys in the firm to the problem so that every collection effort is undertaken according to the same procedures and audit those procedures to insure that they are reasonable. Finally, if an action is brought against you and a violation is found, be in a strong position to argue the bona fide error defense and the amelioration of liability.

125. See Stephen L. Albrecht, *Minimize Risk by Maximizing Compliance*, COLLECTOR, Aug. 1997, at 18.