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AS IF WE HAD ENOUGH TO WORRY ABOUT . . . ATTORNEYS AND THE FEDERAL FAIR DEBT COLLECTION PRACTICES ACT: SUPREME COURT RULES ON FORMER ATTORNEY EXEMPTION

I. INTRODUCTION

This article provides an overview of the Federal Fair Debt Collection Practices Act (hereinafter the "Act" or "FDCPA"), a relatively unknown statute which regulates the collection practices of debt collectors while providing protection to consumer debtors.¹ The purpose of this article is to educate attorneys by making them aware of how they may qualify as "debt collectors" under the FDCPA. Additionally, this article may serve as a guide for attorneys who qualify as "debt collectors," detailing the applicable provisions with which they must comply to avoid liability. Whether you are a solo practitioner or a member of a large firm, regardless of the state in which you currently practice, if you collect consumer debts, you need to be aware of this statute and how you may fall prey to its provisions.

This article briefly traces the history of the FDCPA, from the original legislation enacted in 1977 to the 1986 Amendments, and further provides an overview of appellate courts' previous interpretations of the Act's applicability to attorneys. From here, the article summarizes *Heintz v. Jenkins*, a 1995 United States Supreme Court decision holding attorneys who meet the FDCPA's statutory definition of "debt collector," subject to the Act's provisions.² Further discussion of exactly what qualifies as a "debt" and as a "debt collector" under the Act is presented in correlation with a summary of the main provisions of the FDCPA that attorneys need beware. These provisions are broken down in to four categories: 1) venue restrictions, 2) communications with the debtor, 3) communications with third parties concerning the debt, and 4) potential civil liability under the Act. This article further discusses how state debt collection statutes apply in concert with the FDCPA, followed by a brief mention of tort actions to which attorneys could be subject, when the FDCPA does not apply.

1. 15 U.S.C. § 1692 (1994).

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

Finally, a summary of North Carolina's statute concerning debt collection is presented, with key topics highlighted.

II. HISTORY OF THE FEDERAL FAIR DEBT COLLECTION PRACTICES ACT

A. *The 1977 Federal Fair Debt Collection Practices Act*

Congress enacted the Federal Fair Debt Collection Practices Act in 1977, after discovering abundant evidence of abusive, deceptive, and unfair debt collection practices by debt collectors.³ These practices contributed to the rising number of personal bankruptcies, marital dissolutions, job losses, and invasions of privacy.⁴ Additionally, interstate commerce was adversely affected by corrupt debt collectors.⁵

The FDCPA's purpose was to eliminate abusive debt collection practices, and to promote consistent state action in order to protect consumers against those who abuse the debt collection process.⁶ Moreover, the Act promotes fair ethical collection prac-

3. See 15 U.S.C. §§ 1692-1692o. See also *Miller v. Payco-General American Credits*, 943 F.2d 482, 483-84 (4th Cir. 1991); *Pipiles v. Credit Bureau of Lockport Section*, 886 F.2d 22, 27 (2d Cir. 1989) (stating section 1692e was enacted "to prevent abusive, deceptive, and unfair debt collection practices").

4. See 15 U.S.C. § 1692:

Congressional findings and declaration of purpose

(a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) 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 collection abuses.

5. *Id.*

6. *Id.*

tices, by insuring that those debt collectors who do not abuse the collection process will not suffer a competitive disadvantage.⁷

B. *The 1986 Amendments to the FDCPA*

The original Act exempted attorneys from the statutory definition of "debt collector" because their debt collection activities were considered incidental to the practice of law. Local bar associations thereby inherited the duty to protect consumers from attorneys engaged in abusive collection practices.⁸ However, Congress discovered that more and more attorneys were engaging in the debt collection process. These attorneys used tactics that ordinary debt collectors were barred from using, due to attorneys exempt status under the 1977 Act.⁹

In 1986, Congress amended the original FDCPA, eliminating the exemption which previously excluded from the statutory definition of "debt collector" any attorney-at-law collecting debts on behalf of, or in the name of a client.¹⁰

C. *Jurisdictions: Holdings and Conflicts Concerning Interpretation of the 1986 Amendments*

Since the adoption of the 1986 Amendments, appellate decisions regarding the status of the former attorney exemption have resulted in varying views among the circuits.

Addressing the issue in *Paulemon v. Tobin*, the Second Circuit Court of Appeals held that attorneys may qualify as debt collectors under the FDCPA.¹¹ In that case, the plaintiff-debtor

7. *Id.* See also *Johnson v. NCB Collection Srvc.*, 799 F. Supp. 1298, 1303 (D. Conn. 1992) (quoting S. Rep. No. 382, 95th Cong., 1st Sess. 1, 2, (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1696). The Committee on Banking, Housing, and Urban Affairs, which reported on the Act and recommended it to the Senate, found that debt collection abuse by third party debt collectors is "a widespread and serious national problem." *Id.*

8. See H.R. Rep. No. 405, 99th Cong., 2d. Sess. 3-7 (1985), reprinted in 1986 U.S.C.C.A.N. 1752-61. See also Henry D. Menghini and Jason D. Ponfil, *Fair Debt Collection Practices Act: The Debtor Strikes Back*, 47 J. Mo. B. 115 (1991).

9. H.R. Rep. No. 99-405, *supra* note 8.

10. 1986 Amendment 1 Par. (6). Pub.L. 99-361: In provision preceding subpar. (A) substituted "clause (F)" for "clause (G)", in subpar. (E) inserted "and" after "creditor;" struck out subpar. (F), which excluded from the term "debt collector" any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client, and redesignated subpar. (G) as (F). Effective Date: Section effective upon the expiration of six months after Sept. 20, 1977, see § 818 of Pub.L. 90-321, set out as an Effective Date note under § 1692 of this title.

11. *Paulemon v. Tobin*, 30 F.3d 307 (2d Cir. 1994).

owed a debt to a local hospital for medical services.¹² The hospital's retained attorney sent a letter entitled "Institution of Litigation" to the plaintiff-debtor's attorney, requesting notice of whether that attorney still represented the plaintiff-debtor, and if so, to thereby accept service of process.¹³

The plaintiff-debtor filed a complaint against the attorney, alleging that the letter violated the FDCPA by threatening to communicate directly with a represented person, and by making deceptive and misleading statements.¹⁴ Granting a motion for dismissal, the District Court held that the attorney had acted as an attorney in the course of litigation, not as a "debt collector" as defined by the FDCPA, thus not liable under the Act.¹⁵

The Second Circuit Court of Appeals, in reversing the lower court, held the creditor's attorney to be a "debt collector" liable under the FDCPA, even if the Act contained a litigation exemption, because the letter failed to qualify as a litigation activity sufficient to trigger any such exception.¹⁶ Although the court reversed on other grounds, the court expressed considerable doubt as to the existence of a litigation exemption.¹⁷

12. *Id.* at 308.

13. *Id.* at 308. The letter stated:

Our firm has been engaged by the above-named client to institute suit against your client. It is our understanding that you represent this individual and would be willing to accept service on their behalf.

We will assume that you no longer represent this individual if you do not notify us of your continued representation within seven (7) days from the date of this correspondence and in such case, we will contact this individual directly.

Thank you for your attention to this matter.

Id.

On the reverse side of the date, the letter included a printed list of specific federal rights and a statement that read: "THIS IS AN ATTEMPT TO COLLECT A DEBT. ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE." *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 309-310.

17. *Id.* at 310. The 2nd Circuit in *Paulemon* never reached the issue of whether the FDCPA impliedly contains a litigation exemption. *Id.* Instead, the court determined the attorney's actions were not "litigation." Therefore it was unnecessary to rule on the exemption. *Id.*

The court did, however, review recent decisions from other circuits: *Jenkins v. Heintz*, 25 F.3d 536 (7th Cir. 1994); *Fox v. Citicorp Credit Service*, 15 F.3d 1507 (9th Cir. 1994); *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992).

The Sixth Circuit addressed the issue in *Green v. Hocking*.¹⁸ In *Green*, the plaintiff-debtor used a credit card to make a purchase at a local appliance store.¹⁹ The credit card company refused to accept the charge, so the appliance store assigned the debt to a collection corporation.²⁰ The attorney for the corporation without first contacting the debtor, filed a complaint in state court against the debtor, alleging the debtor owed a total amount of approximately three hundred dollars, which included interest calculated at eighteen percent.²¹ One week later, the attorney filed an amended complaint using a five percent interest rate, acknowledging the eighteen percent rate used in the original complaint to be incorrect, because neither the corporation nor the original appliance store contracted for such a rate.²²

Debtor-plaintiff then sued the attorney in federal court, alleging violations of sections 1692e(2)(A)-1692f(1) of the FDCPA for misstating the total amount of debt owed, due to the attorney's incorrect calculation of the appropriate interest rate.²³ Dismissing the action, the District Court held the attorney immune from liability under the FDCPA because his activities were of a legal nature covered by the litigation exemption under the Act.²⁴ The Sixth Circuit Court of Appeals addressed only the issue of whether the FDCPA covers an attorney functioning solely in a legal capacity.²⁵

After examining the context of the FDCPA, the court held that the Act was not intended to govern attorneys engaged solely

18. 9 F.3d 18 (6th Cir. 1993).

19. *Id.* at 19.

20. *Id.*

21. *Id.*

22. *Id.* at 20.

23. *Id.* The complaint alleged violations of 15 U.S.C. § 1692e(2)(A) which proscribes the false representation of the amount of any debt, and 15 U.S.C. § 1692f(1) which proscribes the collection, or attempted collection, of any amount, including interest "unless such amount is expressly authorized by the agreement creating the debt or permitted by law." *Id.*

24. *Green*, 9 F.3d at 20.

25. *Id.* The court distinguished *Frey v. Gangwish II*, 970 F.2d 1516 (6th Cir. 1992), and *Crossley v. Liebermann*, 868 F.2d 566 (3d Cir. 1989). In *Frey*, the attorney acted as a post-judgment bill collector, and the issue of exemption was never raised. In *Crossley*, the attorney sent a letter, rather than filing a lawsuit. Neither case was found to be applicable to the narrow question of whether attorneys functioning solely in a legal capacity are covered by the Act. *Green*, 9 F.3d at 20, n.3.

in the practice of law.²⁶ Even though the 1986 amendments to the FDCPA did away with the attorney exemption, the purpose was to close a loophole that allowed an attorney engaged in the same unsavory debt collection activities as other debt collectors, to avoid liability due solely to his possession of a law degree.²⁷ Congress did not intend to prohibit attorneys from engaging in normal law practices; such a conclusion would result in absurd outcomes.²⁸ In conclusion, the Court relied on the original drafters'

26. *Green*, 9 F.3d at 21. The *Green* court read the statute as a whole, since the meaning of statutory language depends on context. *Id.* (relying on *King v. St. Vincent's Hosp.*, 502 U.S. 215 (1991)). See *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125-126 (1985) (holding in those rare cases where the literal reading of the statute is unambiguous, courts may seek extrinsic evidence of legislative intent when the literal interpretation makes little sense, renders the statute ineffective, leads to irrational consequences, or is otherwise demonstrably at odds with the true intentions of the statute's drafters. In such cases, the intention of the drafters, rather than the literal language, controls); *Arizona Governing Comm'n for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1108 (1983) (holding that under appropriate circumstances, the court should test the statute's plain meaning with legislative history, policy, and overall statutory scheme). See also *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235 (1989).

27. *Green*, 9 F.3d at 21. Before the 1986 FDCPA amendment went into effect, attorneys advertised to creditors that they could do what other debt collectors could no longer do because of their status as attorneys. Attorneys could make "late night telephone calls to consumers, calls to consumers' employers concerning the consumers' debts," and "disclose the consumer's debt to third parties" without worrying about falling prey to the FDCPA. H.R. Rep. No. 405, *supra* note 8, at 1754-57.

28. *Green*, 9 F.3d at 21. The court relied on various sections of FDCPA as examples of absurd results. For example, 15 U.S.C. § 1692g(b) provides that collection efforts must cease if, within thirty days of receiving a communication, the debtor disputes the amount owed, and 15 U.S.C. § 1692c provides that all debt communications must cease once the debtor makes such a request. A literal reading of these provisions would mean that "once a creditor initiates a lawsuit, and the consumer responds that he does not owe the amount alleged, or that he wishes to cease communications, it would be unlawful to bring a motion for summary judgment." *Green*, 9 F.3d at 21. The court reasoned that "if an attorney first writes a letter, and the consumer asks that communications cease, it would be unlawful to instigate a lawsuit." *Id.*

Further, 15 U.S.C. § 1692c(b) prevents a debt collector from communicating with any third party pertaining to the consumer's debt. This portion of the Act, would make it unlawful for "an attorney to communicate with the court or the clerk's office by filing suit." The court also cited section 1692e(5) which makes it unlawful to threaten "to take any action that cannot legally be taken or that is not intended to be taken." If a lawsuit is brought, and the consumer prevails to any extent, it appears that the law has been broken, as the creditor took an

intent to have a litigation exception for attorneys over the plain language of the statute.²⁹

Similarly, in *Firemen's Ins. Co. v. Keating*, the court held that the 1986 Amendments do not reach all legal activity engaged in by attorneys.³⁰ By removing the attorney exemption, Congress did not intend to sweep within the meaning of the term "debt collector," attorneys acting as legal counsel for their clients.³¹ Additionally, the court in *National Union Fire Ins. Co. v. Hartel*, held a law firm not to be a "debt collector" under the FDCPA since it engaged in activities purely legal in nature, without seeking any reimbursements.³²

The Fourth Circuit Court of Appeals, addressing the issue in *Scott v. Jones*, reached a conclusion contrary to that of the Sixth Circuit.³³ The *Scott* court determined an attorney to be subject to the provisions of the FDCPA, if the attorney meets the Act's definition of a "debt collector."³⁴

action that apparently "cannot legally be taken" as a result of the judgment. *Green*, 9 F.3d at 21. The *Green* court also noted that:

[A]ccording to Representative Annunzio, the sole sponsor of the 1986 amendments, "the removal of the attorney exemption will not interfere with the practice of law by the Nation's attorneys." Annunzio further stated that "only collection activities, not legal activities, are covered by the act The act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature The act only regulates the conduct of debt collectors, it does not prevent creditors, through their attorneys, from pursuing any legal remedies available to them."

Green, 9 F.3d at 21 (citations omitted). See also Federal Trade Commission, Statements of General Policy or Interpretation: Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,100 (1988) (stating "attorneys . . . whose practice is limited to legal activities are not covered by the FDCPA") [hereinafter *Staff Commentary*].

29. *Green*, 9 F.3d at 22 (citing *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 242 (1989) which stated "[w]e are mindful that in those rare cases where the intent of the statute's drafters is clearly contrary to the plain language, the intention of the drafters, rather than the strict language, controls"). See also *North Howen B'd of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) (stating "while the views of the sponsors of legislation are by no means conclusive, they are entitled to considerable weight").

30. *Firemen's Ins. Co. v. Keating*, 753 F. Supp. 1137 (S.D.N.Y. 1990).

31. *Id.* at 1142.

32. *National Union Fire Ins. Co. v. Hartel*, 741 F. Supp. 1139, 1141 (S.D.N.Y. 1990).

33. *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992).

34. *Id.* at 315.

In *Scott*, the debtor brought a class action suit against an attorney and his law firm for violating the venue provisions of the FDCPA.³⁵ The attorney was retained by two banks to represent their bank card divisions in lawsuits on delinquent credit card accounts.³⁶ In an effort to collect the debt, the attorney filed suit in the General District Court for the City of Richmond against the debtor, a resident of Lynchburg, Virginia, in order to recover the past due balance on the debtor's credit card account.³⁷ Objecting to the Richmond venue under the FDCPA, the debtor filed a class action suit against the attorney and his law firm alleging violations of the FDCPA's venue provisions.³⁸

The attorney argued as an affirmative defense that he was not a "debt collector" under the FDCPA, and thereby he did not have to comply with the Act's venue provisions.³⁹ The district court, however, held that the attorney fell within the plain meaning of the Act's definition of "debt collector," and was thus subject to liability for violating the Act's venue provisions.⁴⁰

Affirming the district court, the Fourth Circuit Court of Appeals held the "venue restrictions of section 1692i, apply only to legal actions initiated by 'debt collectors,' as defined in the FDCPA."⁴¹ To determine whether the attorney was a "debt collector," the court looked to the statute for the definition of a "debt collector."⁴² Finding the statutory language to be "clear and

35. *Id.*

36. *Id.*

37. *Id.* The debtor sought actual damages, statutory damages, attorney's fees, and injunctive relief. For a discussion of damages available for violations of the FDCPA, see *infra* part IV.D.

38. *Scott*, 964 F.2d at 315. See also 15 U.S.C. § 1692i(a) which states:

Any debt collector who brings any legal action on a debt against any consumer shall . . . bring such action only in the judicial district or similar 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.

Plaintiff *Scott* had applied for the credit card at the Lynchburg branch office of CFB, however the suit was filed in Richmond, Virginia. This was neither where the contract was signed, nor where the debtor currently resided; thus it violated § 1692i(a) of the FDCPA. *Scott*, 964 F.2d at 316.

39. *Scott*, 964 F.2d at 316.

40. *Id.*

41. *Id.*

42. *Id.* See also 15 U.S.C. § 1692a(6), which defines the term "debt collector" to mean "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

unambiguous," the court refused to consider the legislative history of the provision.⁴³ Although the court acknowledged no absolute rule against the use of extrinsic aids for statutory interpretation, even when the statutory language on its face is unambiguous, it further to give any weight to extrinsic aids presented from the House comments on the amendment, the Banking Finance and Urban Affairs Committee comments, or statements made by the representative who sponsored the 1986 Amendments.⁴⁴

Using the statutory definition the *Scott* court found the primary purpose of the attorney's business to be the collection of debts, thus qualifying the attorney as a "debt collector" under the Act.⁴⁵ The attorney further argued that the court was bound by the Federal Trade Commission ("FTC") interpretation of "debt collector" under the FDCPA which does not include an attorney whose practice is limited to legal activities.⁴⁶ However, the court declined to adopt the FTC position, deferring instead to the Act's

debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."

43. *Scott*, 964 F.2d at 316. See *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Cominetti v. United States*, 242 U.S. 470 (1917) which states that "[w]here the statute's language is plain and clear, the sole function of the courts is to enforce it according to its terms").

44. *Scott*, 964 F.2d at 317. Extrinsic evidence presented included the House of Representatives Report on the amendment, showing that the primary concern of the Banking, Finance and Urban Affairs Committee was the unfair advantage accorded to attorneys who could legally engage in the same abusive practices that were proscribed for non-lawyer debt collectors. *Id.* (citing H.R. Rep. No. 405, *supra* note 8, at 1752). Additionally, defendant Jones quoted Rep. Annunzio, speaking on the floor of the House after the passage of the bill, where Annunzio stated that "[o]nly collection activities, not legal activities, are covered by the Act. The Act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature." *Id.* (citing 132 Cong. Rec. H10031 (1986)). See also *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976).

45. *Scott*, 964 F.2d at 317. Deposition testimony revealed that at least 70-80% of defendant Jones' legal fees were generated in relation to legal work performed toward the collection of debts. According to the court:

Jones regularly attempted to collect debts "indirectly," as outlined in the second prong of the "debt collector" definition. The "regularity" is shown by the sheer volume of Jones' business. Jones filed approximately 4,000 warrants per year between 1983 and 1987, and while the number declined in recent years, the practice continued to constitute a significant portion of his business. The filing of warrants constitutes an "indirect" means of debt collection.

Id. at 316.

46. *Id.* at 317. The FTC's position had been that:

plain statutory meaning, holding the attorney to be a "debt collector" under the Act subject to its venue provisions.⁴⁷

The Ninth Circuit Court of Appeals reached a similar verdict in *Fox v. Citicorp Credit Serv., Inc.*⁴⁸ After the debtors defaulted on a credit card account, the bank referred the matter to their collection branch, which retained an attorney.⁴⁹ On behalf of the bank, the attorney filed an action against the debtors in Maricopa County, Arizona.⁵⁰ Before judgment was rendered, the two parties reached an agreement stipulating that the debtors would pay a specified sum every month until the debt was paid off.⁵¹ Subsequently, however, the debtors failed to pay off the debt according to that agreement.⁵² The bank contacted the debtors numerous times, threatening to garnish the debtors' wages if payment was not forth coming.⁵³

After not receiving any payment from the debtors, the bank contacted its attorney, requesting that he proceed with the garnishment proceeding.⁵⁴ Before the attorney filed the action, the debtors mailed the requested payment to the bank.⁵⁵ The bank, however, never informed the attorney of the current zero balance, therefore the attorney proceeded with garnishment.⁵⁶ After the garnishment proceeding had commenced, the attorney received information showing the debtors to be current in their payments; the attorney, thereafter quashed the writ of garnishment.⁵⁷

Attorneys or law firms that engage in traditional debt collection activities (sending dunning letters, making collection calls to consumers) are covered by the FDCPA The term [debt collector] does not include . . . [a]n attorney whose practice is limited to legal activities (e.g., the filing and prosecution of lawsuits to reduce debts to judgment).

Staff Commentary, supra note 28, at 50,100-02.

47. *Scott*, 964 F.2d at 317. See also *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (holding that "if the statute is silent or ambiguous with respect to the specific issue" a court should defer to a reasonable administrative interpretation of the statute).

48. *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994).

49. *Id.* at 1510-11.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Fox*, 15 F.3d at 1510-11.

54. *Id.*

55. *Id.*

56. *Id.* at 1511.

57. *Id.*

Debtors then brought suit against the bank and the attorney under the FDCPA. The attorney argued as an affirmative defense that his actions were covered by an implied exemption in the FDCPA for attorneys engaged in legal actions.⁵⁸

The district court granted summary judgment for the bank and attorney.⁵⁹ Reversing the decision, the Ninth Circuit Court of Appeals refused to adopt “this ‘phantom limb’ theory of statutory interpretation.”⁶⁰ The court instead deferred to the plain meaning of the statute, and found no mention of an attorney exemption, or any distinction between legal and non-legal activities.⁶¹

D. *Heintz v. Jenkins: Resolving the FDCPA Applicability to Attorneys*

On April 18, 1995, the United States Supreme Court in *Heintz v. Jenkins* held the FDCPA applicable to attorneys qualifying under the Act’s definition of “debt collector.”⁶² The Court accepted review of the *Heintz* case in order to clear the remaining ambiguity among the districts since the 1986 Amendments to the FDCPA were adopted.

In *Jenkins v. Heintz*, the debtor borrowed money from a bank in order to buy a car. After the debtor defaulted on her loan, the

58. *Id.* at 1512. See *Firemen’s Ins. Co. v. Keating*, 753 F. Supp. 1137, 1141-44 (S.D.N.Y. 1990); *National Union Fire Ins. Co. v. Hartel*, 741 F. Supp. 1139, 1140-41 (S.D.N.Y. 1990). See also *Green v. Hocking*, 792 F. Supp. 1064, 1065-66 (E.D. Mich. 1992). These cases conclude that Congress did not intend to expose “those attorneys acting in the role of legal counsel while representing clients” to FDCPA liability.

59. *Fox*, 15 F.3d at 1512.

60. *Id.*

61. *Id.* “Applying our general rules of statutory construction to the FDCPA freed from the repealed limitation, neither the plain language of the Act nor its structure supports any exemption for attorneys’ ‘purely legal’ debt collection activities.” *Id.* Additionally, looking to the legislative history of the 1986 repeal of the attorney exemption, the *Fox* court found no clearly-expressed contrary intention necessary to overcome “the strong presumption that Congress expresses its intent through the language it chooses.” *Id.* (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)). See *Sacramento Regional County Sanitation Dist. v. Reilly*, 905 F.2d 1262, 1268 (9th Cir. 1990) (stating “[t]he plain language of a statute is the starting point of statutory construction.”); *Seldovia Native Ass’n. v. Lujan*, 904 F.2d 1335, 1341 (9th Cir. 1990) (holding that to determine plain meaning the court must look to language and design of statute as whole).

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

bank retained a law firm to proceed with litigation in order to collect the debt.⁶³ The defendant, an attorney and partner with the retained law firm, sued the debtor in state court to recover the balance due on the loan.⁶⁴ In an effort to settle the suit, the attorney wrote a letter to the debtor detailing the amount of debt owed to the Bank.⁶⁵ Included as part of the amount of debt was a sum for insurance bought by the bank because the debtor had not kept the car insured as her loan agreement required.⁶⁶ Subsequently, the debtor brought a FDCPA suit against the attorney and his firm claiming the letter violated the Act's prohibitions against attempting to collect an amount not "authorized by the agreement creating the debt."⁶⁷

Plaintiff-debtor conceded the agreement required her to keep the car insured "against loss or damage" and permitted the bank to buy such insurance to protect the car should she fail to do so.⁶⁸ However, the plaintiff-debtor claimed the substitute policy was not the kind of policy the loan agreement had in mind for it insured the bank not only against "loss or damage" but also against her failure to repay the bank's car loan.⁶⁹ Therefore a portion of the debt owed to the bank was not authorized by the original contract.⁷⁰ Since the attorney's representation about the debt amount was false, the defendant-attorney had attempted to collect an "amount" not authorized" by the loan agreement, thus violating the FDCPA.⁷¹

The District Court dismissed the suit, holding the FDCPA not applicable to lawyers engaged in litigation.⁷² Reversing, the Seventh Circuit Court of Appeals interpreted the Act to apply to litigating lawyers.⁷³

The Supreme Court granted certiorari thereby affirming the decision of the Court of Appeals. In an opinion by Justice Breyer,

63. *Id.* at 1492. The Court determined the bank was a client of the law firm and has a large number of customers who sign retail installment contracts for the purchase of motor vehicles. *Id.*

64. *Id.* at 1493.

65. *Id.*

66. *Id.*

67. *Id.* See 15 U.S.C. § 1692e(2)(A).

68. *Heintz*, 115 S. Ct. at 1493.

69. *Id.* at 1495.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Jenkins v. Heintz*, 25 F.3d 536 (7th Cir. 1994).

expressing the unanimous view of the court, the Court held that the FDCPA applies to attorneys who regularly engage in consumer debt collection practices through litigation.⁷⁴

The Court cited two reasons for the holding. First, the FDCPA defines "debt collector" to include those who "regularly collec[t] or attempt[t] to collect, directly or indirectly, [consumer] debts owed or due or asserted to be owed or due another."⁷⁵ Thus, attorneys who regularly strive to obtain payment of consumer debts through legal proceedings, qualify as debt collectors pursuant to the statutory definition.⁷⁶

Second, the original version of the FDCPA did contain an express exemption for attorneys which stated that the term "debt collector" did not include "any attorney-at-law collecting a debt as an attorney on behalf of or in the name of a client."⁷⁷ However, the 1986 Amendments to the FDCPA completely eliminated this exemption without enacting a narrower litigation exemption for attorneys.⁷⁸

The Court further rejected all arguments for reading the Act as containing an implied exemption for attorneys engaging in debt collection activities.⁷⁹ Petitioner-attorney introduced statements by one of the sponsors of the amendment, taken after the Amendment was adopted:

[The Act] regulates debt collection, not the practice of law. Congress repealed the attorney exemption to the act, not because of

74. *Heintz*, 115 S. Ct. at 1492.

75. 15 U.S.C. § 1692a(6).

76. *Heintz*, 115 S. Ct. at 1495. Black's Law Dictionary defines "collect" as "[t]o collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings" BLACK'S LAW DICTIONARY 263 (6th ed. 1990).

77. Pub. L. No. 95-109, § 803(6)(F), 91 Stat. 874, 875. In 1986 Congress repealed this exception in its entirety without creating a narrower, litigation-related exemption to fill the void. Pub. L. No. 99-361, 100 Stat. 768.

78. See 1986 Amendments *supra* note 10.

79. *Heintz*, 115 S. Ct. at 1491. Arguments presented by the attorney in favor of reading an implied litigation exception are: 1) That application of the Act's requirements to litigation activities will create harmfully anomalous results not intended by Congress; 2) that after the amendment became law, a statement was made, by one of the sponsors of the 1986 Amendment, Congressman Frank Annunzio, that removed the exemption, to the effect that the Act covered only the collection of debt, not the practice of law; and 3) that a Federal Trade Commission Staff Commentary indicated that attorneys who engage in traditional debt collection activities are covered by the Act but those whose practice is limited to legal activities are not covered.

attorneys' conduct in the courtroom, but because of their conduct in the back room. Only collection activities, not legal activities, are covered by the act The act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature The act only regulates the conduct of debt collectors, it does not prevent creditors, through their attorneys, from pursuing any legal remedies available to them.⁸⁰

The Court found this unpersuasive because the Congressman made his statement "not during the legislative process, but after the statute became law. It therefore is not a statement upon which other legislators might have relied in voting for or against the Act" ⁸¹

Petitioner-attorney also introduced "Commentary" on the Act by the Federal Trade Commission which stated the existence of an implied exemption from the Act for litigating attorneys.⁸² The Court refused to give the comments conclusive weight, finding nothing in the Act or elsewhere indicating that Congress intended to authorize the FTC to create an exception from the Act's coverage, especially an exception that lies outside the range of reasonable interpretations of the Act's express language.⁸³

III. AFTERMATH OF HEINTZ

What exactly does all this mean? Now that *Heintz* clearly provides that there is no longer an attorney or litigation exemption to the FDCPA, how will this affect the attorney practitioner in the future? Simply stated, attorneys who meet the statutory definition of "debt collector" and thereby attempt to collect a "debt" as defined by the Act, subject themselves to liability for any violation of the Act's provisions.

80. 132 Cong. Rec. 30842 (1986).

81. *Heintz*, 115 S. Ct. at 1497.

82. *Staff Commentary*, *supra* note 28, at 50100 (stating "[a]ttorneys or law firms that engage in traditional debt collection activities (sending dunning letters, making collection calls to consumers) are covered by the [Act]. But those whose practice is limited to legal activities are not covered").

83. *See also* *Fox v. Citicorp Credit Serv., Inc.*, 15 F.3d 1507, 1513 (9th Cir. 1994); *Scott v. Jones*, 964 F.2d 314, 317 (4th Cir. 1992) (finding FTC staff's statement conflicts with the Act's plain language and is therefore not entitled to deference).

A. What is a "Debt" Under the FDCPA?

The Act as it currently stands applies only to the traditional collection of "consumer debts."⁸⁴ Section 1692a(3) of the FDCPA defines "consumer" as follows: "any natural person obligated or allegedly obligated to pay any debt."⁸⁵ Further, the Act defines the term "debt" to mean:

[A]ny 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.⁸⁶

Under the statutory definition of "debt," the borrower's use of the proceeds is paramount, whereas the lender's motive or intent is irrelevant.⁸⁷

From these definitions, courts determine whether the disputed debt falls within the statutory definition of "debt," thereby requiring the debt collector to comply with the FDCPA.⁸⁸ This distinction, however, is not always so clear. Many debts fall outside the statutory definition, thus not requiring debt collectors to comply with the Act.

For example, a debt incurred purely for business reasons does not qualify as a debt under the FDCPA.⁸⁹ The court in *Bloom v.*

84. For general legislative purposes see generally 15 U.S.C. § 1692a and 1977 U.S.C.C.A.N. 1695.

85. 15 U.S.C. § 1692a(3).

86. 15 U.S.C. § 1692a(5). See also *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1168-69 (3d Cir. 1987) (defining consumer debt under the FDCPA to be a transaction in which a consumer is offered or extended the right to acquire "money, property, insurance, or services" which are "primarily for household purposes" and to "defer payment").

87. 15 U.S.C. § 1692a(5).

88. See *Herbert v. Monterey Financial Serv., Inc.*, 863 F. Supp. 76, 79 (D. Conn. 1994). (holding a debt arising out of a transaction involving vacation timeshare for the debtor and her family was for personal or family purposes, thus within the statutory definition of "debt" in the FDCPA); *Scrimpsheer v. Scrimpsheer*, 17 B.R. 999 (Bkrpt. N.D.N.Y. 1982). In *Scrimpsheer*, the debtor's "debt" arose from several purchases of food paid for by personal checks. The court found that the collection bureau's activities concerning collection of the debtor's outstanding dishonored checks involved collection of a "debt" under this subchapter, despite argument that dishonored checks represented debts separate and distinct from debt associated with debtor's consumer purchase of food. *Id.*

89. 15 U.S.C. § 1692a(5). See also *Bank of Boston Intern. of Miami v. Arguello Tefel*, 644 F. Supp. 1423 (E.D.N.Y. 1986) (finding the debt involved was a business debt and therefore not subject to the FDCPA); *Mendez v. Apple Bank*

I.C. Sys. Inc., held loans made between friends, so that the debtor could invest in a software company, were "business loans," not "consumer debt," because the debtor's intended use of the funds could not be characterized as "primarily for personal, family or household purposes."⁹⁰

Child support obligations arising from administrative support orders do not qualify as a "debt" under the Act because they are not incurred in exchange for goods or services. For example, in *Mabe v. G.C. Serv. Ltd. Partnership*, the Third Circuit Court of Appeals determined that the Department of Social Services had imposed child support obligations upon appellants to force them to fulfill their parental duty to support their children.⁹¹ Therefore, the child support arrearage was not a consumer "debt" as defined by the FDCPA.⁹²

Additionally, capital taxes levied by local governments are not subject to the FDCPA. In *Staub v. Harris*, the 3rd Circuit held a per capita tax levied by local taxing authorities not to be a debt under the FDCPA; at a minimum, the debt must arise as a result of the rendition of a service or the purchase of property or any other items of value.⁹³

B. What is a "Debt Collector" Under the FDCPA?

Once it has been determined that the debt in question falls under the FDCPA, a person collecting the debt must meet the statutory definition of "debt collector" in order to subject himself to

for Sav., 541 N.Y.S.2d 920 (N.Y. 1989) (finding the debt involved was a business debt and therefore not subject to the FDCPA).

90. 753 F. Supp. 314, 317 (1990), *aff'd*, 972 F.2d 1067 (9th Cir. 1992). Other Courts have reached the same conclusion that the FDCPA does not apply where an examination of the transaction as a whole, and the purpose for which credit was extended shows that the loan was primarily a business loan. See *Poe v. First Nat'l Bank of Dekalb County*, 597 F.2d 895, 896 (5th Cir. 1979); *Morse v. Mutual Fed. Sav. & Loan Ass'n of Whitman*, 536 F. Supp. 1271, 1275-78 (D. Mass. 1982).

Agricultural loans are generally not considered "debt" as defined by the FDCPA. See *Munk v. Federal Land Bank of Wichita*, 791 F.2d 130 (10th Cir. 1986) (holding loans for agricultural purposes were not incurred for personal, family or household purposes, therefore lenders were not attempting to collect another's debt, thus the Federal Fair Debt Collection Practices Act did not apply to the transaction); 15 U.S.C. § 1692a(5).

91. 32 F.3d 86, 88 (3d Cir. 1994).

92. *Id.*

93. 626 F.2d 275, 277-78 (3d Cir. 1980). The relationship between taxpayer and taxing authority does not encompass that type of pro tanto exchange which the statutory definition envisages.

the provisions of the Act. Section 1692a(6) of the FDCPA defines "debt collector" as:

[A]ny 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.⁹⁴

The FDCPA generally does not apply to creditors collecting or attempting to collect their own debts. However, the Act specifically includes as a debt collector "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts."⁹⁵ Thus, any employee of a creditor who represents to a debtor that he or she is working independently, or for a third party, subjects the original creditor to the Act as a "debt collector."⁹⁶

Similarly, in-house counsel normally exempt from the Act can lose their exempt status if, in communicating with creditors concerning the collection of any debt, they leave the impression that they have been retained as counsel independent and separate from the entity to which the debt is owed.⁹⁷ Additionally, a "cred-

94. 15 U.S.C. § 1692a(6).

95. *Id.*

96. *Kempf v. Famous Barr Co.*, 676 F. Supp. 937, 938 (E.D. Mo. 1988). Even though the employee of the creditor regularly collects debts owed to another (i.e., her employer/creditor), the employee is not a "debt collector" so long as the employee acts "in the name of the creditor" by informing the debtor that she is collecting the debt as an employee of the creditor. *Id.* See *Kicken v. Valentine Prod. Credit Ass'n.*, 628 F. Supp. 1008, 1011 (D. Neb. 1984); *Dau v. Storm Lake Production Credit Ass'n.*, 626 F. Supp. 862, 864 (N.D. Iowa 1985); *West v. Costen*, 558 F. Supp. 564, 573 (W.D. Va. 1983); 1977 U.S.C.C.A.N. 1695, 1698 (stating "[t]he term debt collector is not intended to include . . . 'in house' collectors for creditors so long as they use the creditor's true business name when collecting").

If the employee of the creditor is collecting the debt on behalf of the creditor, and indicates to the debtor that she is collecting the debt as an employee of a third person, then the creditor is a "debt collector." Similarly, if the employee of the creditor denies that she is collecting the debt as an employee of the creditor, then the employee is a "debt collector" because the employee collects debts owed to a third party, but does not act "in the name of the creditor." *Kempf*, 676 F. Supp. at 938.

97. See *Dorsey v. Morgan*, 760 F. Supp. 509, 513-14 (D. Md. 1991). In *Dorsey*, the letterhead of the attorney's letter to the consumer referred only to the attorney, and further contained no references to the creditor, but the letter

itor" who is also an "assignee" is thereby subject to the Act's provisions.⁹⁸

The Act further lists collectors specifically excluded from the statutory definition of "debt collector."⁹⁹ Included in this list are any officer or employee of a creditor acting in the name of the creditor and trying to collect a debt for such creditor, and any person who acts as a debt collector for another person if: 1) both are related by common ownership or affiliated corporate control, and 2) the person collecting the debt does so only for persons to whom he is related to and the principal business of that person is not the collection of debts.¹⁰⁰ Additional exemptions from the definition of

referred to the creditor as a "client" and did not indicate an attempt to collect in the seller's name. *Id.*

98. See 15 U.S.C. § 1692a(4). "Creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another. *Id.*; See also *Meads v. Citicorp Credit Serv., Inc.*, 686 F. Supp. 330, 333 (S.D. Ga. 1988). In *Meads* the court held creditors were generally not considered to be "debt collectors" subject to the Act unless the debt collector is also the assignee of the debt. *Id.*

99. See 15 U.S.C. § 1692a(6)(A)-(F). Section 1692a(6) states:

The term does not include:

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditor; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

100. Section 1692a(A)-(B).

“debt collector” provided by the statute concern certain fiduciary relationships.¹⁰¹

The *Heintz* case qualified the present law concerning the FDCPA applicability to attorneys by holding an attorney who qualifies as a “debt collector” under the statutory definition, must conform to the Act’s provisions.¹⁰² Ambiguity remains, however, concerning in which situations an attorney qualifies as a “debt collector” under the statutory definition.

Those courts which previously held that there was no longer an attorney exemption to the FDCPA still had to determine whether the attorney in question met the statutory definition of “debt collector.” In *Crossley v. Liberman*, the court directly addressed this issue holding that the trier of fact must determine on a case by case basis whether an attorney has regularly collected or attempted to collect a debt.¹⁰³ However, the term “regularly” is not synonymous with “substantial.”¹⁰⁴ Therefore, a law firm can regularly collect debts even though those services amount to only a small fraction of the firm’s total activities.¹⁰⁵

101. Section 1692a(C)-(F).

102. See *Heintz v. Jenkins*, 115 S. Ct. 1489 (1995).

103. *Crossley v. Lieberman*, 868 F.2d 566 (3d Cir. 1989). In *Crossley*, the court held that the attorney was a “debt collector” subject to the requirements of the Fair Debt Collection Practices Act and was not a mere agent where the collection letters the attorney sent to debtors unequivocally stated that monies were to be sent to him directly. *Id.* Factors the trier of fact should consider in determining whether an attorney has regularly collected a debt include the volume and nature of the attorney’s case load. *Id.*

104. Although the FDCPA fails to define “regularly,” Black’s Law Dictionary defines “regular” to mean “steady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation. Usual, customary, normal or general.” BLACK’S LAW DICTIONARY 1285 (6th ed. 1990).

105. *Stojanovski v. Strobl & Manoogian, P.C.*, 783 F. Supp. 319, 322 (E.D. Mi. 1992). In *Stojanovski* the attorney’s practice was sufficiently high to constitute “regular” debt collection. *Id.* The defendant attorney had an ongoing relationship with Chrysler, a large corporation with presumably many overdue accounts on its books. *Id.* While the ratio of debt collection to other efforts was small, the actual volume was sufficient to bring the defendant under the Act’s definition of “debt collector.” *Id.* See also *Crossley v. Lieberman*, 868 F.2d 566, 569 (3d Cir. 1989). In *Crossley*, the court held the case law on point shows that an attorney “who engages in collection activities more than a handful of times per year must comply with the Act.” *Id.* It is the volume of the attorney’s debt collection efforts that is dispositive, not the percentage such efforts amount to in the attorney’s practice. *Id.* See also *Cacace v. Lucas*, 775 F. Supp. 502, 504 (D. Conn. 1990); *In re Littles*, 90 B.R. 669, 676 (Bankr. E.D. Pa. 1988), *aff’d as*

Some courts in determining whether an attorney has "regularly attempted to collect a debt" have considered the percentage of total practice devoted to debt collection. In *Fox v. Citicorp Credit Serv., Inc.*, the court held that an attorney who dedicated 80% of his practice to debt collection fell within the definition of "debt collector" under FDCPA.¹⁰⁶ Similarly, where a bank retained an attorney to represent the bank for lawsuits based on delinquent credit card accounts, the attorney was found to be a "debt collector" under the FDCPA since at least 70% of the attorney's legal fees were generated from debt collection; the "principal purpose" of the attorney's practice was filing warrants which constituted an "indirect" means of debt collection.¹⁰⁷

Other courts have found attorneys to be "debt collectors" under the FDCPA, even though the portion of their business dedicated to debt collection is considerably less than fifty percent. A Michigan federal district court held that a law firm, which had an ongoing relationship with a corporate client with numerous overdue accounts, qualified as a person who "regularly" collected debts for FDCPA purposes, even though the firm's collection business constituted less than four percent of its total business.¹⁰⁸ Similarly, the federal district court for Connecticut, in *Cacace v. Lucas*, found an attorney qualified as a "debt collector" within the meaning of the FDCPA, even though debt collection did not form a principal part of the attorney's practice.¹⁰⁹ In that case, the attorney

modified sub nom., *Crossley v. Lieberman*, 90 B.R. 682 (E.D. Pa. 1988), *aff'd*, 868 F.2d 566 (3d Cir. 1989).

106. 15 F.3d 1507 (9th Cir. 1994) (holding that even though the filing of an application for writ of garnishment by the attorney was a pure legal action, this did not alter the conclusion because the attorney exemption was no longer part of FDCPA).

107. *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992). *See also Cirkot v. Diversified Fin. Sys., Inc.*, 839 F. Supp. 941 (D. Conn. 1993). The court held the general partner of a partnership engaged primarily in the business of providing collection services for the partnership and third parties was a "debt collector" for purposes of Fair Debt Collection Practices Act.

108. *Stojanovski*, 783 F. Supp. at 322.

109. 775 F. Supp. 502, 505 (D. Conn. 1990). The court held that debt collection does not form a principal part of the defendant's practice. Instead, a person can be a person who regularly collects debts owed or due another within the meaning of the FDCPA based on the regularity of the defendant's involvement in debt collection work, and the amount of debt collection work the defendant engaged in at the time in question. *See also Crossley*, 868 F.2d at 570. In *Crossley*, the court found that in order to determine whether an attorney is a person who "regularly" collects a debt, the court may take into account the volume of the attorney's

filed one hundred and forty-four small claims suits concerning collection matters in 1986 and 1987.¹¹⁰

Finally, where an attorney, in his representation of a creditor in debt collection efforts, does not send a demand letter to debtors, but merely accommodates debtors by providing them with information they request, does not thereby qualify as a "debt collector" subject to the Act.¹¹¹

IV. APPLICABLE SECTIONS OF THE FDCPA THAT ATTORNEYS NEED BEWARE

Attorneys who qualify as "debt collectors" under the Act and thereby attempt to collect a consumer debt, should beware of the general requirements of the FDCPA in order to avoid potential liability. These requirements fall within several categories: 1) venue; 2) disclosure requirements; 3) communications with the debtor; 4) communications with third-parties; and 5) civil liability.

A. Venue Provisions Under the FDCPA

The venue provisions of the FDCPA were designed to limit a debt collector's ability to file debt collection actions in courts inconvenient to a consumer debtor.¹¹² Section 1692i of the FDCPA provides that a debt collector may sue a consumer debtor only in the judicial district, or similar legal entity, where the con-

collection activities, the frequency of the use of the collection letter in question, and whether or not there is an ongoing relationship between the attorney and the collection agency he represents.

110. *Cacace*, 775 F. Supp. at 505. The collection letter in question had been used 125-150 times in fourteen months, and more than 60% of the attorney's work for the credit union involved collection matters.

111. *Williams v. Trott*, 822 F. Supp. 1266, 1269 (E.D. Mich. 1993). In *Williams*, the attorney, at the request of the debtor, provided the debtor with information concerning the reinstatement of the debtor's mortgage in order to avoid foreclosure. The contact the attorney had with the plaintiffs was not for the purpose of collecting the debt but merely to accommodate the plaintiffs by providing information they requested regarding reinstatement of the mortgage to avoid foreclosure. *Id.* See also *Firemen's Ins. Co. of Newark v. Keating*, 753 F. Supp. 1137 (S.D.N.Y. 1990). The court in *Keating* held a law firm not to be a "debt collector," as defined by Fair Debt Collection Practice Act, with respect to its representation of a surety in actions brought by the surety to compel partnership investors, who were in default on promissory notes, to comply with indemnification agreements.

112. S. Rep. No. 382 *supra* note 7 at 1699; *Dutton v. Wolhar*, 809 F. Supp. 1130, 1139 (D. Del. 1992); *Action Professional Serv. v. Kiggins*, 458 N.W.2d 365, 367 (S.D. 1990).

sumer originally signed the contract sued upon, or where the consumer resides at the commencement of the action.¹¹³ If services are provided pursuant to an oral agreement, the debt collector may sue only where the consumer currently resides.¹¹⁴

However, once a judgment is obtained in a forum that satisfies the Act's requirements, it may be enforced in other jurisdictions since the consumer had the opportunity to defend the original action previously in a convenient forum.¹¹⁵ Finally, any waiver of the venue provisions provided in the FDCPA must be addressed directly to the debt collector.¹¹⁶

B. *Validation of Debt and Disclosure Requirements Under the FDCPA*

Within five days after his initial communication with a consumer debtor, a debt collector must send a written validation notice which contains the following: 1) the amount of the debt; 2)

113. 15 U.S.C. § 1692i. Section 1692i states:

Legal actions by debt collectors—

(a) Venue. 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 similar 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) Authorization of actions. Nothing in this title shall be construed to authorize the bringing of legal actions by debt collectors.

114. See *Staff Commentary*, *supra* note 28, at 50101. See also *Fox v. Citicorp Credit Serv., Inc.*, 15 F.3d 1507, 1513 (9th Cir. 1994). The complaint in *Fox* alleged that the defendants violated the venue provisions by filing the two actions in Maricopa County, which was neither where the plaintiffs resided nor where they signed the contract. However, the plaintiffs were unable to argue this point because the statute of limitations had run out.

115. *Staff Commentary*, *supra* note 28, at 50109. See also 15 U.S.C. § 1692k(d). Section 1692k(d) states:

Jurisdiction—An action to enforce any liability created by this subchapter 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, within ONE YEAR from the date on which the violation occurs.

(Emphasis added).

116. *Staff Commentary*, *supra* note 28, at 50109.

the creditor's name; 3) a statement that unless the consumer disputes the debt within thirty days after receipt of such notice, the debt will be assumed valid by the debt collector; 4) a statement that if the consumer does notify the debt collector in writing within thirty days of receipt of such notice, the debt collector will obtain verification of the debt, or a copy of any judgment, and that a copy of the verification will be mailed to the consumer by the debt collector; and 5) a statement that upon written request by the consumer within thirty days of receipt of such notice, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current debt collector.¹¹⁷

In order to give sufficient notice to the debtor, the disclosures required on the notice of debt must be situated so they can be easily read, and prominent enough to be noticed by even the "least sophisticated" debtor.¹¹⁸ The notice must not be "overshadowed

117. 15 U.S.C. § 1692g(a)(1)-(5). The disclosures required in subsection g may be given as part of the initial communication to the debtor providing they are in writing; if not in writing they must be sent to the debtor within five days of the initial communications. *Id.* See also *Pipiles v. Credit Bureau of Lockport*, 886 F.2d 22, 26-27 (2d Cir. 1989) (confirming the notice requirement is mandatory); *Emanuel v. American Credit Exch.*, 870 F.2d 805, 808 (2d Cir. 1989) (holding the failure to include such a notice is a basis for the granting of summary judgment); *Raymond Woolfolk v. Albert G. Rubin*, 783 F. Supp. 724 (D. Conn. 1990); *Ayala v. Dial Adjustment Bureau, Inc.*, Civil No. N-86-315 (EEB) (D. Conn. Dec 4, 1986); Manuel H. Newburger, *Acceleration Notices and Demand Letters*, 47 CONSUMER FIN. L. Q. REP. 338 (1993). (discussing a detailed accounting of the specific categories under the FDCPA).

118. *Wright v. Credit Bureau of Georgia, Inc.*, 555 F. Supp. 1005, 1007 (N.D. Ga. 1982) (deciding that the test developed under the Federal Trade Commission Act cases, which looked not to the most, but to the "least sophisticated" readers, was more appropriate than the less stringent "reasonable consumer" test developed from the Truth in Lending Act). See also *Bustamante v. First Fed. Sav. & Loan Ass'n*, 619 F.2d 360, 364 (5th Cir.1980) (considering the term "reasonable consumer" an appropriate appellation for the objective standard to be applied, providing that standard encompasses protection for "the unsophisticated or uneducated consumer"); *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 871-73 (2d Cir. 1961) (finding section 1692e violated if "debtors on the low side of reasonable capacity who read a given notice or hear a given statement read into the message oppressiveness, falsehood or threat"); *Dutton v. Wolhar*, 809 F. Supp. 1130, 1141 (1992) (analyzing a claim under section 1692e(10) by using the least sophisticated debtor standard and finding that "when language is susceptible to two plausible interpretations the least sophisticated debtor is not charged with gleaning the more subtle of the two interpretations"); *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864, 870 (D.N.D. 1981) (holding that to determine whether a statement by a debt collector is false, deceptive, or

or contradicted" by any other messages appearing in the communication.¹¹⁹

If a consumer notifies the debt collector in writing within thirty days of the verification notice that the debt is disputed, the debt collector must cease collection of the debt.¹²⁰ The debt collector may not continue collection of the debt until he receives either verification or a copy of the judgement, and it is mailed to the consumer by the debt collector.¹²¹ Regardless of whether the debt is disputed, this notice requirement does not prohibit attorneys from engaging in any legal action regarding the debt within the thirty day period of sending the validation notice.¹²²

C. Communications Covered by the FDCPA

The FDCPA strictly regulates all "communications" between a debt collector and a consumer or third party regarding the collection of any debt. "Communications" under the FDCPA means "the conveying of information regarding a debt directly or indirectly to any person through any medium."¹²³

1. Communications to Debtors

A debt collector may not communicate directly with the consumer at any unusual time, place, or at a time or place which

misleading, the court "should look not to the most sophisticated readers but to the least").

119. *Swanson v. Southern Oregon Credit Serv., Inc.*, 869 F.2d 1222, 1225 (9th Cir. 1988). Two other circuits have adopted the Ninth circuits ruling preventing the 30 day notice letter from having any other communication overshadowing or contradicting the disclosures. See *Graziano v. Harrison*, 950 F.2d 107, 109-111 (3d Cir. 1991). In *Graziano*, an attorney gave the 30 day notice, but also threatened to sue within ten days. *Id.* The court held that the inclusion of a threat to sue within ten days "overshadowed" and "contradicted" the 30 day language in the validation notice. *Id.* However, the phrase at the bottom of the page which said "See reverse side for information regarding your legal rights!", was a statement of rights printed in a manner sufficient to bring it to the attention of the debtor. *Id.* In *Miller v. Payco-General Am. Credits, Inc.*, 943 F.2d 482 (4th Cir. 1991), the court determined that the words "IMMEDIATE FULL PAYMENT," "PHONE US TODAY," and "NOW" in bold face type printed on the 30 day validation notice "overshadowed" and "contradicted" the validation notice. *Id.* See also Manuel H. Newburger, *Acceleration Notices and Demand Letters*, 47 CONSUMER FIN. L. Q. REP. 338 (1993).

120. 15 U.S.C. § 1692g(b).

121. *Id.*

122. See *Staff Commentary*, *supra* note 28, at 50101.

123. 15 U.S.C. § 1692a(2).

should be known to be inconvenient to the consumer, without first obtaining prior permission from the consumer.¹²⁴ The FDCPA further requires any communication sent by a “debt collector” to state clearly that the “debt collector is attempting to collect a debt and any information obtained will be used for that purpose.”¹²⁵ Some dispute remains whether this requirement applies to follow-up letters sent by the debt collector after the initial notice. Some circuits have held such follow up communications do not require this disclosure requirement.¹²⁶ Most circuits, however, maintain that follow-up letters sent to the creditor after the initial communication fall under the statutory definition of “communication,” thus requiring compliance with the Act.¹²⁷ This forces a debt col-

124. 15 U.S.C. § 1692c. Section 1692c states:

Communication in connection with debt collection:

(a) Communication with the consumer generally—Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

125. 15 U.S.C. § 1692e(11). An exception to this requirement is available for a debt collector who is attempting to acquire location information about a consumer under section 1692b.

126. *Pressly v. Capital Credit & Collection Serv. Inc.*, 760 F.2d 922, 925 (9th Cir. 1985) (holding “that the follow up notice sent in this case is not a ‘communication’ within which the disclosure required by 15 U.S.C. § 1692e(11) was made”).

127. See *Tolentino v. Friedman*, 46 F.3d 645, 650-52 (7th Cir. 1995). In *Tolentino*, the defendant, an attorney collecting debts on behalf of a bank, filed a lawsuit to collect a debt owed the bank after no reply was received from a dunning letter sent. *Id.* The communication in question was a follow up letter mailed to the debtor after the initial dunning letter. *Id.* This letter, entitled “IMPORTANT NOTICE” did not contain the warning required by subsection

lector to include in any communication to the consumer, whether it is the initial dunning letter, or a subsequent follow-up letter, the statements required under the Act concerning the debt collector's intention to collect a debt.¹²⁸ Failure to include this disclosure is a "false, deceptive, or misleading representation" in connection with debt collection.¹²⁹

Where the debt collector knows that the consumer is represented by an attorney regarding the debt, the debt collector may not communicate directly with the consumer, but may communicate only through the retained attorney.¹³⁰ There are, however, two exceptions to this rule. A debt collector may contact the consumer directly when: 1) the consumer's retained attorney fails to respond in a reasonable time to the debt collector's communication, or 2) the retained attorney's address or location is not readily obtainable.¹³¹

In communicating with the consumer debtor, under no circumstances may a debt collector imply threats, or engage in any communication to harass, oppress, or abuse any person in connec-

(11). *Id.* The court held that the defendant violated subsection (11) of the FDCPA, in that subsection (11) applies to "all communications made to collect a debt." The FDCPA defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). Defendant's "IMPORTANT NOTICE," obviously related to the debt, and nevertheless he failed to write on the "IMPORTANT NOTICE" that he was attempting to collect a debt and that any information would be used for that purpose. *Id.* See *Carroll v. Wolpoff & Abramson*, 961 F.2d 459, 461 (4th Cir. 1992). In *Carroll*, the Fourth Circuit stated the language "all communications" in section 1692e(11) was clear and unambiguous, making no distinction between initial and subsequent communications. *Id.* Consumers sometimes did not receive first notices, thus follow-up letters often provide them with their first notice of the debt collection process. *Id.* Therefore, the disclosure requirements of Section 1692e(11) in the follow-up letters further Congressional intent to prevent abusive debt collection techniques. *Id.* See *Pipiles v. Credit Bureau of Lockport*, 886 F.2d 22, 26-27 (2d Cir. 1989) (holding that the balancing analysis applied in *Pressley* is precluded by clear statutory language). See also *Dutton v. Wolpoff & Abramson*, 5 F.3d 649 (3d Cir. 1993) and *Frey v. Gangwish II*, 970 F.2d 1516 (6th Cir. 1992) (both rejecting *Pressley* and following the Second Circuit); *Johnson v. Eaton*, 873 F. Supp. 1019, 1027 (1995) (rejecting *Pressley* and holding that all communications met the disclosure requirement).

128. 15 U.S.C. § 1692e(11).

129. 15 U.S.C. § 1692e.

130. 15 U.S.C. § 1692c(a).

131. 15 U.S.C. § 1692c(a)(2).

tion with a debt.¹³² For instance a debt collector may not use violence, obscenity, or any annoying phone calls in attempting to collect a debt.¹³³

Finally, a debt collector must never use false, deceptive, or misleading representations in connection with the collection of any debt.¹³⁴ Such representations not allowed under the Act include any false statements as to the "character, amount, or legal status of the debt."¹³⁵

2. *Communications with Third Parties*

In addition to communications with consumers, the FDCPA tightly regulates communications with third parties concerning the collection of any debt. Section 1692c(b) provides that a debt collector may not communicate regarding debt collection with any person other than the consumer debtor, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the debtor's attorney, without the prior consent of the consumer debtor.¹³⁶ This section, however, does not prohibit the debt collector from communicating directly with the consumer debtor, or with a third party, once permission is obtained from "a court of competent jurisdiction, or if it is reasonably necessary to effectuate a postjudgment judicial remedy."¹³⁷

As for communications concerning other purposes, section 1692b provides that a debt collector may communicate with any person other than the consumer in order to acquire location information about the consumer.¹³⁸ This section requires the debt collector to identify himself and state that his purpose is to confirm or correct information concerning the location of the consumer.¹³⁹

132. See 15 U.S.C. § 1692d. See also *Fox v. Citicorp Credit Serv., Inc.*, 15 F.3d 1507, 1516 (9th Cir. 1994) (holding threatening and intimidating calls to a consumer at an inconvenient time or place could rationally support a jury finding of harassing conduct; communications at a place known to be inconvenient to the consumer may also violate 15 U.S.C. § 1692c(a)(1)); *Staff Commentary, supra* note 28, at 50105.

133. 15 U.S.C. §§ 1692d(1)-(2), (5).

134. See 15 U.S.C. § 1692e. See also *Crossley v. Lieberman*, 868 F.2d 566 (3d Cir. 1989) (holding attorney's communication to the debtor which implied that a mortgage foreclosure case was already in litigation violated the FDCPA).

135. See 15 U.S.C. § 1692e(2)(A).

136. See 15 U.S.C. § 1692c(b).

137. *Id.*

138. 15 U.S.C. § 1692b.

139. 15 U.S.C. § 1692b(1).

However, the debt collector must not reveal to the third party that the consumer owes a debt.¹⁴⁰

If the debt collector knows the consumer has an attorney whose name and address is readily available, the debt collector must not communicate with any person other than the consumer's attorney unless the attorney fails to respond to the debt collector's communication within a reasonable period of time.¹⁴¹

D. *Civil Liability Under the FDCPA*

An attorney who meets the statutory definition of a debt collector and who thereafter violates the FDCPA could face a lawsuit in federal court by the person from whom the attorney initially attempted to collect the debt. Consumer debtors may bring such lawsuits in any United States federal district court or other court of competent jurisdiction, notwithstanding the amount in controversy, within one year of the violation.¹⁴² Even if the consumer admits to owing the entire debt he still maintains standing to assert violations of the FDCPA.¹⁴³

In these lawsuits the consumer-debtor may seek actual damages, statutory damages (up to one thousand dollars), the costs of the action, and reasonable attorney's fees.¹⁴⁴ Recovery is not lim-

140. 15 U.S.C. § 1692b(2).

141. See generally 15 U.S.C. § 1692b(1)-(5).

142. 15 U.S.C. § 1692k(d).

143. 15 U.S.C. § 1692k. See also *Riveria v. MAB Collections, Inc.*, 682 F.Supp. 174, 175-76 (W.D.N.Y. 1988) (holding the FDCPA is a strict liability statute; proof of one violation is sufficient to support summary judgment for the plaintiff); *Ayala v. Dial Adjustment Bureau, Inc.*, Civil No. N-86-315 (EEB) (D. Conn. Dec. 4, 1986).

144. 15 U.S.C. § 1692k(a). Section 1692k(a) states:

Amount of Damages—Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person for an amount equal to the sum of:

(1) any actual damage sustained by such person as a result of such failure;

(2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1,000; or

(B) in the case of a class action, (I) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as

ited to just one type of the specified damages listed under the Act, but debtors may recover one or all of the damages listed.¹⁴⁵ Actual damages may include recovery for a broad spectrum of harm including emotional distress and anguish.¹⁴⁶ Statutory damages under the Act are not determined per violation, but per action, such that the one thousand dollar amount represents the statutory maximum in a single action for one or more violations.¹⁴⁷ Moreover, an award of statutory damages does not require proof of actual damages.¹⁴⁸

The FDCPA further provides that any debt collector who fails to comply with the Act becomes liable for reasonable attorney's fees and costs of the action.¹⁴⁹ In determining the amount of attorney's fees, the Supreme Court recently held that "the most critical factor in determining the reasonableness of a fee award is

determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

145. *Harvey v. United Adjusters*, 509 F. Supp. 1218 (D. Ore. 1981) (holding plaintiff may recover for any actual damages he sustained as well as attorney fees and costs of litigation).

146. *Teng v. Metropolitan Retail Recovery Inc.*, 851 F. Supp. 61, 69 (E.D.N.Y. 1994). In *Teng*, a debt collection agency and its employees falsely represented to debtor that there was an emergency family crises. The court allowed recovery for the emotional distress the employee suffered as a result of the false statements made by the collection agency. *See also Donahue v. NFS Inc.*, 781 F. Supp. 188 (W.D.N.Y. 1991) (holding that the right to recover actual damages under the FDCPA for emotional distress is independent of the right, if any, to recover damages for emotional distress under state law).

147. *See Harper v. Better Business Services*, 961 F.2d 1561 (11th Cir. 1992); *Beattie v. D.M. Collections, Inc.*, 764 F. Supp. 925 (D. Del. 1991) (holding that additional damages shall not exceed \$1,000; the maximum additional damages of \$1,000 are to be awarded for each case, not for each violation or improper communication); *Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456 (C.D. Cal. 1991); *Cacace v. Lucas*, 775 F. Supp. 502 (D. Conn. 1990).

148. *Baker v. G.C. Serv. Corp.*, 677 F.2d 775, 780-81 (9th Cir.1982); *Woolfolk v. Van Ru Credit Corp.*, 783 F. Supp 724, 727 (1990); *Traverso v. Sharinn*, Civil No. N-88-446 (WWE), 1989 WL 265042 (D. Conn. Sept. 15, 1989); *Riveria v. MAB Collections, Inc.*, 682 F. Supp. 174, 177 (W.D.N.Y. 1988); *Harvey v. United Adjusters*, 509 F. Supp. 1218, 1221-22 (D. Ore. 1981).

149. 15 U.S.C. § 1692k(a)(3); *See also Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991); *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 28 (2d Cir. 1989) (holding that upon establishing the defendant's violation of the FDCPA, an award of attorney fees is mandatory); *Emanuel v. American Credit Exch.*, 870 F.2d 805, 809 (2d Cir. 1989).

the degree of success obtained."¹⁵⁰ If, however, a court determines that an action brought under the FDCPA was brought in bad faith or for harrassment purposes, the court in its discretion may award the defendant attorney's fees reasonable in relation to the work performed and the costs assumed.¹⁵¹

Finally, in determining the total liability under the FDCPA, the court must consider, among other relevant factors, the: 1) frequency and persistence of noncompliance by the debt collector; 2) nature of the noncompliance; and 3) extent to which such noncompliance was intentional.¹⁵²

E. Defenses Available to Attorneys Under the FDCPA

Attorneys sued under the FDCPA may assert some defenses depending on circumstances surrounding the debt collection, and their status as debt collectors.

First, an attorney may assert an affirmative statutory defense negating liability where the attorney "shows by a preponderance of the evidence that the violation was not intentional," but the result of a bona fide error notwithstanding reasonable procedures adopted to avoid any such error.¹⁵³ Courts, however, are generally reluctant to apply the bone fide error exception.¹⁵⁴ For exam-

150. *Farrar v. Hobby*, 113 S. Ct. 566, 574 (1992) (applying 42 U.S.C. § 1988). See *Texas State Teachers Ass'n. v. Garland Indep. School Dist.*, 489 U.S. 782, 789 (1989) (applying 42 U.S.C. § 1988); *Hensley v. Eckerhart*, 461 U.S. 424, 433-37 (1983) (applying 42 U.S.C. § 1988). Among other factors the court may consider in determining an appropriate attorney fee is the degree of success obtained by the prevailing plaintiff; if the plaintiff has only partial or limited success, a reduction in the award of attorney's fees may be appropriate. *Hensley*, 461 U.S. at 434-37. Additionally, the court should assess the reasonableness of the hours expended by the attorney for the prevailing party. *Id.* at 433-34.

151. *Johnson v. Eaton*, 884 F. Supp. 1068, 1071 (M.D. La. 1995). See also *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1211 (5th Cir. 1985) *modified on other grounds*, 761 F.2d 237 (5th Cir. 1985); *Knowles v. Credit Bureau of Rochester*, No. 91-CV-145, 1992 WL 131107 (W.D.N.Y. May 28, 1992).

152. 15 U.S.C. § 1692k(b).

153. 15 U.S.C. § 1692k(c). See also *Fox v. Citicorp*, 15 F.3d 150, 1514 (9th Cir. 1994) (holding that the bona fide error exemption is an affirmative defense, which the mover has the burden of proof at trial); *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025 (6th Cir. 1992) (finding collection agency which ceased collection activities after receipt of consumer's cease and desist letter, but subsequently sent a second letter due to a clerical mistake, fell under the bone fide error exception); *Johnson v. Eaton*, 884 F. Supp. 1068 (M.D. La. 1995).

154. See *Baker v. G.C. Serv. Corp.*, 677 F.2d 775 (9th Cir. 1982) (holding that reliance on advice of counsel or mistake about the law is insufficient by itself to raise a bone fide error defense).

ple, in *Cacace v. Lucas*, the court held the exception did not apply where an attorney failed to prove by a preponderance of evidence that his letter overstating the debt amount was due to a bona fide error notwithstanding reasonable procedures adapted to avoid the error.¹⁵⁵

Another possible defense that may be applicable depends on the attorney creditor relationship. If there is any debate concerning such relationship, the attorney may raise the issue that he is not an outside party collecting a debt, but in-house counsel for the creditor. Under the Act the term "debt collector" does not include those collecting debts for corporate affiliates "if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts."¹⁵⁶ Therefore, in-house counsel collecting a debt for their affiliate corporation are not subject to the provisions of the FDCPA.

V. THE FDCPA, STATE STATUTES COVERING DEBT COLLECTION, AND TORT REMEDIES

Many states have enacted statutes to protect consumers from oppressive and abusive debt collection practices. State debt collection statutes are not annulled by the FDCPA.¹⁵⁷ Section 1692n of the FDCPA provides in pertinent part that the Act:

[D]oes not annul, alter, or affect, or exempt any person subject to the provisions of [the Act] from complying with the laws of any state with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of [the Act], and then only to the extent of the inconsistency.¹⁵⁸

The Act further provides that state laws involving debt collection are not inconsistent with the FDCPA if the state law affords the consumer greater protection than does the FDCPA.¹⁵⁹

Since the FDCPA applies to any person collecting a debt owed or due a third party, any state law that defines "debt collector" as any person or collection agency in general provides greater protec-

155. 775 F. Supp. 502, 506 (D. Conn. 1990).

156. 15 U.S.C. § 1692a(6)(B).

157. 15 U.S.C. § 1692n. See generally Joel E. Smith, Annotation, *Validity, Construction, and Application of State Statutes Prohibiting Abusive or Coercive Debt Collection Practices*, 87 A.L.R.3d 786 (1978 & Supp. 1995).

158. 15 U.S.C. § 1692n.

159. *Id.* See 15 U.S.C. § 1692o. See generally Smith, *supra* note 157.

tion than the FDCPA.¹⁶⁰ Such a statute may give greater deference to the debtor with respect to certain types of communications, thus affording the general public greater protection from harassing communications.

A. North Carolina's Statute Concerning Debt Collection

North Carolina General Statute section 75-50, entitled "Prohibited Acts by Debt Collectors," provides specifically what debt collectors may and may not do.¹⁶¹ The statute defines "debt collector" as "any person engaging directly or indirectly, in debt collection from a consumer."¹⁶²

Like the FDCPA, the North Carolina Act prohibits debt collectors from using unfair threats or coercion in attempting to collect any debt.¹⁶³ The statute sets forth specific examples of prohib-

160. See generally Smith, *supra* note 157.

161. N.C. GEN. STAT. § 75-50 (1994).

162. *Id.*

163. N.C. GEN. STAT. § 75-51 (1994). Section 75-51 states:

Threats and coercion.

No debt collector shall collect or attempt to collect any debt alleged to be due and owing from a consumer by means of any unfair threat, coercion, or attempt to coerce. Such unfair acts include, but are not limited to, the following:

- (1) Using or threatening to use violence or any illegal means to cause harm to the person, reputation or property of any person.
- (2) Falsely accusing or threatening to accuse any person of fraud or any crime, or of any conduct that would tend to cause disgrace, contempt or ridicule.
- (3) Making or threatening to make false accusations to another person, including any credit reporting agency, that a consumer has not paid, or has willfully refused to pay a just debt.
- (4) Threatening to sell or assign, or to refer to another for collection, the debt of the consumer with an attending representation that the result of such sale, assignment or reference would be that the consumer would lose any defense to the debt or would be subjected to harsh, vindictive, or abusive collection attempts.
- (5) Representing that nonpayment of an alleged debt may result in the arrest of any person.
- (6) Representing that nonpayment of an alleged debt may result in the seizure, garnishment, attachment, or sale of any property or wages unless such action is in fact contemplated by the debt collector and permitted by law.
- (7) Threatening to take any action not in fact taken in the usual course of business, unless it can be shown that such threatened action was actually intended to be taken in the particular case in which the threat was made.

ited techniques which include: 1) falsely accusing the debtor of a crime or failing to pay, 2) threatening to use violence to collect adebt, and 3) threatening to sell or assign the debt to someone else for collection.¹⁶⁴

North Carolina's statute also prohibits debt collectors from using any conduct which harrasses or abuses a consumer debtor.¹⁶⁵ Moreover, the debt collector may not use any unconscionable means in his attempts to collect any debt.¹⁶⁶ Additionally, debt collectors may not unreasonably publicize any

(8) Threatening to take any action not permitted by law.

164. *Id.*

165. N.C. GEN. STAT. § 75-52 (1994). Section 75-52 states:

Harassment:

No debt collector shall use any conduct, the natural consequence of which is to oppress, harass, or abuse any person in connection with the attempt to collect any debt. Such unfair acts include, but are not limited to, the following:

(1) Using profane or obscene language, or language that would ordinarily abuse the typical hearer or reader.

(2) Placing collect telephone calls or sending collect telegrams unless the caller fully identifies himself and the company he represents.

(3) Causing a telephone to ring or engaging any person in telephone conversation with such frequency as to be unreasonable or to constitute a harassment to the person under the circumstances or at times known to be times other than normal waking hours of the person.

(4) Placing telephone calls or attempting to communicate with any person, contrary to his instructions, at his place of employment, unless the debt collector does not have a telephone number where the consumer can be reached during the consumer's nonworking hours.

166. N.C. GEN. STAT. § 75-55 (1994). Section 75-55 states:

Unconscionable means.

No debt collector shall collect or attempt to collect any debt by use of any unconscionable means. Such means include, but are not limited to, the following:

(1) Seeking or obtaining any written statement or acknowledgment in any form containing an affirmation of any debt by a consumer who has been declared bankrupt, an acknowledgment of any debt barred by the statute of limitations, or a waiver of any legal rights of the debtor without disclosing the nature and consequences of such affirmation or waiver and the fact that the consumer is not legally obligated to make such affirmation or waiver.

(2) Collecting or attempting to collect from the consumer all or any part of the debt collector's fee or charge for services rendered, collecting or attempting to collect any interest or other charge, fee or expense

information regarding the consumer's debt.¹⁶⁷ Examples of such publication include any communication with any person other than the debtor or his attorney.¹⁶⁸

Finally, the North Carolina Act prohibits a debt collector from using fraudulent, deceptive, or misleading representations while attempting to collect or obtain information concerning a consumer

incidental to the principal debt unless legally entitled to such fee or charge.

(3) Communicating with a consumer (other than a statement of account used in the normal course of business) whenever the debt collector has been notified by the consumer's attorney that he represents said consumer.

(4) Bringing suit against the debtor in a county other than that in which the debt was incurred or in which the debtor resides if the distances and amounts involved would make it impractical for the debtor to defend the claim.

167. N.C. GEN. STAT. § 75-53 (1994). Section 75-53 states:

Unreasonable publication.

No debt collector shall unreasonably publicize information regarding a consumer's debt. Such unreasonable publication includes, but is not limited to, the following:

(1) Any communication with any person other than the debtor or his attorney, except:

a. With the written permission of the debtor or his attorney given after default;

b. To persons employed by the debt collector, to a credit reporting agency, to a person or business employed to collect the debt on behalf of the creditor, or to a person who makes a legitimate request for the information;

c. To the spouse (or one who stands in place of the spouse) of the debtor, or to the parent or guardian of the debtor if the debtor is a minor and lives in the same household with such parent;

d. For the sole purpose of locating the debtor, if no indication of indebtedness is made;

e. Through legal process.

(2) Using any form of communication which ordinarily would be seen or heard by any person other than the consumer that displays or conveys any information about the alleged debt other than the name, address and phone number of the debt collector except as otherwise provided in this Article.

(3) Disclosing any information relating to a consumer's debt by publishing or posting any list of consumers, except for credit reporting purposes and the publication and distribution of otherwise permissible "stop lists" to the point-of-sale locations where the credit is extended, or by advertising for sale any claim to enforce payment thereof or in any other manner other than through legal process.

168. *Id.*

debt.¹⁶⁹ In *Forsyth Memorial Hospital v. Contreras*, the North Carolina Court of Appeals held communications to a debtor did not violate North Carolina's Deceptive Misrepresentation statute.¹⁷⁰ In this case, the hospital's collection procedures for delinquent accounts were handled through its holding company.¹⁷¹ The holding company mailed correspondence to the plaintiff-debtor under the letterhead of the vice president for legal affairs for the holding company without indicating the affiliation between the holding company and the hospital.¹⁷² Plaintiff-debtor filed suit alleging that these written communications led him to believe

169. N.C. GEN. STAT. § 75-54 (1994). Section 75-54 states:

Deceptive representation.

No debt collector shall collect or attempt to collect a debt or obtain information concerning a consumer by any fraudulent, deceptive or misleading representation. Such representations include, but are not limited to, the following:

- (1) Communicating with the consumer other than in the name (or unique pseudonym) of the debt collector and the person or business on whose behalf the debt collector is acting or to whom the debt is owed.
- (2) Failing to disclose in all communications attempting to collect a debt that the purpose of such communication is to collect a debt.
- (3) Falsely representing that the debt collector has in his possession information or something of value for the consumer.
- (4) Falsely representing the character, extent, or amount of a debt against a consumer or of its status in any legal proceeding; falsely representing that the collector is in any way connected with any agency of the federal, State or local government; or falsely representing the creditor's rights or intentions.
- (5) Using or distributing or selling any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by a court, an official, or any other legally constituted or authorized authority, or which creates a false impression about its source.
- (6) Falsely representing that an existing obligation of the consumer may be increased by the addition of attorney's fees, investigation fees, service fees, or any other fees or charges.
- (7) Falsely representing the status or true nature of the services rendered by the debt collector or his business.

170. 107 N.C. App. 611, 421 S.E.2d 167 (1992), *cert. denied* 333 N.C. 344, 426 S.E.2d 705 (1993).

171. *Id.* See also *Spinks v. Taylor*, 303 N.C. 256, 278 S.E.2d 501 (1981) (holding that a padlocking notice posted by the defendant landlord on the doors of tenants who were late paying their rent did not simulate legal process in violation of this section, since the notice in question contained no signatures, no seal, no mention of an official or of a court, no date, and no reference to an amount due).

172. *Contreras*, 107 N.C. App. at 614, 421 S.E.2d at 169 (1992).

the matter had been turned over to an independent attorney or independent third-party agency for collection.¹⁷³ The court of appeals held the vice president's communications were not deceptive communications in that they did not constitute a communication with the consumer other than in the name of the debt collector.¹⁷⁴

B. Beware of Tort Remedies Where Neither the FDCPA Nor a State Statute Applies

If there is a case where there is no state statute prohibiting abusive debt collection practices and the FDCPA is not applicable, as in cases where the debt collector is the creditor himself, there are various tort theories a debtor may pursue for any damages suffered as a result of abusive debt collection practices. Theories include libel and slander, invasion of privacy, intentional infliction of mental anguish, negligent infliction of emotional distress, false imprisonment, abuse of process, and assault and battery.¹⁷⁵

VI. CONCLUSION

The recent decision of the United States Supreme Court in *Heintz v. Jenkins* extinguishes any doubt concerning the current status of attorneys under the FDCPA. *Heintz* clearly provides that attorneys qualifying under the FDCPA's definition of a debt collector must comply with the Act's provisions. Failure to comply with these provisions subjects the attorney to potential civil liability to the debtor.

Ambiguity still remains, however, surrounding the term "debt collector" as defined by the FDCPA. What is meant by "regularly

173. *Id.*

174. *Id.*

175. See Smith, *supra* note 157. A debtor may be able to seek relief from abusive debt collection practices under the Unfair and Deceptive Trade Practices Acts or any other consumer Sales Act. *Id.* See also Liggins v. May Co., 4 Ohio Misc. 81, 337 N.E.2d 816 (1975) (holding the term "consumer transaction" as used in the applicable state deceptive consumer sales practices act prohibiting deceptive acts or practices in connection with a consumer transaction, to include the collection of, or the attempt to collect on, a debt owed by a consumer); "Actionable Practices in Debt Collection," 18 Am. Jur. *Proof of Facts* § 59 (1967) (discussing generally liability for abusive debt collection practices, and subsections 24-31 discussing actionable practices and debt collection); "Action for Harassment of Debtor," 16 Am. Jur. *Trials* § 619, (1969) (detailing practices, techniques, and tactics for preparing and trying cases for actions regarding the harassment of a debtor).

attempting” to collect consumer debts? Does it mean consistent collection of one or more consumer debts a month, or does it mean a majority of your practice is specifically dedicated to debt collection? Without a final determination on this issue, attorneys who collect any type of consumer debts, from foreclosures to delinquent accounts, should beware the FDCPA.

Finally, beware state debt collection statutes. They can be more restrictive than the FDCPA, thus subjecting the debt collector to even greater liability than the federal counterpart. In conclusion, attorneys can no longer assert their law degrees as defenses from liability under either federal or state debt collection legislation. Attorneys collecting consumer debts must learn the provisions of the FDCPA and abide by them if they want to avoid liability.

David Hilton