

FDCPA APPLIES TO WORK IN COURT

According to a court's recent decision, in a case of first impression, lawyers can be held liable under the Federal Debt Collection Practices Act for work in court. This week's article provides valuable lessons for lawyers and law practices regarding debt-collection efforts.

In a recent decision, the Eleventh Circuit ruled that court filings by a debt collection lawyer in litigation of a debt are actionable under the FDCPA, even if those filings are directed to the debtor's attorney.

Enacted in 1977 as an amendment to the Consumer Credit Protection Act, the FDCPA regulates what debt collectors can do in collecting debts. The purpose of the act is to eliminate abusive practices in the collection of consumer debts and to promote fair debt collection.

A debt collector under the FDCPA includes any person who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another. Prohibited acts include harassing phone calls, communicating with the consumer at his or her place of employment, and misrepresenting the amount of debt owed. Since its inception, the FDCPA has been amended to provide broader protection to consumers.

Attorneys and law practices who regularly engage in debt collection activity can learn some valuable lessons from a recent Eleventh Circuit decision concerning the FDCPA. In *Miljkovic v. Shafritz* and *Dunkin*, the court held, in a case of first impression, that representations made by an attorney in court filings during the course of debt-collection litigation are actionable under the FDCPA. 791 F.3d 1291 (11th Cir. 2015).

The court further held that the purpose underlying the FDCPA mandates a finding that the act applies even when the attorneys' conduct is directed at someone other than the consumer—such as the debtor's attorney.

The case arose out of an automobile loan that the plaintiff failed to repay. The defendant obtained a judgment in its favor and in early 2014 obtained a writ of garnishment against the plaintiff's wages to recover the unpaid balance.

The plaintiff filed a claim of exemption from garnishment, claiming in a sworn affidavit that, because he was the primary source of income of his household, he was exempt from garnishment under state law. The defendant filed a sworn reply disputing that the plaintiff was a "head of household" under Florida law.

After conducting discovery, the defendant filed a motion to dissolve the writ of garnishment, which was granted.

The plaintiff then sued the defendant in federal court, claiming that, by filing the sworn reply after obtaining actual knowledge of the plaintiff's exemption, the defendants engaged in deceptive, harassing behavior that violated the FDCPA. The defendants filed a motion to dismiss, claiming that they were just following procedural requirements under the Florida

garnishment statute. They argued that the sworn reply was merely a procedural filing directed to the state court and plaintiff's counsel and was not the type of conduct that the FDCPA was meant to regulate.

The district court agreed that the sworn reply was a formulaic procedural filing and that the FDCPA was inapplicable to the facts of the case. It also found that communications directed to someone other than the consumer, such as the consumer's attorney, are not actionable under the FDCPA. The plaintiff appealed.

The Eleventh Circuit disagreed with the district court's finding that the FDCPA did not apply to the defendant's conduct. It held that the plain language of the FDCPA mandates that its provisions apply to lawyers and law firms who engage in debt-collecting litigation and prohibits abusive conduct even when the debt-collecting activity is directed at someone other than the consumer.

According to the Eleventh Circuit, prohibitions of the FDCPA apply to all litigation activities of debt-collecting attorneys except for pleadings, which the law specifically exempts.

The Eleventh Circuit reasoned that the purpose of the statute is to protect consumers and others from abusive debt-collecting practices, regardless of whether the activity at issue is merely procedural.

However, the court affirmed the dismissal of the plaintiff's complaint because it did not find the defendant's sworn reply to be abusive, deceptive or unfair, and therefore concluded that it did not violate the FDCPA. Rather, the Eleventh Circuit determined that the defendants were just following discovery requirements under Florida law.

The FDCPA applies to debt collection lawyers

In reaching its decision, the Eleventh Circuit relied heavily on a Supreme Court case, *Heintz v. Jenkins*, in which the Supreme Court expressly held that the FDCPA "applies to the litigating activities of debt collector lawyers." 514 U.S. 291 (1995). In reaching this decision, the Supreme Court considered a prior version of the FDCPA, which contained an express exemption for lawyers.

The exemption stated that the term debt collector did not include "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." Congress later repealed this exemption in its entirety, leaving no other exemptions to fill its void. The Supreme Court interpreted this lack of an exemption as meaning that Congress intended for lawyers to be subject to the Act whenever they meet the general debt collector definition. This expansive reading of the term "debt collectors" places attorneys and law firms who engage in debt collection squarely in the purview of the FDCPA.

FDCPA applies to actions taken toward the debtor's attorney

In *Miljkovic v. Shafritz and Dunkin*, the Eleventh Circuit held that the FDCPA does not exempt conduct or communications on the part of the debt-collecting lawyer that is directed to a consumer's attorney. Rather, the court held that the FDCPA prohibits abusive conduct directed toward any person in connection with the collection of the debt.

According to the Eleventh Circuit, this provision expressly includes the debtor's attorney. Therefore, attorneys and law firms that engage in debt collection activities must be careful when engaging in procedural filings and other substantive court filings to avoid behavior that can be interpreted as deceptive, harassing, abusive or oppressive. This means that when an attorney is charged with actual knowledge of a debtor's financial situation, he or she must act accordingly and withdraw filings if necessary.

FDCPA bans a variety of conduct

Although banned conduct under the FDCPA includes the use of violence, the use of obscene or profane language, and repeated phone calls intended to annoy or harass any person at the called number, other less obviously abusive conduct can be interpreted as abusive and thus violations of the FDCPA.

The most frequent violation consists of threatening to take or taking an action that cannot be legally taken or is not intended to be taken.

For example, some debt collectors send collection letters attempting to collect debts beyond the statute of limitations. Another example is threatening to contact third parties, such as the debtor's employer.

In adjudicating claims under the FDCPA, claims are viewed from the perspective of the consumer whose circumstances make him relatively more susceptible to harassment, oppression or abuse. However, the mere filing of a lawsuit or threatened filing of a lawsuit, without the immediate means of proving the debt, does not constitute an abusive practice in violation of the FDCPA.

Likewise, it is not enough that a pleading causes the debtor unwanted embarrassment, inconvenience and further expense. Indeed, the debt collector attorney who files a complaint or responds to a complaint does not need to state that a complaint is filed by a debt collector. Rather to violate the FDCPA, the debt collector's conduct must manifest a tone of intimidation.

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