

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Civil LITIGATION

The FDCPA — what you don't know can hurt you

For attorneys attempting to collect non-commercial debts for their clients, familiarity with the Fair Debt Collection Practices Act (FDCPA) is essential. The unwary attorney serving as a “debt collector” may expose him/herself to liability for failing to strictly comply with the mandates of the FDCPA, including providing debtors with notices of their rights under the statute.

In 1977, the FDCPA was enacted to protect consumers from abusive debt collection practices and ensure that reputable collectors were not competitively disadvantaged. The statute is codified at 15 U.S.C. § 1692 et seq. The FDCPA articulates a non-exclusive, 16-item list of prohibited collection activities, and generally prohibits debt collectors from using “any false, deceptive or misleading representations or means” while collecting debts.

In addition to the enumerated prohibitions, section 1692g of the FDCPA also requires that debt collectors provide debtors specific notice of their rights under the statute within five days of the debt collector's initial communication with the debtor. These required notices must be prominent and conveyed effectively to the debtor. Other content or notices included in the initial communication from the debt collector must not diminish or contradict the FDCPA required notice in any way.

Courts use the least sophisticated consumer standard to determine whether an FDCPA notice is false, deceptive or misleading. In fact, if the collection notice is open to more than one reasonable interpretation, at least one of which is in-



By **JILLIAN K. FARRAR**
Daily Record
Columnist

accurate, a collection notice is misleading. *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir.1993).

For example, the Second Circuit recently found that a debt collector's failure to disclose the ever-increasing nature of the debt constituted a violation of section 1692e's prohibition on false, deceptive or misleading statements of the amount owed. See *Avila v. Riexinger & Assoc., LLC*, 817 F.3d 72 (2d Cir. 2016). In *Avila*, the Court found that failing to disclose that the debt continued to increase could lead the least sophisticated consumer to believe that payment of the amount in the notice would satisfy the entire debt. Where debts continue to accrue, the *Avila* Court provided a safe harbor, suggesting that debt collectors use the language adopted by the Seventh Circuit in *Miller v. McCalla et al.*, 214 F.3d 872 (7th Cir.2000) or the Connecticut District Court in *Jones v. Midland Funding, LLC*, 755 F.Supp.2d 393, 397–98 (D.Conn.2010).

What often seem to be minor changes or variations to the statutory language on an initial communication letter can invite an FDCPA claim. Last month a Wisconsin Federal District Court magistrate judge found that the plaintiff stated an FDCPA claim where a demand letter included a check-the-box option with the following language: “I am disputing the validity of this debt” followed by “Reason for Dis-

pute (required)”. *Mikolajczyk v. Universal Fidelity, LP*, Case No. 16-CV-1382, (E.D. Wis. 2017). Noting that consumers are not required to provide a reason for disputing the debt, the Magistrate Judge found that the consumer had stated a claim for false, deceptive, or misleading representation of the debt. This decision is notable because the demand letter at issue is similar to the model demand letter prepared by the Consumer Finance Protection Bureau in its August 2016 outline of debt collection rule proposals.

The FDCPA creates a private cause of action by the debtor against the debt collector within one year from the date of the violation. Pursuant to § 1692k, a debt collector who violates the FDCPA may be liable for any actual damages sustained as a result of the violation; statutory damages of up to \$1,000; in a class action, statutory damages of up to \$500,000 or 1% of the collector's net worth; and the costs of the action, including reasonable attorney's fees. Defendants of an FDCPA claim can receive an award of attorney's fees where an action was brought in bad faith or solely for the purpose of harassment.

The FDCPA applies to attorneys whose principal business purpose is the collection of debts or who regularly collect or attempt to collect debts owed to another. 15 U.S.C. § 1692a(6). For attorneys, the key provision is what constitutes “regularly.” The Second Circuit identified the following factors in determining regularity: (1) the number of debt collection communications sent and/or litigation

Continued on next page

Continued from previous page

tion matters; (2) frequency of collection communications/litigation activity; (3) whether personnel are dedicated to work on debt collection activity; (4) whether there are systems or contractors in place to facilitate collection activity; (5) whether there are ongoing client relationships that have retained the attorney to assist in the collection of consumer debts; (6) the role of debt collection work in the attorney's/firm's practice; and (7) whether the law practice seeks collection work or markets itself as having debt collection expertise. See *Goldstein v. Hutton, In-*

gram, Yuzek, Gainem, Carroll & Bertolotti, 374 F.3d 56, 62-63 (2nd Cir. 2004).

Before sending a demand letter on a non-commercial debt, the prudent practitioner will ensure that his/her initial contact with a debtor complies with the FDCPA.

Jillian K. Farrar is an Associate in Underberg & Kessler's Litigation, Creditors' Rights and Health Care Practice Groups. She concentrates her practice in litigation, bankruptcy and collections.