

# Law Trends & News

Practice Area Newsletter



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## Attorney Liability Under the Fair Debt Collection Practices Act

*By Kenneth J. Ashman and Bardia Fard*

Where attorneys serve as “debt collectors,” as that term is defined under the Fair Debt Collection Practices Act (FDCPA), for serving to collect debts on behalf of their clients, they can expose themselves to liability by failing to comport with the FDCPA’s strictures and obligations—including the obligation to provide to consumers certain notices of their rights. To the unwary practitioner, the FDCPA is a minefield of potential liability, so it is important that before one undertakes representation as a debt collector, one familiarizes him- or herself with the statute.

The FDCPA was enacted 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

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consistent state action to protect consumers against debt collection abuses.” 15 U.S.C. § 1692(e). A “debt collector” is defined under the FDCPA as “any person who . . . [operates] any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect . . . debts owed . . . another.” 15 U.S.C. § 1692a(6). The definition also includes 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.” *Id.*

Attorneys hired by creditors may be held liable as a “debt collectors” under the FDCPA, where they “regularly” engage in debt collection. *See, e.g., Nielsen v. Dickerson*, 307 F.3d 623 (7th Cir. 2002). The key is the “regularly” provision. As the Second Circuit explained in a case in which a plaintiff sought to impose FDCPA liability on a law firm:

Most important in the analysis is the assessment of facts closely relating to ordinary concepts of regularity, including (1) the absolute number of debt collection communications issued, and/or collection-related litigation matters pursued, over the relevant period(s), (2) the frequency of such communications and/or litigation activity, including whether any patterns of such activity are discernable, (3) whether the entity has personnel specifically assigned to work on debt collection activity, (4) whether the entity has systems or contractors in place to facilitate such activity, and (5) whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the lawyer or firm to assist in the collection of outstanding consumer debt obligations. Facts relating to the role debt collection work plays in the practice as a whole should also be considered to the extent they bear on the question of regularity of debt collection activity (debt collection constituting 1% of the overall work or revenues of a very large entity may, for instance, suggest regularity, whereas such work constituting 1% of an individual lawyer's practice might not). Whether the law practice seeks debt collection business by marketing itself as having debt collection expertise may also be an indicator of the regularity of collection as a part of the practice.

*Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti*, 374 F.3d 56, 62–63 (2nd Cir. 2004).

No matter under what definition a person is deemed a debt collector, the FDCPA will generally prohibit such a debt collector from using “any false, deceptive, or misleading representations or means in connection with the collection of any

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debt.” 15 U.S.C. § 1692e. The statute identifies 16 nonexclusive instances of conduct that would constitute a violation of this general prohibition. 15 U.S.C. § 1692e(1)-(16).

There are no lack of cases imposing FDCPA liability on attorneys. In one recent case, the Seventh Circuit affirmed summary judgment against a law firm for violation of the FDCPA where it assisted a bank’s collection efforts from certain credit card holders. *See Nielsen v. Dickerson*, 307 F.3d 623, 626 (7th Cir. 2002). In *Nielsen*, the attorney received the debtors’ information from the bank, conducted a facial check of the data to screen out debtors who were bankrupt or who lived in prohibited states, and then mailed out delinquency letters to the debtor on the attorney’s letterhead. *Id.* at 626–27. Although the attorney was not authorized to resolve any matters on the bank’s behalf, the delinquency letters contained the attorney’s contact information, and advised the debtor to contact “us,” presumably the attorney, if any part of the debt was disputed. *Id.* at 637. The attorney was paid by the bank a flat fee of \$2.45 per letter, regardless of the letter’s effect, and the attorney had no equitable interest in the debt. *Id.* at 630.

The Court of Appeals affirmed a finding that the attorney violated the FDCPA—not because the attorney played a significant role in the collection process, but for precisely the opposite reason: the attorney’s small and ministerial role, coupled with the language in the dunning letter, left consumers with the misimpression that the attorney had exercised his professional judgment that the debt was delinquent and ripe for legal action. More precisely, because the attorney played a superficial and ministerial role in the collection process, the court held that the attorney had violated provisions of the FDCPA by (i) falsely representing or implying that in his professional judgment the debt was delinquent and ripe for legal action, and (ii) using this false representation to collect or attempt to collect the debts owed.

The attorney thus violated 15 U.S.C. § 1692e(3) and (10), according to the court. Critically, the court opined that “an attorney must have some professional involvement with the debtor’s file if a delinquency letter sent under his name is not to be considered false or misleading in violation of the [FDCPA].” *Nielsen*, 307 F.3d at 638. The court also held the attorney liable for furnishing deceptive delinquency letters where he designed and furnished the letters “knowing that [they] would be used to create the false belief in a consumer that a person other than the creditor . . . [was] participating in the collection of . . . a debt . . . when in fact such person is not so participating.” *Id.* at 639, quoting 15 U.S.C. § 1692j (a).

The occasional practitioner who helps a client collect a debt should face no exposure to liability under the FDCPA. If one does undertake a collection practice, however, one would be wise to review carefully the statute and two decisions of the Seventh Circuit that provide model dunning letters that should serve as a safe harbor if employed truthfully by a practicing attorney. *See Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, LLC*, 214 F.3d 872 (7th Cir. 2000); *Bartlett v. Heibl*, 128 F.3d 497 (7th Cir. 1997).

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