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Fair Debt Collection - The Need for Private Enforcement

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Fair Debt Collection

The need for private enforcement

The Fair Debt Collection Practices Act was enacted to protect consumers from abusive debt collection practices. But more is needed.

by O. Randolph Bragg and Daniel A. Edelman

Introduction

One of the most important federal statutes protecting consumers is the Fair Debt Collection Practices Act ("FDCPA").[1] The purpose of the statute is to eliminate abusive collection practices and to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.[2] Congress articulated the purposes for the enactment of this legislation as follows:

> 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 personal privacy.[3]

The FDCPA is based on the premise that every individual, whether or not he owes the debt, has a right to be treated in a reasonable and civil manner.[4] Congress recognized:

> [the] universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is minuscule [sic]. . . . [T]he vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, over-extension, serious illness, or marital difficulties or divorce.[5]

Congress' intent in enacting the FDCPA has not been fulfilled. The abuses Congress meant to abolish have continued virtually unabated, as is apparent from the decisions discussed below. Many of these decisions deal with serious violations by attorney and non-attorney debt collectors alike, such as: "padding" debts with unauthorized charges;[6] systematically filing lawsuits in improper forums to make it difficult or impossible for consumers to be heard;[7] and impersonation of attorneys by lay debt collectors,[8] often with the complicity of the attorneys whose names are used. In essence, debt collectors have refused to voluntarily comply with the law.

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At the same time, the Federal Trade Commission ("FTC"), the federal agency charged with enforcement of the FDCPA, has brought few cases to enforce the statute. The FTC, staffed largely with people who joined the agency during previous administrations, appears to be more interested in cutting back the protections of the FDCPA than discharging its statutory duty to enforce the law as presently written.[9] Consequently, private enforcement of the FDCPA, particularly on a class action basis, is essential to induce both attorney and non-attorney debt collectors to comply with the law.

A single violation is sufficient to support judgment for the consumer.[10] The validity of the underlying debt, for example whether the consumer owes the alleged obligation, is normally not relevant to the debt collector's liability for violation of the FDCPA.[11] Thus, a successful consumer is entitled to an award of actual damages, statutory damages up to $1,000, costs, and attorney's fees.[12] Class action relief is also available.[13]

Moreover, in FDCPA litigation brought against the debt collector, the collector normally may not assert a counterclaim for the underlying debt.[14]

I. Coverage and definitions

A. Debt

The FDCPA applies to attempts to collect a debt. "Debt," under the FDCPA, is defined as:

> any 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.[15]

Thus, consumer debts reduced to judgment are covered by the FDCPA.[16] Dishonored checks for consumer goods also fall within the FDCPA.[17]

In contrast, business and agricultural loans are not "debts" covered by the FDCPA.[18] Nor are transactions such as capital taxes[19] and child support obligations.[20] Similarly, tort claims arising from the illegal reception of microwave telephone signals are also excluded from the definition of debt.[21]

B. Debt collector

Generally, the FDCPA covers the activities of a debt collector. The definition of "debt collector" has two parts:

> any person [1] 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 [2] who regularly collect or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.[22]

The creditor itself is excluded from the definition of debt collector, unless it uses a name which suggests that a third-party debt collector is involved in the collection process.[23] Also excluded from the definition of debt collector are (i) officers and employees of the creditor while collecting the debt in the creditor's name; (ii) affiliates of the creditor;[24] (iii) officers or employees of the United States or any state; (iv) process servers; (v) non-profit debt counselors; (v) people who service debts which are not in default (e.g., servicers of mortgages and student loans),[25] and (vi) fiduciaries.[26]

Originally, lawyers were also excluded from this definition. However, in 1986, Congress removed the attorney exemption.[27] Presently, however, the FDCPA applies to "a lawyer . . . with a general practice including a minor, but regular, practice in debt collection."[28] The legislative history of the amendment reveals that collection attorneys were not being effectively policed by the legal profession and courts, and that the removal of the exemption was necessary to "stop by the abusive and harassing tactics of attorney debt collectors."[29]

The amount of collection activity necessary to make a lawyer a "debt collector" is minimal. In fact, a law firm falls within the definition if debt collection work consists of amounts as small as less than 4% of its total business. While the ratio of debt collection to other efforts may be small, the actual volume is sufficient to bring defendant under the Act's definition of 'debt collector.'[30] Thus, an attorney who represented four collection agencies, filed over 150 collection suits in a two-year period, and sent one particular collection letter over 125 times in a 14-month period was a debt collector even though debt collection was merely incidental to his primary law practice.[31] On the other hand, an attorney who collected less than 20 consumer debts in a 10-year period was not a debt collector.[32] Therefore, a lawyer should be classified as a debt collector if either a volume threshold or a per-

centage-of-time threshold is met. In both cases, the threshold is fairly low.[33]

Recently, the U.S. Supreme Court in *Heintz v. Jenkins*[34] resolved the split between the Sixth Circuit[35] and the Second, Third, Seventh, and Ninth Circuits[36] on the purported exemption for "litigation conduct" of attorneys. Affirming the Seventh Circuit's decision, the Supreme Court reasoned:

> There are two rather strong reasons for believing that the Act applies to the litigation activities of lawyers. First the Act defines the "debt collectors" to whom it applies as including those who "regularly collect or attempt to collect, directly or indirectly, [consumer] debts owed or due or asserted to be owed or due another." . . . In ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly "attempts" to "collect" those consumer debts. See, e.g. Black's Law Dictionary 263 (6th ed. 1990) ("To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings").
>
> Second, in 1977, Congress enacted an earlier version of this statute, which contained an express exemption for lawyers. That exemption said 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." In 1986, however, Congress repealed this exemption in its entirety, . . . without creating a narrower, litigation-related, exemption to fill the void. Without more, then, one would think that Congress intended that lawyers be subject to the Act whenever they meet the general "debt collector" definition.[37]

The Court concluded "that the Act applies to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation."[38]

Finally, repossession agencies are not debt collectors included within the FDCPA unless they perform common collection services, such as sending dunning letters or making telephone calls.[39]

C. Creditor

The FDCPA defines a creditor as:

> 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 debt in default solely for the purpose of facilitating collection of such debt for another.[40]

Generally, creditors are not covered by the Act.[41] There are two exceptions. First, a person who accepts assignment of a debt in default is governed by the FDCPA.[42] Thus, check guaranty agencies, which purchase dishonored checks from merchants and seek to collect them from consumers, are "debt collectors."[43]

Second, a creditor who uses a name other than its own also falls within the coverage of the FDCPA.[44] Whether a creditor has used a name other than its own depends on whether the name used is sufficiently identified with the name used by the creditor in conducting the underlying transactions.[45]

D. Communication

Certain substantive prohibitions of the FDCPA apply to "communications." Communications include the conveying of information regarding a debt directly or indirectly to any person through any medium.[46] Usually this takes the form of dunning letters or telephone calls. However, the term is broadly and literally construed to encompass other forms of conveying information as well.[47]

E. Consumer

Only consumer debts are protected by the FDCPA. Under this provision, a consumer is "any natural person obligated or allegedly obligated to pay any debt."[48] This definition gives a consumer's executrix standing to bring an FDCPA action.[49] It should be noted that certain substantive protections of the FDCPA are not limited to "consumers."[50]

II. Violations

A. "Least Sophisticated Consumer" or "Unsophisticated Consumer" standard

Courts have generally held that whether a communication or other conduct violates the FDCPA is determined by analyzing it from the perspective of the "least sophisticated consumer" or "least sophisticated debtor."[51] This

standard ensures that the FDCPA protects all consumers, "the gullible as well as the shrewd."[52]

The Seventh U.S. Circuit Court of Appeals recently held that a more appropriate formulation was that a violation should be determined from the perspective of the "unsophisticated consumer."[53] Since the "least sophisticated consumer" standard has never been interpreted to impose liability for bizarre or idiosyncratic interpretations of collection demands,[54] it does not appear that the difference in language represents a difference in substance.

The U.S. District Court for the Northern District of Illinois explained the unsophisticated consumer standard:

> *Gammon* does not change the substance of the "least sophisticated consumer" standard as it had been routinely applied by courts. Instead, *Gammon* concluded that the term "unsophisticated consumer" represented a simpler and less confusing formulation of a standard designed to protect those consumers of below-average sophistication or intelligence. As a result, the court stated "we will use the term, 'unsophisticated,' to describe the hypothetical consumer whose reasonable perceptions will be used to determine if collection messages are deceptive or misleading."[55] The terminology reconciles the former standard's literal meaning with its application. As *Avila* correctly observes, the unsophisticated consumer standard is a distinction without a difference in application.[56]

B. Validation or verification notice

The FDCPA provides:

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing —

(1)the amount of the debt;

(2)the name of the creditor to whom the debt is owed;

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

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

(5)a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.[57]

These warnings are commonly referred to as "civil *Miranda* warnings" by debt collectors. Furthermore, the Act provides that if the consumer disputes the debt, the collector must cease further collection efforts until the validation procedure is satisfied.

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The validation notice may not be either "overshadowed" or contradicted by other language or material in the collection letter.[58] For example, in *Miller v. Payco-General American Credits, Inc.*,[59] the debt collector's "screaming headlines, bright colors and huge lettering" utilizing language "IMMEDIATE FULL PAYMENT," "PHONE US TODAY," and "NOW," were held to have overshadowed the 30-day validation notice. A collection letter from an attorney demanding payment within ten days upon the threat of suit also contradicted the 30-day validation notice.[60]

Where the validation notice is placed on the back of the correspondence, without a legible and reasonably prominent reference thereto on the front, the Act is violated.[61] Similarly, requests that the consumer telephone the debt collector have been held to violate the FDCPA where it would induce the consumer to waive his right to verification by failing to request the same in writing.[62]

C. Debt collection warning

The FDCPA requires that the debt collector "disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose."[63] Prior to the enactment of the FDCPA, debt collectors would send people mail purporting to seek employment references, inviting the recipient to collect a prize, or otherwise disguising its true purpose.

Five appellate courts have held that the debt collection warning must be included in all communications.[64] An early decision from the Ninth U.S. Circuit Court of Appeals held that this warning was not required in follow up letters[65] as long as the warning was included in the initial communication. The U.S. Courts of Appeals which have considered this issue have all rejected the Ninth Circuit's interpretation.[66]

D. Threats of unintended, unauthorized or illegal action

The FDCPA prohibits threatening any action that cannot legally be taken or that is not intended to be taken.[67] This prohibition is commonly violated. Some examples of violations include:

1. Threats of suit within a short time when the creditor has not authorized suit or the debt collector does not file suit within the period stated.[68]

2. Threats of suit by an attorney not licensed within the jurisdiction or who does not in fact file suits in the jurisdiction.[69]

3. Threats to enforce creditor remedies which cannot be enforced at the time stated or to the extent stated. For example, a debt collector may threaten to obtain a wage garnishment or execution without disclosing that this can only be done after notice, hearing, and judgment, or may threaten to garnish "all" of a consumer's wages when the law clearly imposes limitations on the amount which may be garnished.[70]

E. False representation that communication is from an attorney

A popular debt collection technique is to have large numbers of collection letters, with implicit or explicit threats of suit, sent under the name of an attorney. The courts have recognized that "a debt collection letter on an attorney's letterhead conveys authority and credibility."[71] The clear implication of any attorney letter is a threat of suit. Thus, unless the attorney has in fact reviewed the debtor's file and made a professional judgment that whatever action is threatened is appropriate, and the threatened action has been authorized by the creditor, the use of such letters violates the Act. In fact, the FDCPA specifically prohibits misrepresenting or implying that an individual is an attorney or that any communication is from an attorney.

Recently, the Second U.S. Circuit Court of Appeals found the use of an attorney's name in the letterhead and at the conclusion of the debt collector's dunning letter, where the attorney did not review the file, violated the FDCPA.[72] Collection letters which create the false and misleading impression that the communications are from an attorney when in fact they are "from" the collection agency violates the Act.[73] Similarly, a California District Court found that a debt collector's form letter which is signed by an independent attorney who has no knowledge of and has not conferred with a debt collector concerning a particular debt is an unfair collection practice.[74] In fact, some attorneys have purportedly sent out collection letters at the rate of 60,000 per month.

F. Other false or misleading representations

The FDCPA prohibits using of any false, deceptive, or misleading representation in an attempt to collect a debt.[75] The FDCPA specifically enumerates sixteen such violations.

In addition, other common violations of this section include: the false representation of the character, amount or legal status of the debt, the representation or implication that nonpayment will result in arrest, imprisonment, seizure, garnishment, attachment, or sale of the consumer's property, simulation of legal process, use of any name other than the true name of the debt collector, use of names or statements which falsely suggest affiliation with government agencies,[76] and representation that the debt collector is part of a credit reporting agency when it is not. Similarly, filling suit on obviously time-barred debts has been held to violate the FDCPA.[77]

G. Unfair practices

The FDCPA further prohibits "unfair or unconscionable means to collect or attempt to collect any debt."[78] The most common violation of the "unfair practice" section is collecting an amount (including any interest, fee,

charge, or expense incidental to the principal obligation) which has not been expressly authorized by the agreement creating the debt or permitted by law.[79]

Typical violations include imposing service charges for bad checks where not permitted by agreement and applicable state law,[80] imposing attorney's fees where no contract or statute authorizes them,[81] adding unauthorized insurance charges,[82] and other forms of "debt padding."[83]

Other unfair practices consist of soliciting and using post-dated checks under certain circumstances, placing collect telephone calls and telegrams, threatening illegal repossession, and sending postcards or envelopes that reveal the collection purpose, thus invading the privacy of the debtor.

H. Harassment or abuse

The FDCPA also prohibits any conduct intended to harass, oppress, or abuse any person in connection with the collection of a debt.[84] Among the conduct specifically defined as harassment or abuse is the threat of violence, obscene or profane language, publication of a list of debtors, the advertisement of a debt in order to coerce payment, repeated telephone calls, and telephone calls without disclosure of the caller's identity.

Claims should be viewed from the customer's perspective.

Moreover, under the FDCPA, claims should be viewed from the customer's prospective, even though his circumstances make him more susceptible to harassment, oppression, and abuse.[85] Under this standard, debt collection letters[86] and immediate return telephone calls by the debt collector to the consumer containing abusive comments violate the FDCPA.[87]

In addition, abusive conduct by the debt collector actually makes it less likely that the creditor will be paid. Contacts with consumers at their place of employment in a manner that jeopardizes their jobs frequently can be described as abusive. Any such conduct is considered to be harassing, abusive and oppressive.

I. Communications with the consumer and others

The FDCPA provides that the debt collector may not communicate with the consumer at any unusual time or place known, or that should be known, to be inconvenient to the consumer.[88] Thus, communications before 8:00 a.m. and after 9:00 p.m. would violate the Act. Further, the debt collector may not communicate with a consumer known to be represented by legal counsel[89] or at the consumer's place of employment where on-the-job personal communications are prohibited. Similarly, collection letters mailed in care of the consumer's attorney have violated this portion of the FDCPA.[90] Contacts with the consumer's relatives, other than the spouse, violate the FDCPA.[91] Also, where the consumer has written to the debt collector to cease further communications, continued collection contacts violate the FDCPA.[92]

On the other hand, where the debt collector did not have knowledge of the consumer's previous bankruptcy and representation by legal counsel, the FDCPA was not violated.[93] Thus, the *bona fide* error defense, discussed later, may protect an otherwise improper communication.[94]

J. Acquisition of location information

A debt collector is prohibited from communicating with someone other than the consumer except to obtain location information.[95] In doing so, the debt collector must identify himself but not discuss the debt. Such a communication can be made only once unless requested by that third party. If the consumer is represented by an attorney, the debt collector may not communicate with any other person.

K. Legal action by debt collectors

A debt collector may bring an action to enforce an interest in real property only where the property is located.[96] This includes attorneys whose collection activities are limited to purely legal activities, such as the filing of collection actions or mortgage foreclosures.[97]

A collection action brought by a debt collector on a personal obligation may be brought only in the "judicial district" where the consumer signed the contract or in which the consumer resides at the time the action is filed.[98] Thus, a lawyer, whose only action was to bring suit on behalf of the creditor, could violate the FDCPA if he files suit in a jurisdiction other than that where the contract was signed or the consumer resided.[99]

The Federal Trade Commission staff has determined that a collection lawyer violates the FDCPA if he files an

action in a county where the debtor neither signed the contract nor lives.[100] In outlying multi-county circuits, the debt collector must file suit in the county in which the debtor resides or signed the contract.[101]

The protection afforded by the FDCPA is not waived by the consumer's failure to request a change of venue in the debt collection action.[102] By filing suit in an improper forum and forcing the consumer to either default or appear in the improper forum (in person or by counsel), the debt collector has already inflicted the injury sought to be avoided by the Act.

The FDCPA does not confer authority for any legal action by a debt collector. In many jurisdictions, a collection agency may neither file suit in its own name, nor have its attorney file suit in its name, nor take an assignment of a debt for collection and then have its attorney file suit in its name. If the commencement of legal action by the debt collector is unauthorized or constitutes the unauthorized practice of law under state law, it will also violate the FDCPA.[103]

L. Furnishing deceptive forms

In addition, it is unlawful to design, compile and furnish any forms knowing that such forms would be used to create the false belief in the consumer that a person other than the creditor is participating in the collection.[104] Similarly, an attorney furnishing form letters which deceive the consumer violates the FDCPA.[105] Thus, an attorney who authorizes a creditor or collection agency to use his letterhead without his reviewing the files also violates the Act.

III. Remedies

A. Actual damages

A debt collector who violates any provision of the FDCPA is liable for actual damages.[106] State law requirements regarding the proof of intentional or negligent infliction of emotional distress, however, do not apply to actual damages under the FDCPA. In one FDCPA case, the jury was instructed:

> First, actual damages may be awarded the plaintiff as result of the failure of defendants to comply with the Act. Actual damages not only include any out-of-pocket expenses, but also damages for personal humiliation, embarrassment, mental anguish or emotional distress.
>
> You must determine a fair and adequate award of these items through the exercise of your judgment and experience in the affairs of the world after considering all facts and circumstances presented during the trial of this case.[107]

Although the consumers had no out-of-pocket losses, the jury awarded $15,000 as actual damages for the emotional distress as a result of receiving the defendant's law firm's three collection letters. The court granted a remittitur to $3,000.

B. Statutory damages

In addition to actual damages, if any, the consumer may be awarded "such actual damages as the court may allow, but not exceeding $1,000."[108] In determining the amount of statutory damages in an individual action the court considers "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which the non-compliance was intentional."[109]As a result, a question arises as to what "not exceeding $1,000" refers. The Sixth and Eleventh U.S. Circuit Courts of Appeal have held that statutory damages of up to $1,000 were limited to each case.[110]

The consumer need not prove the debt is invalid,[111] although payment of amounts not owed as a result of an FDCPA violation would certainly constitute actual damages. The consumer also need not show any actual damages in order to recover statutory damages.[112]

C. Attorney's fees

The successful consumer is entitled to costs and reasonable attorney's fees.[113] Given the structure of the section, attorney's fees should not be construed as a special or discretionary remedy; rather the Act mandates an award of attorney's fees as a means of fulfilling Congress's intent that the Act should be enforced by debtors acting as private attorneys general.[114]

Even where no actual or statutory damages are awarded, attorney's fees are still available.[115] In a successful action, however, attorney's fees are mandatory.[116] This provision is intended to encourage consumers to act as "private attorneys general" to enforce the FDCPA.[117] The hourly rate normally awarded the consumer's attorney may not be reduced merely because the action was brought pursuant to the FDCPA, which limits the award of statutory damages.[118]

For instance, after a trial at which the jury awarded the consumer $200 actual damages and $1,000 statutory damages, the court awarded attorney's fees totaling $10,110.[119] Despite the court's granting of the debt collector's motion for a new trial or remittitur, the consumer's lawyer was entitled to an award of additional attorney's fees for the time expended in defending this motion to protect the judgment.[120]

D. Bona fide error defense

In most cases, the debtor suing under the FDCPA need not prove that a violation was intentional or negligent.[121] Rather the FDCPA is a strict liability statute.[122] Of course, evidence that the debt collector intended to mislead consumers tends to prove that he selected suitable means to accomplish that end.[123]

The FDCPA, however, does provide an affirmative defense to debt collectors:

> A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.[124]

This provision is similar to one found in the Truth in Lending Act;[125] a mistaken view of the law is not excused under the FDCPA.[126] As a result, maintaining precautions designed to avoid errors is mandatory. Thus, where the debt collector fails to provide any evidence that it maintained proper procedures to avoid error, the *bona fide* error defense was held not to be available.[127] Reliance by the debt collector on an informal Federal Trade Commission advisory opinion does not establish a *bona fide* error defense.[128]

In a split decision, the Sixth U.S. Circuit Court of Appeals found that the debt collector demonstrated procedures reasonably adapted to avoid violation of the FDCPA and thereby established a *bona fide* error defense.[129] Although the debt collector sent from its California headquarters a second letter to the consumer shortly after receiving the consumer's cease and desist letter at its Ohio office, the debt collector demonstrated "procedures reasonably adapted to avoid any such error" and thereby established a *bona fide* error defense.[130] A dissenting judge wrote that the debt collector "has intentionally structured and implemented a system that defies compliance with the absolute duty mandated by [the Act]."

Where the debt collector telephoned the consumer before 8:00 a.m., a *bona fide* error defense was demonstrated where the debt collector erroneously failed to consider the consumer's time zone and no damage resulted from such calls.[131] Similarly, an unintentional misstatement of the law of garnishment, where it was demonstrated that the collector's employee had been properly trained on wage garnishment limitations, established a *bona fide* error defense.[132] A debt collector, which posted a card containing the debt collection warning required by the Act, required its employees to recite this language immediately in all telephone conversations, and trained its employees regarding this requirement, established a *bona fide* error defense to a claim based on failure to provide the proper warning.[133]

E. Jurisdiction

Federal and state courts have concurrent jurisdiction of FDCPA suits.[134] Thus, a suit pursuant to the FDCPA "may be brought in any appropriate United States district court without regard to the amount in controversy," or in the appropriate state court, within one year of the date of violation.[135] In a split decision, the Eighth U.S. Circuit Court of Appeals calculated the one year statutory limitation to expire on the day before that anniversary date.[136] FDCPA litigation is appropriately filed within the district where the consumer received the communication. This venue determination has been upheld even where the debt collector's letter had been forwarded to a district in which it did not do business.[137]

FDCPA litigation may be brought in either state or federal court[138] and a jury trial is available in FDCPA actions brought in federal court.[139] Furthermore, the debt collector normally may not bring counterclaims for either the underlying debt,[140] misrepresenting the involvement of an attorney,[141] or for bad faith and harassment.[142]

F. Class actions

The FDCPA contains special damage provisions for class actions.[143] Under the Act, recovery of statutory damages for the class is limited to 1% of the debt collector's net worth or $500,000, whichever is less. Plaintiffs, however, can collect their full statutory damages. The damage limitation does not apply to actual damages.

FDCPA actions based on improper form letters or charges, or similar standard practices, are ideally suited for class action treatment. Under the "least sophisticated consumer" or "unsophisticated consumer" standard of liability, an FDCPA claim for statutory damages presents no issues of reliance or causation.[144] Class actions have been certified under the FDCPA in cases involving unauthorized charges,[145] improper form letters,[146] misrepresenting the involvement of an attorney[147] and the filing of suits in improper venues.[148]

G. FTC Official Staff Commentary

The FTC has published an Official Staff Commentary on the FDCPA.[149] The Staff Commentary is a guide intended to clarify the staff's interpretations of the statute, but does not have the force or effect of law. It is not a formal trade regulation rule or advisory opinion of the Commission, and thus is not binding on the Commission or the public.[150] The FDCPA states: "Neither the Commission nor any other agency referred to in subsection (b) may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this title."[151]

In certain respects, the Commentary reflects the FTC's desire to narrow the FDCPA rather than to enforce it as written. Most notably, it purports to support the efforts of the collection bar to obtain exemption from the FDCPA's restrictions. Several courts have held that and other portions of the FTC's staff commentary to be unpersuasive and flatly contrary to the statute.[152]

A debt collector's good faith compliance with an FTC advisory opinion insulates the collector from liability.[153] However, at the date of this writing, the FTC has not issued any formal opinions.

Conclusion

Although the FDCPA was enacted nearly 20 years ago, most of the abuses it has meant to end have continued virtually unabated. In the absence of effective governmental enforcement, vigorous enforcement by private citizens, particularly through class actions, is essential to ensure that debt collectors comply with this important consumer protection measure.

E N D N O T E S

[1] 15 U.S.C. § 1692 *et seq.* (1977).

[2] 15 U.S.C. § 1692(e).

[3] 15 U.S.C. § 1692(a).

[4] 123 CONG. REC. 10241 (1977) (Remarks of Rep. Annunzio); *see* Baker v. G. C. Services Corp., 677 F.2d 775, 777 (9th Cir. 1982).

[5] S. REP. No. 382, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S.C.C.A.N 1695, 1697.

[6] Heintz v. Jenkins, 115 S.Ct. 1489 (1995); Strange v. Wexler, 796 F. Supp. 1117 (N.D. Ill. 1992); Ransom v. Telecredit Service Corp., H-91-897 (D. Md. 1991); Temogonwuno v. Todd, Bremer & Larsen, 1:89 CV 2871 JTC (N.D. Ga. 1991); Cacace v. Lucas, 775 F. Supp. 502 (D. Conn. 1990); Butler v. International Collection Service, Inc., Civ. No. N-88-302 (D. Conn. 1989); Yelvington v. Buckner, C82-2234A (N.D. Ga. 1984); West v. Costen, 558 F. Supp. 564 (W.D. Va. 1983); In re Scrimpsher, 17 B.R. 999 (Bankr. N.D.N.Y. 1982); Duran v. Credit Bureau of Yuma, 93 F.R.D. 607 (D. Ariz. 1982); Miller v. Mikell, 81 C 4736 (N.D. Ill., July 30, 1982); People ex rel. Daley v. Datacom Sys. Corp., 146 Ill.2d 1 (1991); Clark v. Marine Midland Bank, 413 N.Y.S.2d 9 (1979).

[7] Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507 (9th Cir. 1994); Scott v. Jones, 964 F.2d 314 (4th Cir. 1992); Dutton v. Wolhar, 809 F. Supp. 1130 (D. Del. 1992); Shapiro & Meinhold v. Zartman, 823 P.2d 120 (Colo. 1992).

[8] Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993); Avila v. Van Ru Credit Corp., 1995 U.S. Dist. LEXIS 1502 (N.D. Ill., February 8, 1995); Masuda v. Thomas Richards & Co., 759 F. Supp. 1456, 1461-2 (C.D. Cal. 1991); United States v. Central Adjustment Bureau, Inc., 667 F. Supp. 370, 380-81 (N.D. Tex. 1986), *aff'd*, 823 F.2d 880 (5th Cir. 1987).

[9] Every year for the last few years, the FTC has recommended to narrow the scope of the FDCPA.

[10] Bentley v. Great Lakes Collection Bureau, 6 F.3d 60 (2nd Cir. 1993); Supan v. Medical Bureau of Economics, Inc., 785 F. Supp. 304, 305 (D.Conn. 1991); Cacace v. Lucas, 775 F. Supp. 502, 505 (D.Conn. 1990).

[11] McCartney v. First City Bank, 970 F.2d 45 (5th Cir. 1992); Baker v. G.C. Services Corp., 677 F.2d 775 (9th Cir. 1982); Adams v. First Federal Credit Control, Inc., 1992 WL 131121 (N.D. Ohio 1992). The only exception is that one ground of liability under the FDCPA is when a debt collector attempts to collect a debt which is obviously not owed. *See* Kimber v. Federal Financial Corp., 668 F. Supp. 1480 (M.D. Ala. 1987) (debt collector held liable for attempting to collect obviously time-barred debt).

[12] 15 U.S.C. § 1692k (a).

[13] 15 U.S.C. § 1692k (a) (2) (B).

[14] Peterson v. United Accounts, Inc., 638 F.2d 1134 (8th Cir. 1981); Gutshall v. Bailey & Associates, 1991 U.S. Dist.

LEXIS 12153 (N.D. Ill. 1991); Leatherwood v. Universal Business Service Co., 115 F.R.D. 48 (W.D.N.Y. 1987); Venes v. Professional Service Bureau, Inc., 353 N.W.2d 671 (Minn. App. 1984) (is permissive).

[15] 15 U.S.C. § 1692a (5) (emphasis added).

[16] Frey v. Gangwish, 970 F.2d 1516 (6th Cir. 1992).

[17] Holmes v. Telecredit Service Corp., 736 F. Supp. 1289 (D. Del. 1990); In re Scrimpsher, 17 B.R. 999 (N.D.N.Y. 1982).

[18] Bloom v. I.C. System, Inc., 972 F.2d 1067 (9th Cir. 1992) (business loan); Munk v. Federal Land Bank, 791 F.2d 130 (10th Cir. 1986) (agricultural loan); Kicken v. Valentine Production Credit Ass'n, 628 F. Supp. 1008 (D. Neb. 1984) (agricultural loan).

[19] Staub v. Harris, 626 F.2d 275 (3d Cir. 1980).

[20] Mabe v. GC Services, L.P., 1994 WL 6920, 1994 U.S.Dist. LEXIS 162 (W.D. Va. 1994), *aff'd*, 32 F.3d 86 (4th Cir. 1994).

[21] Zimmerman v. H.B.O. Affiliated Group, 834 F.2d 1163 (3d Cir. 1987).

[22] 15 U.S.C. § 1692a (6).

[23] *Id.*

[24] This exception has been construed to be subject to the restriction that the relationship between the affiliate and the creditor is disclosed and that the affiliate does not use a name which conveys the impression that a third-party debt collector is involved. Cramer v. First of America Bank Corp., 1994 WL 478997, 1993 U.S.Dist. LEXIS 16276 (N.D. Ill. 1993).

[25] Perry v. Stewart Title Co., 756 F.2d 1197 (5th Cir. 1985); Coppola v. Connecticut Student Loan Found., 1989 WL 33707 (D. Conn. 1989).

[26] *E.g.*, a receiver or trustee of a corporate creditor or the personal representative of an individual creditor.

[27] Pub. L. 99-361, 100 Stat. 768 (deleting former 15 U.S.C. § 1692a (6) (F), which excluded from the definition of "debt collector" "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client.")

[28] Crossley v. Lieberman, 90 B.R. 682, 694 (E.D. Pa. 1988), *aff'd*, 886 F.2d 566 (3d Cir. 1989).

[29] 1986 U.S.C.C.A.N. 1756-57.

[30] Stojanovski v. Strobl & Manoogian, P.C., 783 F. Supp. 319, 322 (E.D. Mich. 1992).

[31] Cacace v. Lucas, 775 F. Supp. 502 (D. Conn. 1990).

[32] Mertes v. Devitt, 734 F. Supp. 872 (W.D. Wis. 1990).

[33] A volume threshold is necessary because a law firm that handles a modest number of consumer collection matters as part of providing a full range of services to its clients should be required to comply with the FDCPA. A percentage threshold is necessary because a lawyer who attempts to obtain collection business should be required to comply whether or not he is successful in doing so. The decisions indicate that the volume threshold is in the range of 5-10 attempts to collect consumer debts per year, while the percentage threshold is in the 5% area.

[34] Heintz v. Jenkins, 115 S.Ct.1489 (April 18, 1995).

[35] Green v. Hocking, 9 F.3d 18 (6th Cir. 1993) (the district court within the Sixth Circuit held that required notifications sent pursuant to the mortgage foreclosure process were not covered by the FDCPA); *see also* Williams v. Trott, 822 F. Supp. 1266 (E.D. Mich. 1993).

[36] Jenkins v. Heintz, 25 F.3d 536 (7th Cir. 1994), *aff'd* 115 S.Ct. 1489 (1995); Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507 (9th Cir. 1994); Paulemon v. Tobin, 1994 U.S.App. LEXIS 17182 (2d Cir., July 13, 1994); Scott v. Jones, 964 F.2d 314 (4th Cir. 1992); Crossley v. Lieberman, 90 B.R. 682, 694 (E.D. Pa. 1988), *aff'd*, 886 F.2d 566 (3d Cir. 1989).

[37] Jenkins v. Heintz, 115 S.Ct. at 1490-91.

[38] *Id.* at 1493.

[39] Jordan v. Kent Recovery Systems, Inc., 731 F. Supp. 652 (D. Del. 1990); Larranaga v. Mile High Collection and Recovery Bureau, Inc., 807 F. Supp. 111 (D.N.M. 1992).

[40] 15 U.S.C. § 1692a (4).

[41] Warren v. Bank of Marion, 618 F. Supp. 317 (W.D. Va. 1985).

[42] Cirkot v. Diversified Financial Systems, Inc., 839 F. Supp. 941 (D. Conn. 1993); Kimber v. Federal Financial Corp., 668 F. Supp. 1480 (N.D. Ala. 1987); Commercial Service of Perry, Inc. v. Fitzgerald, 856 P.2d 58 (Colo. Ct. App. 1993).

[43] Holmes v. Telecredit Service Corp., 736 F. Supp. 1289 (D. Del. 1990); Ransom v. Telecredit Service Corp., H-91-897 (D. Md. 1991). The FDCPA's definitional language, "owed or due another," means originally owed or due to another. Kimber, 668 F. Supp. 1480 (N.D. Ala. 1987).

[44] Supan v. Medical Bureau of Economics, Inc., 785 F. Supp. 304, 305 (D. Conn. 1991). The Federal Trade Commission Staff Commentary to 15 U.S.C. § 1692e (3) states that "If a creditor falsely uses an attorney's name rather than his own in his collection communications, he both loses his exemption from the FDCPA's definition of 'debt collector' [15 U.S.C. § 1692a (6)] and violates this provision." 53 Fed. Reg. 50097, 50102.

[45] Dickenson v. Townside TV & Appliance, Inc., 770 F. Supp. 1122 (S.D.W. Va. 1990) (creditor which consistently used its assumed business name in dealing with customers, rather than its incorporated name, did not thereby become a "debt collector" as defined by 15 U.S.C. § 1692a (6)); Britton v. Weiss, 1989 WL 148663 (N.D.N.Y. 1989) (attorney who was employed by creditor and who included creditor's name as part of his street address in collection letter was a "debt collector" because intent and tendency of letter was to convey impression that a private attorney had intervened); Young v. Lehigh Corp., 1989-2 Trade Cas. (CCH) ¶68,790 (N.D. Ill. 1989) (affiliated entity's similar name was sufficiently identified with creditor so as not to convey the impression that a third party was involved); Cramer v. First of America Bank Corp., 1993 WL 478997, 1993 U.S.Dist. LEXIS 16276 (N.D. Ill. 1993) (bank holding company sent collection letter on behalf of subsidiary which had dealt with consumer under name not in any way similar to that of holding company).

[46] 15 U.S.C. § 1692a (2).

[47] Tolentino v. Friedman, 46 F.3d 645 (7th Cir. 1995) (debt collector sent consumers a copy of the summons and complaint prior to service accompanied by an "IMPORTANT NOTICE" discussing the consequences of filing bankruptcy).

[48] 15 U.S.C. § 1692a (3).

[49] Wright v. Finance Service of Norwalk, Inc., 22 F.3d 647 (6th Cir. 1994);

Riveria v. MAB Collections, Inc., 682 F. Supp. 174 (W.D.N.Y. 1988).

[50] West v. Costen, 558 F. Supp. 570 (W.D. Va. 1983). One need not be a consumer to recover under provisions of the FDCPA which apply to any "person," *e.g.*, 15 U.S.C. § 1692e. Other provisions of the FDCPA, *e.g.*, 15 U.S.C. § 1692c, only protect a "consumer."

[51] Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993); Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991); Swanson v. Southern Oregon Credit Service, Inc., 869 F.2d 1222, 1225-26 (9th Cir. 1988); Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th Cir. 1985).

[52] Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993).

[53] Gammon v. GC Services L.P., 27 F.3d 1254 (7th Cir. 1994).

[54] Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993).

[55] Gammon v. GC Services L.P., 27 F.3d 1254 (7th Cir. 1994).

[56] Avila v. Van Ru Credit Corp., 1995 U.S. Dist. LEXIS 1502 (N.D. Ill., February 8, 1995). *See also* Vaughn v. CSC Services, Inc., 1995 U.S. Dist. LEXIS 1358 (N.D. Ill., February 3, 1995).

[57] 15 U.S.C. § 1692g (a).

[58] Swanson v. Southern Oregon Credit Service, Inc., 869 F.2d 1222, 1225-26 (9th Cir. 1988).

[59] Miller v. Payco-General American Credits, Inc., 943 F 2d 482, 484 (4th Cir. 1991).

[60] *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991) (threat to sue if payment was not received within ten days rendered the validation notice ineffective); Swanson v. Southern Oregon Credit Service, Inc., 869 F.2d 1222, 1225-26 (9th Cir. 1988) (§1692g notice accompanied by demand that account be paid within 10 days to avoid adverse credit report is not effectively conveyed, and demand violates statute; such a communication would "lead the least sophisticated debtor, and quite probably even the average debtor, only to one conclusion: he must ignore the right to take 30 days to verify his debt and act immediately or he will be remembered as a deadbeat in the 'master file' of his local collection agency and will, accordingly, lose his 'most valuable asset,' his good credit rating"); United States v. National Financial Services, Inc., 820 F. Supp. 228 (D. Md. 1993) (letter containing §1692g notice and also stating that matter would be referred to an attorney in ten days violated §1692g because the ten day demand "contradict[s] the validation notice's declaration that the debtor has thirty days to dispute the debt"); Cortright v. Thompson, 812 F. Supp. 772, 778 (N.D. Ill. 1992) (attorney demand letter stating that "in the event the balance is not paid in full or satisfactory payment arrangements made within ten days, it may be necessary to file at any time thereafter a lawsuit to recover the amount due if so requested by my client . . . Although the letter is not as threatening visually as some described in cases finding violations of § 1692g (a), [citation], defendant's letter appears on law firm stationery and states that it may be necessary to file a lawsuit at any time after 10 days . . . ."); Siler v. Management Adjustment Bureau, No. CIV-91-65E (W.D.N.Y. 1992) (letter referring to "immediate collection," "demand for payment in full today," and "full payment today" violated § 1692g); Avila v. Van Ru Credit Corp., 1995 U.S. Dist. LEXIS 1502 (N.D. Ill., February 8, 1995); Vaughn v. CSC Services, Inc., 1995 U.S. Dist. LEXIS 1358 (N.D. Ill., February 3, 1995); Taylor v. Fink, 1994 U.S.Dist. LEXIS 16821 (N.D. Ill., November 23, 1994).

[61] Riveria v. MAB Collections, Inc., 682 F. Supp. 174 (W.D.N.Y. 1988); Ost v. Collection Bureau, Inc., 493 F. Supp. 701 (D.N.D. 1980); *see also* Rabideau v. Management Adjustment Bureau, 805 F. Supp. 1086 (W.D.N.Y. 1992). *Contra* Blackwell v. Professional Business Services, Inc., 526 F. Supp. 535 (N.D. Ga. 1981).

[62] Miller v. Payco-General American Credits, Inc., 943 F 2d 482 (4th Cir. 1991); Woolfolk v. Van Ru Credit Corp., 783 F. Supp. 724, 726 (D. Conn. 1990).

[63] 15 U.S.C. § 1692e (11).

[64] Tolentino v. Friedman, 46 F.3d 645 (7th Cir. 1995); Dutton v. Wolpoff & Abramson, 5 F.3d 649 (3d Cir. 1993); Carroll v. Wolpoff & Abramson, 961 F.2d 459, 461 (4th Cir. 1992); Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22, 26-27 (2d Cir. 1989); Frey v. Gangwish, 970 F.2d 1516 (6th Cir. 1992).

[65] Pressley v. Capital & Collection Services, Inc., 760 F.2d 922 (9th Cir. 1985).

[66] Tolentino v. Friedman, 46 F.3d 645 (7th Cir. 1995).

[67] 15 U.S.C. § 1692e (5).

[68] Bentley v. Great Lakes Collection Bureau, 6 F.3d 60 (2d Cir. 1993); Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991); Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22, 26-27 (2d Cir. 1989) (48 hour notice); Oglesby v. Rotche, 1993 WL 460841 (N.D. Ill. 1993).

[69] Rosa v. Gaynor, 784 F. Supp. 1, 5 (D. Conn. 1989); Avila v. Van Ru Credit Corp., 1995 U.S. Dist. LEXIS 1502, 29-43 (N.D. Ill., February 8, 1995); Taylor v. Fink, 1994 U.S.Dist. LEXIS 16821, 11 (N.D. Ill., November 23, 1994).

[70] Oglesby v. Rotche, 1993 WL 460841 (N.D. Ill. 1993) (threat to garnish all wages and attach all property); Woolfolk v. Van Ru Credit Corp., 783 F. Supp. 724 (D. Conn. 1990) (oppressive list of post-judgment remedies); Seabrook v. Onondaga Bureau of Medical Economics, Inc., 705 F. Supp. 81 (N.D.N.Y. 1989) (threat to garnish wages in excess of amounts permitted under federal law); Cacace v. Lucas, 775 F. Supp. 502 (D. Conn. 1990) (letter stating that litigation could result in seizure of real estate and bank account deceptive; mere filing of litigation could not have any of stated effects); Bice v. Merchants Adjustment Service, Inc., No. 85-0283-H-S (S.D. Ala., Nov. 20, 1985) (letter stated that "If suit is filed and judgment obtained, the following actions will result: 1. YOUR WAGES will be garnished. 2. YOUR CARS, TRUCKS, HOUSES, LAND, FURNITURE and APPLIANCES will be seized and sold by the Sheriff. Partial payments will not be accepted").

[71] Crossley v. Lieberman, 868 F.2d 566, 570 (3d Cir. 1989).

[72] Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993) ("there will be few, if any, cases in which a mass-produced collection letter bearing the facsimile of an attorney's signature will comply with the restrictions imposed by §1692e").

[73] Avila v. Van Ru Credit Corp., 1995 U.S. Dist. LEXIS 1502 (N.D. Ill., February 8, 1995).

[74] Masuda v. Thomas Richards & Co., 759 F. Supp. 1456, 1461-2 (C.D. Cal. 1991) ("the letter falsely suggests to the least sophisticated debtor that an attorney has been retained to collect his or her particular debt. Thus, the letter implies to the recipient that TRC considers the debt to be more serious than TRC, in fact, considers it to be. . . . The representation that independent outside counsel has been hired may unjustifiably frighten the unsophisticated debtor into paying a debt that he or she does not owe. The FDCPA must be construed to proscribe this means of collection"). *Accord*, United States v. Central Adjustment Bureau, Inc., 667 F. Supp. 370, 380-81 (N.D. Tex. 1986), *aff'd*, 823 F.2d 880 (5th Cir. 1987) ("The attorney must have sufficient information to satisfy himself that it is proper to send the dunning letter, i.e., he must investigate the merits of the claim before making a demand for payment. . . . the attorney must have the file for review to determine the merits of the claim, as well as the limits of his authority"); Federal Trade Commission, Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed.Reg. 50,097, 50,105 (1988) ("a debt collector may not send a computer-generated letter deceptively using an attorney's name").

[75] 15 U.S.C. § 1692e.

[76] Gammon v. GC Services L.P., 27 F.3d 1254 (7th Cir. 1994) (debt collector stated in collection letter that it had designed collection systems used by federal and state tax collection authorities; Court of Appeals characterized the statement as having no conceivable purpose other than to convey the impression that the tax collection systems could in some manner be used in debt collection); Adams v. First Federal Credit Control, Inc., 1992 WL 131121 (N.D. Ohio 1992) (use of the word "federal" and seal emblem improperly suggested affiliation with federal government).

The FDCPA prohibits "[t]he false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof," 15 U.S.C. § 1692e (1), and "[t]he use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval." 15 U.S.C. § 1692e (9).

[77] Kimber v. Federal Financial Corp., 668 F. Supp. 1480 (M.D. Ala. 1987).

[78] 15 U.S.C. § 1692f.

[79] 15 U.S.C. § 1692f (1).

[80] Ransom v. Telecredit Service Corp., H-91-897 (D. Md. 1991) (unauthorized "service charge" on NSF checks); Butler v. International Collection Service, Inc., Civ. No. N-88-302 (D. Conn. 1989) (same); West v. Costen, 558 F. Supp. 564 (W.D. Va. 1983) (same); In re Scrimpsher, 17 B.R. 999 (Bankr. N.D.N.Y. 1982) (same); Clark v. Marine Midland Bank, 413 N.Y.S.2d 9 (1979) (same).

[81] Strange v. Wexler, 796 F. Supp. 1117 (N.D. Ill. 1992).

[82] Jenkins v. Heintz, 115 S.Ct. 1489, 1490-91 (1995).

[83] Teemogonwuno v. Todd, Bremer & Larsen, 1:89 CV 2871 JTC (N.D. Ga. 1991) ($4000 "collection fee" tacked onto debt); Cacace v. Lucas, 775 F. Supp. 502 (D. Conn. 1990) (lawyer demanded excessive amounts); Yelvington v. Buckner, C82-2234A (N.D. Ga. 1984) (10% service charge added to debts without authority); Duran v. Credit Bureau of Yuma, 93 F.R.D. 607 (D.Ariz. 1982) (unauthorized collection fees); Miller v. Mikell, 81 C 4736 (N.D. Ill., July 30, 1982) (attorney demanded payment of court costs which had not yet been incurred); People ex rel. Daley v. Datacom Sys. Corp., 585 N.E.2d 51 (1991) (collection agency hired to collect parking fines tacked on unauthorized fees).

In addition to § 1692f, debt padding also violates § 1692e (2), which prohibits "[t]he false representation of . . . (A) the character, amount, or legal status of any debt; or (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt."

[84] 15 U.S.C. § 1692d.

[85] Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1179 (11th Cir. 1985).

[86] Harvey v. United Adjusters, 509 F. Supp. 1218 (D. Or. 1991) (letter implying that the debtor is financially irresponsible and ignores her mail violated § 1692d); Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980 (N.D. Ill. 1979) (letter using an intimidating tone and threatening an investigation and embarrassment violates § 1692d).

[87] Bingham v. Collection Bureau, Inc., 505 F. Supp. 864 (D.N.D. 1981).

[88] 15 U.S.C. § 1692c (a) (1).

[89] 15 U.S.C. § 1692c (a) (2).

[90] Clark's Jewelers v. Humble, 823 P.2d 818 (Kan. Ct. App. 1991).

[91] West v. Costen, 558 F. Supp. 564, 570 (W.D. Va. 1983).

[92] Carrigan v. Central Adjustment Bureau, Inc., 494 F. Supp. 824 (N.D. Ga. 1980).

[93] Hubbard v. National Bond & Collection Associates, 126 B.R. 422 (D. Del. 1991), *aff'd*, 947 F.2d 935 (3d Cir. 1991).

[94] Juras v. Amana Collection Service, Inc., 829 F.2d 739 (9th Cir. 1987); Biber v. Associated Collection Services, Inc., 631 F. Supp. 1410 (D. Kan. 1986).

[95] 15 U.S.C. § 1692b.

[96] 15 U.S.C. § 1692i (a) (1).

[97] Shapiro & Meinhold v. Zartman, 823 P.2d 120 (Colo. 1992).

[98] Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507 (9th Cir. 1994); 15 U.S.C. § 1692i (a) (2).

[99] Scott v. Jones, 964 F.2d 314 (4th Cir. 1992); Dutton v. Wolhar, 809 F. Supp. 1130 (D. Del. 1992); Oglesby v. Rotche, 1993 WL 460841 (N.D. Ill. 1993).

[100] Letter from Rachelle V. Browne to George W. Heintz (March 23, 1989).

[101] Letter from Rachelle V. Browne to John P. Schwulst (Sept. 12, 1988).

[102] Oglesby v. Rotche, 1993 WL 460841, 1993 U.S.Dist. LEXIS 15687 (N.D. Ill. 1993).

[103] Kolker v. Sanchez, 1991 U.S.Dist. LEXIS 20783 (D.N.M. 1991) (where commencement of suit by collection agency is unauthorized practice of law under state law, it also violates FDCPA); Kolker v. Duke City Collection Agency, 750 F. Supp. 468 (D.N.M. 1990); *see* Gaetano v. Payco, Inc., 774 F. Supp. 1404 (D. Conn. 1990) (threats to collect a debt were deceptive violating 15 U.S.C. § 1692e (5) where the collector did not have the required state license to collect the debt).

[104] 15 U.S.C. § 1692j.

[105] Littles v. Lieberman, 90 B.R. 700 (E.D. Pa. 1988).

[106] 15 U.S.C. § 1692k (a) (1).

[107] Smith v. Law Offices of Mitchell N. Kay, 124 B.R. 182, 185 (D. Del. 1991).

[108] 15 U.S.C. § 1692k (a) (2).

[109] 15 U.S.C. § 1692k (b) (1).

[110] Wright v. Finance Service of Norwalk, Inc., 22 F.3d 647 (6th Cir. 1994); Harper v. Better Business Services, Inc., 961 F.2d 1561 (11th Cir. 1992).

[111] McCartney v. First City Bank, 970 F.2d 45 (5th Cir. 1992); Baker v. G.C. Services Corp., 677 F.2d 775 (9th Cir. 1982); Adams v. First Federal Credit Control, Inc., 1992 WL 131121 (N.D. Ohio 1992).

[112] Baker v. G.C. Services Corp., 677 F.2d 775 (9th Cir. 1982); Harvey v. United Adjusters, 509 F. Supp. 1218 (D. Or. 1991).

[113] 15 U.S.C. § 1692k (a) (3); *See also* Tolentino v. Friedman, 46 F.3d 645 (7th Cir. 1995). In order to encourage able counsel to undertake FDCPA cases, as Congress intended, it is necessary that counsel be awarded fees commensurate with those which they could obtain by taking other types of cases.

[114] Graziano v. Harrison, 950 F.2d 107, 113 (3d Cir. 1991).

[115] "Because the FDCPA was violated, however, the statute requires the award of costs and a reasonable attorney's fee." *Id.*

[116] Emanuel v. American Credit Exchange, 870 F.2d 805, 809 (2d Cir. 1989).

[117] Baker v. G.C. Services Corp., 677 F.2d 775, 780 (9th Cir. 1982); Whatley v. Universal Collection Bureau, 525 F. Supp. 1204, 1206 (N.D. Ga. 1981); FTC v. Schaffner, supra at 35 (7th Cir. 1980) (Congress intended the Act to be enforced primarily by consumers).

[118] Tolentino v. Friedman, 46 F.3d 645 (7th Cir. 1995) (Paying counsel in FDCPA cases at rates lower than those they can obtain in the marketplace is inconsistent with the congressional desire to enforce the FDCPA through private actions, and therefore misapplies the law).

[119] Perez v. Perkiss, 742 F. Supp. 883 (D. Del. 1990).

[120] Smith v. Law Offices of Mitchell N. Kay, 762 F. Supp. 82 (D. Del. 1991).

[121] Those sections which include a culpability requirement explicitly impose it. *E.g.*, 15 U.S.C. §1692d(5) prohibits the making of repeated telephone calls to a debtor "with intent to annoy." *See* Baker v. G.C. Services Corp., 677 F.2d 775 (9th Cir. 1982).

[122] Cacace v. Lucas, 775 F. Supp. 502, 505 (D. Conn. 1990).

[123] Gammon v. GC Services L.P., 27 F.3d 1254 (7th Cir. 1994).

[124] 15 U.S.C. § 1692k (c).

[125] 15 U.S.C. § 1640.

[126] Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22, 27 (2d Cir. 1989); Baker v. G.C. Services Corp., 677 F.2d 775 (9th Cir. 1982).

[127] Carrigan v. Central Adjustment Bureau, Inc., 494 F. Supp. 824, 827 (N.D. Ga. 1980); Oglesby v. Rotche, 1993 WL 460841 (N.D. Ill. 1993).

[128] Carroll v. Wolpoff & Abramson, 961 F.2d 459 (4th Cir. 1992); Scott v. Jones, 961 F.2d 459 (4th Cir. 1992) (declining to adopt FTC's interpretation of the definition because it conflicts with the unambiguous text of the statute); Hulshizer v. Global Credit Services, Inc., 728 F.2d 1037 (8th Cir. 1984).

[129] Smith v. Transworld Systems, Inc., 953 F.2d 1025 (6th Cir. 1992).

[130] *Id.*

[131] Juras v. Amana Collection Service, Inc., 829 F.2d 739 (9th Cir. 1987).

[132] Biber v. Associated Collection Services, Inc., 631 F. Supp. 1410 (D. Kan. 1986).

[133] Beattie v. D.M. Collections, Inc., 754 F. Supp. 383, 389-390 (D. Del. 1991).

[134] 15 U.S.C. § 1692k (d).

[135] *Id.*

[136] Matteson v. U.S. West Communications, Inc., 967 F.2d 259 (8th Cir. 1992). *See also,* Seabrook v. Onondaga Bureau of Medical Economics, 705 F. Supp. 81, 83-84 (N.D.N.Y. 1989).

[137] Bates v. C & S Adjusters, Inc., 980 F.2d 865 (2d Cir. 1992); Russey v. Rankin, 837 F. Supp. 1103 (D.N.M. 1993); Sluys v. Hand, 831 F. Supp. 321 (S.D.N.Y. 1993); Bailey v. Clegg, Brush & Assocs., Inc., 1991 WL 143361 (N.D. Ga. 1991); Christopherson v. Gross & Siegel, 89-6469-CO (D. Or. July 3, 1991); Stone v. Talan & Ktsanes, 1991 WL 134364 (D. Or. 1991); Lachman v. Bank of Louisiana, 510 F. Supp. 753, 758 (N.D. Ohio 1981).

[138] Itri v. Equibank, N.A., 464 A.2d 1336 (Pa. Super. Ct. 1983).

[139] Sibley v. Fulton DeKalb Collection Service, 677 F.2d 830 (11th Cir. 1982).

[140] Peterson v. United Accounts, Inc., 638 F.2d 1134 (8th Cir. 1981); Leatherwood v. Universal Business Service Co., 115 F.R.D. 48 (W.D.N.Y. 1987); Venes v. Professional Service Bureau, Inc., 353 N.W.2d 671 (Minn. Ct. App. 1984).

[141] Avila v. Van Ru Credit Corp., 1995 U.S. Dist. LEXIS 1502 (N.D. Ill., February 8, 1995).

[142] Hardin v. Folger, supra.

[143] 15 U.S.C. § 1692k.

[144] "The question is not whether the plaintiffs were deceived or misled, but rather whether an unsophisticated consumer would have been misled." Beattie v. D.M. Collections, Inc., 754 F. Supp. 383, 392 (D. Del. 1991).

[145] West v. Costen, 558 F. Supp. 570 (W.D. Va. 1983); Duran v. Credit Bureau of Yuma, Inc., 93 F.R.D. 607 (D. Ariz. 1982); Miller v. Mikell, 81 C 4736 (N.D. Ill.) (class action under FDCPA and state law was settled for $25,000 to 1100 class members, $1000 actual damages to the named plaintiff, and $10,110 in attorney fees).

[146] Vaughn v. CSC Services, Inc., 1995 U.S. Dist. LEXIS 1358 (N.D. Ill., February 3, 1995).

[147] Avila v. Van Ru Credit Corp., 1995 U.S. Dist. LEXIS 1502 (N.D. Ill., February 8, 1995).

[148] Zanni v. Lippold, 119 F.R.D. 32, 35 (C.D.Ill. 1988).

[149] 15 Fed. Reg. 50097, 50097, 50097-50110 (December 13, 1988).

[150] *Id.* at 50101.

[151] 15 U.S.C. § 1692l (d).

[152] Heintz v. Jenkins, 115 S.Ct. 1489 (1995). *See also* Scott v. Jones, 964 F.2d 314, 317 (4th Cir. 1992) ("We decline to adopt the FTC's position"); Carroll v. Wolpoff & Abramson, 961 F.2d 459, 461 n. 4 (4th Cir. 1992) ("We find the position of the FTC unpersuasive"); Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22, 27 (2d Cir. 1989); Hulshizer v. Global Credit Services, Inc., 728 F.2d 1037 (8th Cir. 1984); Cortright v. Thompson, 812 F. Supp. 772 (N.D. Ill. 1992).

[153] 15 U.S.C. § 1692k (e).