

# Filing Of Collection Suit Triggered Fair Debt Act

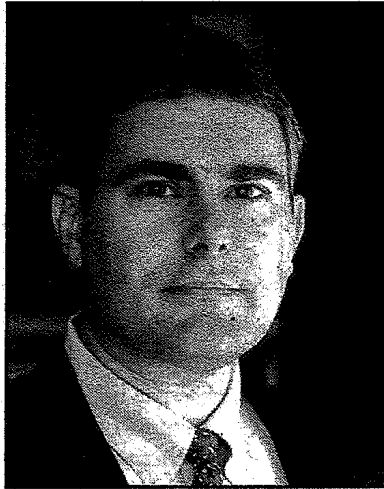
By Correy E. Stephenson

A state court complaint and summons in a collection action constituted an "initial communication" triggering the protections of the Fair Debt Collection Practices Act, the 7th Circuit has ruled.

Under the act, within five days of a creditor or debt collector's initial communication seeking to enforce a debt, a debt validation notice must be sent to debtors informing them of their rights (15 U.S.C. §1692 et. seq.) The debtors then have 30 days to request verification of the amount owed and challenge the debt.

In the 7th Circuit case, a law firm filed suit in state court on behalf of a car lessor when the plaintiff missed several car payments.

In response, the plaintiff filed suit



**To be safe, lawyers should "give [a] FDCPA notice and wait 30 days before filing a state collection action," said Manuel Newburger.**

against the both the law firm and the car leasing company, alleging violations of the FDCPA.

The decision creates a split among the circuits. The 11th Circuit recently held to the contrary under very similar facts. (See "Complaint Not 'Communication' Under Fair Debt Act," Lawyers Weekly USA, Jan. 5, 2004. Search words for LWUSA Archives: Vega and McKay.)

Consumer advocates told Lawyers Weekly USA that the decision is good news for both debtors and attorneys who act as debt collectors.

"Not only is it beneficial for consumers, but in terms of client relations, this decision gives lawyers a basis for explaining to their clients why all the extra documentation is necessary," said Austin, Texas consumer

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law specialist Manuel H. Newburger.

And O. Randolph Bragg, a Chicago debtor's attorney, said that the ruling "gives the debtor an opportunity to try and settle the debt himself."

But David M. Shultz, who represents lawyers and debt collection agencies in Chicago, said that the act was not intended to apply to litigation.

"It's certainly a very different setting when you are involved in a lawsuit than if you are getting dunned [by] someone," he explained. "I don't know if it's necessary [to include the Fair Debt Act requirements] when you are already working within court requirements."

And Chicago attorney Peter A. Monahan, who represented the law firm in the 7th Circuit case, told Lawyers Weekly USA that the decision could result in a clash between federal and state law.

"Essentially the Fair Debt Act has been grafted onto" Illinois law, he said.

## Complaint And Summons

Frank Thomas purchased a Chevrolet Blazer in January 1998 under an installment contract that was immediately assigned by the dealership to General Motors Acceptance Corporation (GMAC).

Shortly after he lost his job in 2000, the plaintiff received a default letter on GMAC letterhead informing him that his payment on the vehicle was past due.

Two months later, the law firm Simpson & Cybak, representing GMAC, sued the plaintiff in Illinois state court seeking to recover the Blazer.

The complaint included a statement that, "[p]ursuant to the [FDCPA], you are advised that this law firm is a debt collector attempting to collect a debt, and any information obtained will be used for that purpose."

The summons included similar language.

The plaintiff then filed suit against both GMAC and the law firm, claiming they had violated the act because neither party sent him a preliminary debt validation notice informing him of his rights as a debtor, pursuant to 15 U.S.C. § 1692(g).

A U.S. District Court granted the defendants' motion to dismiss.

Although the plaintiff handled the District Court proceedings and initial appeal pro se, the 7th Circuit appointed Marquette University Law School Professor Jessica E. Price to argue on behalf of the plaintiff. Then, in a 2-1 decision, it reversed the District Court.

First, said the court, because the act applies to debt collectors, not creditors, GMAC's letter to the plaintiff was not covered by the act.

But, said the court, the plain language of the act covers court filings.

"The FDCPA defines a 'communication' broadly: 'the conveying of information regarding a debt directly or indirectly to any person through any medium,'" the court said. "By its terms ... the FDCPA's broad definition of a 'communication' encompasses the filing of a summons and complaint. When [the firm] filed the summons and complaint, it conveyed information regarding [the plaintiff's] debt," the court said.

Noting that the statute was intended to protect consumers from unfair debt collection practices, the court said that its "interpretation ... furthers this objective because it helps ensure that debtors will be informed about their validation rights and that debt collectors will investigate claims before initiating litigation to collect debts."

The court said the federal trial courts were split on this issue.

A dissenting judge argued that the act shouldn't be read to apply to a complaint

and summons.

"[I]n this case, the lawyers were not sending dunning 'communications' to [the plaintiff]. Instead, they were doing what lawyers traditionally do - filing a lawsuit in state court on behalf of their client. To hold that they must include in their court pleadings all the notice/validation, etc. information required by the FDCPA seems very odd indeed," he said.

Monahan said his client would seek re-hearing based on the conflict with the recent 11th Circuit decision, and if that is unsuccessful, will petition for re-hearing en banc.

## State And Federal Conflicts

The 7th Circuit's decision will have a wide-ranging impact, Monahan said.

"If the [act] applies to a summons and complaint, then we must assume it applies to everything else that follows," he said.

He noted that the act has much more stringent requirements than state collection actions.

"Generally, a prayer for relief in a state collection complaint may not be sufficient under the FDCPA," he explained.

For example, the act gives debtors a 30-day period to dispute their debt after they receive an initial communication. "But the Illinois Civil Practice Act gives only 20 days after service of summons for a plaintiff to respond. How can a plaintiff comply with both?" he asked.

And, he added as a result of the decision, lawyers in the states covered by the 7th Circuit - Illinois, Indiana and Wisconsin - will now have to make sure that their pleadings in collection cases "conform to the requirements of initial communications under the FDCPA."

But Bragg said that he did not think the burden on attorneys would be overwhelming, nor that firms will automatically be sub-

ject to the act.

"An initial question is whether the attorney is considered a 'debt collector,'" he said. "If this is the one and only collection suit he has filed, then he is not a debt collector under the FDCPA."

He explained that to be considered a debt collector, a lawyer's principal business must be debt collection.

Still, Schultz said that attaching a Fair Debt Act verification notice to pleadings "to be on the safe side" isn't "a startling opinion."

"The lesson is that until the courts resolve [the issue, an attorney] should give [a] FDCPA notice and wait 30 days before filing a state collection action," Newburger said. "Then you're home free."

But Schulz did express concern that the latest decision could be used by plaintiffs to file "technical" lawsuits.

"It would be a bit of a shame to use this opinion to create ancillary litigation over fairly technical issues that I'm not sure people are getting hurt over," he said.

*U.S. Court of Appeals, 7th Circuit. Thomas v. Law Firm of Simpson & Cybak, No. 02-1113. January 13, 2004. Lawyers Weekly USA No. 9927419. To link to the full text of this opinion, go to:*

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