



OUTSIDE COUNSEL

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Defining Meaningful Attorney Involvement Under the FDCPA

Collection attorneys have come under attack for sending dunning letters to consumers. Consumers claim the letters violate the Fair Debt Collection Practices Act¹ if the collection attorneys lack “meaningful involvement” with the consumers’ accounts prior to issuing each letter. Lack of meaningful involvement causes each letter to be a “false, deceptive and misleading representation” that the communication (letter) is from an attorney.

The courts have crafted standards of review in cases in which attorneys who sent dunning letters clearly had no involvement in the collection process.² In those cases, defendants sold the use of their letterhead to collection agencies or creditors and did not participate in the collection of the debt. No clear standard has emerged in cases in which a law firm regularly collects debts with actual authority from its client to do so.

The Fair Debt Collection Practices Act (FDCPA) was adopted in 1977. Its purpose was to eliminate abusive practices by debt collectors, insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and promote consistent state action to protect consumers against debt collection abuses.

Attorneys were at first exempted from the act, but the exemption was revoked in 1986.³ Attorneys are now caught between the duties of a “debt collector” under the FDCPA and an attorney’s responsibilities under the Code of Professional Responsibility.

Not Defined

Section 1692e[36] of the FDCPA provides that “a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt ... [including] ... the false representation or implication that any individual is an attorney or

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that any communication is from an attorney ... [and/or] the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.”

What authority must a collection attorney have from a client to act on its behalf, and what actions must the collection attorney take on behalf of its client to be meaningfully involved?

There is no definition nor reference to “meaningful attorney involvement” in the statute.

Consumers argue that a collection attorney is not “meaningfully involved” and cannot independently make the judgment necessary to issue a dunning letter without reviewing the consumer’s entire credit file. Consumers claim the review of information contained in a spreadsheet or data file (which is how files are initially referred by large financial institutions) is prima facie inadequate to allow independent judgment, notwithstanding the fact that these files contain the same information as the statements of account.

Though the basis of this alleged breach is ethical, not statutory, the lack of meaningful involvement causes any communication sent by the attorney to a consumer to be false, deceptive and misleading, thereby violating the FDCPA. The result is a standard of review easily applied to clear-cut cases of abuse, but which fails to consider the nature of the relationship a legitimate collection law firm has with its clients.

Determining if an attorney is meaningfully involved in the prosecution of a client’s claim appears simple, but is vexing in application.

Courts and bar agencies, struggling to define the somewhat amorphous concept of the practice of law, have devised several tests including the “commonly understood” test that defines the practice of law as composed of activities that lawyers have traditionally performed,⁴ and the existence of an attorney-client relationship test.⁵

If an attorney-client relationship exists in which the attorney is actively providing services to his client and the client benefits therefrom, there is meaningful involvement.

Fair Debt Collection Practices Act case law also examines the attorney-client relationship, but its focus is on the lack of a meaningful relationship. Without a meaningful relationship, there cannot be meaningful involvement.

In the following cases, meaningful involvement did not exist because the defendants did little more than allow their letterhead to be used by their clients to send out dunning letters.

‘Clomon’

In *Clomon v. Jackson*, the U.S. Court of Appeals for the Second Circuit held that a letter from a law firm implies that an attorney has actually reviewed the claim and is actually handling the file.

Defendant Jackson acknowledged “he did not have any direct personal involvement in the mailing of letters to Clomon (or to any other debtor): he never reviewed Clomon’s file; he never reviewed or signed any letter that was sent in his name to Clomon.”

“The fact that Jackson played virtually no day-to-day role in the debt collection process supports the conclusion that the collection letters

were not 'from' Jackson in any meaningful sense of that word," the circuit ruled.

In *Avila v. Rubin*, the Seventh Circuit found that "Rubin has no real involvement in the mailing of dunning letters to debtors. Rubin is not personally or indirectly involved in deciding when or to whom a dunning letter should be sent. There is no real judgement being rendered here by a real attorney. ... The 'law firm' does not have a retainer agreement with plaintiffs' creditor. No attorney working in the 'law firm' ever files a lawsuit or goes to court on behalf of a client."

In another Seventh Circuit case, *Boyd v. Wexler*, the court held that "the Act forbids a debt collector, which Wexler is conceded to be, to use any false, deceptive, or misleading representation or means in connection with the collection of any debt," including "the false representation or implication that any individual is an attorney or that any communication is from an attorney. ... A lawyer who merely rents his letterhead to a collection agency violates the Act, for in such a case the lawyer is allowing the collection agency to impersonate him."⁶

In *Neilsen v. Dickerson*, the Seventh Circuit found that Household Bank paid Dickerson a flat fee of \$2.45 per letter regardless of the result that the letter produced. The fixed and quite modest nature of Dickerson's remuneration strongly suggests that Household was paying for the marquee value of Dickerson's name rather than his professional assistance in the collection of its debts.

"Dickerson played barely more than a ministerial role in handling the responses to his letter," the court ruled. "Dickerson had not been engaged and was not prepared to take legal action in pursuit of the debt; he had no authority to negotiate a payment plan, settle, or otherwise dispose of any debt."

No Relationship

The common thread running through these decisions is that there was no relationship between the attorney and client beyond the dunning letters.

The courts emphasized the lack of actual attorney involvement by underscoring lack of a retainer agreement, lack of review of letters or files, lack of daily participation, lack of supervisory control of the collection process, lack of the authority to respond to debtors' letters, and lack of authority to settle or otherwise dispose of cases.

So, what must an attorney do to be meaningfully involved?

The Los Angeles County Bar⁷ concluded that an attorney would not mislead debtors (and therefore not violate ethical constraints and professional responsibilities) by mass mailing collection letters on an attorney's letterhead when (1) the attorney established a procedure by which determinations were made to mail particular

letters to particular people, (2) the form letter was initially reviewed by the attorney, (3) the attorney supervised the staff, and (4) the staff followed the procedures.

Similarly, in *Heintz v. Jenkins*, U.S. Supreme Court Justice Stephen Breyer wrote in response to concerns from lawyers regarding collection

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litigation that "the Act says explicitly that a 'debt collector' may not be held liable if he 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."

Guidelines Provided

Though the *Clomon*, *Avila*, *Boyd* and *Neilsen* courts did not set a standard of review, they did provide guidance by highlighting actions the defendants failed to take.

To be meaningfully involved, collection attorneys must have a meaningful business relationship with their clients with actual authority to settle or otherwise dispose of their clients' accounts. They must have collection procedures in place and must control, supervise and actively participate in the collection process.

Attorneys can be in compliance if part of the review process is delegated to paralegals or computer programs and even if they lack access to their clients' entire files prior to issuing dunning letters.

As the Fourth Circuit held in *Amond v. Brincefield, Hartnett & Associates*,⁸ "lawyers who regularly engage in consumer debt collection activity are subject to the limitations of the FDCPA, even where their conduct involves litigation. However, they are not subject to any special, higher duty under the FDCPA solely by virtue of their status as lawyers. ... The Act reads that debt collectors are not liable for attempting to collect validly certified amounts owed their client. It does not say that the collector's status as an attorney should add a requirement of independent legal analysis for each aspect of the creditor's claim. ... to interpret the FDCPA as not to treat lawyers and debt collectors equally would contort the statute's meaning, and ignore Congress' drafting and the Supreme Court's interpretation."

To determine if meaningful attorney involvement exists, courts should consider the totality of

the attorney-client relationship and the actual role performed by the attorney in the collection process. They should ascertain if procedures are in place and if those procedures are implemented under the supervision of attorneys.

In their examinations, they will find that the presence of the following criteria is evidence of a meaningful relationship:

- There is a retainer agreement setting forth the obligations and responsibilities of both attorney and client.
- The attorney has knowledge of client practices and procedures, including those related to delinquent accounts.
- The attorney and client regularly communicate in regard to collection practices and procedures, and regularly update information concerning individual accounts.
- The attorney and client have established processes for the transmission of account information and the collection of the referred accounts.
- The attorney has reviewed and retained copies of consumer contracts governing the referred accounts.
- The attorney has actual authority from the client to act on its behalf and regularly contracts debtors, settles accounts, negotiates payment arrangements, responds to communications from debtors and their representatives, including disputes and validation demands, and otherwise disposes of the debt.
- Attorneys control the collection process, draft all collection letters, and supervise staff to insure that the process and procedures are properly implemented.

(1) Consumer Credit Protection Act, 15 U.S.C. §1692 et seq.
 (2) *Avila v. Rubin*, 84 F3d 222 (7th Cir. 1996); *Boyd v. Wexler*, 275 F3d 642 (7th Cir. 2001); *Clomon v. Jackson*, 988 F2d 1314, 1318 (2d Cir. 1993); *Nielsen v. Dickerson*, 307 F3d 623, 2002 WL 31255777 (7th Cir.(Ill.)); *Taylor v. Perrin, Landry deLaunay & Durand*, 103 F3d 1232 (5th Cir. 1997).

(3) The Act was amended in Pub.L. 99-361, July 9, 1986, 100 Stat. 768, deleting the attorney exemption in 15 U.S.C. §1692a(6)(F). See *Heintz v. Jenkins*, 514 U.S. 291 (1995).

(4) *State Bar of Arizona v. Arizona Land Title and Trust Co.*, 366 P.2d at 9 ("We believe it sufficient to state that those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries must constitute 'the practice of law.'") Cited in FTC Letter.

(5) *Virginia v. Jones & Robins, Inc.*, 41 S.E.2d 720, 727 (Va. 1947). Cited in FTC Letter.

(6) *Boyd*, 275 F3d at 644, citing 15 U.S.C. § 1692j(a); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F3d 1232, 1235-38 (5th Cir.1997); cf. *White v. Goodman*, 200 F3d 1016, 1018 (7th Cir.2000).

(7) Los Angeles County Bar Association. Formal Ethics Opinion, No. 338 (Sept. 27, 1973).

(8) U.S. App. Lexis 4815 at pps. 8, 9 (4th Cir. 1999).