PERIL IN PENNSYLVANIA

How Violating the Fair Debt Collection Practices Act Turned a Creditor Into a Debtor

By: William L. Hallam

Congress enacted the Fair Debt Collection Practices Act ("FDCPA") in 1977 "to eliminate abusive debt collection practices by debt collectors." Among other things, the FDCPA: (1) requires that either in the "initial communication" between a debt collector and a consumer borrower or within five days after the initial communication if the initial communication is oral, the debt collector inform the borrower in writing that: (a) the borrower has the right to dispute the debt; and (b) if the borrower disputes the debt within 30 days, the debt collector will provide a verification of the debt; (2) requires the debt collector to suspend collection activities if the borrower disputes the debt within the 30 day period until verification of the debt is provided; (3) prohibits use of any "false, deceptive, or misleading representation or means in connection with the collection of any debt;" and (4) prohibits attempting to collect any charge unless it is "expressly authorized by the agreement creating the debt or permitted by law." Debt collectors who violate the FDCPA and the creditors on whose behalf they are seeking to collect debts are liable to borrowers for actual damages and civil penalties.

Initially, attorneys collecting debts on behalf of clients were excluded from the definition of "debt collector." However, Congress later eliminated this exclusion, making attorneys subject to the FDCPA. This raised a host of problems when the initial communication between the debt collector and the borrower was a complaint seeking a judgment for the unpaid balance of the loan. For example, the required notice that the borrower had 30 days in which to dispute the debt often conflicted with the amount of days in which the borrower was obligated to answer the complaint under applicable court rules. In addition, it was unclear how to reconcile the debt collector's obligation to cease collection activities until a verification of the debt had been provided if the borrower disputed the debt within 30 days with court rules governing when events are to occur in litigation. Consequently, Congress amended the FDCPA to provide that if a filed complaint is the initial communication between the debt collector and the borrower: (1) the complaint does not have to include the information that otherwise has to be communicated to the borrower in writing in the initial communication or within five days thereafter; and (2) the obligation to cease collection activities until a verification of the debt has been provided if the borrower disputes the debt within 30 days does not apply.

While these amendments lessened the conflicts between the FDCPA and court rules when attorneys filed suit on behalf of clients to collect consumer loans, an April 2015 decision of the United States Court of Appeals for the Third Circuit underscores that the FDCPA still can have a profound effect in consumer loan collection litigation. In *Kaymark v. Bank of America*, the Udren Law Firm had filed a foreclosure complaint against Mr. Kaymark in Pennsylvania state court. The complaint alleged that Mr. Kaymark owed, in addition to over $226,000 in principal, interest, and late charges on the loan

secured by the mortgage on his home, $1,650 in attorneys' fees, $325 for a title report, and $75 for a property inspection.

Mr. Kaymark responded by suing Bank of America and the Udren Law Firm in federal court. Mr. Kaymark alleged that, because the attorneys' fees, title search fees, and property inspection fees had not yet been incurred by the Bank when the complaint was filed against him, the Bank and the Udren Law Firm had violated the FDCPA by including them in the complaint. Mr. Kaymark claimed that Bank of America and the Udren Law Firm had violated: (1) Section 1692e(2)(A) which prohibits "a false representation of…the character, amount, or legal status of any debt; (2) Section 1692e(5) which prohibits "the threat to take any action that cannot legally be taken or that is not intended to be taken;" (3) Section 1692e(10) which prohibits "the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer;" and (4) Section 1692(f)(1) which prohibits attempting to collect any "amount…unless such amount is expressly authorized by the agreement creating the debt or permitted by law."

The Bank and the Udren Law Firm moved to dismiss Mr. Kaymark's complaint. They pointed out that Mr. Kaymark had agreed in his mortgage to pay various fees, specifically including attorneys' fees and property inspection fees" resulting from "services performed in connection with his default" or incurred by the Bank "in pursuing authorized remedies." They asserted that the amounts in the complaint were reasonable estimates of the fees and expenses that the Bank would incur in the foreclosure process, pointing out that they were consistent with maximum fees for such services allowed under the FNMA servicing guide.

The District Court dismissed all of the claims asserted by Mr. Kaymark under the FDCPA. The District Court found that the amounts in the complaint were reasonable estimates of the expenses that the Bank would necessarily incur in the foreclosure case and described as "hypertechnical" Mr. Kaymark's argument that including them in the complaint violated the FDCPA because the expenses had not yet actually been incurred by the Bank at the time the complaint was filed. Mr. Kaymark appealed to the Third Circuit.

The Third Circuit agreed with the District Court that the Bank and the Udren Law Firm had not violated Section 1692e(5) because they had not threatened to take any action in the complaint. As to every other claim asserted by Mr. Kaymark under the FDCPA, however, the Third Circuit sided with Mr. Kaymark, reversed the dismissal of those claims, and sent the case back to the District Court for trial.

The Third Circuit reasoned that the mortgage did not expressly authorize the Bank to sue for estimated reasonable fees and expenses, but only for fees and expenses actually incurred by the Bank. By alleging that Mr. Kaymark owed fees before they were incurred, the Udren Law Firm had made "a false representation of…the amount… of the debt," made "a false representation to collect or attempt to collect [a] debt," and had attempted to collect an amount not "expressly authorized by the agreement creating the debt," each of which is a violation of the FDCPA. The Bank and the Udren Law Firm

argued that statements in complaints did not have the potentially abusive effects on consumer borrowers that the FDCPA was intended to prevent because borrowers had a full opportunity to contest the allegations under court supervision. In support of this argument, the Bank and the Udren Law Firm pointed to the amendment of the FDCPA to exempt complaints from having to comply with the "initial communication" notice requirements and to dispense with the requirement to cease collection activity if the debt is disputed, asserting that those amendments evidence recognition by Congress that there is less potential for abuse in a judicial setting. However, the Third Circuit said that the fact that Congress found it appropriate to exempt complaints from these specific FDCPA requirements showed that Congress indeed regarded complaints as being subject to the FDCPA and reinforced its conclusion that complaints were required to comply with the FDCPA in the absence of specific exemptions.

The end result of the *Kaymark* case is that by alleging that Mr. Kaymark owed just over $2,000 in fees and expenses that had not yet been incurred, the Udren Law Firm subjected itself and its client to liability to the defaulting borrower. As the Third Circuit put it, the prudence of this result "is not ours to decide; it is Congress's."

For any of your other creditors' rights needs, please contact an attorney in our creditors' rights group:

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