

**ALERT**

## **FINANCE, INSOLVENCY & RESTRUCTURING**

November 2007

### **Recent Seventh Circuit Case Provides Roadmap for Federal Fair Debt Collection Practices Act**

On October 23, 2007, the Seventh Circuit Court of Appeals handed down a very important and far-reaching series of rulings regarding the Federal Fair Debt Collection Practices Act (FDCPA). The Court consolidated for decision four unrelated, but yet intertwined cases. In its decision, the Seventh Circuit answers a number of important heretofore generally unanswered questions in this circuit about whether, and to what extent, the FDCPA rules differ when a debt collector is communicating with a debtor's lawyer rather than with the debtor himself, both in general and in the context of settlement offers.

In addition, this decision answers certain questions regarding the role of Fed. R. Civ. P 12(c) (judgment on the pleadings) in deciding claims of violation of Section 1692e (false, deceptive, or misleading representations). Here the issue is whether these kinds of claims are to be treated always as a matter of law, or always as a matter of fact, or sometimes as a matter of fact and sometimes as a matter of law. The following series of rules and principles can be gleaned from this very important decision:

#### **Required Notices to a Debtor's Lawyer**

- *Any* written notice sent to the debtor's lawyer must contain the information that would be required by the FDCPA if the notice were sent to the debtor directly. (Although the court's legal analysis was based upon the need for the lawyer and the debtor to have the "validation of debt" information required by Section 1692g, the court's actual ruling *may be* equally applicable to the "mini-Miranda" notices required to be provided to the debtor under Section 1692e(11).)

#### **False, Misleading, Deceptive, Etc. Communications with the Debtor's Lawyer**

- A debtor may assert a cognizable claim under Section 1692d (harassment or abuse), Section 1692e (false, misleading, or deceptive representations), and/or Section 1692f (unfair or unconscionable practices), even when the purportedly offensive communication is directed at the debtor's lawyer. This ruling places the Seventh Circuit at odds with the Second and Ninth Circuits, but in agreement with the Fourth Circuit on this issue.

- The *standard* for determining whether a particular communication violates the FDCPA varies, depending upon whether the debtor or the debtor’s lawyer is the (initial) recipient of the debt collector’s communication. More specifically, the standard for establishing a violation is (almost) always higher when the purportedly offensive communication is directed at the debtor’s lawyer.
- With respect to claims based upon “misrepresentation” or “deception,” representations by a debt collector to a debtor’s lawyer that would be unlikely to deceive a *competent lawyer* are *not* actionable, even when the debtor’s actual lawyer is not a specialist or particularly knowledgeable in consumer debt law. (Presumably, an analogously higher standard would apply to claims based upon harassment, abuse, unfairness, or unconscionability, when the debt collector’s communication is directed at the debtor’s lawyer.)
- By contrast, if the claim is based upon a “false claim of fact” (as distinguished from simply a “misleading” or a “deceptive” representation) directed at the debtor’s lawyer, then the standard is the same as when the “false” representation is made to the debtor directly. Such a claim will be actionable whether made to the debtor directly or indirectly through his lawyer. (The theory here is that a debtor’s lawyer will be no better able to figure out the existence of a “false” statement than the debtor himself, when, for example, the debt collector lies about the amount of the debt owed (*i.e.*, makes a “false claim of fact”).)

#### **Settlement Offers by Debt Collectors**

- Settlement offers pose special consideration under the FDCPA, with certain courts concluding that a settlement offer contained in a letter from the debt collector to a debtor is lawful *per se* under Section 1692f. Here the Seventh Circuit determined that such settlement offers are *not* lawful *per se*, siding with the Fifth Circuit but disagreeing with the Sixth Circuit on this issue.
- The typical situation concerns a written settlement proposal wherein the debt collector, in an effort to induce prompt payment on the debt, offers to the debtor a discount from the full amount of the debt if payment of the lesser amount is received by a particular date or within a relatively short period of time. The Seventh Circuit recognized that, in those circumstances, an unsophisticated debtor might believe that the offer is a “one-time offer” and is available only if payment is actually made by the stated deadline when, in fact, substantially the same offer would likely be renewed at a later time, perhaps on even more favorable terms. So are such offers “deceptive” or “misleading” under Section 1692e? Without deciding whether the FDCPA would be violated under the language of any particular settlement proposal of this sort, the Seventh Circuit fashioned the following “safe-harbor language” to be inserted immediately after the settlement proposal language: “We are not obligated to renew this offer.” While the absence of this “safe-harbor language” will not be deemed a *per se* violation of the FDCPA, the inclusion of such language will have the effect of protecting debt collectors from liability under Section 1692e just in case.
- Claims pertaining to settlement offers directed at the debtor’s lawyer will rarely, if ever, survive the debt collector’s motion for summary judgment or even judgment on the pleadings, due to the presumptive “competent lawyer” standard described above. (However, it appears that if the debt collector misstates the amount of the existing debt in making the settlement offer to the debtor through his lawyer, the debtor would have a good claim against the debt collector in that instance.)

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**Satisfying the Debtor’s Burden in Establishing  
a “Deception” Claim under the FDCPA**

- The standard for “deception” (when the debt collector’s communication is directed at the debtor rather than at his lawyer) is not whether the “least intelligent consumer” in the entire nation would be deceived, but rather whether “the average consumer in the lowest quartile (or some other substantial bottom fraction)” of the population or, as applicable, the targeted group would be deceived.
- For the most part, the Seventh Circuit expects a plaintiff debtor to provide to the court some kind of a consumer survey, prepared in compliance with principles of professional survey research, in order to satisfy the requisite “deception” standard under the FDCPA. With certain exceptions described below, the Seventh Circuit treats the deceptive character of a debt collector’s communication as a question of fact, rather than as a question of law. Here the Seventh Circuit went against both the Third and Ninth Circuits, each of which had determined that such claims are always to be determined as a matter of law.
- Even though the issue of “deception” under the FDCPA is to be treated as a question of fact, rather than as a question law, certain instances do exist where a court can properly reject a debtor’s “deception” claim on the pleadings alone. Examples include: (1) where the plaintiff has relied exclusively on, and rested upon, the text of the communication itself and there is “nothing deceptive-seeming about the communication”; (2) where the debt collector uses “clear statutory language” in the communication; (3) where the debt collector uses the Seventh Circuit’s “safe-harbor language” in the communication; (4) where the “false” or “deceptive” statement made by the debt collector is “immaterial”; (5) where the “false” or “deceptive” statement is “clarified” elsewhere in the communication; and (6) where a statement claimed to be “false” is “obviously true.”

The case is *Evory v. RJM Acquisitions Funding L.L.C.*, 06-2130 (7th Cir. 10-23-2007) *Tammy A. Evory, et al., individually and on behalf of all others similarly situated, Plaintiffs-Appellants, v. RJM Acquisitions Funding L.L.C., et al., Defendants-Appellees, Kelly Lauer and Karla Lauer, Plaintiffs-Appellants, v. Mason, Silver, Wenk & Mishkin, LLC, et al., Defendants-Appellees, Kevin I. Captain, Plaintiff-Appellant, v. ARS National Services, Inc., Defendant-Appellee, Philip Jackson, et al., individually and on behalf of all others similarly situated, Plaintiffs-Appellants, v. National Action Financial Services, Inc., et al., Defendants-Appellees*, Nos. 06-2130 to 2132, 06-2134, 06-2157, 06-2271, 06-3129, 06-3162, 06-3327, 06-3439, 06-3446 (7th Cir. Oct. 23, 2007).

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