Comment for the Federal Trade Commission's Debt Collection Workshop P074805

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Thank you for this opportunity to comment on the Fair Debt Collection Practices Act ("FDCPA").[1] My comments are made in response to the question posed in Topic 6(a): Are any modifications to the FDCPA warranted in light of technological, economic, or legal changes affecting the debt collection industry?

As a professor of law at St. John's University School of Law, I have taught and written about consumer protection for twenty years. I recently co-authored a casebook titled *Consumer Law Cases and Materials* (Thomson/West 3d ed. 2007) (with Professors John A. Spanogle, Ralph J. Rohner, and Dee Pridgen). The casebook explores a number of problem areas involving the FDCPA. While the problem areas make for interesting class room discussion, the statute would better serve its goals if the problems were ironed out. Accordingly, this comment discusses two of these problems. I am also a co-coordinator of the Consumer Law and Policy Blog (which can be read at www.clpblog.org) where I have previously blogged about at least one of these issues.

1. **Issues Regarding the Validation Requirement of FDCPA § 809, 15 U.S.C. § 1692g.**

Section 809 obliges debt collectors to offer to validate the consumer's debt within "five days after the initial communication with a consumer in connection with the collection of any debt . . . ." Before the 2006 amendment to that section, courts had split on whether a complaint qualified as an initial communication. Compare Vega v. McKay, 351 F.3d 1334 (11th Cir. 2003) with Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914 (7th Cir. 2004). The 2006 amendment added a new subsection (d) to provide that a "communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a)." The 2006 amendment takes care of whether the complaint is an initial communication. But what about a summons? Because complaints are usually accompanied by a summons, an exclusion for a complaint that does not also extend to a summons serves little purpose, but the subsection (d) exclusion seems not to apply to a summons. The FDCPA does not define pleadings, but a summons is not usually thought of as a pleading, much less a "formal pleading." Indeed, the definition of "pleadings" in Federal Rule of Civil Procedure 7(a) does not include a summons.

[1] These comments reflect my personal opinion and are not necessarily the views of St. John's University School of Law.

A summons would trigger the validation notice obligation only if it qualifies as a "communication," but it seemingly does so qualify. "Communication" is defined in the statute as "the conveying of information regarding a debt directly or indirectly to any person through any medium." A summons is certainly a medium for conveying information and because a summons discloses that a suit has been commenced based on the debt, it appears (at least indirectly, and probably directly, for that matter) to convey information about the debt. Indeed, in New York, summonses in cases arising out of consumer credit transactions are required to "prominently display at the top of the summons the words 'consumer credit transaction' . . . ." N.Y. McKinney's CPLR Rule 305(a). Even if a summons is somehow found not to trigger the validation notice obligation, there does not appear to be an argument for excluding later documents in a case (other than formal pleadings), such as motion papers or a discovery request, from triggering the validation notice obligation.

A second issue involving validation notices and the papers commencing a suit ("initiatory papers") involves the overshadowing doctrine, codified in the last sentence of § 809(b) in the 2006 amendments to the statute ("Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor."). In *In re* Martinez, 266 B.R. 523 (B.S.D. Fla.), *aff'd*, 271 B.R. 696 (S.D. Fla. 2001), *aff'd*, 311 F.3d 1272 (11th Cir. 2002), the court found that the summons and complaint overshadowed the validation notice. While that case antedated the 2006 codification of the overshadowing rule, nothing in the 2006 amendments indicates that Congress rejected the *Martinez* view that a validation notice can be overshadowed by initiatory papers. It is possible that *Martinez* should be confined to its facts: the court discussed the particular documents involved at length and emphasized that the validation notice appeared on the eighth page of the packet served on the defendant. But some of the court's reasoning suggests that making the validation notice more prominent would not have cured the problem. In particular, the court noted that the consumer's need to respond to the complaint might cause the consumer to overlook the validation notice. It is certainly understandable that a consumer faced with a law suit might overlook her rights under § 809. A related issue has to do with timing, as highlighted in Kafele v. Lerner, Sampson & Rothfuss, L.P.A., 2005 WL 1379107 (S.D. Oh. 2005), in which the defendant did not dispute that the requirement that the defendant respond to the summons and complaint within 28 days overshadowed the 30-day validation notice in such a way that it might confuse the least sophisticated debtor.

In short, the exception for formal pleadings in section 809(d) is either pointless—because debt collectors must still provide the validation notice for other court documents, such as a summons--or functions as a trap for unwary debt collectors by deceiving them into thinking that they need not serve a validation notice when they must—because, for example, they are serving a summons with the complaint. In addition, a validation notice may well be overshadowed by accompanying initiatory papers. Congress's original reasons for requiring the validation notice apply just as forcefully when a debt collector initiates contact with the consumer through a law suit as when the debt collector initiates

contact in other ways. Probably the best solution to this problem would be for debt collectors to avoid the overshadowing problem by providing a validation notice before serving the debtor with a summons and complaint. The FTC should urge Congress to amend the statute to so require. In the alternative, perhaps the FTC could provide guidance to debt collectors along those lines.

2. Issues regarding voice mail messages (This point also responds to Topic 3(a)(iii) about the role of telephone technology, including voice mail).

The FDCPA was enacted in 1977, when telephone answering machines were not yet common, and so the drafters of the statute understandably did not anticipate all the consequences of that technology. In the intervening decades, answering machines and voice mail have, of course, become omnipresent. Answering machines present a dilemma for debt collectors. Debt collectors who repeatedly reach an answering machine and respond by hanging up without leaving a message risk violating § 806, 15 U.S.C. § 1692d, barring harassment, and particularly subsection (5) of that provision ("Causing a telephone to ring . . . repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.") and subsection (6) (prohibiting "the placement of telephone calls without meaningful disclosure of the caller's identity").

Another option for a debt collector reaching an answer machine might be to leave a message. But a collector leaving a message risks violating three sections of the FDCPA. First, a collector leaving a message doesn't know who will overhear it. Consequently, the collector might fall afoul of § 805(b), 15 U.S.C. § 1692c(b), by communicating with third parties in connection with the collection of a debt. Second, a collector leaving a message may have to comply with the validation provision of § 809, 15 U.S.C. § 1692g, and the so-called Miranda warning of § 807(11), 15 U.S.C. § 1692e(11). Collectors must comply with those provisions in the initial communication; whether a message would qualify as a "communication" depends on whether information has been conveyed "regarding a debt" under § 803(2), 15 U.S.C. § 1692a(2).

The FTC Staff Commentary takes the position that if the collector does not refer to the debt or the caller's status as affiliated with a debt collector, the call does not convey information regarding a debt. § 803(2)-2.[2] It thus represents an attempt to amputate one horn of the debt collector's dilemma by permitting the collector to leave a limited message requesting a return call. The problem is that recent case law seems to reject the FTC position. Thus, in Foti v. NCO Financial Systems, Inc., 424 F. Supp.2d 643 (S.D.N.Y. 2006), the debt collector left a pre-recorded phone message at the debtor's home, saying "Good day, we are calling from NCO Financial Systems regarding a personal business matter that requires your immediate attention. Please call back 1-866-701-1275 once again please call back, toll-free, 1-866-701-1275, this is not a solicitation." The message did not mention a debt, but only a "personal business matter." The court nevertheless found this to be a communication within the meaning of the

[2] The Commentary refers to messages left with third parties but there does not appear to be a principled basis for distinguishing messages left on answering machines.

FDCPA, stating "The FDCPA should be interpreted to cover communications that convey, directly or indirectly, any information relating to a debt, and not just when the debt collector discloses specific information about the particular debt being collected."

Similarly, in Hosseinzadeh v. M.R.S. Associates, inc., 387 F. Supp.2d 1104 (C.D. Cal. 2006), the debt collector left several messages of which the following is typical: "Hello, this is Thomas Hunt calling. Please have an adult contact me regarding some rather important information. This is not a sales call, however, regulations prevent me from leaving more details. You will want to contact me at 1-877-647-5945 as soon as possible. This is a toll free number. Once again this is Thomas Hunt calling and my number is 1-877-647-5945. Thank you." The court found the messages to be communications even though, again, they did not explicitly mention the debt. The court also concluded that the messages violated the requirement of § 806(6), 15 U.S.C. § 16926(6), that debt collectors provide meaningful disclosure of their identity.

Debt collectors who follow the FTC Staff Commentary, then, risk liability under *Foti* and *Hosseinzadeh*. The FTC should encourage Congress to amend the FDCPA to clarify whether debt collectors can leave messages on telephone answering systems and if so, what can be said without incurring liability. Failing that, the FTC should revisit its Commentary to see if it needs updating.

I am grateful for the helpful suggestions of my colleague, Gina Calabrese, Associate Director of the St. John's University School of Law Elder Law Clinic and Assistant Professor for Clinical Education at St. John's University School of Law. Professor Calabrese is also filing a comment in connection with the Debt Collection Workshop.