

THE FDCPA AND POTENTIAL TECHNOLOGICAL PITFALLS (Continued from page 3)

a reminder to send the notice prior to depositing an electronic check.

Conclusion

When properly used, technology can provide tremendous benefits to collection agencies and attorney collectors. Technology must, however, be used with sound judgment to ensure that collection efforts do not run afoul of the law.

If you have any questions regarding the matters addressed

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This publication is provided only as a general discussion of legal principles and ideas. Every situation is unique and must be reviewed by a licensed attorney to determine the appropriate application of the law to any particular fact scenario. If you have a legal question, consult with an attorney. The reader of this publication will not rely upon anything herein as legal advice and will not substitute anything contained herein for obtaining legal advice from an attorney. No attorney-client relationship is formed by the publication or reading of this document. Moss & Barnett, P.A. assumes no liability for typographical or other errors contained herein or for changes in the law affecting anything discussed herein.

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THE COLLECTORS' ADVOCATE

LAW FIRM SCORES MAJOR VICTORIES FOR CREDIT AND COLLECTION INDUSTRY

Moss & Barnett, A Professional Association, scored two important victories on behalf of its clients that benefit the credit and collection industry. In one case, the firm secured the dismissal of a Fair Credit Reporting Act case brought against its collection agency client. The other a Fair Debt Collection Practices Act class action against an attorney collecting bad checks. Moss & Barnett represented the collectors in both of these victories that advanced the interests of all collectors.

In Re Abendroth, involved a claim that a collection agency wrongfully obtained a credit bureau report on the plaintiff. The plaintiff's name was nearly identical to the name of a debtor from whom the collection agency was attempting to collect a debt. When the collection agency requested a credit bureau report on the debtor, the credit reporting agencies mistakenly reported that the collection agency had requested a credit bureau on the non-debtor plaintiff.

The collection agency resolutely refused to pay any amount to settle with the plaintiff since it had committed no wrongdoing. Despite the substantial cost of defending, the steadfast approach paid off: the plaintiff agreed to voluntarily dismiss his claims against the collection agency after being presented with the evidence exonerating the collection agency.

In the case of In Re Hacken, a debtor's claim arose from the collector's attempt to secure payment on bad checks the debtor issued to various merchants. The consumer's actions against the debt collector included a purported class action. The collector's FDCPA defense counsel, John K. Rossman of Moss & Barnett, P.A.,

made several legal maneuvers that resulted in the dismissal of the actions against the debt collector for a nominal settlement

DESPITE THE SUBSTANTIAL COST OF DEFENDING, THE STEADFAST APPROACH PAID OFF.

amount. The attorney representing the consumer subsequently sought to modify the settlement agreement in an attempt to apparently force the defendant collection attorney to pay additional amounts. The defendant collection attorney refused to pay any further amounts and instead mounted an awe inspiring legal defense culminating with the complete dismissal of all claims, including the class action. Sanctions are now being sought against the consumer law attorney for his role in perpetuating these proceedings.

According to John K. Rossman, Chair of the Creditor Remedies and Bankruptcy Practice Group at Moss & Barnett, P.A., the collection agency owner in Abendroth affirmed that a tenacious and intelligent defense by a collector — coupled with an unyielding refusal to settle when the collector has committed no wrongdoing — is the best response in many of these cases brought by consumers. In this particular case, the initial documentary evidence from the credit bureaus wrongly indicated that the collection agency had requested a credit bureau on the plaintiff in violation of the law. However, the source documents from the credit bureaus — coded computer documents that were produced

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only after we served a subpoena — showed that the credit reporting agencies made an error in how they coded the credit bureau request of the collection agency.

In Hacken, careful planning and development of a legal strategy at the outset of the case resulted in a most favorable result for the client. The use of the Rule 68 Offer of Judgment, early motion practice to challenge the standing of the alleged class action, participation in a settlement conference, careful examination of a settlement agreement and forceful dispositive motion practice compelled dismissal of multiple federal cases by the consumer law attorney against the collector.

STATE AGENCY RULES THAT COLLECTION AGENCY MAY NOT ELECTRONICALLY RE-PRESENT TO COLLECT NSF FEE ON DISHONORED CHECK

The murky frontier of electronic re-presentation of bad checks became more treacherous and less certain with the issuance of a decision by the State of North Dakota, Commissioner of Financial Institutions, which held that a Collection Agency violated the Fair Debt Collection Practices Act and North Dakota law by electronically re-presenting the face value of a worthless check, plus the NSF service fee. This ruling furthers the split of authority on how collectors may use electronic re-presentation and the scope of re-presentation.

The agency in the North Dakota matter pursued electronic re-presentation of the face value of insufficient funds checks placed with the agency for collection, plus the agency also sought to electronically debit from the consumer's checking account the statutory NSF fee. The ruling by the state relied in part upon the fact that the collection agency did not, in every instance, ensure that a sign was posted at the point of sale, advising the consumer that an insufficient funds check issued to the merchant could result in an electronic debit of the face value of the check, plus the NSF service fee. Further, the state relied on the National Automated Clearing House Association (NACHA) rules that prohibit electronic debiting of the NSF fee from the consumer's account unless the consumer agrees in writing to such a debit from his or her account. Additionally, the state examined the official comments of the Federal Reserve Board to Regulation E, and specifically that section of the comments that state:

Moss & Barnett is presently defending, with the assistance of local counsel, two FDCPA class actions brought against separate collection agencies clients of the firm in New York. This is another example of how we have been able to apply strategies like those implemented in Hacken, on a national basis.

For further information on defense of Fair Debt Collection Practices Act or Fair Credit Reporting Act cases, contact John K. Rossman at Moss & Barnett, P.A., via email at rossmanj@moss-barnett.com or by phone at 612.347.0396.

The electronic re-presentation of a returned check is not covered by Regulation E because the transaction originated by check. Regulation E does apply, however, to any fee authorized by the consumer to be debited electronically from the consumer's account, because the check was returned for insufficient funds. Authorization occurs where the consumer has received notice that the fee imposed for the return check will be debited electronically from the consumer's account.

The state held in its ruling that even if the debt collector could verify that the merchant posted notice to its consumers regarding electronic debiting of the NSF fee, the electronic debit of a consumer's account for an NSF fee violates the Fair Debt Collection Practices Act unless the consumer gives consent to such transaction "directly to the debt collector."

If your company is involved in the electronic re-presentation of insufficient funds checks, and if your company is presently debiting from a debtor's account the NSF fee, you must review this decision with your counsel and examine your company's practices to avoid potential litigation on this issue.

For a free copy of the North Dakota decision, please contact Moss & Barnett, P.A., at 612.347.0396.

THE FDCPA AND POTENTIAL TECHNOLOGICAL PITFALLS

By Michael S. Poncin

No matter what industry, technological growth plays and will continue to play a vital role in permitting businesses to be competitive and handle tasks, which once would have been highly difficult, if not impossible, to do. This is, of course, true in the collection industry. Without doubt, technology has improved the ability to manage sizeable debt portfolios, whether or not your business is a large collection agency or a sole practitioner law office. New and improved collection software, e-mail communication technology, and electronic checks are all welcomed advances to the collection industry, but each comes with a sizeable risk.

Collection Software

Advances in debt collection software help collectors stay on top of files, provide updates to clients and record transactions and payments, in addition to providing a permanent record of collection activity which may be needed should a claim be made. In addition, even if a claim is made, collection software itself may provide your office with a defense to the action. In Danielson v. Hicks, 1995 WL 767290 (D. Minn. 1996), the Court held that evidence of a law firm's substantial expenditure on computers and software to prevent clerical errors constituted procedures to establish a bona fide error defense under the Fair Debt Collection Practices Act ("FDCPA").

Such benefits, however, may not always be the norm. Attorneys must not rely completely upon their collection software, as they must be "meaningfully involved" in the sending of a collection letter. See Sonmore v. CheckRite Recovery Services, Inc. et. al., 99-2039 (D. Minn. 2001). As set forth in Sonmore, "[t]he FDCPA prohibits a debt collector from sending a letter that falsely implies to the unsophisticated consumer that an attorney is pursuing them in an effort to collect a debt." Various factors to determine if an attorney is meaningfully involved include: 1) whether the attorney reviewed the file before issuing a dunning letter; 2) whether the attorney was aware of the identities of the intended recipients or circumstances of the debt; 3) whether the attorney exercised professional judgment in the sending of the letter; and, 4) whether the attorney drafted or supervised the drafting of the letter.

Last, collectors must remember to use the collection software as an aid in collections, not as replacement to exercising sound judgment.

E-mail Communications

The ability to e-mail also has benefits. It speeds up communications and is often a quicker, more viable means of communicating. However, due to its less secure nature, e-mail does have its drawbacks.

If you intend to use e-mail to communicate with a client, it is important to obtain permission from your client. As e-mail appears on the recipient's monitor, your client may wish to restrict and control the content of e-mail communications.

The use of e-mail leads to some interesting FDCPA concerns. If you send an e-mail to a debtor and it is read by an unintended party, even if sent to the proper e-mail address, is it an impermissible third-party contact, which consumer attorneys would also claim to be an invasion of privacy? At this point, we are not aware of any on-point decisions and would advise all interested parties to err on the side of caution. If you choose to communicate with debtors via e-mail you should first obtain written authorization from the debtor.

Electronic Checks

Electronic checks have helped to speed up delays in obtaining payments from debtors. However, even electronic check payments have a hidden pitfall of their own.

THE EASE OF COLLECTING VIA ELECTRONIC CHECKS MAY LEAD TO COLLECTORS FORGETTING TO SEND ONE NOTICE TO DEBTORS.

As most collectors know, the FDCPA forbids depositing a debtor's "check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument no more than ten nor less than three business days prior to such deposit." 15 U.S.C. § 1692f(2). The ease of collecting via electronic checks may lead to collectors forgetting to send one notice to debtors. This is where collection software with a tickler system can provide

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