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Attorney Liability Under the Fair Debt Collection Practices Act

BY CHAD M. KNIGHT*

INTRODUCTION

In 1977, Congress enacted the Fair Debt Collection Practices Act ("FDCPA" or the "Act")¹ to protect consumers against debt collection abuses.² The FDCPA serves to prohibit abusive or harassing communications by debt collectors to debtors.³ Originally, attorneys were excluded from the Act's coverage.⁴ However, in 1986, the FDCPA was amended, and the exclusion for attorneys was removed.⁵

After this exclusion was removed, the state courts and lower federal courts were divided on whether and under what circumstances the FDCPA should apply to attorneys.⁶ The Sixth Circuit, in *Green v. Hocking*,⁷ held that attorneys who collected consumer debts exclusively

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¹ Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977), amended by Pub. L. No. 99-361, 100 Stat. 768 (1986) (codified as amended at 15 U.S.C. §§ 1692-1692o (1994)).

² 15 U.S.C. § 1692(e) (1994).

³ *Id.* § 1692c(a).

⁴ Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 803(6)(F), 91 Stat. 874, 875 (1977), amended by Pub. L. No. 99-361, 100 Stat. 768 (1986).

⁵ Fair Debt Collection Practices Act, Pub. L. No. 99-361, 100 Stat. 768 (1986) (amending Pub. L. No. 95-109, § 803(6)(F)).

⁶ Compare *Green v. Hocking*, 9 F.3d 18, 22 (6th Cir. 1993) (holding that an attorney engaged exclusively in the practice of law was not covered under the FDCPA) with *Scott v. Jones*, 964 F.2d 314, 317 (4th Cir. 1992) (holding that the mere fact that attorney performed exclusively legal tasks did not preclude him from being considered a "debt collector") and *Zartman v. Shapiro & Meinhold*, 811 P.2d 409 (Colo. App. 1990) (holding that "debt collectors" under FDCPA included attorneys whose practices were limited to purely legal matters), *aff'd*, 823 P.2d 120, 125 (Colo. 1992).

⁷ *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993).

through litigation were excluded from the FDCPA's coverage.⁸ Then, in April of 1995, the United States Supreme Court, in *Heintz v. Jenkins*,⁹ ruled that attorneys who regularly collect consumer debts fall within the scope of the FDCPA, regardless of whether they collect debts through litigation or through traditional debt collection methods, such as telephone calls to debtors, collection letters, and repossessions.¹⁰

The 1986 amendments, and later the decision in *Heintz*, served as a response to the most widespread criticism of the FDCPA since its enactment in 1977: the exclusion from liability of attorneys engaged in debt collection.¹¹ In 1985, attorneys accounted for a greater proportion of the debt collection industry than did collection agencies.¹² Prior to the 1986 amendments, however, an attorney was essentially permitted to act as a traditional collection agency, yet avoid regulation under the FDCPA solely because of his professional status.

Part I of this Note provides an overview of the provisions of the FDCPA that are of particular importance to attorneys.¹³ Part II analyzes the Supreme Court's decision in *Heintz v. Jenkins*.¹⁴ Part III addresses the impact that *Heintz* will have on the way attorneys practice debt collection law.¹⁵ Finally, this Note concludes that all attorneys engaged in debt collection, even on a limited basis, should obtain a working knowledge of the provisions of the FDCPA to ensure compliance.¹⁶

I. THE PROVISIONS OF THE FDCPA

The FDCPA contains numerous technical provisions that an attorney should carefully review before engaging in consumer debt collection. The following provides an overview of some of the major requirements and prohibitions contained in the Act.

⁸ See *id.* at 22.

⁹ *Heintz v. Jenkins*, 115 S. Ct. 1489 (1995).

¹⁰ See *id.* at 1492.

¹¹ See H.R. REP. NO. 99-405, at 2 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752.

¹² In 1985, 5000 attorneys were engaged in the debt collection industry as opposed to 4500 traditional debt collection agencies. See *id.* at 2.

¹³ See *infra* notes 17-91 and accompanying text.

¹⁴ See *infra* notes 92-134 and accompanying text.

¹⁵ See *infra* notes 135-46 and accompanying text.

¹⁶ See *infra* notes 147-49 and accompanying text.

A. *Definition of a "Debt Collector"*

An understanding of the terms "debt"¹⁷ and "debt collector"¹⁸ as defined in the FDCPA is vital to an understanding of the application of the Act. The scope of the Act is only as broad as the definitions of these two terms.

The definition of "debt" as provided in the Act limits its scope to consumer debt.¹⁹ A debt incurred primarily for consumer purposes falls within the Act's definition of debt even if it also partially serves a business purpose.²⁰

A "debt collector" includes any person who uses any instrumentality of interstate commerce in a business whose principle purpose is debt collection (i.e., a collection agency) or any person who regularly collects, or attempts to collect, debts owed to another person.²¹ A creditor who collects his own debts does not fall within the Act's definition of a debt collector,²² provided that the creditor does not seek to collect the debts under an assumed name²³ and the principal business of the creditor is

¹⁷The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

15 U.S.C. § 1692a(5).

¹⁸The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.

Id. § 1692a(6).

¹⁹*Id.* § 1692a(5).

²⁰*See id.*

²¹*See Kempf v. Famous Barr Co.*, 676 F. Supp. 937, 938 (E.D. Mo. 1988).

²²*See, e.g., Teng v. Metropolitan Retail Recovery, Inc.*, 851 F. Supp. 61, 66 (E.D.N.Y. 1994) (emphasizing that a "debt collector" under the statutory definition collects debts "owed or due another").

²³The test is whether the assumed name would indicate to the consumer that a third party is collecting the debt on behalf of the creditor. *See* 15 U.S.C. § 1692a(6).

not debt collection.²⁴ Officers or employees of a creditor are also excluded from coverage when collecting debts on behalf of the employer.²⁵

Under this definition, an attorney collecting his own fees would not be covered by the Act. Nor would in-house counsel be covered, provided that the in-house attorney collects the debts in the name of the employer and not as an independent attorney.²⁶

The decision in *Heintz v. Jenkins*²⁷ established that an attorney who collects consumer debts for others may be considered a debt collector for purposes of the FDCPA regardless of whether that attorney collects the consumer debts through litigation or traditional debt collection methods.²⁸ However, not all attorneys who collect consumer debts necessarily will be considered debt collectors. To be considered a debt collector, an attorney must engage in debt collection activities on a regular basis.²⁹

Defining "regular basis" for purposes of liability under the FDCPA poses an especially difficult problem for attorneys. Traditional debt collection agencies clearly must comply with the Act because their entire business activity is devoted to collecting consumer debts for others.³⁰ At the other end of the spectrum are retailers, lending agencies, and other creditors who collect only their own debts and need not comply with the Act as long as they do not collect their debts under an assumed name.³¹ Attorneys, on the other hand, do not enjoy the same certainty. Attorneys often collect debts as a service to clients incidental to some other type of representation. There can be no assurances as to when or if this practice will be considered debt collection on a "regular basis."

The decision in *Heintz* offers little guidance in determining at what point an attorney's collection activity will become "regular."³² Lower

²⁴ See *id.* § 1692a(6)(B).

²⁵ See *id.* § 1692a(6)(A); *Kizer v. Finance Am. Credit Corp.*, 454 F. Supp. 937 (N.D. Miss. 1978); *Sterling Mirror of Md., Inc. v. Gordon*, 619 A.2d 64 (D.C. App. 1993).

²⁶ See *Dorsey v. Morgan*, 760 F. Supp. 509, 514 (D. Md. 1991).

²⁷ *Heintz v. Jenkins*, 115 S. Ct. 1489 (1995).

²⁸ *Id.* at 1493.

²⁹ See *supra* note 18 for the definition of a "debt collector"; see also *Mertes v. Devitt*, 734 F. Supp. 872, 874 (W.D. Wis. 1990) (holding attorney who averaged less than two collection matters per year comprising less than one percent of his practice did not regularly collect or attempt to collect debts of another and, therefore, was not a "debt collector" under the FDCPA).

³⁰ See *supra* notes 21-24 and accompanying text.

³¹ See *supra* notes 21-23 and accompanying text.

³² See *infra* notes 92-134 and accompanying text for an in-depth discussion

courts have typically considered two key factors of the debt collection activities: its frequency and its substantiality.³³ Additionally, when the client is a collection agency, courts will also take into consideration “whether or not there is found to be an ongoing relationship between the attorney and the collection agency he represented.”³⁴

There is no exact formula for determining when an attorney’s debt collection activities become “regular” so as to subject that attorney to exposure to liability under the FDCPA. Therefore, it is recommended that any attorney who performs even very little collection work obtain a working knowledge of the provisions of the Act.

B. Regulatory Provisions of the FDCPA

The FDCPA governs the conduct of debt collectors³⁵ in four primary areas. First, the FDCPA governs communications by the debt collector both to the debtor and to third parties concerning the debt.³⁶ Second, the FDCPA requires validation of a debt at the initial stage of debt collection.³⁷ Third, the FDCPA prohibits “unfair” practices.³⁸ Finally, the FDCPA governs the venue(s) in which an action may be brought to recover a consumer debt.³⁹

1. The Regulation of Communications by the Debt Collector

The FDCPA regulates three types of communications made by a debt collector: communications made to third parties in which information is

of *Heintz*.

³³ See, e.g., *Mertes*, 734 F. Supp. at 875; *Stojanovski and Strobl & Manoogian, P.C.*, 783 F. Supp. 319, 322 (E.D. Mich. 1992) (law firm which had an ongoing relationship with a corporate client, who presumably had many overdue accounts, did collect debts on a regular basis, although the firm’s collection practices comprised less than four percent of its total business; it is the volume of debt collection efforts, not the percentage of such efforts in relation to the attorney’s total practice, that is dispositive).

³⁴ *Cacace v. Lucas*, 775 F. Supp. 502, 504 (D. Conn. 1990).

³⁵ See *supra* note 18 for a definition of debt collector.

³⁶ 15 U.S.C. §§ 1692b-1692d.

³⁷ *Id.* § 1692g.

³⁸ *Id.* §§ 1692e-1692f.

³⁹ *Id.* § 1692i(a).

sought about the debtor,⁴⁰ abusive communications,⁴¹ and false or misleading representations.⁴² For purposes of the Act, a "communication" is defined as "the conveying of information regarding a debt directly or indirectly to any person through any medium."⁴³

The regulation that is of particular concern to attorneys lies within the prohibition against "false or misleading" representations made by a debt collector to a debtor or to a third party.⁴⁴ The Act prohibits threatening legal action unless (1) that action can legally be taken and (2) the debt collector actually intends to take that action.⁴⁵ A debt collector should never threaten to take legal action without the authority and intent to take that action,⁴⁶ and the debt collector should follow through with the threat, when appropriate, in order to ensure compliance with the Act.⁴⁷

Another simple, yet extremely important, provision requires that all collector/debtor communications attempting to collect a debt include a warning that the debt collector is "attempting to collect a debt, and that any information obtained will be used for that purpose."⁴⁸ These exact words should be included in every communication to a debtor, whether written or oral.⁴⁹

2. *The Requirement of Debt Validation*

In addition to regulating communications by debt collectors, the FDCPA also requires that a debt collector provide a "Validation Notice" to a debtor

⁴⁰ *Id.* §§ 1692b, 1692c(b).

⁴¹ *Id.* § 1692d.

⁴² *Id.* § 1692e.

⁴³ *Id.* § 1692a(2).

⁴⁴ *Id.* § 1692e.

⁴⁵ *Id.* § 1692e(5).

⁴⁶ See *United States v. National Fin. Serv., Inc.*, 820 F. Supp. 228, 234 (D. Md. 1993) (holding debt collector made threat of legal action without the intent to follow through when debt collector did not have procedures in place for filing suit), *aff'd*, 98 F.3d 131 (4th Cir. 1996).

⁴⁷ See *Pearce v. Rapid Check Collection, Inc.*, 738 F. Supp. 334, 338 (D.S.D. 1990) (holding that evidence did not support conclusion that debt collector did not intend to follow through with threatened legal action in light of the fact that suit was actually filed).

⁴⁸ 15 U.S.C. § 1692e(11) (applying to "all communications made to collect a debt or to obtain information about a consumer" — presumably also covering third parties).

⁴⁹ See *Tolentino v. Friedman*, 46 F.3d 645, 650 (7th Cir.) (holding that an attorney violated the Act by failing to include the warning in a follow-up letter), *cert. denied subnom.* *Friedman v. Tolentino*, 115 S. Ct. 2613 (1995).

at the initial stage of debt collection.⁵⁰ This validation notice must be in writing and sent to a debtor within five days of a debt collector's initial contact with the debtor.⁵¹ The Act requires that five statements be included in every validation notice.⁵² These statements, which are typically incorporated into the language of the validation notice, serve to inform the debtor of the amount of the debt, the name of the creditor, and the debtor's rights with regard to contesting the validity of the debt.⁵³ While the statements that must be conveyed are relatively uncomplicated, a debt collector must be wary of potential pitfalls arising when actually communicating the statements to a debtor.

One area of potential trouble arises because the Act requires a statement that the debtor has thirty days from receipt of the validation notice to challenge the validity of the debt or the debt will be assumed valid.⁵⁴ In drafting the communication to a debtor, a debt collector must be certain that no other portion of the letter conflicts with this statement.⁵⁵ For example, a statement demanding payment within ten days coupled with a threat of legal action if payment is not received would

⁵⁰ *Id.* § 1692g.

⁵¹ *Id.* § 1692g(a).

⁵² The following statements should be included in a validation notice:

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

Id.

⁵³ *Id.*

⁵⁴ *Id.* § 1692g(3); *see also* Bingham v. Collection Bureau, Inc., 505 F. Supp. 864, 871 (D.N.D. 1981) (holding that thirty-day notice should be included in the first mailed validation notice from the debt collector to the debtor).

⁵⁵ *See* Miller v. Payco-General Am. Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991).

violate the Act because it would indicate that the debtor does not have thirty days to contest the validity of the debt.⁵⁶

Similarly, a debt collector must be certain that separate communications with a debtor within the thirty day period are not contradictory. For example, a debt collector is permitted to pursue collection efforts within the thirty day period, unless the debtor disputes the validity of the debt.⁵⁷ However, any such subsequent communication cannot state that the debt will be considered valid at a date before the termination of the thirty day period.⁵⁸ An attorney acting as a debt collector should be aware that a communication with a debtor following a judgment is considered an "initial communication" requiring a validation notice.⁵⁹

Another area requiring care by debt collectors is the form of the notice. The required statements in a validation notice must be conveyed "effectively,"⁶⁰ as determined under the "least sophisticated debtor" test.⁶¹ Under this test, the initial communication taken as a whole, as well as subsequent communications, must not mislead the unsophisticated debtor into foregoing or ignoring his rights under the Act.⁶² Factors considered by the courts include location, type size, and the graphic impact of the information conveyed to the debtor.⁶³ The information must be large enough to be easily read and it must be placed in a prominent position in the notice.⁶⁴ Courts will also consider whether the debt collector has included statements that tend to contradict the validation notice.⁶⁵

⁵⁶ See *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991).

⁵⁷ See *Rabideau v. Management Adjustment Bureau*, 805 F. Supp. 1086, 1094 (W.D.N.Y. 1992).

⁵⁸ See *Robinson v. Transworld Sys., Inc.*, 876 F. Supp. 385, 391 (N.D.N.Y. 1995); see also *Ost v. Collection Bureau, Inc.*, 493 F. Supp. 701, 704 (D.N.D. 1980) (holding that collection agency did not comply with validation requirement because demands were sent to debtor prior to sending the validation notice).

⁵⁹ See *Frey v. Gangwish*, 970 F.2d 1516, 1518-19 (6th Cir. 1992).

⁶⁰ See *Bukumirovich v. Credit Bureau of Baton Rouge, Inc.*, 155 F.R.D. 146, 148 (M.D. La. 1994).

⁶¹ See *Graziano*, 950 F.2d at 111 (citing *Baker v. G.C. Servs.*, 677 F.2d 775, 778 (9th Cir. 1982)) (The *Graziano* court indicates that "least sophisticated consumer" is more accurate, but that "least sophisticated debtor" follows the usage in the reported case law. See *id.* at 778 n.5).

⁶² See *Higgins v. Capitol Credit Servs., Inc.*, 762 F. Supp. 1128, 1133 (D. Del. 1991).

⁶³ See *Bukumirovich*, 155 F.R.D. at 148.

⁶⁴ See *id.*

⁶⁵ See *Miller v. Payco-General Am. Credits, Inc.*, 943 F.2d 482, 484 (4th

Due to the fact that the validation notification must be in writing⁶⁶ and that an omission of any provision constitutes a violation,⁶⁷ a debtor will have little difficulty in proving a violation of the section. This makes strict compliance essential. However, the forthright debt collector should find little difficulty complying with this section of the Act.

3. *The Prohibition Against Unfair Practices*

The FDCPA prohibits debt collectors from engaging in “unfair or unconscionable” practices for the purpose of collecting a debt.⁶⁸ Acts of a debt collector that would constitute a violation of the Act include collecting any amount not expressly authorized by the instrument creating the debt.⁶⁹ These amounts include items such as interest, fees, charges, and attorney’s fees.⁷⁰ A debt collector is also prohibited from accepting a check post-dated by more than five days unless the debt collector notifies the debtor that the debt collector intends to deposit the check three to ten days prior to doing so; soliciting a postdated check for the purpose of threatening criminal prosecution; and depositing a post-dated check prior to the date on the check.⁷¹ Finally, the Act prohibits a debt collector from communicating with a debtor via postcard,⁷² because this type of communication would allow third parties to read the communication. Similarly, any envelope used to send a communication to a debtor must not indicate that the sender is a debt collector.⁷³

Cir. 1991).

⁶⁶ See 15 U.S.C. § 1692g(a).

⁶⁷ See *West v. Costen*, 558 F. Supp. 564, 580 (W.D. Va. 1983) (holding debt collector who failed to give debtors written notice of their right to dispute debts within thirty days violated the validation requirement).

⁶⁸ 15 U.S.C. § 1692f.

⁶⁹ *Id.* § 1692f(1); see also *Heintz v. Jenkins*, 115 S. Ct. 1489 (1995), discussed *infra* notes 92-134 and accompanying text.

⁷⁰ 15 U.S.C. § 1692f(1); see also *Strange v. Wexler*, 796 F. Supp. 1117, 1118 (N.D. Ill. 1992) (holding attorney violated the Act by demanding his fee in a lawsuit to collect a debt).

⁷¹ 15 U.S.C. § 1692f(2)-(4).

⁷² *Id.* § 1692f(7).

⁷³ *Id.* § 1692f(8); see also *Rutyna v. Collection Accounts Terminal, Inc.*, 478 F. Supp. 980, 982 (N.D. Ill. 1979).

4. *The Venue Provision*

As the final key area of regulation, the FDCPA regulates the venue in which an action may be brought to collect a debt.⁷⁴ The Act provides that a legal action on a debt may be brought only in the "judicial district or similar legal entity" in which: (1) the consumer resides, (2) the consumer signed the contract creating the debt, or (3) real property securing the debt is located, if applicable.⁷⁵ The "judicial district or similar legal entity" is the federal district when filing in federal court, and the similar legal entity as established by the particular state law when filing in state court.⁷⁶ An attorney filing an action must be careful when seeking to transfer venue because transferring an action on a debt to a venue not proper under the FDCPA would violate the Act, even though permitted under the applicable transfer of venue statute.⁷⁷

C. *Civil Liability Under the FDCPA*

The FDCPA expressly provides for civil liability for violations of the Act.⁷⁸ A debt collector found in violation of the Act can be held liable for actual damages, statutory damages (which are punitive in nature) and reasonable costs and attorney's fees.⁷⁹ In some cases, debt collectors may also be held liable for damages for emotional or mental distress.⁸⁰ Such damages are reserved only for instances involving "extreme and outrageous conduct."⁸¹ Actual damages are predicated upon a showing

⁷⁴ 15 U.S.C. § 1692i.

⁷⁵ *Id.* § 1692i(a).

⁷⁶ *See* Action Prof'l Serv. v. Kiggins, 458 N.W.2d 365, 367 (S.D. 1990).

⁷⁷ *See* Fox v. Citicorp Credit Servs., Inc., 15 F.3d 1507, 1515 (9th Cir. 1994) (holding transfer to unauthorized venue was a violation of the Act, and the fact that Arizona provided a formal transfer mechanism was irrelevant).

⁷⁸ 15 U.S.C. § 1692k.

⁷⁹ *Id.* § 1692k(a).

⁸⁰ *See* Teng v. Metropolitan Retail Recovery, Inc., 851 F. Supp. 61, 67-68 (E.D.N.Y. 1994) (debt collector was assessed \$1000 in actual damages for emotional distress for falsely representing to the debtor that there was a family emergency in order to obtain personal information and later impersonating a Marshal and threatening to take the debtor's furniture).

⁸¹ *See* Venes v. Professional Serv. Bureau, Inc., 353 N.W.2d 671, 674 (Minn. Ct. App. 1984) (debt collector's repeated abusive telephone calls to the debtor in which the debtor was called a "deadbeat" and warned to "stay out of Minnesota if you know what's good for you and your family" qualified as

by the debtor of actual pecuniary injury; however, no such requirement exists for the debtor to collect statutory damages.⁸² Courts do not require a showing of actual pecuniary injury to collect statutory damages because doing so would limit the Act's effectiveness by placing an extra burden on the complaining party.⁸³

Statutory damages are limited to \$1000 per action by an individual and the lesser of \$500,000 or one percent of the debt collector's net worth per class action.⁸⁴ The \$1000 maximum statutory penalty is *not* awarded per violation.⁸⁵ Rather, a single action involving multiple violations of the Act against one individual can give rise only to a maximum of \$1000 in statutory damages.⁸⁶

Factors considered by the courts when determining the amount of statutory damages to award include "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; . . ."⁸⁷ In a class action, additional factors of "the resources of the debt collector" and "the number of persons adversely affected" are also considered.⁸⁸ Isolated violations of the Act will typically result in statutory damages considerably less than the \$1000 maximum.⁸⁹

Although the Act provides for civil liability, such liability is not assessed in every case. A debtor is not required to prove intent in order to establish a violation, but a debt collector can avoid liability upon a

extreme and outrageous conduct. *Id.* at 675.).

⁸² See *Harvey v. United Adjusters*, 509 F. Supp. 1218, 1221-22 (D. Or. 1981).

⁸³ See *id.*

⁸⁴ See 15 U.S.C. § 1692k(a)(2).

⁸⁵ See *Wright v. Financial Serv. of Norwalk, Inc.*, 22 F.3d 647, 651 (6th Cir. 1994); *Harper v. Better Bus. Servs., Inc.*, 961 F.2d 1561, 1563 (11th Cir. 1992).

⁸⁶ See *Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456, 1467 (C.D. Cal. 1991).

⁸⁷ 15 U.S.C. § 1692k(b)(1).

⁸⁸ *Id.* § 1692k(b)(2).

⁸⁹ See *Strange v. Wexler*, 796 F. Supp. 1117, 1120 (N.D. Ill. 1992) (awarding \$250 in statutory damages for sending form letter to debtor improperly stating that debtor was liable for attorney's fees); *Young v. Credit Bureau of Lockport, Inc.*, 729 F. Supp. 1421, 1422 (W.D.N.Y. 1989) (awarding \$100 in statutory damages for failure to include warning in communication to debtor that the debt collector was attempting to collect a debt and that all information obtained must be used for that purpose).

showing "by a preponderance of 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."⁹⁰ Thus, while intent need not be proven, lack of intent may excuse a violation.⁹¹

II. ANALYSIS OF *HEINTZ V. JENKINS*

Recently, the Supreme Court addressed the issue of whether a lawyer who regularly collects consumer debts through litigation falls within the FDCPA's definition of a "debt collector."⁹² The plaintiff, Darlene Jenkins, brought suit under the FDCPA after George Heintz, a lawyer representing a creditor of Jenkins, wrote a letter to Jenkins' attorney misstating the amount owed.⁹³ In ruling that a lawyer who regularly collects debts through litigation is not exempt from liability under the FDCPA, the Supreme Court based its decision upon two premises: the plain language of the statute, and the 1986 Amendment to the Act removing the broad exemption for attorneys.⁹⁴

A. *The Plain Language of the Statute*

First, the Court noted that the plain language of the statute, in defining a debt collector, encompasses debt collection activities by a lawyer even when conducted through litigation.⁹⁵ The Act defines a "debt collector" as one who "regularly collects or attempts to collect, directly or indirectly, [consumer] debts owed or due or asserted to be owed or due another."⁹⁶ The Court held that litigation is just another

⁹⁰ 15 U.S.C. § 1692k(c); see also *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1514 (9th Cir. 1994) (holding debt collector did not fall within bona fide error exception due to the absence of procedures reasonably adapted to avoid errors in transferring accounts).

⁹¹ See 15 U.S.C. § 1692k(c).

⁹² *Heintz v. Jenkins*, 115 S. Ct. 1489 (1995). For a discussion of the definition of debt collector, see *supra* notes 18-34 and accompanying text.

⁹³ *Id.* (Heintz included in the total amount due the \$4173 cost of auto insurance, which the creditor had purchased after Jenkins had failed to do so, and which was not part of the original debt).

⁹⁴ *Id.* at 1491.

⁹⁵ *Id.*

⁹⁶ 15 U.S.C. § 1692a(6); *Heintz*, 115 S. Ct. at 1490.

way to obtain payment of consumer debts;⁹⁷ therefore, “a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly ‘attempts’ to ‘collect’ those consumer debts.”⁹⁸ In support of this proposition, the Court cited the *Black’s Law Dictionary* definition of debt collection: “‘To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings.’”⁹⁹

The Court addressed the potential absurdities that the Sixth Circuit in *Green v. Hocking*¹⁰⁰ claimed would result from subjecting attorneys who collect debts primarily through litigation to the Act’s provisions,¹⁰¹ stating that these results depended upon literal readings of the Act’s provisions not likely to be endorsed by the courts.¹⁰² First, the Court pointed out that § 1692e(5), which forbids a debt collector from making any threat or taking any action that cannot legally be taken, must be read in light of § 1692k(c), which provides that a debt collector is not liable under the FDCPA “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

⁹⁷ *Heintz*, 115 S. Ct. at 1491.

⁹⁸ *Id.*

⁹⁹ *Id.* (quoting BLACK’S LAW DICTIONARY 263 (6th ed. 1990)).

¹⁰⁰ *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993).

¹⁰¹ The *Green* court ruled that subjecting attorneys engaged in purely legal activities to liability under the provisions of the FDCPA would produce “absurd outcomes.” The court noted that, if read literally, § 1692c(c), which provides that all debt collections must cease once the debtor so requests, and § 1692g(b), which provides that a debt collector must cease collection efforts if the debtor disputes the amount owed within thirty days of receiving the initial communication from the debt collector, would prevent an attorney from initiating a lawsuit or proceeding with an already existing lawsuit. The court stated that, if an attorney initiated a lawsuit and the debtor disputed the amount owed, the attorney would be prevented from bringing a motion for summary judgment. Furthermore, the court stated that if an attorney wrote a letter to a debtor and the debtor asked that the communications cease, the attorney would be prevented from initiating a lawsuit altogether. The court also stated that § 1692c(b), which prevents a debt collector from communicating with any third party concerning a consumer’s debt, would make it “unlawful for an attorney to communicate with the court or the clerk’s office by filing suit.” The court further noted that § 1692e(5), which makes threats to take any action that cannot legally be taken unlawful, would subject an attorney to liability anytime the attorney brings a lawsuit and is unsuccessful. *See id.* at 21.

¹⁰² *Heintz*, 115 S. Ct. at 1491.

avoid such error.'¹⁰³ Section 1692k(c) would enable an attorney in an unsuccessful suit to avoid liability under the Act upon a showing of lack of intent and bona fide error, a burden the Court deemed reasonable.¹⁰⁴

The Court in *Heintz* did not address the impact that application of the FDCPA to attorneys collecting debts through litigation would have on Rule 11.¹⁰⁵ Section 1692k(c) has the effect of limiting the liability of an attorney who collects debts through litigation to instances in which that attorney would be liable under Rule 11 anyway.¹⁰⁶ The standard for liability under both provisions is negligence.¹⁰⁷ Under the negligence standard, an attorney would be subject to sanctions under Rule 11 and under § 1692e(5) for an unsuccessful suit only when the attorney failed

¹⁰³ *Id.* (quoting 15 U.S.C. § 1692k(c) (1988 and Supp. V)).

¹⁰⁴ *Id.*

¹⁰⁵ See *supra* note 101 for an overview of issues addressed by the *Heintz* Court. Rule 11 states:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claim, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonable based on a lack of information or belief.

FED. R. CIV. P. 11(b)(1)-(4).

¹⁰⁶ See *Green*, 9 F.3d at 22 (stating that there are many similarities between Rule 11 and the FDCPA).

¹⁰⁷ See FED. R. CIV. P. 11 (requiring "reasonable" investigation); see also *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864, 870 (D.N.D. 1981) (holding standard of conduct under § 1692k to which debtor is held is on the low end of the spectrum of the reasonable person).

to reasonably investigate the claim.¹⁰⁸ The result is that the provisions overlap in application.

Despite the overlap, two major differences remain in the application of Rule 11 and § 1692k(c). First, as noted by the Sixth Circuit in *Green v. Hocking*, sanctions under the FDCPA are mandatory;¹⁰⁹ therefore, an attorney who collects consumer debts through litigation and violates Rule 11, thereby violating § 1692e(5), would be subject to mandatory sanctions. On the other hand, an attorney engaged in litigation not for the purpose of collecting consumer debts who, through similar conduct, violates Rule 11 would not necessarily be subjected to sanctions. In this situation, the attorney's liability would depend on the court's discretion,¹¹⁰ presumably allowing the attorney the opportunity to explain to the court why sanctions may not be appropriate in that instance. The result is different treatment for like conduct due merely to a difference in the type of litigation involved.

A second difference in the application of Rule 11 and § 1692k(c) lies with the burden of proof. Under Rule 11, sanctions may be imposed against an attorney upon motion by the opposing party or on the court's own initiative.¹¹¹ On motion, the burden of proving that an attorney did not reasonably investigate the claim and, therefore, should be subject to sanctions, lies with the moving party.¹¹² When a court on its own initiative imposes sanctions, the court enters an order describing the conduct that appears to violate Rule 11.¹¹³ Presumably, the court would enter such an order only after determining that such charges are warranted; therefore, the initial burden of proof lies with the court.

On the other hand, § 1692k(c) is an affirmative defense; therefore, the attorney who has been charged with a violation of the FDCPA has the burden of proof with regard to a reasonable investigation.¹¹⁴ The burden of pleading under the FDCPA is minimal. The complaining party must only allege and prove noncompliance with a provision of the Act and has

¹⁰⁸ See *Green*, 9 F.3d at 22; see *supra* notes 103-05 and accompanying text.

¹⁰⁹ *Id.*

¹¹⁰ *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (court of appeals should use abuse-of-discretion standard when reviewing all Rule 11 determinations).

¹¹¹ FED. R. CIV. P. 11(c)(1).

¹¹² See *id.* at 11(c)(1)(A); see also *Vandeventer v. Wabash Nat'l Corp.*, 893 F. Supp. 827, 840 (N.D. Ind. 1995).

¹¹³ See FED. R. CIV. P. 11(c)(1)(B).

¹¹⁴ See *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507 (9th Cir. 1994).

no burden of proof with regard to the reasonableness of the attorney's conduct.¹¹⁵

The effect of (1) mandatory sanctions under the FDCPA and (2) the shift of the burden of proof with regard to the reasonableness of the attorney's conduct from the complaining party under Rule 11 to the attorney under § 1692k(c) is that an attorney engaged in litigation for the purpose of collecting consumer debts has a greater chance of being subjected to liability than his counterpart engaged in other types of litigation. The Court in *Heintz* avoided addressing this particular issue by stating that, regardless of the effect of § 1692e(5), "we do not see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an 'action that cannot legally be taken.'"¹¹⁶ The accuracy of that statement remains to be seen.

Another "absurd"¹¹⁷ result discussed by the Sixth Circuit in *Green v. Hocking*¹¹⁸ is the effect of § 1692c(c), which prohibits communications with a debtor who notifies the debt collector that he refuses to pay and/or does not wish to be contacted again.¹¹⁹ The court in *Green* reasoned that this section would serve to prohibit an attorney from filing a collection action after a debt has been contested or the debtor has communicated his desire not to be contacted again.¹²⁰ The Court in *Heintz* noted that § 1692c(c) provides an exception that permits the debt collector to notify the consumer that he may invoke or intends to invoke a specific remedy.¹²¹ The Court read this exception as applying to filing an action to collect a debt, reasoning that filing an action is tantamount to notifying the consumer of an intent to invoke a specific remedy.¹²²

The Court in *Heintz* failed to address another provision of § 1692c, which prohibits communications to third parties concerning a consumer's

¹¹⁵ "[A]ny debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person . . ." 15 U.S.C. § 1692k(a). See *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 780 (9th Cir. 1982) (statutory damages are available merely upon proof of violation); *Cacace v. Lucas*, 775 F. Supp. 502, 505 (D. Conn. 1990) (proof of one violation of FDCPA is sufficient to support judgment for the plaintiff).

¹¹⁶ *Heintz v. Jenkins*, 115 S. Ct. 1489, 1491 (1995).

¹¹⁷ *Green v. Hocking*, 9 F.3d 18, 22 (6th Cir. 1993).

¹¹⁸ *Id.* at 21; see *supra* note 101.

¹¹⁹ *Green*, 9 F.3d at 21.

¹²⁰ *Id.*

¹²¹ *Heintz*, 115 S. Ct. at 1491-92.

¹²² *Id.* at 1492.

debt.¹²³ The Sixth Circuit stated that this section would prohibit attorneys from filing complaints with a court or that court's clerk because these would amount to a communication to a third party.¹²⁴ Section 1692c(b) provides an exception to the prohibition on communication to third parties if the communication is "reasonably necessary to effectuate a post judgment judicial remedy;"¹²⁵ however, the statute does not specifically provide an exception for communications necessary to institute a judicial proceeding. The omission of a provision permitting suits to be initiated indicates that Congress may have intended not to regulate filing suits and, more generally, not to regulate litigation.

B. *The 1986 Amendment*

The second premise upon which the Court in *Heintz* based its decision was the 1986 amendment to the FDCPA that removed the broad exemption for attorneys.¹²⁶ Prior to 1986, the FDCPA stated that a "debt collector" did not include "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of the client."¹²⁷ The Court noted that this exemption was completely removed in 1986¹²⁸ and was not replaced with a more narrow exemption for attorneys collecting debts through litigation.¹²⁹ This fact led the Court to conclude that Congress intended for attorneys to be subject to the FDCPA whenever they met the Act's definition of a "debt collector."¹³⁰

Although Representative Annunzio, speaking as the sponsor of the bill, stated that the FDCPA as amended in 1986 was not intended to cover attorneys engaged in purely legal tasks,¹³¹ the Court in *Heintz* dismissed this as merely one representative's opinion expressed after the amendment was passed and not necessarily indicative of the consensus

¹²³ See 15 U.S.C. § 1692c(b).

¹²⁴ *Green*, 9 F.3d at 21.

¹²⁵ 15 U.S.C. § 1692c(b).

¹²⁶ *Heintz*, 115 S. Ct. at 1492.

¹²⁷ Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 803(6)(F), 91 Stat. 874, 875 (1977), amended by Pub. L. No. 99-361, 100 Stat. 768 (1986) (codified as amended at 15 U.S.C. §§ 1692-1692o (1994)).

¹²⁸ See Fair Debt Collection Practices Act, Pub. L. No. 99-361, 100 Stat. 768 (1986) (amending Pub. L. No. 95-109, § 803(6)(F)).

¹²⁹ *Heintz*, 115 S. Ct. at 1491.

¹³⁰ *Id.*

¹³¹ 132 CONG. REC. 30,842 (1986).

opinion on the Act's applicability.¹³² The Court also dismissed the Federal Trade Commission's staff commentary, which also stated that the FDCPA as amended should not apply to attorneys engaged in purely legal tasks.¹³³ The Court stated that the Federal Trade Commission, although charged with enforcement of the FDCPA, did not have the authority to create an exception that "falls outside the range of reasonable interpretations of the Act's express language."¹³⁴

III. THE IMPACT OF *HEINTZ* ON ATTORNEYS

Some might question how much, if any, impact the decision in *Heintz* will have on the day-to-day practice of attorneys. Certainly for the attorney whose practice is entirely devoted to collection work and who has enjoyed freedom from regulation under the Act, the decision in *Heintz* will have a significant impact. That attorney may no longer pursue collections with relative impunity. Moreover, with the exception of the ability to represent creditors in court, the attorney will no longer have a competitive edge over his traditional, non-attorney debt-collecting counterparts, because the attorney will have the same limitations imposed on him as have collection agencies.

For an attorney who engages in consumer debt collection less frequently and primarily engages in litigation or other "legal" activities unrelated to consumer debt collection, the impact of *Heintz* will be less significant. The result in *Heintz* is consistent with a central reason expressed by Congress for removing the exemption for attorneys: "substantial concern with lawyers who were unfairly competing with collection firms and abusing their exemption from FDCPA coverage."¹³⁵

Removal of the exception followed by application of the "regularly collects" limitation in the Act will ensure that those attorneys who infrequently collect debts, regardless of the method, will be spared liability under the Act. However, an attorney who, for example, frequently initiates foreclosure actions on behalf of a creditor and who previously could do so with impunity will now be forced to bear the

¹³² *Heintz*, 115 S. Ct. at 1492.

¹³³ *Id.*

¹³⁴ *Id.* at 1492-93.

¹³⁵ *Mertest v. Debitt*, 734 F. Supp. 872, 874 (W.D. Wis. 1990) (citing H.R. REP. NO. 405, 99th Cong., 2d Sess. 2 (1986), reprinted in 1986 U.S.C.C.A.N. 1752).

“burden” of compliance with the Act. The end result is that those attorneys who are “in the business of collecting debts” will be regulated and those who are not will not.¹³⁶

Regardless of whether an attorney is one who rarely collects consumer debts or is one who is essentially a debt collection agent with a license to practice law, the scrupulous attorney who abides by the Model Rules of Professional Conduct will find that the Act adds little to the “burdens” of fairness and professional courtesy already mandated by the Model Rules.

One might think that the Act would hinder an attorney’s ability to represent his client “with reasonable diligence” as required by Model Rule 1.3.¹³⁷ However, a comparison of the Act’s restrictions with the remaining provisions of the Model Rules reveals that the Act places few limitations on the attorney’s ability to represent his client not already provided for by the Model Rules.

Rules 4.1 through 4.4 of the Model Rules, which govern an attorney’s transactions with persons other than his client, provide the regulations on attorney conduct that most closely parallel the Act’s provisions. Rule 4.1 prohibits a lawyer from knowingly making a false statement to a third party.¹³⁸ Any violation of the Act’s prohibition against any “false, deceptive, or misleading representation . . . in connection with the collection of any debt”¹³⁹ would also violate Rule 4.1. Similarly, Rule 4.2 prohibits a lawyer from communicating about the subject of his representation with a party the lawyer knows to be represented by another attorney.¹⁴⁰ This same prohibition appears in the Act.¹⁴¹ Finally, Rule 4.4 provides that a lawyer “shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person”¹⁴² The Com-

¹³⁶ H.R. REP. NO. 405, 99th Cong., 2d Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1753.

¹³⁷ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1992).

¹³⁸ *Id.* Rule 4.1(a).

¹³⁹ 15 U.S.C. § 1692e; *see supra* notes 44-47 and accompanying text for a discussion of this provision.

¹⁴⁰ MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1992).

¹⁴¹ The FDCPA prohibits communications with the debtor “in connection with the collection of any debt” when the attorney knows that the debtor is “represented by an attorney with respect to such debt.” 15 U.S.C. § 1692c(a)(2). Communications “in connection with the collection of any debt” would be about the subject of the attorney’s representation in a collection case, so both provisions apply to the same limited type of communications.

¹⁴² MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.4 (1992).

ment to the Rule explains that Rule 4.4 simply requires that lawyers show respect for the rights of third parties.¹⁴³ Strict compliance with this Rule would also avoid any violation of the Act's prohibitions against "engag-[ing] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt"¹⁴⁴ as well as the prohibition against the "use [of] unfair or unconscionable means to collect or attempt to collect any debt."¹⁴⁵

These provisions of the Act constitute the "meat" of the restrictions and prohibitions contained in the Act. It should be no surprise that the Act and the Model Rules overlap significantly because both serve to ensure that those governed by their provisions act in an ethical manner. When taken in conjunction with the application of Rule 11 discussed in Part II of this Note,¹⁴⁶ the Model Rules leave attorneys little rope with which to hang themselves.

CONCLUSION

The Fair Debt Collection Practices Act is a potential source of significant liability for attorneys engaged in debt collection.¹⁴⁷ As a result of the decision in *Heintz v. Jenkins*, attorneys who collect debts solely through legal proceedings and do not employ traditional debt collection methods are no longer exempt from the Act's regulations.¹⁴⁸ The Act contains numerous regulatory provisions not discussed in this Note.¹⁴⁹ Since most attorneys should not find compliance with the FDCPA unduly burdensome or complicated and the potential for liability is significant, every attorney who engages in any debt collection activities should obtain a working knowledge of the Act's provisions in order to ensure compliance.

¹⁴³ *Id.* Rule 4.4 (cmt.).

¹⁴⁴ 15 U.S.C. § 1692d.

¹⁴⁵ *Id.* § 1692f; *see supra* notes 68-73 and accompanying text for a discussion of this provision.

¹⁴⁶ *See supra* notes 92-134 and accompanying text.

¹⁴⁷ *See supra* notes 78-91 and accompanying text.

¹⁴⁸ *See supra* notes 92-134 and accompanying text.

¹⁴⁹ *See supra* notes 35-77 and accompanying text.