

# Fair Debt Collection Lawsuits Threaten Attorneys

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**T**ake the following five minute test and determine whether you may be susceptible to claims under the Fair Debt Collection Practices Act (the "FDCPA"):

1. Corporate Attorney regularly represents General Hospital on a wide variety of legal matters. From time to time during the year, General Hospital asks Corporate Attorney to pursue a former patient for a past due bill. Corporate Attorney's nonthreatening letters to the patient/debtor need not comply with the requirements of the FDCPA. True or false?

2. Attorney Tracy is a partner in the law firm of Tracy & Hepburn. Attorney Tracy, who has a general practice, was recently asked by one of his small banking clients to collect a past due mortgage obligation from the delinquent homeowner. Attorney Tracy has not collected a debt on behalf of a client in several years. His partner, Ms. Hepburn, however, has a small debt collection practice. Attorney Tracy does not have to comply with the FDCPA in his correspondence with the delinquent homeowner. True or false?

3. Attorney Jones is a successful trial lawyer with a small firm. One of Attorney Jones' corporate clients, Small-Mart, instructs her to file complaints against several customers for bounced checks. Another client, Widgets-R-Us, instructs Attorney Jones to file a debt collection suit against one of its wholesalers. Neither the Small-Mart nor the Widgets-R-Us complaint must contain the notice required under the FDCPA. True or false?

4. Attorney Smith writes letters to several of his former clients in a last



***Are you subject to claims under the Fair Debt Collection Practices Act? Don't assume the answer is no.***

ditch attempt to collect past due legal fees. Attorney Smith's collection letters must meet the requirements of the FDCPA. True or false?

The answer to all of the above appears to be *false*. There has been a tremendous increase in the number of claims brought against attorneys under the FDCPA in the past year or so. This trend will undoubtedly continue in light of a United States Supreme Court opinion issued last April that held that attorneys who regularly collect consumer debts on behalf of others are subject to the requirements of the FDCPA. *Heintz v Jenkins*, 63 USLW 4266 (for more on this case and the FDCPA generally, see Jeffrey S. Wilson and Stuart M. Nagel, "The Lawyer's Post-*Heintz* Guide to the Fair Debt Collection Practices Act" in last month's *Journal* at page 483).

The FDCPA prohibits the use of unfair, deceptive, abusive, or misleading practices in the collection of consumer debts. The Act attempts to curb debt collection abuses by establishing a set of rules that debt collectors must follow, including stringent rules regarding correspondence with the debtor. Some debtors' attorneys are building practices based almost exclusively on FDCPA cases and are reaping the benefits of the attorney fee-shifting provision in the Act.

As a result of these developments, *any attorney who collects a debt on behalf of a client, whether through litigation or routine correspondence, should determine whether his or her collection efforts are subject to the FDCPA.* In making this determination, the following factors should be considered:

(1) The FDCPA only applies to "consumer" debts owed by natural persons. Thus, if you represent a manufacturing company that is suing a wholesaler corporation for a past due obligation, like our Widgets-R-Us example above, you are not subject to the FDCPA with respect to such debt collection. On the other hand, the Small-Mart debts that Attorney Reno is attempting to collect probably would fall within the FDCPA.

(2) In order to be subject to FDCPA rules, the attorney and/or his or her firm must be "regularly" engaged in collecting or attempting to collect consumer debts. Unfortunately, the *Heintz* decision did not answer the critical question of what constitutes "regular" debt collection. It is clear from other FDCPA caselaw, however, that the courts are using a very low threshold in determining whether an attorney's debt collection activities fall within the Act.

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*In fact, many experts in the field now suggest that an attorney or firm that cumulatively collects more than a handful of debts per year may fall under the FDCPA.*

In our first example, Corporate Attorney may be deemed to be “regularly” engaged in debt collection by virtue of the handful of debts he is collecting each year. Additionally, Attorney Tracy will most likely be subject to the FDCPA since the firm of Tracy & Hepburn collects several debts a year on an aggregate basis.

(3) The FDCPA covers only debt collectors who are collecting debts “owed to another” person or entity. In the fourth example, Attorney Smith’s correspondence with his former clients regarding past due legal fees would not fall under the FDCPA since Attorney Smith is collecting the debt for himself rather than a client.

(4) The *Heintz* opinion suggests that pleadings, motions, and discovery requests generated in the course of debt collection suits may constitute “communications” with debtors that are regulated by the FDCPA. Litiga-

tors like Attorney Jones in our third hypothetical who represent creditors in debt collection suits should take a hard look at the dictum in *Heintz* and determine whether their court documents must satisfy the FDCPA. Many commentators believe the answer is yes and suggest that attorneys add the FDCPA-required warning to all pleadings, including substitutions of counsel.

Don’t forget that the settlement process may also fall under the FDCPA. In *Heintz*, a letter written by the creditor’s attorney in an attempt to settle the debt collection action was deemed to be subject to the FDCPA.

Attorneys can reduce the risk of FDCPA violations in several ways. First, attorneys who collect consumer debts, even on an infrequent basis, should poll the other attorneys in their firm to establish whether the firm as a whole is regularly engaged in debt collection. If the firm is handling more than one or two debt collection matters a year, the firm should

obtain a copy of the FDCPA ( 15 USC section 1691, et seq) and establish strict guidelines for collecting debts and corresponding with debtors based upon the FDCPA rules.

Remember that the FDCPA contains a “bona fide error” exclusion which provides that a debt collector will not be held liable if he or she can show “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.” Thus, if your firm establishes and adheres to strict guidelines in collecting consumer debts under the FDCPA, the firm can defend against an alleged violation by showing that an honest mistake was made.

Finally, attorneys who believe they may be subject to the Act can contact Michael Matek, Executive Vice President of the Illinois Creditors Bar Association, at (312) 629-5700 for more information.