

# Attorneys Beware: Debt Collection Now More Risky

## Fair Debt Practices Act Covers Actions For Rent

By KENNETH C. JONES

Collecting a debt for a client has just become riskier for Missouri lawyers — especially for those who practice landlord-tenant law, according to creditors' rights attorneys.

A recent case makes clear that the

### Practice Point

Fair Debt Collection Practices Act applies to attempts to collect rent. But this has created

a conflict between an FDCPA provision giving debtors 30 days to dispute a debt, and shorter time limitations provided in some Missouri statutes.

Creditors' rights attorneys advise that lawyers should now be more cautious in their attempts to collect rent and other debts — advice that does not please creditors or their lawyers.

"I can either risk being sued by the debtor or lose my clientele," lamented Kansas City attorney Robert Wise.

#### The Mini-Miranda Warning

Springfield attorney Dudley Martin, who represents creditors, said the FDCPA, 15 U.S.C. 1692 *et seq.*, imposes certain duties "on third parties — including lawyers — who collect consumer debts, which are obligations arising from any transaction for personal, family or household use.

"And it doesn't matter what kind of lawyer you call yourself," continued Martin. "You are covered if you are collecting money for someone."

The most significant duty is to give the debtor what is called the "mini-Miranda warning."

According to Martin, this means that "at the first contact with the debtor, the attorney has to disclose, among other things, 'You have the right to dispute the debt within 30 days.'"

What can a lawyer do during this 30-day notice period in furtherance of collecting the debt? And most importantly, can the lawyer file suit?

"There's no case in the Eighth Circuit that says you can — or can't — sue within the 30 days," said Hetley. "It's not real clear."

Given this lack of clarity, some who practice in the area advise that lawyers should be careful not to "overshadow" the notice period.

"Overshadowing is any action contradicting or taking away from the 30-day notice period," said St. Louis attorney David Gamache, who is chair of the FDCPA Committee of the Commercial Law League.

"I've always waited 32 days — 30 days plus two days for mailing — from the date I send out my first notice before I have any contact with the debtor. No phone calls, no lawsuits, no contact at

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all," said Gamache.

Such caution is understandable, because the penalty for failure to comply with the FDCPA is serious — \$1,000 liquidated damages for each violation, in addition to actual damages and attorneys' fees, Martin said.

## A St. Louis — K.C. Split?

Until recently, it was unclear whether landlord-tenant disputes were covered by the FDCPA. And many lawyers had argued there was no coverage, based on cases holding that actions to collect a condominium fee were not covered.

"Cases a couple of years ago said that [a condominium fee] is not a debt because it's not an extension of credit," said Wise. "It's not something owed personally, but is more like a property tax that runs with the land."

"I was prepared to fall back on the old condo cases" if challenged by a tenant for not complying with the FDCPA, Wise said. "I can't do that any more."

That's because this summer, a federal court ruled that a lawyer trying to collect an overdue condominium fee was covered by the FDCPA. Attorneys agree this ruling is applicable to landlord-tenant situations.

And with the application of the FDCPA to collection of rent, a significant question arises — can an attorney sue for rent and possession or unlawful detainer within 30 days after sending a demand letter, or would this be overshadowing?

Some attorneys take the cautious approach and always wait for 30 days.

"That's what I hear St. Louis attorneys do — they send out the demand letter but don't sue for 30 days," said Wise. "They're more cautious than Kansas City attorneys."

But waiting does not please landlords. "When my client comes to me and says, 'The last thing the client wants to hear is that he has to wait at least another 30

days before filing suit," Wise said.

## FDCPA v. Missouri Law

In addition to the problem with delay, some practitioners point to another concern — the 30-day notice period appears to conflict with shorter time limitations provided in some Missouri statutes.

"There are conflicts between Missouri statutes and the 30-day law all over the place," said Kansas City attorney Tim Murphy.

Wise described a scenario that portrays such a contradiction.

"It's the day after I get my judgment for unlawful detain-

er, and the tenant calls me. He didn't show for the court date, which isn't unusual.

"He asks me, 'What happened?'"

"Now this is my first contact with him, and the Act says I'm supposed to tell him he has 30 days to dispute the debt."

"But Missouri state law requires

him to request a trial de novo within 10 days of the entry of judgment.

"If I don't tell him that, is that overshadowing?"

"Or he may get a summons one week before the court date," Wise said, noting that the unlawful detainer statute requires only five days notice before court. "What happened to his 30 days to dispute?"

Attorney Hetley pointed out another apparent contradiction with Missouri law and the 30-day notice period: "In some jurisdictions you have just 20 days to answer a complaint."

These ambiguities in the FDCPA frustrate practitioners.

"This is the first time in Anglo-Saxon law that I know of that I'm required to

advise the other party of his rights," Wise said.

## Advice To Lawyers

Should lawyers wait 30 days before suing?

"My advice is — maybe we better be cautious until the law is changed," he said.

That's the same advice Kansas City attorney Murphy gives. "Send the demand letter then wait the 30 days."

But because of the delays the FDCPA causes in collecting rents, some attorneys look for ways to avoid the 30-day notice period.

One way is to file suit immediately without sending a demand letter or contacting the tenant.

Such a tack is possible, said Springfield attorney Martin,

because a recent amendment to the FDCPA made it clear that the *Miranda* warning is not necessary in

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Robert Wise, Kansas City Creditors' Attorney

may be the better part of valor when collecting debts.

Hetley emphasized that the FDCPA's lack of clarity should cause lawyers to err on the side of caution, especially because "the Act says that its purpose is to protect the *least sophisticated* debtor."

"If you want to sleep at night, you have to comply with the most restrictive interpretation of the Act," said Wise.

And Wise said that the sweeping coverage of the FDCPA should concern all lawyers, not just those who practice landlord-tenant law.

He pointed to a recent Ninth Circuit case holding that a lawyer trying to collect on a \$17 bounced check was covered by the FDCPA.

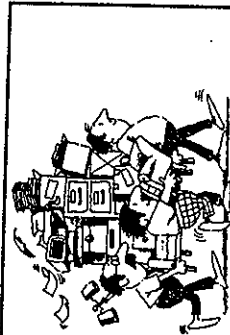
"What this means is that any time you say, 'A owes B \$10,' you're trying to collect a debt.

"So any time you're asking someone for money, you're covered by the Act.

"When in doubt, assume it applies," Wise concluded.

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*(The most recent amendment to the Fair Debt Collection Practices Act can be found on Missouri Lawyers Weekly's web site at [http://www.missourilaw.com/treas/PL2\\_08B.HTM](http://www.missourilaw.com/treas/PL2_08B.HTM).)*



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