



PAST DUE

THE FDCPA AND DEBTS THAT CAN CAUSE DESPAIR:

*Issues Implicated in Connection with
Debt Collection for Community Associations*

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The Fair Debt Collection Practices Act, 15 U.S.C. § 1692, commonly known and referred as the FDCPA, is a federal statute that regulates the conduct of debt collectors in connection with activity to collect consumer debt on behalf of creditors.

Although normally associated with and discussed in the context of credit card debt collection and other similar types of consumer debt, it is undisputed the FDCPA applies to action undertaken by attorneys to collect past due condominium and homeowners association maintenance fees and related charges.¹ Attorneys are debt collectors and as such are subject to the FDCPA.

The FDCPA would not apply to an association that was collecting debts for itself. Conversely, a federal appeals court recently determined that the FDCPA would not apply to efforts of a management company to collect debts on behalf of an association, under the fiduciary obligation exception to the FDCPA, if debt collection was merely incidental to the management company's main function.² However, the FDCPA would apply to a management company if its main function was collection of past due maintenance fees and related debt.

The FDCPA is a strict liability statute, which means that fault or lack of intent to cause a violation will not be considered in determining that a violation has occurred. As such, attorneys and law firms engaged to collect maintenance fees on behalf of association clients must be vigilant to comply with the requirements of the FDCPA and be aware of the damages that can be awarded for a violation. Penalties for violations include compensation for actual damages or \$1,000.00 per violation, as well as awards for attorneys' fees to a successful plaintiff.

Since most attorneys engaged in association collections do so for more than one entity and generally for multiple individuals within a specific community, it is important to be aware of the potential for class action liability under the FDCPA. According to the statute, liability could be based on the amount allowed by the court for all class members without considering a minimum amount for recovery to each individual, not to exceed the lesser of \$500,000.00 or one percent of the net worth of the debt collector.³

As such, FDCPA compliance will be taken into consideration at the time a law firm is engaged to collect past due maintenance fees

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by a community association. Typically, a retainer agreement will contain an indemnification provision advising that the association agrees to indemnify its counsel in the event the association or its management company provides counsel with a misstatement of the amount due that results in attorney liability under the FDCPA.

As such, management companies are cautioned to keep accurate records of charges and credits, especially in instances where accounts are taken over from a prior management company. Typically, the new company's ledger will state an initial liability that is not capable of being broken down into the various components of maintenance fees, late fees, legal fees, etc. As such, the individual charges and time frames may be impossible to substantiate if the debt is disputed. It may be prudent to request a current ledger for all

CONTINUES ON PAGE 28.



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THE FDCPA... from page 26.

delinquent accounts from a current management company prior to switching to a new management company.

Also, associations and management companies should be careful not to include fees or charges for items not specifically authorized by the association's governing documents, such as legal fees, interest and late fees. A demand for such unauthorized fees would violate the FDCPA.

Similarly, collection action should follow a very specific timeline that affords the ability to protect and secure the association's interests while complying with the FDCPA.

Most association collection efforts commence with a demand letter. The demand letter must accurately reflect the amount the association claims is due and must advise the debtor of its right to dispute the debt and to request validation of the debt within thirty days of the debtor's receipt of the debt notice.⁴ If the debtor disputes the debt, in writing, within the stated time frame, all collection activity must cease until such time as verification of the debt is provided to the debtor by the association. Generally, verification will be satisfied by providing the debtor with a current account ledger.

In the *Loigman* case, the court determined that causing a claim of lien to be recorded after a debtor disputed the debt, in writing, and prior to the association providing verification of the debt, constituted a violation of the FDCPA. There, the remedy for the violation consisted of the court ordering the discharge of the lien.

The FDCPA is a volatile and ripe area for litigation for plaintiffs' attorneys and the law is continuously evolving. Although this article does not address all of the issues and pitfalls that may arise in connection with debt collection activities, it is important to be mindful of the constraints and the potential for liability if the mandates of the FDCPA are not followed. ■

(Endnotes)

1. *Loigman v. Kings Landing Condo. Association, Inc.*, 324 N.J. Super. 97 (Ch. Div. 1999).
2. *Harris v. Liberty Community Management, Inc.*, 702 F.3d 1298 (11th Cir. 2012).
3. 15 U.S.C. § 1692(k)(2) (B).
4. 15 U.S.C. § 1692(g).