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When the Dispatcher Must Stop the Truck: A Collection Lawyer's Duty to Stop the Work of Others That She Caused

Collection lawyers know that sometimes their efforts, including litigation, are temporarily halted. Occasionally, the client directs the delay. On other occasions, the defendant / borrower unilaterally grants itself a delay. The classic borrower caused delay is the automatic stay that is imposed on collection counsel when a borrower files bankruptcy. 11 U.S.C. Section 362.

Another opportunity for borrowers to unilaterally cause delay is found in the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692, *et seq.* When applicable, the FDCPA requires debt collectors to send a notice to borrowers. *Inter alia*, the notice must tell borrowers that they have 30 days to (i) demand verification of the debt to be collected, (ii) dispute the debt, or (iii) demand information concerning the debt. If the borrower exercises any of those rights, the debt collector must cease all debt collection activity until the borrower's demand has been handled. See, 15 U.S.C. Section 1692g titled "Validation of Debts."

Among the most common FDCPA applicable cases are residential foreclosure cases, at least in some areas. In *Glazer v. Chase Home Finance LLC*, 704 F.3d 463 (6th Cir. 2013) the Sixth Circuit (i) acknowledged that "a majority of district courts . . . [hold] that mortgage foreclosure is not debt collection" so the FDCPA would not apply and then (ii) overruled the magistrate and district court holding that foreclosure work was FDCPA covered debt collection activity and not mere enforcement of a lien on property. The *Glazer* court stated that it was joining the Third Circuit and Fourth Circuit when it decided that the FDCPA may apply to foreclosure cases.^[1] But see, *Vien-Phuong Thi Ho v. Recontrust Company NA*, 858 F.3d 568 (9th Cir. 2017) holding that a California non-judicial residential foreclosure was not covered by the FDCPA. The *Vien-Phuong* decision was distinguished from *Glazer*, in part, by the fact that

California law did not grant a deficiency judgment that could be enforced personally against the borrower. Nonetheless, unless local law clearly says the FDCPA does not apply to your work, I would comply with the FDCPA lest you be the unfortunate collection lawyer who loses that issue for the first time as happened in *Glazer*.

In a judicial debt collection litigation, sending the FDCPA notice basically need not cause delay. If so planned, the notice will be sent on or around the date the complaint is filed, assuming the complaint is the first communication from the debt collector to the borrower.

[\[2\]](#) If the first communication from the debt collecting lawyer is the complaint initiating a lawsuit, it is common to attach the FDCPA required communication as an exhibit to the complaint. The FDCPA notice gives the borrower 30 days to act. If done properly, those 30 days will run concurrently with the borrower's time to file an answer and the time the court will take to consider collection counsel's default or summary judgment motion.

So, how do we handle FDCPA notices in non-judicial foreclosure situations? In these situations, the required FDCPA notice cannot be provided with the litigation starting complaint because no complaint is filed. If the FDCPA applies, collection counsel can avoid any delay caused by the borrower's 30-day window by serving the FDCPA notice so that the 30 days run currently with the applicable publication and advertising requirements. I am unaware of any non-judicial foreclosure that can be completed in less than 30 days and collection activity can proceed during the 30 days of the FDCPA notice.

Now that we have complied with the FDCPA and timed events so that the 30-day window granted to the borrower does not delay our collection work, what happens if a borrower exercises one of its FDCPA rights and disputes the debt or demands information within the 30-day window? In that event, the "debt collector shall cease collection of the debt, or any disputed portion thereof, . . ." 15 U.S.C. Section 1692g(b). In judicial debt collection actions, the collection lawyer is in control of the early stage proceedings[\[3\]](#) as she is responsible for court filings and scheduling hearings – thus, it is relatively easy for collection counsel to "cease" collection activity.

On the other hand, what happens in non-judicial foreclosure cases where collection counsel is often not in control after the activity is initiated.^[4] I have steered many foreclosures under both judicial and non-judicial foreclosure rules. Commonly, in non-judicial foreclosures:

- collecting counsel causes (i) the publication of notices in the newspaper or elsewhere, (ii) the posting of a notice on the property and (iii) schedules the sale of the property by the sheriff or trustee under the deed of trust;^[5] but
- collection counsel does not actually publish the notice, post the notice or conduct the sale. That work is done by others such as newspapers and auctioneers.

The lack of control by collection counsel is a potential trap if the work must be stopped.

Scott v. Trott Law, P.C., No 18-1051 (6th Cir. Jan. 11, 2019) involves a situation where debt collection was a non-judicial foreclosure as permitted in Michigan. In the *Trott Law* case, collection counsel arranged for the publications, notice posting, sale date and sent the FDCPA notice more or less simultaneously. After that, collection counsel was not in control since the advertising, posting, and sale were handled by others. Given the FDCPA 30 day notice window, the borrower timely disputed the debt before all the sale advertising was completed. When that advertising continued, the borrower sued asserting that collection counsel had an obligation to affirmatively prevent others from taking activity in furtherance of the foreclosure per 15 U.S.C. Section 1692g(b). Collection counsel successfully responded by accurately asserting that it had “ceased collection of the debt” because collection counsel did nothing after the borrower exercised his FDCPA rights; collection counsel won in the trial court.

At this point two bad facts occurred in the *Trott Law* case’s underlying collection litigation: (i) the foreclosure case continued to a property sale; and (ii) collection counsel ceased all communication with the borrower which means the borrower’s FDCPA assertions were not resolved. In short, the FDCPA was neutered. With those facts, the Sixth Circuit held that the district

court in Michigan read the FDCPA too restrictively. The Sixth Circuit held that collection counsel had a duty to reach out and stop the work by others that collection counsel had caused. The court reasoned that otherwise, the FDCPA provided opportunity for the borrower to send a dispute letter was a nullity in situations like this non-judicial foreclosure when there was nothing else collection counsel had to do for the foreclosure to be completed.

The *Trott Law* decision mirrors the rule applicable in bankruptcy cases. Collection counsel has an obligation to take affirmative action to stop others from continuing activity to collect a debt if collection counsel caused those persons to act in violation of bankruptcy law. See, for example:

- *In re Daniels*, 316 B.R. 342 (Bankr. D. Idaho 2004) (“[creditor] contends it took no action in state court against Debtor after he filed for bankruptcy. [but the state did act] . . . As interpreted by the Ninth Circuit Court of Appeals, ‘[§ 362\(a\)\(1\)](#) imposes an affirmative duty to discontinue post-petition collection actions.’ . . . Implicit in this command is a creditor’s responsibility to act to stay further proceedings in process at the time a bankruptcy case is commenced, or in the words of the court, to ‘automatically dismiss or stay such proceeding or risk possible sanctions for willful violations’ of the automatic stay. . . . The cases instruct that [creditor] had an affirmative duty to act to suspend the collection action.”); and
- *In re Halas*, 239 B.R. 182 (Bankr. N.D. Ill 2000) (collecting a default judgment unknowingly taken in violation of the automatic stay, after learning of the bankruptcy collection counsel, “did not take steps to void the garnishment against Halas’ salary and thereby reverse effects of the default judgment . . .”)

In both these cases, collection counsel was sanctioned because others continued the debt collection activity in violation of the automatic stay. Collection counsel that caused others to act has a duty to stop those actions.

In sum, if you as collection counsel started a process and the borrower exercises certain legal rights, you need to do more than

just stop you own work.

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[1] See, *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir.2006) and *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227 (3d Cir.2005) both of which are cited in *Glazer*.

[2] Debt collectors should provide the statutorily required information in their initial communication to a debtor protected by the FDCPA.

[3] As opposed to later stage foreclosure proceedings where someone else, often the sheriff, is responsible for appraising, advertising, scheduling and conducting the foreclosure sale. In theory, none of this activity should occur during the FDCPA period since it will occur after the borrower's 30 day notice window and only after any borrower FDCPA assertions were resolved.

[4] According to one source, 30 jurisdictions allow some form of nonjudicial foreclosure. See, <https://www.nolo.com/legal-encyclopedia/chart-judicial-v-nonjudicial-foreclosures.html>.

[5] Sometimes the trustee under the deed of trust does the administrative work needed for the sale. Foreclosure always starts with some lender's representative (often a collection lawyer) causing the process to begin.

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