9
Debt Collection

Steven A. Harms
Jennifer T. Dillow

I. Overview

§9.1 Generally, a collection case arises from a debtor's default on the payment of an account for goods or services rendered on credit terms. The typical collection case is rather simple: the damages are easily calculated because they represent the balance of unpaid invoices or a statement of account, and expert opinion is usually not necessary. Debtor collectibility is usually the chief concern. In most instances, the case is based on an account of goods and/or services sold and delivered, a promissory note, or a default on some type of business contract. If the matter is much more complicated than that, it may still be considered a collection

case, but the attorney may be wise to consider whether to charge more for it or change the fee from contingent (the customary fee on ordinary collections) to hourly. In other words, the collection attorney should beware the client who claims, "I have a challenging case for your talents." This should signal the case is more than just a collection case.

Many collection cases go to judgment by default. In most instances, little pre-suit investigation or work is called for other than making sure that all of the defendants are included, the defendants' addresses are good, the paperwork is in order, and there is a balance due on the account. This is a good point in the handling of the case to consider any additional legal theories such as treble damages on insufficient funds checks and additional defendants, such as guarantors, who may be part of the case. The defenses raised in most collection cases are generally intended to stall the litigation and thereby avoid paying the debt.

As stated, most collection cases are handled on a contingent fee basis. A large volume of files is generally necessary to make a collection business profitable. To handle the claims, you will need an efficient office system, as discussed in §9.11. A collection agency may be a good source of cases. See §9.3.

For a detailed discussion of collection practice in Michigan, see Steven A. Harms, *Handling the Collection Case in Michigan: A Creditor's Guide* (ICLE 4th ed).

II. Preliminary Considerations

A. Types of Collection Cases

§9.2 Collection cases fall into two general categories: (1) retail or consumer collections and (2) commercial collections. The distinction between the two categories is significant, as can be seen from the discussion on fees (see §§9.6–9.10) and particularly the discussion on the applicability of the Fair Debt Collection Practices Act (FDCPA) (see §9.5).

Retail or consumer collection cases arise from consumer transactions in which the debtors are individuals. Generally, the account balance represents a personal or household purchase, such as carpeting, furniture, or a recreational vehicle. Commercial collection cases, on the other hand, arise from transactions between businesses. The goods or services are for business purposes.

As discussed in §§9.26–9.35, strategies for postjudgment collection in these two types of cases differ. Commercial claims generally involve business assets, such as inventory or accounts receivable, whereas retail claims involve collection from personal assets and may take the form of wage garnishments or automobile executions, among other things.

B. Forwarders and Receivers

§9.3 Collection cases might come from your clients, from collection agencies, or from attorneys in other states or other areas of Michigan. When a collection agency sends a case to an attorney, the collection agency is referred to as the "forwarder" and the attorney as the "receiver."

When a claim is forwarded, the collection attorney generally reports to the forwarding agency, which in turn reports to the client. Although collection agencies usually collect the easy cases and turn only the more difficult ones over to the collection attorney, the positive aspect of dealing with an agency is that a claim is usually not turned over to the attorney unless there is still a good address and phone number for the debtor. Collection agencies are not interested in wasting time or energy on junk claims any more than the collection attorney is.

Another advantage of dealing with collection agencies is that the agencies and their employees are aware of many of the problems and headaches collection attorneys encounter. Individual clients, on the other hand, can be naive and, therefore, overly demanding. For example, most clients do not understand—nor do they really wish to be bothered with—the details involved in starting a collection lawsuit and serving a summons and complaint. Many direct clients expect the collection attorney to obtain a judgment "yesterday." On the other hand, the collection agency knows that the attorney has to file a summons and complaint with the court, turn the papers over to a court officer for service, wait for service of the summons and complaint, send certified mail when appropriate, and then wait the appropriate amount of time for the court to enter a default judgment. The good agencies therefore advise their clients that the suit process, even when a default judgment is obtained, can easily take six weeks or more. Collection agencies assist their clients in filling out affidavits; answer their clients' routine questions about judgments, executions, etc.; and handle other case details according to established systems developed through years of experience.

C. The Advantages to the Client of Using a Collection Agency

§9.4 To the company having problems collecting its accounts receivable, the collection agency offers a systematized and efficient approach to handling those accounts. Agencies have set practices to follow in demanding money from debtors and are generally efficient in processing paperwork and remittances. Agencies also have a network of attorneys around the country. While an individual company might send only a claim or two to a particular attorney, the collection agency the company employs might send dozens of files to a particular attorney. Therefore, that collection attorney might be more loyal to the collection agency because of the volume and might handle the claim more aggressively as a result of this special relationship. The collection agency might have more influence with the attorney in acting on a particular client's behalf if it deals with the attorney on a volume basis.

To an outsider, these relationships might seem strange and distant, but they are a product of the unique nature of the collection practice. Corporate lawyers do not wish to handle collection cases on a contingent fee basis, and most companies do not want their collections handled on an hourly basis. Often, a company has a large number of claims, but each must be brought in a different jurisdiction. Most businesses have neither the staff nor the sophistication to locate and supervise the large number of attorneys required to handle these collection matters. A good solid collection agency can be relied on to handle this responsibility.

For a more detailed discussion of making the necessary contacts to establish relationships with direct clients and collection agencies, see Steven A. Harms, *Handling the Collection Case in Michigan: A Creditor's Guide* §§1.8–1.12 (ICLE 4th ed).

III. State and Federal Legislation of Importance to Debt Collectors

§9.5 Two Michigan statutes that are of the utmost importance to debt collectors—particularly debt collectors in the field of retail or consumer collections—are MCL 339.901 et seq. and MCL 445.251 et seq. Attorneys engaged in debt collection are specifically regulated under these collection practices acts. MCL 445.251(g)(xi). If you are pursuing a collection case, you should read the statutes, paying special attention to the provision that lists prohibited practices. *See* MCL 445.252.

Federal legislation, encompassed in the FDCPA, 15 USC 1692 et seq., is more comprehensive than the Michigan legislation and is of primary concern to collection agencies and collection attorneys alike. Although the FDCPA was designed primarily to prevent abuses by collection agencies, collection attorneys are also included in the act. Thus, all attorneys who are considered debt collectors under the FDCPA should examine the law's current provisions and pay close attention to 15 USC 1692a(6), which defines the term *debt collector.*

A debt collector is a person who is involved 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." *Id.* Thus, collection attorneys are covered. However, an attorney who handles only one or two collection files a year generally need not be concerned about being considered a regular debt collector. In *Heintz v Jenkins*, 514 US 291 (1995), the U.S. Supreme Court confirmed that an attorney who regularly collects debts is considered a debt collector (and thus subject to the act) even while the attorney is in the midst of litigating a consumer debt. *See also Schroyer v Frankel*, 197 F3d 1170 (6th Cir 1999) (law firm that collects debts as matter of course for some clients or collects debts as substantial part of its general law practice is considered to regularly collect debts under FDCPA). In *Kistner v Law Offices of Michael P Margelefsky, LLC*, 518 F3d 433 (6th Cir 2008), defendant attorney was the sole member of a law office, under whose name he operated both a law practice and a debt collection agency, which had separate bank accounts, addresses, and phone numbers but were physically adjacent to each other. The collection letter in this case made a number of references to defendant's law firm, including mailing payment to it, but the signature block referred only to an "Account Representative" without a name. Regarding defendant's argument that he could not be held individually liable notwithstanding the potential liability for his debt collection business, the court held that subjecting the sole member of a limited liability company (LLC) to individual liability for violations of the FDCPA requires proof that the individual is a "debt collector," but does not require piercing of the LLC's limited liability veil. In this case defendant's alleged liability was not based only on his being the sole member of his law firm but was also grounded on his regular

engagement in the collection of debts. The court concluded as a matter of law that the defendant was a debt collector and subject to individual liability.

15 USC 1692e(11) provides that the warnings required under the FDCPA do not apply to a "formal pleading made in connection with a legal action." However, because the amendment does not define *formal pleading* and there does not appear to be a uniform definition of the term among the states, practitioners might want to err on the side of caution and include the warning.

In *Grden v Leikin Ingber & Winters PC*, 643 F3d 169 (6th Cir 2011), reversing summary judgment for defendant collection agency, the Sixth Circuit held that there was a jury question about whether defendant's "motion for default" constituted a misleading statement under the Fair Debt Collection Practices Act. The court found that the motion could reasonably be construed as falsely stating that plaintiff had already missed the deadline for responding to the collection action.

In *Romea v Heiberger & Assocs*, 163 F3d 111 (2d Cir 1998), a landlord's attorney complied with statutory eviction requirements, which included a "notice to quit" with a three-day grace period (the notice was similar to Michigan's summary proceedings notice, MCL 600.5714, .5716). The *Romea* court held that the attorney was a debt collector and that the notice to quit, which he had signed, failed to meet the FDCPA's disclosure and debt validation requirements. As a result, the attorney was liable for actual damages plus additional statutory damages and costs. For a thorough discussion of *Romea,* see Lawrence Shoffner & Eric S. Bronstein, *Michigan Summary Proceedings and the Fair Debt Collection Practices Act: A Sea Change for Landlords' Lawyers?* Mich Real Prop Rev, Spring 1999, at 31–35.

The FDCPA covers only *consumer debts,* which are defined as debts for insurance, money, property, or other services that are "primarily for personal, family, or household purposes." 15 USC 1692a(5). No "offer or extension of credit" is required. *Pollice v National Tax Funding, LP*, 225 F3d 379, 401 (3d Cir 2000).

If your practice falls within the FDCPA, you need to be concerned about such issues as where suits can be filed, 809 validation letters to debtors (see form 9.1), handling postdated checks, contacting third parties, and practices prohibited under the act, such as harassment, abuse, and misrepresentation.

Violators of the FDCPA are liable for actual and statutory damages up to $1,000. The act also mandates the award of reasonable attorney fees. 15 USC 1692k(a)(3). The Sixth Circuit has decided that the act should be construed to assess damages at $1,000 per proceeding rather than $1,000 per violation, a significant potential savings for attorneys who violate the act. *Wright v Finance Serv*, 22 F3d 647 (6th Cir 1994).

For a full, detailed discussion of the areas of concern, prohibited practices, and guidelines for operating under the FDCPA, see Steven A. Harms, *Handling the Collection Case in Michigan: A Creditor's Guide* ch 3 (ICLE 4th ed).

Another federal statute that affects debt collectors, including attorneys working to collect a debt, is the Fair and Accurate Credit Transactions Act (FACTA or FACT Act), which amended the Fair Credit Reporting Act, Pub L No 108-159, 117 Stat 1952 (2003). Extensive protections are provided for victims of identity