

**FEDERAL COURTS RESTRICT LANDLORDS'
ABILITY TO COLLECT UNPAID RENT UNDER
THE FAIR DEBT COLLECTION PRACTICES ACT¹**

1. Recent Federal Cases Affect New York's
Procedure for Summary Proceedings

On December 22, 1997 the United States District Court for the Southern District of New York decided a case of great import for those practitioners of landlord-tenant law. In Romea v. Heiberger, 1997 U.S. Dist. Lexis 20352, (S.D.N.Y. 1997) Judge Kaplan determined that the statutorily required predicate notice to a summary proceeding signed by an attorney is a communication for the purpose of collecting a debt within the meaning of the federal Fair Debt Collection Practices Act ("FDCPA").

New York law has long provided for a mechanism for the efficient resolution of certain landlord-tenant disputes pursuant to Article 7 of the Real Property Action and Proceedings Law ("RPAPL"). Summary proceedings based on nonpayment of rent may be commenced three days after a demand for rent is served on the tenant and the case may theoretically be resolved in as little as twenty days. A potential conflict arises because federal law requires that a debt collector give the consumer 30 days to seek validation of the debt.

Attorneys who wish to avoid a thirty day delay prior to commencing the proceeding must have the landlords sign three day notices, since the Act in most cases, does not apply to creditors seeking to collect their own debts. Thus, a landlord who signs a three day demand need not validate the debt or include any of the FDCPA's statutorily required notices. Landlord-tenant practitioners wishing to avoid potential liability under the Act and the application of FDCPA's waiting periods would do best to advise their clients to sign their own three day demands.

The Romea case was recently followed by Judge John S. Martin Jr. in a case titled Hairston and Hairston v. Whitehorn & Delman, 1998 U.S. Dist. Lexis 819 (S.D.N.Y.

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1998). There, the court agreed with Romea and held that rent is a debt since the definition of debt includes those scenarios where there is no extension of credit, cf. Zimmerman v. HBO Affiliate Group, 834 F.2d 1163 (3rd Cir. 1987). The court went on to address an argument not set forth in Romea, that the defendants' communications were not attempting to collect a debt but were merely following the procedure under RPAPL for evicting someone. The court rejected this argument and stated that although the letters do fulfill RPAPL prerequisites they serve a dual purpose by seeking to collect a debt. These cases raise significant questions for all practitioners particularly those in the field of landlord and tenant law and demand an analysis of the Act's provisions and stated purpose.

The Fair Debt Collection Practices Act ("FDCPA"), enacted in 1977, was premised on Congressional concern that state protection against questionable debt collection practices were insufficient. The primary goal of the FDCPA is to protect consumers from those unscrupulous debt collectors who use abusive, deceptive, and unfair debt collection practices, including threats of violence, use of obscene language, certain contacts with acquaintances of the consumer, late night phone calls, and simulated legal process.

Specifically, the Act provides that a "debt collector" may not use various "unfair or unconscionable means to collect or attempt to collect" a consumer debt. The Act sets out rules that a debt collector must follow for "acquiring location information" about the debtor; communicating about or with the debtor and bringing legal actions. 15 U.S.C. § 1692 et seq. The statute also prohibits false and misleading communications in connection with the collection of a debt. The Act imposes civil liability on debt collectors who violate the act and contains a provision for attorneys fees.

The Act is well-intentioned and attempts to address a problem that is clearly of concern to many consumers. Unfortunately, Congress' stated purpose is often at odds with actual FDCPA litigation. The FDCPA has become the bane of attorneys who, using reasonable means, legitimately seek to collect money owed to clients. A large amount of litigation has ensued for the most minor perceived violations, primarily because the FDCPA provides for an award of attorneys fees to the prevailing party. Additionally, the FDCPA's confusing structure and highly technical requirements make it difficult to comply with and result in wasteful litigation over conduct that Congress probably never intended would result in liability. Landlord-tenant practitioners are already seeing repercussions from the Romea decision as tenant's attorneys seek dismissal of nonpayment petitions for failure to comply with the FDCPA or threaten suit against owner's counsel over cases resolved months ago. Other attorneys, having found a new tool in their shed are bringing FDCPA claims even in situations where communications were made in court-related documents and no abuse of a consumer ever occurred.

It is unlikely that Congress foresaw the FDCPA being used to preempt a state law, that in effect gives tenants greater protection than they might otherwise have, even if the State legislature were to do away entirely with the three day demand requirement. Indeed the FDCPA contains an exemption where the state law consumer protections are greater than those provided by the FDCPA. One federal court judge has said as much. In a case not mentioned by the Romea or the Hairston Courts, Judge Weinstein found that "[t]he quick resolution of disputes under the RPAPL framework satisfies the essence of the FDCPA protection of debtors." Travieso et. al v. Gutman, Mintz, Baker & Sonnenfeldt, P.C. et. al, 1995 U.S. Dist. Lexis 17804 (E.D.N.Y. 1995). Judge Weinstein also realized that "to apply the FDCPA against a law firm engaged in litigation in housing court would essentially preempt New York's [RPAPL] a result never intended by Congress in enacting the FDCPA." Additionally, it is unlikely that Congress would find a three day notice to be abusive or harassment of the "least sophisticated consumer", the standard currently used to determine if actions by debt collectors violate the Act. This is especially true where it has been argued that the purpose of summary proceedings is to facilitate landlords who primarily seek possession of premises and not collection of debts.

The Romea decision was recently certified for interlocutory appeal to the Second Circuit Court of Appeals. In doing so, Judge Kaplan seemed to rethink some of his pronouncements on New York's statutory scheme for summary proceedings as they relate to the FDCPA. First, he noted that there is conflict among the federal circuit courts of appeal as to whether the FDCPA applies to obligations that do not involve a deferral of payment. As rent typically is payable in advance, it is arguable that the obligation to pay rent is not one involving deferral of payment. Additionally, there is significant difference of opinion as to whether the three day demand at issue in the aforementioned case is in fact a communication to collect a debt. It has been argued that the three day notice may be construed as a litigation paper not subject to the Act.

2. Is Rent A Debt?

The FDCPA defines debt as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes. . .". There are state and federal court decisions finding that condominium fees are not debts. An Illinois federal court held that condo fees do not involve extension of credit and therefore could not amount to a debt under the Act. Another federal court held that condominium fees for maintenance of common areas do not constitute a debt under the FDCPA because they arise by contract, are assessed on a regular basis and like rent, do not reflect deferred payments on prior debt. Azar v. Hayter, 874 F. Supp. 1314, (N.D.

Fla.) aff'd, 66 F.3d 342 (11th Cir. 1995).

Some courts have rejected the extension of credit requirement in finding an attempt to collect debt. However, at least one circuit court of appeals has found that in order for there to be a debt under the Act there must be an extension of credit. Zimmerman v. HBO Affiliate Group, 834 F.2d 1163 (3d Cir. 1987). Since rent does not involve the extension of credit and is not a deferred payment, but rather is paid as it becomes due, the Second Circuit in deciding Romea could find that rent is not a debt.

3. Are Three-Day Demands
"Communications to Collect a Debt?"

Another argument against the FDCPA application to statutorily required rent demands is that the three-day notice is a litigation paper which is impliedly excepted from the requirements of the FDCPA. Although the Supreme Court in Heintz v. Jenkins, 514 U.S. 291 (1995) held that the FDCPA applies to attorneys involved in litigation, the facts of the case involved a settlement letter sent by an attorney to a party during the course of litigation. The Court did not find that litigation papers sent to a party could violate the Act. In fact, a close reading of the decision indicates that the Court was content to carve out an implied exception for court-related documents as opposed to creating a far broader exception, for all litigating attorneys. This exception would be consistent with the statute's apparent objective of preserving creditor's judicial remedies.

In carving out the exception the Court stated: "it would be odd if the Act empowered a debt-owing consumer to stop the 'communications' inherent in an ordinary lawsuit and thereby cause an ordinary debt-collecting lawsuit to grind to a halt." Although the Court was not interpreting the provision at issue in the Romea and Hairston cases it is an indication that litigation papers are to be treated differently from communications that have no jurisdictional or substantive significance.

In New York, the three day notice is a jurisdictional predicate to commencement of a summary proceeding for nonpayment of rent and failure to serve a proper three day demand will result in dismissal of the proceeding. Solack Estates, Inc. v. Goodman, 102 Misc. 2d 504 (A.T. 1st 1979). Additionally, proof of a demand for rent is an essential element of a nonpayment proceeding and a copy of the three day demand with proof of service must be annexed to the petition and incorporated therein by reference. Arden Street Assocs. v. Santana, N.Y.L.J., October 20, 1987, p. 12, col. 2 (A.T. 1st); RPAPL § 711(2). Service of the demand must be made in the same manner as the notice of petition and petition pursuant to RPAPL § 735. In Civil Court the three day demand is treated much like a

pleading or other court-related documents and may therefore be exempt from the FDCPA's provisions.

4. Validation Provision

Despite all of this it may be possible for attorneys to send three day demands and still comply with the FDCPA. The potential for the FDCPA to preempt parts of New York's RPAPL arises from the FDCPA's validation provision. 15 U.S.C. § 1692g provides that when debt collectors solicit payment they must provide consumers with a detailed validation notice, a statement that the consumer has 30 days to dispute the debt, and an offer to verify the debt, if the consumer so requests. Significantly, the debt collector who receives a request for validation must cease collection of the debt until the debt collector complies with the consumer's request. The recent decisions discussing the potential demise of the common New York practice for summary proceedings may overstate the case. It may be possible for attorneys to comply with the validation provision and still effectuate the efficient nature of nonpayment proceedings.

Debt collectors need not cease collection of debts during the thirty day validation period. Even if the consumer requests validation, the efforts to collect the debt must cease only for the period from the date the validation demand is received by the debt collector, until the date the information demanded is provided to the debtor. A validation demand could be received and satisfied in as little as one day thereby allowing attorneys who represent landlords to lose little time when prosecuting nonpayment cases. Of course, problems may arise where the tenant requests validation and the attorney does not receive or properly comply with the request yet continues prosecution of the nonpayment case.

However, attorney compliance with the FDCPA is not such a simple matter. In addition to providing the validation notice, there is an additional requirement that such notice may not be contradicted or overshadowed by other communications or notices to the consumer including contradictory language within the notice itself. A notice is overshadowing or contradictory if it would make the "least sophisticated consumer" uncertain as to his or her rights. A three-day notice has historically informed the tenant if they failed to pay the rent or vacate within three days the landlord would commence a summary proceeding to recover possession. Assuming the Act applies to the demand, one could argue that such a notice is contradicted by a validation provision giving the consumer thirty days to dispute the debt.

While it may be cumbersome for practitioners to obtain their client's signatures in every nonpayment proceeding, it is simply not a viable alternative for the experienced landlord and tenant practitioner to resort to serving a thirty (30)

day notice. The tenant's bar has publicly stated that the thirty (30) day notice requirement of the FDCPA should also be extended to the service of the Notice of Petition and Petition which docket a summary proceeding. It is likely that these documents, which are issued by the clerk of the court, would fall squarely within the Heintz exception for court related "documents."

5. Conclusion

While the ultimate effects of the Romea decision on landlord-tenant litigation are unknown, what Romea does highlight is the need for all practitioners to be cognizant of the potential reach of the federal law into any heretofore, traditional state law preserve.