Notes from the Litigation Trenches: Rosenthal FDCPA – 2012 Year in Review

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As in past years, this Article will provide you with the highlights of cases discussing evolving issues in California's Rosenthal Fair Debt Collection Practices Act ("Rosenthal FDCPA"). This year saw a decrease in the number of cases decided that referenced the Rosenthal FDCPA, which appears to correspond with the decrease in FDCPA cases that were filed this year in California. Nonetheless, there were approximately 125 cases in 2012 that referenced the Rosenthal FDCPA. The issues below highlight emerging trends in California Rosenthal FDCPA litigation and useful information for addressing Rosenthal FDCPA litigation.

The Rosenthal FDCPA and Mortgages

There continue to be many cases involving mortgages that reference the Rosenthal FDCPA. This is a trend that the courts are seeing as well. The number of cases filed by persons facing foreclosure in California continues to swamp the courts. As reported in previous articles, courts have generally held that foreclosure does not constitute "debt collection" under the Rosenthal FDCPA. With very little analysis, the courts have dismissed cases involving foreclosures. (*Gilmore v. American Mortg. Network*, 2012 WL 6193843, *6 (C.D. Cal. 2012).) And courts have then expanded the application of this brief analysis and held that if foreclosures are outside the scope of the Rosenthal FDCPA, then so are other collection activities by mortgage loan servicers.

In addition to cases involving foreclosures, courts also addressed lawsuits against loan servicers involving the modification of loans. In one case, the defendant argued that the state Rosenthal FDCPA was preempted by the federal Home Owner's Loan Act. The Court refused to dismiss this type of Rosenthal FDCPA claim, rejecting the preemption argument. (*Chao v. Aurora Loan Services, LLC*, 2012 WL 6652442, *6 (N.D. Cal. 2012).) Preemption has worked as a defense in other types of Rosenthal FDCPA cases. (*Pirouzian v. SLM Corp.*, 396 F.Supp.2d 1124, 1130 (S.D. Cal. 2005) (Rosenthal FDCPA claim preempted by the Higher Education Act and the Fair Credit Reporting Act).) Defendants should continue to review their cases to see is preemption is a potential defense.

Statute of Limitations

Any action under the Rosenthal Act must be brought "within one year from the date of the occurrence of the violation." (Civ. Code § 1788.30(f).) The Ninth Circuit has ruled that "a limitations period begins to run when the plaintiff knows or has reason to know of the injury which is the basis of the action" in an FDCPA action involving disclosure to third parties (*Magnum v. Action Collection Serv., Inc.*, 575 F.3d 935, 940 (9th Cir.2009) (internal quotation marks omitted).) However, Ninth Circuit authority also provides that when the alleged violation of the FDCPA is the filing of a lawsuit, the statute of limitations begins to run on the filing of the complaint in state court. (*Naas v. Stolman*, 130 F.3d 892, 893 (9th Cir.1997) ("Filing a complaint is the debt collector's last opportunity to comply with the Act, and the filing date is easily ascertainable.").) In 2012, a Southern District Court analyzed a case where Plaintiff alleged that the amount demanded was not legally permissible. The collection lawsuit was filed in 2010, and the Rosenthal FDCPA lawsuit was filed in early 2012. Plaintiff argued that the improper demand was included in a motion for summary judgment, which fell within the one year statute of limitations. The Court held that the filing of the lawsuit with the same demand was the point at which the statute of limitations began to run, and thus, the lawsuit was time-barred. (*Cappos v. Suppa, Trucchi & Henin, LLP*, 2012 WL 6057995, *3 (S.D. Cal. 2012).)

Agency and the Statute of Limitations

A recent case, *Quinlan v. CitiMortgage, Inc.*, 2012 WL 2401380 (E.D. Cal. 2012), addressed the sufficiency of agency allegations and discussed statute of limitations and the continuing violation doctrine. In this case, Plaintiff alleged that various collection agencies made improper calls, and ultimately claimed that two Citibank entities violated the Rosenthal FDCPA based on the actions of the collection agencies under the vicarious liability theory of agency. The Citibank entities sought to dismiss these claims because (1) Plaintiff had failed to sufficiently plead agency and thus had no vicarious liability, and (2) these claims were barred by the statute of limitations, eliminating any direct liability.

Plaintiff had pled (1) that each of the collection agencies were working on behalf of the Citibank entities, (2) that the collection agencies received detailed information about the account from the Citibank entities, and (3) that the collection agencies had represented that they were working on behalf of the Citibank entities. The Court noted that these representations by the collection agencies should be assumed to be accurate at the pleading stage in part because the FDCPA prohibits collection agencies from making misrepresentations. (See 15 U.S.C. § 1692e.) The Court found this sufficient at the pleading stage to defeat this insufficient pleadings argument by the Citibank entities. (*Quinlan, supra*, 2012 WL 2401380 at *3-*4.)

The Citibank entities also argued that the claims were time barred because the Citibank entities did not have direct contact with Plaintiff during the year preceding the filing of the lawsuit, which would have eliminated any direct liability. The Court held that the continuing violation doctrine defeated this argument, at least at the pleading stage. The continuing violation doctrine looks to whether the conduct complained of constitutes a continuing pattern and course of conduct, rather than unrelated discrete acts. The Court found that determining whether a myriad of phone calls by various collection agencies constitutes a continuing pattern was too fact intensive to determine at the pleading stage with a motion to dismiss. (*Id.* at 4.) Agencies and their clients should closely follow this issue. Because the Rosenthal FDCPA applies to creditors and collection agencies alike, creditors may be finding that plaintiffs use the continuing violation doctrine more to hold creditors liable. Depending on the claims, this could also mean that collection agencies are asked to indemnify their clients for conduct that occurred more than one year ago.

Default Judgments

As noted in previous articles, default judgments can be very enlightening in relation to what a court might award in damages and attorneys' fees. As courts have seen increased FDCPA lawsuit filings, courts have taken a more strict approach to default judgments, and have critically examined claims of emotional distress and sufficiency of pleadings. And it is important to remember that even if a plaintiff seeks a default judgment, a defendant can oppose the motion for default judgment to dispute the amount of damages or attorneys' fees.

In 2012, a court granted a default judgment finding that the following factual allegations were sufficient to establish liability: A collector called the debtor and stated that there was an impending criminal case against the Plaintiff for failure to pay her debt. After this initial communication, a collector called the Plaintiff again and repeated the statement that the Plaintiff would be criminally prosecuted for failure to pay her debt and threatened to "intercept" her paycheck. In a third call, the collector called the Plaintiff's place of employment and spoke to Plaintiff's coworker, representing that he was from the "D.A.'s Office" and that if the Plaintiff did not return the call, the agent could "legally take action and have her arrested at her place of employment." (*Ortega v. Griggs & Associates LLC*, 2012 WL 2913202, *1 (N.D. Cal. 2012).) The Court found that these factual allegations were not only sufficient to establish liability under both the FDCPA and the Rosenthal FDCPA, but also justified maximum statutory damages under both statutes. The Court explained that there were multiple violations in each of the three phone calls and the fact that there were three separate phone calls demonstrated a complete disregard of the statutory prohibitions. Plaintiff did not seek any actual damages. The Court also held that reasonable attorneys' fees for drafting an initial complaint and the pleadings for a motion for default judgment were $5,146. (*Id.* at *5.) This award is useful in valuing what attorneys' fees might be awarded if the case is resolved very early. Often times, agencies believe that attorneys' fees at a very early stage may be $1,000 or less.

In *Salamon v. Creditors Specialty Service Inc.*, 2012 WL 762014 (N.D. Cal. 2012), the Court awarded only $500 in statutory damages under the Rosenthal FDCPA because the following conduct was not very egregious. Plaintiff alleged: (1) the collector told Plaintiff that the collector could remove the lien against her house, which was false; (2) there were 4 phone calls after Plaintiff requested that Defendant cease and desist, and (3) there were an undetermined number of phone calls over a multi-year period which Plaintiff believed were harassing. (*Id.* at *4; <u>see also</u> *Patton v. Prober & Raphael, a Law Corp.*, 2012 WL 294537, *7 (N.D. Cal. 2012) (default judgment awarding $500 in statutory damages for failure to include some of the validation notices required by section 1692g).)

Similarly, in *Torres v. Bernstein, Shapiro & Associates, L.L.C.*, 2012 WL 2376401 (E.D. Cal. 2012), Plaintiff was awarded a default judgment, including $4,128.50 in fees and $583.32 in costs to file and serve the complaint. Notably, the court awarded fees $355 per hour for Robert Hyde, of Hyde & Swigart and at $275 for one of his associates, David McGlothlin. The only reduction made by the Court on the fee request was for mathematical errors by Plaintiff's counsel.

In *Torres*, the plaintiff was also awarded statutory damages and emotional distress damages as part of her default judgment. Plaintiff alleged that a collector contacted her mother at her mother's place of employment and left two messages stating that the collector needed to speak with Plaintiff regarding a legal matter involving Plaintiff's social security number. The collector left a phone number, but failed to identify himself. Plaintiff called the number and reached a recorded message that stated that Plaintiff had reached the "Pending Warrants Department." Plaintiff spoke with a collector who informed her that she owed a debt of $800 originally incurred in 2005 to ACE Check Cashing for a $350 check. Plaintiff was frightened that she was contacted by the "Pending Warrants Department" and arranged a payment plan totaling $900, even though she apparently owed only $800. Plaintiff claimed she had not received any letter setting forth the 1692g validation notices. Shortly after her initial contact with the collector, she sent an email stating that she disputed the debt and that the payment arrangement was null and void. Nonetheless, six days later, the collection agency withdrew $150 from her checking account. (*Id.* at *2.)

The Court found that the collection agency's conduct was the kind that prompted the enactment of debt collection statutes like the Rosenthal FDCPA. The Court also found that the misleading use of legal terminology was clearly intentional, and not a mere technical violation, which warranted full statutory damages. Additionally, the Court awarded emotional distress damages. Plaintiff's affidavit set forth that she was nervous and frightened by the phone calls, which caused her to enter into a payment arrangement. Plaintiff stated in her affidavit that she experienced mental anguish, including sleeplessness, nervousness, stress, anxiety and embarrassment. The Court noted that the amount she requested for emotional distress, $5,000, was justified, especially since it was on the low end of emotional distress awards and because the motion for default judgment was unopposed. (*Id.* at *4.) This case is useful in gauging what conduct warrants an award of emotional distress and what actual emotional distress damages might be awarded under these circumstances.

Attorneys' Fees

Like attorneys' fees determinations in default judgments, attorneys' fees orders are instructive of how much is a reasonable fee at different stages in litigation, and appropriate hourly rates. In *Rubenstein v. National Recovery Agency, Inc.*, 2012 WL 1425144 (C.D. Cal. 2012), the Court ruled on a motion for attorneys' fees, finding that a reasonable hourly rate for a simple case involving a single phone call was $275 for Amir Goldstein. The Court's decision focused in part on previous awards obtained by Mr. Goldstein, but also debunked an hourly rate survey. The Court explained that the survey was unreliable for several reasons. First, it appears that only consumer attorneys were invited to participate. The Court explained that if a consumer attorney knew the purpose of the survey, he or she would have an incentive to inflate their responses. The survey did not contain any information about how large a sample was used to reach the conclusions regarding hourly rates in California. And the hourly rates in the survey results for the most experienced attorneys inexplicably drop, raising further issues regarding the credibility of the results. Ultimately, the Court found other decisions awarding $275 to be more credible than the survey. (*Id.* at *2-*4.)

The *Rubenstein* Court also reviewed the hours claimed for this simple case. At the time it was resolved, Plaintiff had filed a complaint and Defendant had answered. Some light discovery had been exchanged, and some settlement discussions had occurred. Plaintiff's counsel claimed over 50 hours had been reasonably incurred. However, the Court noted that certain phone calls were overbilled, including .2 hours to make an unanswered phone call to defense counsel. Plaintiff also noted in his reply brief that he had a few additional hours not noted on his time records. This failure to track time accurately brought the entire billing records under question. After an in-depth review of the records, the Court reduced the 50 hours claimed by about 4.5 hours. (*Id.* at *5-*6.)

After concluding that a reasonable lodestar amount (reasonable hours time reasonable rate) was approximately $12,700, rather than the demanded $16,500, the Court decided to reduce the figure further. Defendant had noted that very early in the case, Plaintiff demanded $15,000. The time records indicated that Plaintiff's counsel's fees at that time were approximately $5,400, using Plaintiff's counsel's higher hourly rate and the hours on the time records. Therefore, Plaintiff was seeking actual and statutory damages of about $9,600 in the $15,000 demand. Plaintiff ultimately settled for $2,500 in statutory and actual damages. Thus, Plaintiff settled for 26% of her original demand. The Court concluded that the excessively high demand might have discouraged settlement and prolonged litigation. Thus, the Court used its discretion and reduced the $12,700 figure by 20%, and awarded $10,153. (*Id.* at *6-*7.) Careful and meticulous oppositions to motions for attorneys' fees can result in huge reductions in attorneys' fees awards. In this case, the Court reduced the initial demand by about 40%. (See also *Miranda v. Law Office of D. Scott Carruthers*, 2012 WL 78236, *8-*9 (E.D. Cal. 2012) (same, awarding fees for 54 hours out of the 94 hours requested, a reduction of about 40%, due to excessive litigation, especially after liability was determined).)

Opinions that address fee motions are often a great source of cases setting forth the reasonable hourly rate in a District. For instance, in *Scott v. Kelkris Associates, Inc.*, 2012 WL 1131360, *5 (E.D. Cal. 2012), the Court noted that reasonable hourly rates in the Eastern District in FDCPA cases range from $250-$275. (See also *Miranda, supra*, 2012 WL 78236, at *7 (same, awarding $250 per hour to Elizabeth Arleo in an Eastern District case).) In *Blackburn v. ABC Legal Services, Inc.*, 2012 WL 1067632, *5 (N.D. Cal. 2012), a Northern District judge found that an hourly rate of $395 was reasonable, citing to a case that awarded fees with hourly rates between $350 and $480. (See also *Salamon, supra*, 2012 WL 762014, at *5 (default judgment from the Northern District awarded fees to Krohn & Moss with the following hourly rates: Chris Addy - $225; Jim Pacetti - $390, and $125 for paralegals); *Patton, supra*, 2012 WL 294537, *8 (default judgment from the Northern District awarded fees to Fred Schwinn of $3,465 and a market rate of $350).)

Credit Transaction Element of the Rosenthal FDCPA

As discussed in previous articles, the Rosenthal FDCPA only applies to debt collection efforts involving a debt arising from a credit transaction. Courts have rarely addressed the credit transaction element, holding in one case that service on an automobile where payment is due upon completion is not a credit transaction (*Gouskos v. Aptos Vill. Garage,* 94 Cal.App.4th 754, 759 (2001)), and neither is a dishonored check (*Abels v. JBC Legal Group,* 428 F.Supp.2d 1023, 1026 (N.D. Cal. 2005)). The *Gouskos* Court had concluded, a "transaction when the consumer acquires something without paying for it" is a "consumer credit transaction." In 2012, in *Koller v. West Bay Acquisitions, LLC*, 2012 WL 2862440 (N.D. Cal. 2012), the Court analyzed whether late fees for a video rental would be considered a credit transaction, falling within the ambit of the Rosenthal FDCPA. The Court determined that such late fees were a credit transaction because the debtor received the video rentals for a longer period of time without paying for it. (*Koller supra*, 2012 WL 2862440, at *7.) This is distinguished from the analysis in *Abels*, where the Court looked at the intent at the beginning of the transaction.

Pursuing Litigation When Service of Process Is Known to Be Ineffective

The Rosenthal FDCPA prohibits collectors (typically attorneys) from pursuing litigation when the collector knows that service of process was not affected. (Civ. Code § 1788.15(a).) In 2012, a court addressed this issue and established a standard for proving that the collector/attorney did not know that service was not affected. As the Court began its analysis, the Court explained that defendants cannot prevail on these claims by simply submitting a declaration that states the defendant did not know of the non-effective service because the defendant hired an independent process server. The Court ultimately concluded that the evidence submitted by Defendant would demonstrate that Defendant had no knowledge of the ineffective service. Defendant's declarations set forth the following evidence: (1) the factual basis from which Defendant concluded that Plaintiff lived at a certain address (and such conclusion was reasonable); and (2) that Defendant was notified that substitute service at that address was successful; and (3) the Process Server's declaration stated he was never informed that Plaintiff did not live at the address at which service was effected. (*Scott v. Kelkris Associates, Inc.*, 2012 WL 996578, *8 (E.D. Cal. 2012).) This road map will help other collectors sued on this type of claim.

Conclusion

As the economy begins to turn around, and collection agencies address the issues that have fueled Rosenthal FDCPA litigation in the past, we anticipate that the plaintiff's bar will become inventive in the theories that they use to support litigation. We are seeing less FDCPA/Rosenthal FDCPA cases, and more cases involving call recording, cell phone calls, and credit reporting. And we anticipate that CFPB investigations and litigation will take the forefront in legal issues effecting debt collectors. CFPB will look to the case law that develops from the FDCPA and its state counterparts, like the Rosenthal FDCPA, to develop the regulations that will impact the financial services industry. Tracking the development of the Rosenthal FDCPA case law prepares you to manage the risk of claims CFPB investigations and to address claims as they occur … here in the litigation trenches.