

Follow Through On Federal Law Developments

Are Bad Checks Covered by the FDCPA?

A split of authority has developed on the issue of whether the Federal Fair Debt Collection Practices Act applies to collecting bad checks (15 U.S.C. §1692). The Federal Trade Commission says yes in certain circumstances as do the Seventh and Ninth Circuit courts (*Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997); *Newman v. Boehm, Pearlstein & Bright, Ltd.*, No. 96-2839 (7th Cir. July 2, 1997); *Charles v. Lundgren & Associates, P.C.*, No. 96-15995 (9th Cir. July 8, 1997)). The Third Circuit (*Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (1987)) and several federal district court decisions indicate that collecting bad checks is not covered. A recent Ohio case holding that the Act does not apply to bad checks is headed for the Sixth Circuit (U.S.D.C. So. Distr. of Ohio, *Pocisk v. VAS Dimensions, Inc.*, No. C2-96-1161, April 25, 1997). The argument is over whether a check transaction involves "an offer or extension of credit." The Ohio court held "The tendering of a check is the antithesis of a voluntary extension of credit. To the contrary, the vendor parted with the service or product after receiving what it reasonably assumed was payment in full." Looks like this issue is ultimately one for the Supreme Court. The only safe practice now is to assume that you must comply with the Act when collecting on bad checks. If you don't, it could be expensive.

Medicaid Fraud: Putting Grandma's Lawyer In Jail

Section 217 of the Kennedy-Kassebaum health bill criminalized certain transfers of assets to become eligible for Medicaid thereby creating chaos for lawyers advising elderly clients. The Taxpayer Relief Act of 1997 repealed Section 217. It replaces it with 42 U.S.C. § 1320a-7b(6). This change criminalizes the actions of an individual who "for a fee knowingly and willfully counsels or assists an individual to dispose of assets ... in order for the individual to become eligible for [Medicaid], if disposing of the assets results in the imposition of a period of ineligibility for [Medicaid]...." The penalty is a \$10,000 fine or one year in prison, or both.

Space does not permit going into all the pitfalls of the new law. One interpretation is that the law is broken only if the client is advised to apply for Medicaid benefits during the period of ineligibility created by the transfer. Some fear, however, that even if the lawyer gives accurate legal advice, the lawyer will be held responsible if the client inadvertently or deliberately applies for aid prematurely. Failure to give accurate legal advice, however, may be malpractice because competence and diligence require a lawyer to fully advise a client on pertinent law.

Several constitutional law experts believe this change is a violation of lawyers' First Amendment rights. Some lawyers think the Department of Justice will not vigorously enforce it based on Justice's low key approach to the repealed law in *Peebler and Nay v. Reno*, No. CV97 256-HA (D. Ore., May 5, 1997). No one wants to be the test case, however. For more detail, two good recent articles are available. The *National Law Journal* in its September 8, 1997 issue at page B14 covers the situation well in "Advising

Elderly Clients May Raise Liability Risks." Lawyers Weekly USA in its September 8, 1997 issue on page 1 covers the issue in "Lawyers Threatened by Medicaid Law." It includes this advice on how to protect yourself if you counsel on asset transfers and Medicaid eligibility: 1. Warn the client not to apply early. 2. Avoid gray areas in the rules. 3. Just explain the rules. 4. Document what you say.

I Can't Find My Client!

By Beverly Michaelis, Practice Management Advisor, Oregon Professional Liability Fund. Reprinted with permission.

The odds are that sometime during the course of your career you will be unable to locate one of your clients. Often, this happens at a crucial point during representation, such as on the eve of trial or when a statute is about to run. Here are some suggestions for minimizing the risk of being unable to locate your clients:

Look for red flags. Clients who move frequently, change jobs often or have no friends or family in the community are likely to fall out of touch. Proceed with caution.

Listen to your intuition. If your gut sends out a warning flare, turn the case down. Don't be swayed by pressure from a friend, the amount of fees involved or the promise of a quick resolution. Such cases are rarely worth the trouble and often result in malpractice claims which could have been avoided.

Use client intake forms which prompt you to get names, addresses, telephone numbers, and relationships of at least two people who will always know where your client can be reached. Get additional names, addresses and telephone numbers if the situation warrants. Social Security numbers, drivers license numbers and dates of birth can be helpful in tracking your client later, if need be.

Stress to clients the importance of keeping in touch with your office at all times. Some law offices add language to their fee agreement or engagement letters giving the responsible attorney the right to withdraw if the client fails to cooperate in the client's case. This can include requiring the client to keep a current address and telephone number on file with the lawyer's office at all times.

If a client becomes unresponsive or difficult to reach, the situation is not likely to improve. Carefully document your efforts to communicate with the client and give strong consideration to withdrawing from representation when the problem first develops.

Take extra precautions with impaired clients. One solution may be to learn the names and numbers of the other professionals with whom your client has regular contact. Case workers, mental health workers and the like can be extremely helpful. Get your client's authorization to establish and maintain contact with these professionals.

Recognize that certain practice areas such as criminal law involve clients who are more likely to move without notifying you.

If you decide to withdraw from representation, read and comply with the applicable disciplinary and court rules.

If it's too late and your client has already disappeared, conduct as thorough a search as possible. Working from the information on your intake sheet, call the client's employer and emergency contacts. Visit your client's last known address and talk to the neighbors. Do a DMV search. Run a skip trace. Use the Internet. Apply the same level of diligence in searching for your client as you would in locating and serving the opposing party in your case.