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October 12, 1995

RE: Service of Summons and Complaint with a Validation Notice

Dear Mr.

The Executive Director of the Collection Agency Board has forwarded your questions to me. The office has been experiencing a slight backlog, and I apologize for any inconvenience this may have caused you.

Please refer to this office's July 3, 1995 response to your inquiry with respect to communicating with the consumer at his or her place of employment. That letter indicated that the Collection Agency Board has not taken a position on mailing the initial written communication from a collection agency to the consumer at the consumer's place of employment, nor are there any prohibitions against it found in the Colorado Fair Debt Collection Practices Act ("CFDCPA"). The letter further suggested that the envelope which contains the communication be conspicuously marked "personal and confidential", and if possible, inquiries regarding the mail opening procedures at the consumer's place of employment should be made prior to sending the initial notice. Whether the procedure constitutes a third party communication in violation of §12-14-105(2), C.R.S. would then become a factual issue.

Your letter of July 11, 1995 inquired whether the Collection Agency Board has taken a position on the issue of attaching a FDCPA initial communication to a summons, and then having the summons and initial communication served on the consumer in his or her work place.

Section 12-14-109, C.R.S. requires that, within five days after the initial communication with the consumer in connection with any debt, a debt collector or collection agency send the consumer an initial written communication, in which certain disclosures must be made. Among other things, the consumer must be informed that he or she has a thirty-day time period in which the validity

of the debt may be disputed. The consumer must also be informed that if the consumer notifies the debt collector or collection agency in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector or collection agency must obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector or collection agency.

Personally serving a summons with the initial written communication (validation notice) attached to it raises several issues. First, the question of whether the summons would overshadow the validation notice arises.

Case law interpreting the federal Fair Debt Collection Practices Act has established that the initial written communication (validation notice) must be provided in a manner that effectively communicates its contents to the least sophisticated of consumers. See e.g., Clomon v. Jackson, 998 F.2d 1314 (2nd Cir. 1993); Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991); Smith v. Transworld Systems, Inc., 953 F.2d 1025 (6th Cir. 1992). The validation notice cannot be overshadowed by other messages which may confuse or obscure the notification that the consumer has thirty days in which to dispute the debt. See e.g. Graziano, supra; Cortright v. Thomspon, 812 F. Supp. 772 (N.D. Ill. 1992). However, no Colorado or federal cases have addressed the specific issue of whether a summons attached to a validation notice would overshadow the notice. It remains unclear whether this procedure would constitute a violation.

The second issue your inquiry raises is whether service of the summons and attached validation notice would constitute violations of other provisions of the FDCPA. For a number of years, the Federal Trade Commission ("the FTC") has taken the position that legal action, such as the filing of a summons and complaint, is not a "communication" as defined by 15 U.S.C. §1692a(2) and that there is no communication requiring a 15 U.S.C. §1692g validation notice if the debt collector merely files suit. See e.g. Goldfarb, FTC Informal Staff Letter (Nov. 23, 1988). The FTC has also taken the position that it is not necessary to wait 30 days for a possible request for verification before filing suit. See e.g. Broadway, FTC Informal Staff Letter (Jan. 21, 1987); Peters, FTC Informal Staff Letter (Feb. 6, 1987).

However, in the recent case of Heintz v. Jenkins, ___ U.S. ___, 131 L. Ed. 2d 395, 63 U.S.L.W. 4266 (April 18, 1995), the United States Supreme Court held that the Fair Debt Collection Practices Act applies to the litigating activities of lawyers. And, in Tolentino v. Friedman, 833 F.Supp. 697 (N.D. Ill. 1993), the court held that a collection attorney's notice urging the consumer to arrange payment of the debt and to avoid bankruptcy,

placed in the same envelope as a copy of a summons and complaint, would mislead the least sophisticated debtor about the court's role in the debt collection process in violation of 15 U.S.C. §§1692e(9) and 1692e(13). The court rejected the attorney's defense that he was engaged in litigation efforts.

Despite the FTC's position, it appears that federal courts do not recognize the distinction between litigation and collection efforts. Thus, serving a summons attached to a validation notice raises not only the issue of overshadowing, but other potential violations of the federal and Colorado FDCPA as well.

You also asked for the Collection Agency Board's comments on several form letters you enclosed in your correspondence dated June 28, 1995:

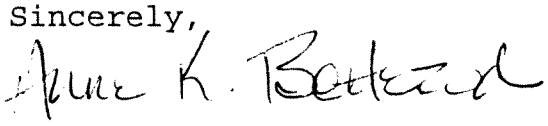
1. Exhibit A: This letter was identified as your office's initial communication to consumers in non-judgment cases. Effective July 1, 1995, the language of §12-14-109(1) was amended and the requirement that the name of the creditor and the amount of the debt appear in eight (8) point bold type was eliminated. However, proposed Collection Agency Board Rule 2.01(2) retains the requirement that the information appear in eight (8) point type. The rulemaking hearing on proposed rules is scheduled on Friday, October 27, 1995, at 1:30 p.m. The location of the hearing is the State Services Building, 1525 Sherman Street, Room 620, Denver, CO 80203. It is anticipated that the new rules will be effective January 1, 1996.

2. Exhibit B: Your office mails this letter in situations where a check has been dishonored. The first paragraph of the letter provides the consumer with notice, as required by §13-21-109(3), C.R.S. This paragraph could be interpreted as overshadowing the consumer's right to dispute the debt in writing within thirty (30) days of receipt of the initial written communication, as set forth in §12-14-109, C.R.S. To resolve the conflict between the time periods set forth in the referenced statutes, the Collection Agency Board has proposed a rule change. Proposed rule 2.13(1) requires that a collection agency collecting a check, draft, or order not paid upon presentment send the consumer its validation of debts notice required by §12-14-109, C.R.S. at least fifteen (15) days prior to the mailing or service of the notice of nonpayment required by §13-21-109(2)(a) and (3), C.R.S.

3. Exhibit C: Your office employs this letter as its initial written communication in cases in which a judgment has been entered. Due to the anticipated rule change noted under Exhibit A, the name of the creditor should appear in eight (8) point bold type until January 1, 1996, at which time it should appear in eight (8) point type.

Please be advised that the information contained in this letter is opinion only and does not carry the force of law. It is not necessarily the position of the Office of the Attorney General and should not be considered an advisory opinion of the Collection Agency Board pursuant to §12-14-114(5), C.R.S.

Sincerely,



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