Does the litigation privilege protect against suits filed under California's Rosenthal FDCPA?

*By Scott J. Hyman and Joshua Whitehair**

California Civil Code § 47(b) provides that a privilege attaches to a publication or broadcast made in any judicial proceeding. This litigation privilege "applies to any communication: 1) made in judicial or quasi-judicial proceedings; 2) by litigants or other participants authorized by law; 3) to achieve the objects of the litigation; and 4) that have some connection or logical relation to the action." (*Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990).)

Federal District Courts have split on whether California's litigation privilege precludes claims under California's Rosenthal Fair Debt Collection Practices Act, Civil Code §§ 1788 *et seq.* (*Compare Gerber v. Citigroup, Inc.* 2009 WL 248094 (E.D. Cal. 2009) (Rosenthal not reconcilable with litigation privilege, *accord Oei v. N. Star Capital Acquisitions, LLC*, 486 F. Supp. 2d 1089 (C.D. Cal. 2006),) with *Nickoloff v. Wolpoff & Abramson, L.L.P.*, 511 F. Supp. 2d 1043 (C.D. Cal. 2007), *accord Taylor v. Quall*, 458 F. Supp. 2d 1065 (C.D. Cal. 2006).)

The litigation privilege is meant to afford litigants access to the courts without fear of reprisal based on the statements and acts necessary to secure and defend their rights. Derived originally as a common-law defense to defamation, the privilege is now widely recognized as absolute, applying to all torts except malicious prosecution. California courts have held that the privilege extends to any communication, whether published or not, that bears "some relation" to judicial or quasi-judicial proceedings, though it is not limited to statements made in a litigation — it may extend to steps taken prior to and after the litigation.

'Essential' communicative conduct key to application of privilege

The key for determining whether the privilege applies is whether the injurious conduct was communicative in its essential nature. That is, if the gravamen of the claim is communicative, the privilege extends to noncommunicative acts necessarily related to the communicative conduct. (*e.g.*, *Rusheen v. Cohen*, 37 Cal. 4th 1048 (2006) (perjured declarations of service and noncommunicative acts such as levying).)

Like its federal counterpart, the Rosenthal Act prohibits a number of debt collection activities, including written or verbal threats to garnish wages, and repeated, continuous and harassing telephone calls, all of which involve communications. Thus, the two leading decisions applying the litigation privilege to a Rosenthal Act claim – *Nickoloff* and *Taylor* – have found no reason for exempting these collection activities from the broad sweep of the privilege, particularly when they have occurred in the context of a litigation or other proceeding.

Conversely, *Oei* reasoned that the very protections Rosenthal was meant to provide would be rendered meaningless if the litigation privilege applied. Finding the two statutes irreconcilable, the court relied on the principle of statutory construction that a later, more specific statute prevails over an earlier, more general one, to hold that Rosenthal (enacted in 1977) prevailed over the litigation privilege (enacted in 1872).

Subsequent decisions have followed *Oei*'s reasoning, as well as pointing out that remedial statutes such as the Rosenthal Act should be interpreted broadly to effectuate their purpose.

(*See Butler v. Resurgence Fin., LLC*, 521 F. Supp. 2d 1093 (C.D. Cal. 2007); *see also Sial v. Unifund CCR Partners*, 2008 WL 4079281 (S.D. Cal. 2008); *Yates v. Allied Int'l Credit Corp.*, 578 F. Supp. 2d 1251 (S.D. Cal. 2008); *Mello v. Great Seneca Fin. Corp.*, 526 F. Supp. 2d 1024 (C.D. Cal. 2007).)

'Middle ground' line of cases

A third line of cases has emerged paving some middle ground. In *Reyes v. Kenosian & Miele, LLP*, 525 F. Supp. 2d 1158 (N.D. Cal. 2007), the court concluded that the litigation privilege applies to Rosenthal claims that arise from collection activity after litigation has commenced. Attempting to reconcile *Nickoloff* and *Taylor* with *Oei*, the court based its decision on the fact that the Rosenthal Act did not explicitly regulate the communications at issue in that case, allegations in a state court complaint that plaintiff owed an outstanding debt and attorney's fees to defendant. Therefore, applying the litigation privilege would not vitiate any provision of the Rosenthal Act. (*See, e.g., Cassady v. Union Adjustment Co., Inc.*, 2008 WL 4773976 (N.D. Cal. 2008) (following *Reyes*, applying litigation privilege to communications related to filing of collection action since such conduct was not proscribed by Rosenthal).)

Similarly, in *Johnson v. JP Morgan Chase Bank dba Chase Manhattan*, 536 F. Supp. 2d 1207 (E.D. Cal. 2008) the court granted, in part, a motion to dismiss a Rosenthal Act claim as barred by the litigation privilege where the allegations did not implicate activity proscribed by Rosenthal. Yet it denied the motion to the extent that the litigation privilege covered such proscribed conduct, since in that instance the two statutes were irreconcilable and Rosenthal (as the later, more specific statute), would prevail.

(See **ROSENTHAL** on page 4)

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Federal judge schools debt collector, attorneys on FDCPA validation notices

The adjudication of a recent Fair Debt Collection Practices Act dispute prompted a federal judge to deliver some choice words for defense attorneys and for their debt collection clients. On the one hand, the decision reads as a primer for attorneys on how not to compose a complaint on the issue. On the other, it serves to let debt collection agencies know how they need to proceed with a proper FDCPA validation notice. (*Rosamilia v. ACB Receivables Management, Inc.*, No. 08-4063(FLW) (D.N.J. 04/22/09).)

"Defendant offers the court various arguments that are either irrelevant or legally erroneous" concerning whether the debtor's pleadings were sufficient to sustain his claims of unlawful debt collection practices, wrote District Judge Freda L. Wolfson of the U.S. District Court, District of New Jersey.

Steven Rosamilia, after discovering that a $250 "collection account" had appeared on his credit report, contacted ACB Receivables Management Inc. by telephone on July 18, 2008. ACB demanded payment, telling Rosamilia that a dermatology lab had placed the account for collection. Rosamilia disputed the debt and requested a copy of the invoice; ACB agreed to send Rosamilia a copy of the statement of account.

ACB mailed a copy of a "Statement of Collection" to Rosamilia on July 22, along with a cover letter requesting payment and supplying an ACB contact person for further correspondence regarding the debt. Rosamilia's attorney on July 25 sent a letter disputing the debt, and demanded verification and a full accounting of the debt amount.

Rosamilia sued, claiming that ACB failed to provide a proper validation notice within five days of the parties' initial communication, in violation of the FDCPA at 15 USC §§ 1692g(a)(3), (4) and (5). Rosamilia claimed that ACB failed to inform him of his rights under these FDCPA provisions — to dispute the debt, to obtain verification and to obtain the name and address of the original creditor (if different than the current creditor). ACB moved to dismiss.

'Flawed premise'

Judge Wolfson rejected ACB's various defenses, beginning with its "flawed premise" that Rosamilia asserted that the initial communication between the parties was conducted through the collection letter ACB sent him on July 22. It was from that point, ACB argued, that it had five days to fulfill its notice obligation.

"It illogically avers that because [Rosamilia] disputed his debt and demanded verification on July 25, 2008, it was relieved of its obligations under the Act," Judge Wolfson wrote. Moreover, "compounding its errors," ACB posited that Rosamilia had to allege that ACB took steps to collect the debt after Rosamilia requested debt verification.

Judge Wolfson, observing that ACB's arguments "miss the mark," explained that the "initial communication" between the parties occurred on July 18, not July 22, when Rosamilia first telephoned ACB. After that, pursuant to Section 1692g(a), ACB was supposed to send him a debt validation notice no later than July 23. ACB did send the collection letter to Rosamilia on July 22, demanding payment of the alleged debt, but apparently only stating the amount of the debt and the name of the current creditor to whom the debt was owed. Absent from the letter are the statutorily required statements regarding Rosamilia's rights.

'Infirm argument'

No matter how ACB sliced its arguments, Judge Wolfson found that Rosamilia sufficiently alleged that ACB did not provide a proper debt validation notice pursuant to the FDCPA. For example, ACB could not cite "and the court could find no authority" to support its theory that ceasing communication and debt collection activities after receiving a request for verification relieves the debt collector from liability for failing to provide a proper debt collection notice.

Rather, "in support of its infirm argument," ACB cited *A.M. Miller and Associates*, 122 F.3d 480 (7th Cir. 1997), for the proposition that a plaintiff fails to state a valid claim under Section 1692g when debt collectors cease all collection activities after the plaintiff requested validation.

"This case has no relevance here," declared Judge Wolfson, noting that ACB's "independent statutory obligation to send a proper debt validation notice is triggered by the 'initial communication,'" not by Rosamilia's subsequent request for validation.

The District Court found that Rosamilia sufficiently pleaded cognizable claims and denied the motion to dismiss.

Joseph Jones in Fairfield, N.J., represented Rosamilia.

Philip J. Cohen of Kaminsky-Cohen & Assocs. in Trenton, N.J., represented ACB Receivables. ❑

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A 'proper balance'

This middle ground strikes a proper balance. Certainly, the litigation privilege is not inconsistent with the entire Rosenthal Act. However, in such circumstances where the Legislature explicitly meant to abrogate the litigation privilege, the Rosenthal Act should govern. (e.g., Cal. Civil Code § 1788.15(a) (prohibiting collection "by means of judicial proceedings where the debt collector knows that services of process … has not been effected"); Cal. Civil Code § 1788.15(b) (prohibiting collection by means of judicial proceedings in a county other than the county in which the debtor incurred the debt or resides).)

But to abrogate the entire statutory litigation privilege in favor of statutory protection against abusive debt collection practices in the absence of either conflict or legislative intent to do so improperly favors one statutory protection over another. ❑

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