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Consumer Attorneys Target Filers of Mechanic's Lien: How to Avoid Getting Sued

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Most construction and trade creditors do not consider themselves to be in the business of debt collection. And, most of the time, they are not. The Minnesota Court of Appeals recently issued an opinion of interest to the construction and trade industries, and to all parties who serve mechanic's lien statements on consumers. The court cautioned such parties to ensure that their communications with consumers comply not only with the applicable mechanic's lien statute, but also, in certain circumstances, with federal consumer protection laws.

What does this mean for construction and other trade creditors who regularly serve and record mechanic's lien statements?

First, a primer on how mechanic's liens work: In Minnesota, when a person has contributed to the improvement of another's land, that person (or company) has a lien against the property, so long as the lien statement is recorded and the landowner is served with a copy of the lien statement within 120 days of the completion of the work, and pre-lien notice requirements have been met. The right to a lien serves as security for payment to a company or contractor that supplies goods and services on credit to the owner of the improved land.

The Fair Debt Collection Practices Act, or "FDCPA," in turn, is a broad, federal consumer protection statute that protects consumers from abusive, unfair, and deceptive collection practices. Among other things, the FDCPA governs what can and cannot be included in communications with consumers in connection with the collection of a debt. Under the FDCPA, "consumers" are natural persons (but not business or corporate entities) who have incurred debts for personal, family, or household purposes. Violations can lead to the imposition of damages, penalties, and an award of the consumer's attorney fees for enforcing the violation.

In the recent Minnesota Court of Appeals decision, *Randall, et al. v. Paul* (opinion filed June 19, 2017), the Court held that if a party's *primary goal* in serving the mechanic's lien statement on a consumer is to collect its debt, then that party must comply with the FDCPA's requirements for communications with consumers. Notably, the attorney who served the mechanic's lien statement in *Randall* failed to include what is often called a "Mini-*Miranda*" disclosure of consumer rights. He also failed to send the creditor the "validation notice" required by the FDCPA.

How can a creditor be sure it is complying with the FDCPA when serving a mechanic's lien notice?

Before causing a mechanic's lien statement to be served, a creditor should answer the following questions:

1. Is the creditor contacting the consumer directly or through a third party, e.g., an attorney or collection agency?

The FDCPA only applies to third-party "debt collectors," not to creditors collecting debts in their own name. If the mechanic's lien statement is prepared and sent out by the creditor itself, or one of its employees, the FDCPA does not apply. If outside counsel or another vendor prepares and serves the notice on behalf of the creditor, however, the FDCPA may apply.

2. Is the customer a consumer for purposes of the FDCPA?

Next, a creditor should determine whether they are dealing with a "consumer" for purposes of triggering the FDCPA. Is the customer an individual, rather than a business? What was the nature of the work performed? Was it for a personal or household project, e.g., homebuilding or landscaping? If so, the FDCPA may apply.

3. What is the purpose of serving the mechanic's lien statement?

Creditors are entitled to be paid what they are owed for their supplies, labor, and services. The mechanic's lien laws allow them to attach a lien to a customer's property if they are not paid. On the one hand, a party serving a mechanic's lien statement may say that it was doing so simply because that is what the law requires in order for the creditor to perfect its lien. But the *Randall* court adopted an "animating purpose test" for determining whether a communication with a consumer is in connection with the collection of a debt. There need not be an explicit demand for payment in order for a mechanic's lien statement to trigger the FDCPA. That is, if the statement is served on a consumer in an attempt to induce payment, the FDCPA may apply.

A party who determines that it may need to comply with the FDCPA should seek the advice of counsel for guidance on what should and should not be included in consumer communications. For example, any initial communication with a consumer for the purpose of collecting a debt should include a "mini-*Miranda*" disclosure, which informs the consumer that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose. Second, within five days of any initial communication with a consumer, including, in some instances, service of a mechanic's lien statement, a debt collector must send the debtor a "validation notice" that informs the consumer of the amount owed, the name of the creditor, and the applicable timeframe for disputing the debt. Finally, counsel can assist in drafting communications that effectively communicate with consumers while avoiding potential exposure under the FDCPA and other consumer protection laws.

Sarah Doerr practices in the areas of bankruptcy and creditors' remedies. She has experience in both individual and commercial bankruptcy matters and regularly represents secured and unsecured creditors. She also counsels clients in matters related to bankruptcy, insolvency, and restructuring. In her creditors' remedies practice, Sarah defends and counsels debt buyers and debt collection agencies in connection with issues arising under the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Telephone Consumer Protection Act, and related consumer-protection statutes and regulations.

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