

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

The following notes advise attorneys of current developments in the law and in policies. Judge advocates may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. The faculty of The Judge Advocate General's School, U.S. Army, welcomes articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-DDL, Charlottesville, Virginia 22903-1781.

Consumer Law Note

Seventh and Ninth Circuits Hold That Bad Checks Are Debts Under the FDCPA

The Federal Trade Commission (FTC) has consistently stated that bad checks are “debts” under the Fair Debt Collection Practices Act (FDCPA).¹ The statutory definition of “debt” appears to support this position.² An opinion by the U.S. Court of Appeals for the Third Circuit, however, has caused the FTC's position to be controversial and has spawned some litigation.

In *Zimmerman v. HBO Affiliate Group*,³ the Third Circuit faced a claim which alleged that HBO had violated the FDCPA in the course of its attempts to collect compensation for unauthorized use of its microwave television signals.⁴ The court did not limit itself to deciding whether the compensation for microwave signals was a “debt” under the FDCPA. Instead, the court held “that the type of transaction which may give rise to a ‘debt,’ as defined in the FDCPA, is the same type of

transaction as is dealt with in all other subchapters of the Consumer Credit Protection Act, i.e., one involving the offer or extension of credit to a consumer.”⁵ This expansive language was used in subsequent litigation by debt collectors who argued that the FDCPA did not apply to their actions.⁶ One type of debt which was attacked in this fashion is checks that were returned for insufficient funds, so-called “bad checks.”

The issue of whether a dishonored check is a “debt” under the FDCPA was squarely presented to two circuit courts in recent cases. The first decision, which was issued by the Seventh Circuit, was *Bass v. Stolper*.⁷ In that case, the plaintiff held a joint checking account with a consumer who had written a check for groceries; the check was returned for insufficient funds.⁸ The defendant was a law firm hired by the grocery store to collect the debt after the check bounced.⁹ Relying primarily on the plain language of the statute, the Seventh Circuit held that “an offer or extension of credit is not required for a payment obligation to constitute a ‘debt’ under the FDCPA.”¹⁰ The court also stated that “[e]ven if the language in the Act's definition of ‘debt’ was so unclear as to require our resort to extrinsic sources, these sources only further support our holding today.”¹¹ The court found that the legislative history of the FDCPA expressly supports the court's resolution of this particular case—that “debt” includes obligations based upon bad checks.¹² The Seventh Circuit specifically addressed *Zimmerman* and disagreed with the Third Circuit, stating that “to the extent that the *Zimmerman* court creates a requirement that only credit-based transactions constitute ‘debt’ under the FDCPA, we must respectfully part ways.”¹³

1. See Consumer Law Note, *The Fair Debt Collection Practices Act Applies to Bad Checks*, ARMY LAW., Oct. 1996, at 25. The FDCPA is codified at 15 U.S.C.A. §§ 1692-92o (West 1997).

2. The FDCPA defines debt as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.” 15 U.S.C.A. § 1692a (5).

3. 834 F.2d 1163 (3d Cir. 1987).

4. *Id.* at 1165-68.

5. *Id.* at 1168.

6. See generally *Now Before the Circuits: FDCPA Coverage of Bounced Checks and Condo Fees and the (Invented) Credit Requirement*, 15 NCLC REPORTS, DEBT COLLECTION AND REPOSSESSION EDITION (Nat'l Consumer L. Ctr.) July/Aug. 1996, at 1.

7. 111 F.3d 1322 (7th Cir. 1997). The court framed the issue before it in this way: “[W]e face only the task of resolving the parties' dispute over the scope of the FDCPA, specifically whether the payment obligation that arises from a dishonored check constitutes a “debt” as defined in the FDCPA.” *Id.* at 1324.

8. *Id.* at 1323.

9. *Id.*

The Ninth Circuit followed suit in *Charles v. Lundgren & Associates, P.C.*¹⁴ The facts were similar to those in *Bass*. The plaintiff wrote a check for a meal at a restaurant, and the check was later returned for insufficient funds.¹⁵ The suit alleged violations of the FDCPA and was initiated against a law firm involved in the collection of the debt resulting from the bad check.¹⁶ The Ninth Circuit agreed with the Seventh Circuit's analysis of whether or not a bad check is a "debt" under the FDCPA, stating:

The only federal court of appeals that has considered this question is the Seventh Circuit. In a well-reasoned and persuasive opinion, that court recently held that a dishonored check is a "debt" under the FDCPA. We agree with its conclusion that, because "an offer or extension of credit is not required for a payment obligation to constitute a 'debt' under the FDCPA," the FDCPA governs the collection of dishonored checks.¹⁷

These cases are significant because it seems that "the lasting effect of the Third Circuit's dicta [has] finally . . . been put to rest."¹⁸ They may become increasingly significant to legal assistance practitioners as AAFES contracts out its check collection operations.¹⁹ Bad checks written to AAFES comprise a significant number of the dishonored checks written by soldiers overall. Since obligations based upon bad checks are "debts" covered by the FDCPA, it will provide valuable protections to soldiers once collections are turned over to a company that may fall within the definition of "debt collector."²⁰ Major Lescault.

Family Law Notes

North Carolina Changes Vesting Requirements for Division of Pension

The Uniformed Services Former Spouses' Protection Act²¹ (USFSPA) allows state courts to divide disposable military

10. *Id.* at 1326. In discussing the plain language of the statute, the court commented that:

Appellants would have us read into [the definition of "debt"] the additional requirement that the debt flow from a specific type of consumer transaction—one involving the offer or extension of credit. However, we see no language in the Act's definition of "debt" (or any other section of the Act) that mentions, let alone requires, that the debt arise from an extension of credit. Nor do we find patent ambiguity in the definition of "debt." The definition is not "beset with internal inconsistencies [or] . . . burdened with vocabulary that escapes common understanding." In the absence of ambiguity, our inquiry is at an end, and we must enforce the congressional intent embodied in the plain wording of the statute.

Id. at 1325 (citations omitted).

11. *Id.* at 1326-27.

12. The court said that "the legislative history provides an unequivocal statement of the drafters' intent on this issue: '[T]he committee intends that the term 'debt' include consumer obligations paid by check or other non-credit consumer obligations.'" *Id.* at 1327 (quoting H.R. REP. NO. 95-131, at 4 (1977)).

13. *Id.* at 1326.

14. 119 F.3d 739 (9th Cir. 1997).

15. *Id.* at 741.

16. *Id.*

17. *Id.* (citations omitted).

18. *FDCPA Applies to Dishonored Check & Condominium Fee Collections*, 16 NCLC REPORTS, DEBT COLLECTION AND REPOSSESSION EDITION (Nat'l Consumer L. Ctr.) July/Aug. 1997, at 27.

19. See *Exchange Outsources Returned Check Processing*, (visited Jan. 6, 1998) <<http://www.aafes.com/pa/news/97news/97011.htm>> (announcing the contracting of collection efforts within the first sixty days after return of the checks to National City Processing Company for all installations in Europe and for ten CONUS installations beginning 1 February 1997).

20. Under the FDCPA, a debt collector is defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C.A. § 1692a(6) (West 1997). Ordinarily, FDCPA provisions do not apply to AAFES collections because the Act does not apply to "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor." *Id.* § 1692a(6)(A). Normally, AAFES collects its own debts as a creditor. In this instance, practitioners must look to state law, which may provide protections against collection abuses by a creditor. Additionally, AAFES, as a government agency, may well fall in the government actor exception. The FDCPA definition of debt collector expressly excludes "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." *Id.* § 1692a(6)(C). Contractors who are collecting on behalf of the government have not been included in this exception, at least in the context of student loans. See Consumer Law Note, *The Fair Debt Collection Practices Act Can Still Help with Government Contracted Debt Collectors*, ARMY LAW., Dec. 1996, at 20. Consequently, it is unlikely that the AAFES collection contractor could avail itself of this exception, and, if it meets the basic requirements of the definition, the contractor would be a "debt collector" subject to the FDCPA.

retirement pay as property in a divorce action. It does not, however, create a federal right to a division of military retirement pay. Therefore, the divorce forum's state law requirements for dividing pensions apply to the division of a military retirement. Some states refuse to divide any retirement pension unless the retirement is vested, reasoning that there is no property interest to divide until the pension vests. When a retirement plan vests is usually defined by the plan itself or by law. There is no statutory definition of "vesting" for a military retirement.

Until recently, North Carolina defined vesting by case law.²² In a dramatic change for military spouses and service members, the North Carolina legislature enacted a new law in June 1997 which did away with the vesting requirement for division of pensions.²³ The statute specifically includes military retirement benefits that are eligible under the USFSPA as marital property and are subject to division.²⁴ The new statute applies to all petitions for equitable distribution filed on or after 1 October 1997.²⁵ Major Fenton.

Uniformed Services Former Spouses' Protection Act and Veterans' Disability and Dual Compensation Act Awards

The Uniformed Services Former Spouses' Protection Act (USFSPA) allows states to divide disposable military retirement pay as property in a divorce action.²⁶ The USFSPA defines "disposable military retirement pay" specifically and

excludes portions of retirement which are waived in order to accept Veterans Administration (VA) disability²⁷ or salary received subject to the Dual Compensation Act (DCA).²⁸ In order to receive either VA disability payments or salary subject to the limits of the DCA, a retiree must voluntarily waive a portion of longevity retirement.²⁹ This waiver often has a drastic effect on the amount of disposable retirement pay available for division under a divorce decree. Despite this provision of the USFSPA, many state courts continued to divide gross retirement pay.

Many practitioners and service members believed *Mansell v. Mansell*³⁰ settled the issue once and for all. In *Mansell*, the U.S. Supreme Court held that state courts are federally preempted from dividing military retirement pay which is waived by the service member in order to receive VA disability benefits.³¹ However, the dissent, led by Justice O'Connor, set out a position that has taken hold in the state courts during the ensuing eight years of litigation. Justice O'Connor found this limitation on the USFSPA fundamentally unfair to the former spouse because it amounted to a unilateral change to a court-awarded property settlement.³² A majority of state courts agree with Justice O'Connor and take equitable action to compensate the former spouse when this reduction in disposable military retirement pay occurs.

Abernethy v. Fishkin,³³ a recent Florida case, illustrates a common approach by state courts when a property settlement is contained in a separation agreement which is later incorporated

21. 10 U.S.C.A. § 1408 (West 1996).

22. See *George v. George*, 444 S.E.2d 449 (N.C. 1994), *rehearing den.*, 463 S.E.2d 236 (N.C. 1995). An enlisted soldier and his wife separated after seventeen years in the service. The divorce decree reserved the distribution of military retirement pay until such time as the soldier retired. After his retirement, the ex-wife petitioned for equitable distribution of the military retirement. The trial court awarded her thirty-one percent of the military retirement. The Court of Appeals for North Carolina reversed and held that the military retirement was not vested as of the separation and therefore was not subject to equitable distribution because it was not marital property at the time of the divorce.

23. H.B. 535, 1997 Sess., S.L. 212 (N.C. 1997) (amending chapter 50 of the North Carolina General Statutes).

24. *Id.* § 1.

25. *Id.* § 6

26. 10 U.S.C.A. § 1408 (West 1996).

27. VA disability payments awarded under 38 U.S.C. § 5305 are tax-free to the service member. To receive these payments, the USFSPA requires the retiree to waive an equal amount of the longevity retirement. 10 U.S.C.A. § 1408(a)(4)(B).

28. 5 U.S.C.A. § 5532(b) applies only to federal employees in the civil service who were officers in the armed forces. If an officer secures federal employment after military service, Section 5532(b) requires the employee to waive a portion of his military longevity retirement in order to receive his federal salary. 5 U.S.C.A. § 5532(b) (West 1996).

29. 10 U.S.C.A. § 1408(a)(4)(B).

30. 490 U.S. 581 (1989).

31. *Id.* at 594-95.

32. *Id.* at 601-02 (O'Connor, J., dissenting).

33. 699 So. 2d 235 (Fla. 1997).

into the divorce decree. In *Abernethy*, the parties divorced after almost fifteen years of marriage. They signed a separation agreement which awarded Fishkin twenty-five percent of any retirement pay received by Abernethy. In addition, the separation agreement contained a clause prohibiting Abernethy from pursuing any course of action to defeat Fishkin's right to receive her allotted portion of disposable military retirement pay and requiring Abernethy to indemnify Fishkin for any breach.³⁴ Later, Abernethy elected to leave the military and to collect voluntary separation incentive (VSI)³⁵ pay.³⁶ A Florida trial court awarded Fishkin a twenty-five percent interest in the annual VSI payments.³⁷ As with retirement pay, a service member who is collecting VSI payments must waive a portion of that pay if he accepts VA disability payments.³⁸ Abernethy began receiving VA disability payments, thus reducing his disposable VSI payments.³⁹

The Supreme Court of Florida found that Fishkin was entitled to receive payments equal to the amount she was receiving before Abernethy elected to receive VA disability payments.⁴⁰ Specifically, the court found that Abernethy was not receiving any disability benefits when the property settlement was agreed to in the separation agreement; therefore, the calculation of the amount of retirement pay awarded to Fishkin did not impermissibly include VA disability benefits.⁴¹

In addition, the separation agreement contained an indemnification clause which indicated the parties' intent to maintain monthly payments at a certain level.⁴² Nothing in the indemnification clause required Abernethy to provide the funds from the VA disability benefits. Rather, he could pay with any asset.⁴³

A similar issue arises in the context of the DCA. In *Gaddis v. Gaddis*,⁴⁴ the Arizona Court of Appeals ruled that the former spouse's property interest remained at the original level, despite waiver of military retirement to collect salary covered by the DCA.⁴⁵ The trial court awarded Mrs. Gaddis fifty percent of the disposable military retirement pay at the time of the divorce.⁴⁶ Mrs. Gaddis received approximately \$750 per month until Mr. Gaddis took a civil service job, reducing Mrs. Gaddis' portion of disposable retirement pay by fifty percent.⁴⁷ Mrs. Gaddis filed a petition for an order to show cause, and the trial court ordered Mr. Gaddis to continue paying the original \$750.⁴⁸

Applying the same reasoning as the *Abernethy* court, the Arizona court found that the original award of community property established an enforceable property interest.⁴⁹ Since Mr. Gaddis did not receive federal employment income which was subject to the DCA at the time of the divorce, the court was not dividing his DCA salary.⁵⁰ The court found Mr. Gaddis'

34. *Id.* at 236.

35. 10 U.S.C.A. § 1175 (West 1996). VSI is a temporary program to provide a financial incentive for service members to leave the service earlier than their scheduled end of term of service to assist with the downsizing of the military.

36. *Abernethy*, 699 So. 2d at 237. Although this case involves an award of VSI payments, the Florida court addresses the impact of the USFSPA. Florida treats VSI and SSB payments as retirement pay. *See*, *Kelson v. Kelson*, 675 So. 2d 1370 (Fla. 1996). Most states do not go as far as Florida does and call these payments retirement pay; however, most states which have addressed the issue do a USFSPA analysis because they treat the payments as the "functional equivalent" of retirement pay and divide it subject to USFSPA limitations.

37. *Abernethy*, 699 So. 2d at 237.

38. 10 U.S.C.A. § 1175(e)(4).9

39. *Abernethy*, 699 So. 2d at 238.

40. *Id.* at 239.

41. *Id.* at 240.

42. *Id.* at 237.

43. *Id.* at 240.

44. No. 2 CA-CV 96-0315, 1997 WL 467023 (Ariz. App. Aug. 14, 1997).

45. *Id.* at *3.

46. *Id.* at *1.

47. *Id.*

48. *Id.*

49. *Id.* at *2.

50. *Id.* at *4.

deliberate frustration of the decree's award fundamentally unfair to his former spouse.⁵¹ Both of these cases distinguish *Mansell's* holding the same way. The California trial court in *Mansell* awarded Mrs. Mansell a portion of the gross retirement pay Major Mansell received. At the time of the divorce and property settlement, Major Mansell was already retired, received VA disability payments, and had already waived a portion of the longevity retirement.⁵²

Issues concerning the USFSPA remain very state specific. Legal assistance attorneys who advise clients on separation and divorce must be aware of the growing trend to ensure that former spouses' property interests are protected in the event of a future award of VA disability or federal employment by the service member. Major Fenton.

Uniformed Services Employment and Reemployment Rights Act Note

Merit Systems Protection Board Develops Regulations for USERRA Claims by Federal Employees

On 22 December 1997, the Merit Systems Protection Board (MSPB) promulgated interim procedural regulations⁵³ for claims by federal employees that their agencies or the Office of Personnel Management did not comply with the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁵⁴ Under the interim regulations, all USERRA actions brought before the MSPB will be processed under the board's appellate jurisdiction procedures. Past board actions involving government employee restoration after military duty

were handled under the board's appellate procedures, and the MSPB has determined that the USERRA does not require the board to change this practice.⁵⁵

The interim regulations also establish time limits for filing USERRA complaints with the MSPB.⁵⁶ All federal employees are given a minimum of six months (180 days) from the date of an alleged USERRA violation to file a complaint directly to the MSPB.⁵⁷ "If a person seeks assistance from DOL [the Department of Labor] under 38 U.S.C. § 4321 but does not file a formal complaint under 38 U.S.C. § 4322(a), he or she may subsequently file an appeal with [the] MSPB at any time during the 180-day period."⁵⁸ If a federal employee files a formal complaint with his agency and the DOL investigates, is unable to resolve the issue, and so notifies the employee in writing, the employee may choose to file directly with the Board within the 180-day limit or within thirty days of receiving the DOL non-resolution notice, whichever is later.⁵⁹

The DOL can also refer complaints to the Office of Special Counsel (OSC).⁶⁰ If, after investigation, the DOL refers a complaint to the OSC and the OSC notifies the employee that the OSC "will not represent the person before [the] MSPB, [the employee] may subsequently file an appeal with [the] MSPB within 30 days after receipt of the notification from the special counsel or within 180 days of the alleged violation, whichever is later."⁶¹ If the OSC agrees to represent the employee, the MSPB will not set a time limit for filing.⁶² The board's rationale is that the special counsel should have time to secure voluntary agency compliance before filing with the MSPB.⁶³ The board assumes that the OSC should give the agency one

51. *Id.*

52. *Mansell v. Mansell*, 490 U.S. 581, 585-86 (1989).

53. *See* Merit Systems Protection Board Practices and Procedures, 62 Fed. Reg. 66,813 (1997) (to be codified at 5 C.F.R. pt. 1201).

54. Pub. L. No. 103-353, 108 Stat. 3150 (1994), *codified at* 38 U.S.C. §§ 4301-33 (1994).

55. 62 Fed. Reg. at 66,813. The original jurisdiction procedures for the Office of Special Counsel when processing cases before the MSPB, found at 5 C.F.R. part 1201, subpart D, do not apply to USERRA cases. 5 C.F.R. § 1201.3 (1997).

56. 62 Fed. Reg. at 66,814. These regulations address the lack of a statute of limitations in the USERRA and the problems raised because the MSPB did not set a time limit on considering USERRA discrimination and job restoration claims. *See* Petersen v. Department of Interior, 71 M.S.P.R. 227, 233 (1996); Jasper v. U.S. Postal Serv., 73 M.S.P.R. 367, 370 (1997).

57. 62 Fed. Reg. at 66,814.

58. *Id.* (to be codified at 5 C.F.R. §§ 1201.22(b)(2)(i), 1201.22(b)(2)(ii)).

59. *Id.* (to be codified at 5 C.F.R. § 1201.22(b)(2) (iii)). A copy of the DOL notification must be filed with the appeal to get the thirty-day extension. *Id.*

60. *See* 38 U.S.C.A. § 4322(a) (West 1997).

61. 62 Fed. Reg. at 66,814 (to be codified at 5 C.F.R. § 1201.22(b)(2) (iv)). A copy of the OSC "no merit" notice must be filed with the appeal to get the thirty-day extension. *Id.*

62. *Id.*

63. *Id.*

last chance to resolve issues after refusing to do so with DOL investigators.

The MSPB interim regulations guarantee federal employees at least six months from the time of an alleged USERRA violation to file an appeal with the MSPB. If a person files a formal complaint with the DOL or seeks OSC representation,

the time limit for filing may extend beyond six months. The new regulations encourage federal employees to use the free services of the DOL and the OSC to resolve USERRA complaints prior to filing a formal complaint with the MSPB. Lieutenant Colonel Conrad.