

## “WHAT WOULD ABE LINCOLN SAY?”

FDCPA decision requires collection lawyers to sue, sue, sue

On June 17, 2010, Judge Sally Adkins of the Maryland Court of Appeals addressed new bar admittees at the Court’s swearing in ceremony in Annapolis, Maryland. Judge Adkins implored the new attorneys in attendance to follow the sage advice of Abraham Lincoln by quoting his well known admonition that lawyers should “*discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker, the lawyer has superior opportunity of being a good man. There will be business enough.*”

It is likely that Judge Adkins was not aware of a decision rendered just three days earlier in Leshler v. Law Office of Mitchell N.K., P.C., (Case No. 1:09-cv-0578) 2010 U.S. Dist. Lexis 58263 (June 14, 2010). In Leshler, a Federal District Court held that a lawyer violates federal law when sending a letter to a borrower providing an opportunity to settle a debt with a lump sum payment and inviting the debtor to visit the attorney’s website to “resolve this debt privately.” The Court figuratively turned a blind eye to Mr. Lincoln’s opinion about what makes a good lawyer. The Court explained that “since it is an attorney’s communication, the implication is not avoidable that a threat of litigation is being presented to the debtor. . . . it is customary and ordinary for the recipient of the law firm’s letter to feel that a lawsuit could be the next step”. The Court stretched to reach this conclusion not based upon the content of the lawyer’s letter, which made no mention of litigation, but instead on the unwarranted speculation that once a lawyer sends a letter, a lawsuit necessary follows.

The Court’s surmise that a lawsuit always follows a lawyer’s letter should come as a surprise to lawyers who send letters on lawyer letterhead to insurance carriers making claims for damages arising out of motor vehicle accidents. Common knowledge suggests that many accident claims settle privately without litigation. Similarly, a small town lawyer’s letter to his client’s neighbor concerning a property dispute does not inevitably head to the courthouse. These are but two examples of disputes where a lawyer’s competence is often used, in Lincoln’s words, in persuading compromise and in acting as a “peacemaker”.

Not only does a lawyer perform a valued service for a client and, at the same time, meet the lofty goals of professionalism when he or she acts to “discourage litigation”, once the dispute moves into the courtroom, judges invariably encourage the parties to settle. One can only venture an educated guess that Magistrate Judge Smyzer, the author of the Leshler decision beseeches parties who appear in his Court to settle and compromise.

However, his decision in this FDCPA case points collection lawyers 180 degrees in the opposite direction. The best analysis of Judge Smyzer’s decision is to paraphrase Mr. Lincoln’s famous quote, but putting a different spin thanks to the Leshler case. “***You must encourage litigation. You cannot persuade your neighbor to compromise. You cannot be a peacemaker because your calling is to be a litigator at all costs and not to be a good man.***” While it is true under Judge Smyzer’s ruling that there will still continue to “be business enough”, that business will invariably add to the congestion in the courts while at the same time burdening those consumers whom the FDCPA proposes to protect with cumbersome court processes likely resulting in an official court record that the debt is owed.

All this leads to a rhetorical question posed for Judge Smyzer “how does the FDCPA’s supposed ‘unsophisticated consumer’ benefit when the lawyer is compelled to sue rather than settle?”