

FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)

Introduction and Issues

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What is the FDCPA?

- § Federal Statute (15 U.S.C. 1692-1692p)
- § Originally enacted in 1977
- § Intended to prevent abusive, deceptive, and unfair debt collection practices by debt collectors
- § Enforced by the Federal Trade Commission (unless Debt Collector subject to regulation by another related agency (15 U.S.C. 1692m(a))
- § Consumer Financial Protection Bureau (“CFPB”) has authority to issue regulations and advisory opinions
- § Provides for private right of action with statutory penalties

What is the FDCPA?



Who is Subject to the FDCPA?

Debt Collectors (15 U.S.C. 1692a(6))

“The term ‘debt collector’ means 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.

Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.”

Who is Subject to the FDCPA?

Regularly Collects Debts

- § In the business of collecting debts
- § Debt collection does not have to be the principal business function – if a business “regularly” collects debts it is a debt collector
- § “Debt” is for “personal, family, or household purposes,” does not include commercial debt (15 U.S.C. 1692a(5))
- § Attorneys can be Debt Collectors if they meet the statutory definition (*Heintz v. Jenkins*, 514 U.S. 291 (1995))

Who is Subject to the FDCPA?

Collects Third-Party Debts

- § Parties collecting Debts for themselves are not “Debt Collectors”
- § Debt must be “owed or due or asserted to be owed or due to another”
- § Assignees are not Debt Collectors, unless debt was in default at the time of assignment
- § Parties can collect debts for third parties if related by common ownership or corporate control and party does not collect for non-related entities. HOWEVER, if a party collects its own debt using a different name indicating that it is collecting debts, then it becomes a Debt Collector

Who is Subject to the FDCPA?

Enforcing Security Interests

- § Parties enforcing security interests are Debt Collectors only for purpose of 15 U.S.C. 1692(f)(6) (prohibiting taking or threatening nonjudicial action to repossess property if not authorized, no intention, or property is exempt)
- § QUESTION, what about a foreclosure trustee?

Who is Subject to the FDCPA?

Enforcing Security Interests

§ *Alaska Trustee v. Ambridge*, 372 P.3d 207 (Alaska 2016)

“As to the first question raised by this case—whether the nonjudicial foreclosure of a security interest is a method of “collect[ing] or attempt[ing] to collect, directly or indirectly,” a “debt,” that is, a consumer’s “obligation ... to pay money”—we agree with the Sixth Circuit’s common-sense answer: “In fact, every mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion... or compulsion...”

§ *Ho v. ReconTrust, Co.*, 840 F.3d 618 (9th Cir. 2016)

“ReconTrust would only be liable if it attempted to collect money from Ho. And this it did not do, directly or otherwise. The object of a non-judicial foreclosure is to retake and resell the security, not to collect money from the borrower. California law does not allow for a deficiency judgment following non-judicial foreclosure. This means that the foreclosure extinguishes the entire debt even if it results in a recovery of less than the amount of the debt... Thus, actions taken to facilitate a non-judicial foreclosure, such as sending the notice of default and notice of sale, are not attempts to collect “debt” as that term is defined by the FDCPA.”

Who is Subject to the FDCPA?



What Does the FDCPA Prohibit?

Communications (15 U.S.C. 1692d)

- § Forbidden to contact consumer an unusual time or place (presumption that 8am to 9pm is OK)
- § Forbidden to contact consumer known to be represented by attorney, unless attorney fails to respond or authorizes communication
- § Forbidden to contact at place of Employment IF Debt Collector knows employer prohibits such communication
- § Cannot communicate with third persons, EXCEPT: (1) with permission of consumer or court, (2) to pursue postjudgment remedy, (3) with attorney for consumer, or (4) in order to obtain “location information” (15 U.S.C. 1692c)

What Does the FDCPA Prohibit?

Harassment and Abuse (15 U.S.C. 1692e)

- § Debt Collectors are forbidden from engaging in conduct that would harass, oppress, or abuse a consumer. Prohibited conduct includes, but is not limited to:
 - § Using violence or threats of violence
 - § Using obscene or profane language
 - § Publishing lists of consumers who fail or refuse to pay debts (except reporting to a consumer reporting agency)
 - § Advertising a debt for sale in order to coerce payment
 - § Causing a telephone to ring, or engaging in telephone conversations, repeatedly and constantly with an intent to harass (note intent requirement)

What Does the FDCPA Prohibit?

False or Misleading Statements (15 U.S.C. 1692f)

- § Debt Collectors are forbidden from making false, deceptive, or misleading statements. Prohibited conduct includes, but is not limited to:
 - § False representation that Debt Collector is affiliated with government
 - § False representation of the character, amount, or legal status of debt
 - § False representation that individual is an attorney or communication is from an attorney
 - § False representation that nonpayment will result in arrest or imprisonment, or the seizure, garnishment, attachment, or sale of property, unless the action is legal and the Debt Collector intends to take that action
 - § False representation that failure to pay will cause consumer to forfeit any claim or defense
 - § False representation that the consumer committed any crime

What Does the FDCPA Prohibit?

False or Misleading Statements (Continued)

- § Threatening to communicate, or actually communicating, credit information that is known to be false
- § Use of any written communication which simulates or is falsely represented as authorized or issued by a court, official, or government agency
- § The use of any false representation to obtain information about a consumer
- § False representation that a debt has been turned over to innocent purchasers for value
- § False representation that documents are legal process
- § False representation that documents are not legal process
- § Use of any business name other than the Debt Collector's true name

What Does the FDCPA Prohibit?

Unfair Practices (15 U.S.C. 1692g)

- § Debt Collectors are forbidden from engaging in unfair or unconscionable practices to collect a debt. Prohibited conduct includes, but is not limited to:
 - § Collection of any amount unless that amount is expressly authorized by the agreement creating the debt
 - § The acceptance of a check postdated more than five days, unless notice is given in writing of the intent to deposit the check at least three and no more than ten days prior to the deposit.
 - § Depositing or threatening to deposit a postdated check prior to the date on the check
 - § Communicating by postcard
 - § Using any symbol or language other than the Debt Collector's address on the outside of an envelope, except that the Debt Collector can also include its business name if the name does not reveal that it is a debt collector

What Does the FDCPA Prohibit?



What Does the FDCPA Require?

Initial Communications (15 U.S.C. 1692h)

- § Within five days of the Initial Communication with a consumer, a Debt Collector is required to send the consumer a written notice stating:
 - § *The amount of the debt*
 - § *The name of the current creditor*
 - § *A statement that the debt will be presumed valid unless the consumer disputes the debt in writing within 30 days*
 - § *A statement that if the debt is disputed, the Debt Collector will obtain verification of the debt and mail it to the consumer*
 - § *A statement that, if the consumer requests within the 30 day period, the Debt Collector will provide the consumer the name and address of the original creditor*
- § An attempt to collect the debt before a request is responded may be a violation

What Does the FDCPA Require?

Mini-Miranda (15 U.S.C. 1692f(11))

- § In the initial written communication (and initial oral communication, if the Initial Communication is oral), a debt collector is required to disclose to a consumer that:
 - § *That the communication is from a Debt Collector trying to collect a debt*
 - § *That any information obtained will be used for the purpose of collecting the debt*
- § A Debt Collector is required to inform the consumer that a communication is from the Debt Collector in all subsequent communications
- § Common practice in the collections industry is to use the full initial Mini-Miranda in all communications

What Does the FDCPA Require?

Ceasing Communications (15 U.S.C. 1692d(c))

- § A Debt Collector is required to cease all communication with a consumer if the consumer (1) refuses to pay the debt or (2) requests that the Debt Collector stop communicating with the consumer

- § Exceptions to the cease communication requirement are provided for:
 - § Communication telling the consumer that the Debt Collector is ceasing collection efforts
 - § Notifying the consumer that the Debt Collector may invoke specified remedies which are ordinarily invoked by the Debt Collector or creditor
 - § To notify the consumer that the Debt Collector or creditor intends to invoke a specified remedy

What Does the FDCPA Require?



FDCPA Liability & Defenses

Liability under the FDCPA

- § In addition to administrative enforcement, the FDCPA provides for a private right of action for any consumer who experiences a violation of the FDCPA by a Debt Collector
- § The FDCPA is (with a few exceptions) a strict liability statute (but see the *bona fide error* defense - 15 U.S.C. 1692l(c))
- § In addition to actual damages, statutory damages of up to \$1,000 may be awarded by a court. In a class action, statutory damages are capped at \$500,000 or 1% of the Debt Collector's net worth
- § The Statute of Limitations on FDCPA claims is one year
- § Full attorneys fees are also awarded

FDCPA Liability & Defenses

Bona Fide Error (15 U.S.C. 1692I(c))

- § While intent is not an element of a successful FDCPA claim, it is an element of an affirmative defense provided by statute
- § The statutory defense requires that the Debt Collector prove by a preponderance of the evidence that
 - § *The Debt Collector did not intend to commit the violation*
 - § *That the violation was the result of a bona fide error*
 - § *That the violation occurred notwithstanding the maintenance of procedures reasonably adapted to avoid any such error*

FDCPA Liability & Defenses



Current FDCPA Issues

Voice Mail

- § A recurring issue in FDCPA cases has been the application of the FDCPA to voice mail messages
- § A Debt Collector is forbidden from communicating information about a consumer's debt, including the existence of the debt, to third parties. (15 U.S.C. 1692e(11)). However, a Debt Collector is also required to inform a consumer that it is a debt collector in every communication. (15 U.S.C. 1692(c(b))).
- § What do you say on a voice message?

Current FDCPA Issues

Voice Mail (Continued)

- § In *Foti v. NCO Financial Systems*, 424 F. Supp. 2d 643 (S.D.N.Y. 2006), a Defendant was found liable under the FDCPA for failing to identify itself as a debt collector in a voice message.
- § In response, NCO adopted policy of leaving voicemails identifying the intended recipient, inviting anyone else to hang up, then disclosing in that it was a debt collector after a brief pause.
- § NCO was then sued by the FTC on the basis that its voicemails could have been overheard by third parties, and settled for \$3.2 million.
- § Current strategies follow *Zortman v. J.C. Christensen & Assoc., Inc.*, 870 F. Supp. 2d 694 (D. Minn. 2012). Identify caller and that it is a Debt Collector, but do not identify intended recipient.

Current FDCPA Issues

CFPB Consent Orders

- § The CFPB has filed suit against several large debt collectors, and obtained negotiated consent orders containing compliance issues that appear repeatedly. CFPB statements indicate that it views these compliance issues as potential FDCPA liability issues. These consent orders cover:
 - § Data integrity
 - § Dispute handling and Debt validation
 - § Heightened evidentiary standards for affidavits used in litigation (referred to as “Competent and Reliable Evidence”)
 - § Attorney participation standards for communications and litigation

Current FDCPA Issues

Midland Funding v. Johnson (SCOTUS, OT2016)

- § Argued January 17, 2017
- § Does filing a claim for a time-barred debt in a bankruptcy proceeding violate the FDCPA?
- § Does the Bankruptcy Code preclude the application of the FDCPA to a filed claim for a time-barred debt?
- § Your guess is as good as mine

Current FDCPA Issues

Changes Coming?

- § Amendments to the FDCPA are introduced virtually every Congress, and have included proposals such as increasing statutory penalties or exempting litigation activities.
- § The new administration has repeatedly stated its intent to rescind Dodd-Frank, which puts into question the continuing existence of the CFPB and the FDCPA reforms included in Dodd-Frank.
- § At a minimum, the CFPB is likely to see a new director following the D.C. Circuit decision in *PHH Corporation v. CFPB*, which ruled that the CFPB's director is removable at the will of the President.

Current FDCPA Issues



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Ryan is a lifelong Alaskan, and has practiced law for more than eight years. Ryan spent his first six years practicing with R. Crabtree, APC (formerly Routh Crabtree, APC) as a collections and business law attorney. As an attorney at Manley & Brautigam, Ryan practices in the areas of tax, business, energy, and estate planning.

When not in the office, chances are pretty good that Ryan can be found fly fishing.

About the Presenter