

Fair Debt Collection Practices Act: The Fundamentals

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INTRODUCTION

Enacted in 1978, the federal Fair Debt Collection Practices Act ("FDCPA")¹ was created to "eliminate abusive debt collection practices by debt collectors" by placing restrictions on the communications that debt collectors have with consumers and by protecting debt collectors who avoid using abusive practices from being competitively disadvantaged.² This purpose is achieved by prohibiting certain types of conduct by debt collectors making attempts to collect consumer debt.³ Debt collectors who find themselves violating the provisions of the statute can find themselves liable to the debtor for actual damages, statutory damages not exceeding \$1,000.00 per action, as well as the "costs of the action" and "reasonable attorney's fee[s] as determined by the court."⁴ It is the extensive damages available to the consumer, as well as the promise of attorney's fees to a successful plaintiff, that becomes the driving force behind FDCPA lawsuits.

Due to the recent financial crisis, and the ever-increasing load of consumer debt, federal courts have seen a proliferation of the number of FDCPA cases nationwide.⁵ The Federal Trade Commission ("FTC") has reported that of the 78,000 consumer complaints received in the year 2008, nearly 18.9 percent of them were related to debt collection.⁶ As a result of this increase, the FDCPA is at the forefront of the

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¹ The FDCPA is codified at 15 U.S.C. § 1692 *et seq.*

² See 15 U.S.C. § 1692(e); see also Anderson, Rex, *Fair Debt Collection Practices Act: A Law Needing Updating?*, 89-MICH. BAR J. 28 (Sept. 2010).

³ See 15 U.S.C. § 1692c-g.

⁴ See 15 U.S.C. § 1692k.

⁵ See Stueben, Christian, *Judge or Jury? Determining Deception or Misrepresentation Under the Fair Debt Collection Practices Act*, 78 FORDHAM L. REV. 3107, 3110-11 (May 2010) (stating that "3,183 FDCPA cases were filed nationwide in 2007, 5,188 cases were filed in 2008 . . . , and 8,287 cases were filed in 2009 . . .") (citing WebRecon LLC, *FDCPA and Other Consumer Rights Lawsuit Statistics*, available at <http://webrecon.com/news/?p=131> (last visited Mar. 15, 2011)).

⁶ See Karni, Dana, *Consumers vs. Debt Collectors: Consumer Rights Under the Fair Debt Collection Practices Act*, 47 HOUSTON LAWYER 16, 18 (Jan./Feb. 2010).

minds of any businesses or attorneys that find themselves involved, in any way, in the process of collecting debt from a consumer. This article will provide a very brief summary of the applicability of the FDCPA toward collection work, specific conduct that is prohibited or required by the Act and how common FDCPA pitfalls may be avoided.

APPLICABILITY OF THE FDCPA

While the FDCPA imposes broad limitations on collection conduct, the statute itself contains significant limitations on its own scope, stating that in most cases it only applies to "debt collectors" engaged in the process of collecting "debt."⁷ The FDCPA defines the term "debt" as constituting only consumer debt, and specifically debt obligations that arise out of transactions "primarily for personal, family, or household purposes"⁸ Thus, collectors do not find themselves subject to the provisions of the statute when collecting debts that were incurred for a business purpose.⁹ The FDCPA defines a "debt collector" as an entity "who regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another."¹⁰ For this reason, it is generally understood that original creditors are exempted from the provisions of the FDCPA, provided they are not attempting to collect debt by using another name.¹¹ Additionally, courts have generally exempted entities from the FDCPA if they are enforcing a security interest.¹² Enforcers of a security interest are subject only to the provisions of § 16992f(6), which prohibits threatening to take nonjudicial action to effect dispossession without a right or intent to take the property.¹³

Prior to amendment in 1986, the FDCPA excluded from the definition of debt collector any attorney collecting a debt as an attorney on behalf of a client.¹⁴ However, that provision was stricken from the Act and Congress failed to enact any additional attorney-related protections. In the 1995 decision *Heintz v. Jenkins*,¹⁵ the U.S. Supreme Court confirmed that lawyers could be subject to the provisions of the FDCPA if the attorney "'regularly' engage[s] in consumer-debt-collection activity, even when that activity consists of litigation."¹⁶ Thus, attorneys are provided no special protection under the statute and applicability must be determined by analyzing the definition of "debt" and "debt collector" as with any other collection entity.

⁷ 15 U.S.C. § 1692a.

⁸ 15 U.S.C. § 1692a(5).

⁹ *Pollice v. National Tax Funding, LP*, 225 F.3d 379, 400-402 (3d Cir. 2000).

¹⁰ 15 U.S.C. § 1692a(6).

¹¹ See *Fouche' v. Shapiro & Massey L.L.P.*, 575 F. Supp. 2d 776, 783 (S.D. Miss. 2008); see also *Gillard v. Michalakos*, No. 09-2898, 2010 WL 457238, at *2 (7th Cir. Jan. 29, 2010).

¹² *Mongomery v. Huntington Bank*, 346 F.3d 693 (6th Cir. 2003).

¹³ See 15 U.S.C. § 1692f(6).

¹⁴ See *Azar v. Hayter*, 874 F. Supp. 1314, 1320 (N.D. Fla. 1995).

¹⁵ 514 U.S. 291 (1995).

¹⁶ *Id.* at 299.

SPECIFIC PROHIBITED CONDUCT

While the preamble is couched in such a way as to prohibit "abusive, deceptive, and unfair debt collection practices," the FDCPA provides specific subsections that prohibit certain types of conduct.¹⁷ The most commonly litigated provisions are located within subsections d through f. Subsection d generally prohibits "harassment" or "abuse" by a debt collector "in connection with the collection of a debt."¹⁸ Unlike its counterparts in subsections c, e, and f, a violation of subsection d can generally be brought by any person, even if that person is not considered a "consumer" under the Act.¹⁹ Subsection d generally prohibits using threats of violence or harm, using obscene or profane language, public shaming of debtors, causing a telephone to ring with the intent to annoy, abuse, or harass, and the placement of a telephone call without the meaningful disclosure of the caller's identity.²⁰ The requirement regarding "meaningful disclosure" of a caller's identity has been interpreted as "requir[ing] that the caller [s]tate his or her name and capacity, and disclose enough information so as not to mislead the recipient as to the purpose of the call."²¹

Subsection e generally prohibits using "false, deceptive, or misleading representation[s] or means in connection with the collection of any debt."²² Subsection e then contains a list of activities that are specifically prohibited including, *inter alia*, threatening to take any action that cannot legally be taken, using false representations to collect a debt, the failure to disclose in an initial written communication that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the use of any business name other than the true name of the debt collector's business.²³ Unlike subsection d, many of the provisions of subsection e require that a "consumer" bring a claim for a violation. A "consumer" is generally defined as "any natural person obligated or allegedly obligated to pay any debt."²⁴ This commonly results in findings that spouses, family members, friends, and neighbors cannot be a plaintiff for the purpose of asserting claims under several of subsection e's provisions.²⁵

Subsection f is generally described as the FDCPA's "catch-all" provision and precludes a debt collector from using "unfair and unconscionable means to collect or attempt to collect any debt."²⁶ The provision prohibits a collector from collecting any amount that is not expressly authorized by agreement or

¹⁷ 15 U.S.C. § 1692(a).

¹⁸ 15 U.S.C. § 1692d.

¹⁹ *Bank v. Pentagroup Financial, LLC*, No. 08-CV-5293 (JG) (RML), 2009 WL 1606420, at *5 (E.D.N.Y. June 9, 2009).

²⁰ 15 U.S.C. § 1692d(1)-(6).

²¹ *Hosseinzadeh v. M.R.S. Assocs., Inc.*, 387 F. Supp. 2d 1104, 1112 (C.D. Cal. 2005).

²² 15 U.S.C. § 1692e.

²³ 15 U.S.C. § 1692e(5), (10), (11), (14).

²⁴ 15 U.S.C. § 1692a(3).

²⁵ See *Conboy v. AT&T*, 84 F. Supp. 2d 492, 504-05 n.9 (S.D.N.Y. 2000) (holding that non-consumer plaintiffs lacked standing to sue under § 1692e(11)); *Siberski v. Goldstein*, 155 Fed. Appx. 10 (2d Cir. 2005) (holding that husband could not bring FDCPA claim under subsections e(5) or e(11) on behalf of his wife, the true debtor).

²⁶ 15 U.S.C. § 1692f.

permitted by law and other seemingly random activities.²⁷ However, unlike the other subsections, case law is clear that a plaintiff cannot base a section 1692f claim upon the same conduct that the plaintiff alleges violates another subsection.²⁸ In other words, in order to use the catchall provision of the FDCPA, some conduct must have been committed that does not constitute a violation of another provision of the statute.²⁹

Finally, the FDCPA prohibits a debt collector from contacting a third party regarding the consumer's indebtedness, unless the debt collector contacts the third party solely for the purpose of obtaining the location information of the consumer.³⁰ Subsection b provides guidelines for contacting a third party for location information, and requires a debt collector to identify himself and prohibits the debt collector from discussing the consumer's indebtedness.³¹ Subsection c(b) then prohibits any communication with third parties, except for the purpose of obtaining location information, "without the prior consent of the consumer . . . , or the express permission of a court."³² The remaining provisions of subsection c prohibit a debt collector from contacting the consumer: at "an unusual place or . . . time;"³³ if the debt collector has knowledge that the consumer is represented by an attorney; or at the consumer's place of employment "if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication."³⁴ Finally, subsection c also provides the consumer with the ability to send a written request that the debt collector cease communications because the consumer refuses to pay a debt.³⁵ This provision has been found to encompass letters from a consumer that simply state "kindly don't other me anymore"³⁶ and seems to provide that a debt collector's only additional recourse would be filing a lawsuit on the debt.

VALIDATION PROCESS

In addition to the prohibitions on certain communications described above, the FDCPA also requires debt collectors to provide the consumer with information in its initial communication,³⁷ providing the

²⁷ 15 U.S.C. § 1692f(1)-(8).

²⁸ See *Cox v. Hilco Receivables, LLC*, 726 F. Supp. 2d 659, 666 (N.D. Tex. 2010); *Baker v. Allstate Financial Svcs, Inc.*, 554 F. Supp. 2d 945, 953 (D. Minn. 2008).

²⁹ See *Taylor v. Heath W. Williams, L.L.C.*, 510 F. Supp. 2d 1206, 1217 (N.D. Ga. 2007).

³⁰ See 15 U.S.C. §§ 1692b, c.

³¹ See 15 U.S.C. § 1692b.

³² See 15 U.S.C. § 1692c(b).

³³ This prohibition includes communicating with the consumer after 8 p.m. or before 9 p.m. local time at the consumer's location. See 15 U.S.C. § 1692b(c)(a)(1).

³⁴ See 15 U.S.C. § 1692c.

³⁵ See 15 U.S.C. § 1692c(c).

³⁶ *Isham v. Gurstel, Staloch & Chargo, P.A.*, 738 F. Supp. 2d 986 (D. Ariz. 2010).

³⁷ Questions have arisen as to whether a legal complaint constitutes an "initial communication" that would require a validation notice. While federal district courts have disagreed on the issue, the Eleventh Circuit Court of Appeals issued a decision in *Vega v. McKay*, which definitively holds that a legal action is not an "initial communication" and, thus, does not need to comply with the provisions of § 1692g. 351 F.3d 1334 (11th Cir. 2003). However, as explained below, *bona fide error* of the law is not a defense and different legal opinions does not permit a collector from violating the FDCPA, thus, attorneys need to examine the law in a specific jurisdiction before filing a complaint.

consumer with the opportunity to request "validation" of the debt that the debt collector is seeking to collect. The validation procedures were enacted as a response to "the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid."³⁸ Specifically, the procedures provide that "within five days after the initial communication with a consumer, a debt collector shall send the consumer a notice containing: (1) the amount of the debt; (2) the name of the creditor to whom the debt is owed; (3) a statement that "unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;" (4) a statement that if the consumer disputes the debt in writing "the debt collector will obtain verification of the debt;" and (5) a statement that upon written request, the debt collector will provide the consumer with the name and address of the original creditor."³⁹

In *Bartlett v. Heibl*, the Seventh Circuit Court of Appeals gave an example of a letter that would satisfy the validation notification required by section 1692g(b):

Federal law gives you thirty days after you receive this letter to dispute the validity of the debt or any part of it. If you don't dispute it within that period, I'll assume that it's valid. If you do dispute it-by notifying me in writing to that effect-I will, as required by the law, obtain and mail to you proof of the debt. And if, within the same period, you request in writing the name and address of your original creditor, if the original creditor is different from the current creditor ([debt collector's name]), I will furnish you with that information too.

The law does not require me to wait until the end of the thirty-day period before suing you to collect this debt. If, however, you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law requires me to suspend my efforts (through litigation or otherwise) to collect the debt until I mail the requested information to you.⁴⁰

While including this information is required, debt collectors must also ensure that "[a]ny collection activities and communications during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor."⁴¹ Whether a collection practice overshadows notice of the consumer's validation rights is determined under the "least sophisticated consumer" standard.⁴² A collection activity would overshadow or contradict the validation notice "if it would make the least sophisticated consumer uncertain as to her rights."⁴³

³⁸ S.Rep. No. 95-382, at 4 (1977), as reprinted in 1977 U.S.C.C.A.N. 1695, 1699.

³⁹ 15 U.S.C. § 1692g(a)(1)-(5).

⁴⁰ 128 F.3d 497, 501 (7th Cir. 1997).

⁴¹ *Ellis v. Solomon and Solomon, P.C.*, 591 F.3d 130, 135 (2d Cir. 2010) (citing 15 U.S.C. § 1692g(b)).

⁴² See *Greco v. Trauner, Cohen & Thomas, LLP*, 412 F.3d 360, 363 (2d Cir. 2005).

⁴³ *Id.* (quoting *Russell v. Equifax A.R.S.*, 74 F.3d 30, 35 (2d Cir. 1996)).

Once a validation notice is sent to the debt collector, the collector has two choices: ceasing collection activity or validating the debt.⁴⁴ In other words, a debt collector does not violate the FDCPA when it fails to respond to a validation request and merely stops all attempts to collect on the debt.⁴⁵ Should the collector decide to continue collection activity, however, the courts have provided guidelines for "validating" a debt. The Ninth Circuit Court of Appeals has found that a debt collector properly verified an alleged debt when it obtained information from the creditor about the nature and balance of the outstanding bill and provided the debtor with documentary evidence of the debt in the form of an itemized statement.⁴⁶ Similarly, federal courts within the Eleventh Circuit have held that copies of a signed credit application and credit card statements are sufficient to verify the debt being collected.⁴⁷ Once the debt is verified, a debt collector may continue collection activity.⁴⁸

BONA FIDE ERROR DEFENSE

With the large number of prohibitions contained within the FDCPA, and with the potential for minor, technical violations, Congress did create a safety net for collectors in the *bona fide error* defense. The FDCPA states that a debt collector will not be held liable for violations that "are not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."⁴⁹ "The debt collector must only show that the violation was unintentional, not that the communication itself was unintentional."⁵⁰ Thus, to avail itself of the *bona fide error* defense, it is the debt collector's burden to prove two elements: (1) its error was bona fide and unintentional; and (2) it had procedures in place reasonably adapted to avoid the error.⁵¹

In a recent decision entitled *Jerman v. Carlisle*, the U.S. Supreme Court has severely limited the application of the *bona fide error* defense by clarifying that it does not apply to bona fide errors of law.⁵² Therefore, a debt collector may not rely on conflicting judicial opinions to support a practice, but to be safe, must model FDCPA compliance after the most strict interpretations of the statute. This *Jerman* decision has been interpreted by federal courts as limiting the *bona fide error* defense to only factual or clerical mistakes.⁵³

COMMON FDCPA PITFALLS

In light of the restrictions and requirements discussed above, and mindful of the fact that the *bona fide error* defense is sometimes difficult to prove and has been severely limited by the Supreme Court, following is a non-exhaustive list of things to beware of when collecting from consumers:

⁴⁴ See *Jang v. A.M. Miller and Assocs.*, 122 F.3d 480, 483 (7th Cir. 1997).

⁴⁵ See *Smith v. Transworld Systems, Inc.*, 953 F.2d 1025, 1031 (6th Cir. 1992).

⁴⁶ See *Clark v. Capital Credit & Collection Svcs., Inc.*, 460 F.3d 1162 (9th Cir. 2006).

⁴⁷ *Mammen v. Bronson & Migliaccio, LLP*, 715 F. Supp. 2d 1210, 1221-1222 (M.D. Fla. 2009).

⁴⁸ See *Quale v. Unifund CCR Partners*, 682 F. Supp. 2d 1274 (S.D. Ala. 2010).

⁴⁹ See 15 U.S.C. § 1692k(c).

⁵⁰ *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1988).

⁵¹ *Id.*

⁵² 130 S.Ct. 1605 (2010).

⁵³ *Owen v. I.C. System, Inc.*, 629 F.3d 1263, 1273 (11th Cir. 2011).

- ensure that any initial communication contains the information required by § 1692g(a)(1)-(5) and is not overshadowed or inconsistent with other portions of the initial written communication or debt collection procedures during the 30-day validation period;
- if you receive a validation request, cease communications immediately and provide verification of the debt in the form of the original contract, statements, or other evidence demonstrating that the debt is valid;
- ensure that all written communications with the consumer identify you as a debt collector;
- be mindful that in each telephone communication with the consumer you provide meaningful disclosure of your identity, including your name, businesses' name, and your capacity;
- ensure that all communications with the consumer contain accurate information regarding the debt and are not too voluminous as to constitute harassment or abuse;
- do not contact third parties about the consumer's debt unless for the specific purpose of obtaining location information;
- if obtaining location information from a third party, be sure to comply with the provisions of section 1692b and do not mention that you are attempting to collect a debt from the consumer;
- do not contact a consumer or a third party after obtaining information that the consumer is represented by an attorney;
- review the specific provisions of the FDCPA and adhere to the most strict interpretations of the statute; and
- develop policies and procedures to avoid factual or clerical mistakes to enhance your ability to avail yourself of the *bona fide error* defense.

CONCLUSION

The FDCPA is a detailed statute that can present numerous issues for attorneys or businesses engaged in collecting debts from consumers; however, taking adequate precautions in communications with consumers can significantly decrease potential liability. Ensuring compliance with the statute cannot guarantee that lawsuits will not be filed, however, particularly with the promise of an award of attorney's fees for successful litigants. Therefore, before engaging in consumer collection, attorneys and businesses must be sure to evaluate any risks and be adequately prepared in order to avoid the common problems discussed above.

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