

FDCPA Consumer Protection Rights: When the Debt Man Cometh

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Purpose of the FDCPA

- To eliminate abusive debt collection practices by debt collectors;
- To insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged; and,
- To promote consistent State action to protect consumers against debt collection abuses.
- To prohibit debt collectors from engaging in unfair practices, harassment, or making false statements.

15 USC §1692(e); FDCPA §802.

Debt Collector Defined

- 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 (i.e. third party collections).
- Except as excluded in §803(6)(F), debt collector 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.

USC §1692a; FDCPA §803

Unfair Practices Prohibited by FDCPA § 808

- A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.
- §1692f(6) Prohibits taking or threatening to take any non-judicial action to effect dispossession or disablement of property if:
 - (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
 - (B) there is no present intention to take possession of the property; or
 - (C) the property is exempt by law from such dispossession or disablement.

15 USC §1692f; FDCPA §808

When Prohibiting Unfair Practices, Definition of Debt Collector Expanded:

- When regulating “unfair practices” pursuant to §1692f(6), debt collector 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.

15 USC §1692f(6); FDCPA §808

Persons NOT a Debt Collector under FDCPA

“Debt Collector” does not include-

- (A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;
- (B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;
- (C) 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;

15 USC §1692a(6)(A)-(F); FDCPA §803(6)

Persons NOT a Debt Collector under FDCPA(*cont.*)

“Debt Collector” does not include -

- (D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;
- (E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and
- (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

15 USC §1692a(6)(A)-(F); FDCPA §803(6)

Other FDCPA Definitions

- §803(2) “Communication” means the conveying of information regarding a debt directly or indirectly to any person through any medium.
- §803(3) “Consumer” means any natural person obligated or allegedly obligated to pay any debt.
- §803(4) “Creditor” means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.
- §803(5) “Debt” means 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 USC § 1692a; FDCPA §803

FDCPA § 806 Definition of “Harassment”

- § 1692d. Harassment or abuse
- A debt collector may not engage in **any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.** Without limiting the general application of the foregoing, the following conduct is a violation of this section:
 - (1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.
 - (2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.
 - (3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(3) 1 of this title.
 - (4) The advertisement for sale of any debt to coerce payment of the debt.
 - (5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.
 - (6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

15 USC 1692d. FDCPA § 806

False or Misleading Representations § 807

- **§1692e. False or misleading representations**
- A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
 - (1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
 - (2) The false representation of—
 - (A) the character, amount, or legal status of any debt; or
 - (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
 - (3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.
 - (4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.
 - (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

15 USC §1692e: FDCPA § 1692e: FDCPA § 807

False or Misleading Representations *(continued)*

- **§1692e. False or misleading representations**
- (6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—
 - (A) lose any claim or defense to payment of the debt; or
 - (B) become subject to any practice prohibited by this subchapter.
- (7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.
- (8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.
- (9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.
- (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

15 USC §1692e: FDCPA § 1692e: FDCPA § 807

False or Misleading Representations *(continued)*

- **§1692e. False or misleading representations**
- (11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.
- (12) The false representation or implication that accounts have been turned over to innocent purchasers for value.
- (13) The false representation or implication that documents are legal process.
- (14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.
- (15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.
- (16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

Section 806(5) Factors Assessed in Determining Whether Behavior Constitutes Harassment:

- The volume, pattern and frequency of contacts and attempted contacts.
- The duration of the attempted communication and collection.
- Whether the consumer disputed the debt.
- Whether the collector called immediately after the consumer hung up.
- Whether calls were made multiple times in a day.

Section 806(5) Factors Assessed in Determining Whether Behavior Constitutes Harassment (*continued*):

- Whether the calls were made at odd hours.
- Whether the calls were unanswered.
- Whether the collector left a message.
- Whether the consumer requested the collector stop calling.
- Whether calls were made, or threatened to be made, to the consumer's place of employment, family, or friends.

Validation Notices

- §809(a) Requires debt collectors to provide a written notice of specifics of the debt and must notify that the consumer has 30 days to dispute the debt.
- Notice must be given in first communication, or within five days of the initial communication.
- A written dispute during the 30-day validation period triggers the requirement to verify the debt.

Verifying Debt

- §809(a)(4) If a consumer sends a written dispute within the 30 day validation period, it triggers the debt collector's duty to verify the debt with the first party creditor.
- FDCPA does not define verification and Courts have varied in ruling what constitutes a proper verification.
- Proper verification in most cases is just providing to the consumer an itemized statement by mail of the amount due, the name and address of the current and original creditor, an account statement listing the services provided, a statement listing the nature of the and status of the debt, the dates on which the charges were incurred and the amount of the consumer's debt.
- It should also include the name and address of the consumer.

Damages for Violating the FDCPA

- Actual damages.
- Additional damages not to exceed \$1000.
- Attorney's fees, when bad faith proven.

15 USC 1692f FDCPA §813(a)

Enforcement

- FDCPA creates a consumer cause of action for judicial enforcement, however, judicial precedent has somewhat weakened consumer's FDCPA actions.
 - e.g. \$1000 per violation vs. total
- Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.
- Created the Consumer Financial Protection Bureau “CFPB”
- Prior to Dodd-Frank Act, the FDCPA was enforced by the Federal Trade Commission (“FTC”) and still is.
- May file a complaint directly with either FTC or CFPB.

Recent Trends:

- Statute of Limitations.
- “Communication” more broadly defined.
- Impacts of Technological Advances.

Communications Exceptions:

Permissible Third Party Contacts.

- Spouse.
- Parent of a Minor Child Consumer.
- Creditor to Whom the Debt was Originally Owed.
- Attorney of the Consumer, Creditor, or Debt Collector.
- Consumer Reporting Agency (if otherwise permitted by law.)
- Guardian, executor, and administrator (including other individuals authorized to pay debts from assets of the decedent's estate.)
- Co-Debtor, or other person legally obligated to pay the debt.

Communications Exceptions:

Permissible Third Party Contacts. (*cont.*): Debt Collectors Must, When Skiptracing:

- Skiptracing is a method used by debt collectors to acquire information related to the location of the consumer.
- Debt collectors may only communicate with third parties for the purpose of obtaining location information about the consumer.
- Location information defined:
 - The consumer's home address.
 - The consumer's home telephone number.
 - The consumer's place of employment.

Communications Exceptions:

Permissible Third Party Contacts. (*cont.*): Debt Collectors
Must, When Skiptracing:

- Identify herself and state that she is confirming or correcting location information concerning the consumer.
- Only identify for whom the debt collector's is working if expressly asked by the third party.
- Not state that the consumer owes any debt.
- Not communicate with a third party more than once, unless the person requests the debt collector contact her again, or if the collector reasonably believes the previous response was erroneous or incomplete and the third party now has correct or complete information.
- Not communicate by postcard.
- Not use any language or symbol on an envelope that indicates the collector is in the debt collection business or that the communication relates to debt collection.
- Not communicate with any person if the collector knows the consumer is represented by an attorney.

Easy Wins for Consumers:

1. Prohibited Written Communications:

- §808(8) Unfair Practices and Envelopes: no information on outside except for the address of consumer.
- §805(b) no 3rd party disclosures, so no envelopes with “windows.”
- §802(a) no deceptive practices e.g. precludes envelopes from having words like “pre-approved.”

Easy Wins for Consumers

2. Verbal Communications: Pitfalls for Debt Collectors When Leaving Voice Messages

- Duty to provide Mini-Miranda §806(6) and §807(11) *“This is [collector’s name] from [company name]. This is an attempt to collect a debt and any information obtained will be used for that purpose. Please contact me about an important business matter at [phone number].”*

vs.

- Duty not to disclose to 3rd Party information pertaining to consumer debt *“This is for [Consumer’s Name]. If the intended party cannot be reached at this number, please call [phone number], and we will cease further attempts to this number. If you are not the intended party, please hang up at this time. This message contains private information and should not be played in a manner where it can be heard by others...”*

Easy Wins for Consumers

3. Technology; Communications through Social Media etc.

- Increasingly difficult to stop 3rd parties' disclosures
 - E.g. fax machines, text messages, caller ID, voice messaging.
- Harassment/ Deceptive practices e.g. friending a consumer on social media.
- Unfair Practices -Making consumers incur charges e.g. cell phone plans with limited minutes or limited text message.

Helping Post-Judgment Clients

- Proof of Service.
- Dormant Judgments.
- Judgment Liens on Real Property.
- Garnishments.
 - Continuing vs. Non-Continuing
 - Exemptions

Benefits Exempt from Garnishment

- Social Security Benefits.
- Supplemental Security Income (SSI) Benefits.
- Veterans' Benefits.
- Civil Service and Federal Retirement and Disability Benefits.
- Military Annuities and Survivors' Benefits.
- Federal Emergency Management Agency Federal Disaster Assistance.
- Any other exemption as provided by law, e.g. Income Withholding Orders priority over other garnishments, etc.