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Avoiding Liability Under The FDCPA

*Teresa Niederwimmer
Claims Counsel - Claims Department
The Bar Plan Mutual Insurance Company*

The Fair Debt Collection Practices Act (FDCPA) was drafted to eliminate abusive, deceptive and unfair debt collection practices, and promote consistent state action to protect consumer debtors.¹ Those deemed “debt collectors” are required to abide by the Act’s protective standards when attempting to collect debts. Failure to do so can subject the debt collector to various civil penalties.

The FDCPA defines a “debt collector” as: [A]ny person who uses any instrumentality of interstate 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.² Those excluded from “debt collector” status are defined by 15 U.S.C. §1692a(6)(A)-(F). However, attorneys who engage in collection work on behalf of clients “more than a handful of times per year” are deemed “debt collectors” under the Act.³

If a practitioner falls within this definition, the FDCPA regulates his or her actions in the following areas: 1) potential venues; 2) disclosure requirements; 3) communications with a consumer debtor; and 4) communications with third parties.

1) Potential Venues

Section 1692i limits the debt collector’s ability to file debt collection actions in venues inconvenient to the consumer debtor. A debt collector may bring suit only in the judicial district where the consumer originally signed the contract sued upon, or where the consumer resides at the time of the commencement of the action. If the action is brought to enforce an interest in real property securing the consumer’s obligation, then the action may also be brought in the judicial district in which the real property is located.

2) Disclosure Requirements

Section 1692g, requires a debt collector to send a written validation notice to the consumer within five days of the debt collector's initial communication. The validation must contain the following: 1) the amount of the debt; 2) the creditor's name; 3) a statement explaining that unless the consumer disputes the debt within 30 days after receipt of the notice, the debt will be assumed valid by the debt collector; 4) a statement explaining that if the consumer does dispute the debt, the debt collector will obtain verification of the debt, and a copy of the verification will be mailed to the consumer by the debt collector; and 5) a statement explaining that upon written request by the consumer within 30 days of receipt of such notice, the debt collector will provide the consumer with the name and address of the original creditor.

The disclosures and deadlines must be plain, uncontradicted, easy to read, and prominent enough so that even the least sophisticated debtor will notice them.⁴ If the debt is disputed, the FDCPA requires that the attorney cease collection of the debt until the debt collector mails the debt verification to the consumer.

3) Communication with Consumer Debtors

Section 1692a defines "communications" as "the conveying of information regarding a debt directly or indirectly to any person through any medium". The FDCPA strictly regulates both the timing and nature of communications. A debt collector may not directly communicate with a consumer at any unusual time or place, or at a time or place known to be inconvenient to the consumer, without first obtaining permission from the consumer.⁵ All written communication from the debt collector must clearly state that the debt collector is attempting to collect a debt, and any information obtained will be used for that purpose.⁶ Most courts have interpreted the FDCPA to require all correspondence, even follow up letters, contain this caveat.

Further, a debt collector may not communicate directly with a consumer if it is known that the consumer is represented by counsel unless: 1) the consumer's attorney fails to respond in a reasonable time; or 2) the consumer's attorney's address or location is not readily obtainable.⁷

4) Communications with Third Parties

Section 1692c prohibits a debt collector from engaging in communication concerning debt collection with anyone other than the consumer, his or her attorney, a consumer reporting agency, the creditor, or the creditor's attorney without prior permission from the consumer. These requirements may only be set aside if permission is obtained from "a court of competent jurisdiction, or if reasonably necessary to effectuate a post judgment judicial remedy."

The debt collector will be allowed to communicate with persons other than those defined in §1692c if the debt collector is attempting to obtain location information about the consumer. However, the debt collector must identify him or herself, and state that the purpose of the communication is to verify or correct location information. The debt

collector must not reveal that the consumer owes a debt.

Failing to abide by these requirements subjects the debt collector to civil liability. Section 1692k permits consumer debtors to bring suit for violations of the FDCPA in any US federal district court or other court of competent jurisdiction, regardless of the amount in controversy, within one year of the violation. Such actions are permitted even if the consumer admits to owing the debt in question. The consumer may recover actual damages – which can include emotional distress and anguish – statutory damages up to and including \$1,000 per action, the costs of the action, and reasonable attorney fees. An award of statutory damages does not require the showing of actual damages.

Consumers are not the only ones entitled to recover under the FDCPA. If a court determines that an FDCPA action has been brought in bad faith or for purposes of harassment, the court, in its discretion, may award the defendant debt collector reasonable attorney fees incurred to defend against the action.⁸

Application of the Fair Debt Collection Practices Act continues to pose problems both for courts and practitioners. Like anything else, knowledge of the Act is a practitioner's best tool to avoiding liability.

¹ 15 U.S.C. §1692

² 15 U.S.C. §1692a(6)

³ Crossley v. Lieberman, 868 F.2d 566, 569 (3rd Cir. 1989).

⁴ Wright v. Credit Bureau of Georgia, Inc. 555 F.Supp. 1005 (N.D. Ga. 1982).

⁵ 15 U.S.C. 1692c

⁶ 15 U.S.C. 1692e

⁷ 15 U.S.C. 1692c

⁸ Johnson v. Eaton, 884 F.Supp. 1068 (M.D. La. 1995); Perry v. Stewart Title Co., 756 F.2d 1197 (5th Cir. 1985) modified on other grounds; Knowles v. Credit Bureau of Rochester, No. 91-CV-145, 1992 WL 131107 (W.D.N.Y. May 28, 1992).