

An Attorney's Guide to the Fair Debt Collection Practices Act

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FDCPA is a federal law governing all 3rd party
consumer debt collections

- Codified at 15 U.S.C. 1692, adopted by most states
- Subject to a high degree of interpretation and expansion by the courts
 - 12,000 FDCPA suits filed last year nationally
 - Things change fast, many issues unsettled.

When is an attorney a debt collector?

- 15 U.S.C. 1692a(6)** Categorizes an attorney as a debt collector when he or she is collecting a debt owed or due to another that is a Consumer Debt and the lawyer is “regularly” engaged in consumer debt collection.
- However, definition of “regularly” is unsettled

When is an attorney a debt collector? (cont.)

Recent Decisions may make this analysis irrelevant by automatically including all communications from attorneys
See Leshner v. Law Offices of Mitchell N. Kay , 650 F.3d 993 (3rd Cir., 2011)

Bottom Line: You should assume that you're covered by the FDCPA

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Bottom Line: You should assume that you're covered by the FDCPA

Preventative Measures

- Create and promulgate a written SYSTEM for Confirming Facts:
 - Dollar amount owed
 - Identity of debtor
 - PACER bankruptcy search
 - Etc.

- Such a system for error detection is critical to the Bona Fide Error Defense

Initial Communications Requirements:

1.) All communications must contain the “mini-Miranda” from 1692e(11)

2.) Send Validation Notice. See: *Bartlett v. Heibl*, 128 F. 3d 497, 498-99 (7th Cir. 1997)

- Use language from 1692g(a)

- Should be first communication with debtor. –If not (e.g. debtor calls you), must send w/in 5 days

Initial Communications Requirements: (cont.)

3.) Must investigate disputed debt before continuing with collection. *United States v. Asset Acceptance, LLC* 8:12-CV-00182-27EAJ (Md. D. Fla. Jan 30, 2012)

4.) Allow at least 35 days

- Time begins upon receipt, NOT mailing. Assume there will be a delay in the mail.

Avoid “overshadowing” (See *Swanson v. Southern Oregon Credit Svc., Inc.*, 869 F.2d 1222 (9th Cir.1988), *Barrientos v. Law Offices of Mark L. Nichter*, 76 F.Supp.2d 510, 513 (S.D.N.Y. 1999))

Misleading if anything implies that the consumer may have less than 30 days to seek validation or induce fear of action if not paid w/in the 30 days.

Cannot demand that payment be made within 30 days of Notice. *Chauncey v. JDR Recovery Corp.*, 1997 WL 342900 (C.A. 7 Wis.); *Adams v. Law Office of Stuckert & Yates*, WL 251514 (E.D. PA 1996).

Suing or threatening to sue within the 30 day timeline is not recommended.

Least Sophisticated Debtor Doctrine

- Standard by which all actions to be judged
- Unsophisticated, uninformed, naive and trusting person of below-average intelligence (*Bingham v Collection Bureau*, 505 F. Supp. 864 (D. N.D. 1981))
- Strict liability: No regard for actual intelligence or actual effect. (See *Trull v. G.C. Services Ltd. Partnership*, 1997 WL 139475 (N.D. Ill. 1997))
- Debtor does not need to notice or see the communication for violation (*Brown v. Card Serv. Ctr.*, 464 F.3d 450, 453-54 (3d Cir. 2006))

Communication Pitfalls (1692c, d, e)

–No false or deceptive statements (1692d) •at this point, any communication from a law firm or lawyer is considered a threat to sue. If you do not intend to sue, you could be in violation. (*Leshner v. Law Offices of Mitchell N. Kay*, 650 F.3d 993 (3rd Cir., 2011)) –if attorney doesn't review the communication, then misleading because it's on firm letterhead. If attorney does review it, then misleading if a suit was not intended. *Id.* At 999

–disclaimers may be sufficient to avoid liability if suit is not intended. (*Gonzalez v. Kay*, 577 F. 3d 600, 607 (5th Cir. 2009))

–Threatening action you cannot take •e.g. threaten to garnish before you have a judgment

Communication Pitfalls (con't)

- Collecting amounts that aren't due 1692(e) • Discharged debts
- Improper addition of attorneys' fees

- Voicemails • Nearly impossible to leave compliant voicemail
- Must disclose identity and mini-Miranda to debtor, but cannot disclose a debt to a third party that may listen to the message. (*Foti v. NCO Fin. Sys., Inc.*, 424 F. Supp. 2d 643, 669 (S.D. N.Y. 2006))
- Social Media • Treat as any other communication
- See *Beacham v. MarkOne Financial, LLC*, No. 10-12883CI-15 (Fla. Pinellas Cnty. Ct. Sept. 2, 2010)

Communication Pitfalls (con't)

- Prohibited Communications 1692c(a) •Disclosing debt to 3rd parties, except spouses
 - Unusual times (generally outside of 8am-9pm local time)
 - Debtors who are represented by attorney
 - At employer, if collector has reason to know that employer prohibits such communication
 - If given written notice that either:
 - Debtor wants you to cease communications, or
 - Debtor refuses to pay
- Beware of baiting: •Sophisticated debtors attempting to trap you
 - Plan phone call carefully, don't get sidetracked

Bona Fide Error Defense

Affirmative defense allowed by the Act
a "debt collector" may not be held liable if he
"shows by a preponderance of evidence that the
violation was not intentional and resulted from a
bona fide error notwithstanding the maintenance of
procedures reasonably adapted to avoid any such
error." 1692k(c)

The error must be one of fact and not law, as
recently affirmed by the United States Supreme
Court *in Jerman v. Carlisle, McNellie, Rini, Kramer &
Ulrich LPA*, 130 S. Ct. 1605 (2010).

Bona Fide Error Defense (Cont'd)

Ensure that you have written systems in place for fact verification and documentation of communications

Systems must be promulgated to all individuals involved in consumer collections

- Track Everything Keep a log of intake steps

- Keep a log of transactions/communications, as well as comments