

Fair Debt Collection Practices Act: The Basics and Beyond

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Introduction to the FDCPA

- Purpose of the FDCPA
- Scope of the FDCPA
 - Who is a “debt collector” subject to the FDCPA?

Definition of “Debt Collector”

- ***Obduskey v. McCarthy & Holthus, LLP*, 139 S. Ct. 1029 (2019)** – a business engaged in no more than nonjudicial foreclosure proceedings is not a “debt collector” under the FDCPA, except for the limited purpose of § 1692f(6). Section 1692f(6) prohibits, “taking or threatening to take any nonjudicial action to effect violation, which would include attempting to take any nonjudicial action to effect dispossession or disablement of property if ...(C) the property is exempt by law from such dispossession or disablement.”

***Obduskey* in Practice**

- Use of *Obduskey* in practice:
- (1) U.S. Supreme Court reaffirmed its strict constructionist interpretation and held that the first and most decisive factor in interpreting the Act is the text of the Act;
- (2) limits claims to violation of only § 1692f(6);
- (3) However, the limitation does not apply if the business took action beyond a nonjudicial foreclosure.

Definition of Debt Collector

- ***Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718 (2017)** – an entity who regularly purchases debts originated by someone else and then seeks to collect those debts for their own account are not “debt collectors” subject to the FDCPA.

Henson in Practice

- Use of *Henson* in practice: (1) U.S. Supreme Court presumes “the legislature says what it means and means what it says;”
- (2) the entity must have purchased the debt, not just service the debt of another;
- (3) the Court did not decide the issue of whether a defendant could be a “debt collector” if it also is engaged in a business “the principal purpose of which is the collection of debts.”

Introduction to the FDPCA

- What is a “debt” subject to the FDCPA?
- Who is a “consumer” under the FDCPA?

Common FDCA Claims

- Claims for violation of 15 U.S.C. § 1692d
- Claims for violation of 15 U.S.C. § 1692e
- Claims for violation of 15 U.S.C. § 1692f
- Claims for violation of 15 U.S.C. § 1692g

15 U.S.C. § 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

15 U.S.C. § 1692d

- (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.

15 U.S.C. § 1692d

- (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.

Violation of § 1692e(2)(A)

- Claims include a debt collector falsely implying legal action has begun when it has not or a debt collector demanding an amount more than actually owed, for example because of interest, late charges, or other fees that are not authorized.

Violation of § 1692e(5)

- ***Brown v. Card Service Center***, 464 F.3d 450 (3d Cir. 2006) – collection agency wrote that unless the consumer made arrangements to pay within five days, the matter could result in referral to an attorney and could result in a lawsuit. Brown claimed that the communication was deceptive because the debt collector had no intention to refer the matter to an attorney or to file a lawsuit.

***Brown v. Card Service Center*, 464 F.3d 450 (3d Cir. 2006)**

- The Third Circuit reversed the trial court's dismissal of the claim based on the fact the letter states that legal action is possible or one option the debt collector could take, not an imminent threat. The Third Circuit reasoned that it would be deceptive under the FDCPA to assert that the debt collector could take an action that it had no intention of taking and has never or very rarely taken before. The least sophisticated consumer may get the impression that litigation or a referral to an attorney would occur if they did not respond in five days.

Truth Not a Defense

- Truth is not a defense to a claim for deception because even true statements can be misleading.

Truth Not a Defense

- “As the addition of the term “misleading” confirms, the statute outlaws more than just falsehoods. That is why “truth is not always a defense,” *Grden v. Leikin Ingber & Winters, PC*, 643 F.3d 169, 172 (6th Cir. 2011), and that is why even a true statement may be banned for creating a misleading impression.” *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 396 (6th Cir. 2015)

Truth Not a Defense

- A debt collection letter is deceptive where it can be reasonably read to have two or more different meanings, one of which is inaccurate. See, e.g., *Rosenau v. Unifund Corp.*, 539 F.3d 218, 221 (3d Cir. 2008)

15 U.S.C. § 1692f

- Violations under this section include the use of unfair or unconscionable means to collect or attempt to collect any debt.
- § 1692f includes a nonexhaustive list of specific violations.

15 U.S.C. § 1692f

- Common claims include:
 - (1) collecting an amount not expressly authorized by agreement;
 - (2) taking or threatening to take nonjudicial action to dispossess property with no present right to do so; and
 - (3) using any language or symbol on an envelope indicating it pertains to debt collection.

15 U.S.C. § 1692g

- Violations under this sections of the FDCPA typically arise from a debt collector's failure to provide the required validation notice.
- Within five days of the initial communication, a debt collector must send a written notice containing:
 - (1) the amount of the debt;
 - (2) the name of the creditor to whom the debt is owed;

15 U.S.C. § 1692g

- (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;

15 U.S.C. § 1692g

- (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

15 U.S.C. § 1692g

- **(5)** a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

Defenses to FDCPA Claims

- Bona Fide Error
- Lack of Standing
- *Rooker-Feldman* doctrine
- Bizarre or Idiosyncratic interpretations
- Statute of Limitations
- Lack of Materiality

Bona Fide Error

- ***Abdollahzadeh v. Mandarich Law Group, LLC***
– **7th Cir April 29, 2019** – affirmed that the bona fide error defense does not require independent verification and procedural perfection, just that the debt collector's violation of the FDCPA was the unintentional result of a bona fide mistake and that it had procedures in place that, while simple, were reasonably adapted to avoid the error, here a late collection attempt.

Lack of Standing

- *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)-
“a plaintiff must demonstrate that (1) he suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” The injury in fact must be “concrete and particularized” and mere statutory violations without actual harm are not sufficient.

Bizarre or Idiosyncratic Interpretations

- The Sixth Circuit has adopted the “least sophisticated consumer” standard for evaluating whether a defendant has engaged in unfair or unconscionable conduct in violation of 15 U.S.C. § 1692f. *Currier v. First Resolution Inv. Corp.*, 762 F.3d 529 (6th Cir. 2014). As applied, this standard is objective and is designed “to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd.” *Fed. Home Loan Mortgage Corp. v. Lamar*, 503 F.3d 504, 509 (6th Cir. 2007). “Although this standard protects naïve consumers, it also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care.” *Id.* at 509-510.

Materiality

- A statement does not violate the least sophisticated consumer standard unless it is “*materially* false or misleading.” *Wallace v. Wash. Mut. Bank*, F.A., 683 F.3d 323, 326 (6th Cir. 2012)(citing *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 596-7 (6th Cir. 2009). To be material, a statement must “in addition to being technically false, . . . tend to mislead or confuse the reasonable unsophisticated consumer.” *Wallace* 683 F.3d at 326-327.

Class Action FDCPA Claims

- Numerosity – typically over 40 putative class members satisfies this requirement.
- Commonality – typically a form letter or envelope
- Typicality – pattern of wrongdoing, claims based on same form or letter, or same FDCPA violation for all class members.
- Adequacy of plaintiff representative or class counsel – class representative will forego actual damages, which could result in a challenge to standing.

Approaches to Defending FDPCA Claims

- Assess liability early and often
- Offer of Judgment
- Reasonableness of attorney fees

CFPB's Notice of Proposed Rulemaking

- Decedents and their representatives are “consumers”
- Limited calls per week
- Increased rules regarding verification of debts and demand letters
- Expressly prohibiting threatening to sue on time-barred debt
- Limits on reporting to a credit reporting agency
- No transfer or sale of debt discharges in bankruptcy

Contact Us With Questions

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