Summary of the Fair Debt Collection Practices Act

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The Fair Debt Collection Practices Act can be used to stop unruly debt collectors.

One of the core elements of successful credit repair is your ability to deal with all types of collectors.

After all, they are the ones who will be making many of the decisions regarding you and your account. Considering this, your success will mostly depend on how you handle them. The information in this section is therefore among the most crucial in your quest for exemplary credit.

A summary of the Fair Debt Collection Practices Act (FDCPA)

The term "collectors" generally refers to those who are collecting for themselves (i.e., original creditors), whereas the term "debt collectors" refers to those who are in the business of collecting for third parties, such as collection agencies and lawyers. This distinction is important where laws about how collectors and debt collectors conduct themselves are concerned, because the FDCPA applies only to debt collectors, not inhouse (creditor) collectors. There are exceptions, however, as certain conduct by creditor collectors can actually bring them under the Fair Debt Collection Practices Act when it would not otherwise apply (see Chapter 14).

A debt collector's contacts with a debtor are known as "duns," regardless of the method of contact. Even debt collectors' dunning letters are governed by the Fair Debt Collection Practices Act, which places tight restrictions on the language they can use. As such, it's extremely important to know your rights before communicating with debt collectors. Such knowledge will provide the basis for the approach you will take and will give you confidence so that you will not allow yourself to be intimidated.

There are two general tests to determine whether a debt collector falls under the FDCPA. One involves the type of collector, and the other involves the type of transaction.

Collectors Covered by the Fair Debt Collection Practices Act

Debt collectors that fall under the Fair Debt Collection Practices Act include the following:[1]

- Collection agencies
- Attorneys who regularly collect debts
- Creditors using a false name
- Creditors collecting for another person
- Repossession and foreclosure companies (if made unlawfully)
- Suppliers or designers of deceptive forms (forms used in collection)
- Purchasers of debt after default

Credit counselors (for profit)
Check guarantee services
Third-party collectors collecting for landlords, including attorneys, realty companies, and servicing companies that are collecting rent debts.[2] Deceptive eviction notices are also covered by the Fair Debt Collection Practices Act. Many state UDAP laws also apply to abusive landlords and their rent collection conduct.[3]

Collectors Excluded from the Fair Debt Collection Practices Act

The following types of collectors are generally excluded from the FDCPA:[4]

Creditors who are collecting their own debts
Assignees (i.e., service companies, such as car finance companies, that take on the collection role prior to default on mortgages, student loans, rental agreements, utility bills, medical debts, and other consumer transactions)
Government employees
Business (aka commercial) creditors
Nonprofit credit counselors

Transactions Covered by the Fair Debt Collection Practices Act

Debts that fall under the FDCPA include consumer debts where the transaction was for personal, family, or household purposes, whether or not such obligation has been reduced to judgment. The Act does not apply to commercial debts.[5] The following are covered by the FDCPA:[6]

Dishonored checks
Rent
Medical bills
Utility bills
Insurance bills and claims
Student loans
Credit cards
Condominium fees
Attorney fees
Judgments
Obligations discharged in bankruptcy
Other personal debts (e.g., parking tickets, auto loans)

Prohibited Practices

The Fair Debt Collection Practices Act defines a debt collector as any person (1) whose principle business is collecting debts, (2) who regularly collects debt owed to a third party, or (3) who uses a false name in the course of debt collection activities or efforts.[7] The FDCPA prohibits debt collectors from engaging in unfair, deceptive, or abusive practices while collecting debts. The following are the rules under which collection agencies must operate:

Debt collectors may contact you only between 8 A.M. and 9 P.M.
Debt collectors may not contact you at work if they know your employer disapproves.
Debt collectors may not harass, oppress, or abuse you.
Debt collectors may not lie when collecting debts, such as falsely implying that you have committed a crime.
Debt collectors must identify themselves to you on the phone.
Debt collectors must stop contacting you if you ask them to stop in writing (known as a cease communication letter).
Debt collectors may call your neighbors, but only to determine where you are and only once.
Debt collectors may not discuss your debts with any third party unless it's your attorney, the creditor's attorney, a credit reporting agency, co debtor, guardian (administrator/executor), or parent (if the debtor is a minor).[8]

In a nutshell, bill collectors from collection agencies cannot harass you by calling late, calling your neighbors repeatedly (or talking to them about your debts), calling your work, or at all! This means that you don't have to be a victim, and you can take action to see that the harassment stops or doesn't occur at all. A cease communication letter is a way to get debt collectors to stop contacting you. This is explained in detail later in this chapter.

Collectors may not make threats.

One of the most common illegal actions by debt collectors is to threaten legal action. Debt collectors believe they can

get away with such threats because debtors often fear a lawsuit. Few debtors understand that the threat of legal action by debt collectors can actually be spun against them, since any such threat is a violation of the Fair Debt Collection Practices Act. A very broad range of legal threats are in breach, including those that are (1) not intended to be carried out when made, (2) not as imminent as presented, (3) beyond the purview of the debt collector's authority (i.e., those the creditor didn't authorize), or (4) beyond the debt collector's legal authority (e.g., the state forbids lawsuits by collection agencies).[9]

Further, even oblique or disguised threats of a lawsuit on the part of debt collectors are classified as threats under the FDCPA. Examples include claiming that they will agree to settle debts "out of court," saying they "can" sue you, stating that the debt will be referred to a lawyer for debt collection, claiming that they are authorized to proceed with legal action against you, sending a complaint (lawsuit) to a debtor before actually filing it with the court, claiming that "action will be taken" to secure payment in full, listing available creditor remedies (inclusive of legal action), saying "every step will be taken," and marking an envelope with "legal matter enclosed" or the like.[10]

Collector Dunning Letter Requirements

An initial letter from a debt collector must comply with the Fair Debt Collection Practices Act rule requiring that a letter contain the following:[11]

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written 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 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
(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.
(b) If the consumer notifies the debt collector in writing within the thirty day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.
(c) The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

The rules concerning a debt collector's communication are very strict, and even the validation rights notice (paragraph b above) must be placed in such a manner as to avoid confusion to the "least sophisticated consumer." "The law was not made for the protection of experts but for the public—that vast multitude of which includes the ignorant, the unthinking, and the credulous."[12] Not only must a validation notice be present, but it also cannot be obscured by other language, contradict the content of the validation rights, or serve to confuse a debtor. This includes making the font of the validation paragraph smaller than that of the rest of the notice, capitalizing nonvalidation content, or placing the validation notice on the back of the notice. Demanding payment within 10 days would also serve to confuse or contradict the validation rights by causing a debtor to perceive that he or she actually doesn't have 30 days to dispute a debt under validation.[13] Likewise, threatening lawsuit within 10 days is contradictory.[14]

And there's more. The letter must also contain the name of the creditor, state that the debt is assumed to be valid if it is not disputed, and disclose the exact amount of the debt, not just a principal balance "plus late fees, attorney fees, and interest."[15]

Finagling Subscriber Numbers and Account Identifiers

Bureaus use subscriber numbers to distinguish between furnishers, preventing duplication and reinsertion. Collection agencies know this and will often submit accounts to the bureaus using a new subscriber number for accounts that are outside the seven year limit for credit reporting. This is especially true for sinister agencies that buy old junk debt for pennies. Since collection agencies understand the credit reporting agency's use of queries and filters within their

repository, they'll use new or modified account identifiers to get the item to show up on the report when it otherwise wouldn't.

Through this and other illegal methods, the accounts are listed as new on someone's credit file, and then collection attempts resume. Many debtors become frustrated and pay the debts to save their credit, simply because they don't understand that they cannot only get money damages when this happens, but also they can have the collection agencies shut down by notifying the FTC and their state's attorney general.[16]

It's important that consumers dispute any bogus entries with the bureaus, since any affirmation creates huge liability on the part of the furnisher as additional causes of action under the FCRA become available. It can open up the bureau to civil liability as well, so dispute such entries in accordance with Chapter 11.

Violations of Bank Withdrawals

There are two types of bank withdrawals that can be performed by a debt collector. One is a preauthorized draft (demand draft), governed by the Uniform Commercial Code (UCC), and the other is an electronic fund transfer, governed by the Electronic Funds Transfer Act (EFTA). A preauthorized draft is simply a check that a collector prepares and endorses in the account holder's name. This is legal as long as the debtor authorizes it; if not, it is considered fraud, and the collector is liable under the FDCPA and state UDAP or state debt collection laws. And even if the debtor permits a series of preauthorized drafts, the collector must notify the debtor at least three days (and no more than 10 days) before submitting each draft.[17]

The UCC permits the account holder debtor to dispute the bank check as long as the bank is notified "promptly." If the account holder doesn't dispute the initial check, then subsequent checks will be honored, and no remedy is available under the UCC.

In some cases a debtor will authorize a collector to withdraw money directly from a bank account. However, collectors cannot sign a debtor's name for a series of electronic funds transfers (EFTs), as they can with a preauthorized draft. If a collector taps an account without permission, the account holder has 60 days from the statement date (date of a billing statement that includes the transaction) to dispute the transaction and avoid liability for the withdrawal.

If there's no access device (e.g., automated teller machine or debit card) used in the withdrawal, an institution that fails to complete its investigation of a consumer dispute within 10 days and recredit the account can take 45 days to complete its investigation. This increases to 90 days if an access device was involved.[18] Consumers can also stop payment on EFTs by notifying the financial institution within three business days prior to the scheduled transfer. Banks are liable under the EFTA for failing to perform their duties under the Act.

Regardless of what type of unauthorized withdrawal takes place, a debt collector should also be liable under state UDAPs as well as the FDCPA.

Most banking institutions are also members of the Automated Clearing House (ACH) network and therefore subject to rules that govern electronic transactions, called the National Automated Clearing House Association (NACHA) rules. For more information on this, see the NCLC *Consumer Banking and Payments Law* (2d ed. 2002 and Supp.).

Telephone Company Violations

For violations of certain provisions by interstate phone companies of the Federal Communications Act (FCA) and Federal Communication Commission (FCC) tariffs (rules and regulations), a consumer can seek a private lawsuit for negligence and breach of telephone contract. This includes a phone company's failure to properly address a complaint made to a telephone company by a consumer against a debt collector. Complaints made to the FCC can be made using its Web site: www.fcc.gov.

In-state breaches are more complicated, depending on state law. Contact the FCC or state Public Utilities Commission (PUC) to find out the enforcer in your state.

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1. NCLC *Fair Debt Collection* § 4.1 (5th ed. 2004 and 2005 Supp.)
2. *Romea v. Heiberger & Associates*, 163 F.3d 111 (2d Cir. 1998); *Wenrich v. Robert E. Cole, P.C.*, 2000 U.S. Dist. LEXIS 18687 (E.D. Pa. Dec. 22, 2000); *Travieso v. Gutman, Mintz, Baker, & Sonnefeldt, P.C.*, 1995 U.S. Dist. LEXIS (E.D.N.Y. 1995).
3. NCLC *Fair Debt Collection* § 1.5.2.1 (5th ed. 2004 and 2005 Supp.). See NCLC *Unfair and Deceptive Acts and Practices* §§

2.2.2, 2.2.5 (6th ed. 2004).

4. NCLC *Fair Debt Collection* § 4.1 (5th ed. 2004 and 2005 Supp.)

5. 15 U.S.C. § 1692a(5).

6. NCLC Fair *Debt Collection* § 4.4.2.2 (5th ed. 2004 and 2005 Supp.).

7. 15 U.S.C. § 1692a(6). Use of a false name would indicate that a third party collector is involved in the collection efforts, and, as such, the creditor would be subject to the FDCPA where he or she wouldn't have been otherwise. Even an in-house attorney (for the creditor) using his or her own name on stationery when communicating with a debtor would make the creditor subject to the FDCPA. See *Nielsen v. Dickerson*, 307 F.3d 623 (7th Cir. 2002); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232 (5th Cir. 1997). Also see NCLC *Fair Debt Collection* § 4.2.5 (5th ed. 2004 and 2005 Supp.).

8. See NCLC *Fair Debt Collection* § 5.3.5.3 (5th ed. 2004 and 2005 Supp.).

9. NCLC *Fair Debt Collection* § 5.3.5.3 (5th ed. 2004 and 2005 Supp.).

10. Numerous other types of deceptive statements are also violations of the FDCPA. For a complete list and hundreds of case citations, see NCLC *Fair Debt Collection* § 5.5.2.8 (5th ed. 2004 and 2005 Supp.).

11. 15 U.S.C. § 1692g(a).

12. *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985).

13. U.S.C. § 1692g and 1692e(10). *Graziano v. Harrison*, 950 F.2d 107, 111 (3rd Cir. 1991); *Johnson v. Revenue Management Corp.*, 169 F.3d 1057 (7th Cir. 1999). The 4th Circuit found likewise.

14. 15 U.S.C. § 1692g and 1692e(10). *Graziano v. Harrison*, 950 F.2d 107, 111 (3rd Cir. 1991). See also Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997).

15. 15 U.S.C. § 1692g; *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, L.L.C.*, 214 F.3d 872 (7th Cir. June 5, 2000); see also *Zaborac v. Phillips and Cohen Assocs., Ltd.*, 330 F. Supp. 2d 962 (N.D. Ill 2004) (section 1692g(a)(1) requires statement of the amount the consumer allegedly owes, not just the unpaid principal balance). See NCLC *Fair Debt Collection* § 5.7 (5th ed. 2004 and 2005 Supp.).

16. Numerous breaches of law can exist, including multiple violations of the FCRA and the FDCPA.

17. 15 U.S.C. § 1692f(2).

18. Reg. E, §§ 205.6(b), 205.11(c)(2), 206.11(c)(3)(ii)(B).