

Back to Basics, Continued—Debt Collection!.

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Successfully collecting consumer debt is often the difference between running a healthy finance company or installment seller, and just going out of business. It's pretty much that simple. When I started practicing law, collections were straightforward, involving dunning of various types by the creditor—letters, phone calls and field calling—or use of third party debt collectors to pursue debt or attorneys-at-law to file debt collection law suits. Alas, no longer.

The Fair Debt Collection Practices Act (FDCPA), a 1978 federal law codified at Title 15 U.S.C. Section 1692, was the initial federal effort to address unfair and abusive acts of debt collectors. By the terms of the FDCPA, it only had application to 3rd party debt collectors—those who are hired to collect debts that are owed to others. Installment lenders and credit sellers were not, and still to this day, are not subject to the FDCPA as they are collecting debt which is owed to them, not to 3rd parties.

So, original creditors extending consumer credit did not worry too much about the substantive or procedural aspects of the FDCPA, because with few exceptions they were not subject to the act. However, this turns out not to be the end of the story.

With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, all “Covered Persons” including creditors extending consumer credit, became subject to the requirement that they not engage in any unfair, deceptive or abusive acts or practices in connection with the consumer finance business. And, as it turns out, debt collection is an integral part of the business of consumer finance. As a consequence, even though original creditors are not subject to the FDCPA, there are several sections of that law that define conduct as unfair, deceptive and abusive acts and practices. So, we should pay attention to the FDCPA to understand what types of conduct under the Dodd-Frank Act are potentially unfair, deceptive or abusive, and subject to attack by regulators, attorneys general and the CFPB.

In looking over the FDCPA, there are three sections that are particularly instructive—Section 806 Harassment or abuse, Section 807 False or misleading representations and Section 808 Unfair practices. These sections list the following conduct to be avoided in debt collection:

- Use or threat of physical violence
- Use of obscene or profane language
- Publication of “shame lists”
- Advertisement for sale of a debt to coerce payment
- Any false representation
 - o that the collector is affiliated with government
 - o that the collector is an attorney
 - o that nonpayment will result in arrest or imprisonment
 - o that the consumer has committed any crime by not paying the debt
 - o that the account has been turned over to a debt buyer
 - o that documents are legal process
 - o of the name of the party attempting to collect the debt

- Claiming that the collector will take an action that cannot legally be taken or that the collector will not take
- Claiming amounts due that are not
- Taking a post-dated check and then depositing the same before the agreed date

These are the examples of actions that the FDCPA has prohibited 3rd party debt collectors from using. Consequently, these are the types of conduct that I consider off-limits because Congress has already deemed them to be unfair, deceptive or abusive.

And one more cautionary word: There is a rulemaking that the Bureau was pursuing in the area of debt collection. It has been almost two years since the CFPB first released its Proposals Under Consideration and Alternatives Considered for Debt Collector and Debt Buyer Rulemaking. That proposal:

- addresses the substantiation of claims of indebtedness, the review and transfer of certain information between debt owner and debt collector, and another validation notice and statement of rights,
- includes a litigation disclosure, and a substantive prohibition against collecting time-barred and obsolete debt, and
- regulates collector communication practices, including the general time, place and manner of communication.

The Bureau could take this proposal out of the deep freeze, but so far has offered no indication when this may occur. So, with this said, I offer the following:

Practice Pointer #1: Read and Heed the types of practices and conduct that would result in a violation of the FDCPA if you were a 3rd party debt collector, and instruct your collectors to refrain from such practices.

Practice Pointer #2: Carefully consider how you compensate those employees engaged in debt collection, to make certain that you do not unintentionally encourage bad behaviors.

Practice Pointer #3: Stay tuned to future CFPB pronouncements about debt collection!

Please note: This is the seventh blog in a series of “Back-to-Basics” blogs, in which relevant and resourceful information can be easily accessed by clicking [HERE](#).