

Consumer Protection: The Fair Debt Collection Practices Act

By Hillary R. Ross, Esq.



The FDCPA—Overview

- 15 U.S.C. § 1692 et seq.
- Prohibits false, deceptive, misleading, harassing, abusive and offensive conduct during collection of consumer debts.

Definitions

- “Consumer”: any natural person obligated or allegedly obligated to pay a debt. 15 U.S.C. § 1692a(3).
- “Debt”: any obligation or alleged obligation of a consumer to pay money for goods or services that are primarily for personal, family or household purposes. 15 U.S.C. § 1692a(5).
- “Debt Collectors”: any person who uses any instrumentality of interstate commerce (phone, mail, email) in any business, the principal purpose of which is collection of the debts of another. 15 U.S.C. § 1692a(6).

Definitions

- The FDCPA DOES NOT apply to:
 - “Creditors”: any person or entity that extends credit, creating a debt, to whom the debt is owed. 15 U.S.C. § 1692a(4). Examples: Chase Bank, MBNA Bank, HSBC.
 - Any officer or employee of a creditor.
 - Any officer or employee of the United States or any State.
 - Companies with common ownership with a creditor.
 - Anyone attempting to serve legal process.
- “Communication”: conveying of information regarding a debt directly or indirectly to any person through any medium. 15 U.S.C. § 1692a(2).

Communications

- 15 U.S.C. § 1692b: Communications with Third Parties
- 15 U.S.C. § 1692c: Communications with Consumers

Communications with Third Parties

- In communicating with third parties, Debt Collectors:
 - Must identify the caller and, if requested, his or her employer
 - Must state that they are seeking or confirming location information about the consumer
 - Must NOT discuss the Consumer's debt or disclose that the Consumer has a debt
 - Generally, Debt Collectors may NOT contact a third party more than once

Communications with Consumers

- Debt Collectors may NOT:
 - Call before 8:00 am or after 9:00 pm. 15 U.S.C. § 1692c(a)(1).
 - Contact Consumer if known to be represented by an attorney. 15 U.S.C. § 1692c(a)(2).
 - Contact Consumer's place of work if consumer notified Debt Collector not to call there. **Oral notice is sufficient.** 15 U.S.C. § 1692c(a)(3).
 - Contact Consumer if consumer advises Debt Collector in writing to cease communications OR that Consumer refuses to pay. 15 U.S.C. § 1692c(c).

Abuse and Harassment

- The FDCPA provides a general prohibition against harassing, abusive and/or oppressive conduct. 15 U.S.C. § 1692d.

Abuse and Harassment

- A Debt Collector may NOT:
 - Threaten violence or use of criminal activity towards consumer or property. 15 U.S.C § 1692d(1).
 - Use obscene or profane language. 15 U.S.C. § 1692d(2).
 - Publish lists of debtors or advertise debts, including blacklisting. 15 U.S.C. § 1692d(3).
 - Cause phone to ring repeatedly for purposes of harassing or annoying. 15 U.S.C. § 1692d(4).
 - Place calls to consumer without meaningful disclosure of identity. 15 U.S.C. § 1692d(6).

False, Deceptive or Misleading Tactics

- The FDCPA provides a general prohibition against use of false, deceptive or misleading collection tactics. 15 U.S.C. § 1692e.
- A Debt Collector's actions are to be interpreted from the perspective of the "**least sophisticated consumer.**"

False, Deceptive or Misleading Tactics

- Debt Collectors may NOT:
 - Make any false, deceptive or misleading statements. 15 U.S.C. § 1692e(10).
 - Falsely represent character, amount or legal status of debt. 15 U.S.C. § 1692e(2)(A).
 - Falsely represent themselves as an attorney. 15 U.S.C. § 1692e(3).
 - State or imply that non-payment will result in arrest or criminal prosecution. 15 U.S.C. § 1692e(4).
 - Threaten suit, garnishment or seizure of property without intent *and* legal ability to do the same. 15 U.S.C. § 1692e(5).
 - Report or threaten to report false credit information. 15 U.S.C. § 1692e(8).

Unfair or Unconscionable Tactics

- The FDCPA provides general prohibition against the use of any unfair or unconscionable means to collect a debt. 15 U.S.C. § 1692f.

Unfair or Unconscionable Tactics

- Debt Collectors May NOT:
 - Attempt to collect any amount not authorized by the agreement creating the debt or permitted by law. 15 U.S.C. § 1692f(1).
 - Accept or solicit postdated check without providing written notice of at least 3 days that intends to deposit. 15 U.S.C. § 1692f(2).
 - Accept or solicit postdated check for purpose of threatening criminal prosecution. 15 U.S.C. § 1692f(3).

Notice Requirements

- 15 U.S.C. § 1692e(11)—the “Mini-Miranda”
- 15 U.S.C. § 1692g—Validation of Debts Disclosure

The “Mini-Miranda”

- Initial communication: “This communication is from a debt collector in an attempt to collect a debt. Any information obtained will be used for that purpose.” 15 U.S.C. § 1692e(11).
- Each subsequent communication: “This communication is from a debt collector,” or “this is an attempt to collect a debt.” 15 U.S.C. § 1692e(11).
- Applies to **ALL** communications with Consumers, written or oral.

Validation of Debts Disclosure

- Within five days after the initial communication with a Consumer, a Debt Collector must send the consumer a written notice stating:
 - Amount of the debt. 15 U.S.C. § 1692g(a)(1);
 - Name of the creditor owed. 15 U.S.C. § 1692g(a)(2);
 - Right to dispute validity within 30 days. 15 U.S.C. § 1692g(a)(3);
 - If disputed in writing by consumer within 30 days, collector will provide verification of the debt. 15 U.S.C. § 1692g(a)(4); and
 - If requested in writing, the Debt Collector will provide the name and address of the original creditor, 15 U.S.C. § 1692g(a)(5).

Validation of Debts Disclosure

- Debt Collectors may NOT require all disputes to be in writing.
- If a Consumer properly disputes a debt, a Debt Collector must cease collection until it obtains verification of the debt and the information is mailed to the Consumer. 15 U.S.C. § 1692g(b).
- Other communications during this 30 day dispute period may not “overshadow” the consumer's right to dispute the debt. 15 U.S.C. § 1692g(b).
- Se habla Español?

Enforcement

- Strict liability statute. 15 U.S.C. § 1692k.
- FDCPA claims have a one year statute of limitations. 15 U.S.C. § 1692k(d).
- Claims can be brought in state or federal court. 15 U.S.C. § 1692k(d).

Damages

- Actual damages, 15 U.S.C. § 1692k(a)(1), including emotional distress.
- Statutory damages of up to \$1000. 15 U.S.C. § 1692k(a)(2)(A).
- Costs and attorney fees, 15 U.S.C. § 1692k(a)(3).
- Class actions: A class of consumers is entitled to the lesser of \$500,000 or 1% of the net worth of the collector (15 U.S.C. § 1692k(a)(2)(B)), as well as costs and fees. 15 U.S.C. § 1692k(a)(3).
- **CAUTION:** Courts may award fees to a prevailing defendant if the action was “brought in bad faith and for the purpose of harassment.” 15 U.S.C. § 1692k(a)(3).

Defenses

- Bone fide error, 15 U.S.C. § 1692k(c):
 - Violation was NOT intentional, AND
 - Resulted from bona fide error, AND
 - Debt Collector employs reasonable procedures to prevent such violations.
 - Burden of proof is on the Debt Collector.
 - Generally only applies to clerical or factual errors.

Other Statutes

- Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681 *et seq.*
 - Provides rules about who can access a consumer’s credit report, what can be reported and for how long, and what Credit Reporting Agencies (Experian, TransUnion, Equifax) and creditors (including debt collectors) must do if a consumer disputes information.
- Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227
 - Restricts the use of automated telephone equipment.

FCRA

- Disputed Information:
 - Within 20 days after receipt of dispute notice from a consumer, Credit Reporting Agencies have the duty to “conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate” 15 U.S.C. § 1681i(a).
 - A furnisher's of information (i.e. a creditor or a Debt Collector) must also “conduct an investigation with respect to the disputed information,” after receiving notice of a dispute from a Consumer Reporting Agency or it may also be held liable. 15 U.S.C. § 1681s-2(b)(1).

FCRA

- Damages
 - Willful violation (15 U.S.C. § 1681n)—“knew or should have known” standard:
 - Actual damages
 - Statutory damages damages between \$100 and \$1,000
 - Punitive damages
 - Attorneys fees and costs.
 - Negligent Violation (15 U.S.C. § 1681o):
 - Actual damages
 - Attorneys fees and costs
- **CAUTION:** Courts may award defendant’s attorney fees for actions brought in “bad faith or for purposes of harassment.”

FCRA

- Statute of limitations: “within 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability,” or within “5 years after the date on which the violation that is the basis for such liability occurs.” 15 U.S.C. § 1681p.

TCPA

- Prohibits calls by “any person” (other than for emergency purposes or with the prior express consent of the called party)
 - using “any automatic telephone dialing system or an artificial or prerecorded voice”
 - to “any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.” 47 U.S.C. § 227(b)(1)(A)(iii).

TCPA

- Damages
 - Negligent violation:
 - Actual damages. 47 U.S.C. § 227(b)(3)(B).
 - Statutory damages of up to \$500.00 **per violation**. 47 U.S.C. § 227(b)(3)(B).
 - Willful violation
 - Actual damages. 47 U.S.C. § 227(b)(3)(B).
 - Statutory damages of up to **\$1,500.00 per violation**. 47 U.S.C. § 227(b)(3)(C).
 - Four year statute of limitations applies. 28 U.S.C. § 1658(a).



Hillary R. Ross, Esq.
The Bourassa Law Group, LLC
3773 Cherry Creek Drive North, Suite 575
Denver, CO 80209