

# **The Fair Debt Collection Practices Act**

15 U.S.C. § 1692 et seq.

## **I. Overview**

- A. Enacted in 1978 to prevent personal bankruptcy, marital instability, loss of employment and invasion of personal privacy.
- B. Prohibits false, deceptive, misleading, harassing, abusive and offensive conduct during collection of consumer debts.

## **II. Definitions**

- A. “Consumer”: any natural person obligated or allegedly obligated to pay a debt. 15 U.S.C. § 1692a(3).
- B. “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).
  - a. DOES NOT COVER taxes, criminal restitution. Obligation must result from a consumer transaction.
  - b. DOES NOT COVER businesses or individuals alleged to owe debts incurred in the operation of a business.
- C. “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).
  - a. APPLIES TO:
    - i. Attorneys who regularly collect debts. Heintz v. Jenkins, 514 U.S. 291, 115 S.Ct. 1489 (1995).
    - ii. Creditors who hold themselves out to be debt collectors.
  - b. DOES NOT APPLY TO:
    - i. “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.
    - ii. Any officer or employee of the creditor.
    - iii. Any officer or employee of the United States or any State.

iv. Companies with common ownership with a creditor.

v. Anyone attempting to serve legal process.

D. "Communication": conveying of information regarding a debt directly or indirectly to any person through any medium. 15 U.S.C. § 1692a(2).

### III. Requirements and Prohibitions (this is not a complete list)

#### A. Restricted Communications

- a. Cannot discuss the debt with a 3<sup>rd</sup> party. 15 U.S.C § 1692b(2).
- b. Can only contact a 3<sup>rd</sup> party one time for the purpose of obtaining location information. 15 U.S.C. § 1692b(3)
- c. Can't call before 8am or after 9pm. 15 U.S.C. § 1692c(a)(1).
- d. Cannot contact consumer if known to be represented by an attorney. 15 U.S.C. § 1692c(a)(2)
- e. Cannot contact consumer's place of work if consumer notified debt collector not to call work. **Oral notice is sufficient.** 15 U.S.C. § 1692c(a)(3).
- f. Cannot contact consumer if consumer advises debt collector in writing to cease communications OR that consumer refuses to pay. 15 U.S.C. § 1692c.

#### B. Abuse/Harassment

- a. Act provides a general prohibition against harassing, abusive and/or oppressive conduct. 15 U.S.C. § 1692d.
- b. Collector can't threaten violence or use of criminal activity towards consumer or property. 15 U.S.C § 1692d(1).
- c. Collector can't use obscene or profane language. 15 U.S.C. § 1692d(2).
- d. Collector can't publish lists of debtors or advertise debts, including blacklisting. 15 U.S.C. § 1692d(3).
- e. Collector can't cause phone to ring repeatedly for purposes of harassing or annoying. 15 U.S.C. § 1692d(4).

- f. Collector can't place calls to consumer without meaningful disclosure of identity. 15 U.S.C. § 1692d(6).

C. False, Deceptive or Misleading

- a. FDCPA provides a general prohibition against use of false, deceptive or misleading collection tactics. A collector's actions are to be interpreted from the perspective of the "**least sophisticated consumer.**" Martsof v. JBC Legal Group, P.C., 2008 U.S. Dist. LEXIS 6876 (M.D. Pa. Jan. 30, 2008); Nelson v. Select Fin. Servs., 430 F. Supp. 2d 455, 457 (E.D. Pa. 2006).
- b. Collector cannot make any false, deceptive or misleading statements. 15 U.S.C. § 1692e, e(10).**
- c. Collector cannot falsely represent character, amount or legal status of debt. 15 U.S.C. § 1692e(2)(A).
- d. Collector cannot falsely represent himself/herself as an attorney. 15 U.S.C. § 1692e(3).
- e. Collector cannot state or imply that non-payment will result in arrest or criminal prosecution. 15 U.S.C. § 1692e(4).**
- f. Collector cannot threaten suit, garnishment or seizure of property without legal ability to do the same. 15 U.S.C. § 1692e(5). Ex: Threatening suit to collect a time-barred debt. Martsof v. JBC Legal Group, P.C., 2008 U.S. Dist. LEXIS 6876 (M.D. Pa. Jan. 30, 2008).
- g. Collector cannot report or threaten to report false credit information (like fraud). 15 U.S.C. § 1692e(8). (ties to FCRA)

D. Unfair or Unconscionable

- a. Act provides general prohibition against the use of any unfair or unconscionable means to collect a debt. 15 U.S.C. § 1692f.
- b. Collector cannot attempt to collect any amount not authorized by the agreement creating the debt or permitted by law. (This usually comes up if collector takes more than authorized by electronic funds transfer.) 15 U.S.C. § 1692f(1).
- c. Collector cannot accept or solicit postdated check without providing written notice of at least 3 days that intends to deposit. 15 U.S.C. § 1692f(2).

- d. Collector cannot accept or solicit postdated check for purpose of threatening criminal prosecution. 15 U.S.C. § 1692f(3).

#### E. Notice Requirements

- a. Notices sent pursuant to Section 1692g are to be interpreted from the perspective of the "**least sophisticated consumer.**" Martsoff v. JBC Legal Group, P.C., 2008 U.S. Dist. LEXIS 6876 (M.D. Pa. Jan. 30, 2008); Nelson v. Select Fin. Servs., 430 F. Supp. 2d 455, 457 (E.D. Pa. 2006)
- b. Collector shall provide the following notices:
  - i. Initial communication (oral or written): "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).
  - ii. Each subsequent communication: "This communication is from a debt collector," or "this is an attempt to collect a debt." 15 U.S.C. § 1692a(11).
  - iii. Within 5 days of initial communication (oral or written), in writing:
    1. Amount of the debt, 15 U.S.C. § 1692g(a)(1);
    2. Name of the creditor owed 15 U.S.C. § 1692g(a)(2);
    3. Right to dispute validity within 30 days, 15 U.S.C. § 1692g(a)(3); and
    4. Name and address of the original creditor, 15 U.S.C. § 1692g(a)(5).
    5. If disputed by consumer within 30 days, collector will provide verification of the debt, 15 U.S.C. § 1692g(a)(4).

#### IV. Enforcement

- A. FDCPA is a strict liability statute. 15 U.S.C. § 1692k; Foti v. NCO Fin. Sys., 424 F. Supp. 2d 643 (S.D.N.Y. 2006).
- B. FDCPA claims have a one year statute of limitations. 15 U.S.C. § 1692k(d).

- C. Claims can be brought in state or federal court. 15 U.S.C. § 1692k(d); Itri v. Equibank, N.A., 318 Pa. Super. 268, 282 (Pa. Super. Ct. 1983).
- D. Upon successful litigation of an individual suit, plaintiff/consumer is entitled to:
- a. Any actual damages, 15 U.S.C. § 1692k(a)(1), including emotional distress, McNally v. Client Services, 2008 U.S. Dist. LEXIS 66845 (W.D. Pa. 2008); and
  - b. Statutory damages of up to \$1000, 15 U.S.C. § 1692k(a)(2)(A); and
  - c. Costs expended in litigation, 15 U.S.C. § 1692k(a)(3); and
  - d. Reasonable attorney's fees, 15 U.S.C. § 1692k(a)(3).  
Examples:
    - **\$24,693.80** in Nelson v. Select Financial Serv., Inc., 2006 U.S. Dist. LEXIS 42637 (E.D.Pa. 2006)(collector used the phrase "verifies the validity of this debt" in a letter to debtor);
    - \$9195.83 in Rivera v. Corporate Receivables, Inc., 540 F. Supp. 2d 329 (D. Conn. 2008).
    - \$5713 in Holliday v. Cabrera & Assocs., P.C., 2007 U.S. Dist. LEXIS 161 (E.D. Pa. Jan. 3, 2007)
- E. Upon successful litigation of a class action, the class of consumer is entitled to:
- a. The lesser of \$500,000 or 1% of the net worth of the collector. 15 U.S.C. § 1692k(a)(2)(B); and
  - b. Costs expended in litigation, 15 U.S.C. § 1692k(a)(3); and
  - c. Reasonable attorney's fees, 15 U.S.C. § 1692k(a)(3).
- F. Defenses
- a. Factual dispute
  - b. Bone fide error:
    - i. Violation was NOT intentional, AND
    - ii. Resulted from bona fide error, AND
    - iii. Collector employs reasonable procedures to prevent such violations.  
Piper v. Portnoff Law Associates, 274 F.Supp.2d 681 (E.D.Pa. 2003).

- iv. Burden of proof is on the collector.
- v. Generally only applies to clerical or factual errors. Picht v. Jon R. Hawks, Ltd., 236 F.3d 446, 451-52 (8<sup>th</sup> Cir. 2001); Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22, 27 (2<sup>nd</sup> Cir. 1989); Baker v. GC Servs. Corp., 677 F.2d 775, 779 (9<sup>th</sup> Cir. 1982).
- vi. Intentionally excluding required language is not a bona fide error. Nielsen v. Dickerson, 307 F.3d 623, 640 (7<sup>th</sup> Cir. 2002).

## V. Recent Amendments to FDCPA and Recent Caselaw

### A. Amendments

- a. FDCPA-compliant collection activities may be undertaken by debt collectors during the 30-day validation period absent a consumers request for validation. 15 U.S.C. § 1692g(b).
- b. Any collection activities conducted within 30-day validation period must not overshadow consumer's validation rights. 15 U.S.C. § 1692g(b).
- c. Formal pleading in a civil action does not constitute the initial communication. 15 U.S.C. § 1692g(c).
- d. Notices not related to collection of debt, such as IRS forms, Gramm-Leach-Bliley Act or other forms required by state or federal law do not require 1682e(11) notice. 15 U.S.C. § 1692g(e).
- e. Exceptions were added for private entities employed by the government to collect fees, fines and restitution for bad checks. 15 U.S.C. § 1692p.

### B. Recent Case Law

Note: Since this is a federal statute, there are hundreds of cases interpreting the provisions outlined here, and we have not attempted to summarize them, but we are providing a few recent cases of interest.

- a. No "bona fide error" defense for mistakes of law. Letter can't say "you must dispute in writing." Jermyn v. Carlisle, McNellie, et al. - US Supreme Court - April 21, 2010, (<http://www.supremecourt.gov/opinions/09pdf/08-1200.pdf>)
- b. Threatening or bringing suit on time-barred debt violates the FDCPA. Martsolf v. JBC Legal Group, P.C., 2008 U.S. Dist. LEXIS 6876 (M.D. Pa. Jan. 30, 2008); Richburg v. Palisades Collection LLC, 247 F.R.D. 457 (E.D. Pa. 2008).

- c. Vicarious liability: The client of an attorney who is a "debt collector," as defined in § 1692a(6), is vicariously liable for the attorney's misconduct if the client is itself a debt collector. Duraney v. Wash. Mut. Bank F.A., 2008 U.S. Dist. LEXIS 72087 (W.D. Pa. Sept. 11, 2008).
- d. A debtor's failure to request validation does not waive any right the debtor might have to deny validity at a later date, and telling a debtor that failing to respond will verify the validity of the debt violates FDCPA. Nelson v. Select Financial Serv., Inc., 2006 U.S. Dist. LEXIS 42637 (E.D. Pa. 2006); Gigli v. Palisades Collection, L.L.C., 2008 U.S. Dist. LEXIS 62684 (M.D. Pa. Aug. 14, 2008).
- e. A debt collection letter can be deceptive under the FDCPA even if it only implies that it is from an attorney. Using the phrase "Legal Department" could imply to the least sophisticated debtor that a lawyer was involved in drafting or sending the letter. Rosenau v. Unifund Corp., 539 F.3d 218 (3d Cir. Pa. 2008)
- f. The FDCPA does apply to litigation activities, including formal pleadings by attorneys. Phath v. J. Scott Watson, P.C., 2008 U.S. Dist. LEXIS 17563 (E.D. Pa. Mar. 7, 2008). See exception for 1692g notices.
- g. A writing is deceptive where it can reasonably be read to have two or more different meanings, one of which is inaccurate. A letter was misleading because it gave the impression that the debt was being pursued by "high-ranking officer of the company," when in fact it was not, thereby creating a false impression as to source, authorization or approval. Campuzano-Burgos v. Midland Credit Mgmt., 497 F. Supp. 2d 660 (E.D. Pa. 2007).
- h. "Mini-Miranda" (1692e(11) notice) is required when debt collector leaves pre-recorded message for debtor. Foti v. NCO Financial Systems, Inc., 424 F.Supp.2d 643 (S.D.N.Y. 2006).

#### VI. Other statutes that may apply:

Telephone Consumer Protection Act of 1991 (47 U.S.C. § 227)

Fair Credit Extension Uniformity Act (73 P.S. § 2270.1 et seq.)

Unfair Trade Practices and Consumer Protection Law (73 P.S. § 201-1 et seq.)