

Attorney's guide to the federal Fair Debt Collection Practices Act

By **Richard A. Klass, Esq.**

The Fair Debt Collection Practices Act, as codified in 15 USC §1692, is a federal statute which governs the practices of “debt collectors.” Attorneys engaged in the general practice of law, and debt collection in particular should be mindful of the rules of this federal law.

As stated in §1692, Congress found that there had been widespread abuses on the part of debt collectors, and saw the need for federal legislation to fill the gaps in enforcement that various state laws could not fill. The purpose was to protect consumers from abusive tactics and practices which were rife within the collection industry.

1. General definitions:

There are a couple of important terms under the statute which must be analyzed to determine whether the actions to be taken by a person are covered by the statute.

A. What types of debts are covered under the statute.

The term “debt” means any obligation of a consumer arising from a transaction whose primary subject is for personal, family, or household purposes. §1692a(5). Consumer debts have been defined to, inter alia, include:

- i) dishonored check written in payment for consumer goods. *Snow v. Jesse L. Riddle, PC*, 143 F.3d 1350 (10th Cir. 1998);
- ii) automobile liability insurance premiums. *Kahn v. Rowley*, 968 F. Supp. 1095 (M.D.La. 1997); and
- iii) assessment owed to a condominium association. *Ladick v. Van Gemert*, 146 F.3d 1205 (10th Cir. 1998). cert. denied, 119 S.Ct. 511.

Some debts have been found to be outside the realm of consumer debts, including:

- i) claims for theft. *Coretti v. Lefkowitz*, 965 F. Supp. 3 (D. Conn. 1997);
- ii) property taxes. *Beggs v. Rossi*, 145 F.3d 511 (2nd Cir. 1998);
- iii) leases for business equipment of family-owned business. *Garza v. Bancorp Group*, 955 F. Supp. 68 (S.D.Tex. 1996); and
- iv) child support obligations. *Mabe v. G.C. Services*, 32 F.3d 86 (4th Cir. 1994).

B. Who is defined as a “debt collector”?

The term “debt collector is defined as being a person whose principal business is the collection of debt, or who regularly collects debts on behalf of another. §1692a(6). Such term does not include the creditor to which the debt is owed, or its employees; process servers; or enforcement officers of the United States or of a State (such as a Sheriff or Marshal). The term “debt collector” also includes attorneys regularly engaged in debt collection. *Heintz v. Jenkins*, 115 S.Ct. 1489 (1995). However, the term has been found not to include:

- i) mortgage company. *Oldroyd v. Associates Consumer Discount Company*, 863 F. Supp. 237 (E.D., PA. 1994);
- ii) student loan servicing company prior to borrower's default. *Fischer v. UNIPAC Service*, 519 N.W.2d 793 (Iowa 1994);
- iii) bank which issued credit card. *Meads v. Citicorp Credit Services*, 686 F. Supp. 330 (S.D., GA. 1988); and
- iv) repossessioners. *Seibel v. Society Lease*, 969 F. Supp. 713 (M.D. Fla. 1997).

2. Communication with parties concerning a debt.

Concerning the collection of a consumer debt by a debt collector, the debt collector must follow certain rules in communicating with the debtor or other parties.

A. How may a “debt collector” communicate with the debtor?

The debt collector must ensure that the following practices are taken:

- i) Not contact the debtor at unusual times or places. Before 8 a.m. and after 9 p.m. are presumed to be unusual times. §1692c(a)(1);
- ii) Communicate through the debtor's attorney, if the debt collector has been informed or is aware that the debtor is being represented by an attorney.

§1692c(a)(2); *Graziano v. Harrison*, 950 F.2d 109 (3d Cir. 1991) (no violation occurred where collection agency was not aware that the debtor retained counsel with respect to the particular debt);

- iii) If the debt collector knows that an employer prohibits communications concerning debts, not contact the debtor during his/her employment.
§1692c(a)(3); *Austin v. Great Lakes Collection Bureau*, 834 F.Supp. 557 (D. Conn. 1993) (collection agency's disregard of debtor's request not to contact her at her office was a direct violation of the statute);
- iv) Cease communication with a debtor who has informed the debt collector in writing that he/she refuses to pay the debt or wishes the debt collector to cease further communications. However, the debt collector may inform the debtor that specific legal remedies will be taken. §1692c(c);
- v) Send the debtor a written notice, known as a "validation" notice or "initial demand letter," within 5 days of initial communication with a debtor concerning the collection of a consumer debt, advising: (a) the amount of the debt owed; (b) the name of the creditor to whom it is owed; (c) that the debtor has thirty days to dispute the validity of the debt; (d) that the creditor will obtain verification of the debt, if the debtor makes a dispute in writing within such 30-day period; and (e) the name of the original creditor, if the debt has been assigned to another. §1692g(a). This obligation of written notice has often been referred to in the collections industry as the "mini-Miranda" rule. The standard to be applied towards correspondence with the debtor is the "least sophisticated consumer" standard. *Russell v. Equifax*, 74 F.3d 30 (2d Cir. 1996) (Using an objective method, the court measures how the most unsophisticated consumer would interpret a notice received from a debt collector).

B. How can other parties be contacted regarding a debtor?

There are severe restrictions to contacting other parties regarding collection of a consumer debt by a debt collector. As set forth in §1692c(b), other than for the purpose of obtaining information concerning the debtor's location, a debt collector may not contact someone other than:

- a) debtor's attorney;
- b) creditor or debt collector's attorney;
- c) consumer reporting agency, such as Equifax, Experian, or Trans Union;
- d) court-authorized entities;
- e) such persons, as reasonably necessary, to effectuate a post-judgment remedy; or
- f) those persons with whom the debtor has given his/her express permission to communicate.

In obtaining location information under §1692b, a debt collector must:

- a) identify him/herself and state he/she is confirming location information;
- b) not state that a debt is owed;
- c) not communicate with someone more than once unless requested to or where the debt collector believes the information may have been erroneous;
- d) not communicate by post card;
- e) make sure that return addresses on envelopes do not identify that the communication is from a debt collector; and
- f) communicate only with an attorney identified as representing the debtor, unless the attorney fails to communicate with the debt collector beyond a reasonable period of time.

C. Prohibited acts of debt collectors.

In addition to the prescriptions and proscriptions mentioned above, specific more-abusive practices are prohibited by several provisions of the FDCPA.

- a) Harassment (§1692d):
A debt collector may not harass or abuse any person to collect a debt, including:
 - (i) threatening violence against the person or property of the person;
 - (ii) using obscene or profane language;
 - (iii) publishing a list of "deadbeats";
 - (iv) advertising for sale the debt for the purpose of coercing payment;
 - (v) repeatedly or continuously telephoning someone; *Bingham v. Collection Bureau*, 505 F. Supp. 864 (DCND 1981) (collector's immediately recalling debtor after the debtor hung up constituted harassment); or
 - (vi) telephoning someone without identifying himself. *Kleczy v. First Federal Credit Control*, 486 N.E.2d 204 (Ohio App. 1984) (debt collector who used an alias, but accurately identified her employer and the nature of the call did not violate the act).

b) False or misleading representations (§1692e):

A debt collector may not make any false or deceptive representations, including any representations:

- (i) that the debt is associated with the United States or a State, including displaying a badge or uniform; *Johnson v. State-wide Collections*, 778 P.2d 93 (Wyo. 1989) (actual name of collection agency may have been interpreted by the least sophisticated consumer as a governmental agency);
- (ii) regarding the nature or legal status of the debt; *Simmons v. Miller*, 970 F. Supp. 661 (SD Ind. 1997) (attorney did not violate the act where he brought action upon a time-barred claim, as he believed that a longer statute of limitations period applied to the debt);
- (iii) that the person is an attorney (when such debt collector is not an attorney); *Russey v. Rankin*, 911 F. Supp. 1449 (DNM 1995) (collection agency sent a letter purporting to be from an attorney, but the attorney never reviewed the letter but merely had his name affixed to form correspondence);
- (iv) that nonpayment may result in arrest or seizure of any property, unless such action is lawful and the collector intends to do the same;
- (v) threatening to take any actions that cannot legally be taken; *In re Belile*, 209 B.R. 658 (Bkrpty. ED, PA . 1997) (threatening to take imminent action, where no one in the creditor's legal department was admitted to practice in the debtor's jurisdiction was a violation of the act);
- (vi) implying that transfer of the debt will cause the debtor to lose any claims or defenses to payment of the debt;
- (vii) informing the debtor that he committed a crime in order to disgrace him;
- (viii) communicating false credit information, including the omission of any dispute by the debtor;
- (ix) simulating documents intended to appear as court documents;
- (x) using deceptive means to obtain information about the debtor;
- (xi) failing to disclose to the debtor that the collector is attempting to collect a debt and that any information obtained may be used for such purpose (except such statement need not be made in formal court pleadings);
- (xii) stating that accounts have been turned over to innocent purchasers;
- (xiii) stating that documents are legal process which are not; *Marchant v. U.S. Collections West*, 12 F. Supp.2d 1001 (D. Ariz. 1998) (officer of collection agency engaged in unauthorized practice of law in Arizona, when she signed an application for a writ of garnishment);
- (xiv) using a business name other than the true name of the business;
- (xv) stating that documents are not legal process which are, or implying that no action is required relating to such legal process; or
- (xvi) stating that the collector works for a consumer reporting agency.

c) Unfair practices (§1692f):

A debt collector may not use unfair or unconscionable practices to collect a debt, including:

- (i) collection of any amount not authorized by the contract or law; *Patzka v. Viterbo College*, 917 F. Supp. 654 (WD Wis. 1996) (it is unconscionable for a debt collector to collect any amount in excess of those charges expressly authorized by the terms of the agreement);
- (ii) accepting post-dated checks unless collector notifies debtor of intent to deposit checks not more than 10 or less than 3 days before doing so;
- (iii) soliciting post-dated checks for the purpose of threatening a crime;
- (iv) depositing a check prior to the date thereon, or threatening to do so;
- (v) causing charges to be made to a person by concealment, including the placement of collect calls, etc.;
- (vi) taking or threatening to take non-judicial action to repossess property where there is no present right to do so, there is no intent to do so, or the property is exempt by law from such repossession;
- (vii) communicating with a debtor by postcard; or
- (viii) using language or symbols on an envelope other than the collector's address and business name, providing such name does not indicate that it is a collector; *Johnson v. NCB Collection Services*, 799 F. Supp. 1298 (D. Conn. 1992) (return address of "Revenue Department" did not necessarily indicate that the entity was a debt collector, as it could have been a direct bill from a creditor).

d) Legal actions to be brought in proper venue (§1692i):

Legal actions taken must be brought in the proper venue, which is either the venue in which the debtor entered into the contract or where the debtor resides at the time of commencement of the action. Actions to enforce debts against real property must be brought in the venue in which the real property is located. *Martinez v. Albuquerque Collection Services*, 867 F. Supp. 1495 (DNM 1994) (collection agency could be held vicariously liable for actions taken by attorneys it employed to file an action, where the attorney erred in venue selection).

- e) **Multiple debts (§1692h):**
A debtor's payment to a collector for multiple debts shall not be applied to any debt which is disputed.
- f) **Furnishing deceptive forms (§1692j):**
A debt collector may not furnish forms which are intended to show that the collector is participating in the collection of the particular debt when he is not. This discourages "flat-rating" by collectors (transmission of dunning letters where the collector has no connection to the collection of the involved debt); *Randle v. GC Services*, 48 F. Supp.2d 835 (ND Ill. 1999) (agency created a false impression that another party other than the creditor was involved in the collection process, where it instructed the debtors to mail payments to the creditor, creditor referred fewer than 20% of the debtors for collection, and agency was paid a flat fee for each letter as opposed to a fee relating to collection of the debt).

3. Penalties for non-compliance.

There are several manners in which penalties can be imposed upon a violator of the regulations under the FDCPA.

A. Civil action by debtor.

The statute authorizes a private cause of action by a person, including the debtor or any other person affected by the provisions of the statute, to be brought against the collector within one year from the date of violation. Section 1692k provides that a debt collector may be liable to a person in an amount equal to:

- i) any actual damage sustained as a result of the violation; *Smith v. Law Offices of Mitchell Kay*, 124 B.R. 182 (D. Del. 1991) (actual damages for emotional distress under the FDCPA can be proved independently of state law requirements for a tort action);
- ii) statutory damages of up to \$1,000; *Wright v. Finance Service of Norwalk*, 22 F.3d 647 (6th Cir. 1994) (plaintiff is limited to additional damages of \$1,000 per proceeding, and not per violation);
- iii) in the case of a class action, statutory damages to each named plaintiff and amounts to other class members not exceeding \$500,000 or 1 percent of the collector's net worth; *Sanders v. Jackson*, 33 F. Supp. 693 (ND Ill. 1998) (net worth is interpreted as being the difference between assets and liabilities, and not the fair market value); and
- iv) the costs of the action, including reasonable attorney's fees; *Edwards v. National Business Factors*, 897 F. Supp. 458 (D. Nev. 1995) (court was to determine consumer's reasonable attorney's fees utilizing the lodestar method of calculating time by the usual and customary rate).

Section 1692k also authorizes a court to award a defendant attorney's fees where it is determined that the civil action by a party was brought in bad faith or solely for harassment. *Mendez v. Apple Bank for Savings*, 541 NYS2d 920 (Civ.Ct., NY, CO . 1989) (for a court to award a defendant attorney's fees, it is not enough for such party to have plaintiff's case dismissed; it must prove bad faith).

The court in a civil action may consider, inter alia, the frequency and persistence of non-compliance by the debt collector; whether the actions were intentional; or whether the actions were bona fide errors notwithstanding the maintenance of procedures to prevent such errors. 1692k(b) and (c). *Cavallaro v. Shapiro & Kreisman*, 933 F. Supp. 1148 (EDNY 1996) (a single violation is sufficient to establish liability).

B. Federal Trade Commission.

The FTC has enforcement power over the rules of the FDCPA, including the assurance of compliance and administrative enforcement. Other federal agencies, including the Comptroller of the Currency, Office of Thrift Supervision, Secretaries of Transportation and Agriculture, may take appropriate actions with respect to particular types of collectors. *Hicks v. Intercontinental Acceptance Corp.*, 154 F.R.D. 134 (EDNC 1994) (decisions of the FTC to investigate or prosecute alleged violations of the FDCPA are completely discretionary).

C. State enforcement.

The FDCPA is specifically not designed to annul or affect any laws of a particular state to regulate conduct of a person relating to debt collection practices, so long as those laws are not inconsistent with the Act. Section 1692n.

New York State allows the Attorney General or the District Attorney of a particular county to bring an action against a debt collector under General Business Law §600, et. seq., for violations of New York's debt collection practice statute codified therein. Unlike the FDCPA, the New York statute does not afford an individual a private cause of action. An individual may be entitled to assert a claim for deceptive practices under General Business Law §349.

© 2001. Richard A. Klass, Esq., Attorney-at-Law
16 Court Street, 35th Floor
Brooklyn, NY 11241
(718) COURT . ST