

FAIR DEBT COLLECTION PRACTICES ACT
15 U.S.C. § 1692 et.seq.

Lori E. Brown
lbrown@gallaghersharp.com

I. OVERVIEW OF THE FAIR DEBT COLLECTION PRACTICES ACT (“FDCPA”)

A. Purpose of the FDCPA

1. The FDCPA is a consumer protection statute that was enacted in 1977 to: (1) eliminate abusive debt collection practices by debt collectors; (2) to insure that debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged; and (3) to promote consistent State action to protect consumers against debt collection abuses. 15 U.S.C. §1692 (e).
2. The FDCPA is a strict liability statute.
3. The FDCPA is a complex and technical statute, with provisions often subject to different interpretations.
4. The FDCPA does not preempt state consumer protection/collection laws.

B. Enforcement of the FDCPA

1. The Federal Trade Commission (“FTC”) is charged with the enforcement of the Act. 15 U.S.C. §1692l
 - a. In 2009, the FTC received 88,190 FDCPA complaints about third-party debt collectors.
 - b. In 2009, the FTC received 524,509 complaints about all industries.¹
2. The majority of suits are brought by private individuals. Now we are seeing an increasing number of class actions, which has caused a chilling effect on creditors, collectors and attorneys.

¹ See Federal Trade Commission Annual Report 2010: Fair Debt Collection Practices Act.

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C. Prohibited Conduct Includes:

1. Improper or abusive communication. §1692(c).
2. Harassment or abuse. 15 U.S.C. §1692 (d).
3. False or misleading representations. 15 U.S.C. §1692 (e).
4. Unfair practices. 15 U.S.C. §1692 (f).
5. Furnishing deceptive forms. 15 U.S.C. §1692(j);

II. WHO AND WHAT THE FDCPA COVERS

A. The FDCPA Covers Debt Collectors, Who are Acting in the Collection of any Debt.

1. A “debt collector” is defined as “any person who uses any instrumentality of interstate commerce or the mails in any business the principle purpose of which is collection of any debts, or who regularly collects or attempt to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. § §1692a(6).
2. A “debt” is defined as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment.” 15 U.S.C. §1692 a(5).
 - a. The FDCPA does not apply to business debts, only consumer debts. Senate Report No. 95-382.
3. A “consumer” is defined as “any natural person obligated or allegedly obligated to pay any debt.” 15 U.S.C. §1692a (3).
4. A “creditor” is defined as “any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.” 15 U.S.C. §1692a(4).

B. Who are Debt Collectors for Purposes of the FDCPA? (This is not an exhaustive list):

1. Attorneys can be held as debt collectors under the FDCPA.

- a. Attorneys were originally excluded from the FDCPA's definition of "debt collectors." In 1986, the FDCPA was amended so that attorneys were no longer exempted. However, there was a question of whether an attorney's litigation activities in collecting a debt were covered.
 - b. In *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995), The United States Supreme Court held that the FDCPA's definition of debt collectors includes lawyers who regularly, through litigation, attempt to collect consumer debts.
2. Collection Agencies.
 3. Debt Buyers if the debt was in default at the time the debt was purchased.
 4. Creditors who attempt to collect their own debt using any other name.

C. Who, Generally, are Not Debt Collectors for Purposes of the Act?

1. Creditors that collect debts that are in their own name, i.e., first party debt collectors.
2. Debt Buyers if the debt was not in default at the time it obtained ownership of the debt.
3. Mortgage or other debt servicers are generally exempt under the Act.
4. Government officials if they are collecting a debt in the performance of an official duty.
5. Non-Profit credit counselors/credit repair organizations.
6. Secured lenders of creditors.
7. Entity whose primary purpose is the enforcement of security interest/repossession agencies.

D. The Definition of Debt Collectors and its Exclusions Has Caused Significant Litigation.

III. THE LEAST SOPHISTICATED CONSUMER STANDARD

- A. In determining whether any particular conduct violates the FDCPA, the courts have used an objective test based on the least sophisticated consumer. See, e.g. *Federal Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504 (6th Cir.2007).
- B. The basic purpose of the least sophisticated consumer standard is to protect all consumers—from the educated to the naïve. It does not require actual deception.
- C. The Sixth Circuit Court of Appeals in *Federal Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504 (6th Cir.2007) has noted that the “least sophisticated consumer standard” has led to a proliferation of litigation:

‘Ironically, it appears that it is often the extremely sophisticated consumer who takes advantage of the civil liability scheme defined by this statute, not the individual who has been threatened or misled. The cottage industry that has emerged does not bring suits to remedy the ‘widespread and serious national problem’ of abuse that the Senate observed in adopting the legislation, 1977 U.S.C.C.A.N. 1695, 1696, nor to ferret out collection abuse in the form of ‘obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer’s legal rights, disclosing a consumer’s personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.’ *Id.* Rather, the inescapable inference is that the judicially developed standards have enabled a class of professional plaintiffs ...’

Id. At 513-514, citing *Jacobson v. Healthcare Fin. Serv., Inc.*, 434 F.Supp.2d 133, 138 (E.D.N.Y. 2006)

IV. DAMAGES

The FDCPA subjects debt collectors to civil liability for engaging in debt collection practices prohibited by the Act. 15 U.S.C. §1692k.

- A. **A Successful Plaintiff is Entitled to Recover: (1) Actual Damages; (2) Statutory Damages; and (3) Attorney’s Fees and Costs**
 - 1. Statutory damages are limited to \$1,000.
 - 2. Actual and statutory damages generally do not constitute a significant portion of a possible damage award. However, actual damages may consist of out of pocket loss and emotional distress.

3. Attorneys fees may constitute the largest portion of a damages award.

B. The FDCPA Also Explicitly Permits Class Action Suits. 15 U.S.C. §1692k (a)(2)(B)

1. Class action recovery under the Act is up to “the lesser of \$500,000 or 1 per centum of the net worth of the defendant.”

2. This is added to the \$1,000 in statutory damages that is available for each named plaintiff.

C. A Successful Defendant May Recover Attorneys’ Fees, if She Can Prove Bad Faith or Harassment.

D. An Offer of Judgment Pursuant to Fed. R. Civ. R. 68 is one way to limit damages.

V. THE FDCPA PROVIDES DEBT COLLECTORS WITH TWO STATUTORY DEFENSES

A. The Bona Fide Error Defense

1. 15 U.S.C. §1692k (c) states “A debt collector may not be held liable in any action brought if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.”

a. The FDCPA is a strict liability statute, but provides a narrow exception, in the bona fide error defense.

b. It is an affirmative defense, whereby the defendant bears the burden of proof. It also requires that the defendant show that it maintains procedures to avoid such errors.

2. In *Jerman v. Carlisle, McNelis, Rini, Kramer & Ulrich LPA*, 130 S.Ct. 1605, 176 L.Ed. 2d 519, the United States Supreme Court held that the bona fide error defense did not apply to a violation resulting from a debt collector’s mistaken interpretation of the legal requirements of the Act. The Supreme Court held that it can only be used to shield lawyers (or other debt collectors) from liability for FDCPA violations arising from clerical or factual errors, not good faith errors in legal interpretation of the FDCPA’s requirements or mistakes in law.

- a. In holding that the bona fide error defense did not apply, the Supreme Court recognized “the common maxim” that ignorance of the law will not excuse any person, either civilly or criminally.
 - b. As stated by Justice Kennedy in his dissent “The practical consequences of this decision are that “as long as legal mistakes occur, plaintiffs and their attorneys will have an incentive to bring suits” based on [harmless] infractions. *Id.* at 1635, 176 L. Ed. 2d, at 551.
3. *McCullough v. Johnson, Rodenburg & Lauinger, LLC.*, Case No. 09-35767 (9th Cir. 2011).
 - a. The Ninth District Court of Appeals held that the law firm violated the FDCPA in relying on a client’s information in pursuing a time-barred action.
 - b. The law firm was not entitled to rely on the bona fide error defense because reliance on client’s statement was not a “procedure.”

B. Reliance on an FTC Formal Staff Opinion. 15 U.S.C. § 1692k(e)

1. Impractical
2. Infrequent

VI. CURRENT TRENDS AND IMPLICATIONS FOR ATTORNEYS

A. Constraints on Client Advocacy

B. Creates Conflicts between Attorneys and Clients

C. Rise of Class Action Lawsuits and Windfalls for Plaintiff’s Attorneys

1. Mortgage Industry
2. Credit Card Industry
3. Third Party Debt Buyers

D. Increase in Lawsuits When No Harm