Overview of the Fair Debt Collection Practices Act After the 1996 Revisions - Time for Another Change?

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I. Introduction

The Fair Debt Collection Practices Act (FDCPA or the Act) imposes a strict regimen of substantive, procedural, and disclosure requirements on debt collectors seeking to collect consumer debts. For more than a decade, since Congress removed a previous exemption for attorneys, collection attorneys and courts have grappled with difficult issues regarding application of the Act to attorneys and litigation-related collection activities.

Interested parties are guided primarily by the statute. The Federal Trade Commission (FTC) is charged with administrative enforcement, and has issued advisory opinions and a staff commentary. However, the courts have not accorded much deference to this commentary. As a result, the primary sources of law are the Act and judicial opinions interpreting it. The purpose of this article is to review the requirements of the Act (including the 1996 revisions) as an introduction to the subsequent articles in this Symposium.

II. The Scope of the Act

The Act applies to any "debt collector" seeking to collect a consumer debt. "Debt collector" is broadly defined to include any person who uses "any instrumentality" to regularly seek collection of consumer debts, "directly or indirectly." It does not apply to creditors (or their staff) seeking to collect their own debts, unless the creditor acquired the debt after default or uses a name suggesting that a third party is collecting the debt.

Since removal of the attorney exemption in 1986, attorneys "regularly" engaged in collection of consumer debts have been covered as debt collectors under the Act. Periodically a court will hold that an attorney who only rarely collects debts is not covered by the Act. However, collection attorneys should be very cautious about relying on this exception. The U.S. Supreme Court rejected the argument that litigation counsel who engage exclusively in trial practice are thereby excluded from the Act. Prudence suggests that any attorney handling a consumer debt collection matter assume that he or she is covered by the Act.

Some recent caselaw has tended to broaden the scope of the Act beyond previous expectations. For example, two recent U.S. Court of Appeals decisions held that collection of dishonored checks is debt collection covered by the Act, even
III. Required Disclosure

Notices—1996 Revisions

There are two primary, affirmative disclosure obligations for debt collectors under the Act. One, at 15 U.S.C. section 1690g, requires a specific disclosure of debt notice to be provided to the consumer within five days after the debt collector's initial communication with the consumer. The other, at 15 U.S.C. section 1692e(11), requires (after the 1996 statutory revision) that the initial written communication (and, in addition, if the initial communication is oral, that oral communication) regarding collection of a debt (except "formal pleadings") in a "legal action" contain the following warning: "the debtor is attempting to collect a debt and that any information obtained will be used for that purpose." All subsequent communications (except formal pleadings) must disclose only that the communication is from a debt collector. Although some...
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VIII. Other Limits on Communications with the Debtor

As noted supra at Part VI, communications with parties other than the debtor are strictly limited and are broadly prohibited outside the stated parameters. Communications with the debtor are also regulated. As noted above, they must be made upon request and if allowed are subject to specific disclosure requirements. In addition to these requirements, communications with the debtor must meet the requirements of 15 U.S.C. section 1692(a).

Section 1692(e)(2) prohibits communications with the debtor:

A. At any unusual time or place or one which should be known as inconvenient to the debtor (any time before 8:00 a.m. or after 9:00 p.m. local time at the debtor’s location is deemed inconvenient);

B. If the collector knows the consumer is represented by an attorney and can readily ascertain that attorney’s name and address (unless the attorney fails to respond within a reasonable period);

C. At the debtor’s place of employment if the collector has reason to know that such communications are prohibited by the employer.

The use of the terminology like “should be known,” “reason to know,” “readily ascertain,” and “reasonably period” in section 1692(e)(2) creates ambiguities that may complicate an attorney’s compliance efforts and create traps for even the most cautious attorney.

IX. Harassment or Abuse

Section 1692(d) of the Act broadly prohibits any conduct by the debt collector “the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.” Section 1692(d) then sets forth six non-exclusive examples of harassment or abuse:

A. The use or threat of violence or other criminal means involving harm to the person, property or reputation of any person (not just the debtor);

B. The use of obscene or profane language or the natural consequence of which is to abuse the person or to harass or threaten any person;

C. The publication of a list of defaulting debtors (except for lawful credit reporting services);

D. Advertising any debt for sale as a collection service;

E. Continuous telephone calls with an intent to annoy, abuse, or harass any person;

F. Placement of telephone calls without meaningful disclosure of the caller’s identity (subject to the disclosure requirements at 15 U.S.C. § 1692d, discussed supra at Part VI).

While a creditor collecting its own debts is generally not subject to the Act, many state consumer protection acts also broadly prohibit abusive behavior or impose other restrictions similar to the FCVA and are directly applicable to creditors. Many of these state statutes specifically and data protect the abuses covered by the Act; however, to the extent that section 1692(d) defines additional abusive behavior, it may reflect societal standards also actionable under these state laws. Thus, state consumer protection laws may be a means to expand the scope of section 1692(d) (and sections 1692e and 1692f as discussed below) beyond the scope of the Act (e.g., to cover creditors collecting their own debts).

X. Misrepresentations

Section 1692(d) of the Act broadly prohibits the “use of any false, deceptive, or misleading representation or means in connection with the collection of any debt.” Like section 1692(d) (discussed above), this section may reflect societal standards that are enforceable against creditors (as well as debt collectors) under state law. This could have broad implications for example, some have argued that this could prohibit the use of trickery or stealth in the repossession of collateral by self-help under Uniform Commercial Code (UCC) Article 9.

However, your author is not aware that this argument has been accepted by any court.

Section 1692(e) provides a non-exclusive list of examples of conduct that violates this broad prohibition:

A. False representation or implication that the collector is affiliated with any government entity (e.g., displaying a badge, uniform, or facsimile thereof);

B. False representation of the character, amount, or legal status of any debt (note that this may make any error in the stated amount or status of the debt a violation).

Note that this was a core issue in the Heintz litigation: The consumer was seeking to hold the attorney debt collector liable for misrepresenting the amount of the debt, due to charges by the client/creditor for improper forced-placement of collateral protection insurance. Had the consumer prevailed on this issue, it would appear to have required all debt collectors to complete an accounting and legal audit of the creditor’s records to assure that all information provided by the creditor was precisely accurate. The impracticality of this seems obvious. On remand from the Supreme Court, Mr. Heintz (the debt collector) relied on the bona fide error defense at 11 U.S.C. section 1692(e)(2), which precludes liability if the debt collector shows a preponderance of evidence that the violation was not intentional and resulted from a bona fide error not resulting from innocent error under UCC Article 3) could cause the debtor to lose any claim or defend to payment on any property or wages of any person “unless such action is lawful and the collector or creditor intends to take such action” (emphasis added).

F. “A threat to take any action that cannot legally be taken or that is not intended to be taken”;

G. False representation or implication that the sale, referral or other transfer of the debt (e.g., negotiation to a holder in due course under UCC Article 3) could cause the debtor to lose any claim or become subject to any practice prohibited by the Act;

H. False representation that the debtor committed any crime or other conduct that would “disgrace” the consumer.

I. Communicating or threatening to communicate any credit information known ("or which should be known") to be false, including failure to communicate that a debt is disputed.

J. Use of any written communication falsely represented to be issued, authorized or approved by any court or government official or agency. A pre-litigation letter referencing the deceptive matter as an adversarial proceeding (e.g., “Re: State Bank v. Jones”) may violate this provision.

K. The use of any false representation or deceptive means to collect a debt or obtain information about the debtor.

L. Failure to include the "mini-Miranda" disclosure as required.

M. False representation that the debt has been transferred to an innocent purchaser for value.

N. False representation that documents are legal process.

O. Use of any business, company or organization name other than the collector’s true name.

P. False representation or implication that a collector operates or is employed by a consumer reporting agency.

Again, some of these practices may also be actionable against creditors collecting their own debts, under state consumer protection laws.
XI. Unfair Practices

1. Like 15 U.S.C. sections 1692d and 1692e, the section 1692j prohibits on unfair practices in creditors under state consumer protection laws, even though those creditors are not directly covered by the FDCPA.

Section 1692j prohibits use of any "untrue or inaccurate" meaning to attempt collection of a debt. The following non-exhaustive list of examples of violations is provided:

A. Collection of any amount (including interest, fees, charges or expenses) in violation of the debt unless authorized in the contract or by law. For example, an effort to collect an unauthorized charge for collateral protection insurance will violate the Act.9

B. Acceptance or solicitation of a post-dated check except as a authorized by the debtor in the contract or by law. It is a violation to deposit or threaten to deposit any post-dated check or other instrument before its date (note that this is otherwise permitted under revised UCC Article 4).10

C. Causing the debtor to be charged for communications (e.g., telegrams or collect phone calls) by concealing the purpose of the communication.

D. Taking or threatening to take any unjustified action "to effect possession or disbursement of property" (i.e., self-help repossession of collateral)! If there is no present right to possession or intention to take possession or

E. Communicating by postcard.12

F. Using any language or symbol, other than the collector's address, on an envelope when using the mail or a telegram to communicate with the debtor (except that the collector may use his or her business name if it does not indicate he or she is in the collection business).13

XII. Venue

Section 1692j(2) requires that legal action to enforce a debt must be brought in the judicial district in which the debtor signed the credit contract or currently resides. This has been interpreted to require filing in the smallest applicable judicial district. An action to enforce an interest in real property must be brought in the judicial district where the real property is located.14

XIII. Civil Liability

While 15 U.S.C. section 1692j provides for administrative enforcement of the Act by the FTC (and the federal bank regulatory agencies for the institutions they regulate), the major concern for private practitioners has been the civil liability provisions at 15 U.S.C. section 1692j.

Section 1692j(k) provides for actual damages (including pain and suffering where appropriate), plus statutory damages up to $1,000 per case (even in the absence of actual harm). The latter potentially permits a plaintiff to recover statutory damages for any violation, no matter how trivial, minor, or harmless. This in turn has permitted plaintiffs to claim that a recovery limited to statutory damages (where there were no actual damages) means the action was "successful," so as to entitle the plaintiff to recovery of attorney fees under the Act.15

Section 1692j(k) also provides that the likelihood of a FDCPA plaintiff will be able to recover his or her attorney fees from the defendant.

It is apparent that the claim for attorney fees is driving much of the FDCPA litigation. Because of the technical nature of the Act, there is likely to be a basis for claiming some violation of the Act in almost any scenario, thereby triggering a plausible argument for statutory damages and hence attorney fees. This has enabled some plaintiffs' lawyers to successfully settle large numbers of cases, based on defendants' fears that upon trial some minor violation or ambiguous standard could be used as the basis for a claim to large attorney fees. Collection attorneys initially thought they had received some relief from this risk in the Fifth Circuit decision in Johnson v. Eisdon,16 but a headnote and language in the reported decision in Johnson seems to suggest that a more technical violation of the Act, resulting in an award of only statutory damages, is not sufficient to support a "successful action" entitling the plaintiff to recover attorney fees under 15 U.S.C. section 1692j(k). The opinion specifically stated an intention to deter attorneys from alleging technical violations as a basis for generating attorney fees. However, a close reading of the case reveals that the court held only that attorney fees are inapplicable in the absence of both actual and statutory damages, leaving open the possibility that a

XIV. Conclusion

Despite reform efforts in Congress in 1996 that addressed litigation abuses under the FDCPA, the Act remains a very potent weapon for debtors' counsel to use against unscrupulous collection attorneys. Many a collection attorney has found himself or herself paying thousands of dollars to settle an action that originated with a minor, technical error by an attorney routinely seeking to collect a small debt.

The combination of a complex, comprehensive and sometimes ambiguous statute providing statutory damages for any violation, no matter how minor, technical and harmless, together with a statutory right of the prevailing party to recover attorney fees, has made it very difficult for a collection attorney sued under the Act to justify the risk of a trial to defend his or her position. As a result many collection attorneys have felt economically compelled to pay to settle cases of doubtful merit. Clearly this is not what the drafters of the Act intended.

The problem is compounded by the courts' use of unclear concepts to determine, for example, if the notices required under the Act were "enveloped" so as to potentially entitle the "least sophisticated consumer." Few collection attorneys can be sure prior to trial that they have satisfied such a vague standard.

Finally, the continuing broad applicability of a section 1692j(k) notice requirement to all communications (except formal pleadings), and the U.S. Supreme Court's decision in Howes v. The Act's coverage and related communications, mean that the Act costs a far wider net than many people realize, even after the 1996 revisions. The risk of liability for a technical, harmless violation of the Act is directly proportional to its scope, and the result of this broad scope is that potential liability under the Act can be interjected as a dispositive element in a surprisingly wide variety of debtor-creditor scenarios.

In the 12 years following loss of the attorney exemption, the Act has been transformed into a litigation tool far different from what was envisioned when the legislation was passed. The 1996 revisions did not adequately address the fundamental issues implicated by these developments. Congress needs to revisit these issues again and to further consider the purposes of the Act in light of its current uses and the impact on courts and debtor-creditor relations. In the meantime, practicing lawyers and creditors must be alert to the broad scope and technical requirements of the Act.

Articles Solicited on Bankruptcy Reform Issues

With the Report of the National Bankruptcy Review Commission now complete (as of October 20, 1997), the Conference is soliciting articles, case notes, empirical data, recommendations, proposals and any other information relating to consumer bankruptcy and the need for bankruptcy reform. Please send your input to the Editor of the Quarterly Report at the address shown on the masthead page.